

BB REVIEW

Product Liability and Casualty Litigation Update

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ALABAMA SUPREME COURT CLARIFIES THE STATUTE OF LIMITATIONS FOR WRONGFUL DEATH

The Alabama Supreme Court this month confirmed that wrongful death actions based on asbestos exposure occurring prior to May 19, 1980 are time-barred if the decedent could not have commenced an action in Alabama if alive. *Henderson v. MeadWestvaco Corp. & CSX Transp., Inc.*, No. 1070522 (March 20, 2009). In doing so, the Court held that the Alabama Legislature intended that Alabama's wrongful death statute, Ala. Code § 6-5-410, permit recovery **only** if the decedent had a viable personal injury claim under **Alabama** law at the time of his death.

Tony Henderson ("Tony") first developed symptoms of mesothelioma in September 2004, and was diagnosed with the disease in mid-October 2004. He died on February 1, 2006. Tony's alleged asbestos exposure occurred while working at the Cement Asbestos Products Company ("CAPCO") plant in St. Clair County, AL, where he unloaded packages of raw asbestos fibers from Seaboard Coastline railroad cars. Tony last worked at the CAPCO plant in 1972.

In March of 2005, Tony and his wife, Sheila, filed a personal injury action in Georgia state court against CSX and several other defendants. On June 16, 2006, following Tony's death, Sheila voluntarily dismissed the Georgia action. On the same day, acting as the personal representative of Tony's estate, Sheila filed a single count wrongful death action in Alabama against CSX, MeadWestvaco and several fictitious defendants alleging that CSX, through Seaboard, failed to warn of the danger and failed to train Tony to safely unload the asbestos. MeadWestvaco, she alleged, was responsible as the successor to CAPCO because CAPCO assumed a duty to inspect the plant and ensure compliance with safety standards. Defendants moved for summary judgment based upon (1) the statute of limitations in Alabama's wrongful death statute, (2) the rule of repose, and (3) defendant-specific defenses. On July 3, 2007, the trial court entered summary judgment in favor of the defendants, finding that the rule of repose barred Sheila's claim, but denying the motion as to the other arguments. Sheila appealed.

The Alabama Supreme Court affirmed the summary judgment but on different grounds. The Court held that Sheila's wrongful death action was barred by the statute of limitations. Alabama's wrongful death statute allows a personal representative to commence an action, but with one significant limitation (the "proviso"): "provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death." Ala. Code § 6-5-410(a)(1975). Stated differently, if a decedent could not have asserted a personal injury claim at the time of his death, then his personal representative cannot bring a wrongful death action.

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Under Alabama law, for asbestos exposure occurring prior to May 19, 1980, a plaintiff has one year from the date of his last exposure to file a claim for personal injury. *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981). Accordingly, the statute of limitations on Tony's personal injury claim for exposure to asbestos expired in 1973. At the time of his death in 2006, Tony was barred from asserting a personal injury action in Alabama.

Sheila argued that the timely personal injury action in Georgia satisfied the limiting proviso of § 6-5-410. In asserting this position, Sheila relied on the Alabama Supreme Court's decision in *Pace v. Armstrong World Industries, Inc.*, 578 So. 2d 281 (Ala. 1991). In that case, the plaintiff was last exposed to asbestos in 1966. He timely filed an action in the United States District Court for the Northern District of Texas that was transferred to the United States District Court for the Southern District of Alabama. While Alabama substantive law applied, the case was governed by Texas procedural law. Pace died while his personal injury claim was pending, and his personal representative filed an amended complaint seeking to recover for wrongful death. Defendants moved to dismiss the amended complaint on the grounds that it was time-barred. Just as Sheila did in this matter, Pace argued that the proviso does not require the underlying personal injury action to have been available in Alabama. However, in answering a certified question from the District Court, the Alabama Supreme Court only consented to address a second contention raised by Pace: whether a personal representative could "*convert an existing, timely, personal injury action in a foreign court to a wrongful death action.*" *Pace*, 578 So. 2d at 283 (emphasis added) (internal quotations and brackets omitted). Strictly construing the restrictive scope of the Alabama wrongful death statute, the Court in *Pace* held that, since the legislature omitted words that would have mandated the underlying personal injury action be commenced in Alabama, the Court could not insert them. Accordingly, the Court held that the "inability to commence a personal injury action in Alabama . . . does not preclude a personal representative from *converting* his *existing* personal injury action filed in Texas into a wrongful death action." *Pace*, 578 So. 2d at 286 (emphasis added).

Sheila argued that *Pace* stood for the proposition that any personal injury action timely filed in another state satisfies the proviso in Alabama's wrongful death statute. To accept this interpretation, the Supreme Court responded, would mean that Alabama's conflicts-of-law rule would not apply to personal injury actions contemplated by the proviso. Instead, a personal representative could meet the requirement of the proviso by avoiding Alabama's conflicts-of-law rules and applying a more favorable rule of another jurisdiction. The Court concluded that this was beyond the contemplation of the legislature and rejected Sheila's interpretation of *Pace*. Accordingly, the Alabama Supreme Court limited the holding in *Pace* to the specific facts presented there, those situations in which the substantive law of Alabama and the procedural law of another state apply and under which procedural rules the personal injury claim is viable.

Sheila also argued that her Georgia action satisfied the proviso because the Alabama Supreme Court had invited plaintiffs to file personal injury actions in jurisdictions with more favorable statutes of limitation when it stated in *Textron Inc. v. Whitfield* that, "if a plaintiff can present his claim elsewhere, in a jurisdiction which has a longer or different statute of limitations . . . he should have the opportunity to do so." 380 So. 2d 259, 260 (Ala. 1979). Rejecting this argument, the Court noted that *Textron* — a case not involving the wrongful death statute — stood for nothing more than the right to pursue a claim in another jurisdiction if that claim would be viable under the statute of limitations applicable in that jurisdiction.

In turning to Sheila's wrongful death claim, the Court noted that the timeliness of the Hendersons' original personal injury action in Georgia was governed by Georgia's conflicts-of-law and procedural rules. However, that action was dismissed, rather than amended as in *Pace*. Sheila then filed the wrongful death action in



Alabama, where, consistent with the Court's analysis of both *Pace* and *Textron*, Alabama's longstanding conflicts-of-law principle of *lex fori* applies. Under this principle, the law of this forum, including the statute of limitations, applies to the analysis required by the proviso of § 6-5-410. Thus, if a decedent's personal injury cause of action is time-barred under Alabama law at his death, then the personal representative cannot bring a wrongful death action.

At the time of his death in 2006, Tony could not have commenced an action in Alabama, and, therefore, neither could his personal representative. A decedent's ability to commence a personal injury action in another state is irrelevant for purposes of commencing a new action under the Alabama Wrongful Death Act.

Balch & Bingham, LLP – Product Liability and Casualty Litigation Practice Group

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