

Seventh Circuit Rejects "Cumulative Exposure Theory" And Helsinki Statement

The United States Court of Appeals for the Seventh Circuit, Northern District of Illinois, in Krik v. Exxon Mobil Corp., No. 15-3112, 2017 U.S. App. LEXIS 16795 (7th Cir. Aug. 31, 2017) upheld the barring of plaintiff expert, Dr. Arthur Frank, from testifying as to the "cumulative exposure"/"each and every exposure theory"/"single fiber"/"any exposure" theory and upheld the preclusion of the Helsinki Statement as evidence from which a jury could infer defendant's liability as to causation.

The Court of Appeals in Krik, acknowledging the expert standards articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) held that the Federal District Court correctly excluded the cumulative exposure theory, which was no different from the "each and every exposure theory" that had been excluded in an motion in limine. The Seventh Circuit decision also noted that the Sixth and Ninth Circuits have likewise excluded the "each and every exposure theory"/"cumulative exposure" theory. Krik at 16. The Krik decision succinctly summarized the principal behind the theory, regardless of what it is referred to as. That is, "it is impossible to determine which particular exposure to carcinogens, if any, caused illness." In other words, just like "each and every exposure", the cumulative exposure theory does not rely upon any particular dose or exposure to asbestos, rather all of the exposures contribute to a cumulative dose." Krik at 15.

In rejecting such a theory, the Seventh Circuit cited the Ninth Circuit decision in McIndoe v. Huntington Ingalls Inc., 817 F.3d 1170, 1177 (9th Cir. 2016) that "such a theory of liability would render the substantial factor test essentially meaningless. Allowing causation to be established through testimony like [the expert's] would "permit imposition of liability on the manufacturer of any [asbestos-containing] product with which a worker had the briefest of encounters on a single occasion." This is precisely the sort of unbounded liability that the substantial factor test was developed to limit."

The Seventh Circuit in Krik then cited the Owens Illinois brief of more than 30 federal and state courts which have held that the "each and every exposure theory"/"single fiber"/"any exposure"/"cumulative exposure" theory is not reliable.

The Seventh Circuit in Krik also addressed the admissibility of the Helsinki statement as an independent exhibit of substantive evidence or as a foundation for inadmissible causation testimony. The Helsinki statement was developed at an international public policy conference in the 1990s, and has been updated at a subsequent conference, essentially stating that cumulative exposure on a probability basis should be considered a main criteria for the attribution of a substantial contribution by asbestos to a lung cancer risk. After analyzing the Federal District Court decision regarding the Helsinki criteria, the Seventh Circuit in Krik noted that many courts have rejected the Helsinki criteria for the same reasons as the lower court in Krik, namely, it was a general document, not learned treatise, not based upon scientific studies; rather it was just consensus principles at an international public policy conference and that the criteria was not substantive evidence of causation.

The Appellate Court in Krik , also ruled that based upon the Federal District Court's earlier ruling in the case excluding unreliable and non-case-specific causation testimony, it would have been confusing and unfairly prejudicial to allow the criteria as evidence from which a jury could infer defendant's liability as to causation. As such, the United States Court of Appeals, Seventh Circuit, in Krik, "cannot say that it was abuse of discretion" for a Federal District Court to exclude the Helsinki criteria.

This decision should be used by all defense counsel to not only preclude Dr. Arthur Frank and the Helsinki statement, but also any attempt by plaintiff to present any theory of liability based upon "each and every exposure theory" /"single fiber"/ "any exposure"/ "cumulative exposure" which theory does not meet causation standards for liability.