



Toxic Torts and Environmental Law Committee

THIRD CIRCUIT OVERRULES OFT-CRITICIZED ACCRUAL TEST, BUT PRACTICAL IMPACT REMAINS UNCLEAR

By: Brett S. Moore and Heather B. Siegelheim¹

The Third Circuit Court of Appeals recently addressed a highly controversial and much debated issue regarding discharging latent asbestos claims against companies that have reorganized through a bankruptcy proceeding. In overruling its own oft-criticized decision, *Avellino & Beines v. M. Frenville Co. (Matter of M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984), the Third Circuit fell more in line with its sister courts when analyzing when an asbestos claim has been discharged in a bankruptcy case. (See *In re: Grossmans, Inc., et al. v. Van Brunt (“Jeld-Wen”)*, 607 F.3d 114 (3d Cir. 2010)). The *Jeld-Wen* decision is significant because it overrules *Frenville’s* “accrual test,” and holds that an asbestos claim arises “when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a ‘right to payment’ under the Bankruptcy Code.” (*Jeld-Wen*, 607 F.3d at 125 (citing 11 U.S.C. § 101(5))). However, the court also emphasized that the analysis cannot be divorced from the “fundamental principles of due process” and a claim may not be discharged if a claimant lacks a meaningful opportunity to protect his or her claim.

A. The Facts and Background of *Jeld-Wen*

In *Jeld-Wen*, the claimant, Mary Van Brunt,

purchased home-remodeling products that allegedly contained asbestos from retailer Grossman’s Inc. (“Grossman’s”) in 1977. She developed symptoms of mesothelioma in 2006. Shortly after her diagnosis was confirmed in 2007, Mrs. Van Brunt and her husband filed product liability and breach of warranty claims in New York state court against Grossman’s successor-in-

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EDITOR'S MESSAGE:

We would like to thank all of our contributors to this informative issue of the Toxic Tort and Environmental Law Committee's Newsletter. In this issue Brett Moore and Heather Siegelheim provide us with their analysis of the Third Circuit Court of Appeals' issuance of new law regarding the discharge of latent asbestos claims against companies reorganized from bankruptcy. From Lawrence Cetrulo, Kyle Bjornlund and Robert Moore, we have a helpful overview of how various states have addressed Component Parts Liability. In addition Julie Goulet Stromberg provides a discussion regarding the EPA's Proposed Revisions to the Chromium Electroplating MACT Standards. Sharon Caffrey and Alyson Walker have analyzed the defenses against medical monitoring claims from plaintiffs alleging disease caused by exposures related to extracting natural gas from the Marcellus Shale. Also, Douglas Harrison analyzes Damages for Stigma Awarded in Canadian Environmental Class Action.

On behalf of the Committee, we invite you to attend the Committee's 20th Annual Spring CLE meeting March 31 – April 2, 2011. We are again pleased to be holding the meeting at the Arizona Biltmore Resort & Spa in Phoenix. This year's program will provide coverage of an outstanding array of issues facing the toxic tort and environmental practitioner, including some emerging "hot" issues, such as nano-technology and cosmetics, carbon capture, wind energy and environmental justice. There will also be a mock jury selection in a toxic tort case, an expert panel on the changing face of cancer debate, a panel on childhood exposures and toxic tort and environmental litigation, and a top-notch panel on the gulf oil spill litigation.

The CLE programs will take place on Friday and Saturday mornings, April 1 and 2, 2011, providing not only an excellent opportunity for networking and education, but allowing the afternoons free for additional activities such as golf, tennis, swimming, hiking and horseback riding, as a perfect family break. We look forward to seeing you beginning Thursday, March 31, for the Welcome Reception, through the end of the program on Saturday, April 2, 2011.

Leland I. Kellner, Esquire

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EPA'S PROPOSED REVISIONS TO THE CHROMIUM ELECTROPLATING MACT STANDARDS

By: Julie C. Goulet Stromberg, *Kutak Rock LLP* (Los Angeles)

I. Introduction

For the first time, the U.S. Environmental Protection Agency (EPA) has proposed how it will evaluate residual risk and technology reviews for national emission standards for hazardous air pollutants (NESHAP) in the Chromium Electroplating MACT (Maximum Achievable Control Technology) ("CEMACT") standards and source categories. 75 Fed. Reg. 65068 (Oct. 21, 2010). In addition, the action proposes a limited affirmative defense to certain civil penalties in the event of malfunction.

Regulations of CEMACT source category emissions are contentious because the primary emission is hexavalent chromium (Chromium-VI). According to the International Agency for Research on Cancer (IARC) and the EPA, Chromium-VI is a carcinogen by inhalation route of exposure. However, Chromium is ubiquitous in the environment and Chromium-VI is widely used in manufacturing. For example, revisions to CEMACT standards will affect approximately 1,770 plants and impact a wide range of industries, including: aerospace, automotive, construction, furniture, maritime, printing, and various manufacturing where Chromium-VI is widely used.¹ The proposed regulation represents the EPA's continued emphasis on monitoring Chromium-VI emissions and analyzing cost-efficient technological measures to reduce the risk of exposure.

This article discusses the proposed revisions to CEMACT standards, the public health concerns underlying the proposed revisions, the requirements of the proposed affirmative defense, and the features of EPA's proposals that owners/operators of facilities subject to CEMACT standards should consider.

II. Discussion

a. CEMACT Standards Related Source Categories

Pursuant to Sections 112(d)(2) and (3) of the Clean Air Act (CAA), the EPA can regulate emissions of hazardous air pollutants (HAPs) from stationary sources in two regulatory stages. The EPA completed

the first stage by promulgating the NESHAP CEMACT standards on January 25, 1996, (60 Fed. Reg. 4963), codified at 40 C.F.R. pt. 63, subpart N. CEMACT standards specifically apply to the following source categories: (1) Hard Chromium Electroplating; (2) Decorative Chromium Electroplating; and (3) Chromium Anodizing source categories. HAP emission sources subject to the Chromium Electroplating NESHAP are the tanks in which the chromium deposition takes place: electroplating tanks for the Hard Chromium Electroplating, and anodizing tanks for the Decorative Chromium Electroplating and Chromium Anodizing source categories.

The proposed regulation illustrates the second regulatory stage established in Section 112 of the CAA. In the second stage, EPA focuses on implementing standards with the objective of reducing "residual" risk according to CAA section 112(f). CAA section 112(f)(2) requires the EPA to determine if emission standards provide ample margin of safety to protect public health. The EPA has the authority to adopt more stringent technologically-based standards if necessary. Based on their analysis, the EPA proposes to re-adopt the existing MACT standard to satisfy section 112(f) of the CAA and adopt additional requirements under CAA section 112(d)(6).

b. Proposed Additional Requirements to CEMACT

In evaluating developments in practices, processes, and control technologies for Chromium Electroplating source categories, the EPA analyzed specific technological developments since the 2004 amendments to the CEMACT. The EPA refrained from mandating certain control devices, such as an Emission Elimination Device or high efficiency particulate air filters, because the options were either not reasonably feasible or the high costs of implementation did not justify the estimated risks reductions.

The EPA, however, seeks to revise CEMACT standards to preclude the addition of perfluorooctyl sulfonate (PFOS)-based Wetting Agent Fume

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¹ For example, Chromium-VI is used in the manufacture of bicycles, hand tools, automotive trim, aircraft parts, architectural structures, marine hardware, engine components, and large cylinders and industrial rolls used in construction equipment and printing presses.

A 'DUTY' TOO FAR? COURTS TACKLE 'COMPONENT PARTS LIABILITY'

By: Lawrence G. Cetrulo, Esquire; Kyle E. Bjornlund, Esquire; and Robert J. L. Moore, Esquire, *Cetrulo & Capone LLP (New Jersey)*

Appellate courts in several recent high-profile cases have considered whether to hold manufacturing defendants liable for the dangers inherent in the “component parts” inserted into, or otherwise an integral part of, the products they manufacture. In this context, “component parts liability” may ensnare manufacturers of products that, while not actually containing any toxic substances themselves, may have implicitly called for their use as components. Plaintiffs have advanced claims based upon this theory for alleged harm from exposure to a variety of alleged toxins, including asbestos, ozone, and toxins from breast implants.

Consider the asbestos litigation, where plaintiffs often sue manufacturers of equipment, such as pumps or valves, that neither contained nor called for the use of asbestos-containing components, such as gaskets or packing, on the theory that the equipment manufacturers are liable for asbestos-containing components affixed to the equipment only after the manufacturer sold or supplied it. The archetype asbestos “component parts” defendant is the manufacturer of bare steel Naval equipment that specified the use of insulation, gaskets, or packing. In such cases, plaintiffs claim that equipment manufacturers have a duty to warn end users of the hazards of asbestos-containing components that would, foreseeably, have been used “in conjunction with” its products. The equipment manufacturer, according to these plaintiffs, should have known that the insulation, gaskets, or packing the Navy would have used for the purposes specified by the manufacturer would contain asbestos.

Toxic torts litigants are well advised to pay heed to developments in this doctrine. This article will survey recent cases which address equipment manufacturer liability for component parts.

Washington

In two opinions issued in 2008, the Washington Supreme Court held that component parts liability is not a cognizable theory in that state. Legislative efforts to overturn these opinions have, thus far, been unavailing.

In *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008), the Washington Supreme Court rejected the component parts theory of liability. The plaintiff, a former Navy machinist, alleged that he contracted lung cancer from exposure to asbestos used to insulate a ship’s evaporator. The trial court entered summary judgment on behalf of the manufacturer of the evaporator. After the Washington Appeals Court reversed, the Washington Supreme Court reinstated the judgment of the trial court. The Washington Supreme Court held that manufacturers do not have a duty to warn of dangers posed by asbestos insulation that it did not manufacture, sell, or supply even though the defendant’s evaporator was built with the knowledge that insulation was required for its proper operation. Because the component part at issue could have been constructed using non-hazardous materials, the Court opined, the defendant manufacturer was “outside the chain of distribution” of the hazardous product – the insulation.

Braaten v. Saberhagen Holdings, 198 P.3d 493 (Wash. 2008), extended this holding, and relieved manufacturers of liability for asbestos-containing replacement parts not required under any specifications. In *Braaten*, the plaintiff, a former Navy pipefitter, alleged that he contracted mesothelioma from exposure to asbestos in replacement packing and gaskets used on valves and pumps manufactured by the defendant. As in *Simonetta*, the trial court entered summary judgment in favor of the defendant, and the Washington Appeals Court reversed. The Washington Supreme Court reversed again on the grounds that (1) the defendant did not place the replacement packing and gaskets into the stream of commerce in any way, (2) the defendant did not specifically call for asbestos-containing packing and gaskets to be used with its pumps and valves, and (3) other non-hazardous types of material could have been used.

In the wake of *Simonetta* and *Braaten*, the Washington legislature considered bills that would create retroactive component part liability. Senate Bill 5964, introduced in 2009, and its counterpart House Bill 2054 would have retroactively imposed a duty to warn on manufacturers that should have known that

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DEFENDING AGAINST MEDICAL MONITORING; DEFENDING AGAINST FEAR – A BATTLE OF EXPERTS

By: Sharon L. Caffrey and Alyson B. Walker

In September 2010, a group of plaintiffs filed a lawsuit in Susquehanna County, Pennsylvania, and alleged that defendant Southwestern Energy Company caused releases, spills, and discharges of combustible gases, hazardous chemicals, and industrial wastes from its oil and gas drilling in the Marcellus Shale. The Shale is a rock formation that underlies a large section of western Pennsylvania, New York, West Virginia, and Maryland. The plaintiffs alleged exposure to various chemicals – including barium, manganese, and strontium – which they claim are released during fracking of the Shale. The action was subsequently removed to the U.S. District Court for the Middle District of Pennsylvania.

Fracking of the Marcellus Shale to extract natural gas has taken place since the 1950s, but recent technological advances now allow for horizontal fracking, which results in the need for fewer gas wells. The process of fracking – otherwise known as hydraulic fracturing – involves the use of pressurized fluids injected into small cracks in the Shale where natural gas resides. This makes it easier to release the natural gas. The plaintiffs claim that the fracking process discharges hazardous chemicals into groundwater and the environment.

Among other damages, the plaintiffs have asked for the defendant to pay for medical monitoring. According to the Complaint, one of the plaintiffs has become “physically sick and ill, manifesting neurological, symptoms, consistent with toxic exposure to, for example, heavy metals.” Further, the plaintiffs alleged that they “live in constant fear of future physical illness, particularly with respect to the health of their minor children and grandchildren.” As increased fracking occurs, it is anticipated that similar cases will follow.

Proving a claim for medical monitoring in this case is likely to be challenging. Under Pennsylvania law, plaintiffs must demonstrate seven factors to sustain a medical-monitoring claim: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant’s negligence; (4) that significantly increased risk of contracting a

serious latent disease as a proximate result of the exposure; (5) a monitoring procedure exists that makes early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.¹ Additionally, the plaintiffs must provide expert testimony to prove each of the above elements.²

It does not appear sufficient for the plaintiffs to assert a fear of a general disease that may or may not be caused by the exposure alleged. Plaintiffs should have to prove that they were exposed to particular chemicals or substances at levels known to be hazardous. Both sides are likely to require experts to testify in a variety of areas to prove and defend against these claims.

First, experts will be required to measure the chemicals in the plaintiffs’ drinking water and determine whether or not the levels exceed background, or permissible, levels of exposure. Without showing that there was exposure beyond background levels, plaintiffs are unlikely to be able to sustain a medical-monitoring claim.

Second, the plaintiffs will need to provide expert testimony regarding fracking to defend against allegations that the alleged negligence of the defendant in fracking caused the alleged contamination. Experts in the fracking process, as well as geologic and environmental studies, will be needed to establish an association between the fracking and the alleged contamination.

Third, medical experts are likely to be key to this case. Simple fear of a disease is not enough to receive medical monitoring. Thus, the plaintiffs will have to show a significantly increased risk – not merely that they may possibly develop a serious, latent disease. The chance of contracting the illness cannot be the “norm.” Rather, there must be a significant increase risk of developing the disease.

The plaintiffs appear to have an uphill battle in the current cases, as they have not identified any specific medical conditions they have contracted, or are likely

¹ See *Redland Soccer v. Department of the Army*, 548 Pa. 178, 195-96 (1997).

² *Id.* at 196.

to develop from the alleged exposure. Instead, they have only listed symptoms consistent with toxic exposure generally – similar to those from heavy metals. It is possible that defense experts could opine that the chemicals at issue would not cause these symptoms. As a result, the plaintiffs will likely need to present medical experts that could assess whether or not the plaintiffs' symptoms are merely subjective or whether they were caused by an alternate exposure, such as exposure to other chemicals through employment or other sources.

Additionally, the plaintiffs will need to provide expert testimony to assess whether or not the plaintiffs experienced an elevated risk of toxic exposure. Finally, the plaintiffs will need to provide experts to determine whether the medical-monitoring program would be any different from the medical treatment an individual would obtain if she was not exposed to chemicals, and whether the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. Here again, experts would be vital to determine the recommended treatment plan for an

individual with known chemical exposure and to determine what the contemporary scientific principles consider reasonably necessary.

Evaluative expert assessments would be the best defense against fear and speculation. Environmental controls are being evaluated through proposed legislation. On February 18, 2010, the U.S. House Energy and Commerce Committee announced an investigation of fracking and its impact on the environment.³ More studies are likely to be needed to determine whether or not fracking may result in exposures sufficient to impact human health. ⚖️

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³ U.S. House Energy and Commerce Committee Memorandum, "Examining the Potential Impact of Hydraulic Fracturing," p. 1, located at http://energycommerce.house.gov/Press_111/20100218/hydraulic_fracturing_memo.pdf.

DAMAGES FOR STIGMA AWARDED IN CANADIAN ENVIRONMENTAL CLASS ACTION

By: Douglas F. Harrison¹

Damages for stigma in environmental cases are now a firm part of the Canadian legal landscape. In one of the first environmental class actions to reach trial in Canada, global mining company Vale (formerly Inco Limited) has recently been ordered to compensate a group of homeowners for the stigma of negative publicity about the long-term contamination of their properties.

After a three-month common issues trial, Mr. Justice Henderson of the Ontario Superior Court of Justice, in a decision released on July 6, 2010, held that the class in *Smith v. Inco, 2010 ONSC 3790*, had suffered a diminution in the value of their residential properties resulting from elevated levels of nickel in the soil.² Comprised of over 7,000 homeowners whose properties are close to the Vale refinery in the town of Port Colborne, Ontario, on the north shore of Lake Erie, the

class was awarded aggregate damages of \$36 million (Canadian dollars; approximately \$35 million U.S.). Under the judge's allocation, homeowners closer to the facility are to receive higher individual amounts.

Although the emissions of nickel began in 1918 and ended when nickel ceased being refined at the facility in 1984, the judge found that the homeowners' claim arose only after the Ontario Ministry of the Environment ("MOE") made certain disclosures about the effects of the contamination on health in the fall of 2000. The action did not include claims for personal injury or adverse effects on health, as class certification of these issues was previously denied by the court.

While Vale admitted prior to the trial that the refinery was the source of the nickel contamination, the judge found that the discharge of nickel was a private

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² The action was formerly titled *Pearson v. Inco*, until the representative plaintiff was changed; Inco Limited was acquired by Vale in 2007.

nuisance and that the company was strictly liable to the class for the discharge as a result of a failure to prevent the escape of a dangerous substance, pursuant to the common law *Rylands v. Fletcher* doctrine. A claim of public nuisance was dismissed on the basis that there was no allegation that the company's conduct had affected public health, public morals, or public conduct, or the use of a public place. A claim of trespass was also dismissed on the basis that the intrusion of the nickel particles onto the class members' properties was indirect.

The judge found that prior to 1990, most class members would not have been aware, or ought not to have been aware, of the fact that nickel in the soil could affect their property values, as they had no reason to be concerned about any adverse effects from nickel in the soil. In fact, according to the judge, the message to the public as of early 2000 was that everything was fine. The judge found that beginning with the release of an MOE phytotoxicological report in early 2000, the focus of the message to the public changed such that there was, after that point, a concern for human health due to levels of nickel in the soil. Accordingly, class members would have concluded after that time that the nickel contamination could affect property values.

Vale was not successful in arguing that the claim was barred by the expiry of the relevant limitation period on the basis that it was well known prior to the fall of 2000 that there was a problem with nickel soil contamination in the area. The judge did find that most class members would have been aware, or should have been aware, prior to 1990 of the possibility that nickel particles may have been in the soil on their properties and that those particles came from the refinery. But the judge went on to conclude that the class members did not have a cause of action until they knew or ought to have known that they had suffered damages. That occurred only after the message to the public changed in 2000 and was widely publicized. The fact that a small number of people in the class knew, or ought to have known, about the relevant facts prior to the fall of 2000 was not enough to affect the claim of the entire class, the judge held.

The damages were based on a comparison of property values in Port Colborne and the nearby city of

Welland, Ontario. Even accepting that properties adjacent to a large industrial facility would have reduced values, the judge found that the rate of increase of property values in Port Colborne was lower after the 2000 public disclosures than they otherwise would have been, due to the negative publicity concerning the nickel contamination and its possible effects on human health. In essence, the judge found that a quantifiable stigma in the form of lost value attached to the contaminated properties.

The test for a claim under the *Rylands v. Fletcher* doctrine was made out on the judge's findings that nickel refining was a non-natural use of the land and the escape of the nickel particles from Vale's land had the potential to cause damage to neighboring properties. It was not relevant that the operation of the facility had been in compliance with all environmental and zoning regulations. The judge also held that the *Rylands* doctrine applied regardless of whether there had been a single isolated escape or a continuous long-term escape.

The judge held that a private nuisance was established by the occurrence of material physical damage to the class members' properties from nickel emissions. The judge concluded that he was not required to balance external factors such as the severity of the harm, the utility of the company's conduct, the character of the neighborhood, or the plaintiffs' sensitivity. Even if he was required to do so, the judge concluded that the harm suffered outweighed the public utility of the defendant's business operations. The judge also found that damages were an essential element of both private nuisance and the *Rylands* claim. Thus, in order to determine if the defendant's conduct created liability, it was necessary to determine whether the class members had suffered harm. He further found that the claim was neither barred nor diminished by the fact that some of the properties had been remediated or that class members had not sold or attempted to sell their properties. A claim for punitive damages was dismissed.

The decision is now under appeal by Vale to the Court of Appeals for Ontario.

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THIRD CIRCUIT OVERRULES...

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interest, JELD-WEN, Inc. (“Jeld-Wen”), and 57 other companies, which allegedly manufactured products that Mrs. Van Brunt purchased from Grossman’s. Almost a decade before the Van Brunts filed suit, however, Grossman’s had filed a Chapter 11 bankruptcy proceeding. (*Id.* at 117). Although Grossman’s had “actual knowledge” that it previously sold products containing asbestos and was “aware that asbestos manufacturers had been or were being sued by asbestos personal-injury claimants,” it had not been sued for any asbestos product liability claims at the time it filed its bankruptcy. (*Id.* (citation omitted)). When Grossman’s published its notice of the deadline for filing proofs of claim, there was “no suggestion in the publication notice that Grossman’s might have future asbestos liability.” (*Id.*). Grossman’s Plan of Reorganization was confirmed in December 1997, and purported to discharge all pre-petition claims. (*Id.*). Accordingly, when the Van Brunts brought claims against Jeld-Wen for asbestos-related personal injury, Jeld-Wen moved to reopen Grossman’s Chapter 11 case and sought a ruling that the Van Brunts’ claims were discharged by Grossman’s Plan of Reorganization. (*Id.* at 117-18).

The bankruptcy and district courts applied *Frenville*’s accrual test and determined that under New York law, an asbestos-related tort claim accrues upon discovery of an injury, and not upon first exposure. (*Jeld-Wen, Inc. v. Van Brunt*, 389 B.R. 384, 388 (Bankr. D. Del. 2008); *Jeld-Wen v. Van Brunt*, 400 B.R. 429, 433 (D. Del. 2009)). Because Mrs. Van Brunt did not have symptoms of mesothelioma until 2006, the lower courts found that the Van Brunts did not have a “claim” subject to discharge at the time Grossman’s Plan of Reorganization was confirmed in 1997.² Jeld-Wen appealed, arguing that the Van Brunts did, in fact, have a pre-petition claim that should have been discharged. On appeal, the Third Circuit explained that although the lower courts correctly applied *Frenville*’s accrual test, it recognized the sharp criticism of the *Frenville* holding³ and decided to analyze the accrual test’s continued viability.

B. The Problem with *Frenville*

Since 1984, courts in the Third Circuit have applied

Frenville’s accrual test to determine whether a valid claim exists under the Bankruptcy Code. The accrual test evaluates “(1) whether the claimant possessed a right to payment; and (2) when that right arose as determined by reference to the relevant non-bankruptcy law.” (*Id.* at 119 (citations and internal quotation marks omitted)). Thus, under *Frenville*, federal law governs *what* claims are actionable under the Bankruptcy Code, but state law controls *when* the claims accrue, which means that claims arise for bankruptcy purposes when the underlying state law cause of action accrues. In the case of Mrs. Van Brunt, her cause of action accrued when she manifested symptoms of mesothelioma in 2006, and her claims, therefore, arose post-petition under *Frenville*. (*Id.* at 119-20).

Many courts have declined to follow *Frenville* because its narrow interpretation of “claim” conflicts with the expansive Bankruptcy Code definition of claim: “[a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . .” (*Id.* (citing 11 U.S.C. § 101(5))).⁴ Courts interpret this as the “broadest possible definition of the term ‘claim,’” which “permits the broadest possible relief.” (*Id.* (internal brackets omitted)). As the Third Circuit recognized in *Jeld-Wen*, however, *Frenville* focused on the “right to payment” language, but failed to give sufficient weight to the language modifying it, such as “contingent,” “unmatured,” and “unliquidated.” (*Id.*). Essentially, *Frenville*’s accrual test failed to account for the fact that an individual can have a “claim” under the Bankruptcy Code before he or she has a right to payment pursuant to applicable state law. (*Id.* at 121).

C. Accrual Test Is Overruled

The Third Circuit, sitting *en banc*, agreed that *Frenville*’s accrual test interprets “claim” too narrowly in light of the Bankruptcy Code’s deliberately broad definition of the term. (*Id.*). The court overruled *Frenville*’s accrual test and, in joining the increasing “consensus among the courts,” held that a claim arises under the Bankruptcy Code when an individual is exposed to the allegedly defective product that gives rise to the claim pre-petition, regardless of whether the injury manifests itself after the reorganization. (*Id.* at 125). The Van Brunts’ claims, therefore, arose at Mrs.

² The United States District Court for the District of Delaware affirmed the bankruptcy court with the exception of finding that a breach of warranty claim was discharged in the bankruptcy proceeding.

³ The Third Circuit cited numerous cases that have criticized *Frenville* and noted that *Frenville*’s accrual test has been described as “universally rejected.” The Third Circuit also noted that the courts of appeals that have considered *Frenville* have “uniformly declined to follow it.”

⁴ Pub. L. No. 101-647 (1990) redesignated section 101(4) as section 101(5), but the current broad definition of claim has been effective since 1978.

Van Brunt's first exposure to the product that allegedly contained asbestos in 1977.

But merely because a claim arises pre-petition does not mean it will be discharged in a bankruptcy proceeding. As the Third Circuit explained, "any application of the test to be applied cannot be divorced from fundamental principles of due process." (*Id.*). Importantly, the court stressed the due process requirement of notice, and stated that inadequate notice may preclude the discharge of a claim in a bankruptcy. (*Id.* at 125-26). The issue of notice is particularly troublesome in the context of asbestos and other toxic tort injuries, as the symptoms of these injuries often do not manifest until years after the initial exposure. (*Id.* at 126).

As the Third Circuit recognized, the Bankruptcy Code does have due process safeguards in place. (*Id.* at 126-27 (citing 11 U.S.C. § 524(g))). Recognizing that "future claims by presently unknown claimants could cripple a debtor's reorganization," Congress enacted 11 U.S.C. § 524(g) ("section 524(g)"), which provides a mechanism to pay current asbestos claims and account equitably for potential future unknown claims by way of a channeling injunction or asbestos trust. (*Id.*). In *Jeld-Wen*, however, because the Grossman's Plan of Reorganization did not provide for such an injunction or a trust for future unknown asbestos-related claims, the Van Brunts could not seek to address their claims against monies set aside under section 524(g). (*Id.* at 127).⁵ The Third Circuit held that where the plan of reorganization does not provide for a channeling injunction or an asbestos trust pursuant to section 524(g), the inquiry becomes whether discharge of a particular claim would comport with due process. This inquiry depends on a host of factors, including but not limited to:

- the circumstances of the initial exposure;
- whether and/or when the claimants were aware of the exposure;
- whether claimants were aware of the notice of the claims bar date;
- whether the claimants were known or unknown creditors;
- whether the claimants had a colorable claim at the time of the bar date; and

- whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).

(*Id.* at 127-28). Accordingly, the Third Circuit reversed and remanded to the district court so it could determine whether the Van Brunts' claims should be discharged under the above analysis. (*Id.* at 128).

D. The Bottom Line

So what can bankruptcy practitioners and toxic tort litigators take from this? *Jeld-Wen* clarifies that if an individual is exposed to asbestos pre-petition, that individual has a claim under the Bankruptcy Code irrespective of when symptoms manifest. Therefore, companies that reorganize and establish a section 524(g) asbestos trust will continue to be insulated from suits like the one brought by the Van Brunts.

The more difficult question is how courts will interpret *Jeld-Wen* when debtors either are not eligible for, or fail to establish, a section 524(g) asbestos trust. Without the procedural due process protections built into a section 524(g) asbestos trust, courts will analyze whether a claim is discharged by reviewing the underlying facts, including the nature of the exposure and whether the claimant lacked a meaningful opportunity to protect his or her claim in the bankruptcy. Based on the reasoning set forth in the *Jeld-Wen* decision, it is possible that the bankruptcy court will permit the Van Brunts to pursue their action against *Jeld-Wen* given the lack of notice and opportunity to protect their rights in the Grossman's bankruptcy.

To help address the notice issue, companies should consider including notice of potential asbestos liability in any claims bar notice. Even that may not fully insulate a company that lacks the protection of a section 524(g) asbestos trust. Nevertheless, it seems likely that at least some claims that would have survived under *Frenville* will now be found to be discharged under *Jeld-Wen*. However, given the factual analysis required, and the practical difficulties associated with noticing parties with latent tort injuries, the real impact on discharging latent asbestos claims may not be significantly altered despite *Frenville* being overruled. ⚖️

⁵ The court noted that Grossman's would not qualify for a section 524(g) asbestos trust in any event because, for example, no asbestos product liability cases had been filed against Grossman's at the time it filed for bankruptcy.

EPA'S PROPOSED...

Continued from page 4

Suppressants (WAFS) used in the chromium electroplating industry. The EPA considers this a cost-efficient option supported by the availability of several types of WAFS that do not include PFOS. The non-PFOS WAFS have proven effective for use in hard and decorative chromium electroplating baths. Although the chromium anodizing industry has not extensively used the non-PFOS WAFS, the EPA found no technical barriers precluding their implementation or effectiveness. The EPA proposes to revise the MACT to allow the use of non-PFOS WAFS upon startup and their addition to existing electroplating and anodizing tanks. Owners/operators of subject facilities must comply with the proposed revisions beginning three years after promulgation of the final amendments.

The EPA is also proposing under CAA section 112 (d)(6) to incorporate several housekeeping requirements into 40 C.F.R. § 63.342(f). These measures would potentially reduce fugitive chromium emissions from chromium electroplating and anodizing operations. The proposed housekeeping procedures include: storage requirements for any substance that contains Chromium-VI as a primary ingredient; controls for the dripping of bath solution resulting from dragout; splash guards minimizing overspray and returning bath solution to the electroplating or anodizing tank; a requirement to promptly clean up or contain all spills of any substance containing Chromium-VI;² requirements for the routine cleaning or stabilizing of storage and work surfaces, walkways, and other surfaces potentially contaminated with Chromium-VI; a requirement to install a barrier between all buffing, grinding, or polishing operations and electroplating or anodizing operations; and requirements for the storage, disposal, recovery, or recycling of chromium-containing wastes. In addition, this action would require owners/operators to incorporate and implement these housekeeping procedures in the facility Operation and Maintenance Plan specified in section 40 C.F.R. § 63.342(f)(3) (2008) and implement them. The proposed compliance date would be six months after promulgation of the final amendments.

c. Public Health Concerns Underlying Adoption of Proposed Revisions

The underlying purpose of the proposal is

undeniably public health. For example, PFOS-based WAFS used in the chromium electroplating industry are part of a family of chemical compounds categorized as long-chain perfluorinated chemicals. According to the 2010 California Office of Health Hazard Assessment Report, Perfluorooctane Sulfonate and its Salts and Transformation and Degradation Precursors, these compounds have persistent, bioaccumulative, and toxic characteristics and are a particular concern for children's health. The EPA relies on the Report's findings and availability of non-PFOS WAFS to justify the MACT revision.

More importantly, the proposed revisions represent the EPA's continued attempt to reduce human exposure to Chromium-VI. The EPA found that Chromium-VI compounds account for 98 percent of the Hard Chromium Electroplating source category emissions. Chromium-VI compounds account for 94 percent and 99 percent of the emissions in the Decorative Chromium Electroplating and Chromium Anodizing sources, respectively. Consequently, in all emission estimates, the EPA made "the conservative assumption that 100 percent of the emissions are Chromium-VI compounds." 75 Fed. Reg. 65086-7 (Oct, 21, 2010).

EPA found that a number of their risk assessments results approached the "presumptive limit on maximum individual lifetime risk of approximately 1-in-10 thousand [100-in-1 million]" recognized in the Benzene NESHAP. 54 Fed. Reg. 30844 (Sept. 14, 1989). For instance, the maximum lifetime individual cancer risk based on allowable emissions, and maximum pollutant concentrations for 70 years for a person living within 50 km from Hard chromium Electroplating plant, could be as high as 90-in-1 million. In addition, the EPA's facility-wide risk assessment found the maximum individual cancer risks from all HAP emissions at Hard and Decorative Chromium Electroplating facilities are estimated to be 90-in-1 million, individually.

d. The EPA Provides for an Affirmative Defense in the Event of Malfunction

The recommended housekeeping measures compliment the EPA's proposed affirmative defense against certain civil penalties in the event of a malfunction. The proposed affirmative defense may be construed as EPA's response to the federal district court's decision in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), which vacated CAA Section 112

² A new definition would be added to 40 C.F.R. §63.341(a) (2008) to clarify what is meant by the term "contains hexavalent chromium as a primary ingredient."

regulations governing the emissions of HAP during periods of Startup, Shutdown, and Malfunction (SSM).

In the current proposal, the EPA allows some leniency during periods of malfunction. For example, the EPA acknowledges that properly designed and maintained equipment can fail and cause or contribute to emissions in excess of relevant emission standards.³ Consistent with the EPA's final amendments to regulations addressed in the Portland Cement Category, 75 Fed. Reg. 54970 (Sept. 9, 2010), the EPA proposes to add regulatory language providing an affirmative defense against civil penalties for exceedances of emission limits caused by malfunctions in this MACT standard. However, the affirmative defense is narrowly tailored to only be available where exceedance is caused by a malfunction meeting a narrow definition of sudden, infrequent, not reasonably preventable, and not caused by poor maintenance and/or careless operation. 40 C.F.R. § 63.2 (2004). The EPA contends that the proposed criteria are designed to ensure that steps are taken to correct the malfunction, minimize emissions, and prevent future malfunctions.

Owners/operators of CEMACT source category facilities should proactively address and remedy any malfunctions promptly. They should diligently ensure

that they meet their housekeeping duties under the MACT standards and offer evidentiary proof to that effect. The affirmative defense is narrowly tailored to the extent that owners/operators must meet their burden of proving all of the requirements or be subject to penalties under CAA section 113. In addition, owners/operators must show that they meet the narrow definition of malfunction under 40 C.F.R. § 63.2 (2004). Therefore, the affirmative defense provided by the proposed regulation is not a blanket defense. Owners/operators may still be subject to the Administrator's challenge unless they provide concrete evidence of compliance with recordkeeping and reporting requirements, meet the narrow definition of malfunction and every requirement of the proposed limited affirmative defense.

III. Conclusion

As inherently emphasized in the proposed regulation, the key for owners/operators will be compliance with proposed housekeeping requirements. Failure to adhere to the housekeeping requirements will not only prove costly to owner/operator in terms of civil penalties, but may also cost them an invaluable affirmative defense. ⚖️

³ See, e.g., State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983).

A 'DUTY' TOO...

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their products would be used in conjunction with asbestos-containing products. After proponents of the bills took out full-page newspaper advertisements against senators in opposition, the Washington Senate allowed its session to expire without voting on its version of the bill. Both bills were re-introduced in early 2010, but the Washington Legislature has yet to vote on either.

Pennsylvania

Pennsylvania courts have also rejected the theory of component parts liability as applied in cases involving component parts which contain toxic substances.

In the unpublished decision *Schaffner v. Aesys Technologies, LLC, et al.*, 2010 WL 605275 (Pa. Super. Jan. 21, 2010), a three-member panel of the

Pennsylvania Superior Court upheld summary judgment granted by the Court of Common Pleas of Philadelphia County to a manufacturer of boilers that include asbestos-containing component parts added to the boiler after manufacture. The plaintiff adduced evidence that from 1967 until 1980, the decedent had removed and maintained the manufacturer's boilers on dozens of occasions. Evidence also suggests that the manufacturer had neither manufactured nor supplied any of the original or replacement asbestos-containing components used in conjunction with the boilers at issue. Accordingly, the Superior Court affirmed summary judgment, joining what it called the majority view, "that an equipment manufacturer can not be held liable for products it neither manufactured nor supplied."

New York

A New York court endorsed component parts liability, rejecting a defendant's argument that it was

not liable for hazards associated with component parts affixed to its products after sale.

In a January 25, 2010, decision in the case *Webb, et al. v. A.O. Smith Water Products Inc., et al.*, No. 2008/9199 (N.Y. Sup. Ct., Erie Cty.), the New York Supreme Court for Erie County held that, because an equipment manufacturer's products required the use of insulation, and because asbestos was a component in much of the insulation used at the time, the manufacturer had a duty to warn end users of the hazards of asbestos contained in products that would foreseeably have been used with its products. The manufacturer could only prevail at summary judgment if it affirmatively demonstrated that the plaintiff was not exposed to asbestos from products used in conjunction with its equipment, held the New York Supreme Court.

Utah

The Utah Supreme Court in 2010 explained precisely the circumstances under which a defendant could be liable for defective component parts.

In *Gudmundson v. Del Ozone*, 232 P.3d 1059 (Utah 2010), the plaintiff, a worker at a facility where an ozone-generating system was installed, alleged that she developed a neurological disorder as a result of overexposure to ozone from that system. Defendant Del Ozone moved for summary judgment on the basis that it supplied only the ozone generator, and that other defendants were responsible for installing the additional asbestos-containing components necessary to ensure that the system as a whole did not emit hazardous levels of ozone. The trial court concurred with this view, but the Utah Supreme Court disagreed.

A manufacturer of equipment is liable for defective component parts, held the Court, where (1) the manufacturer participated to a substantial degree in the design of the integrated product, including any defective component parts; and (2) the integration of the nondefective component caused the integrated product to be defective. Substantial participation, in this sense, means that the "manufacturer must have had some control over the decision-making process of the final product or system." In this case, there was evidence that Del Ozone collaborated with the defendants responsible for the integrated system and

that said defendants purchased necessary component parts from Del Ozone.

Massachusetts

One Massachusetts Superior Court judge recently had occasion to address component parts liability in the toxic torts setting. In *Dombrowski v. Alfa Laval, Inc., et al.*, C.A. No. 08-1938 (Middlesex Cty., Mass. 2010), the plaintiffs alleged exposure to asbestos from replacement gasket and packing material used on a defendant's valves. The valve manufacturer moved for summary judgment on the ground that it cannot be liable for another's defective parts. In a July, 2010 ruling, the Massachusetts Superior Court judge presiding over the state's asbestos docket agreed with the manufacturer. The plaintiffs have declined to appeal the judgment.

California

In five recent high-profile toxic torts cases, the California appellate districts have split as to whether, under that state's laws, one can recover pursuant to a component parts theory. This question is now before the California Supreme Court in the case *O'Neil et al. v. Crane Co. et al.*, 177 Cal.App.4th 1019 (Cal. Ct. App. 2d Dist., Div. 5, Sept. 18, 2009).

In the first California appellate opinion to address the subject, *Taylor v. Elliot Turbomachinery Co. Inc.*, 171 Cal.App.4th 564 (Cal. Ct. App., 1st Dist., Div. 5, Feb. 25, 2009), the Court of Appeals of California, First District, Division Five, affirmed the trial court's ruling that defendant equipment manufacturers had no duty to warn end users regarding component parts over which they had no control, whether the use of those component parts was foreseeable or not.

The First District Court of Appeals affirmed on the grounds that (1) the equipment manufacturers were not in the "chain of distribution" of the defective products, the various components alleged to contain asbestos, (2) the equipment manufacturers' products themselves were not defective, and (3) "manufacturers or suppliers of non-defective component parts bear no liability when they simply build a product to a customer's specifications but do not substantially participate in the integration of their components into the final product."

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Several divisions of California's Second Appellate District Court followed suit shortly thereafter in the cases *Merrill et al. v. Leslie Controls*, 99 Cal.Rptr.3d 839 (Cal. Ct. App., 2d Dist., Div. 3, Sept. 25, 2009); *Hall v. Warren Pumps et al.*, 2010 WL 528489 (Cal. Ct. App., 2d Dist., Div. 2, Feb. 16, 2010); and *Walton v. William Powell Co.*, 2010 WL 1612209 (Cal. Ct. App., 2d Dist., Div. 4, Apr. 22, 2010). *Walton* in particular added judicial gloss to the *Taylor* holding, determining that manufacturers of non-defective equipment are not liable for defective components over which they had no control, whether the underlying claims are premised on a failure to warn, or a design defect claim.

The Court in *O'Neil et al. v. Crane Co. et al.*, 177 Cal.App.4th 1019 (Cal. Ct. App. 2d Dist., Div. 5, Sept.

18, 2009), reached a contrary conclusion. There, defendant Crane Co. ("Crane") allegedly sold pumps and valves to which a third-party affixed asbestos-containing insulation. The trial court granted Crane's motion for non-suit on the ground that its products were, themselves, not defective. However, the Court of Appeals for the Second District of California reversed, holding that the duty to warn owed by Crane to end users extended to component parts that would foreseeably be affixed to its equipment after installation.

The California Supreme Court has granted certiorari to resolve the conflict of law presented by these cases. ⚖️



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