

# BSB REVIEW

## *Product Liability and Casualty Litigation Update*

### "DATE OF LAST EXPOSURE" NO LONGER THE RULE IN ALABAMA TOXIC TORT CASES

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#### *Plaintiffs Alleging Injury by Exposure to Toxic Substances No Longer Required To File Within Two (2) Years of Last Exposure*

The *Griffin v. Unocal Corp.* decision handed down last week by the Alabama Supreme Court has significantly changed the landscape of toxic tort law in Alabama. Alabama law requires personal injury actions based on exposure to hazardous chemicals to be brought within two (2) years of when the cause of action accrues. Ala. Code § 6-2-30(a), 38(l). The long-standing rule in Alabama prior to the *Griffin* opinion, known as the "date of last exposure" rule, provided that a personal-injury action based on exposure to hazardous chemicals accrues on the date of last exposure to the chemicals. Thus, suit had to be filed within two (2) years of the last exposure to the chemicals, regardless of when any disease was diagnosed. This rule was widely criticized as being unfair and creating a Catch-22 for plaintiffs: *i.e.* if a plaintiff filed within 2 years of last exposure but before diagnosis (injury), the claim was dismissed as being premature, but if a plaintiff filed more than 2 years after last exposure but within 2 years of diagnosis (injury), the claim was dismissed because the statute of limitations had run. Despite the criticism, the Supreme Court affirmed the date of exposure rule in a 5-4 decision less than a year ago in *Cline v. Ashland, Inc.*, No. 1041076, 2007 WL 30070 (Ala. Jan. 5, 2007).

With a new Chief Justice presiding, the Court has now reversed direction in another 5-4 decision, holding that the statute of limitations begins to run when there is a "manifest" present injury regardless of the lapse of time since exposure. *Griffin v. Unocal Corp.*, No. 1061214, 2008 WL 204445 (Ala. Jan. 25, 2008). As a result, the toxic tort cause of action is available to a much larger group of plaintiffs, although the increase in filings may be delayed for some time.

The facts in *Griffin* are typical of many toxic tort cases. David Wayne Griffin was employed at a Tuscaloosa tire manufacturing plant from 1973 until 1993, where he was allegedly exposed to benzene and other toxic chemicals. *Id.* at \*1. In 2003, he was diagnosed with acute myelogenous leukemia and died from it a year later. *Id.* In 2006, David's wife, Brenda, filed a wrongful death action against Unocal Corporation and several other companies alleging that their chemicals caused his leukemia and ultimate death. *Id.* The companies moved to dismiss, arguing that the "date of last exposure" rule barred the claim because he had not worked at the plant within the last two years. *Id.* The trial court dismissed the case and Griffin appealed.

On appeal, the Alabama Supreme Court stated, "the dispositive issue in this case is whether 'the date of last exposure rule [is] still the law in Alabama.' . . . Stated



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simply, it is not . . . ." *Id.* at \*2. In so holding, the Court adopted the reasoning of former Justice Harwood's dissent in *Cline v. Ashland, Inc.*, No. 1041076, 2007 WL 30070 (Ala. Jan. 5, 2007). *Id.* Justice Harwood explained in his dissent that the statute of limitations applicable to these claims requires suit to be brought within two (2) years of when the cause of action "accrues." He suggested that a toxic-substance-exposure cause of action "accrues" only when there is a "manifest, present injury" defined as "an injury manifested by observable signs or symptoms or the existence of which is medically identifiable." *Id.* at \*20. He went on to explain that it is not necessary that the plaintiff be personally aware of the injury or its origin, but only that there is "in fact a physical injury manifested." *Id.* Justice Harwood made clear that he was not advocating a "discovery rule," under which the statute of limitations would begin to run only when the plaintiff discovered, or should have discovered, the injury

Although the precise interpretation of Justice Harwood's definition will likely be the subject of argument and debate, it appears to suggest, in layman's terms, that the two-year statute of limitations begins to run when a physician or medical procedure would be able to detect some physical injury, however slight, even if the plaintiff is unaware of the injury or even symptoms of it. He states only that the injury must be "identifiable" (rather than "identified"). *Id.* Debate is also expected as to when an injury becomes "identifiable" if a plaintiff has not sought any medical treatment until after it is apparent that the injury has developed.

A significant part of the decision is that, unlike some other decisions in which prior precedent is overruled, this new rule will not be applied retroactively (except that the plaintiff in *Griffin* will get the benefit of it). *Id.* at \*23. A retroactive application would have permitted plaintiffs who have not been exposed to a toxic substance in over two years to bring suit now if there has been a "manifest" injury within the last two years, arguably opening the "flood gates of litigation" and reviving otherwise "stale" claims. Rather, this new rule will be applied prospectively and "only those persons whose last exposure to a toxic substance, and first manifest injury resulting from that exposure, occurred within two years of the opinion adopting the new rule [are] entitled to have the accrual of their cause of action determined according to the new rule." *Id.* Thus, the decision clearly extinguishes the claim of anyone who has not been exposed to toxic substances since January 25, 2006. A narrow reading suggests that for those last exposed between January 25, 2006 and January 25, 2008, there must also have been a "manifest" injury during that time for them to have a claim. A more reasonable construction, however, is that for anyone exposed after January 25, 2006, the two year statute of limitations will begin to run from the date of the first "manifest" injury regardless of how long it has been since they were last exposed to toxic substances. Given that under this new rule there could be a significant lag time between exposure and "manifest" injury, Justice Harwood invited the legislature to statutorily set the amount of time permitted to lapse between exposure and "manifest" injury. *Id.* at \*24.

### ***Conclusion***

The Alabama Supreme Court has opened a door for many plaintiffs alleging injury from exposure to toxic substances, although the Court's prospective application of the new rule suggests it should take some time before this group of otherwise-excluded plaintiffs can bring a claim. Balch & Bingham's Product Liability and Casualty attorneys are on top of this change and have the experience and expertise to navigate clients through it.



## **Balch & Bingham, LLP – Product Liability and Casualty Litigation Practice Group Toxic Tort Area**

The attorneys in Balch & Bingham LLP's Product Liability and Casualty Litigation Practice Group have extensive experience in individual, mass, and class action environmental and toxic tort litigation. They have litigated personal injury, property damage, and wrongful death claims relating to alleged exposures to and/or releases of agricultural herbicides and pesticides, asbestos, benzene, boron triflouride (BF3), chlorinated solvents, formaldehyde, industrial waste water, carbon black, carbon dioxide, isocyanate compounds (MDI and TDI), lead-based paint, Illemite dust, maleic anhydride mercury, mixed-dust, polychlorinated biphenyls (PCBs), particulate matter, perlite, petroleum hydrocarbons, radioactive material and waste, rutile dust, silica, trimelletic anhydride Tordon, and welding fumes. Balch & Bingham LLP's Product Liability and Casualty Litigation Practice Group also has extensive experience in insurance coverage matters related to such exposures and releases.

Balch & Bingham attorneys enjoy membership in a number of professional associations, including the highly-selective American College of Trial Lawyers, the International Association of Defense Counsel (IADC), the Federation of Defense and Corporate Counsel (FDCC), DRI, and the Alabama Defense Lawyers Association (ADLA), including one partner currently serving as President and two partners serving on its Board of Directors. A number of Balch & Bingham litigators are listed in *The Best Lawyers in America*, with several included in the new category of "Bet The Company" litigators. Balch & Bingham's more than 250 attorneys serve our clients from offices in Alabama, Georgia, Mississippi and Washington, D.C.

