The Institute is especially grateful to our outstanding Seminar Chairperson(s) for providing the necessary leadership, organization, and supervision that has brought this program into a reality. Indeed a debt of gratitude is particularly due our articulate and knowledgeable faculty, without whose untiring dedication and efforts this seminar would not have been possible. Their names are listed on the brochure for this program and their contributions to the success of this seminar are immeasurable.

I would be remiss if I did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us hope your attendance will be most beneficial as well as enjoyable. Your comments and suggestions are always welcome.

March, 2017

_Tangela S. King_
Interim Director, ICLE
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Foreword</th>
<th>iii</th>
</tr>
</thead>
<tbody>
<tr>
<td>The FDA and Its Impact on Tort Litigation:</td>
<td>01</td>
</tr>
<tr>
<td>Oversight of Health Protection and Off-Label Promotion</td>
<td>1–19</td>
</tr>
<tr>
<td><em>William H. Kitchens</em></td>
<td></td>
</tr>
<tr>
<td>Toxic Tort Trial Themes and Tactics –</td>
<td>02</td>
</tr>
<tr>
<td>Communicating Complexity from the Plaintiff Perspective</td>
<td>1–23</td>
</tr>
<tr>
<td><em>Jared M. Lina</em></td>
<td></td>
</tr>
<tr>
<td>Medical Monitoring for Toxic Exposures</td>
<td>03</td>
</tr>
<tr>
<td>1–19</td>
<td></td>
</tr>
<tr>
<td><em>Carmen R. Toledo</em></td>
<td></td>
</tr>
<tr>
<td>Asbestos Litigation – Current Status and Future Predictions</td>
<td>04</td>
</tr>
<tr>
<td>1–34</td>
<td></td>
</tr>
<tr>
<td><em>David C. Marshall and Eric T. Hawkins</em></td>
<td></td>
</tr>
<tr>
<td>Particular Causation Issues in Failure to Warn Cases</td>
<td>05</td>
</tr>
<tr>
<td>1–5</td>
<td></td>
</tr>
<tr>
<td><em>W. Clay Massey</em></td>
<td></td>
</tr>
<tr>
<td>The Class Action Fairness Act (CAFA)</td>
<td>06</td>
</tr>
<tr>
<td>1–29</td>
<td></td>
</tr>
<tr>
<td><em>Christopher T. Giovinazzo</em></td>
<td></td>
</tr>
<tr>
<td>Appendix:</td>
<td></td>
</tr>
<tr>
<td>Georgia Mandatory CLE Fact Sheet</td>
<td>1</td>
</tr>
<tr>
<td>Postface</td>
<td>2</td>
</tr>
</tbody>
</table>
Materials Were Not Submitted for the Following Presentations at the Time of Printing/Duplication:

**TOXIC TORT TRIAL THEMES AND TACTICS – COMMUNICATING COMPLEXITY**  
*Defense Perspective:*
Victoria D. Lockard, Greenberg Traurig, Atlanta

**TALC POWDER LITIGATION**  
*Hon. Roy Barnes*, Barnes Law Group LLC, Marietta

**PROCEDURAL ISSUES IN TOXIC AND MASS TORTS**  
*Robert D. Mowrey*, Kazmarek, Mowrey, Cloud and Laster, Atlanta

**EXPERT WITNESS/DAUBERT LAW UPDATE**  
*Courtney E. Ferrell*, Troutman Sanders, Atlanta
The FDA and Its Impact on Tort Litigation: 
Oversight of Health Protection and Off-Label Promotion

*William H. Kitchens*
Arnall Golden Gregory LLP
Atlanta, Georgia
The FDA and Its Impact on Tort Litigation: Oversight of Health Protection and Off-Label Promotion

Presented by: William H. Kitchens
Arnall Golden Gregory LLP
Atlanta, GA
william.kitchens@agg.com

Presented to: ICLE Seminar: Toxic & Mass Torts
March 30, 2017

Introduction

- The pharmaceutical, medical device, and food industries increasingly have been the target of large and expensive toxic tort, product liability, and class action litigation
- How the FDA operates, the procedures the agency employs for risk management and approval decisions for products, and the detailed requirements that manufacturers of such products must follow cast a long shadow over the ultimate resolution of this litigation
- As a result, counsel involved in these cases are well advised to have a working knowledge of FDA's framework of regulation
Introduction

- Food and Drug Law is the oldest field of consumer protection legislation in the United States and deals primarily with government protection of public health and safety with regard to the manufacture and marketing of food (including dietary supplements), drugs, medical devices, biological products, cosmetics, animal food, animal drugs, radiation-emitting products, and the regulation of the distribution, promotion, and advertising of tobacco products.

Introduction (cont’d.)

- The scope of these commercial markets is impressive. By a rough estimate 25 cents of every consumer dollar is spent for products that fall within the categories of products regulated by the Food and Drug Administration.

- The primary statutes covering this area are:
  2. Public Health Service Act, 42 U.S.C. §§ 262, 264, 266, 282, 284
Basic Legal Theories of Tort Liability Over FDA-Regulated Products

Whether framed in terms of strict liability or negligence, the law allows consumers to recover damages caused by "defective" products sold by the defendant.

Product manufacturers and others in the chain of distribution may face tort liability for:

- Manufacturing defects (when a product comes off the assembly line out of specifications);
- Design defects (when the specifications themselves are deemed unreasonably unsafe because the risks associated with the design outweigh the utility when compared with reasonable alternative designs (in a few jurisdictions the test for design defect is whether the product's performance disappointed the expectations of a reasonable consumer);
- Inadequate instructions or warnings about inherent risks in the design or use of the product that the defendant knew or should have known about but that consumers are unlikely to recognize (the Learned Intermediary defense often comes into play in these cases);
- Implied warranty (most states require products to be generally fit for the ordinary purpose for which they are sold, and a defendant's fault or degree of care is not an issue);
- Fraud (these claims involve an assertion that the defendant committed a fraud on the FDA by providing FDA with false information or improperly withheld data that was material to the FDA's decision to approve the product).
The Role of FDA In Product Risk Assessment and Approval

- FDA, although rarely directly involved in private tort actions concerning FDA-regulated products, is never far from the scene.
- A comprehensive review of the FDA approval mechanisms is beyond the scope of this presentation, but the following outline presents an overview.

Regulation of Food Safety and Labeling

- The Federal Food, Drug, and Cosmetic Act (FDCA) contains a variety of standards for the regulation of food safety, particularly with the enactment of the Food Safety and Modernization Act in 2011:
  - A general prohibition against food adulteration, including the addition of any poisonous or deleterious substance to food;
  - A prohibition against the addition of substances that have been found to induce cancer in man or animals;
  - A provision to set tolerances for unavoidable added poisonous or deleterious substances (including pesticide residues);
Regulation of Food Safety and Labeling (cont’d.)

- A premarket review process to evaluate the safety of all food and color additives and to establish safe limits for such additives;
- The promulgation of current good manufacturing practices (cGMPs) for the general food industry;
- The ability to require science-and risk–based preventive controls and mitigation strategies to strengthen food safety practices at problematic and vulnerable links along the food supply chain;

Regulation of Food Safety and Labeling (cont’d.)

- Detailed requirements regarding the information that must appear on food labels and the format that must be used to present this information; and
- General inspection and compliance authority at establishments where food is manufactured, processed, packed, transported, or held for introduction into interstate commerce
Regulation of Food Safety and Labeling (cont’d.)

- Although tort cases involving food spoilage and contamination represent the majority of claims against food manufacturers, cases relating to information on the food label (including the labeling of dietary supplements) are increasing (e.g., "natural" claims and claims regarding failure to disclose the presence of genetically modified organisms (GMOs) in food ingredients)

---

Preemption of Food Labeling

- The 1990 Nutrition Labeling and Education Act, which amended the FDCA, expressly prohibits any state or local government from "directly or indirectly" establishing any food labeling requirement that is not identical to FDA requirements for certain food labeling disclosures (e.g., identity statements, net quantity of contents and ingredient declarations, nutrition facts, nutrition claims, and health claims)

- As a result, most tort cases involving alleged deficiencies in food labels are brought under state unfair competition statutes
Regulation of Drugs

1. Prescription Drugs
   - There are two basic routes to FDA approval for prescription drugs:
     - New drug approval (NDA)
       - Involves laboratory and animal testing (pre-clinical testing) as well as subsequent clinical trials using human subjects
       - Submission of New Drug Application (NDA)
     - Drug will be approved if FDA concludes there is sufficient evidence of “safety” and “effectiveness”
     - Abbreviated new drug approval (ANDA) for generic drugs

Regulation of Drugs (cont’d.)

- Drug labeling
  - The FDCA provides that a drug is “misbranded” if its “labeling is false or misleading in any particular”
  - Importantly, another section of the FDCA states that in determining whether labeling is misleading “there shall be taken into account...not only representations made or suggested...but also the extent to which labeling or advertising fails to reveal material facts in light of such representations”
  - The specific content of a prescription drug label, including directions for use and disclosures, such as contraindications, warnings, precautions, and adverse reactions is determined by FDA as part of the new drug approval process. In addition, FDA regulations set forth a specific format for a prescription drug’s label
Regulation of Drugs (cont’d.)

2. Regulation of over-the-counter drugs

- The category of over-the-counter (OTC) drugs refers to the category of drugs that are sold legally without a healthcare provider’s prescription.
- The FDA regulates OTC drugs with a monograph system under which the agency evaluates the safety and effectiveness of OTC drugs by considering categories of active ingredients at specific dosage levels together with their labeled directions for use, warnings, and other relevant information.
- Once safety and effectiveness is established through procedures involving notice-and-comment rulemaking, FDA publishes “monographs” for each OTC drug category in the form of final regulations.
- Under these OTC regulations, a drug may be marketed without approval of an NDA if it has active ingredients and labeling that conform to a final monograph, and its inactive ingredients are all “safe and suitable.”

Regulation of Medical Devices

- The regulation of medical devices under the FDCA is structured around recognition that medical devices vary widely in their simplicity or complexity and their corresponding degree of risk or benefit. FDA classifies devices into three classes, corresponding to their degree of risk-benefit.
- Class I devices present the lowest risk and are subject to general controls (registration, listing, quality system regulations, adverse event reporting, recordkeeping, adulteration and misbranding).
- Class II devices are subject to both general controls and special controls or performance standards.
- Class III devices are subject to the most stringent controls, including premarket approval by FDA (e.g. implants and life-sustaining devices).
Regulation of Medical Devices (cont’d.)

- Almost all Class I and a few Class II devices are exempt from premarket review.
- Most Class II devices (and a few Class I devices) may be marketed only after FDA clearance of a premarket notification (PMN) under Section 510(k) of the FDCA. This is commonly called a “510(k) submission.” This pathway requires that the device be “substantially equivalent” to a “predicate device.”
- Class III devices, including a device that is not substantially equivalent to a predicate device, may not be marketed until:
  1. the device has been tested for safety and effectiveness;
  2. a premarket approval application (PMA) has been submitted to FDA; and
  3. FDA has approved the PMA as demonstrating reasonable assurance that the device is safe and effective for its intended use.

Does the FDCA Preempt State Law Tort Claims Involving Drugs and Devices?

- The United States Supreme Court in recent years has decided several cases related to federal preemption of state law claims for products approved by the FDA.
- In some instances, the Court found the FDCA and applicable FDA regulations preempted state law claims. In other cases, the Court found that no federal preemption existed and allowed the state law claims to proceed.
- On June 24, 2013, the Supreme Court held 5-4 in Mutual Pharmaceutical Co. v. Bartlett, 133 S.Ct. 2466 (2013) that the FDCA preempted a state law design-defect damages claim against a manufacturer of generic prescription drugs.
- The Court analyzed the nature of Mutual’s state law duty (the case involved New Hampshire law) and Mutual’s duty under the FDCA and concluded that the drug manufacturer’s federal law and state law duties conflicted.
Does the FDCA Preempt State Law Tort Claims Involving Drugs and Devices? (cont’d.)

- In so holding, the Court noted that the FDCA and FDA’s regulations prohibit generic manufacturers from unilaterally changing their labels. The FDCA, the Court explained, also does not authorize generic manufacturers to alter the composition of their products because approval depends on bioequivalency with a referenced listed (brand name) drug.

---

Does the FDCA Preempt State Law Tort Claims Involving Drugs and Devices? (cont’d.)

- In Wyeth, the court held that federal law generally does not preempt state law failure-to-warn claims (Vermont) against manufacturers of brand name prescription drugs.
- Wyeth argued that it would be impossible for it to comply with both the state law duties imposed for improved warnings and its federal labeling duties because the labeling for the drug in question had been approved by the FDA as part of the NDA process.
- But, the Court rejected that argument finding that under the FDCA Wyeth could have revised its label pursuant to an FDA regulation allowing a brand name manufacturer to change the labeling for an approved drug based on newly acquired safety information in advance of formal FDA consent to such a change. The Court also pointed out that Congress specifically did not include direct preemption language in the FDCA for drug labeling.
Does the FDCA Preempt State Law Tort Claims Involving Drugs and Devices? (cont’d.)

- In *PLIVA*, on the other hand, the Court held that the FDCA generally does preempt failure-to-warn claims against manufacturers of generic prescription drugs because federal law prohibits generic manufacturers from unilaterally amending their drug labels and instead requires them to adopt the label of the brand name drug on which the generic product is based.

- These decisions, thus, created different preemption determinations based on whether the drug in question was a brand name or a generic drug. This distinction may not exist for long. In November 2013, the FDA published a proposed rule that would allow generic drug manufacturers to use the same process as brand name drug manufacturers to unilaterally update safety information in product labeling (78 Fed. Reg. 67985 (Nov. 13, 2013)).

---

Does the FDCA Preempt State Law Tort Claims Involving Drugs and Devices? (cont’d.)

- The Supreme Court has also addressed preemption in two major cases involving medical devices.

- In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court rejected the argument that the express preemption clause in the Medical Device Amendments of 1976, which amended the FDCA, preempted a state law design defect claim brought by an injured plaintiff against the manufacturer of a the medical device that had been cleared by the FDA for commercial distribution under the 510(k) submission process.

- The Court concluded that unlike a device approved by the FDA under the PMA process for Class III devices, a device cleared under a 510(k) submission is not subject to labeling and manufacturing requirements that are specific to that particular device.
Does the FDCA Preempt State Law Tort Claims Involving Drugs and Devices? (cont’d.)

– Seven years later in Riegel v. Medtronic, Inc., 552 U.S. 312 (2008), the Court modified the rule in Lohr. In Riegel, the Court held that the preemption clause of the Medical Device Amendments of 1976 bars state law claims that challenge the effectiveness or safety of a medical device that has received premarket approval from the FDA (i.e. a PMA approved for a Class III device).

– But, the Court did note that the FDCA express preemption of state law requirements for devices that have an approved PMA does not preempt state requirements that “parallel” federal requirements. Much of the subsequent litigation in this area has involved whether the state law requirements “parallel” the federal law.

Does the FDCA Preempt State Law Tort Claims Involving Drugs and Devices? (cont’d.)

– Finally, Buckman v. Plaintiffs’ Legal Committee, 531 U.S. 341 (2001) deserves mention. The case concerned whether the FDCA preempted a state-law fraud-on-the-FDA claim. The Court concluded that there was express preemption because holding these claims under state law would “inevitably conflict” with the FDA’s duty to police fraud.
Court Deference to FDA Expertise

- The consideration of noncompliance and compliance with the FDCA and FDA regulations is frequently a central part of litigation involving FDA-regulated products.
  - This is the case even though it is well-established that the FDCA does not create an implied private right of action to allow litigants to recover damages directly from other parties that have violated the law.

- In most jurisdictions, the unexcused violation of a relevant section of the FDCA or an FDA regulation constitutes negligence (or defectiveness) as a matter of law.
  - In contrast, most jurisdictions consider proof of compliance with the FDCA and applicable FDA regulations at best as some relevant evidence that the defendant exercised due care, but such compliance is generally not considered conclusive.

Other Involvement by FDA in Tort Litigation

- There is a wealth of material and information related to FDA rulemaking and enforcement that can play an important role in tort litigation. The most common sources include:
  - Rulemaking: Beginning in 1971, the FDA adopted the practice of explaining and justifying its regulations in lengthy and detailed preambles to both proposed and final rules. As a result, these preambles contain information that may be of immense value in interpreting and understanding the rationale of an FDA regulation relevant to issues in a tort case.
Other Involvement by FDA in Tort Litigation (cont'd.)

- FDA enforcement actions
  - The FDCA sets forth specific mechanisms that FDA may use to enforce the Act. These include injunction proceedings, criminal prosecution, seizure and condemnation, debarment, civil money penalties, and informal compliance correspondence. Additional enforcement tools include, among others, the power to inspect facilities where regulated products are manufactured, processed, and held.
  - Investigating whether FDA has brought an enforcement action against a defendant or involving the product in question in tort litigation should be at the top of counsel's "to do" list.
  - Of special interest will be the observations of FDA investigators during inspections (recorded on FDA forms called "483s") and the formal summary of the inspection (referred to as an Establishment Inspection Report (EIR)), which provide detailed information about observed violations of the FDCA and FDA regulations.

- FDA publicity
  - FDA Warning Letters also are a rich source of information for private litigants about a company’s noncompliance or issues related to a specific FDA-regulated product. Warning Letters are issued as a result of a poor inspection and an insufficient follow-up by an inspected company concerning violations of regulatory significance.
  - The FDCA obligates FDA to publish "from time to time" summaries of all formal enforcement actions resolved in court. This section of the FDCA also permits FDA to disseminate information regarding regulated products "in situations involving...imminent danger to health, or gross deception of the consumer."
Other Involvement by FDA in Tort Litigation (cont’d.)

- Product recalls
  - FDA defines a "recall" as the removal or correction of a marketed product that the agency considers to be in violation of the FDCA and against which the FDA would initiate legal action (e.g., a seizure action). Most recalls are voluntary.
  - While most recalls are voluntary, FDA does have mandatory recall authority in three situations: (1) infant formulas; (2) medical devices when FDA concludes there is a reasonable probability that a device intended for human use would cause serious, adverse health consequences or death; and (3) food when the FDA has a reasonable belief that a food is adulterated and presents a threat of serious adverse health consequences or death to humans or animals.

Specific Issues in Recent Food Litigation

- Several potential changes to FDA food labeling regulations present ripe topics for litigation: "natural" and "healthy" claims and disclosure of GMO ingredients.

- Although the FDA has not established a formal definition for the term "natural," the agency does have a longstanding policy concerning the use of "natural" in human food labeling. The FDA has considered the term "natural" to mean that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in that food. Because of the changing landscape of food ingredients and production, and in direct response to consumers and courts that have had to evaluate cases that allege a food is misbranded because its label claims the food is "natural," the agency has recently asked the public to provide information and comments on the use of this term in the labeling of human food products.
Specific Issues in Recent Food Litigation (cont’d.)

- “Healthy” is an implied nutrient content claim that can be used if the food meets specific conditions for fat, saturated fat, cholesterol, and sodium content
- Kind, a manufacturer of nut-based snack bars, pushed back on the “healthy” definition after receiving an FDA Warning Letter in 2015
  - Kind’s products were labeled as “healthy and tasty,” but the fat levels exceeded the amount specified in the regulation
- Kind argued that equating low-fat with health was outdated because there are healthy fats
  - FDA said it would re-evaluate the definition in the light of changing nutrition research
  - Kind was allowed to keep its “healthy” label

Specific Issues in Recent Food Litigation (cont’d.)

- After the Kind decisions, FDA in September 2016 issued a guidance on use of the term “Healthy” in food labeling that stated FDA would exercise its enforcement discretion over two categories of foods that include a “healthy” labeling claim:
  - Foods that are not low in total fat, but the fats are mostly mono and polyunsaturated fats
  - Foods containing at least 10% of the daily value of potassium or vitamin D
- FDA has an open comment period on the new definition of “healthy”
  - The comment period was originally scheduled to close on December 29, 2016, but was extended to April 26, 2017
Specific Issues in Recent Food Litigation (cont’d.)

- GMO Labeling Disclosures
  - Genetically modified organisms (GMOs) have long been a part of our food system, but have been a point of contention in recent years.
  - FDA initially concluded that GMO labeling is not needed, because GMO foods aren't different from traditional foods.
  - But many consumers advocated for mandatory labeling and Vermont enacted its own GMO labeling law which was to go into effect in July 2016.
  - In July 2016, Congress passed a federal labeling standard for foods with GMO ingredients that also preempted states from issuing their own laws.
  - USDA has two years to promulgate a regulation to create this national standard.

A Final Area of Interest – “Off Label” Promotion of Medical Products

- As a general rule, manufacturers of medical products can only promote their products for their approved uses.
- “Off-label” promotion is prohibited.
- “Safe Harbors”
  - Part of scientific exchange or education
  - Responding to unsolicited requests from doctors
  - Medical journal articles or reference publications disseminated to prescribers or healthcare providers.
FDA acknowledges that off-label promotions may advance other public health interests:
- for some patients, approved therapies are not available and unapproved uses could offer the only treatment option
- reliable scientific information regarding unapproved uses may help further scientific research, for example, through hypothesis generation
- information about unapproved uses may encourage the collection of outcomes on those uses and help identify those that present a greater risk of harm to patients
- Recent cases have brought into question FDA’s ability to preclude all off-label promotion (violation of First Amendment rights)

A Final Area of Interest – “Off Label” Promotion of Medical Products (cont’d.)

FDA recently issued a Memorandum, “Public Health Interests and First Amendment Considerations Related to Manufacturer Communications Regarding Unapproved Uses of Approved or Cleared Medical Products,” to provide additional background as it re-examines its off-label promotion policy

- www.federalregister.gov/documents/2017/01/19/2017-01013/manufacturer-communications-regarding-unapproved-uses-of-approved-or-cleared-medicalproducts
A Final Area of Interest – “Off Label” Promotion of Medical Products (cont’d.)

- Although FDA maintains its enforcement position on, and concerns about, off-label promotion
- This memorandum opens the door to a potential compromise by showing a willingness to allow distribution of certain information that, while not actually in the approved labeling, may be consistent with labeling
- The “truthful, not misleading” concept, which is evolving from lawsuits and trade association recommendations (although it is not the “law of the land”), is a recurrent theme

- Notwithstanding FDA’s apparent willingness to be more open-minded on the subject, the Agency has reiterated that accurate information can still be misleading
- **Something may be truthful in isolation, but misleading in context**
- Transparency and full disclosure, whereby the reader of the information is properly educated as to the good, bad, and ugly, is consistent with the concept of providing truthful, not misleading information
- Whether “off-label” communication may lead to an inadequate instruction or warning about drug or device will likely be an issue in tort litigation
Toxic Tort Trial Themes and Tactics – Communicating Complexity from the Plaintiff Perspective

Jared M. Lina
Goldstein & Hayes, P.C.
Atlanta, Georgia
TOXIC TORT TRIAL THEMES
AND TACTICS

COMMUNICATING COMPLEXITY
FROM THE PLAINTIFF PERSPECTIVE

Jared M. Lina, Esq.
Goldstein & Hayes, P.C.
Atlanta, GA
I. Introduction to Toxic Torts

A toxic tort is committed when a defendant causes the plaintiff or the plaintiff’s property to be exposed to a hazardous substance, resulting in personal injuries, damages or other harm. Examples of toxic torts include unlawful releases of toxic chemicals that invade another person’s person or property, exposing employees to hazardous substances in an occupational setting, and/or exposing tenants, other invitees and/or neighboring property owners to toxic mold or other harmful microbacteria. Many also consider the distribution of consumer products and pharmaceutical drugs that result in unintended and hazardous side effects to constitute a class of toxic torts. Regardless of the nature of the toxic tort, a plaintiff in a toxic tort case generally must prove that:

1) The substance involved was dangerous;
2) The defendant caused or contributed to the release, distribution and/or migration of the toxic substance;
3) The plaintiff and/or the plaintiff’s property were exposed to the substance; and
4) The dangerous substance actually caused either personal injury or harm to the plaintiff.

In most toxic tort cases, the easiest element to satisfy is demonstrating that the substance involved is generally dangerous. Demonstrating that the defendant caused or contributed to the release of the toxic substance, that the plaintiff actually was exposed to the substance (especially in a meaningful quantity), and that the substance harmed the plaintiff are usually more difficult to prove, and require the most attention. For these reasons, discovery in toxic tort cases is extremely important, time-consuming and often very expensive. Absent an imminent need to file suit, lawyers in toxic tort cases should begin conducting extensive fact-finding prior to filing suit and commencing
the discovery clock. Of course, lawyers also should aggressively continue finding material information throughout discovery in these cases. Before you present your toxic tort case to a jury, you ideally want to know (i) how, when, where, why and by whom the toxic substance was released or distributed, (ii) the quantity and/or extent of the release; (iii) how the plaintiff was exposed to the toxic substance; and (iv) how the plaintiff’s alleged harms and injuries were caused by the toxic substance. Proving and demonstrating all of these elements requires both extensive fact discovery and expert analysis. In many cases, the unlawful release and/or migration of the toxic substance has been occurring for years or even decades before it is discovered, and critical documents are often destroyed, missing, not available and/or not voluntarily produced.

II. Case Study: A Recent Toxic Tort Case – Developing Themes and Strategies

Our firm recently finished litigating a case that had many of the common complexities of a classic toxic tort action. In the spring of 2014, we were retained by a family of three (mother, father and young adult son) in Swannanoa, North Carolina. Our clients lived directly across the street from a metal parts and tools manufacturing plant, which had been identified as a hazardous waste site several years earlier. Our clients had built their dream home across the street from the plant in 1991, on land that had been owned by their family for nearly 70 years. Their home utilized a pumping well as its sole source of drinking water, as it was unfeasible to connect the home to a municipal water source.

Shortly before we first met with our clients, they discovered that their drinking well water contained tetrachloroethylene (known as PCE or perc) at toxic levels that were approximately 30 times higher than the State’s regulatory standard. PCE is a manufactured chemical used primarily for dry cleaning and metal degreasing. It was the primary toxic chemical at issue in the recent and well-publicized Camp Lejeune
contamination cases, and is extremely similar in composition to the chemical trichloroethylene ("TCE") that was featured in Jonathan Harr's 1995 non-fiction novel, *A Civil Action*. As of 2016, PCE had been found in at least 945 of the 1,699 National Priorities List sites identified by U.S. Environmental Protection Agency (EPA). Source: Agency for Toxic Substances and Disease Registry (ATSDR) Fact Sheet for Tetrachloroethylene. The United States Environmental Protection Agency (EPA) considers tetrachloroethylene likely to be carcinogenic to humans by all routes of exposure. The International Agency for Research on Cancer (IARC) considers tetrachloroethylene probably carcinogenic to humans. The Department of Health and Human Services (DHHS) considers tetrachloroethylene to be reasonably anticipated to be a human carcinogen. Id.

Our three clients had been consuming water from their drinking well for over 20 years, without any knowledge prior to 2014 that their water was contaminated. Because they had no knowledge of the contamination at the neighboring plant, and because they had not previously tested their water for PCE, they did not know how long their well had been contaminated prior to the 2014 testing. All of our clients were diagnosed with cancer (acute myeloid leukemia, prostate cancer and breast cancer, respectively) at around the time they learned that their water was contaminated with PCE.

When we began gathering information, the only material facts we knew were that the manufacturing plant across the street was on a hazardous waste site list, our clients had PCE in their drinking well, and our clients had been diagnosed with cancer. We were faced with the task of proving that: (i) the PCE in our clients’ well originated from the neighboring plant site; (ii) the PCE in our clients’ well migrated through the groundwater to our clients’ property; and (iii) our clients’ consumption of contaminated well water caused their respective cancers. At that time, there had been essentially no
groundwater testing between the suspected source area at the neighboring plant site and our clients’ property.

Before we filed suit, we retained and/or consulted with geologists, environmental engineers, toxicologists, pathologists and epidemiologists for guidance and assistance. We collected and reviewed thousands of pages of historical environmental reports and investigations for the neighboring site and surrounding area, property records, aerial photographs, medical records, toxicology reports and data, published articles and cancer studies. Given the nature of the case and the lack of groundwater testing in close proximity to our clients’ property, we had to simultaneously determine: (i) the potential origin and migration pathway(s) of the PCE in our clients’ well; and (ii) whether their respective cancers were caused by the PCE in their well. We knew from our research and from prior cases that proving a causation link between PCE and our clients’ respective cancers would be an extremely difficult task.

We filed suit against the owners and operators of the neighboring manufacturing property in February of 2015. During discovery, we consulted with additional toxicologists, epidemiologists, physicians and pathologists regarding our clients’ respective cancers and their consumption of PCE. We had testing conducted to rule out a genetic predisposition to cancer, and we had our clients’ cancer tissue analyzed to determine if they contained any of the markers of PCE exposure. We spoke with experts about the statistical probabilities of having three members of the same family contracting cancer at the same time. We explored the possibility of conducting cancer studies in areas impacted by PCE exposure in drinking water. Given the established precedent and science, we knew from the outset that we were facing extremely overwhelming odds, but we were determined to explore every potential avenue towards proving causation.
After turning over virtually every stone available to us, our consultants and experts were not confident that the current state of medical knowledge and research provided a sufficient basis to render opinions that effectively excluded all other alternative causes for our clients’ respective cancers. The caselaw was stacked against us. Based on our extensive research of published precedent and our experts’ conclusions, it simply did not appear possible for us to survive a Daubert challenge.\footnote{See, however, Depascale v. Sylvania Elec. Products, Inc., 710 F.Supp.2d 275 (E.D.N.Y. 2010), in which a district court permitted the plaintiffs’ experts to testify, over a Daubert objection, regarding a specific link between PCE and TCE exposure and extraskeletal myxoid chondrosarcoma. Given the facts of that case and our discussions with various toxicologists and physicians, we were not confident that we could credibly advance the same scientific principles in our case.}

See, i.e., Magistrini v. One Hour Martinizing Dry Cleaning, 180 F. Supp. 2d 584 (D.N.J. 2002) (setting forth Daubert requirements for causally linking PCE exposure to leukemia, and granting defendant’s Daubert motion to exclude causation testimony of preeminent PCE researcher and expert, Dr. David Ozonoff). We decided not to continue pursuing a claim that had virtually no likelihood of success. We ultimately dismissed all of our cancer claims without prejudice and proceed strictly on our trespass/nuisance claims.

Once we determined that our cancer-causation claims were not viable, all of our compensatory damages in the case hinged on the traditional damages available in real property nuisance and trespass claims. North Carolina and Georgia law are similar when it comes to nuisance and trespass claims and damages. Under Georgia law, “[a] property owner may bring an action for nuisance and trespass against one who contaminates his property with a hazardous substance.” Sprayberry Crossing Partnership v. Phenix Supply Co., 274 Ga. App. 364 (2005); see also O.C.G.A. § 51-9-7
(polluting a downhill property owner’s land “so as to lessen its value to the owner of such land shall constitute a trespass upon the property.”) “A nuisance is anything that causes hurt, inconvenience or damage to another . . . .” O.C.G.A. § 41-1-1. “[P]rivate property cannot be physically harmed or its value impaired in this way, however socially desirable the conduct, without payment being made for the harm done, if the interference that is the consequence of the activity is substantial and considered to be unreasonable.” Sumitomo Corp. of America v. Deal, 256 Ga. App. 703 (2002) (“We believe that the jury, in awarding the Deals compensatory damages, attorney fees, and punitive damages for the harm to their land caused by the runoff from SMG’s detention pond, properly balanced the rights and responsibilities of the parties to this case.”)

“Under Georgia law, the essential element of nuisance is control over the cause of the harm.” Sumitomo Corp. of Amer. V. Deal, 256 Ga. App. 703, 707 (2002). “The tortfeasor must be either be the cause or a concurrent cause of the creation, continuance, or maintenance of the nuisance.” Id. (upholding judgment against uphill property owner and affirming trial court’s denial of motion for directed verdict where evidence demonstrated that owner of uphill property exercised control in the maintenance of the storm water retention system on its property). “The existence of proximate cause is a question of fact for the jury, except in palpable, clear and indisputable cases. Proximate cause is not necessarily the last act or cause, or the nearest act to the injury, but such act [that has] actively aided in producing the injury as a direct and existing cause. And there may be more than one proximate cause of an injury.” Sprayberry Crossing Partnership v. Phenix Supply Co., 274 Ga. App. 364, 365 (2005) (emphasis supplied).

Under Georgia law, “[i]n actions for either trespass or nuisance, there may be a recovery for damage to real property. Generally, the measure of damages to the property
is the cost of repair as well as the difference in the fair market value before the trespass and the fair market value after the trespass. In a nuisance action, there may also be a recovery for damages to the person. The determination of damages for “discomfort, loss of peace of mind, unhappiness and annoyance” caused by the nuisance is for the enlightened mind of the jury. In the case of a nuisance involving runoff of surface water, “actual damages as such, i.e., injuries, are evidenced by a showing that the property owners are deprived of the full use and enjoyment of their property by the increased flow of surface waters or sediments on it.” Bauman v. Snider, 243 Ga. App. 526, 527 (2000).

III. Presentation of Claims: Keeping it Focused and Simple

To prevail on our trespass/nuisance claims, we had to prove, primarily through groundwater testing data and complex hydrogeological testimony, that the PCE moved from Point A (the neighboring plant) to Point B (our clients’ property). In order to demonstrate that the PCE in our clients’ well originated from the defendants’ plant, we coordinated groundwater testing at numerous locations between the suspected source location on the defendants’ plant site and our clients’ well. The purpose of these groundwater wells was two-fold: (i) to locate other detections of PCE in the groundwater between the plant site and our clients’ well; and (ii) to determine the directional flow of groundwater between the suspected source area and our clients’ well. Fortunately, the groundwater testing demonstrated both that PCE existed in the groundwater in our testing area and that there was a component of groundwater flow from the suspected source area towards our clients’ well.

Presenting the scientific portion our case became as simple as there is PCE on the defendants’ plant site, there is PCE in the groundwater between their plant site and our clients’ well, and the groundwater beneath the properties is flowing from the plant site towards our clients’ well. The defendants, not surprisingly, retained multiple
experts to put forth sharply critical and contrasting testimony, not only rejecting all of
our experts’ scientific principles, but also trying to pin the source of the contamination
on another adjacent property. Absent good lawyering on both sides, diligent preparation
and an extremely focused strategy, many hours – and likely days – would be spent
pepper ing the jury with complex hydrogeological and geophysical principles and
theories.

This case, like many environmental toxic tort cases, was complex. This was not
a case where we had video of someone spilling PCE into a creek at the neighboring plant,
with the creek flowing through our clients’ property. Instead, we had a manufacturing
plant that had been in operation for over 60 years, with varying operations over the
years, historical data spanning decades and dozens of different chemicals present in the
soil and groundwater throughout the entire plant property. PCE was just one of the
many chemicals present on the soil and in the groundwater at the plant. We were tasked
with using the voluminous data and hydrogeological principles to show that PCE was
migrating from the plant to our clients’ property in groundwater deep beneath the land
surface. From the outset, our objective was to keep the science as simple as
possible in presenting our case.

It was apparent to the attorneys on both sides that our scientific issues were
complex. Explaining hydrogeology, lithology, chemistry, geophysics and other technical
environmental theories to lay persons was going to be a challenge. One of the main
fights undoubtedly was going to be which side could most clearly present their scientific
theory to the jury. We believed that the more clear and simple our theory was, the more
convincing, credible and persuasive it would be. We spent the majority of our pre-trial
preparation time trying to simplify the scientific evidence in our case presentation.
In order to simplify our case, we prepared several focused demonstrative instruments. First, we constructed a cross-sectional groundwater flow model to demonstrate to jurors how liquid chemicals enter the Earth’s soil, descend vertically into deeper soil and groundwater over time, and then migrate laterally deep beneath the land surface with the prevailing groundwater flow direction. The model also was effective in demonstrating to jurors what the conditions look like under the ground (i.e., layers of soil, groundwater and bedrock), which most people have difficulty understanding and visualizing. Photographs of the groundwater model, taken before and after a contamination event, are attached hereto as Exhibit 1.

Secondly, we took thousands of pages of testing data and, using demonstrative exhibits, summarized only the most relevant and important data in the most simplified and direct manner possible. Our demonstrative exhibits focused exclusively on what we believed were the two key scientific components of our case – the presence of PCE in the subject area and the groundwater flow direction. In order to maintain the focus on these two components, we prepared demonstrative exhibits detailing the following:

1) We highlighted all of the PCE detections in the soil and groundwater between the plant site and our clients’ well; and

2) We demonstrated that groundwater was flowing from a higher elevation at the plant to a lower elevation on our clients’ property.

Attached to this paper for reference are several of the demonstrative exhibits utilized in our case.

For reference, Exhibits 2 and 3 show the location of the plant site (west side of Lytle Cove Road) in relation to our clients’ property (east side of Lytle Cove Road). The large area surrounded by orange tape in Exhibit 3 was the suspected source area on the plant site, with our clients’ homes visible in the background.
Exhibit 149 highlights the locations on the plant site where PCE had been detected in soil samples, which demonstrates that PCE likely was directly released in those locations. That area was coined the “VOC Source Area” (VOC = Volatile Organic Compound) – a name actually given to that area by the defendants years prior to the litigation. This exhibit simply demonstrates where the VOC Source Area was located in relation to our clients’ drinking water well, which was a simple but crucial fact in our case.

Exhibit 146 again shows the location of the VOC Source area relative to our clients’ well, highlighting the detections of PCE in the groundwater between those two points. This demonstrative exhibit demonstrated that the PCE was, in fact, present in the groundwater between the VOC Source Area and our clients’ property.

Exhibits 147 and 148 demonstrate the groundwater elevation data available to the parties during discovery. As most people know or have observed, water flows from a higher elevation to a lower elevation (in other words, water cannot flow uphill!). This same principle applies to both surface water and ground water deep beneath the land surface. By showing that groundwater elevations decreased as you move from the VOC Source Area towards our clients’ well, we were able to effectively demonstrate that the groundwater was flowing “downhill” from the plant site towards our clients’ property. Combined with the fact that PCE was present in the groundwater along that same path, we were able to show that the PCE was flowing from the defendants’ plant into our clients’ well.

IV. Maximizing Damages through Presentation of Evidence

Because our cancer claims were not legally viable, our only damages available were linked to the contamination of property that lacked traditional monetary value. Our clients owned approximately two acres of real property that consisted of two small
homes – one that our clients built to raise their son in 1991, and an older home that had been in the family for nearly 70 years. The market value of our clients’ two homes and land was, according to the parties’ expert witnesses, only a few hundred thousand dollars. The cost of cleaning up the groundwater beneath the property and removing all carcinogens from our clients drinking water was, according to expert testimony, more than $8 million. The defense vehemently objected to this remediation cost evidence, arguing that the available compensatory damages should be capped at the value of the property. Our clients, on the other hand, argued that they should be permitted to remediate all of the contaminants released onto their residential property. Why should they be forced to move from their family homestead because of someone else’s actions? This became the central fight of the case.

The Restatement (Second) of Torts § 929, which has been adopted by the courts of both North Carolina and Georgia, provides the following doctrine on damages in environmental trespass and/or nuisance cases:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for:

(a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,

(b) the loss of use of the land, and

(c) discomfort and annoyance to him as an occupant.

Restatement (Second) of Torts § 929(1)(a) (emphasis supplied).
On the issue of whether “restoration” damages should be capped or limited based on the value of the contaminated property, the Restatement provides the following guidance:

[i]f ... the cost of replacing the land in its original condition is disproportionate to the diminution in value of the land caused by the trespass, **unless there is a reason personal to the owner for restoring the original condition**, damages are measured only by the difference between the value of the land before and after the harm.

Restatement (Second) of Torts § 929(1)(a), cmt. b (emphasis supplied.)

“[I]f a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, **even though this might be greater than the entire value of the building.**” Id. (emphasis supplied)

Thus, pursuant to the Restatement, which has been adopted by courts in both North Carolina and Georgia, while damages generally are capped at the diminished value of the property where remediation costs are disproportionately high, such is not the case where the property at issue has a use that is “personal” to the owner. Id. Comment b on Subsection (1), Clause (a), of section 929 of the Restatement.

This “personal use” exception is consistent with holdings from numerous courts around the country that have applied the Restatement to similar facts. *Sunburst School District No. 2 v. Texaco, Inc.*, 338 Mont. 259 (2007) (affirming restoration damages award of $15 million in contamination case where total market value of impacted property was approximately $2 million); *Brooks v. City of Huntington*, 234 W. Va. 607, 768 S.E. 2d 97 (2014) (holding that “when residential real property is damaged, the owner may recover the reasonable cost of repairing it even if the costs exceed its fair market value
before the damage”); *Berg v. Reaction Motors Division*, 37 N.J. 396 (1962) (affirming restoration award of $25,605 for plaintiffs’ homes where the diminished value of the property was $3,700); *Lexington Ins. Co. v. Baltimore Gas & Electric Co.*, 979 F. Supp. 360 (D. Md. 1997) (adopting “personal use” exception and permitting plaintiff’s expert to introduce expert opinion of $4,400,000.00 repair cost where fire damage diminished value of building by less than $500,000.00); *Tavegie v. Black Hills Power, Inc.*, No. 13-cv-84-S, 2015 WL 10437806 (D. Wyo. Sept. 21, 2015) (holding that under personal use exception, “restoration costs may be considered and assessed by the jury, even if those damages exceed the total value of the property”); *G&A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P. 2d 1379 (Alaska 1974) (affirming award of $50,000 per acre in remediation costs where property owner paid only $4,000 per acre for the property); *Samson Constr. Co. v. Brusowankin*, 218 Md. 458 (1958) (affirming award for restoration costs in excess of the value of the entire property where property owners resided on impacted property); *Grefer v. Alpha Technical*, 901 So. 2d 1117 (La. Ct. App. 2005) (affirming jury award of $56 million in repair costs where market value of property was approximately $1.4 million because property had a special use to the owner); *California v. Kinder Morgan Energy Partners*, 159 F. Supp. 3d 1182 (S.D. Cal. 2016) (denying defendant’s motion in limine to exclude plaintiff’s expert from testifying to restoration costs, holding that a jury must decide if the plaintiff’s proposed cost of restoring the property to its “original pre-contamination condition” was reasonable); *Trinity Church of Boston v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43 (1987) (affirming $4.1 million jury verdict for restoration costs, which were in excess of value of property, because market value was “unsatisfactory as a measure of damages.”); *Courtney v. Ingersoll-Rand Co.*, No. 8:09-cv-1871-JMC (D.S.C. 2009) (Text Order; Docket No. 69) (permitting
plaintiff’s expert to present $8.1 million cleanup cost to jury despite the cleanup cost being far in excess of the value of the contaminated property).

Given the importance of the “personal use exception” in our case, we went to great lengths to demonstrate the “personal” nature of our clients’ property, both so we could present evidence of remediation costs and to convince the jury to award sufficient damages to allow our clients to remediate and restore their family homestead. We dug up photographs of family gatherings at our clients’ property dating back to the 1950s. We gathered family member witnesses to testify to growing up on the property and regularly attending family gatherings on the property. We highlighted that the family property was the sole asset left by our client’s deceased mother to him and his brother. We edited together videos of our clients and their deceased son clearing a portion of the property and building, with their own hands, their dream home in 1991. Our clients made it clear that they built that home with the intent of living out the remainder of their lives on that property. Our two surviving clients stressed that their primary memories of their deceased son’s life were connected to that property.

The defendants filed a pre-trial motion in limine to cap and/or limit the damages based on the market value of our clients’ contaminated property. After considering the caselaw and the evidence referenced above, the court denied the defendants’ motion in limine in our final pre-trial conference, and ruled that he would allow evidence of the cost to remediate the property.

V. Conclusions and Things Learned

The stakes are usually high in toxic tort cases. You’re going to spend a lot of time and money on expert witnesses and environmental testing, and you’re likely going to face talented attorneys and experts on the defense side given the potential exposure. Toxic tort cases are possibly the most enjoyable and rewarding cases you will ever work
on in your career. From the outset of any toxic tort case, your objective should be to gather as much information as you can, and then use the information to figure out how your client was exposed to the toxic substance and how they were harmed. Once you are comfortable with the science, you must determine the most clear and simple way of presenting your case to a jury. If you are presenting scientific theories and principles in such a manner that no one can understand you and/or your expert witnesses, the jury will not be impressed by your acumen and knowledge. Instead, they undoubtedly will be skeptical of the merits of your case. On the other hand, if a jury sees and clearly understands that your client was exposed to a toxic substance, that the defendant caused that exposure, and that the toxic substance harmed your client, then you are standing on solid ground. If at the end of the trial, a juror can explain to another lay person the basic science behind your case, you have effectively done your job and your client more likely than not will be rewarded for it.

*A special thanks to James A. Goldstein, Esq. (Goldstein & Hayes – Atlanta, GA) for his assistance and guidance, both in the development and presentation of the case referenced above and in the preparation of this paper.*
Medical Monitoring for Toxic Exposures

Carmen R. Toledo
King & Spalding
Atlanta, Georgia
Medical Monitoring
For Toxic Exposures

ICLE State Bar Series:
Toxic & Mass Torts
March 30, 2017

Carmen R. Toledo
King & Spalding

What are Medical Monitoring Claims?

Where Plaintiffs seek expenses of future medical testing to monitor for diseases caused by alleged exposure to chemicals

- *Not controversial:* Courts generally allow recovery of future medical monitoring as an element of damages for a present physical injury caused by a defendant’s tortious conduct

- *Harder question:* Where there is an alleged exposure but no physical injury or symptoms, and plaintiffs claim that the exposure puts them at an increased risk of future injury
Non-Traditional Claim

“Medical monitoring is one of a growing number of non-traditional torts that have developed in the common law to compensate plaintiffs who have been exposed to toxic substances.”

_In re Paoli R.R. Yard PCB Litig_, 916 F.2d 829, 849 (3d Cir. 1990) (emphasis added)

Context in Which Medical Monitoring Claims Arise

May involve any type of exposure

– Occupational

– Residential (e.g., air/vapor intrusion, water, soil)

– From a product such as a pharmaceutical or consumer product
May Be Presented As

- A separate **cause of action**
- An **element of damages** in connection with a standard negligence/nuisance claim
- Part of released claims in **class settlements**

---

**Early Cases – 1980’s**

  - Vietnamese orphans in aviation accident
  - Required monitoring for neurological disorders
  - Neighbors of Love Canal landfill
  - Neighbors of landfill that caused groundwater contamination
Early Trend

- From 1984-1997, several different courts recognized claims for medical monitoring
- Allowed recovery of damages for the cost of periodic medical examinations necessitated by exposure to a chemical or substance
  - Recovery for the quantifiable monetary cost of periodic monitoring procedures
- Even in the absence of symptoms or a traditional, manifest physical injury
- Clear trend then appeared to be to recognize the claim.

U.S. Supreme Court Weighs In


- Claim for medical monitoring under FELA rejected
- The Court evaluated the state of the law and weighed public policy factors for and against recovery

<table>
<thead>
<tr>
<th>Cons</th>
<th>Pros</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Difficulties for judges and juries</td>
<td>1. Public health interest in fostering early access to early medical testing</td>
</tr>
<tr>
<td>2. Flood of less important cases would eat up resources</td>
<td>2. Early detection = economic savings</td>
</tr>
<tr>
<td>3. Bad medicine</td>
<td>3. Deterrence</td>
</tr>
</tbody>
</table>
Post-Buckley

• Several additional states allowed recovery for medical monitoring
  
  
  
  
  
  – *ExxonMobil Corp. v. Albright*, 71 A.3d 30 (Md. 2013)

Post Buckley

• Other states, however, have rejected medical monitoring
  
  – *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001)
  
  
  
  
  
  – *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007)
  
Medical Monitoring in Georgia - State

- The Supreme Court has not yet addressed the question
  - A family allegedly exposed to pesticides from spraying of their house
  - Neither the “presence” of the chemical in the minor plaintiffs’ blood nor the need for future medical monitoring constituted an actionable injury
  - “Absent any indication that the presence of these metabolites had caused or would eventually cause actual disease, pain, or impairment of some kind, [the expert’s] testimony must be considered insufficient to support an award of actual damages in any amount.”

Medical Monitoring in Georgia - Federal

  - Employees of the Lockheed Martin facility in Marietta alleged exposure to beryllium dust
  - The district court dismissed the medical monitoring claim: “While a remedy permitting creation of medical monitoring funds has garnered support in several jurisdictions, no Georgia court has ever indicated an inclination to recognize such a remedy.”
  - The Eleventh Circuit affirmed: “Plaintiffs have failed to point us to any Georgia authority that allows recovery of medical monitoring costs in the absence of a current physical injury, and [Boyd] suggests that Georgia would not recognize such a claim.”
Common Elements of the Claim Where Recognized

1. “Significant” exposure, beyond that of the general population or normal background levels
2. To a proven hazardous substance
3. Through the negligent actions of the defendant
4. Proximately causing significantly increased risk of contracting a serious latent disease as compared to the general population
5. Making it reasonably necessary that plaintiff undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure
6. Monitoring and testing procedures exist that make the early detection and treatment of the disease possible and beneficial


Medical Monitoring vs. Increased Risk

- Fundamentally different claims
- Claims for increased risk seek damages for the increased risk of contracting a disease
  - Courts consider it speculative
  - Focus on the probability of contracting the disease
  - Problem of splitting the cause of action
- Medical monitoring seeks recovery of the cost of testing
  - But medical monitoring claim requires proof of increased risk
Scientific Issue: Proving Exposure

Advances in analytical chemistry / technology
– Chemicals can now be detected in the environment and in the human body at infinitesimal levels never before imaginable

- “Recent discoveries of previously undetected but potentially hazardous chemical compounds in environmental media have focused attention . . .”
- “Increased identification . . . is due in great part to the development of new analytical methods, as well as increased field testing.”

Scientific Issue: “Significant” Exposure

Have the plaintiffs had an elevated exposure?
– What is the background level in the environment?
Improvements in Biomonitoring

CDC now monitoring and issuing reports regarding the chemicals in people’s bloodstreams

– “[T]he concentration of the chemical in people that provides the best exposure information to evaluate the potential for adverse health effects.”

Scientific Issue: Exposure Above General Population

What is the background level in people, if measuring that way?

– Widespread presence of many substances in the blood or urine

– CDC reports general population levels for 308 chemicals
  – *Nat’l Report on Human Exposure to Environmental Chemicals*
  – New chemicals added every year
Arsenic Measurements

To a “Proven Hazardous Substance”

Exposure (or mere presence of a chemical) does not equal harm

“The presence of an environmental chemical in people’s blood or urine does not mean that it will cause effects or disease. The toxicity of a chemical is related to its dose or concentration, in addition to a person’s individual susceptibility. Small amounts may be of no health consequence, whereas larger amounts may cause adverse health effects.”

Legal/Scientific Issue: Proximate Cause

- Is the exposure sufficient to cause adverse effects in the future?
- Can plaintiffs establish general causation, *i.e.*, that exposures like theirs, at the level in question, have been demonstrated to cause disease?
- Can they rule out alternative causes of the increased risk (smoking, family history)?

Significantly Increased Risk

Is the risk sufficiently increased to actually cause disease in the future? Must evaluate epidemiologic and toxicological evidence.

“The problem is that, as with the cases involving emotional distress and economic loss, the scope of liability resulting from a mere increase in risk that falls short of probability is virtually limitless. As many courts and scholars addressing the subject have noted, each and every person in contemporary, industrialized society faces significantly increased risks of future harm by merely getting up in the morning and breathing polluted air, drinking coffee, driving in a motor vehicle, eating certain prepared foods, taking over-the-counter and prescription medications, and the like.”

Scientific Issue: Increased Risk

“All substances are poisons; there is none which is not a poison. The right dose differentiates a poison from a remedy.”

- Paracelsus (1493-1541)

• Aspirin
  • One will protect against heart disease
  • Two cure a headache
  • A whole bottle is fatal

• Water
  • Essential for life
  • In excess, can kill

“Reasonably Necessary” Diagnostic Examinations

• Monitoring is for “latent disease”
• Generally refers to cancer, which can take 10-40 years to develop
  – Diagnostic testing is generally available for only a limited number of types of cancer
Distinguishing Medical Monitoring From Routine Medical Care

• Some level of monitoring is recommended for the entire population – based on age, sex, demographics, etc.
  – Annual check-ups
  – Blood tests
  – Mammograms
  – Prostate exam

• Medical Monitoring is something beyond the generally accepted background tests

Early Detection Is Beneficial

• Common conception that all medical monitoring is positive.

• However, a risk/benefit analysis must be made when considering any monitoring program:
  – Certain testing is invasive and potentially harmful
  – Certain testing may yield only marginal detection or treatment benefits
  – Potential for false positives and unnecessary treatment
  – Potential for false negatives which prevent necessary treatment
Practical Issue: Any Actual Benefit?

- Plaintiffs often seek lump sum monetary payments rather than injunctive relief
  - No guarantee that plaintiffs will get the recommended monitoring
  - Experience shows that parties prefer cash to medical testing
- Even if injunctive relief is awarded, plaintiffs cannot be compelled to get tested

Limitations on the Claim

- Meeting the elements of the claim is not easy
  - Medical monitoring is a “special compensatory remedy” that is “not easily invoked.” *Theer v. Philip Carey Co.*, 628 A.2d 724 (N.J. 1993).
Policy Considerations

• Majority rule in existing tort case law
  – Previously held proof of injury required in negligence cases
  – “Possibility of a future injury” not sufficient to maintain a tort claim
• Potential floodgate of trivial litigation
• Delay and decreased remedies for those with manifested illnesses

Class Certification Issues

• Clear Trend & Majority Rule: No Certification
• Requested relief
  – Injunctive, Rule 23(b)(2)
  – Damages, Rule 23(b)(3)
• Individual issues generally found to predominate
  – Significance and extent of exposure
  – Relative increase in the chance of onset of disease
  – Causation; potential alternative causes of disease
  – Whether plaintiff will require a course of medical monitoring independent of other medical care otherwise required
  – Facts supporting a statute of limitations defense
• Choice of law in nationwide classes
Leading Class Certification Case

  - Plaintiffs sought certification of a settlement-only class related to their medical monitoring claim stemming from their exposure to asbestos
  - Held: certification pursuant to Fed. R. Civ. P. 23(b)(3) was inappropriate because individual issues predominate

Other Cases Denying Certification

- Pharmaceutical products
- Environmental exposures
  - *Meyer v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007)
  - *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011)
- Occupational exposures
What Is a Medical Monitoring Program?

- A medical testing program through which plaintiffs exposed to hazardous substances may obtain physical examinations or testing to diagnose or detect early onset of disease
- Typically incorporate diagnostic testing such as
  - X-rays
  - CT scans
  - MRIs
  - Blood testing
  - Urine screening

Program Administration

- Trial court appoints a qualified plan administrator to manage the plan and periodically report to the court regarding progress of the plan
- Court appoints a panel of medical/scientific advisors to assist in development of the medical monitoring protocol
- The plan administrator and/or the panel designate a group of physicians, laboratories and other medical professionals to perform the testing protocol
- Length of the plan depends on latency period
- Plan administrator establishes a notification procedure
  - Direct mailings, website, publication
Program Administration (cont’d)

- Plan gets financed by the defendant; the court may appoint a financial panel to budget and plan
- The plan administrator and panel(s) implement procedures to submit reports and findings
- The plan administrator provides periodic reports to the parties and the court
  - May indicate additional funding is required
- The plan administrator and medical panel maintains all records for additional studies
- Example: *Perrine* Medical Monitoring plan.

Summary – State of the Law

- Most states have not recognized medical monitoring claims without present physical injuries
  - Supreme Courts in 10 states have expressly rejected medical monitoring
  - Nine state supreme courts have recognized the claim (CA, MD, MA, MO, NJ, OH, PA, UT, WV)
  - Predictions by federal courts and rulings by lower courts have not always been upheld
  - The majority of states have not addressed the issue or have divided law
  - Louisiana rejected medical monitoring claims by legislation
- Federal common law rejected it - *Buckley*
Takeaway Messages

• Medical monitoring claims require courts to make sophisticated scientific judgments about exposure, risk, causation and the risk/benefit tradeoffs of medical procedures to be done on large groups

• Although it is still considered a non-traditional tort, a good number of states and courts have ruled that recovery for medical monitoring is available, either as a form of damages or as a separate cause of action

• Public policy considerations generally weigh in favor of not allowing the creation of this cause of action

• New claims constantly being asserted
  – Cosmetics – lead in lipsticks
  – Microwave popcorn
  – Toys – lead in toys
  – Environmental exposures

Medical Monitoring
For Toxic Exposures

ICLE State Bar Series:
Toxic & Mass Torts
March 30, 2017

Carmen R. Toledo
King & Spalding
Asbestos Litigation – Current Status and Future Predictions

David C. Marshall
Eric T. Hawkins
Hawkins Parnell Thackston & Young LLP
Atlanta, Georgia
Asbestos Litigation – Current Status and Future Predictions

David C. Marshall
Eric T. Hawkins
Hawkins Parnell Thackston & Young LLP
Atlanta, Georgia
# Table of Contents

I. Introduction ............................................................................................................... . ..1
   A. What is Asbestos? ............................................................................................ ..1
   B. Asbestosis, Lung Cancer, and Mesothelioma.................................................. ..2
   C. State of the Art – What Was Known and When Was It Known? ................. ..3

II. Asbestos Litigation – Where it’s Been ........................................................................ ..7
   A. Overview .......................................................................................................... ..7
   B. Elements of an Asbestos Case in Georgia ....................................................... ..8
      1. Plaintiff’s Claims................................................................................... ..8
      2. Defending an Asbestos Case............................................................. ….11
      3. Experts .............................................................................................. ….11
      4. Household Exposures ....................................................................... ….12
   C. Tort Reform ................................................................................................. …13

III. Asbestos Litigation – Where Is It Going? .............................................................. ..16
I. Introduction

A. What is Asbestos?

Asbestos is the generic name given to six naturally-occurring minerals. The minerals are divided into two major geological classifications of asbestos, serpentine and amphibole.

Chrysotile is the only commercially-produced type of serpentine asbestos. Chrysotile fibers are white and curvy. The mineral is primarily mined in Canada, although there are mines in California, Vermont and Zimbabwe.

Amosite and Crocidolite are the primary commercially-produced types of amphiboles. Amosite is brown, while Crocidolite is blue. Both fibers are short and straight. In addition, they are primarily mined in South Africa.

Asbestos was once known as the “miracle fiber” and used because of its strength, durability and fire resistance. Asbestos usage dates back thousands of years and across all civilizations. Pliny, the ancient Roman historian, reported accounts of asbestos linen being thrown into fires and emerging unscathed.¹

In the early 20th century, most buildings were constructed out of wood. As our nation became increasingly urban, fire became a problem in Chicago and numerous other cities.² Many cities responded by passing building codes that required asbestos. In the following years, asbestos usage expanded considerably and by the 1970s there were over 3,000 products that included asbestos.³ These products included insulation, fireproofing, cigarette filters, gas masks, brakes, clutches, gaskets, joint compound, roofing materials and numerous other products.

² N. Brandt, Chicago Death Trap: The Iroquois Theatre Fire of 1903 11-13 (Southern Illinois University 2003).
B. Asbestosis, Lung Cancer and Mesothelioma

Asbestosis, lung cancer and mesothelioma are the three diseases associated with asbestos exposure. These diseases are entirely different processes and caused by a number of varying factors.

Asbestosis is “diffuse pulmonary fibrosis caused by the inhalation of excessive amounts of asbestos fiber.”4 The disease is essentially scarring of the lower lungs that severely restricts and impairs breathing. Asbestosis generally progresses slowly, with onset occurring 10 to 20 years after first exposure.5 The disease is diagnosed radiographically or pathologically.

Lung cancer is cancer arising in the interior of the lung. Non-small cell carcinoma is the primary type of lung cancer, although other types include small cell carcinoma, carcinoid and sarcoma. The primary cause of lung cancer is cigarette smoking. Some researchers allege a synergistic effect between asbestos exposures and smoking that resulted in increased levels of lung cancer in asbestos workers. Today, most defense experts require an underlying asbestosis diagnosis to associate asbestos exposure with lung cancer.

Mesothelioma is defined medically as a cancer “arising in the serosal linings of the pleural, pericardial or peritoneal cavities.”6 The serosal lining is a thin layer of cells that surround the heart, lungs and diaphragm. Mesothelioma is an extremely rare form of cancer and only 2,000 to 3,000 cases are diagnosed each year. The disease is diagnosed pathologically with a biopsy of a small amount of tissue. Although some

---

5 Id.
experts allege that mesothelioma is only caused by asbestos exposure, new studies indicate up to 40% of mesothelioma cases may have no known cause.

C. State of the Art – What Was Known And When Was It Known?

In the late 19th century, there was limited knowledge about risks from working with asbestos. Over the next several decades, medical and scientific researchers gradually gained knowledge about potential associations with lung fibrosis, lung cancer and eventually, mesothelioma. Information developed slowly based upon the extended latency, in some cases over 40 years, from the initial exposure to the eventual onset of disease. The initial findings came from case studies that showed a possible association between asbestos and some types of disease. These studies focused on workers with high exposure to asbestos, which made it difficult to extrapolate into other fields.

One of the first studies occurred in 1899 when Dr. Montague Murray conducted a post-mortem evaluation of a London factory laborer who worked with raw asbestos. His evaluation found some asbestos bodies present in the lungs of the worker. In the following years, there were additional findings of lung impairment in several English factory workers.

E.R.A. Merewether and C.W. Price, inspectors of factories for the Queen of England, conducted the first large epidemiological study of asbestos workers in 1935. Their research included physical examinations of 363 workers and chest x-rays for 133 of the workers. Merewether and Price found evidence of lung scarring in 62 of the 133

---

7 E. Merewether, et al., Report on effects of asbestos dust on the lungs and dust suppression in the asbestos industry, Part I and II, 1-34 (London: His Majesty’s Stationary Office 1930); citing H.M. Murray, Minutes of Evidence, Appendices and Index, 127 (1907).

8 Merewether, supra.

9 Id.
The study found an association of fibrosis with raw asbestos exposure. They also noted that reducing the concentration of dust was required to prevent the development of disease.

In 1935, there were two separate case reports mentioning individuals with asbestosis who also developed cancer. The first report came from a pathologist at the London Hospital who reported on two women who developed squamous cancer of the lung and asbestosis. The report also noted a possible association between the two diseases. Several months later, Drs. Lynch and Smith reported a case of a man with asbestosis who developed lung carcinoma. The report indicated the man worked as a weaver at an asbestos factory in South Carolina for 21 years.

In 1938, Dr. Dreessen conducted a study of the 541 men and women in the asbestos textile industry in North Carolina. His study found evidence of asbestosis from long and intense exposure to raw asbestos. Dr. Dreessen recommended a threshold level of 5 million particles per cubic foot for asbestos, which he believed would prevent asbestosis.

In 1946, Drs. Fleischer and Drinker inspected a U.S. Naval yard for evidence of asbestos disease in shipyard insulation workers. At the time, amosite insulation was used throughout the shipyard because of its weight, water resistance, thermal

---

10 Id.
11 Id.
12 S. Gloyne, *Two cases of squamous carcinoma of the lung occurring in asbestosis*, Tubercle, 17:5-10 (October 1935).
15 Id.
16 Id. at p. 91.
conductivity and strength. The research noted that asbestosis was a well known disease caused only by prolonged breathing of asbestos dust. The study concluded “that asbestos pipe covering of naval vessels is a relatively safe occupation.” In retrospect, the report found few cases of asbestosis, because many of the workers were only employed at the shipyard for three years. We now know that even with intense exposures, asbestosis often develops 10 or more years after first exposure.

Based on the findings of Fleischer, Drinker and Dreessen, the American Conference of Governmental Industrial Hygienists (“ACGIH”) adopted a threshold limit value (“TLV”) of five million particles per cubic foot for asbestos. The exposure limit was intended as a level to prevent the development of asbestosis.

In 1955, Dr. Doll published the first study linking asbestos exposure to lung cancer. Dr. Doll examined coroner’s reports for workers at an asbestos mill in England. His examination found a large number of lung cancer diagnoses in workers that were previously diagnosed with asbestosis. The findings allowed Dr. Doll to conclude asbestos workers experienced an increased mortality from lung cancer.

Five years later, Dr. Wagner published the first epidemiological study finding an association between crocidolite and mesothelioma. Dr. Wagner examined individuals who lived near and worked in a crocidolite mine in South Africa. He found 33 cases of mesothelioma amongst the individuals and noted that all but one had probable

18 Id.
19 Id. at p. 16.
20 Id.
22 Id.
23 Id.
crocidolite exposure.\textsuperscript{25} In addition, Dr. Wagner found that some of these people had limited or bystander exposure to crocidolite.\textsuperscript{26} His investigation also found that mesothelioma likely occurred 20 to 40 years after exposure.\textsuperscript{27}

In 1964, Dr. Irving Selikoff published a landmark article finding an excessive number of mesothelioma cases in insulation workers. He began his investigation to “study the question whether asbestos exposures during insulation work in the U.S. was associated with the hazard of asbestosis and its complications.”\textsuperscript{28} At that time, Dr. Selikoff examined a cohort of 632 asbestos insulation workers in the New York area.\textsuperscript{29} He found an excess of lung cancer and mesothelioma amongst insulation workers.\textsuperscript{30} Dr. Selikoff reported that “the growing number of reports of individual cases suggests that these tumors are perhaps becoming relatively frequent complications of asbestos exposure.”\textsuperscript{31}

Over the next several years, Dr. Selikoff and other researchers published numerous other articles that found an association of mesothelioma with insulation. Dr. Selikoff found that “[w]e now know that it may take 20 to 30 or more years from onset of exposure before the effects of this particular hazard begin to manifest themselves in the morbidity and mortality of the workers.”\textsuperscript{32}

In 1970, the Federal government passed a law creating the Occupational Safety and Health Administration (“OSHA”).\textsuperscript{33} The legislation included an emergency temporary standard which instituted a permissible exposure limit (“PEL”) of 12 fibers

\textsuperscript{25} Id. at 265.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
per cubic centimeter (f/cc).\textsuperscript{34} OSHA issued its first comprehensive standard for asbestos in June 1972.\textsuperscript{35} This final standard established an 8-hour time weighted average PEL of 5 f/cc and a ceiling limit of 10 f/cc. Over the past 40 years, the PEL has been gradually lowered to the current standard of 0.1 f/cc.\textsuperscript{36} In addition to OSHA regulations, the use of asbestos is also regulated by the U.S. Environmental Protection Agency (EPA) and the Consumer Product Safety Commission.\textsuperscript{37}

\textbf{II. Asbestos Litigation – Where It’s Been}

\textbf{A. Overview}

The first major asbestos case was filed in Eastern Texas by Clarence Borel on October 20, 1969.\textsuperscript{38} Borel sued several asbestos insulation manufacturers alleging he developed asbestosis and mesothelioma from use of their products. The trial court found against the defendants, because the insulation manufacturers never warned of the hazards associated with their products. \textit{Borel} was a seminal case in that it signaled a shift of asbestos awards from the workers’ compensation system. Subsequent court holdings expanded liability by holding asbestos defendants liable, even if the defendant did not know the risk.\textsuperscript{39}

\textsuperscript{35} 37 Fed. Reg. 11318 (June 7, 1972).
\textsuperscript{36} 29 C.F.R. § 1910.1001(c); 29 C.F.R. § 1926.1101(c); and 29 C.F.R. § 1915.1001(c).
\textsuperscript{37} Contrary to popular belief, the use of asbestos has not been completely banned in the United States. The EPA banned the use of most spray applied surfacing asbestos containing materials in 1973 and 1978 and banned the installation of wet-applied and pre-formed asbestos pipe insulation, and pre-formed asbestos block insulation on boilers and hot water tank in 1975. 40 C.F.R. §§ 140 \textit{et. seq.} The EPA attempted to ban the use of asbestos in its entirely in 1989 with the Asbestos Ban and Phaseout Rule. 54 Fed. Reg. 29460 (July 12, 1989). However, this regulation was largely overturned by the Fifth Circuit Court of Appeals in \textit{Corrosion Proof Fittings v. EPA}, 947 F.2d 1201 (5th Cir. 1991). Six asbestos-containing product categories that are still subject to the asbestos ban include: (1) corrugated paper, (2) rollboard, (3) commercial paper, (4) specialty paper, (5) flooring felt, and (6) new uses of asbestos.
\textsuperscript{38} See \textit{Borel v. Fibreboard Paper Prods. Corp.}, 493 F.2d 1076 (5th Cir. 1973).
In the following years, the number of asbestos-related lawsuits grew significantly. Johns-Manville, the largest asbestos manufacturer in the nation, was forced to file bankruptcy in 1982. At the time, Johns-Manville had been sued in thousands of cases. Johns-Manville was the first company to fall under the weight of asbestos litigation, but it was certainly not the last.

By 1991, one source stated there were over 31,000 asbestos-related lawsuits in the Federal district courts. Other sources estimated that there were over 115,000 asbestos-related claims pending in state and Federal courts. In addition, over $7 billion was spent on asbestos litigation through the 1990s.

Asbestos litigation is now the longest running mass tort in American history. Through 2002, approximately 730,000 people had filed asbestos-related claims. At least 8,400 defendants were named in these suits. These defendants include companies in all sectors of the economy. The suits have cost over $70 billion and resulted in over 80 bankruptcies.

B. Elements of an Asbestos Case in Georgia

1. Plaintiff’s Claims

Plaintiffs typically file suit alleging asbestos exposure from a defendant’s product proximately caused them to develop asbestosis, lung cancer or mesothelioma. The complaint generally alleges damages resulting from defendants’ negligence and product

---

40 In re Asbestos Products Liability Litigation (No. VI), Judicial Panel on Multidistrict Litigation, at 1 fn. 2 (July 29, 1991).
41 Oliver, Who Will the Monster Devour Next?, Forbes, p.7 (February 18, 1991).
44 Id. at p. xxiv.
45 Id. at xxv.
46 Id. at p. xxvi.
liability claims. The product liability claims vary by state, but typically focus on design defect and failure to warn claims.

In Georgia, proximate causation is an essential element of a plaintiff’s case whether proceeding under a strict liability or a negligence theory. To satisfy the proximate cause requirement, a plaintiff must prove exposure to a particular defendant’s products. Plaintiffs must “identify the asbestos-containing product of a particular defendant and show that they worked in proximity to workers using the product.” The Blackston court acknowledged that the standard was difficult to meet in view of the length of time between exposure and perceived injury and the migratory nature of much of the employment involving asbestos exposure.

Since 1985, Georgia courts have repeatedly affirmed the Blackston decision. In Hoffman v. AC&S, Inc., the Georgia Court of Appeals affirmed summary judgment in favor of three defendants, holding that a plaintiff must present evidence that a particular defendant’s asbestos-containing product was used at a job site and the plaintiff was in proximity to that product at the time it was being used. Similarly, in Williams v. The Flintkote Co., the Court of Appeals affirmed summary judgment in favor of Flintkote, noting that the Blackston court rejected the argument that it should create a judicial presumption that a plaintiff was exposed to asbestos in a defendant’s products by simply showing that he worked at a job site at a time when the defendant’s asbestos containing

48 Id.
49 Id. at 1486.
50 Id.
products were used.\footnote{Williams v. The Flintkote Co., 256 Ga. App. 205, 208, 568 S.E.2d 106, 108 (2002).} The \textit{Williams} court held that to conclude that the co-workers used the Flintkote products in proximity to the plaintiffs would be mere speculation.\footnote{Id. at 207.}

In \textit{Adamson v. General Electric Co.}, decided by the Georgia Court of Appeals on March 22, 2010, the court affirmed the trial court’s granting of summary judgment in favor of five manufacturer defendants.\footnote{Adamson v. General Electric Co., 303 Ga. App. 741, 694 S.E.2d 363 (2010).} In \textit{Adamson}, the plaintiff and several co-workers testified the plaintiff worked with and around products manufactured by several defendants. The defendants asserted the plaintiff did not prove he worked with or near any asbestos-containing product that they manufactured. In particular, Garlock asserted that it manufactured some gaskets without asbestos and that the evidence did not show that the plaintiff worked in proximity with any of its asbestos-containing products.\footnote{Id. at 368-69.} The Court of Appeals found that the co-workers could not connect any of Garlock’s asbestos-containing products to a place in proximity to the plaintiff or during a time he was at the job site.\footnote{Id. at 369.} The court reasoned that “[g]uesses or speculation which raise merely a conjecture or possibility are not sufficient to create even an inference of fact for consideration on summary judgment.”\footnote{Id. citing Hoffman, 248 Ga. App. at 612.}

On January 19, 2011, the Third Division of the Georgia Court of Appeals released an unpublished opinion in \textit{Toole v. Georgia-Pacific, LLC}. The court upheld summary judgment for John Deere based upon the plaintiff’s failure to produce evidence that any parts removed were original to the equipment or that the parts contained asbestos. The \textit{Toole} court also affirmed the granting of a directed verdict in favor of Western Auto Supply Company based in part upon the testimony of one of the plaintiff’s experts that
the cumulative dose of asbestos from the installation of new friction products was less than 0.1 f/cc years and the testimony of another expert who could not testify that a dose of asbestos at 0.1 f/cc years caused or contributed to the plaintiff's mesothelioma.58

2. Defending an Asbestos Case

Georgia law requires a plaintiff in a toxic tort case demonstrate specific causation in a manner that satisfies the Daubert standard.59 In addition, the evidence must establish a “dose/response relationship.”60 Strict liability is imposed for injuries which are the proximate result of product defects, not for the manufacture of defective products. Unless the manufacturer's defective product can be shown to be the proximate cause of the injuries, there can be no recovery.61 Defendants also use several other defenses including product identification, government contractor, federal enclave, state of the art, bulk supplier, medical causation, low dose and fiber type. Statutes of limitations or statutes of repose defenses are occasionally used, although the rules are somewhat modified in asbestos cases due to the long latency between first exposure and development of disease.62

3. Experts

Both plaintiffs and defendants in asbestos cases typically use medical doctors and industrial hygienists as expert witnesses. These experts help juries understand causation, fiber release levels, and the historical knowledge regarding asbestos usage. Medical experts are required to establish the diagnosis and causation. Defendants frequently challenge the basis for an expert’s opinion testimony based on the Daubert

58 Id.
60 Id.
61 Blackston, 764 F.2d at 1483 (emphasis added).
62 O.C.G.A. §§ 9-3-51 and 51-1-11(b)(2).
standard. In June 2010, a Morgan County trial court granted a defendant’s motion to strike testimony from a plaintiff’s pathology expert that each and every exposure to asbestos was sufficient to contribute to the development of disease. The Court of Appeals upheld the ruling and concluded that the each and every exposure opinion was inadmissible, because the theory utilized invalid methodology. Last year, the Supreme Court of Georgia further analyzed expert testimony and the causation standard in Scapa v. Knight. The Supreme Court held that expert witnesses cannot establish causation “by any exposure at all” and plaintiffs must show that a particular exposure made a “meaningful contribution” to the overall exposure.

C. Household Exposures

Some plaintiffs allege that they developed asbestos-related disease from laundering clothing that contains asbestos fibers brought home from a family member’s job site. Last year, the Supreme Court of Georgia analyzed the potential liability of a product manufacturer in these cases. The Supreme Court concluded that defendants “...owed no duty to warn [ ] of the possible hazards of asbestos-dust from its products...”

---

63 O.C.G.A. § 24-7-702.
64 Butler v. Union Carbide Corp., 310 Ga. App. 21, 24, 29 (2011)
66 Id. at 291 and 293.
67 CertainTeed v. Fletcher, 300 Ga. 327 (2016)
68 Id.
C. Tort Reform

In February 2005, the Georgia General Assembly passed Senate Bill 3, which abolished joint and several liability in Georgia (with respect to causes of action arising on or after the effective date, February 16, 2005). In addition, SB 3 allowed the trier of fact to apportion damages among persons who were liable according to the percentage of fault of each person, regardless of whether the person or entity was, or could have been, named as a party to the suit. The apportionment of fault to non-parties means that juries can apportion fault on a verdict form to dozens of manufacturers who are now bankrupt, in particular, manufacturers of insulation products such as Johns-Manville and Owens-Corning Fiberglas. The impact of these changes in the law, which are codified at O.C.G.A. §§ 51-12-31 and 51-12-33, cannot be understated in the context of Georgia asbestos litigation.

Only a couple of months after the passage of Senate Bill 3, Georgia passed House Bill 416 in April 2005 that instituted sweeping tort reform for asbestos and silica claims. The new law amended Title 51 of the Official Code of Georgia to require a person to establish prima-facie evidence of physical impairment to bring or maintain an asbestos claim. H.B. 416 specifically required that the prima-facie evidence of physical impairment result from a medical condition for which exposure to asbestos was a substantial contributing factor. The new medical criteria required that a plaintiff obtain a report “certifying to a reasonable degree of medical certainty that exposure to asbestos was a substantial contributing factor to the diagnosed cancer and that it was not more probably the result of causes other than the asbestos exposure.”69

69 H.B. 416 (Ga. 2005).
Prior to the passage of the 2005 Act, a plaintiff only had to prove that a product was a contributing factor to their disease.\textsuperscript{70} Plaintiffs attacked the law by arguing the statute imposed new requirements by inserting the word “substantial” into the diagnosing criteria. In 2006, the Georgia Supreme Court declared in \textit{DaimlerChrysler Corp. v. Ferrante} that it could not “effectively sever the unconstitutional provisions from the Act and it must fall in its entirety.”\textsuperscript{71}

On April 20, 2007, the Georgia General Assembly passed Georgia Senate Bill 182 (“2007 Act”) to address and cure the constitutional issues encountered with the 2005 Act.\textsuperscript{72} The 2007 Act set forth different medical criteria requirements for claims that accrued before April 12, 2005, and claims that accrued on or after May 1, 2007.\textsuperscript{73} For claims accruing before April 12 2005, no further prima-facie evidence of physical impairment would be required for asbestos claims alleging mesothelioma. For claims alleging cancer other than mesothelioma a physician needs only certify that exposure to asbestos was a contributing factor to the diagnosed cancer.\textsuperscript{74} For claims accruing on or after May 1, 2007, no further prima-facie evidence would be required for mesothelioma claims, but a board certified internist, pulmonologist, pathologist, occupational medicine physician, or oncologist must certify that exposure to asbestos was a substantial contributing factor. A substantial contributing factor was defined as “exposure to asbestos or silica took place on a regular basis over an extended period of

\textsuperscript{70} \textit{See John Crane, Inc. v. Jones}, 278 Ga. 747, 604 S.E.2d 822 (2004) (“requiring that [Johns Crane’s] contribution to the resulting injury be ‘substantial’ is not in accord with the longstanding law of Georgia”).
\textsuperscript{72} S.B. 182, 149th General Assembly, Reg. Sess. (Ga. 2007).
\textsuperscript{73} The 2007 Act specifically provided that asbestos claims that accrued on or after April 12, 2005, and before May 1, 2007, shall be governed by Chapter 14 of Title 51, as enacted on April 12, 2005, by 2005 Act No. 29 (Ga. L. 2005, p. 145).
\textsuperscript{74} \textit{Id.}
time and in close proximity to the exposed person and was a factor without which the physical impairment in question would not have occurred.\(^\text{75}\)

In addition, the law provided that all claims pending in Georgia on May 1, 2007, would be dismissed within 180 days after May 1, 2007, without prejudice unless all parties stipulated that prima-facie evidence of physical impairment had been established or the trial court in which the asbestos claims were initially filed entered an order that prima-facie evidence of physical impairment had been established.\(^\text{76}\) For claims filed on or after May 1, 2007, the plaintiff must file a medical report in the form of an affidavit with the complaint and accompanying documentation setting forth the medical findings necessary to establish prima-facie evidence of physical impairment.\(^\text{77}\) The plaintiff must also include a sworn information form containing certain information, including the location of each alleged exposure, the specific product to which the person was exposed and the beginning and ending dates of each alleged exposure.\(^\text{78}\) Until the entry of an order determining that the plaintiff has established prima-facie of physical impairment, no asbestos claim shall be subject to discovery.\(^\text{79}\)

The 2005 and 2007 asbestos claims legislation in Georgia also instituted new venue provisions that require that an asbestos claim be brought or maintained in Georgia only if the plaintiff is a resident of Georgia at the time of filing or the exposure to asbestos occurred in Georgia.\(^\text{80}\) This reform has significantly reduced the number of new asbestos claims filed in Georgia. In addition, the new venue provisions have dramatically altered the courts where the claims were filed. Prior to April 2005, the vast

---

\(^{75}\) O.C.G.A. § 51-14-3(23) (2007).  
\(^{76}\) O.C.G.A. § 51-14-6(1) (2007).  
\(^{79}\) O.C.G.A. § 51-14-8(a) (2007).  
\(^{80}\) O.C.G.A. § 51-14-10 (2007).
majority of asbestos claims were brought in Fulton County. Since April 2005, new asbestos claims were filed across the State of Georgia, including in Chatham, Dougherty, Forsyth, Glynn, Gwinnett, Morgan, Miller, Walker, and Ware Counties.

III. Asbestos Litigation – Where Is It Going?

In the coming years, asbestos litigation will differ dramatically from the first lawsuits filed over 40 years ago. Today’s plaintiffs focus on new defendants, occupations, and products. They are also seeking more money from increasingly depleted resources. Defendants must revise their defense strategies or risk becoming the next company to succumb to bankruptcy.

Recent trends show a proliferation of plaintiffs’ firms that are vying for a decreasing number of cases. Tort reform eliminated most of the non-malignant claims that dominated the 1990s and early 2000s. A recent study found the number of claims has fallen more than 88% since 2003. As the overall numbers decrease, the number of mesothelioma and lung cancer claims will likely remain consistent for the next several years. Through 2004, there were approximately 3,000 cases of mesothelioma diagnosed per year. The number of cases will decrease slightly in the coming years, but could remain over 2,000 per year through 2054.

There are a new group of defendants in asbestos litigation. Most of the insulation manufacturers and distributors are now bankrupt. In the past several years, Garlock and additional defendants filed bankruptcy under the weight of asbestos litigation. Before filing for bankruptcy, Garlock spent $1.37 billion in indemnity and defense

83 Id.
With the increasing number of bankruptcies, peripheral defendants are now receiving increasing demands. Today’s defendants are now comprised of a cross section of American industry, including distributors, equipment manufacturers and contractors. Many of these new cases are being filed in Philadelphia, California, Illinois and New York. These jurisdictions have also brought increasingly high verdicts against a number of defendants. In 2013, a jury in New York awarded plaintiffs $190 million. The new claimants are dramatically reshaping asbestos litigation. In the coming years, plaintiffs and defendants will be forced to develop new strategies to defend and prosecute these cases.

---

84 Information Brief of Garlock Sealing Technologies, In Re: Garlock Sealing Technologies, Case No. 10-BK-31607, U.S. Bankruptcy Court for the Western District of North Carolina, Charlotte Division, pp. 5-6 (June 7, 2010).
What Is Asbestos?

Commercial Asbestos Fibers

- **Chrysotile**
  \[ \text{Mg}_3\text{Si}_2\text{O}_5(\text{OH})_4 \]

- **Crocidolite**
  \[ \text{Na}_2\text{Fe}^{+++}\text{Fe}^{2+}\text{Si}_8\text{O}_{22}(\text{OH})_2 \]

- **Amosite**
  \[ (\text{Fe-Mg})_7\text{Si}_8\text{O}_{22}(\text{OH})_2 \]
Insulation

Insulation vs. Gaskets

Dose Makes the Difference

1 aspirin: prevents heart attack
2 aspirin: relieves headache
100 aspirin: Lethal
Nationwide Filings

<table>
<thead>
<tr>
<th>Disease</th>
<th>Filings by Disease</th>
<th>2016 First Half 1</th>
<th>2015 First Half 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mesothelioma</td>
<td>1,165</td>
<td>1,052</td>
<td></td>
</tr>
<tr>
<td>Lung Cancer</td>
<td>496</td>
<td>537</td>
<td></td>
</tr>
<tr>
<td>Non-Malignant</td>
<td>262</td>
<td>346</td>
<td></td>
</tr>
<tr>
<td>Other Cancer</td>
<td>65</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td>154</td>
<td>176</td>
<td></td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>2,142</strong></td>
<td><strong>2,185</strong></td>
<td></td>
</tr>
</tbody>
</table>

*MESOTHELIOMA FILINGS*  
↑10.7%

*NON-MALIGNANT FILINGS*  
↓24.3%

Top Jurisdictions

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Madison County, IL</td>
<td>619</td>
<td>28.90%</td>
<td>563</td>
<td>25.77%</td>
</tr>
<tr>
<td>New York, NY</td>
<td>154</td>
<td>7.55%</td>
<td>139</td>
<td>6.83%</td>
</tr>
<tr>
<td>Baltimore City, MD</td>
<td>182</td>
<td>8.63%</td>
<td>233</td>
<td>10.66%</td>
</tr>
<tr>
<td>St. Louis, MO</td>
<td>133</td>
<td>6.21%</td>
<td>108</td>
<td>4.94%</td>
</tr>
<tr>
<td>Philadelphia, PA</td>
<td>90</td>
<td>4.20%</td>
<td>93</td>
<td>4.26%</td>
</tr>
<tr>
<td>Wayne, MI</td>
<td>89</td>
<td>4.01%</td>
<td>126</td>
<td>5.72%</td>
</tr>
<tr>
<td>New Castle, DE</td>
<td>74</td>
<td>3.45%</td>
<td>71</td>
<td>3.25%</td>
</tr>
<tr>
<td>Cook County, IL</td>
<td>73</td>
<td>3.41%</td>
<td>96</td>
<td>4.35%</td>
</tr>
<tr>
<td>Los Angeles, CA</td>
<td>57</td>
<td>2.60%</td>
<td>59</td>
<td>2.79%</td>
</tr>
<tr>
<td>Kanawha, WV</td>
<td>55</td>
<td>2.57%</td>
<td>55</td>
<td>2.52%</td>
</tr>
<tr>
<td>Allegheny, PA</td>
<td>50</td>
<td>2.33%</td>
<td>33</td>
<td>1.51%</td>
</tr>
<tr>
<td>Middlesex, NJ</td>
<td>46</td>
<td>2.15%</td>
<td>35</td>
<td>1.60%</td>
</tr>
<tr>
<td>St. Clair, IL</td>
<td>30</td>
<td>1.40%</td>
<td>57</td>
<td>2.61%</td>
</tr>
<tr>
<td>Orleans, LA</td>
<td>29</td>
<td>1.35%</td>
<td>19</td>
<td>0.87%</td>
</tr>
<tr>
<td>Alameda, CA</td>
<td>24</td>
<td>1.12%</td>
<td>29</td>
<td>1.33%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,732</strong></td>
<td><strong>81%</strong></td>
<td><strong>1,748</strong></td>
<td><strong>80%</strong></td>
</tr>
</tbody>
</table>

1 Filings through 6/30/2016 in KCIC’s Lidato system as of 6/10/2016.
2 Filings through 9/30/2015 in KCIC’s Lidato system as of 9/1/2016.
Madison County Filings

*Projected number based on midyear filings.
Mesothelioma Verdicts

NY Jury Awards $190M Over Asbestos Injuries, Deaths

By Jeff Grubnik

Law360, Los Angeles (July 24, 2013, 4:27 PM ET) -- A New York jury Tuesday awarded $190 million in damages to four workers who were exposed to asbestos in a failed construction project, the largest ever awarded in a mesothelioma case.

The jury found design firm Turner Construction and World Trade Center developer Silverstein Properties liable for the workers’ exposure to asbestos while building the complex.

Owens-Illinois Hit With $27.3M Jury Verdict In Asbestos Suit

By Greg Rybus

Law360, New York (June 10, 2013, 4:21 PM ET) -- A California jury awarded a woman with mesothelioma $11 million in punitive damages Wednesday in a lawsuit against Owens-Illinois Inc., over her alleged exposure to asbestos on her ex-husband’s work clothing, a penalty that comes on top of $18.3 million in other damages assessed in May.

The plaintiff, Rose-Marie Ongia, claimed Owens-Illinois and a host of other companies made asbestos-containing products — including Owens-Illinois’ Kyalox brand insulation products — that her onetime husband came into contact with in his work as an insulation sex in other jurisdictions. She was allegedly exposed to the asbestos while shaking out and

Richland County jury awards $38 million in asbestos case

By JOHN WREN

Richland County Superior Court

September 12, 2010

Georgia Verdicts

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Verdict</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lightsey – USDC (ND Ga.)</td>
<td>October 2005</td>
<td>Defense Verdict</td>
</tr>
<tr>
<td>Toole – Miller County Superior Court</td>
<td>January 2010</td>
<td>Defense Verdict</td>
</tr>
<tr>
<td>Knight – Ware County Superior Court</td>
<td>June 2010</td>
<td>$10.5 million verdict – reversed (2016)</td>
</tr>
<tr>
<td>Gibson – Glynn County Superior Court</td>
<td>November 2010</td>
<td>$82,000</td>
</tr>
<tr>
<td>Goins – Fulton County Superior Court</td>
<td>April 2014</td>
<td>Defense Verdict</td>
</tr>
<tr>
<td>Adams – Chatham County</td>
<td>June 2016</td>
<td>$5 million (Defendant 40% liable)</td>
</tr>
</tbody>
</table>
Verdict Form – Nonparty Fault

QUESTION 4
State the percentage of fault allocable to each of the following in causing Plaintiff Herbert Wade Goins’ injuries. (The total must equal 100%)

A.W. Chesterton
Garlock
John Crane, Inc.
Leslie Controls
Warren Pumps

Complaint (1989)

In the United States District Court for the Southern District of Florida

LINDA KEET and MELINDA KEET, Plaintiffs,

v.

SHREVEWORLD SHRINE, INC., and ALL OTHER JOHN DOES and JOHN DOES.

In the United States District Court for the Southern District of Florida

LINDA KEET and MELINDA KEET, Plaintiffs,

v.

SHREVEWORLD SHRINE, INC., and ALL OTHER JOHN DOES and JOHN DOES.

Complaint (2017)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

LINDA KEET and MELINDA KEET, Plaintiffs,

v.

SHREVEWORLD SHRINE, INC., and ALL OTHER JOHN DOES and JOHN DOES.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

LINDA KEET and MELINDA KEET, Plaintiffs,

v.

SHREVEWORLD SHRINE, INC., and ALL OTHER JOHN DOES and JOHN DOES.
Tort Reform

**Senate Bill 3 (February 16, 2005)**
- Joint and Several Liability (O.C.G.A. § 51-12-31)
- Apportionment (O.C.G.A. § 51-12-33)
- Daubert (O.C.G.A. § 24-7-702)

**House Bill 416 (April 12, 2005)**
- Prima Facie Evidence of Physical Impairment
- Substantial Contributing Factor

**Senate Bill 182 (May 1, 2007)**
- Contributing Factor (for claims that accrued before April 12, 2005)

---

Pending Cases

<table>
<thead>
<tr>
<th>Pre-Tort Reform</th>
<th>Post-Tort Reform</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 25 – Cobb County (Inactive)</td>
<td>• 24 Pending Cases –</td>
</tr>
<tr>
<td>• 115 – Fulton County (Being dismissed or settled)</td>
<td>• Berrien, Bulloch, Catoosa, Chatham, Clayton, DeKalb, Floyd, Fulton, Gwinnett, Lauren, Lowndes, Richmond, Walker, and Wayne Counties</td>
</tr>
<tr>
<td></td>
<td>• One in the USDC MDGA</td>
</tr>
</tbody>
</table>
Theories

- Negligence
- Failure to Warn
- Design Defect

Product Identification – Blackston Standard

1. A plaintiff must identify a particular defendant’s asbestos-containing product, and present proof of his actual exposure to asbestos fibers in/associated with that product.

2. Requires that plaintiffs identify the asbestos-containing product of a particular defendant and show they worked in proximity to workers using that product.

3. No presumption that a plaintiff was exposed to asbestos in a defendant’s products by simply showing that he worked at a job site at a time when the defendant’s asbestos-containing products were used.

## Statute of Repose

<table>
<thead>
<tr>
<th><strong>Product Liability</strong></th>
<th><strong>Real Property</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>“No action to recover damages…shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.” <em>O.C.G.A. § 9-3-51.</em></td>
<td>“No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.” <em>O.C.G.A. § 51-1-11(b)(2).</em></td>
</tr>
</tbody>
</table>

## Expert Testimony - Daubert

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

1. The testimony is based upon sufficient facts or data;
2. The testimony is the product of reliable principles and methods; and
3. The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

*[O.C.G.A. § 24-7-702(b)(1-3)]*
Each and Every Exposure

• Each and every exposure contributes to cumulative dose.

• Each and every exposure a substantial contributing factor.

• Split in jurisdictions on admissibility.

Scapa v. Knight - Georgia Expert Causation

• The expert witness must provide evidence of “reliable data to show that the exposure in question were more than de minimis…”

[Scapa v. Knight, S15G1278, Supreme Court of Georgia (July 5, 2016)]
**Scapa** - Does this theory “fit” the pertinent causation inquiry?

- Causation cannot be “established by any exposure at all.” *Id.* at 293.

- Plaintiff must show the exposure to a particular product made a “meaningful contribution.” *Id.* at 291.

---

**Butler v. Union Carbide** – Each and Every Exposure

- Each and every exposure theory is not scientifically valid.

- Expert opinion must “properly utilize the scientific method to make scientifically valid decisions in reaching [the] causation opinion.”

Household Exposures

- Family members exposed to asbestos from laundering clothing.

**CertainTeed v. Fletcher – Take Home/Duty to Warn**

- Plaintiffs alleged mesothelioma developed from laundering her father’s asbestos-laden clothing.

- “…we hold that CertainTeed owed no duty to warn Fletcher of the possible hazards of asbestos-dust from its products…”

- Also addressed the risk-utility analysis.

[Certainteed v. Fletcher, S15G1903, Supreme Court of Georgia (November 30, 2016)]
Household Exposure Cases - Court Rulings

• Majority Approach
  - No legally significant relationship between parties.
  - No duty.
  - No liability.

• Minority Approach
  - Examines foreseeability of harm.
  - Duty imposed based on dates of exposure and state of the art knowledge.

Bare Metal – External Insulation
Bare Metal - Replacement Parts

[http://www.hptylaw.com/media-publications/bare-metal-defense.html]

Chapter 4
33 of 34

Bare Metal Rulings

STATE ADOPTION
Updated: May 2015

- State courts that have adopted the Bare Metal Defense
- Lower court decisions that support the Bare Metal Defense
- Background Jurisdictions

*Maritime law is not included in the map. When considering maritime law, courts have generally applied the O'Neill approach to the Bare Metal Defense.
Thurmon v. A.W. Chesterton - Bare Metal

- No liability for replacement parts or external insulation.
- Must prove exposure to a defendant’s product.
- Georgia is disinclined “to hold manufacturers liable for products they did not manufacture, supply, or design.”


QUESTIONS?
Particular Causation Issues in Failure to Warn Cases

W. Clay Massey
Alston & Bird LLP
Atlanta, Georgia
PARTICULAR CAUSATION ISSUES IN FAILURE TO Warn CASES

by Clay Massey
Alston & Bird LLP

I. Proximate Cause Is an Essential Element of a Failure to Warn Claim.


Thus, showing injury from use of a defendant’s product is not enough to establish proximate cause in a failure to warn claim. The plaintiff must show that the defendant’s *failure to give an adequate warning* proximately caused the injury to occur. This requires a showing that the plaintiff would have avoided the injury had an adequate warning been given. *Weilbrenner v. Teva Pharmaceuticals USA, Inc.*, 696 F. Supp. 2d. 1329, 1341 (M.D. Ga. 2010).

II. A User of a Product Must Read the Warning to Establish Proximate Cause in an Inadequate Warning Case.

Under Georgia law, a plaintiff cannot prove proximate cause in an inadequate warning case where the plaintiff did not read the warning the plaintiff claims was in adequate. *Wilson Foods Corp. v. Turner*, 218 Ga. App. 74, 76 (1995). Because an inadequate warning claim depends on the content of the warning, the plaintiff must prove that she actually read the content in order to establish liability. The Court of Appeals has explained, “[t]his is because even if the warning had been adequate, the plaintiff still would have been injured because in not reading the warning, he would not have benefitted from its adequacy . . . .” *Camden Oil Co. v. Jackson*, 270 Ga. App. 837, 840 (2004). Failure to present this evidence will defeat the claim as a matter of

This is distinguished from a claim based on a defendant’s alleged failure to provide a warning, or a claim based on defendant’s failure to adequately communicate the warning. Such claims do not depend on the content of the warning and instead involve the complete absence of a warning or an inadequate location or presentation of the warning on the product. *Bryant*, 9 F. Supp. 3d at 1395. Thus, to establish proximate cause for such claims, a plaintiff is not required to prove that she would have seen the warning had an adequate warning been included. *Chrysler Group, LLC v. Walden*, 339 Ga. App. 733, 762 (2016). In fact, the Court of Appeals has instructed that a plaintiff’s failure to read the warning can constitute circumstantial evidence that the warning was inadequately communicated. *Wilson Foods Corp.*, 218 Ga. App. at 75.

**III. A Plaintiff Must Prove that the Injury Would Not Have Occurred but for the Absence of or Defective Warning.**

A plaintiff must prove that she would not have been injured had the defendant given an adequate warning. *Eberhardt v. Novartis Pharmaceuticals Corp.*, 867 F. Supp. 2d 1241, 1255 (2011). A plaintiff must present evidence affording a reasonable basis for establishing that the injury would have been avoided had an adequate warning been given. *Shadbum v. Whitlow*, 243 Ga. App. 555, 556-57 (2000). An initial question in this determination is whether the plaintiff would have headed an adequate warning had it been given. Some jurisdictions apply a “heeding presumption” in failure to warn products liability cases. Under the theory of a heeding presumption, “the court presumes that warnings, if given, will be heeded and followed . . . .” *Mahr v. G.D. Searle & Co.*, 390 N.E.2d 1214, 1233 (Ill. App. Ct. 1st Dist. 1979). This presumption is based on the language in comment j to Section 402A of the Restatement (Second)
of Torts, which provides that “[w]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor it is unreasonably dangerous.” Some courts have held that this presumption relieves a plaintiff of having to prove what the user might or might not have done had an adequate warning been given. E.g., Hamilton v. Hardy, 549 P.2d 1099 (Colo. 1994); Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038 (D. Kan. 1984). Other courts have made the presumption rebuttable by evidence that the user of the product would not have heeded the warning, which evidence would shift the burden to the plaintiff to present sufficient evidence that the warning would have been heeded in order to create a triable issue on the question of causation. E.g., Plummer v. Lederle Lab., 819 F.2d 349 (2d Cir. 1987); Grenier v. Medical Eng’y Corp., 99 F. Supp. 2d 759 (W.D. La. 2000); Woulfe v. Eli Lilly & Co., 965 F. Supp. 1478, 1483 (E.D. Okla. 1997). According to the Tenth Circuit Court of Appeals in Thom v. Bristol-Myers Squibb Co., 353 F. 3d 848, 852 (10 Cir. 2003), the “vast majority” of jurisdictions recognize a rebuttable heeding presumption.

Georgia has not expressly adopted such a heeding presumption. At least one Georgia federal court has recognized that Georgia law does not address whether the presumption applies. Porter v. Eli Lily and Co., No. 1:06-CV-1297-JOF, 2008 WL 544739, at *10 (N.D. Ga. 2009). The court in Porter “assume[d]” for the purposes of deciding the summary judgment motion at issue in the case that Georgia would apply a rebuttable heeding presumption, if it applies a presumption at all. Id. at *11. The court did not make the assumption as a finding that Georgia law recognizes a presumption. Rather, the court made the assumption to dispose of the case at issue based on the evidence presented, accepting plaintiff’s argument for the purpose of the motion that a presumption applied. Id. at *11-12. As the court explained, “what is particularly
relevant to this case is not whether Georgia would apply the presumption of § 402A, but how Georgia would apply that presumption.” Id. at *10 (referring to whether Georgia would apply a rebuttable presumption instead of a presumption “vitiating[ing] the need for a plaintiff to establish proximate cause for her injuries”).

Consequently, the current state of Georgia law appears to be that no heeding presumption – rebuttable or absolute – exists. Notably, however, failure to warn cases in Georgia courts applying Georgia law have addressed the heeding issue based on an assessment of whether there was evidence that the user of the product would have heeded the warning. E.g., *Thomas v. Hubtex Maschinenbau GMBH & Co. KG.*, No. 7:06-CV-81(HL), 2008 WL 4371977 (M.D. Ga. Sept. 23, 2009); *Nolley v. Greenlee Textron, Inc.*, No. 1:06-CV-228-MHS, 2007 WL 5369405 (N.D. Ga. Dec. 6, 2007).

In addition, a plaintiff must establish that heeding the warning would have prevented the injury. *R&R Insulation Serv. v. Royal Indem. Co.*, 307 Ga. App. 419, 428 (2010). Such a showing cannot be made by speculation or evidence that only establishes that the prevention of the injury was possible. Id. Rather, the evidence must establish that heeding the adequate warning more likely than not would have prevented the injury. Id.

**IV. Causation Issues Caused by Intermediary Users or Suppliers.**

Where a product is supplied to or used by an intermediary, causation proof can become complicated. These causation complications exist in addition to the duty questions that arise from the involvement of intermediaries under the learned intermediary, bulk supplier and component parts supplier doctrines.¹

Under Georgia law, a plaintiff cannot recover in a failure to warn case where the product is supplied to an intermediary who (1) has independent actual knowledge of the information the plaintiff claims should have been communicated in a warning and (2) with that knowledge, took action with respect to the product that allegedly caused the plaintiff’s injury at issue. *Dietz v. SmithKline Beecham Corp.*, 598 F.3d 812, 816 (2010). This typically arises in cases involving a doctor’s prescription of a pharmaceutical or use of a medical device, but the rule is not necessarily limited to those circumstances.\(^2\) Notably, this proximate cause rule applies regardless of the inadequacy of the warning to the intermediary. *In re Mentor Corp. ObTape Transobturator Sling Prod. Liab. Litig.*, 711 F. Supp. 2d 1348, 1366 (M.D. Ga. 2010); *Dietz*, 598 F.3d at 816. If the intermediary independently and actually knew of the information a plaintiff claims should have been communicated to the intermediary, whether a defendant also communicated that information to the intermediary is immaterial.

---

The Class Action Fairness Act (CAFA)

Christopher T. Giovinazzo
Bondurant Mixson & Elmore LLP
Atlanta, Georgia
Class Actions (Rule 23)

(a) Prerequisites.
   (1) **Numerosity** (individual suits impractical);
   (2) **Commonality** of questions of law and/or fact;
   (3) **Typicality** of the representative (named) plaintiffs’ claims;
   (4) **Adequacy** of representation by named plaintiffs.
Mass Actions (defined by CAFA)

A mass action is “any civil action ... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact”


Pre-CAFA requirements for federal jurisdiction over class actions

- **Complete Diversity** between all representative (named) plaintiffs and all defendants
- **Amount in Controversy** of at least $75,000 for each named plaintiff
- **Defendant from forum state** cannot remove
- **All defendants must consent** to removal
- **No appellate review** of remand
2005: Congress Enacts CAFA because

• “Cases of national importance” are being kept out of federal court
• Perceived settlement collusion:
  – Class members “receive little or no benefit”
  – Lawyers receive “large fees”
• Perceived bias against out-of-state Defendants

Jurisdiction under CAFA

• Minimal Diversity: Only one plaintiff, even an un-named class member, needs to be diverse from any defendant

• Aggregated Amount in Controversy: At least $5 Million across all class members

• Defendant from forum state can remove

• Consent not required from all defendants

• Interlocutory appeal available (seven days!)
Exceptions to Jurisdiction

- Fewer than 100 class members
- Action “solely” related to a “covered security or “internal affairs”/governance of corporation
- “Home State” exception
- “Local Controversy” exception
- Discretion to decline jurisdiction (local controversy-lite)

The Fundamental Tension

- “Courts will not permit plaintiff to use artful pleading to close off defendant’s right to a federal forum.”
  

- “Plaintiffs are the master of the complaint and are free to avoid federal jurisdiction . . . so long as the method of avoidance is not fraudulent.”
  
  — *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. July 1, 2013)
Burden to Prove CAFA Jurisdiction

• “CAFA does not change the traditional rule that the party seeking to remove the case to federal court bears the burden of establishing jurisdiction.”
  
  – Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164 (11th Cir. 2006).

• Jurisdictional requirements must be shown by the *preponderance of the evidence*.

• But what evidence?

Amount in Controversy: Basics

• No inquiry into the merits of the claims when calculating amount-in-controversy.

• What matters is the amount of damages that “*could* be awarded.”

• Punitive damages and value of injunctive or declaratory relief included.

  – McDaniel v. Fifth Third Bank, 568 F. App’x 729, 732 (11th Cir. 2014); Bohannon v. PHH Mortg. Corp., 665 F. App’x 760, at *1 n.2 (11th Cir. 2016).
**Amount in Controversy:**

**Plaintiff Pleads No Amount**

- “Defendants may submit affidavits, declarations, or other documentation” evidencing the amount.

- District court may use “deduction, inference, or other extrapolation.”

- Defendant is “not required to prove the amount beyond all doubt or to banish all uncertainty.”

  – *Pretka v. Kolter City Plaza II*, 608 F.3d 744 (11th Cir. 2010)

---

**Amount in Controversy:**

**Evidence**

- Evidence needs to match the putative class claims

- “Great uncertainty” can still be fatal


  – *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006).
Amount in Controversy:
Plaintiffs Cannot Stipulate to Under $5m

• “Stipulations must be binding.”
• Plaintiffs “cannot legally bind members of the proposed class before the class is certified.”

—Standard Fire Ins. Co. v. Knowles,
133 S.Ct. 1345 (March 19, 2013)

Amount in Controversy:
Can Plaintiffs Split Up the Case?

**Amount in Controversy: Can Plaintiffs Split Case? (Freeman Cont’d)**

- Class action against paper mill for nuisance (water pollution)
- “Plaintiffs divided their suit into five separate suits covering distinct six-month time periods” so that damages for each suit would be under $5 million
- Court rejects plaintiffs’ “artificially divid[ing] the lawsuit” without a “colorable” reason – removal proper because “plaintiffs’ suits in the aggregate seek up to $24.5 million.”

**Amount in Controversy: Injunctive Relief**

“For amount in controversy purposes, the value of injunctive or declaratory relief is the value of the object of the litigation measured from the plaintiff’s perspective.”

—*South Florida Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312 (11th Cir. 2014)
Amount in Controversy: Injunctive Relief (cont’d)

• Property owners sue a nearby wood treatment facility for damages and injunctive relief

• “the upward [damages] limit on each claim . . . would be the full value of that particular piece of property.”

• Same for injunction: the “injunctive relief [sought] is aimed at protecting the value of each class member’s property”


Amount in Controversy: Punitive Damages

• “It is undoubtedly true that punitive damages are included in the calculation of the amount in controversy.”


• District courts may make “reasonable deductions, inferences, and extrapolations” about amount.

• “Judicial experience and common sense” say potential punitives for a wrongful death action exceed $75,000

  – Roe v. Michelin N. Am., 613 F.3d 1058 (11th Cir. 2010)
Exceptions to CAFA Jurisdiction

- Fewer than 100 class members
- Action “solely” related to a “covered security or “internal affairs”/governance of corporation
- “Home State” exception
- “Local Controversy” exception
- Discretion to decline jurisdiction (local controversy-lite)

It is Plaintiffs’ Burden to show that a CAFA exception applies

- Once the removing party has met their burden to show that CAFA’s jurisdictional elements are met,
- The Plaintiff bears the burden to establish that one of CAFA’s jurisdictional exceptions applies.

— Evans v. Walter Industries, Inc., 449 F.3d 1159 (11th Cir. 2006) (local controversy exception)
CAFA’s Home-State Exception

• **At least two-thirds of class** are citizens of the forum state;

  AND

• **The “primary defendants”** are citizens of the forum state.
  – CAFA does not define “primary” defendants

CAFA’s “Local Controversy” Exception

• **At least two-thirds of class** are citizens of the forum state;

• One defendant from whom class seeks “**significant relief**” and “whose alleged conduct forms a **significant basis for the claims**” is a citizen of the forum state;

• The “**principal injuries**” resulting from “conduct of each defendant” incurred in forum;

• No similar class action filed within 3 years
CAFA’s Discretionary Exception

The Court MAY decline jurisdiction where

• At least one-third, but less than two-thirds, of the class are citizens of the forum state.

AND

• The “primary defendants” are citizens of the forum state.

Proof of Citizenship for CAFA Exceptions

*Evans v. Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006).

– Plaintiffs sue 18 defendants for releasing waste from Anniston, AL factories

– Class defined as all owners/lessees of property on which defendants deposited waste, and all individuals who “came into contact” with waste

– Plaintiff cites interviews and surveys estimating 93% of plaintiffs are Alabama citizens
Proof of Citizenship for CAFA Exceptions (Evans cont’d)

- 11th Circuit remands: “the evidence adduced by the plaintiffs wholly fails to present a credible estimate” of citizen percentage

- “We have no way of knowing what percentage of the plaintiff class are Alabama citizens”
  - *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006).

Proof of Citizenship for CAFA Exceptions (cont’d)

- Even proof of residence in forum state usually not enough for plaintiffs to prove 2/3 citizenship

- “We’re inclined to think that at least two-thirds of those who have Kansas cell phone numbers and use Kansas mailing addresses for the cell phone bills are probably Kansas citizens . . . *But that’s all guesswork.*”
  - *In re: Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010)
Proof of Citizenship for CAFA Exceptions (cont’d)

• “Residence is prima facie evidence of citizenship.”
• Hendrix v. New Amsterdam Cas. Co., 390 F.2d 299, 301 & n. 9 (10th Cir. 1968) (“[P]roof that a person is a resident of a state is prima facie evidence that he is a citizen and shifts the burden of showing that his . . . citizenship [is] elsewhere [to removing party]”).
• Courts often don’t rely on these cases under CAFA!

CAFA’s Home-State Exception: “Primary Defendants”

• At least two-thirds of class are citizens of the forum state;
  AND
• The “primary defendants” are citizens of the forum state.
  – CAFA does not define “primary” defendants
CAFA’s Home-State Exception: “Primary Defendants” (cont’d)

- All “primary” defendants must be citizens
- Court asks which defendant(s):
  - has the greater liability exposure;
  - is most able to satisfy a potential judgment;
  - is sued directly, as opposed to vicariously ...;
  - is the subject of a significant portion of the claims asserted by plaintiffs; or
  - is the only defendant named in one particular cause of action.

CAFA’s Home-State Exception: “Primary Defendants” (cont’d)


- Both the Alabama casino and the makers of the bingo machines (foreign defendants) are “primary” because court had “no facts to differentiate” them.
CAFA’s “Local Controversy” Exception

• At least two-thirds of class are citizens of the forum state;

• One defendant from whom class seeks “significant relief” and “whose alleged conduct forms a significant basis for the claims” is a citizen of the forum state;

• The “principal injuries” resulting from “conduct of each defendant” incurred in forum;

• No similar class action filed within 3 years

CAFA’s Local Controversy Exception: “Significant Relief”/“Significant Basis”

Evans v. Walter Indus., Inc., 449 F.3d 1159, 1164 (11th Cir. 2006).

– The class seeks “significant relief” against a defendant when the relief sought against that defendant is “a significant portion of the entire relief sought by the class.”

– Court says the relief sought against the Alabama defendant was insignificant relative to relief sought from 17 other defendants
CAFA’s Local Controversy Exception:
“Principal Injuries Occurred in Forum”

- “[T]his provision looks at where the principal injuries were suffered by everyone who was affected by the alleged conduct – not just where the proposed class members were injured.” (S. Rep. No. 109-14).

- Thus a single-state class action will fail if the allegedly illegal conduct was national.
  


CAFA’s Discretionary Exception
(Local Controversy “Lite”)

The Court MAY decline jurisdiction where

- At least one-third, but less than two-thirds, of the class are citizens of the forum state.

AND

- The “primary defendants” are citizens of the forum state.

- Rarely litigated.
**CAFA’s Discretionary Exception:**

Factors Court Must Consider

- Is the case of national or interstate interest?
- Will forum state law govern the claims?
- Did plaintiffs plead to avoid federal jurisdiction?
- Is there a “distinct nexus” between class members and forum state?
- Is the number of plaintiffs from the forum state “substantially larger” than from all other states?
- Have similar class actions been filed in last 3 yrs?

---

**Removal of “Mass Actions” under CAFA**

“CAFA[’s] mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation.”

*Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007).
Removal of Mass Actions (Cont’d)

- “A mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.” 28 U.S.C. § 1332(d)(11)(A).

- “The term ‘mass action’ means any civil action ... in which monetary relief claims
  - of 100 or more persons
  - are proposed to be tried jointly
  - on the ground that the plaintiffs’ claims involve common questions of law or fact.” 28 U.S.C. § 1332(d)(11)(B)(i).

Removal of Mass Actions (Cont’d)

Combining these provisions, to be removable under CAFA, a “mass action” requires:

- At least $5 million in controversy;
- Minimal diversity;
- At least 100 plaintiffs; and
- Common questions of law or fact.

Lowery v. Alabama Power Co., 483 F.3d 1184 (11th Cir. 2007).
Combining these provisions, to be removable under CAFA, a “mass action” requires:

- At least $5 million in controversy;
- Minimal diversity;
- At least 100 plaintiffs; and
- Common questions of law or fact.

*Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007).

A mass action shall not include actions where:

I. All of the claims (and injuries) arise from “an event or occurrence” in the forum state;
II. The claims are joined upon defendant’s motion;
III. The claims are asserted on behalf of the general public under state statute; or
IV. The claims are consolidated only for pre-trial proceedings.

Removal Mass Actions (Cont’d)

• Amount-in-controversy and minimal diversity requirements are analyzed the same as for class actions.

• “Common questions of law or fact” usually straight-forward

• The exceptions to CAFA jurisdiction over class actions (home state, local controversy, etc.) also apply to mass actions

Removal of Mass Actions: One Hundred Plaintiffs

*Scimone v. Carnival Corp.*. 720 F.3d 876 (11th Cir. July 1, 2013)

Plaintiffs divide into two actions: one with 48 and one with 56 plaintiffs.
Removal of Mass Actions:
One Hundred Plaintiffs (*Scimone* cont’d)

- “Key language” of CAFA’s mass action provision is that the claims of 100 or more plaintiffs “*are proposed to be tried jointly.*”
- Proposal to try claims jointly must come from plaintiffs or from the Court (not the defendants)
- Thus plaintiffs can avoid removal by dividing into two actions with under 100 plaintiffs each

---

Removal of Mass Actions:
One Hundred Plaintiffs (*Scimone* cont’d)

- Other circuits generally agree. *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009) (plaintiffs split into seven actions).
- Plaintiffs must be careful not to propose joint trial. *Roma v. Teva Pharmaceuticals*, 731 F.3d 918 (9th Cir. 2013).
An otherwise-removable mass action will not be removable if all claims arise out of the same “event or occurrence.”

CAFA’s legislative history says the exception targets “truly local single event” cases such as those “involving environmental torts such as a chemical spill.”

Sale of condominiums to 177 plaintiffs over 18 months not an “event or occurrence.” *Galstadi v. Sunvest Communities*, 256 F.R.D. 673 (S.D.Fla. 2009).

Removal of Mass Actions:  
“Event or Occurrence” Exception (cont’d)

BUT see Abraham v. St. Croix Renaissance Grp., 719 F.3d 270 (3d Cir. 2013):

• 459 plaintiffs sue aluminum facility for thirty years of hazardous waste emissions.

• Third Circuit remands: “[N]either ‘event’ nor ‘occurrence’ is used solely to refer to a specific incident . . . Limited to an ascertainable period of minutes, hours or days.”

Removal of Mass Actions:  
“Parens Patriae” Cases

In a parens patriae action, the state sues on behalf of some common interest.

• The state is the sole named plaintiff

• But the “real parties in interest” are the state’s citizens.

Is this a CAFA mass action?
Removal of Mass Actions:  
“Parens Patriae” Cases


Unnamed interested parties do not count to the 100-plaintiff requirement, so parens patriae actions are not removable as mass actions

Removal of Mass Actions:  
Supplemental Jurisdiction

- What if not all of the plaintiff’s claims seek over $75,000?


- But CAFA says that for mass actions, jurisdiction “shall exist only over those plaintiffs whose claims in a mass action satisfy the [$75,000 amount in controversy].”

- And there is no supplemental jurisdiction where a federal statute “expressly provides otherwise.” 28 U.S.C. 1367(a).
**Removal of Mass Actions:**

**Supplemental Jurisdiction**

*Mississippi ex. rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736 (Jan. 14, 2014) (citing Lowery) suggests that CAFA’s “mass action” jurisdiction may not reach those plaintiffs whose claims are not $75,000.

Not entirely clear at this point.

---

**CAFA’s Settlement Provisions**

- Parties must notify federal and state officials before seeking court approval of settlements.
- In “coupon settlements”, any attorney fee award must be based off the value of *redeemed* coupons.
## Fairness in Class Action Litigation Act of 2017

### CAFA 2.0?

- **Introduced in 115th Congress (Feb. 2017)**
  - Sponsored by Rep. Bob Goodlatte (R-VA)
  - House Judiciary Committee Chairman

- **Passed House of Representatives**
  - March 9, 2017
  - 220 for – 201 against
    - For: 220 Rs, 0 Ds
    - Against: 14 Rs, 187 Ds

## Fairness in Class Action Litigation Act of 2017 (cont.)

More stringent class-certification requirements

- **Typicality**
  - “same type and scope of injury”

- **Adequacy**
  - Class counsel cannot be related to named plaintiff (family or previous representation)

- **Ascertainability** (NEW)

- Rule 23(f) appeal is **mandatory**
Fairness in Class Action Litigation Act of 2017 (cont.)

Restrictions on class counsel’s fees

• Fees cannot be determined or paid until after the class is paid

• Calculated only based on the money actually collected by the class

• Cannot exceed the money actually collected by the class

Fairness in Class Action Litigation Act of 2017 (cont.)

Other changes to class actions

• No issue classes unless the entire class is certifiable

• Automatic stay of discovery when defendant files MTD or similar

• Class counsel must disclose third-party funding
Changes to diversity jurisdiction

- Misjoinder rules in personal injury cases
  - If 2+ plaintiffs bring suit and defendant removes, federal court will retain jurisdiction over diverse plaintiff, sever non-diverse plaintiff, and remand non-diverse plaintiff only

Changes to MDLs

- More stringent requirement to be included in MDL
- Codifies “Lexecon waiver” process
- More robust appellate review of orders
- Plaintiffs must receive 80% of recovery
Appendix
GEORGIA MANDATORY CLE FACT SHEET

Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

A portion of your ICLE name tag is your ATTENDANCE CONFIRMATION which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. DO NOT SEND THIS CARD TO THE COMMISSION!

ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee’s Bar record. Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.

Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

If you have any questions concerning attendance credit at ICLE seminars, please call:

Toll Free:
1-800-422-0893

Athens Area:
706-369-5664

Atlanta Area:
770-466-0886 x 306
Dear ICLE Seminar Attendee,

Many thanks to you for attending this seminar. We hope that these program materials will provide a great initial resource and reference for you in the particular subject matter area.

In an effort to make our seminar materials as correct as possible, should you discover any significantly substantial errors within this volume, please do not hesitate to inform us.

Should you have a different legal interpretation/opinion from the author’s, the appropriate way to address this is by contacting them directly, which, by the very nature of our seminars, is always welcome.

Thank you for your assistance. It is truly appreciated.

Sincerely,
Your ICLE Staff

**Jeffrey R. Davis**
Executive Director, State Bar of Georgia

**Tangela S. King**
Interim Director, ICLE

**Sherrie L. Hines**
Assistant Director, ICLE