



October 2008

www.klgates.com

Authors:

Nicholas Vari
+1.412.355.8365
nick.vari@klgates.com

Nicholas Ranjan
+1.412.355.8618
nicholas.ranjan@klgates.com

K&L Gates comprises approximately 1,700 lawyers in 28 offices located in North America, Europe and Asia, and represents capital markets participants, entrepreneurs, growth and middle market companies, leading FORTUNE 100 and FTSE 100 global corporations and public sector entities. For more information, visit www.klgates.com.

Philadelphia Trial Court Rejects “Single-Fiber” Causation Theory in Asbestos Cases

With insolvencies having removed the potentially responsible parties from the courtroom, claimants seeking redress for asbestos-related disease now focus upon entities whose products may have contained some trace amounts of asbestos, usually bound into the product in some way so that the products could potentially emit few, if any, dangerous asbestos fibers. In order to impose liability upon defendants whose products did not release dangerous asbestos, plaintiffs’ counsel have strained to develop extraordinary and novel theories of product-liability causation law. One such extension is the “single-fiber” theory, under which an expert, typically a medical professional, opines that each and every exposure to a single asbestos fiber is deemed to be a substantial contributing factor in causing the plaintiff’s disease.

Less than a year ago, the Pennsylvania Supreme Court severely curtailed the use of the “single-fiber” theory in *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216 (Pa. 2007). In *Gregg*, the Pennsylvania Supreme Court repudiated plaintiff’s “each-and-every exposure” expert testimony, noting that “we do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every ‘direct-evidence’ case.” *Id.* at 227-28. The court recognized further that asbestos plaintiffs’ expert testimony in this regard constitutes “generalized opinions,” insufficient to create a jury question in a case where exposure to the defendant’s product is *de minimus*. *Id.* at 228. Thus, after *Gregg*, a plaintiff cannot survive summary judgment by claiming a *de minimus* exposure to a product and relying on expert testimony opining that exposure to a single asbestos fiber caused his disease.

On September 24, 2008, Judge Alan Tereshko—the coordinating judge for the mass tort docket in Philadelphia County—applied *Gregg* to determine that single-fiber expert testimony does not meet the admissibility requirements set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under *Frye*, for expert testimony to be considered admissible, the proponent of the evidence must prove that the expert’s methodology is generally accepted by scientists in the relevant field as a means of reaching the conclusion to which the expert will testify at trial. *Id.* at 1014. In *In re Asbestos Litigation* (Motion Control No. 084682), Judge Tereshko rejected the testimony of three plaintiffs’ experts, all of whom opined that each and every exposure to a single asbestos fiber was a substantial contributing factor in causing the plaintiff’s disease, because the testimony lacked any coherent methodology.¹ *See Op.*, at 54. According to Judge Tereshko, the experts based their opinions on a form of dubious inductive logic that “[i]f one breath of asbestos can cause a disease then every breath causes it.” Such logic is faulty because it is undisputed that the general population is exposed to asbestos in one form or another (e.g., asbestos in the ambient air) and some get an asbestos-related disease, while others do not. *Id.* at 49-50.

¹ Judge Tereshko specifically denounced the experts’ reliance upon such purported methodologies as chemical structure analysis or animal studies, as being incoherent and lacking any consideration of scientific epidemiology. *See Op.*, at 54-55.

As it now stands, to prevail at trial, asbestos plaintiffs must show a genuine causal nexus between a defendant's product and a plaintiff's injuries. Moreover, because the admissibility of expert evidence is a matter of procedure that should be governed by Pennsylvania law in Pennsylvania courts, plaintiffs cannot circumvent it by arguing that the law of another jurisdiction applies to the substantive causation element of any claim pending in a Pennsylvania court.

K&L Gates comprises multiple affiliated partnerships: a limited liability partnership with the full name K&L Gates LLP qualified in Delaware and maintaining offices throughout the U.S., in Berlin, in Beijing (K&L Gates LLP Beijing Representative Office), and in Shanghai (K&L Gates LLP Shanghai Representative Office); a limited liability partnership (also named K&L Gates LLP) incorporated in England and maintaining our London and Paris offices; a Taiwan general partnership (K&L Gates) which practices from our Taipei office; and a Hong Kong general partnership (K&L Gates, Solicitors) which practices from our Hong Kong office. K&L Gates maintains appropriate registrations in the jurisdictions in which its offices are located. A list of the partners in each entity is available for inspection at any K&L Gates office.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

Data Protection Act 1998—We may contact you from time to time with information on K&L Gates LLP seminars and with our regular newsletters, which may be of interest to you. We will not provide your details to any third parties. Please e-mail london@klgates.com if you would prefer not to receive this information.

©1996-2008 K&L Gates LLP. All Rights Reserved.