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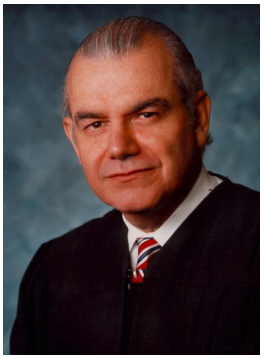
WHAT'S INSIDE

MULTIDISTRICT LITIGATION

Asbestos MDL judge dismisses dozens of shipowner defendants

The federal judge presiding over the asbestos multidistrict litigation has granted more than 400 dismissal motions filed by 25 shipowner defendants on grounds of lack of personal jurisdiction.

Bartel et al. v. Various Defendants, MDL No. 875, 2013 WL 4516651 (E.D. Pa. Aug. 26, 2013).



U.S. District Judge Eduardo C. Robreno of the Eastern District of Pennsylvania

U.S. District Judge Eduardo C. Robreno of the Eastern District of Pennsylvania said the federal court in Ohio, where the cases were originally filed in the 1980s, never had personal jurisdiction over the defendants and he dismissed them rather than transfer the cases to other courts, according to an Aug. 26 opinion.

Harold Henderson of **Thompson Hine LLP**, who represents about 120 shipowner defendants, said in an email that an order that accompanied the opinion sets a precedent for the MDL court's maritime docket.

"Many thousands of personal jurisdiction motions ultimately could be granted as a result," Henderson said.

"The order is expected to set the stage for how the court will deal with the personal jurisdiction motions of large numbers of shipowner defendants similarly situated to the 25 whose motions were granted," he added.

The maritime docket, called MARDOC, consists of 2,671 cases in the MDL and is the largest group of cases still on that docket, according to Judge Robreno's written opinion.

The plaintiffs include former merchant marines, their representatives, survivors and spouses who sued over alleged exposure to asbestos products.

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COMMENTARY

Will the proposed amendments to the Federal Rules of Civil Procedure reduce discovery burdens?

Elizabeth Iglesias of Irell & Manella discusses the proposed amendments to the Federal Rules of Civil Procedure, which are now open for public comment. Given the rise of e-discovery and its costs and burdens, the proposed changes seek to increase cooperation between opposing parties and keep discovery requests reasonable, but will they be up to the task?

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Will the proposed amendments to the Federal Rules of Civil Procedure reduce discovery burdens?

By Elizabeth Iglesias, Esq.
Irell & Manella

Many litigating parties and legal commentators have grown concerned with the well-documented rising costs of e-discovery and, consequently, litigation. The rising costs pose a number of concerns beyond just the expense itself (which is a significant concern on its own) — for example, will the costs of litigation prevent parties from being able to access the courts? Do the high costs of discovery give rise to meritless complaints filed by parties hoping to induce a quick settlement to avoid paying the costs of discovery? To address these and other concerns, a number of jurisdictions have implemented e-discovery local rules or adopted model e-discovery orders with the goal of reducing e-discovery costs and other burdens.

Responding to the rising costs of e-discovery, the federal judiciary's Advisory Committee on Rules of Practice and Procedure has developed a set of proposed amendments to the Federal Rules of Civil Procedure.[1] The proposals arise from a 2010 conference at Duke University at which participants discussed effective ways to control and reduce e-discovery costs.

The proposed amendments effectuate a series of changes to the scope of discovery and case management procedures, with the goal of increasing cooperation and "proportionality," a cost-benefit analysis of whether discovery is permissible in light of the costs it would impose and the potential benefits it offers to the case. The proposed amendments opened for public comment, but are not expected to become effective for some time, perhaps 2015 or later.[2]

WHAT ARE THE PROPOSED AMENDMENTS?

The Advisory Committee's May 8 report separates the proposed amendments into three separate categories: case management, proportionality and cooperation.[3]

> A number of jurisdictions have implemented e-discovery local rules or adopted model e-discovery orders with the goal of reducing e-discovery costs and other burdens.

Case management proposals

A number of the proposed amendments focus on the stated goal for early and active case management. The committee's report explains that certain amendments were drafted to respond to a perception that the early stages of cases take too long and the longer that cases last the more expensive they are to litigate.[4]

The report proposes several amendments to the scheduling conference and order. Discovery-related proposals include amendments to Rules 16(b)(3) and 26(f) to permit Rule 26 scheduling orders to include provisions relating to the preservation of electronic documents and agreements reached under Rule 502 of the Federal Rules of Evidence to "remind litigants that there are useful subjects for discussion and agreement."

Rule 26(d)(1) is proposed to be amended to relax the pre-scheduling conference discovery moratorium and permit early disclosure of Rule 34 requests to produce documents. The Advisory Committee's report explains it believes the scheduling conference may be more efficient if it had the benefit of actual Rule 34 requests to provide a specific focus for discussion at the conference. And, although the proposed amendments allow for early disclosure of Rule 34 requests for production, this does not speed up the time allowed to respond. Rather, the amendments propose an extended response time, saying that parties must respond within 30 days after the scheduling conference.

Proportionality proposals

The proposed amendments to the Federal Rules include several changes seeking to promote responsible use of discovery that is proportional to the needs of the case. The Advisory Committee's report discusses the need to lower civil litigants' expectations regarding what discovery is reasonably necessary.

The scope of discovery is amended to incorporate the current balancing test of Rule 26(b)(2)(C)(iii) into Rule 26(b)(1), so that discovery must be proportional to the needs of the case considering:

Elizabeth Iglesias is an IP litigation associate in the Los Angeles office of **Irell & Manella**, where her practice is focused on patent litigation, re-examination and licensing disputes.

- The amount in controversy.
- The importance of the issues at stake in the action.
- The parties' resources.
- The importance of the discovery in resolving the issues.
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

To readjust the scope of discovery, the report also proposes a revision to the "penultimate" sentence of Rule 26(b)(1) oft-quoted by parties seeking to compel discovery: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Instead, the amended sentence provides that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." The proposed amendment is intended to remove a common argument that the "reasonably calculated" standard broadens limitations on the scope of discovery found elsewhere in the Federal Rules.

The Advisory Committee's May 8 report separates the proposed amendments into three separate categories: case management, proportionality and cooperation.

Further, Rule 26(c)(1)(B) is amended to add an explicit recognition of a court's authority to enter a protective order that allocates the expenses of discovery. For example, it is often the case that the party producing discovery bears the costs of production. In contrast, the proposed amendment explicitly recognizes a court's ability to allocate these production costs if, for example, parties seek disproportionate or overbroad discovery.

A number of proposals concern the manner in which parties object and respond to Rule 34 requests for production. Under the proposed amendments parties must object with "specificity" to requests for production and must state whether documents are being withheld subject to the objection. Further, parties must actually produce the requested documents within the time allowed under the rules, or state in their response when they will produce the requested documents within a reasonable time. The proposed amendments further provide authority to issue a motion to compel if a party fails to produce documents within the time specified. Under the current rules there is no default time limit for actual production of the documents, and it is often difficult to move to compel discovery based upon delay alone.

The report also includes a number of proposed amendments that reduce the presumptive limits on interrogatories, requests for admission and depositions.[5] The Advisory Committee's report discusses a belief that depositions are overused; while many civil litigants believe that all trial witnesses must be deposed before being cross-examined, in criminal trials, witnesses are often cross-examined without the benefit of a prior deposition. The report points out that mediations and arbitrations are effective tools for dispute resolution and are often conducted without any depositions at all. The Advisory Committee hopes that a reduced number of guaranteed depositions will induce parties to reconsider the number of depositions needed, and provides that court supervision will be required should parties decide to seek additional deposition time.

Finally, the proposed amendments to Rule 37(e) address the problem discussed in the report that, facing uncertainty in what documents must be preserved to satisfy preservation obligations, many litigants engage in overbroad preservation to ensure that they will not later face sanctions. Commentators have estimated that such overbroad preservation in complex cases can cost millions of dollars or more.[6] On the other hand, parties have been sanctioned millions of dollars after the court finds that the parties failed to adequately preserve evidence.[7] The proposed amendments aim to create a uniform national standard regarding the level of culpability required to justify sanctions for failure to preserve evidence. Specifically, Rule 37(2) is revised to provide that sanctions may only be applied on a showing of willfulness or bad faith if a court finds that the actions "irreparably deprived a party of any meaningful opportunity to present or defend against claims in the litigation."

Cooperation proposal

Although the Advisory Committee's report identifies cooperation as "vitally important," it states that imposing a duty of cooperation by direct rule provisions is nearly impossible. Instead, a "modest" addition to Rule 1 is proposed to emphasize the duty of cooperation: "[T]hese rules should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding" (proposed addition to existing text emphasized). The intent of the amendment is to impose on parties a shared duty to achieve the goals stated in Rule 1: the "just, speedy, and inexpensive determination of every action and proceeding."

WILL THE PROPOSALS WORK?

It remains to be seen whether the proposed amendments will achieve the stated goals of streamlining the case management process and increasing proportionality and cooperation. As noted by Jaclyn Jaeger of Compliance Week, the proposed amendments to Rule 26 purport to require parties to adhere to proportionality requirements without court intervention.[8] This may lead parties to reconsider, on their own initiative, voluminous discovery requests that their opposing parties may argue are disproportionate.

But the Advisory Committee's report states that empirical studies have suggested that, in most cases, parties already conduct discovery in reasonable proportion to the realistic needs of the case. The proposed amendments are targeted toward complex, high-stakes cases that generate "particularly contentious adversarial behavior." But many complex, high-stakes cases will inherently involve voluminous discovery, making reducing costs more difficult. It is possible that litigants in such cases will be less likely to voluntarily withdraw broad discovery requests as disproportionate.

Further, it is possible that the amendments reducing the scope of discovery and mandating that discovery be "proportionate" will provide additional tools to litigants seeking to object to providing necessary discovery, thereby increasing discovery costs to litigants and creating additional

work for the courts in evaluating objections to discovery. Milberg senior counsel Henry Kelston said the proposed amendments limiting the scope of discovery "will not reduce costs in a meaningful way, and they will create more disputes in the cases where a significant amount of discovery really is warranted."[9]

efficiency, and the scheduling conference may likely be delayed for good cause regardless of the proposed amendments.

As noted in the Advisory Committee's report, cooperation is an open-ended concept that is difficult to mandate by direct rule making. Further, a rule mandating cooperation could potentially conflict with

> Certain amendments were drafted to respond to a perception that the early stages of cases take too long and the longer that cases last the more expensive they are to litigate.

With regard to specific proposed amendments in the "proportionality" context, certain show promise in being able to ameliorate discovery burdens. As Jaeger also noted, many parties to litigations have been concerned about the possibility of sanctions for inadvertent failures to preserve electronic information, even when they were acting in good faith.[10] The amended rule may help to ensure that parties who make reasonable efforts to satisfy their preservation responsibilities will not be sanctioned for their inadvertent shortcomings.

With regard to the "case management" proposed amendments, certain proposals may be effective to reduce delay in a number of cases, such as the changes to the time when a court should issue a scheduling order. However, as noted in the report, defendants may take time to select their counsel, compressing the schedule, particularly in larger, more complex cases. And those cases may require more time for counsel to get up to speed regarding the scope of discovery and the sources to find relevant documents. This is particularly true in light of the proposed amendment in which the pre-scheduling conference discovery moratorium on Rule 34 requests for production is lifted, allowing such requests to be disclosed in advance of the scheduling conference to allow the conference to proceed in light of actual document requests made in the case. In such cases, an earlier scheduling conference may reduce overall legitimate adversarial behavior. In light of these concerns, the proposed amendment to Rule 1 is admittedly modest. However, it may provide some impetus to parties to refrain from overly contentious behavior on their own initiative and further authority to courts seeking to curb overly contentious behavior from litigants.

It will be interesting to see whether the proposed amendments are effective in controlling and reducing e-discovery costs, should they be implemented. While the "case management"-related proposals may be effective in smaller cases, it seems that they may be less effective in the larger, more complex cases that are identified as creating disproportionate e-discovery costs. The proportionality proposals attempt to limit discovery to what is proportionate in light of the value of the information and the costs to produce the information, which may be helpful in reducing costs. But, it is possible that the addition of a proportionality balancing test could increase the likelihood of discovery disputes and thereby increase overall costs. Finally, the cooperation proposal is admittedly modest and may have little effect on actual discovery behavior by litigating parties.

While the proposed amendments are not yet controlling authority, they provide interesting insight into the thinking of attorneys and judges regarding effective ways to focus discovery efforts on what is necessary to litigate the case. WJ

NOTES

[1] Advisory Comm. on Rules of Practice and Procedure, Report of the Advisory Committee on Civil Rules (May 8, 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf.

[2] Maureen O'Neill, *Proposed Amendments to the Federal Rules of Civil Procedure: What the Future Holds and Why the Potential Changes Matter Today*, Discover Ready E-Discovery Blog (May 23, 2013), http://discoverready.com/blog/proposed-amendments-to-the-federal-rules-of-civil-procedure-what-the-future-holds-and-why-the-potential-changes-matter-today.

[3] This article provides an overview of certain important proposed amendments. A complete description of the amendments is beyond the scope of this article.

[4] For example, the report recommends to amend Rule 4(m) to shorten the time for serving the summons and complaint from 120 to 60 days. It also recommends to amend Rule 16(b)(2) to shorten the time in which a scheduling order must be issued (absent good cause) to 90 days after service of the complaint or 60 days after any defendant appears.

[5] For example, the default limit on Rule 33 interrogatories is reduced from 25 to 15, and a default limit of 25 is imposed on Rule 36 requests for admission (other than requests to admit the genuineness of documents). The limit on depositions is reduced from 10 per side to five per side, and the time allowed for depositions is reduced from seven hours to six hours.

[6] *See, e.g.,* The Costs and Burdens of Civil Discovery: Hearing Before the H. Comm. on the Judiciary (Dec. 13, 2011) (statement of William Hubbard).

[7] Bob Ambrogi, *E-Discovery Sanctions Reach an All-Time High, Survey Finds*, Catalyst E-Discovery Search Blog (Jan. 10, 2011), http://www.catalystsecure.com/blog/2011/01/e-discovery-sanctions-reach-an-all-time-high-survey-finds/.

[8] Jaclyn Jaeger, *e-Discovery Rules on the Brink of an Overhaul*, Compliance Week, Apr. 26, 2013, *available at* http://www.complianceweek.com/e-discovery-rules-on-the-brink-of-an-overhaul/article/290790/.

[9] Michael Kozubek, *Proposed Federal Rule Changes Would Limit The Scope Of E-Discovery*, Inside Counsel, July 1, 2013, *available at* http://www.insidecounsel.com/2013/07/01/proposed-federal-rule-changes-would-limit-the-scop.

[10] Jaeger, *supra* note 8.

Reinsurer may assert late-notice defense for asbestos claims, judge says

A federal court has denied an insurance company's motion to defeat its reinsurer's late-notice defense to disclaim paying for asbestos-related damages, saying the insurer was seven years late in notifying the reinsurer of a pending action.

Insurance Company of the State of Pennsylvania v. Argonaut Insurance Co., No. 12 Civ. 6494(DLC), 2013 WL 4005109 (S.D.N.Y. Aug. 6, 2013).

On a cross-motion for summary judgment, the U.S. District Court for the Southern District of New York also granted the reinsurer a trial on whether the late notice prejudiced the reinsurer, causing it substantial injury, and whether the insurer acted in bad faith.

In 1974 reinsurer Argonaut Insurance Co. contracted to provide the Insurance Company of the State of Pennsylvania with reinsurance coverage on an excess umbrella policy with Kaiser Cement Corp.

Argonaut agreed to reinsure 20 percent of the umbrella policy's $5 million limit, equal to $1 million for each occurrence.

The agreement between the two insurers specified that ICSOP notify Argonaut "promptly of any occurrence" triggering a reinsurance obligation, according to an opinion issued by the District Court.

In the 1980s, Kaiser Cement was faced with thousands of lawsuits alleging bodily injury and property damages from its asbestos-containing products. Kaiser turned to its primary general liability insurer, Truck Insurance Exchange, to defend and indemnify it.

In 2001 Truck notified ICSOP and other excess carriers that it had exhausted its policy limits. At the time, ICSOP did not notify Argonaut of any pending action, according to the court's opinion.

In the following years, Truck took legal actions to reduce its liability, leading to a court ruling in 2008 that when Truck exhausted its policy limits per occurrence, it triggered ICSOP's umbrella policy. Again, ICSOP did not notify Argonaut, the opinion said,

That ruling prompted mediation in 2009 among several parties, not including Argonaut, in which ICSOP agreed to pay millions of dollars to indemnify Kaiser.

During 2009, ICSOP sent Argonaut several loss notification letters but did not mention the indemnification settlement, the opinion said.

In December 2009 Argonaut sent a letter to ICSOP saying it reserved the right to deny payment on the basis of late notice.

ICSOP filed suit to force Argonaut to comply with the reinsurance policy. The parties filed their current cross-motions with the District Court in June.

U.S. District Judge Denise Cote found for Argonaut on the late-notice issue because ICSOP's obligation to provide notice arose no later than 2002, but it did not provide notice until 2009.

ICSOP claimed it sent Argonaut computer-generated notices in 2000 and 2002 about a different reinsurance agreement on the 1974 policy, and that constituted constructive notice that the "20 percent" agreement could be triggered.

Judge Cote rejected that argument, saying ICSOP could not prove that Argonaut received either notice.

Granting Argonaut a trial on the issue of prejudice, the judge said, "Argonaut may establish that its participation in litigation would have resulted in not merely an earlier settlement but a more advantageous one as well."

The judge also noted that if Argonaut had been notified earlier by ICSOP, it might not have signed termination agreements from 2001 through 2009 with a dozen of its excess reinsurers.

> The judge let the reinsurer enter into discovery on whether the insurer acted in bad faith, which might relieve the reinsurer of its contractual obligation.

The opinion said those agreements reduced Argonaut's own reinsurance coverage by 23 percent, which increased its exposure to losses on the ICSOP policy.

In addition, Judge Cote ruled that Argonaut could also enter into discovery on whether ICSOP acted in bad faith, which might relieve the reinsurer of its contractual obligation. WJ

Related Court Document:
Opinion: 2013 WL 4005109

New Mexico law applies to widow's meso suit, Arizona high court rules

New Mexico's statute of repose bars a lawsuit that an Arizona woman filed in her state decades after her husband allegedly was exposed to asbestos in New Mexico, the Arizona Supreme Court has affirmed.

Pounders v. Enserch E&C Inc. et al., No. CV-12-0173, 2013 WL 4455688 (Ariz. Aug. 21, 2013).

Because the alleged tortious conduct (exposure to asbestos) occurred in New Mexico, that state has a greater interest than Arizona in the woman's wrongful-death claim, the Arizona high court said in an Aug. 21 opinion.

Dudley and Vicki Pounders filed the suit in 2008 in Arizona's Maricopa County Superior Court against Enserch E&C Inc., alleging his mesothelioma was caused by his exposure to asbestos when he worked as a welder at a power plant in New Mexico, the opinion said.

Dudley worked at the Four Corners power plant from 1969 to 1974 and again from 1979 to 1983, according to court filings.

Enserch is the successor-in-interest to the architect and construction manager for three units at the plant, according to the opinion.

The company successfully moved for summary judgment in the trial court based on New Mexico's statute of repose, which bars actions based on improvements to real property that are filed more than 10 years after the projects are finished.

Following Dudley's death, Vicki Pounders added a claim for wrongful death and appealed the trial court's dismissal.

The Arizona Court of Appeals affirmed the ruling in 2012. *Pounders v. Enserch E&C et al.*, No. 1 CA-CV 11-0282, 276 P.3d 502 (Ariz. Ct. App. Apr. 17, 2012).

The Arizona Supreme Court then agreed to review "to consider issues of statewide importance regarding choice of law in wrongful-death actions involving long-latency diseases," the opinion said.

> The Arizona Supreme Court agreed to review the case "to consider issues of statewide importance regarding choice of law in wrongful-death actions involving long-latency diseases."

The high court noted the choice-of-law decision was crucial in Pounders' case because Arizona does not have a statute of repose; it only has a statute of limitations that bars suits filed more than two years after a claim is discoverable.

The Arizona Supreme Court said it would look at "which state has the most significant relationship to the case."

While Arizona is the place of injury, that is, it is the place where Dudley's mesothelioma manifested, that is of little significance, the court said.

REUTERS/David Moir

The panel said the Pounders could have moved anywhere after they left New Mexico. However, New Mexico is the place "where the conduct causing the injury occurred," the court said.

The high court concluded that New Mexico was entitled to deference in applying its statute of repose in this case because the relationship between Dudley and Enserch was centered there and the conduct that allegedly caused the injury happened there.

The Supreme Court said it agreed with the lower court that New Mexico law applies to Pounders' claim. WJ

Related Court Document:
Opinion: 2013 WL 4455688

See Document Section A (P. 19) for the opinion.

Colgate-Palmolive customers fight to keep asbestos suit in state court

Two women suing Colgate-Palmolive Co. for alleged asbestos exposure from its talcum powder have filed a brief opposing the company's appeal to transfer the case to federal court based on a claim that the plaintiffs fraudulently joined in-state defendants.

Barlow et al. v. Colgate Palmolive Co. et al., No. 13-1839(L.), opposition brief filed (4th Cir. Aug. 16, 2013).

Joyce Barlow and Clara G. Mosko say there was no intent to misrepresent when their lawyers added the parties. They also argue that the company has misrepresented the facts in an effort to get a federal court trial.

The plaintiffs and the company filed opposing briefs with the 4th U.S. Circuit Court of Appeals after the U.S. District Court for the District of Maryland remanded the case to the Baltimore City Circuit Court.

According to the plaintiffs' brief, Barlow and Mosko, who are represented by the same law firm, filed individual suits against several defendants, including Colgate, in 2011.

The women say they used the company's Cashmere Bouquet powder, which they claim contained asbestos. The company denies there is asbestos in the powder.

The suits also name local contractors and other companies as defendants because, the plaintiffs say, they could also have been exposed to asbestos where they worked or at home.

Mosko worked at the Department of Agriculture for 28 years and was there during remodeling by a Maryland contractor, which she said might have exposed her to asbestos, the brief says.

Barlow worked on an assembly line for RMR Corp. in Maryland and said she had heard of asbestos problems there but could not recall the source, according to the brief.

Colgate removed the case to federal court in June 2012 based on diversity jurisdiction, asserting that the Maryland defendants were fraudulently joined so the plaintiffs could secure a state court trial.

The company argued it was a fraudulent joinder because the plaintiffs could not identify specific sources of alleged asbestos exposure other than the talcum powder.

According to the brief, the District Court rejected the company's argument, finding that the plaintiffs' failure to recall a particular exposure to asbestos did not prove a fraudulent joinder. Colgate appealed.

The company continues to seek federal jurisdiction, claiming the plaintiff's' counsel misinformed the District Court that it intended to join the Maryland defendants based on the existing evidence, the brief says.

In their brief opposing Colgate's request to have the District Court's remand decision vacated, Barlow and Mosko say their attorney only gave an opinion in oral argument that the facts raised the "possibility" that the case could include several defendants.

"That is all that is required to obtain remand in a fraudulent-joinder argument," the plaintiffs say.

They also claim that in an earlier, related proceeding, Colgate used their evidence of other possible asbestos exposures in a bid for separate trials when the suit initially included additional plaintiffs.

> Colgate-Palmolive denies the plaintiffs' claim that the company's Cashmere Bouquet talcum powder contained asbestos.

REUTERS/Jeff Christensen

According to the brief, Colgate argued that because several plaintiffs had possible exposures at several workplaces, the circumstances were too diverse for a consolidated case.

"Colgate has manipulated the court record in both courts to its immediate needs and taken opposing positions in two different forums," the brief says.

The opposition brief also raises other appellate issues, including a claim that once a federal court remands a case, the federal court lacks the power to retrieve it. WJ

Attorney:
Plaintiffs-appellees: Jennifer L. Lilly, Law offices of Peter G. Angelos, Baltimore

Related Court Document:
Brief: 2013 WL 4397456

See Document Section B (P. 29) for the brief.

California appeals court overrules trial judge; admits dying man's statement

At a summary judgment hearing, a trial judge abused her discretion by excluding a dying man's statement alleging asbestos exposure from a defendant's products, a California appeals court has ruled in an unpublished opinion.

David v. Slakey Bros. Inc., No. B244802, 2013 WL 4408442 (Cal. Ct. App., 2d Dist. Aug. 15, 2013).

The Court of Appeals, 2nd District, reversed the ruling of Judge Emilie H. Elias of the Los Angeles County Superior Court, saying the trial transcript showed her decision to reject the statement was "a manifest abuse of discretion" based on "positions taken by plaintiffs' counsel in other litigation."

James David and his wife, Rebecca, filed suit in February 2012 against numerous defendants, including Slakey Bros. Inc., according to the opinion.

Their complaint alleged he developed mesothelioma from occupational exposure to the defendants' asbestos-containing products. James died in November 2012, and his wife continued the case.

Judge Elias set Sept. 18, 2012, as the last day to hear a summary judgment motion before a trial began Sept. 24.

However, after Slakey's counsel erroneously scheduled a hearing date of Sept. 19 on a motion to dismiss for lack of evidence, the judge changed the hearing to that date, the opinion said.

Judge Elias then gave the plaintiffs until Sept. 17 to file their opposition to the summary judgment motion.

On Sept. 17, the plaintiffs filed opposing papers, including an unsigned statement by James David in which he said he had worked with asbestos-containing products supplied by Avex Corp. and its successor, Slakey.

The plaintiffs' counsel promised to provide a signed statement as soon as possible, and on Sept. 18 sent a facsimile transmission of the signed declaration to the Superior Court, the opinion said.

On Sept. 19, the day of the hearing, the signed declaration, which showed an execution date of Sept. 17, was filed with the Superior Court, according to the opinion.

At the hearing, Slakey's attorney objected to the unsigned declaration, and plaintiffs' attorney said it had been difficult to get a signature because of his client's medical condition.

Judge Elias refused to consider the plaintiff's statement even though it had been signed and was offered to her in court, the opinion said.

> The appeals court said the trial judge's ruling amounted to a reprimand for the plaintiff's law firms' actions in *other* cases before the judge.

The Davids appealed.

"The transcript ... reflects the trial court's refusal to consider the decedent's declaration did not rest on a find of a lack of good cause under the circumstances," the appeals court said. "Rather ... the trial judge refused ... as a reprimand to the plaintiffs' counsel for the firm's alleged litigation conduct in other cases before the judge."

Addressing Slakey's contention that there was no evidence that James David had been exposed to its asbestos-containing products, the appeals court also found that the declaration provided sufficient information to raise a triable issue of fact.

The 2nd District reversed the trial court and ruled that the plaintiff could recover appeal costs. WJ

Related Court Document:
Opinion: 2013 WL 4408442

Meso case moved from New York to Texas federal court

A judge in the U.S. District Court for the Southern District of New York has granted two defendants in a mesothelioma suit their *forum non conveniens* motion to move the case to Texas.

Hulen v. Crane Co. et al., No. 12 Civ. 7614(JFK), 2013 WL 4528461 (S.D.N.Y. Aug. 27, 2013).

After denying Armstrong International Inc. and Milwaukee Valve Corp. their first motion to dismiss because of an inconvenient venue, U.S. District Judge John F. Keenan granted their second motion on similar grounds to transfer the case to the U.S. District Court for the Southern District of Texas.

Donald Hulen and his wife, Mary, filed suit against numerous defendants, claiming they were responsible for his asbestos exposure during a career in the Navy and in various other jobs.

Hulen alleged that he was exposed to asbestos while serving in the Navy from 1960 to 1989, including four to six months at a shipyard in Brooklyn, N.Y.

He also alleged asbestos exposure when he was in the Navy Reserves in Texas and at various jobs in the auto and construction industries in that state, according to Judge Keenan's opinion.

The Hulens lived in Texas but sued in New York state court in August 2012 so they could participate in New York City's asbestos litigation program, the opinion said. The program's "in extremis" trial group attempts to expedite cases when a plaintiff is critically ill.

However, co-defendant Crane Co. removed the case to the New York federal court in October 2012.

Mary Hulen continued the case after her husband's death in November.

Armstrong International and Milwaukee Valve then moved to transfer the case to Texas. Hulen argued for New York as the venue, saying some of her attorneys and medical experts are in New York and that she was willing to travel there from her home in Texas, according to the opinion.

In granting the defendants' motion, Judge Keenan said Donald Hulen's alleged exposure to asbestos was far greater in Texas, where he worked at various jobs with a potential for exposure, than in New York, where he worked on a ship for a short time.

Saying no other defendants objected to the move and that Texas law would likely apply to the case, the judge ordered the transfer.

"A Texas court and Texas jury have a greater interest in adjudicating the injury to this Texas man," he said. WJ

Related Court Document:
Opinion: 2013 WL 4528461

Chemical sealant caused lung disease, suit says

Exposure to a foam sealant product manufactured by Dow Chemical Co. caused a Massachusetts woman to develop serious lung conditions that left her unable to work for a year, according to a federal court lawsuit.

Lydon v. Dow Chemical Co. et al., No. 1:13-cv-11932, complaint filed (D. Mass. Aug. 12, 2013).

Carol Lydon's suit, filed Aug. 12 in the U.S. District Court for the District of Massachusetts, says defendants Dow and Home Depot, which sold the Great Stuff insulating foam, failed to warn her to wear a mask when using it.

Repeated exposure to the toxic fumes released by the unreasonably dangerous foam caused Lydon to develop the rare lung conditions acute eosinophilic pneumonia, or AEP, and bronchiolitis obliterans organizing pneumonia, or BOOP, she says.

AEP involves the accumulation in the lungs of a certain type of white blood cells that disrupts normal air flow. BOOP occurs when the small passageways in the lungs become inflamed and plugged with connective tissue.

According to the complaint, the foam's instructed users to wear gloves and protective eyewear. Lydon says that even though she followed these instructions when she first used the Great Stuff sealant in her kitchen in October 2010, she began to feel sick the next day.

Lydon became sick again after using the product about three weeks later but did not suspect the foam was causing her symptoms, which included weight loss and sweating, the complaint says.

The following week, Lydon purchased three more cans of Great Stuff from Home Depot and sprayed the product in her home, according to the suit. She says she suffered symptoms including shortness of breath, difficulty walking, fever and chills within a few hours and was admitted to Massachusetts General Hospital later that day.

Doctors diagnosed Lydon with AEP and BOOP, and she was hospitalized for 10 days, according to the complaint. After her discharge, Lydon began to treat her condition with the steroid Prednisone, which allegedly caused her to develop osteoporosis, insomnia, early menopause and suicidal thoughts.

Lydon claims that although she removed Great Stuff from her home in May 2011, she continued to experience difficulty breathing and lung pain, which a doctor attributed to chemical exposure.

She was hospitalized again for BOOP in October 2012 and still suffers chest tightness, wheezing, joint pain and other symptoms, according to the complaint.

Lydon says had she known of the foam's hazards, she would have worn a mask or not used the product at all, the suit says.

The suit alleges design and manufacturing defect, breach of warranty, and failure to warn against Dow and Home Depot. Her husband and two minor children claim loss of consortium. WJ

Attorneys:
Plaintiffs: Frederic N. Halström and Krzysztof G. Sobczak, Boston

Related Court Document:
Complaint: 2013 WL 4053642

Courtesy of Dow.com

REUTERS/Mario Anzuoni

The plaintiff says she became ill because defendants Dow and Home Depot failed to warn her to wear a mask when using Great Stuff insulating foam.

Plant worker, wife seek $17 million for silica-related skin problems

A former wood processing plant worker and his wife developed a painful skin condition after he became "completely drenched" in waste material containing toxic silica in a workplace accident, the couple claims in a $17 million federal court lawsuit.

Davis et al. v. TIN Inc. et al., No. 1:13-CV-00092, complaint filed (M.D. Tenn., Columbia Div. Aug. 23, 2013).

Andrew and Kimberly Davis also say they had to send their three children to live with their grandparents to protect them from exposure to contaminants from the plant operated by defendant TIN Inc.

TIN and co-defendant International Paper Co., which does business as Temple-Inland, operate a plant in New Johnsonville, Tenn., that recycles wood products into container board, according to the suit filed in the U.S. District Court for the Middle District of Tennessee.

The complaint says Andrew was working on a pulper, a machine that chemically processes wood chip fibers, at the plant in October 2010 when the drain valve became blocked because of a disconnected water line.

His supervisor allegedly told him to ram the valve with an apparatus attached to a truck to clear the obstruction. Davis said he did not think it was a good idea but complied when the supervisor told him to "just do it," according to the complaint.

The blockage came loose and caused the entire contents of the pulper to flow over and into the truck where Davis sat, drenching his entire body and entering his eyes, ears and nose, the complaint says.

The pulper contained highly toxic substances such as silicone silica. Within a few weeks, Davis began to suffer symptoms, including a skin rash, cramping, loss of energy, and sores on his neck and arms, according to the suit.

Davis' skin eventually turned the color of the paper pulp. He reported all symptoms to his employers but continued working around silica until he left the job in 2011, the complaint says.

REUTERS/Brian Snyder

The plaintiff said he was injured while working on a pulper, a machine that chemically processes wood chips, like those shown here.

Kimberly allegedly developed painful sores all over her body from exposure to silica on Andrew's skin and clothes, and the couple sent their children away out of fear they would be develop the same symptoms from exposure to their parents.

After years of seeking treatment by medical specialists for her condition, Kimberly Davis was diagnosed earlier this year with Karjoo's skin phenomenon, a disorder caused by silica exposure that causes skin ulcers and lesions, according to the complaint.

The Davises allege TIN and International Paper knew employees working with toxic waste would encounter silicone silica but neglected to warn them of health hazards or implement safety precautions.

The defendants failed to provide Davis with a safe place to work and acted with gross negligence and reckless indifference to his rights and safety, the complaint says.

The Davises seek a jury trial and $6 million in compensatory damages for Kimberly's pain and suffering, disfigurement, and stress, plus $1 million on behalf of Andrew for loss of consortium. They also seek $10 million in punitive damages. WJ

Attorneys:
Plaintiffs: Phillip L. Davidson and Joseph L. Lackey Jr., Nashville, Tenn.

Related Court Document:
Complaint: 2013 WL 4496789

New Jersey court rejects expert testimony on workplace exposure to toxins

A New Jersey workers' compensation judge correctly ruled against a petitioner who failed to produce medical records to support his claim that on-the-job exposure to toxic chemicals caused his lung disease, the state appeals court has ruled.

Donato v. Jersey City Municipal Utilities Authority, No. A-5984-11T4, 2013 WL 4436532 (N.J. Super. Ct. App. Div. Aug. 21, 2013).

In an Aug. 21 opinion affirming the judge's decision, the Superior Court's Appellate Division found that the judge had ample reason to find a defense expert's testimony more credible than petitioner John Donato's medical expert and dismiss his claim.

The two-judge panel also rejected Donato's argument that the worker's comp judge should have excluded the defense's expert because the defense paid him more than the $800 statutory maximum for his evaluation and trial testimony combined.

The limits apply only to physicians testifying on behalf of injured workers, not workers' comp defendants, the appeals court said.

According to Donato's workers' compensation petition, he developed lung disease due to soot, dust and chemical exposure over the course of two 13-year employment stints with the Jersey City Municipal Utilities Authority. He worked for the JCMUA as a clerk and vehicle maintenance supervisor from 1961 to 1974 and again from 1986 to 1999.

Donato claimed in his petition that diesel fumes he inhaled at JCMUA caused him to develop restrictive pulmonary disease, chronic obstructive pulmonary disease, chronic bronchitis and small airways disease. He said the exposure left him 75 percent disabled.

His expert witness, Dr. Malcolm H. Hermele, testified that Donato's workplace exposure to toxic chemicals had caused or aggravated the conditions.

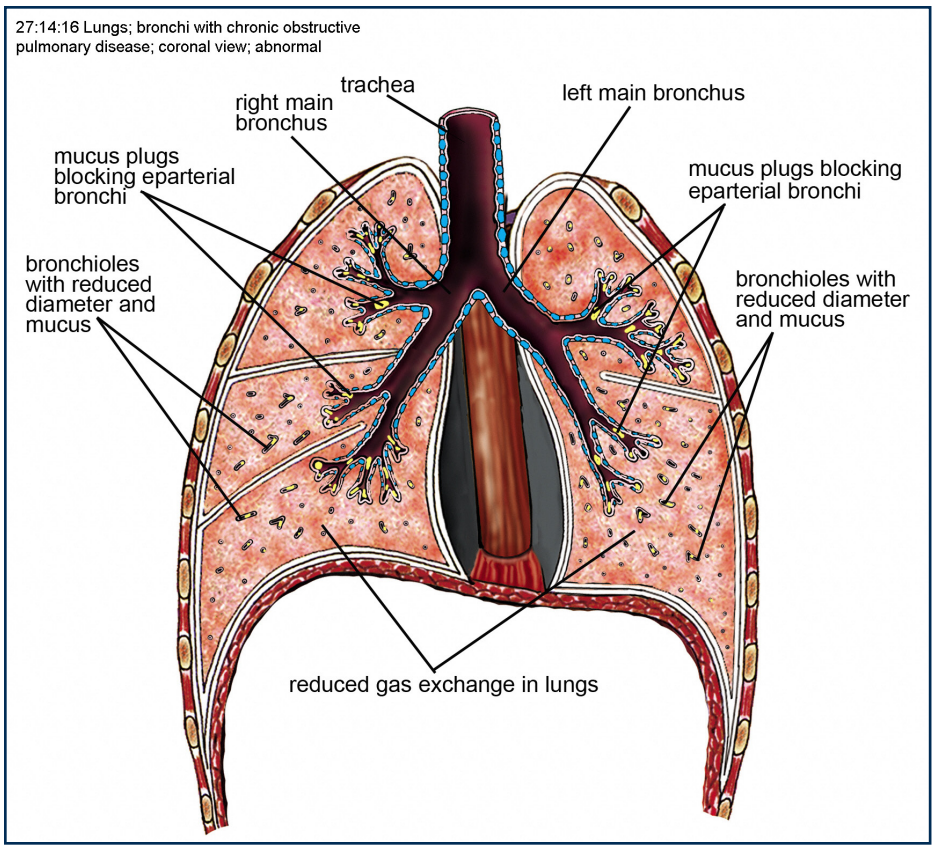
JCMUA countered with expert testimony from Dr. William Kritzberg, an internist who said Donato's pre-existing heart condition, medication and body weight caused his breathing problems. Kritzberg also testified that a pulmonary function test did not reveal an obstruction in Donato's lung capacity, according to the opinion.

After hearing the dueling experts, the workers' comp judge inferred from Donato's failure to submit records or testimony from his longtime cardiologist that the cardiologist likely disagreed with Hermele. Hermele never treated Donato, the judge noted.

Based on that adverse inference, she found that Donato's lung condition was not materially related to his occupational exposure at JCMUA and dismissed his petition.

Donato appealed, arguing that the judge should not have drawn the adverse inference. Instead, she should have excluded Kritzberg's testimony because he received more compensation than the maximum allowed under N.J. Stat. Ann. § 34:15-64, Donato said.

The appellate court sided with JCMUA, finding that the medical records Donato omitted were "highly relevant" and that the workers' comp judge was right to conclude that he was hiding something. WJ



Courtesy of Westlaw Medical Litigator

The plaintiff claims diesel fumes he inhaled at work caused him to develop chronic obstructive pulmonary disease. The lung condition is illustrated in this diagram.

Attorneys:
Appellant: Alan T. Friedman, Bagolie Friedman LLC, Jersey City, N.J.

Respondent: Sean T. Kean, Cleary, Giaccobe, Alfieri, Jacobs LLC, Matawan, N.J.

Related Court Document:
Opinion: 2013 WL 4436532

Symptoms signal 'manifestation' in tobacco suit, appeals court finds

In finding that a plaintiff made the cutoff date for class membership in the landmark class-action *Engle*, a Florida appeals court has ruled that a disease caused by smoking manifests when a smoker first suffers symptoms related to a smoking-related medical condition.

R.J. Reynolds Tobacco Co. v. Ciccone, No. 4D11-3807, 2013 WL 4081105 (Fla. 4th Dist. Ct. App. Aug. 14, 2013).

However, the 4th District Court of Appeal threw out a punitive damages award of $50,000 after determining the plaintiff cannot recover punitive damages on a claim for gross negligence.

The dispute is an offshoot of the one-time class action *Engle v. Liggett Group Inc.*, 945 So. 2d 1246 (Fla. 2006), in which a Miami trial judge certified a nationwide class of people with smoking-related diseases and family members of deceased smokers, and a jury awarded damages of more than $145 billion. An appeals court later reduced the scope of the class to Florida residents.

REUTERS/ Regis Duvignau

> Exhibiting symptoms of PVD, which implies the deceased was suffering from PVD, would suffice for class membership, the appeals court said.

The Florida Supreme Court ordered the class decertified but ruled that class members could file individual suits using the *Engle* jury's findings, including smoking causes cancer, nicotine is addictive and the tobacco companies sold defective and unreasonably dangerous cigarettes

Here, Pamela Ciccone sued R.J. Reynolds Tobacco Co. in 2004, two years after her husband George died from lung cancer. He had smoked cigarettes since he was 8 years old, the court's opinion says.

Ciccone subsequently sought membership in the *Engle* class, alleging that before the Nov. 21, 1996, cutoff date, George had developed peripheral vascular disease, a smoking-related illness. PVD causes the thinning of arteries and lack of circulation in the extremities.

She asserted claims for strict liability, breach of express warranty, breach of implied warranty, civil conspiracy, fraudulent concealment, gross negligence and negligence.

During the first phase of the trial in the Broward County 17th Judicial Circuit Court, the parties disagreed as to whether George's PVD manifested before the cutoff date.

The trial court defined "manifestation" as occurring when a person experienced symptoms of a disease or was diagnosed with a disease by a doctor, the appeals court's opinion says.

The judge allowed the jury to decide whether Ciccone was an *Engle* class member. It determined she was.

In the second phase of the trial, the jury found in Ciccone's favor on the claims for strict liability, gross negligence and negligence. It awarded her $195,000 in medical and funeral expenses, $3 million in noneconomic compensatory damages, and $50,000 in punitive damages for the cigarette maker's gross negligence.

George was found 70 percent liable for his injuries, which reduced the compensatory damages award to less than $1 million, according to the opinion.

R.J. Reynolds appealed, arguing that the trial court erred in instructing the jury that George's manifestation of PVD occurred when he experienced symptoms and not when he was aware of the causal connection between his smoking and the disease. The company also challenged the punitive damages award.

The 4th District failed to find that the jury instruction was erroneous or incomplete.

"Since exhibiting 'symptoms' of PVD creates the implication that the deceased was 'suffering' from PVD, it follows that such a showing would be sufficient for the purposes of class membership," the appeals court said.

However, the panel held that Ciccone was not entitled to punitive damages, and it threw out the $50,000 award. The court reasoned that a claim for gross negligence was not pleaded in the original *Engle* case and noted that the jury found for R.J. Reynolds on the claims for concealment and conspiracy.

The appeals court cited *Soffer v. R.J. Reynolds Tobacco Co.*, 106 So.3d 456 (Fla. 1st Dist. Ct. App. 2012), which held that *Engle*-progeny plaintiffs can only recover punitive damages on concealment or conspiracy claims. WJ

Attorneys:
Appellant: Gordon James III, Sedgwick LLP, Fort Lauderdale, Fla.

Appellee: Bard D. Rockenbach, Burlington & Rockenbach, West Palm Beach, Fla.

Related Court Document:
Opinion: 2013 WL 4081105

CONTINUED FROM PAGE 1

Judge Eduardo C. Robreno on the challenge of sorting out dismissal motions in the MDL's maritime docket:

Over at least the past 25 years, the MARDOC litigation has reached Dickensian proportions. Plaintiffs have passed away; memories have faded; corporations have filed for bankruptcy; the legislature has enacted new laws; lawyers have come and gone, and so have judicial officers. The one constant in this scenario is that the MARDOC docket has grown in numbers, complexity and scope.

Now, some 25 years later, the court, with the assistance of counsel, is called upon to divine the meaning of less-than-pellucid orders entered long ago by prior courts, and to disentangle the parties from a web of procedural knots that have thwarted the progress of this litigation.

Among the defendants are manufacturers and suppliers of those products, as well as owners of the ships on which the merchant marines worked.

The U.S. District Court for the Northern District of Ohio originally oversaw the cases, Judge Robreno said.

The court in Ohio said it lacked personal jurisdiction over about 100 shipowner defendants because they lacked contacts with the state, but transferred all the cases to the MDL court rather than grant the dismissal motions, according to Judge Robreno's opinion.

The judge said now, after more than two decades, he must sort out the meaning of the Ohio federal court's decisions.

Ohio's long-arm statute does not confer jurisdiction over these defendants, Judge Robreno said.

"[The plaintiffs] do not identify how any of their claims arise from defendants' limited contacts with Ohio. As these defendants' contacts do not fall within the statutorily enumerated situations which give rise to personal jurisdiction ... there is no personal jurisdiction over these defendants," Judge Robreno said.

He added that the shipowners did not waive their right to assert lack of jurisdiction by participating in the litigation over the years since the cases were filed in Ohio. The companies were simply complying with court orders to participate in the actions, the judge said.

The judge also declined to transfer the cases to other jurisdictions, noting that rules governing MDL cases allow only transfers to the original court, which in this case had no jurisdiction over the defendants. WJ

Attorneys:
Defendants: Harold Henderson, Thompson Hine LLP, Cleveland

Plaintiffs: Donald A. Krispin, Jaques Admiralty Law Firm, Detroit

Related Court Document:
Opinion: 2013 WL 4516651

"The order is expected to set the stage for how the court will deal with the personal jurisdiction motions of large numbers of shipowner defendants," Harold Henderson of Thompson Hine LLP said.

WESTLAW JOURNAL

ENVIRONMENTAL

This reporter covers the most recent developments in litigation arising under federal and state environmental statutes, including the Superfund Act, the Resource Conservation and Recovery Act (RCRA), the Clean Water and Clean Air Acts, the National Environmental Policy Act, and the Oil Pollution Act of 1990. It also brings you the latest news in the environmental field, including introduction of legislation in the U.S. Congress and settlements, consent decrees, and expert commentaries.

NEWS IN BRIEF

CLEANUP WORKERS AT ASH SPILL SITE FILE CLASS ACTION OVER INJURIES

More than 30 workers who helped clean up an ash spill at a Tennessee coal-fired power plant have filed a federal class-action lawsuit for injuries caused by exposure to radioactive material, arsenic, silica and other chemicals. The plaintiffs allege Jacobs Engineering Group, one of the companies contracted to clean up the spill, misrepresented to nonemployee workers that the fly ash from the 2008 spill in Kingston, Tenn., was not harmful to human health, despite knowing of the toxic and carcinogenic chemicals in the ash. Jacobs denied workers' requests for respirators, masks and other protective equipment, causing them to suffer negative health effects such as breathing and heart problems, the complaint says. The plaintiffs seek compensatory damages for injuries and medical monitoring, plus punitive damages.

Adkisson et al. v. Jacobs Engineering Group Inc., No. 3:13-CV-00505, complaint filed (E.D. Tenn., Knoxville Aug. 22, 2013).

Related Court Document:
Complaint: 2013 WL 4603869

EYE DROP MANUFACTURER SETTLES SUIT OVER FDCA VIOLATIONS

A now-defunct drug manufacturer accused of failing to prevent microbiological contamination of eye drops has agreed to a permanent injunction barring it from violating the federal Food, Drug and Cosmetic Act. The consent decree settles allegations that Dakota Laboratories neglected to control the environment in its sterile processing area and implement procedures to confirm the safety of its products, the Justice Department said in a statement Aug. 26. The Food and Drug Administration warned Dakota in 2011 that inspections of its Mitchell, S.D., facility revealed noncompliance with the FDCA and found in 2012 that the violations had continued. The consent decree prohibits Dakota from resuming operations unless the FDA determines it is compliant with the law.

United States v. Dakota Laboratories LLC et al., No. 13-4086, consent decree approved (D.S.D. Aug. 26, 2013).

WATCHDOG GROUP SUES RETAILERS OVER CARCINOGENS IN SHAMPOO

Major retailers in California have continued to sell without warnings shampoo and personal care products containing the carcinogenic chemical cocamide diethanolamine more than a year after the state added it to a list of chemicals that require consumer warnings, the Center for Environmental Health alleges in a state court lawsuit. The watchdog group said in a statement Aug. 27 that has sued four retailers and sent legal notices to more than 100 companies that manufacture or produce products containing cocamide DEA that they are in violation of state law. The group conducted independent testing on products sold in stores this summer and found that the thickening and foaming agent was still present in 98 shampoos and bath products, often at high levels, the statement said.

Center for Environmental Health v. Lake Consumer Products Inc. et al., No. RG13693280, complaint filed (Cal. Super. Ct., Alameda County Aug. 27, 2013).

Related Court Document:
Complaint: 2013 WL 4529981

CASE AND DOCUMENT INDEX