

ALERTS AND UPDATES

Two-disease Rule No More: Pennsylvania Allows Multiple Malignancy Claims

February 24, 2012

In a [decision](#) that impacts all asbestos defendants, the Pennsylvania Supreme Court held that the so-called "two-disease" rule allows plaintiffs in asbestos cases to file multiple malignancy claims. The state Supreme Court affirmed the Pennsylvania Superior Court's decision in *Daley v. A.W. Chesterton, Inc., et al.*, that the plaintiff could bring a claim for mesothelioma 15 years after his prior lawsuit for lung cancer and asbestosis. Prior to the *Daley* decision, it was generally understood that plaintiffs in Pennsylvania were limited to one non-malignancy claim and one malignancy claim.¹

Pennsylvania is now a "separate disease" state, and plaintiffs may bring separate causes of action for separate and distinguishable malignant diseases allegedly caused by the same asbestos exposure. Each separate malignant disease gives rise to a new cause of action with a new statute of limitations. The court indicated in a footnote that this ruling does not address whether there can be more than one cause of action for separate and distinct nonmalignant asbestos-related diseases.

The plaintiff bears the burden to demonstrate that a malignant disease is "separate and distinct" from another malignant disease. The court identified the following factors for consideration, including evidence that the diseases "developed by different mechanisms; originated in different tissues or organs; affected different tissue or organs; manifested themselves at different times and by different symptoms; progressed at different rates; and carried different outcomes."

The *Daley* decision has increased the number of potential lawsuits against asbestos defendants. Further, this decision likely will impact settlement negotiations in malignancy cases, as a settlement on a lung cancer case may no longer buy "future peace" because a plaintiff who subsequently develops mesothelioma is now entitled to another lawsuit under *Daley*. Finally, the decision may lead to disputes regarding whether a subsequent malignant disease is truly separate and distinct, or rather is a metastasis from the original cancer, such as a lung cancer following a colon cancer.

At the trial level, the plaintiff's claims in *Daley* were dismissed pursuant to the *Marinari* progeny, which found that under Pennsylvania's two-disease rule, plaintiffs could bring one cause of action for a non-malignancy and then one action for a malignant disease allegedly caused by the same asbestos exposure.

The state Supreme Court distinguished the *Marinari* progeny, finding that although certain phrases read in isolation supported the two-disease rule, the rationale underlying the decisions did not. The court held:

"[a] thoughtful reading of *Marinari*, *Simmons*, and the other cases discussed above, reveals that the decision to allow a plaintiff to file one cause action [sic.] for a nonmalignant asbestos-related disease, and a subsequent cause of action for a malignant asbestos-related disease, arose from a recognition that requiring a plaintiff to seek recovery for all present and future asbestos-related diseases, including malignant and nonmalignant diseases, upon first experiencing symptoms of any asbestos-related

disease, is likely to result in anticipatory lawsuits, protracted litigation, evidentiary hurdles, speculative damages, and excessive or inadequate compensation."

Further, the court found that:

"the concerns the [separate disease] rule was (sic) designed to address are not limited to situations where a plaintiff suffers one nonmalignant asbestos-related disease and one malignant asbestos-related disease. Indeed, the same difficulties that led the *Marinari* court to conclude that the single cause of action rule was unworkable in situations where an asbestos plaintiff is first diagnosed with a nonmalignant disease, and subsequently diagnosed with a malignant disease, are equally present in situations where an asbestos plaintiff is diagnosed with a malignant disease, and later diagnosed with a separate and distinct malignant disease caused by the same asbestos exposure."

Justice Orié Melvin [dissented](#), noting that she did not follow the logic of the Supreme Court, nor did she "subscribe to the view that it is unjust to deny recovery for a second malignant disease attributable to the same exposure that caused the first malignancy." She further found that the two-disease rule "was not designed to toll the statute of limitations until every conceivable asbestos-related disease has been detected."

In light of *Daley*, defendants may want to negotiate for the release of all future malignancies when settling any malignancy claims. Whether or not plaintiff's counsel will be willing to include all future malignancies remains unknown.

For Further Information

If you have any questions about this *Alert* or would like more information, please contact [Sharon L. Caffrey](#), [Alyson B. Walker](#), any [member](#) of the [Trial Practice Group](#), any [member](#) of the [Products Liability and Toxic Torts Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Note

1. *Marinari v. Asbestos Corp., Ltd.*, 612 A.2d 1021 (Pa. Super. 1992).

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