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by
Bryce L. Friedman

Simpson Thacher & Bartlett LLP
New York, NY

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Commentary

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[Editor's Note: Bryce L. Friedman is a partner and Co-Chair of the Business Litigation Group at Simpson Thacher & Bartlett LLP in the Firm's New York office. His nationwide practice focuses on trials, arbitrations, and appeals of complex, precedent-setting, and bet-the-company disputes. He argued Nemeth v. Brenntag North America, *which is discussed below, in the New York Court of Appeals for the defendant. The statements and opinions in this article are solely his own and not those of his firm or its clients. Any commentary or opinions do not reflect the opinions of Simpson Thacher & Bartlett LLP or LexisNexis®, Mealey Publications™. Copyright © 2023 by Bryce L. Friedman. Responses are welcome.]*

For over two decades, asbestos litigation has often turned on whether a plaintiff's experts are permitted to testify that every exposure to asbestos is a substantial factor in causing asbestos-related disease. This theory is known as the *every exposure* approach—or its close cousins, commonly known as the *any exposure above background* theory or the more recent *cumulative exposure* theory. If a court finds the testimony sufficient, a plaintiff can proceed to a jury trial based on the most infinitesimal of exposures, and without having to prove that plaintiff received a dose sufficient to cause disease. Most of the courts to have considered the sufficiency of this testimony have rejected it.[1] Many other courts either allow the testimony or the issue has not been decided by the highest court in the state.

Into this mix comes an April 2022 opinion by New York's highest court in *Nemeth v. Brenntag North America.*[2] The Court of Appeals held, in a talc-asbestos mesothelioma case, that plaintiffs' experts could not rely on unquantified notions of exposure but had to present a scientific assessment of dose sufficient to cause disease. The widely respected New York Court of Appeals is often influential, which adds significance to its rejection of *every exposure* testimony.

This article discusses the *Nemeth* opinion in the context of the impact it could have on asbestos and alleged asbestos-in-talc litigation nationwide. The New York court has joined with the highest courts of five other states plus half the federal appellate courts, along with dozens of federal district courts and lower state courts, which reject unscientific expert opinions that consider "any exposure" to be sufficiently causative to impose liability. The remaining holdout jurisdictions must consider carefully whether their rulings have any basis in science or the law. *Nemeth* says no, and it is a forceful voice in this debate.

1. The Course of the *Any Exposure* Theory Through *Nemeth*

For many years, plaintiffs' experts testified universally that each and every exposure to asbestos, even a "single fiber," could cause disease. This testimony allowed plaintiffs' attorneys to bring cases against tangential defendants involving minimal exposure to asbestos fibers, without carrying the traditional burden in toxic tort litigation of proving an actual, causative dose. Asbestos litigation generally stood alone among toxic tort cases during this era: at the same time that *any exposure* testimony held sway in asbestos cases, judges in other toxic tort cases regularly excluded plaintiffs' experts who could not demonstrate a causative dose.

Things began to change for asbestos litigation around 2005. Defendants began to challenge the *any exposure* concept as well outside the bounds of legitimate science and tort law, not to mention its inconsistency with *substantial factor* causation. Trial courts in Texas, Ohio, Washington, and Pennsylvania were the first to reject the *any exposure* approach.[3] These decisions were, at the time, quite novel in the asbestos world—for example, apparently no court had ever rejected long-time plaintiff's expert Dr. Samuel Hammar's *every exposure* opinion until a Washington trial court did so in a 2006 case.[4] The ruling in Ohio rejected "single fiber" testimony from Dr. Arthur Frank. The Pennsylvania rulings prohibited similar testimony from Dr. John Maddox. All three of these experts were frequent experts for plaintiffs' in asbestos cases nationwide.

The early rulings in these state courts encouraged defendants to continue to file motions challenging the *every exposure* approach. Appellate courts soon weighed in, with important decisions rejecting the testimony by the Pennsylvania Supreme Court, the Texas Supreme Court, and the federal Sixth Circuit Court of Appeals.[5] For several years, defendants' motions were successful. By 2012, over 40 courts had joined the chorus rejecting *every exposure* testimony.[6] The *every exposure* theory appeared to be on its last legs, and asbestos litigation causation evidence reform was well underway.

The movement ran into a partial wall, however, after the initial series of decisions favoring defendants. Certain jurisdictions refused to recognize the flaws in *every exposure* testimony. In some jurisdictions (*e.g.*, California) the courts have essentially doubled down, repeatedly allowing even the most limited of exposures to go to a jury and support a liability finding. As a result, although defendants have successfully eliminated *every exposure* or *cumulative exposure* asbestos causation opinions from many jurisdictions, plaintiffs have responded by transferring many of their asbestos cases to jurisdictions where the testimony is still allowed and where lax venue rules apply. In some states, such as California and Louisiana, the line between state and federal courts is stark—the federal courts in those states will not permit *any exposure* testimony, but the theory is still welcome in the state courts.[7] In Pennsylvania, some of the strongest and best opinions rejecting *any exposure* testimony have been undercut by rulings issued after several new Pennsylvania Supreme Court justices were elected to the court.[8]

Today, defendants continue to file motions challenging plaintiffs' experts on Federal Rule of Evidence 702 or *Frye* grounds, or seek dismissals based on insufficient evidence, where plaintiffs' experts continue to assert the cluster of *every exposure*-type opinions. The decisions on those motions are usually case-dispositive—if the court rejects the testimony, the cases are usually dismissed.

2. The *Nemeth* Decision and Its Impact on New York Law

Into this mix of opinions, the New York Court of Appeals recently delivered a compelling opinion welcomed by defendants. The court agreed that plaintiffs must prove a causative dose. Prior to the *Nemeth* opinion, New York occasionally declared that expert testimony based on dose-ignoring labels such as "significant exposure" was invalid. But those cases either occurred in non-asbestos litigation, such as benzene, or consisted of a very short, split opinion in the one asbestos case that had come to the Court of Appeals for review. Following these decisions, New York's courts issued a mix of opinions either rejecting or permitting *every exposure* approaches, without consistent logic.

Nemeth, however, is a forceful and unequivocal rejection of causation testimony not based on a competent and relevant dose assessment of the defendant's product. In *Nemeth*, in lieu of establishing plaintiff's actual dose, plaintiffs attempted to manufacture a "glove box" exposure scenario. A geologist shook a sample of the alleged talc product in a small, enclosed container and then claimed that the resulting "asbestos fibers" found in the glove box somehow simulated the plaintiff's experience in her bathroom. This glove box test is familiar to asbestos defense counsel—plaintiffs often use such approaches to avoid estimating the actual dose for the plaintiff, preferring instead to create the impression of high exposures via an artificial and misleading test setting. The *Nemeth* court found, appropriately, that the circumstance of such a test diverged widely from the use of a talc product in an open bathroom setting. The glove box test did not satisfy proof of dose as required under the court's *Parker* (benzene) ruling or the court's one earlier asbestos ruling, *Juni v. A.O. Smith Water Prods. Co*.[9]

Critically for the *every exposure* theory, the second plaintiff expert, Dr. Jacqueline Moline—a medical doctor active in asbestos litigation—continued to rely

on her testimony that there is no safe dose of asbestos and that every exposure contributes to disease. Thus, she had no need for the glove box test to render a causation opinion, though she nevertheless cited to it as evidence that the exposure was "significant." The court rejected her testimony because it lacked the central foundation of a quantified or estimated dose that could cause disease. The *Nemeth* court thus put a substantial exclamation point on the rejection of *every exposure* in a manner that lower courts now cannot avoid.

If the lower New York courts apply *Nemeth* correctly, the New York asbestos and talc docket should change dramatically—no longer can plaintiffs in New York litigation assert that even the smallest exposure contributes to mesothelioma without proving an actual causative dose from each defendant's product. And based on three subsequent rulings by New York's Appellate Division, First Department,[10] all of which applied *Nemeth* to reject low-dose plaintiff cases, it appears that *Nemeth* will in fact make a difference. The New York talc and asbestos dockets should narrow to those cases involving significant exposures shown by reliable science as capable of causing mesothelioma. That outcome would be welcome for New York asbestos defendants.

3. *Nemeth* and the Jurisdictions Still Permitting *Any Exposure* Testimony

A critical question is whether *Nemeth* will influence other courts around the country. The highest courts of several jurisdictions where asbestos litigation is prominent, such as Illinois, have not yet weighed in on the viability of *any exposure* testimony. Other states, chiefly California and more recently the intermediate appellate court in South Carolina,[11] seemingly permit an *anything goes* approach that allows plaintiffs to argue liability to a jury with the most tenuous exposure evidence. If these courts may have been willing to overlook decisions from jurisdictions such as Texas, it should be much more difficult to overlook the opinion of the New York Court of Appeals. Defense counsel should utilize *Nemeth's* persuasive value not only in border states where the issue is still in play, but also in states like California, Illinois, Pennsylvania, and South Carolina that are presently following a scientifically unsound approach to *every exposure* causation testimony.

Nemeth's conclusions are well-supported not just by scientific and basic tort principles, but also by the many courts that have agreed that *every exposure*-type testimony, including its variant, the *cumulative exposure* approach, is not a sufficient basis on which to argue liability to a jury. In addition to New York, the highest courts of Texas, Georgia, Ohio, Virginia, and Vermont have rejected plaintiff testimony relying on mere exposure without identifying a causative dose.[12] Added to that, the federal circuit courts for the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have likewise fully and forcefully rejected similar testimony.[13] In fact, no federal circuit court has issued an opinion endorsing *every exposure* testimony in asbestos or talc litigation. The vast majority of federal district courts to consider the issue have ruled for defendants, too.

Surprisingly, despite this string of rulings, prior to COVID-19, the number of mesothelioma cases filed every year persisted with little change. The reason, at least in part, is that several courts have opened their doors to *any exposure* testimony in a manner that supports ongoing litigation, despite a continuing decline in the degree of exposure to asbestos in current cases. The low-dose litigation has simply shifted in large part to those more permissive jurisdictions.

As noted above, the intermediate appellate courts of California, for instance, have accepted virtually any plaintiff exposure allegations as sufficient to support a jury verdict. Those courts continue to adhere to what is likely the weakest asbestos causation standard in the country. They hold to this approach even though federal courts in California have repeatedly rejected *every exposure* testimony. Defendants have requested multiple times that the California Supreme Court accept review of one of these cases to bring asbestos litigation in California back in line with the seminal *Rutherford* opinion. *Rutherford* does not support the notion that every exposure is a legal cause.[14] Thus far, the high court has rejected every such request. Perhaps *Nemeth* will lend support to defense pleas for review.

Similarly, in Illinois, another major asbestos litigation state with significant dockets in Cook, Madison, and St. Clair counties, the *every exposure* theory is accepted, largely because the Illinois Supreme Court has yet to issue a controlling opinion. As a result, that docket is largely unaffected by the many rulings in other

courts rejecting *any exposure* approaches, including the federal Seventh Circuit Court of Appeals.

Pennsylvania is also one of the more troubling jurisdictions today. The state's supreme court at one point thoroughly and with strong reasoning rejected *any exposure* testimony in three separate rulings, only to have a newly constituted court reverse course to permit *every exposure*-type testimony.[15] Thus, at least in the last few years, Pennsylvania has not adhered to the bedrock principle of causative dose in asbestos litigation. Perhaps *Nemeth* in New York will pull the Pennsylvania court back in the direction of reasonable limitations on asbestos expert testimony.

Plaintiffs have attempted to isolate the opinions rejecting *every exposure* testimony by claiming they are "outliers." In particular, plaintiffs' counsel have tried to discredit an early Texas Supreme Court opinion rejecting *every exposure* testimony as unreliable because they claim Texas is an "outlier" state. If so, then Texas is an outlier with a great deal of company. The truth is almost the reverse—states that continue to permit the old *any exposure* approach have become increasingly isolated by the stream of federal and state court opinions to the contrary. Those opinions often include the federal circuits for the states involved—for example, California's decisions are contradicted by the Ninth Circuit federal opinions; Louisiana state court opinions are undercut by a series of federal district court opinions from Louisiana; and the Seventh Circuit's rejection of *any exposure* testimony exposes the lack of similar direction from the Illinois Supreme Court. Plaintiffs can no longer contend—if they ever could—that the Texas opinions are mere outliers now that the highest court of New York has joined Texas and many other courts that reject *any exposure*-type testimony.

In certain states where appellate courts seem to have accepted a form of *every exposure* testimony—Nebraska, Tennessee, and South Carolina—it seems necessary that at some point these courts must take up another case where the flaws in the *every exposure* theory are fully presented. *Nemeth* may help contribute to those courts revisiting or revising their earlier opinions.

South Carolina deserves special mention because of the uniqueness of its active asbestos docket. The survival of that docket today rests on the recent *Jolly* opinion by the state's intermediate appellate court accepting *cumulative exposure* testimony by plaintiffs' experts. The *Jolly* court succumbed to the siren song that *cumulative exposure* testimony is not the same as *every exposure* testimony and thus can support litigation despite the widespread rejection of *every exposure* testimony. It is surprising that a major appellate court would accept the mere change in terminology, not accompanied by any actual change in the approach to causation that excludes consideration of dose. As many courts have held, there is no meaningful difference between "each and every exposure above background is a significant contributing factor," and "every cumulative exposure to asbestos above background is a significant factor."

In fact, since 2005, plaintiffs have repeatedly tried changing the nomenclature in the face of rulings rejecting testimony that does not reflect dose—from "single fiber" to "any exposure," from "any exposure" to "each and every exposure," from "each and every exposure" to "every exposure above background," and now from "every exposure above background" to "every cumulative exposure above background." Occasionally, these artificial language changes survive court review, but for the most part, federal and state courts have rejected all of these phrases as reformulations of the same "any exposure from any defendant," litigation-driven approach.[16] The *Nemeth* decision provides a strong basis for convincing the South Carolina Supreme Court to overturn *Jolly*.

Conclusion

Defense counsel should review *Nemeth* and find ways to put the opinion, along with the wide array of similar opinions, in front of appellate courts in states with ongoing large asbestos dockets. At some point, the rule of law and principles of science and dose should take hold in those states. The asbestos docket today should consist of cases involving exposures consistent with valid science demonstrating causation at identified doses and fiber types. Simply claiming that particular exposures are "substantial" or "significant" or "above background" can never suffice under any version of a substantial factor causation standard. At the same time, defense counsel should also be alert for appeals challenging past decisions rejecting *any exposure* rulings. One such appeal

is pending in Texas. *Nemeth* should help eliminate the notion that Texas (or any other similar state) is an outlier and give confidence to those courts that their prior rulings are correct.

Endnotes

1. For a discussion, see William L. Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation*, 42 Am. J. Trial Advoc. 39 (2018); William L. Anderson & Kieran Tuckley, *The Any Exposure Theory Round III: An Update on the State of the Case Law 2012-2016*, 83 Def. Couns. J. 264 (2016); Joseph Sanders, *The "Every Exposure" Cases and the Beginning of the Asbestos Endgame*, 88 Tul. L. Rev. 1153 (2014); William L. Anderson, et al., *The "Any Exposure" Theory Round II—Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 Kan. J. L. & Pub. Pol'y 1 (2012); Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. Rev. 479 (2008).

2. 194 N.E.3d 266 (N.Y. 2022).

3. *See In re Asbestos Litig.*, No. 2004-03964, 2004 WL 5183959 (Tex. Dist. Jan. 20, 2004); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603 (N.D. Ohio 2004), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); I*n re Toxic Substances Cases*, No. A.D. 03-319, 2006 Pa. Dist. & Cnty. Dec. LEXIS 581, 2006 WL 2404008 (Pa. Ct. Com. Pl. Aug. 17, 2006); Transcript of Trial at 61, *Anderson v. Asbestos Corp., Ltd.*, No. 05-2-04551 (Wash. Super. Ct. King County Oct. 31, 2006).

4. *See* Transcript of Trial at 61, *Anderson v. Asbestos Corp.*, Ltd., No. 05-2-04551 (Wash. Super. Ct. King County Oct. 31, 2006).

5. *Lindstrom*, 424 F.3d 488; *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (Pa. 2012); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007).

6. *See supra* note 2.

7. *Compare Jones v. John Crane, Inc.*, 132 Cal. App. 4th 990 (2005); *Robertson v. Doug Ashby Bldg. Materials, Inc.*, 168 So. 3d 556 (La. Ct. App. 1st. Cir. 2014), *with Shelton v. Air & Liquid Sys. Corp.*, No. 4:21-cv-04772-YGR, 2022 U.S. Dist. LEXIS 126281 (N.D. Cal. July 11, 2022); *Schindler v. Dravo Basic Materials Co.*, No. 17-13013, 2019 U.S. Dist. LEXIS 18228 (E.D. La. Feb. 5, 2019), *aff'd*, 790 F. App'x 621 (5th Cir. 2019); *Vedros v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556 (E.D. La. 2015).

8. *See Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016); Stephen Caruso, *How PA's Supreme Court Moved Left, and What It Means for the GOP*, Pa. Capital-Star (Aug. 9, 2019), https://www.penncapital-star.com/government-politics/how-pa-s-supreme-court-moved-left-and-what-it-means-for-the-gop/.

9. *See, e.g., Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114 (N.Y. 2006) (benzene); *Matter of N.Y.C. Asbestos Litig. [Juni v. A.O. Smith Water Prods. Co.]*, 116 N.E.3d 75 (N.Y. 2018), aff'g, 148 A.D.3d 233 (1st Dept. 2017) (asbestos).

10. *Dyer v. Amchem Prods. Inc.*, 207 A.D.3d 408 (1st Dept. 2022); *Pomponi v. A.O. Smith Water Prods. Co.*, 207 A.D.3d 417 (1st Dept. 2022); *Killian v. A.C. & S., Inc.*, 207 A.D.3d 414 (1st Dept. 2022).

11. *See, e.g., Phillips v. Honeywell Int'l, Inc.*, 9 Cal. App. 5th 1061 (2017) (allowing *every identified exposure* approach); *Jolly v. GE*, 865 S.E.2d 12 (S.C. Ct. App. 2021) (permitting *cumulative exposure* testimony in lieu of rejected *any exposure* approach). In contrast to the South Carolina opinion, most courts have understood that *cumulative exposure* testimony is not substantively different from *any exposure* or *every exposure above background* and have excluded cumulative exposure opinions on the same ground as *every exposure* opinions. *See, e.g., Johnson v. Orton*, No. 19-cv-06937, 2021 U.S. Dist. LEXIS 225819 (N.D. Ill. Nov. 23, 2021); *Doolin v. Ford Motor Co.*, No. 3:16-cv-778-J-34PDB, 2018 U.S. Dist. LEXIS 163678 (M.D. Fla. Sep. 25, 2018); *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477 (Ohio 2018); *Krik v. Exxon Mobil Corp.*, 870 F.3d 669 (7th Cir. 2017); *Haskins v. 3M Co.*, No. 2:15-cv-02086-DCN, 2017 U.S. Dist. LEXIS 113657 (D.S.C. July 21, 2017); *Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839 (D. Md. 2017), *appeal dismissed sub nom. Rockman v. Georgia-Pacific, LLC*, No. 17-

1883, 2017 WL 7135451 (4th Cir. Oct. 23, 2017); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196 (W.D. Wis. 2016).

12. *See Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332 (Tex. 2014); *Scapa Dryer Fabrics, Inc. v. Knight,* 788 S.E.2d 421 (Ga. 2016); *Schwartz*, 102 N.E.3d 477; *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013); *Blanchard v. Goodyear Tire and Rubber Co.*, 30 A.3d 1271 (Vt. 2011) (benzene).

13. *Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, *appeal dismissed sub nom. Rockman v. Georgia-Pacific*, LLC, 2017 WL 7135451; *Schindler*, 790 F. App'x 621; *Stallings v. Georgia-Pacific Corp.*, 675 F. App'x 548 (6th Cir. 2017); *Krik, 870 F.3d 669; McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170 (9th Cir. 2016); *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005) (ephedrine).

14. *See* Jason Litt et al., *Returning to Rutherford: A Call to California Courts to Rejoin the Legal Mainstream and Require Causation Be Proved in Asbestos Cases Under Traditional Torts Principles*, 45 Sw. L. Rev. 989 (2016).

15. *See Betz*, 44 A.3d 27; *Howard v. A.W. Chesterton Co.*, 78 A.3d 605 (Pa. 2013); *Rost*, 151 A.3d 1032.

16. *See, e.g., Clarke v. Air & Liquid Sys. Corp.*, No. 2:20-cv-00591-SVW-JC, 2021 U.S. Dist. LEXIS 78139 (C.D. Cal. Mar. 18, 2021). ■

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