

Another Blow to "Every Exposure" in Asbestos Litigation

By **Meghan B. Senter**

January 5, 2017

Causation opinions from plaintiff's experts in asbestos exposure cases have undergone a puzzling evolution as they continue to face successful challenges. From "every exposure" to "every exposure above background" and "every significant exposure," each iteration has attempted to make the same end run around the plaintiff's burden of proof by stating that all exposures in a lifetime work together to cause disease. A recent federal decision, however, struck another blow to the "every exposure" theory, adding to the growing case law debunking it as nothing more than junk science.

Under the "every exposure" theory advanced by plaintiff's attorneys in asbestos litigation, each defendant whose product plaintiff may have worked with or around, no matter how infrequently, is equally liable. The theory claims that each exposure contributes to the development of disease, without making any attempt to quantify the specific exposures from various products. This is particularly problematic when you consider that exposures to asbestos from certain products may be so low that, taken individually, may not have resulted in disease. The "every exposure" theory glosses over these *de minimis* exposures with the opinion "each and every exposure" to asbestos contributes to the causation of disease.

Recently, federal courts have begun to critically analyze this "every exposure" theory, and to demand a more stringent causation analysis. In *Smith v. Ford Motor Co.*, a Utah federal court found held that the "each and every exposure theory is based on a lack of facts and data." *Smith* involved a plaintiff's expert who opined that the plaintiff's mesothelioma was caused by his total and cumulative exposure, with all exposures playing a contributory role. The court excluded that testimony, finding that the "every exposure" theory "asks too much from too little evidence as far as the law is concerned. It seeks to avoid not only the rules of evidence but more importantly the burden of proof." Likewise, in *Yates v. Ford Motor Co.*, a case out of the Eastern District of North Carolina, the court excluded testimony of another well-known plaintiff's expert, finding that his adherence to the "each and every exposure" theory lacked a basis in supporting facts or data.

And most recently, in *Bell v. Foster Wheeler Energy Corp.*, the Eastern District of Louisiana referenced the growing line of exclusionary opinions and stated that the "deficiencies of the "each and every exposure" theory of causation in asbestos exposure cases have been extensively discussed." The court held that the theory is not an acceptable theory of causation because it amounts to "nothing more than the *ipse dixit* of the expert." Though some state and federal courts continue to permit the "every exposure" theory, cases like *Smith*, *Yates*, and *Bell* add to the growing number of jurisdictions requiring plaintiffs to meet their burden of proof.