

## Asbestos Litigation

### 2020 Year in Review

As has been repeated time and again, 2020 was an unprecedented year, both in our everyday lives and in asbestos litigation. The impact of the COVID-19 pandemic on asbestos lawsuits cannot be overstated. Even prior to the pandemic, California courts were under immense pressures and overstretched because of budget cuts – a problem that the effects of COVID-19 have further compounded. Court budgets have been further reduced despite the increased costs required both to ensure courthouse safety for in-person proceedings and to rush technology upgrades to allow for remote hearings. During the early months of the pandemic, the courts and litigators on both sides struggled to figure out what the "new normal" would be with regard to court filings and appearances, depositions, and most crucially, how to handle jury trials. Although each court has approached these issues in various ways, on the whole most court hearings are proceeding via telephone and/or Zoom, and depositions are moving forward remotely despite connection issues and user challenges.

The main difference among the various courts is how they are handling jury trials. As we write this update in mid-January 2021, Los Angeles has not held an asbestos-related trial since March 13, 2020, while it continues to struggle both to develop trial management orders that are fair to both sides and to pull in enough jurors (Los Angeles has reported single-digit return rates in response to juror summonses). On the opposite end of the spectrum, since late July 2020, Alameda County Superior Court has tried several asbestos trials to verdict, although there have been many hiccups and objections along the way. Staking out the middle ground, San Francisco Superior Court has repeatedly announced its readiness to try cases, but last-minute settlements

have derailed planned remote trials. We anticipate the impact of the delays in trials and reduced court budgets will be felt for years to come. Walsworth continues to monitor the courts and their ever-changing orders on trials during COVID-19, and up-to-the-minute charts analyzing and summarizing those orders can be found at <https://www.wfbm.com/covid-19-court-status/>.

With this backdrop in mind, we continue our annual tradition of providing you with an analysis of filings in California's asbestos-related matters, the judges presiding over them, trends in major asbestos jurisdictions, recent appeals that have had an impact, and a wrap-up of all asbestos trials that reached a verdict in 2020.

#### Volume of Asbestos Cases and Overall Filing Trends

##### ► San Francisco Superior Court

Despite the unusual circumstances of 2020, San Francisco filings increased significantly from 2019. From January to December 2020, there were 89 asbestos cases filed. We saw over double the number of mesothelioma matters filed – 18 as compared with only 8 in 2019. There were 34 disputed asbestosis matters – 8 more than had been filed in 2019. We also saw 28 new lung cancer cases – 11 more than we saw in 2019. "Other disease" asbestos-related cases were approximately the same in number as in 2019, at 9 filings. Brayton Purcell continued its trend of filing the most cases in San Francisco. Plaintiffs' firms Roger Gold, Waters Kraus & Paul, Simon Greenstone, Simmons Hanly, and Maune Raichle each filed a few of the 2020 cases. Even with the rise of case filings in 2020, the new case numbers remain below 2018 filings (103) and 2017 filings (93).

#### ▶ Alameda County Superior Court

Although Alameda got off to a slow start by ceasing acceptance of any new filings during the initial months of the pandemic, filings quickly picked up throughout fall and winter 2020, and Alameda ended up with an increase in case filings over 2019, though not as significant as that seen in San Francisco. A total of 65 new asbestos cases were filed in Alameda: 54 mesothelioma matters (just below 2019's 55 filings), 8 lung cancer cases (compared with 6 in 2019), and 3 disputed asbestosis matters (compared with 1 in 2019). Kazan led the filings in Alameda with 20. Maune Raichle was a close second with 15 filings. Other firms that filed matters in Alameda were Pearce Lewis (6), Brayton Purcell (5), Weitz & Luxenberg (4), Ron Shingler (4), Simmons Hanly (2), The Paul Law Firm (2), DeBlase Brown Eyerly (1), Roger Gold (1), Gori (1), Trey Jones (1), Keller Fishback & Jackson (1), The Lanier Firm (1), and newcomer Conor Nideffer (most recently associated with Dean Omar Branham Shirley) (1).

#### ▶ Los Angeles Superior Court

Unlike Northern California, Los Angeles experienced a slight drop in filings: only 118 new cases were filed in 2020, compared with 2019's 134 new matters. The decrease in filings may be due in part to the Los Angeles Superior Court's continuing delays in holding civil jury trials during the pandemic, but it could be simply a matter of chance, as 2020's filing numbers were on par with 2018's. By our count, the firm with the largest number of new filings in Los Angeles was the Simmons Hanly firm, followed by Waters Kraus & Paul and Weitz & Luxenberg.

#### ▶ Other Jurisdictions

There were no filings in Solano County in 2020, a jurisdiction where we usually see at least 1 or 2 filings. There was 1 matter filed in Santa Barbara County Superior Court and 1 matter filed in Contra Costa County Superior Court. There were 11

matters that originated in federal courts in 2020, while several more matters were removed from state courts.

#### Trends Associated With Los Angeles Superior Court

2020 started with Judge Maurice Leiter presiding over the Coordinated Asbestos matters, while Judge David Cunningham was on temporary reassignment to another department. Judge Leiter continued to preside over Department 15 during the early stages of the pandemic until Los Angeles Superior Court reopened its doors to the public (albeit in a limited fashion) on June 22, 2020. At that time, Judge Cunningham resumed his duties in Department 15, and he continues to preside over asbestos matters today.

Los Angeles had a relatively smooth start to pandemic operations – continuing to allow new filings after the imposition of the California stay-at-home orders and ramping up its own remote connection technology – called Los Angeles Court Connect – to allow for telephonic appearances at most hearings. Unfortunately, the Los Angeles Superior Court has so far been unsuccessful in developing a workable method for conducting jury trials during the pandemic; since March 13, 2020, Los Angeles has not held *any* civil trials (asbestos or otherwise) despite preference orders and trial settings that have long since passed.

Even though civil jury trials have been permitted by court order since October 5, 2020, it appears that no civil jury trial will go forward in the near future. It has been reported for weeks that the return rate for jury summonses is in the single digits – and with Los Angeles County COVID-19 cases continuing to rise, it is expected that juror return rates will remain very low. Compounding issues is the very limited number of courtrooms that can facilitate the social distancing needed for in-person jury trials; even the very largest of Los Angeles courtrooms may be unable to accommodate asbestos jury trials, which typically

involve numerous defendants. Furthermore, those jurors who are reporting for jury service in response to summonses are being routed first to criminal trials, where there is also a very significant backlog. Once the criminal trial backlog is eased, jurors will be allotted to Unlawful Detainer matters, which have also been stayed since March 2020.

Since early July, Judge Cunningham has attempted to come up with solutions to allow asbestos jury trials to go forward, but he has been somewhat hamstrung by the lack of a comprehensive order that civil trials be held via remote platforms, and the lack of any agreed-upon management orders for remote trials. (At this time, all parties must stipulate to a remote jury trial – a daunting task, particularly in asbestos cases with numerous defendants.) Judge Cunningham has requested that parties consider either conducting trials with fewer than 12 jurors or forgoing a jury altogether in favor of a bench trial (with no advance knowledge of which judge would preside over that bench trial); but again, he has no present ability to actually force the parties to accept either option. We are currently aware of only one asbestos matter where the parties have stipulated to a remote trial; that trial has not yet begun, and the parties and the court are still developing trial management orders. Several other matters are stalled due to a lack of agreement by the parties and/or a lack of readiness. Judge Cunningham has made it clear that he intends to preside over the first asbestos-related trial ready to proceed.

Regardless of whether a matter will actually proceed to trial on its assigned trial date, Judge Cunningham has implemented strict rules to ensure parties are ready for trial, including an extremely detailed plan for how the matter will be tried in person. Judge Cunningham has repeatedly continued final status conferences and trials if he determines the pretrial documents and case are not ready for the trial to proceed. Judge Cunningham has also ordered the parties to mediation leading up to trial in many of the currently pending cases.

Outside of trial-related issues, Judge Cunningham has, for the most part, worked to move cases forward under new pandemic realities. In response to defense concerns that remote depositions of a plaintiff are unfair when plaintiff's counsel is present in person but the witness and all defense counsel are remote, Judge Cunningham ordered that neither party could be present in the same building as the plaintiff while he was being deposed. He has granted a limited number of motions for summary judgment, which have been primarily based on a lack of identification. However, he has also routinely denied defendants' motions for summary adjudication on the issue of punitive damages. Most recently, Judge Cunningham has been much more stringent with respect to granting trial date preference, an important stance given the current backlog of trials due to COVID-19 court slowdowns and closures.

#### [Trends Associated With San Francisco Superior Court](#)

Like Los Angeles, San Francisco Superior Court has not held an asbestos trial since March 2020; however, that lack of trials in San Francisco has been caused in part by last-minute settlements rather than an inability to hold trials. San Francisco has tried three non-asbestos civil matters to verdict in the Hall of Justice, which houses the only courtroom large enough to accommodate the social distancing needed for in-person trials. In those trials, everyone wore a mask and a face shield, and a plastic barrier was placed around the witness box. For those asbestos cases that have made it to the early stages of trial, the court had intended to proceed with a hybrid-type trial, with lawyers and jurors in person and witnesses appearing remotely.

Over the course of 2020, there was some confusion as to whether in-person settlement conferences would be required by Commissioner Pang Ly despite stay-at-home orders. In September, Ms. Ly required in-person appearances of trial counsel at settlement conferences but eventually excused carriers from the same because of poor air quality caused by the

many wildfires burning throughout Northern California at the time. At present, it appears that Ms. Ly may allow remote appearances for settlement conferences set in the very near future, but she may revert to requiring in-person appearances for all interested parties, including carriers.

### Trends Associated With Alameda County Superior Court

In the early days of the pandemic, Alameda fully closed its doors and did not allow filings of any kind, including new complaints, for nearly two months. When the courts reopened, there were initial struggles to find not only available hearing dates to address new filings but also hearings on motions that had been continued because of the closures, and to determine how to resume trials. After those initial issues were resolved, the asbestos department began moving full steam ahead with conducting case management conferences and other hearings remotely over CourtCall. Settlement conferences have been held via a platform called BlueJeans, the court's remote appearance platform. This has been generally well received, as it avoids the multiday travel that is usually required for in-person settlement conferences.

Just as with Los Angeles County, Alameda faces a large backlog of criminal matters, so all non-preference asbestos trials are being continued for various lengths of time. However, Alameda has been aggressively pushing civil preference cases to and into/through trial.

In late July, Alameda began its process for trying asbestos cases. Over significant objection by defendants, matters were assigned to trial courts, and from there the assigned trial judges determined whether the matter would proceed from jury selection to jury deliberations remotely (and how) or it would use a hybrid model with jury selection, the jury, and limited counsel allowed in the courtroom, and witnesses, remaining counsel, and the public participating and observing via remote

methods. The early days of these trials were rough going with many stops and starts due to technology issues, including juror internet accessibility issues, glitches in the court public access method (LiveStream), user error issues, problems with putting parties into the correct breakout rooms, etc. Two lawsuits have been tried to verdict, but one issue that plagued both cases was the disparate levels of attention paid by the jurors in the more informal environment of their respective homes. In both cases, the judges had to repeatedly remind jurors to pay attention, as there were frequent complaints by defense counsel that the jurors were talking to others off camera, continuing to work on other non-case matters, etc. One trial that began as a hybrid before Judge Brad Seligman, *Wilgenbusch*, changed to a fully remote proceeding following a COVID-19 exposure by one of the jurors. Defendants filed numerous motions for mistrial citing many of these issues, but all such motions were denied.

Adding to the complex logistical issues presented by remote trials is the fact that they require significantly more time for jury selection than do in-person trials. In Alameda County, jurors are required to arrive in person on their first day of service to fill out hardship forms and jury questionnaires. Because of social distancing, the maximum panel size is 50, so it is usually necessary to bring in several panels over multiple days. It has also been reported that Alameda only has the capability to hold two remote civil jury trials at a time due to limited court availability and resources.

Even with vaccines beginning to be distributed in California, it is unclear when civil trials will resume in person and exactly how they will proceed. It is anticipated that social distancing requirements may remain in place through 2021, which would continue to limit the number of individuals that may appear in person and could result in objections to those trials. At least one plaintiffs' firm has filed motions to allow an off-site trial in Alameda (aimed at venueing the trial in a nearby convention center or similarly large

locale); however, the costs of an outside trial, which would include not only access to the internet but also security and the like, are significant and make the idea of off-site trials less feasible.

► Hon. Jo-Lynne Q. Lee

Judge Jo-Lynne Lee remains the presiding judge over all asbestos matters in Alameda County Superior Court. Judge Lee repeatedly continued hearings this past year to allow for additional discovery or motion practice, including hearings on motions for summary judgment and motions to quash for lack of personal jurisdiction. She granted a limited number of motions for summary judgment and denied motions for summary adjudication filed by plaintiffs' counsel on defendants' affirmative defenses. In light of the *People v. Sanchez* ruling, which limits the testimony of a corporate representative to that witness's own personal knowledge, Judge Lee has generally allowed limited testimony regarding corporate knowledge that is tied closely to corporate documents if the witness has no personal knowledge of the issues in a given matter.

Over the summer, Judge Lee ruled that joinders to another party's motion – something regularly filed by co-defendants in asbestos matters – were insufficient and that each party would have to file its own motion in order for its position to be considered. This requirement is puzzling, as it increases the burden on the already overburdened court to read motions, which are for the most part substantially similar and allowed by the Code.

In addition to her normal role presiding over all asbestos cases, Judge Lee also served as the trial judge for one of the asbestos cases tried to verdict in Alameda County in 2020, *Ocampo*, which resulted in a defense verdict. (Judge Lee presided over the matter after Judge Frank Roesch recused himself.)

► Other Alameda Judges

Aside from Judge Lee, Alameda asbestos trials have

been assigned to a variety of judges, including Judge Roesch, Judge Evelio Grillo, Judge Seligman, and others. For now, we focus on Judges Roesch, Grillo, and Seligman.

The most noteworthy judge in 2020 was Judge Roesch, who gained attention after being assigned one of the first pandemic asbestos trials, *Ocampo*. After initially appearing on the bench in a full-face gas mask, Judge Roesch determined that the trial would be 100% remote, which required the use of remote technologies and a quick learning curve for everyone on how that would work. The audio for the trial was also livestreamed for the public. During jury hardshipping, Judge Roesch, who was unaware that his microphone was on, was heard commenting to his clerk on his own exposure to asbestos. According to a defense motion to disqualify, Judge Roesch was heard stating that he had disturbed insulation at a time when he "did not know any better" about "the stuff," and that an asbestos-related illness "would be showing up about now." He made further remarks regarding his exposure during a hearing to address those initial remarks. Ultimately, Judge Roesch recused himself prior to the hearing on the motion to disqualify because he did not want to delay trial. Since then, additional trials have been assigned to him, including *Williams*, a Maune Raichle mesothelioma trial, which is still in its early stages. Defendants have filed multiple motions to disqualify Judge Roesch based on his earlier remarks and general anti-defense demeanor, but to date he has refused to recuse himself and has denied each motion to disqualify.

Judge Grillo did not try a matter to verdict in 2020, but he made an interesting ruling regarding the issuance of laptops to jurors. In a trial that ultimately resolved in its early stages, the parties had to address how to get jurors equal access to the remote proceedings if they did not have laptops or other internet-enabled communication equipment. Initial discussions with the parties on how to provide such technology to jurors who did not have it did

not reach fruition before the case resolved, and there were few complaints with regard to Judge Grillo's handling of the trial prior to its resolution.

Judge Seligman presided over the *Wilgenbusch* trial, one of the only other trials that ended with a verdict in the COVID-19 era. Initially, he determined that the matter could proceed as a hybrid of in-person and remote proceedings, but the trial eventually converted to fully remote due to coronavirus exposure concerns. At trial, Judge Seligman forbade any corporate witness testimony that went beyond the witness's own personal knowledge, which looks to be a trend in Alameda and a growing issue of concern for defendants.

#### Trends Associated With United States District Courts

As with state courts, California federal district courts saw a similar general stoppage of in-person hearings during the COVID-19 pandemic. There were multiple stops and starts to in-person hearings as the spread of the virus waxed and waned over the year, but ultimately the federal courts closed the year with very few in-person hearings going forward.

There were certainly civil jury trials that went forward in California federal courts, but none were asbestos matters. In one Southern District civil trial, it was reported that the witness stand in the courtroom was surrounded by a plastic shield, but the witnesses within the shielding did not wear masks or shields. Counsel were also discouraged from wearing masks because the judge had difficulty hearing them.

Several judges have gone on the record noting their preference for remote hearings, citing the reduced need for extended travel to a hearing that could last as little as 30 minutes. At least 13 federal district courts, including California's own Northern District, intend to continue to livestream audio of select civil proceedings in order to improve public access to the courts. However, unlike Alameda, the district courts

remain reluctant to livestream trial and civil proceedings, the testimony of jurors and witnesses, and any sealed, confidential, and/or classified materials.

#### Noteworthy Rulings

##### ► *People v. Veamatahau*

Early in 2020, the California Supreme Court clarified the meaning of "case-specific" inadmissible hearsay in *People v. Veamatahau*. The ruling clarified what has become a growing issue in asbestos matters, which generally involve exposure claims from events that happened decades ago, and limitations that courts were placing on witnesses to testify only regarding facts of which they have personal knowledge in light of the 2016 holding in *People v. Sanchez*. *Veamatahau* clarified that the "distinction between case-specific facts and background information thus is crucial – the former may be excluded as hearsay, the latter may not."

As a reminder, the court in *Sanchez* changed decades of expert witness testimony practice, holding that an expert witness can no longer testify about "case-specific facts" asserted in hearsay statements unless they are independently proven by competent evidence or are covered by a hearsay exception. Another side effect of the *Sanchez* ruling was its application by some courts to limit corporate witness testimony, which has become problematic in asbestos matters where defendants are oftentimes required to produce corporate witnesses who may not have personal knowledge of events that took place decades prior but are still required to educate themselves about such events prior to giving testimony. At trial, plaintiffs' counsel has been using *Sanchez* to move to exclude the testimony of the very corporate witnesses they forced defendants to educate and produce for deposition. The application of *Sanchez* to limit the ability of corporate defendants to defend themselves by providing their own testimony based on their own witnesses' necessary review of old historic documents and

prior testimony is a very troubling development in California asbestos litigation.

In *Veamatahau*, the defendant was arrested with pills in his pocket. The prosecution's expert criminalist testified that he was able to identify the pills found on the defendant by matching them to a drug identification database. On appeal, *Veamatahau* argued that the criminalist's expert testimony should have been excluded as case-specific hearsay under *Sanchez*.

The California Supreme Court explained that, as codified in *Evidence Code* sections 801 and 802, the hearsay rule has not traditionally barred and does not presently bar an expert's testimony regarding his general knowledge in his field of expertise. However, the court ruled that an expert may not relate inadmissible "case-specific facts about which the expert has no independent knowledge."

More specifically, the court found that (1) the expert's testimony concerning standard practice in the field was not hearsay; (2) the expert's testimony that the seized pills contained alprazolam based on his own visual inspection of the pills also was not hearsay; and (3) while some of the expert's testimony under cross-examination constituted hearsay (e.g., testimony concerning information in the drug identification database the expert used), such testimony was admissible because it was not case-specific.

We believe *Veamatahau* can be used to push trial courts away from any tendency they may have toward applying *Sanchez* to limit the ability of corporate defendants to defend themselves with corporate witness testimony based on matters outside their personal knowledge.

*People v. Veamatahau* (2020) 9 Cal. 5th 16

▶ *Johnson v. Monsanto Company*

In July, the First District Court of Appeal held in a

partially published opinion that a plaintiff is not entitled to future non-economic damages for a period of years that exceeds his or her anticipated lifetime. In *Johnson v. Monsanto Company*, a non-asbestos matter, the court held that the plaintiff, who claimed he contracted non-Hodgkin's lymphoma through his exposure to Monsanto's herbicides, was entitled to future non-economic damages for his actual anticipated lifetime only.

During trial, the evidence indicated that Johnson, who would otherwise have a life expectancy of 33 additional years, was not expected to survive more than another two years. Johnson's counsel argued that Johnson was nonetheless entitled to future non-economic damages of \$1 million per year for each of the 33 years that he would have lived but for his exposure to Monsanto's products. The jury appeared to have accepted counsel's argument and rendered a verdict in favor of Johnson, including awarding future non-economic damages of \$33 million.

At trial, the jury was instructed that Johnson was entitled to recover for "future pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation and emotional distress" only if he proved that he was "reasonably certain to suffer that harm." Jurors were further instructed that if they decided Johnson had suffered damages that would continue for the rest of his life, they needed to determine "how long he will probably live." In awarding damages for years in excess of Johnson's actual expected lifetime, the court found that the jury deviated from these instructions. Johnson was not entitled to non-economic damages for a "shortened life expectancy," and the instructions provided to the jury did not authorize such damages because they are not recoverable in California. Given that Johnson was still alive at the time of oral argument in this matter, two years after the date of trial, the court concluded that \$4 million was an appropriate award for future non-economic damages. The court reduced the

award of economic damages from \$39,253,209 to \$10,253,209.

*Johnson v. Monsanto Company* (2020) 52 Cal.App.5th 434, as modified on denial of reh'g (Aug. 18, 2020), review denied (Oct. 21, 2020)

► *Sabetian v. Exxon Mobil Corporation*

In an unpublished opinion issued in October, the Second District Court of Appeal held that (1) American oil companies did not own, possess, or control Iranian facilities where the plaintiff – who at the time was an Iranian employee of the Iranian facilities – worked, which would impose a duty on them to protect Iranian refinery employees/workers from exposure to asbestos, under the premises liability statute; (2) the balancing test used to determine whether a duty of care arose from a contract in favor of a non-contracting party did not support imposition of liability on American companies; and (3) the trial court did not abuse its discretion in ordering monetary and evidence sanctions based on the plaintiff's counsel's conduct in relation to the plaintiff's deposition.

The plaintiff had alleged that Houshang Sabetian had been exposed to asbestos while working for the National Iranian Oil Company at the Abadan refinery from about 1960 to 1979 in facilities allegedly controlled by Chevron and Exxon. The plaintiff asserted that a 1954 contractual agreement between the Iranian government and a consortium of international oil companies, including the defendants' predecessors in interest (the Agreement) meant that the defendants owed a duty of care to the plaintiff to protect him and other Abadan refinery workers based on a special relationship between their predecessors and refinery workers that arose out of the Agreement. The defendants brought summary judgment motions on the grounds they did not owe a duty of care to the plaintiff, which were granted by the trial court.

The court of appeal concluded that contrary to the plaintiff's assertions, neither the Agreement nor the evidence presented by the Sabetians showed the predecessors to the Chevron and Exxon defendants operated or controlled the Abadan refinery. Nor did the Agreement create a special relationship between the predecessor companies and the Abadan refinery workers. In explaining its decision, the court reasoned that a duty to a plaintiff may arise from a contract based on public policy considerations, but the two most significant factors of the six-factor balancing test do not support imposition of liability on the defendants. Most significantly, the Agreement was not intended to affect Sabetian and other Abadan refinery workers, but rather to accelerate Iranian oil production and exportation to the global market. In addition, because the predecessor oil refining companies had no ability to control day-to-day operations at the Abadan refinery, it was not foreseeable that the companies' conduct would harm Sabetian and other refinery workers.

*Sabetian v. Exxon Mobil Corporation* (2020) 57 Cal.App.5th 1054, as modified (Nov. 25, 2020)

► *Bader v. Avon Products, Inc.*

A published decision by the First District Court of Appeal held that a plaintiff did not have to prove a product was defective to satisfy the relatedness prong of the personal jurisdiction inquiry. In *Bader*, the plaintiff alleged she purchased asbestos-contaminated personal talc products from Avon representatives in California, which caused her mesothelioma. Avon moved to quash the complaint, arguing the plaintiff had failed to establish that Avon sold, and the plaintiff used, talc powder products in California that contained asbestos as opposed to talc powder products without asbestos. Avon further argued the plaintiff had failed to show that Avon injected the particular products into California in a manner that related to the plaintiff's acquisition and usage of those products.

The plaintiff appealed, contending that (1) she satisfied her burden on the relatedness prong with evidence of Avon's sale of the allegedly defective talc powder products to the plaintiff in California, (2) her suit arises out of this contact, and (3) she did not have to additionally prove that these products were in fact defective (contained asbestos) at the jurisdictional phase. Among Avon's arguments was the position that *Bristol-Myers Squibb Co. v. Sup. Ct. of California, San Francisco County* (2017) 137 S.Ct. 1773, 1781, required proof that the talc powder products used by the plaintiff actually contained asbestos because sales of talc powder products without asbestos cannot serve as the jurisdictional basis for claims relating to asbestos-containing talc powder products.

In *Bristol-Myers*, the U.S. Supreme Court held that in order to exercise specific jurisdiction over a claim, "there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.' When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."

The *Bader* court reasoned that *Bristol-Myers* requires that in order for a court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum – not that a plaintiff suing over injury caused by an allegedly defective product prove the product defect at the jurisdictional phase.

The court of appeal concluded that not requiring proof of a product defect at the jurisdictional phase is consistent with the purpose of the personal jurisdiction doctrine, which does not focus on whether the defendant is liable, but instead on whether the defendant has created sufficient minimum contacts with the forum such that requiring him to answer a lawsuit there related to those activities does not offend "traditional notions of fair play and substantial justice."

Following review of Avon's sales model, and in conjunction with its determination that the plaintiff did not have to prove the products defectiveness at the jurisdictional phase in order to satisfy the relatedness prong, the court held that the undisputed evidence demonstrates that *Bader's* claims arose out of or related to Avon's California contacts.

*Bader v. Avon Products, Inc.* (2020) 55 Cal.App.5th 186, 200, reh'g denied (Oct. 22, 2020), review denied (Dec. 23, 2020)

#### Recent California Asbestos Litigation Jury Verdicts

In light of COVID-19, there were very few matters tried to verdict in California in 2020. In all, only 3 cases were tried to verdict, compared with 25 in 2019; all 3 matters were tried in Alameda County Superior Court. The *Mahoney* matter discussed below was the only matter tried to verdict before the pandemic and resulted in a plaintiffs' verdict. The other two trials conducted during the pandemic saw one plaintiffs' verdict and one defense verdict.

The following is a summary of the verdicts:

#### ► *Mahoney v. Kaiser Gypsum Co., Inc.*

In *Mahoney v. Kaiser Gypsum*, tried before Judge Winifred Smith in Alameda County, the jury returned a **plaintiff verdict** of \$250,000 in favor of plaintiffs Louise Mahoney, Michael Mahoney, David Mahoney, James Mahoney, Linda Mahoney, Cambra Mahoney, and Dennis Mahoney. The plaintiffs, represented by Brayton Purcell, argued that decedent Russell Mahoney, 85, was diagnosed with lung cancer as a result of his exposure to asbestos, including asbestos-containing Kaiser Gypsum joint compound, between 1943 and 1968. Jurors allocated 20% of the fault to defendant Kaiser Cement Corp., 1% to defendant Kaiser Gypsum Company, 50% to Russell Mahoney, 1% to non-party the U.S. Navy, 13% to non-party Fatta, and 15% to other non-defendant companies. The jury awarded \$200,000 in

economic damages and \$50,000 in non-economic damages, which the court reduced in the judgment to \$10,500.

► *Ocampo v. Honeywell International, et al.*

A **defense verdict** was entered on September 3, 2020, in favor of Honeywell International by an Alameda County Superior Court jury in *Ocampo v. Honeywell International, et al.* The Paul Law Firm represented plaintiffs Ricardo and Elvia Ocampo, who alleged that plaintiff Ricardo Ocampo was exposed to asbestos at least in part by brake linings sold by Bendix Corp. – a brand for which Honeywell bears liability because of corporate succession – while working as a janitor at various auto dealerships and manufacturing businesses between 1991 and 1997.

Over objections by Honeywell, the *Ocampo* trial was tried fully remotely, from voir dire to jury deliberations, using remote videoconferencing platforms. In light of comments made by the originally assigned Judge Roesch to his clerk regarding his own exposure to asbestos that were caught by a "hot mic," the matter was transferred to Judge Lee, who presided over the remainder of the trial. There were several objections made to remote trial and numerous complaints regarding the lack of attention paid by jurors due to the perceived informalities of the trial. Though there were issues with jurors paying attention, overall the jury was considered to be attentive and reportedly asked questions of every witness.

► *Wilgenbusch v. American Biltrite, Inc.*

In late September 2020, an Alameda County Superior Court jury returned a **plaintiffs' verdict** totaling \$2,545,000 in favor of plaintiffs Admiral Ronald Wilgenbusch and his wife, Judith Wilgenbusch, in *Wilgenbusch v. American Biltrite, Inc.*, which was tried before Judge Seligman. The only defendant remaining at trial was Metalclad. The plaintiffs, represented by Maune Raichle, alleged that

Adm. Wilgenbusch, 82, who served his entire career in the Navy, suffered from mesothelioma caused by exposure to various asbestos-containing products during his service, including asbestos-containing insulation.

The *Wilgenbusch* trial started as a hybrid trial, with jurors and one attorney for each party present in the courtroom. After a COVID-19 scare for one of the jurors, the case moved to a fully remote trial format. There were three motions for mistrial filed related to the trial, including when Adm. Wilgenbusch was sent to a breakout room with the jury while the attorneys and judge were in a sidebar, during which time he communicated with the jurors regarding Zoom backgrounds. All the motions for mistrial were denied.

At verdict, Metalclad was found 7% liable by the jury; however, the court found it responsible for OCF (12%) and Pabco (12%) as part of the same chain of distribution of the same injury-causing products. The Navy was found to be 50% at fault, while Adm. Wilgenbusch was found to bear 4% fault. The plaintiffs' prior settlements totaled \$1,880,000, \$940,000 of which was found to be attributable to the personal injury action by Judge Seligman. After setoffs and apportionment, Metalclad was ultimately responsible for \$1,012,044.

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