

# STATE HIGH COURT REJECTS “ANY FIBER” ASBESTOS LIABILITY THEORY

by

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The Pennsylvania Supreme Court, in its recent *Betz v. Allied Signal* ruling (--- A.3d ----, 2012 WL 1860853 (Pa. Sup. Ct., May 23, 2012), joined a chorus of other courts around the country in rejecting the *any exposure* theory as unscientific and insufficient to support a toxic tort case. This ruling has wide-ranging implications – it represents the third state supreme court to reject *any exposure* testimony, and the ruling delivers another significant blow to the causation theory that is driving most of the current asbestos mesothelioma cases around the country.

The cadre of medical causation experts who testify routinely on behalf of plaintiffs in today’s asbestos litigation universally assert some version of the notion that even the smallest amount of occupational exposure must be considered a cause of mesothelioma – no occupational or para-occupational (e.g., back-yard auto brake jobs) exposure can be excluded. The theory has supported the expansion of asbestos litigation far beyond the original manufacturers of insulation and the “dusty trades” jobs, those that have long been known to cause asbestos disease. Today’s asbestos litigation encompasses virtually any American company that has had any asbestos in a product or a building. A few brake jobs, removing a few gaskets, stripping insulation off a wire, handling minor products such as dental tape, or just walking by others doing such jobs – these and other miniscule exposure situations have resulted in trials and sometimes multi-million dollar asbestos verdicts in recent years. The *any exposure* theory fundamentally contradicts the most critical tenet of toxicology – that the dose makes the poison. But this is no surprise; asbestos litigation historically has spawned rules and theories that would find little or no support in science or in other areas of law.

*Betz v. Allied Signal* is one of a large and growing group of opinions rejecting the *any exposure* theory. See Behrens, Mark A., and Anderson, William L., *The “Any Exposure” Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW U. L. REV. 479 (2008). In *Betz*, the plaintiff encountered very low but regular exposures to a form of asbestos (chrysotile) considerably less potent than other forms through his lifelong work as a vehicle mechanic and handling of asbestos-containing brake pads. Plaintiff’s medical expert declined to determine how much exposure this work caused or whether the dose received from the overall work history was enough to cause plaintiff’s disease. Instead, he opined simply that any workplace exposure was sufficient, and thus plaintiff’s work had to

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be considered a cause of his mesothelioma. The length of employment, number of brake jobs, and amount of fibers released or breathed were all irrelevant to his opinion.

The trial judge in the original *Betz* matter issued one of the earliest opinions rejecting this testimony in 2005. This trial court opinion remains one of the clearest and most effective eviscerations of the *any exposure* theory, and it has been cited and relied on by multiple other courts and defendants in other cases. Nevertheless, the Pennsylvania intermediate appellate court reversed the trial judge last April, leaving the state of law in Pennsylvania in doubt. The Pennsylvania Supreme Court, in the unanimous and forceful *Betz* opinion, reversed the intermediate court and reinstated the trial judge's decision. There is no longer any doubt what the law is in Pennsylvania – plaintiffs' experts may not testify that an occupational exposure is causative regardless of dose. They must assess the dose and prove that it is sufficient to cause asbestos disease.

The Pennsylvania court ruling brings Pennsylvania in line with almost thirty decisions in the past seven years that reject *any exposure* testimony. Those courts include the United States Court of Appeals for the Sixth Circuit, which has rejected the *any exposure* theory three times; the Texas Supreme Court and several Texas appellate courts; the New York Court of Appeals (in a benzene case); and trial and appellate courts in Washington (both state and federal), Georgia, Delaware, Ohio (federal district), Florida (state and federal), and Mississippi. Some of these courts have excluded plaintiffs' experts who rely on this theory, many of whom had never before been excluded in asbestos cases. Others have dismissed cases as lacking causation and scientific support. In the asbestos world, this pattern of opinions represents nothing short of a paradigm shift. The *any exposure* theory is the engine driving most of today's asbestos cases. Without it, most of the low-dose asbestos cases pending in today's courts would have no causation support and could not reasonably be prosecuted.

Despite the Pennsylvania ruling, the *any exposure* theory is by no means a thing of the past – it continues to form the core of plaintiff mesothelioma litigation in most jurisdictions, and it is being challenged on an almost weekly basis in that docket. Plaintiffs have also made attempts in recent years to export the theory into benzene, diacetyl, groundwater contamination, and other toxic tort cases. The Ninth Circuit Court of Appeals has an *any exposure* case pending on its docket, and the Virginia Supreme Court just accepted *certiorari* for one in that state. The key to these cases is whether the reviewing court takes a close look at the literature, logic, and claimed support for the theory. Almost universally, where close review occurs, the theory is rejected. See Anderson, William L., Levitan, Lynn, and Tuckley, Kieran, *The "Any Exposure" Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, KANS. J. LAW & PUB. POLICY (2012, accepted for publication). The *any exposure* theory is at best speculation and is not founded on credible science. Testimony based on this theory should never have gained a foothold in asbestos litigation, nor should the theory play any role in other toxic tort cases. It is encouraging to see courts like Pennsylvania's step up to their gatekeeper roles, reject this testimony, and begin to place curbs on the endless expansion of asbestos cases.