

DEFEATING PLAINTIFF'S NEW THEORIES ON FAILURE TO WARN IN MASS TORT CASES

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**DEFEATING PLAINTIFFS NEW THEORIES
ON FAILURE TO WARN IN ASBESTOS LITIGATION**

I. Plaintiff's "New" Theories, or "How I Won My Case Without Putting On ANY Evidence About Your Client"

- a. Responsibility to Warn for Others' Products (*e.g.*, external insulation)
- b. Imputed Knowledge of Asbestos Hazards Using 3rd-Party Documents

II. Duty to Warn About Other Peoples' Asbestos

a. Plaintiff's Argument:

- i. Companies are responsible for foreseeing the "Environment" in which the product will be used, and manufacture a reasonably safe product for intended use in that environment.
- ii. ∴ Foreseeability of Hazard = Duty to Warn

b. How To Defeat Plaintiffs' Argument:

i. Make Good Law

1. Plaintiffs' argument has surface appeal, but actually is contrary to basic principle underlying products liability – responsibility for hazards of YOUR product!
2. *Strock* (2006): "If you didn't sell the asbestos - no duty"
 - a. Result: Summary Judgment
 - b. Now the law in (most of) Virginia
3. *Balthazar* (2007): "If you didn't supply, specify, or recommend the asbestos - no duty"
 - a. Result: Defense Verdict
 - b. Now the law in Massachusetts

ii. Diligent Pretrial Discovery

1. Depositions
 - a. What to do: Establish that the insulation was manufactured/supplied/specified/applied/ripped out by someone else [Example]
 - b. What not to do [Example]
2. Documents – Find Them and Review Them [Example]

iii. Use (and Appeal to) Common Sense

1. Industry Usage/State-of-the-Art: No equipment manufacturer has EVER warned about someone else's asbestos
2. OSHA Regulations: Only require warnings by manufacturers
3. Proximate Causation: You didn't make the product, so you don't know much about it - a warning about someone else's asbestos that may or may not have been used on/near your product would not have been helpful, and would not have told the Purchaser (Navy/Plant/Employer) anything it didn't already know
4. Does your car warn you that gasoline fumes are dangerous? Why not?

III. Imputed Knowledge of Asbestos Hazards Using 3rd-Party Documents

a. Plaintiffs' Argument (used on your corporate witness):

- i. You say you didn't learn about asbestos hazards until 1968, but...
- ii. Here's some documents you had access to in 1946 that talk about asbestos hazards.
- iii. ∴ You are a liar and a bad company that needs to be taught a lesson.
- iv. Example: Balthazar Trial Video

b. How to Defeat Plaintiffs' Argument

i. Identify Plaintiffs' Straw Man

1. Straw Man: "You claim you didn't know about any asbestos hazards until 1968."
2. Reality: You claim you didn't know about asbestos hazards *related to your product* until 1968.
3. Make sure you (and your interrogatory responses) know the difference.

ii. Do Your Homework and Prepare Your Witnesses

1. The Old Way

- a. "I haven't seen that third party document, so I can't comment on it."
- b. "That's what it says."
- c. Example: Balthazar Trial

2. The New Way

- a. Asbestos failure to warn cases are about state-of-the-art (unless you're in Pennsylvania or New Jersey)
- b. Help your witness help you!
- c. Make sure the witness reads the whole document – not just the part to which the plaintiff's attorney wants to direct your attention

3. The Document is Probably Not About Insulation (and it's certainly not about gaskets/packing), instead...

- a. Hazards of Asbestos Textile Plants
- b. Hazards of Asbestos Mining
- c. Hazards of Asbestos in Foundries
- d. *Because this was state-of-the-art at the time*

4. The Document is Probably Not About Cancer (and it's certainly not about mesothelioma), instead...

- a. Asbestosis
- b. Years for prolonged, intense exposure
- c. *Because this was state-of-the-art at the time*

5. The Document Probably Talks About TLVs/Safe Exposure Levels

- a. 5 mppcf = SAFE for a working lifetime
- b. Way below anything associated with my product (unless you're Owens-Illinois)
- c. *Because this was state-of-the-art at the time*

6. If the President of Your Company Read This Document in 1946, Would He Have Had Knowledge of Asbestos Hazards? NO!

- a. Hazard related to other industries (textiles, mining)
- b. Hazard had nothing to do with cancer, and required decades of intense exposure
- c. Hazard required exposures at orders of magnitude greater than could ever be anticipated from your product
- d. What was he supposed to warn about? If anything, he would have been relieved!!!

IV. Conclusion: If the Plaintiff is Not Talking About Your Asbestos, and He's Not Talking About Your Documents – That Means You're Supposed to WIN!!!



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Practice Areas

Commercial
Product Liability
Professional Liability
Toxic Torts

Industries

Asbestos
Aviation
Chemical
Health Care
Insurance
Manufacturing
Medical Devices
Medical Profession
Pharmaceuticals

Education

University of Notre Dame
Law School, *cum laude*,
J.D., 1981
United States Military
Academy, West Point, New
York, B.S., 1974

John Fitzpatrick is a former concert pianist and Army Airborne Ranger who began his legal career in 1981 with the U.S. Army JAG Corps as a prosecutor trying criminal cases in Colorado and shortly thereafter became Chief Prosecutor in South Korea. He was selected to be the senior medical malpractice attorney at the U.S. Army Tort Branch in the Pentagon for two years, where he tried 12 civil cases to verdict before entering private practice in Richmond, Virginia in 1988.

Over the next 20 years, "Fitz" has developed the reputation as the "go-to" trial attorney for high exposure cases for both national and local clients. Whether the case involves claims of product defects in aviation, asbestos or heavy equipment, high exposure birth trauma claims in medical malpractice, or chemical releases of toxic substances, Fitz has an unparalleled record of success with high exposure cases. He has tried in excess of 150 cases to verdict in 22 states and obtained defense verdicts in over 140 cases.

REPRESENTATIVE CASES & CLIENTS

Product Liability

Fitz's civilian trial career started when he was selected as the youngest national trial counsel for Owens-Corning's national asbestos trial team in 1989. He currently is serving as national trial counsel for CertainTeed Corporation (2001), GE (2003), Cooper / Abex (2005), Foster Wheeler (2006), and Georgia-Pacific (2006). He's taken more than 30 asbestos cases to verdict in the toughest jurisdictions in the United States.

- *Foster Wheeler* (June 2006, Los Angeles, CA) – The same day a settlement was reached during trial in another case, Fitz was asked to take over the defense of a living mesothelioma case already in jury selection. After three weeks of trial, he obtained the first defense verdict for Foster Wheeler since their emergence from bankruptcy.
- *General Electric* (June 2005, Madison County, IL) – Fitz obtained the first defense verdict for GE in an asbestos case in the jurisdiction voted the "#1 Judicial Hellhole" for corporate America. It was the first case in 15 years tried to verdict for GE in asbestos litigation.

