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## Calendar of Events

### February

12: CCNJ H&S Committee | Troy Chemical, Florham Park, NJ\*

13: DC Reception | The Social Reform Kitchen & Bar, Washington, D.C.\*

19: Chemical Sector Working Group Meeting | Hamilton, NJ\*

27: 3Rs Sharing Conference | Paving the Path to Regulatory Acceptance of Alternative Methods\*

### April

28-29: 30th Annual CCNJ Spring Conference | Seaview Resort, Galloway Twp., NJ \*

\*Require you to RSVP/Register to attend.

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## ENSURING OBJECTIVE REASONABLENESS: AN EXAMINATION OF FEAR OF CANCER LAW

Increasing numbers of Plaintiffs are seeking emotional distress damages engendered by a fear of contracting cancer. In the toxic tort field, many fear of cancer lawsuits to date have involved complex claims of exposure to carcinogenic, or potentially carcinogenic, compounds such as asbestos or petroleum additives. However, to date, only a few jurisdictions have established *prima facie* standards for this complex cause of action in the absence of a physical injury, and in arriving upon these standards, the courts have been challenged with the task of balancing competing public policy interests.

Despite improving medication and treatment, cancer remains a potentially life-threatening illness that can result in emotional distress if one legitimately fears development of cancer. Moreover, because one person may develop cancer from a different level of exposure than another, and the latency period of cancer varies from person to person, it is possible that one could experience post-exposure distress prior to being actually diagnosed with cancer.

Nevertheless, because of the confounding characteristics of cancer, a real potential for misapplication or abuse of this claim exists where a plaintiff's claimed emotional distress may be meritless or wholly speculative. Aside from the usual challenges of evaluating the veracity of an individual's claimed emotional distress, because of cancer's inconsistent genesis and latency period, it is challenging for a fact finder to evaluate whether a toxic exposure will cause the plaintiff to develop cancer at some point in time, which in turn makes it difficult to evaluate whether a plaintiff's emotional distress claim is reasonable. Even worse, an opportunistic or disingenuous plaintiff could use this uncertainty as an advantage, feigning emotional distress in order to secure a financial windfall. Moreover, due to the scientific uncertainty surrounding causes of cancer in humans, any person who has been exposed to a carcinogen could theoretically be entitled to fear of cancer damages without a legal standard providing guidance and limits to this cause of action.

Therefore, in balancing these legitimate interests for both sides, courts that have ruled on emotional distress claims for fear of cancer have ultimately set standards intended to ensure some measure of objectivity, reasonableness, and genuineness by requiring proof of

exposure, an objective belief that the plaintiff would contract the disease, and some measure of likelihood of contracting the disease. However, the proofs by which a plaintiff must prove an objectively reasonable fear can vary from jurisdiction to jurisdiction. Below is a discussion of two seminal cases that set the standard for proving a *prima facie* case of fear of cancer, as well as the current state of New Jersey's fear of cancer law.

In *Potter v. Firestone Tire and Rubber Co.*, the Supreme Court of California set what is widely regarded as the seminal standard regarding fear of cancer claims by requiring proof, in the absence of a present physical injury or illness, that (1) the plaintiff was exposed to a toxic substance which threatens cancer, (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that (3) it is more likely than not that the plaintiff will develop cancer in the future due to the toxic exposure. In striving to ensure that plaintiffs' fear of cancer claims are genuine and reasonable, the *Potter* court



specifically rejected the argument that an exposure, or even a significant increase in the risk of cancer, is enough to recover fear of cancer damages where there is no showing of the actual likelihood of developing cancer due to exposure. The *Potter* court explained "nearly everybody is exposed to carcinogens which appear naturally in all types of foods. Yet ordinary consumption for such foods is not substantially likely to result in cancer. Nor is the knowledge of such consumption likely to result in a reasonable fear of cancer."

In 2013, the Maryland Court of Appeals set the most recent standard for fear of cancer claims in the case of *Exxon Mobil Corp. v. Albright*. Until this litigation, no legal standard for emotional distress from fear of cancer existed under Maryland law, but the lower courts had awarded significant financial damages to numerous residential plaintiffs with respect to their fear of cancer claims stemming from alleged contamination of their well water as a result of a significant gasoline leak from a nearby gasoline station.

On appeal, the *Albright* court asserted a significant interest in applying a measure of objective reasonableness to fear of cancer claims. With this in mind, the court held that to recover emotional distress

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damages for fear of contracting a latent disease in Maryland, a plaintiff must show that (1) he was actually exposed to a toxic substance due to the defendant's tortious conduct, (2) which led him to fear objectively and reasonably that he would contract a disease, and (3) as a result of the objective and reasonable fear, he manifested a physical injury capable of objective determination. Under Maryland tort law, "physical injury" does not mean manifested cancer or disease, but that the injury for which recovery is sought is capable of objective determination, meaning testimony "must contain more than mere conclusory statements," and be sufficiently detailed "to give the jury a basis upon which to quantify the injury."

Applying this new standard, the *Albright* court overturned emotional damage awards for all residents who had failed to present evidence of detectable contamination in their well water for failure to meet the first prong of the *prima facie* standard. Applying the second prong, the court determined that even those plaintiffs who demonstrated exposure had to show contaminant levels above the regulatory standards to ensure that their fear was reasonable and objective. Finally, to ensure against the possibility of feigned claims and to prove a causal relationship to the alleged tortious conduct, the Court examined whether the plaintiffs had presented sufficient evidence of a "physical injury" resulting from their objectively reasonable fear. Of the eighty-eight plaintiffs who were originally awarded emotional damages for fear of cancer, only one plaintiff's fear of cancer claim survived judicial scrutiny.

In New Jersey, the law regarding fear of cancer in the absence of physical injury is not well settled. In 1985, the Superior Court recognized that plaintiffs suffering from present manifestations of asbestos-related disease may recover for "serious fear or emotional distress or a clinically diagnosed phobia of cancer" if the fear is reasonable and proximately caused by exposure to asbestos. *Devlin v. Johns-Manville Corp.* The *Devlin* court distinguished its decision from the Superior Court's 1983 dismissal of "cancerphobia" claims by plaintiffs not presently suffering from physical illness as a result of their ingestion of pollutants in *Ayers v. Jackson Twp.* In *Ayers*, the Superior Court had noted that without a present "substantial bodily injury or sickness" which resulted from knowledge that plaintiffs have ingested contaminants, "the task of evaluating and quantifying each

person's apprehension in every groundwater pollution case, each of which might involve hundreds, if not thousands of residents, would become prodigious." Subsequently, in 1989, the New Jersey Supreme Court affirmed that a claim for emotional distress damages based on a reasonable fear of future disease is clearly cognizable where plaintiff's exposure to asbestos has resulted in a present physical injury. *Mauro v. Raymark Indus., Inc.* However, the *Mauro* court left the door open for fear of cancer claims absent physical injury by explaining that it was not addressing the question of whether exposure to toxic chemicals without the manifestation of physical injury could sustain a claim for emotional distress based on a reasonable fear of future disease.

Since the *Mauro* opinion, no New Jersey court has set specific *prima facie* standards for claims of emotional distress from fear of cancer in the absence of physical injury. But because New Jersey's reported decisions related to fear of cancer claims preceded the *Potter* and *Albright* decisions, and based upon the court's expressed desire to avoid speculative claims, it is likely that New Jersey courts would adopt a *prima facie* standard for claims of emotional distress from fear of cancer similar to *Potter* or *Albright* if confronted with the issue.

The *prima facie* standards set by the *Potter* and *Albright* courts are not without criticism. The uncertain science regarding the genesis and latency of cancer could cause a person exposed to carcinogenic compounds to experience some level of emotional distress from fear of developing cancer. Plaintiffs' advocates would also argue that victims of toxic torts do not choose to be exposed to carcinogenic compounds, and therefore deserve a means of compensation for any genuine, reasonable emotional distress that results. Critics of the *Potter* and *Albright* standards would also argue that the *prima facie* standards require plaintiffs to expend significant amounts of money for toxicology and epidemiology experts, and are too stringent and difficult to meet. However, a clear message has been sent: in the eyes of the judiciary, setting standards which ensure that plaintiffs' fear of cancer claims are genuine and objectively reasonable is prudent and necessary.

*This article was authored by Phil Cha, a partner at Archer & Greiner, with Dan Farino, an associate at the same firm.*

## LEADERSHIP AND COMMITTEE ANNOUNCEMENTS RELEASED FOR 2014-2015 LEGISLATIVE SESSION



Pictured above: Assembly Speaker Prieto (D-32). Photo courtesy of NJ Legislature.

The New Jersey Senate and General Assembly recently reorganized for the 2014-2015 Legislative Session. As expected, Senate President Steve Sweeney (D-3) and Assembly Speaker Vincent Prieto (D-32) were chosen by their peers to lead their respective houses. Chosen, once again by their colleagues, to serve as majority leader in their respect houses, were Assemblyman Louis Greenwald and Senator Loretta Weinberg. Additionally, Senator Tom Kean and Assemblyman Jon Bramnick were chosen to serve as minority leader for their respective caucuses.

As the session commenced, both houses released the lists of Committee chairman and members for the 2014-2015 legislative session. The Senate Committee lists had minor changes, while many of the Assembly Committees have a new look. Here is a list of the Committees with which the Chemistry Council of New Jersey frequently does business:

### Senate and Assembly Environment Committees:

#### **Senate Environment and Energy Committee**

Senator Smith remains as the chair of the Senate Environment and Energy Committee, and Senator Sam Thompson, a former DuPont employee, joins the Committee replacing Senator Jennifer Beck. All other members, who previously served on this Committee, were reappointed. Below is a list of Committee members for the 2014-2015 Legislative Session:

- Senator Smith, (D-17) Chair
- Senator Greenstein, (D-14) Vice Chair
- Senator Whelan (D-2), Senator Bateman (R-16), Senator Thompson (R-12)

#### **Assembly Environment and Solid Waste Committee**

Assemblywoman Grace Spencer will continue as the chair of the Assembly Environment and Solid Waste Committee. Assemblymen John McKeon, Dan Benson, John Wisniewski, Scott Rumana and Dave Wolfe are all new members on this Committee. Below is a list of Committee members for the 2014-2015 Legislative Session:

- Assemblywoman Spencer (D-29) Chair
- Assemblyman McKeon (D-27) Vice-Chair
- Assemblyman Benson (D-14), Assemblyman Wisniewski (D-19), Assemblyman Rumana (R-40), Assemblyman Wolfe (R-10)

### Senate and Assembly Consumer Affairs and Commerce Committees:

#### **Assembly Consumer Affairs**

Assemblyman Moriarty remains the chairman of the Assembly Consumer Affairs Committee and Assemblymen Charles Mainor and Brian Rumpf are new members assigned to this Committee. All other members, who previously served on this Committee, were reappointed. Below is a list of

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