THE EFFECT OF EPIDEMIC-TYPE CLAIMS IN THE MARITIME WORKPLACE: AN OVERVIEW

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Introduction

Over the past 13 years, asbestos litigation has had a significant impact upon the judicial system. Unlike any other tort, decisions from asbestos litigation have permeated reported cases in all federal circuits, many federal districts, state appellate and supreme courts, the Benefits Review Board and compensation systems throughout the United States.

Initially, the judicial response of the tort system to asbestos litigation was negative. A variety of evidentiary and jurisdictional issues were unfavorable to the asbestos litigant. The state compensation decisions and decisions under the federal Longshore and Harbor Workers' Compensation Act,[2] due to the remedial nature of compensation acts generally, were more favorable. Over the past decade, judicial decisions have become more favorable to the claimant, significantly expanding the procedural and substantive rights of the claimant and providing greater opportunity for recovery.

As the number of asbestos claims filed in both state and federal courts increased, the judiciary began to respond with decisions which reflected a greater appreciation of the factual and medical basis for these claims. Additionally, the courts began to respond with a greater appreciation for the necessity of limiting repetitive litigation of common issues, thereby reducing the burden on the court's docket.

The effect in both compensation and tort cases has been to create a body of law which has been based upon asbestos litigation. This body of law has had a significant impact on both product liability litigation and occupational disease cases. This body of law, which continues to develop, has touched on such diverse areas as admiralty jurisdiction, admissibility of evidence, application of the last injurious exposure rule, concepts of causation, defenses available in product liability claims, interpretation of statutes of limitations, civil procedure generally, compensatory damages, punitive damages, third-party lien rights, bankruptcy, class certification, insurance law, and many others. Appellate decisions regarding asbestos litigants have become commonplace.

This article will address many of the aforementioned areas in an attempt to demonstrate the significant impact of asbestos litigation. It is the authors' belief that the combination of sympathy for the asbestos victim and the vigorous defense of an essentially indefensible industry has resulted in a body of case law which provides the asbestos victim access to the legal system and an opportunity to recover compensation to which the victim is rightfully entitled.

I. The Tort System

A. Generally

One of the unique aspects of asbestos litigation has been the utilization, by the victim, of the tort system and the compensation system, simultaneously. Since asbestos-related diseases are primarily contracted as the result of occupational exposure, most lawyers representing asbestos victims file claims for compensation from the victim's employer, and at the same time, seek damages from the manufacturers of the products to which the victim was exposed during employment.

Early decisions reflected the difficulty of asbestos victims in securing access to the courts as a result of obstructive statutes of limitations. In many jurisdictions, courts did not contemplate the long latency period from asbestos exposure to the eventual development of asbestos-related diseases.

Even where jurisdiction in the federal court was predicated upon diversity,[3] the statute of limitations of the state where the exposure occurred was often controlling. Because many asbestos-exposed individuals worked in multiple jurisdictions, it was frequently contended that each exposure to asbestos provided a basis for recovery because of the dose-response relationship of asbestos-related diseases. It has been successfully argued that claims for asbestos-related injuries may appropriately be filed in any jurisdiction where the victim was exposed to asbestos.

B. Admiralty

As a response to restrictive statutes of limitations, and also in consideration of such issues as pre-judgment interest, punitive damages, and a different body of substantive law, admiralty jurisdiction[4] was alleged as a basis for recovery in the early stages of asbestos litigation.

The Fourth Circuit's decisions in *Glover v. Johns-Manville Corp.*[5] and *White v. Johns-Manville Corp.*[6] were the first to provide admiralty jurisdiction to the asbestos victim. In *Glover* and *White,* the Fourth Circuit Court held that individuals involved in ship repair and shipbuilding activities, exposed to air-borne asbestos fibers, who sustained subsequent asbestos-related injuries, were entitled to proceed in admiralty. By doing so, the plaintiffs were to avail themselves of a more favorable statute of limitations, including the discovery rule, pre-judgment interest, and punitive damages.

In *Owens Illinois, Inc. v. United States District Court*[7] and *Myhran v. Johns-Manville Corp.*[8] the Ninth Circuit reached the opposite conclusion. In these cases, the Ninth Circuit, analyzing traditional admiralty jurisdiction, determined that while ship repair activities of individuals might arguably be related to navigation and commerce, the incidental exposure to asbestos while engaged in those activities was not an injury falling within the traditional scope of admiralty jurisdiction. The Ninth Circuit rejected the Fourth Circuit's reasoning and refused to allow asbestos victims access to the federal courts predicated upon admiralty jurisdiction.

While there undoubtedly exist specific factual situations which would provide a basis for admiralty jurisdiction to the asbestos victim whose exposure to asbestos occurred during shipbuilding, repair, or renovation activity, the Ninth Circuit's view of those factual situations is extremely restrictive.

Since the Fourth Circuit's decisions in *Glover* and *White,* the Fourth Circuit has redefined its analysis, substantially narrowing its previous holding and reaching a position very similar to the approach adopted in the Ninth Circuit in *Owens Illinois'* and *Myhran.* These cases should be viewed in historical context, however. Had the Ninth Circuit been aware of the substantial number of asbestos cases which were to be filed after its decision in *Myhran,* it may well have reached a different conclusion. Cases tried by the court in admiralty could provide substantial docket relief. The court, sitting in admiralty, would arguably be required to rule only once as to the unreasonably dangerous nature of the product or the negligence of the defendants. Thereafter, cases could be resolved more rapidly, with the primary consideration being a particular individual's entitlement to compensation.

In those jurisdictions, where admiralty jurisdiction has been utilized by marine engineers, seamen, or other individuals whose exposure falls within traditional admiralty jurisdiction, courts have been creative in expediting cases to resolution.

C. Jones Act

Some asbestos-exposed individuals have also sought damages predicated upon the Jones Act.[9] The primary concern is for the individual to meet the status requirements of a seaman, as distinguished from that of a longshoreman under the Longshore and Harbor Workers' Compensation Act.[10] As the Jones Act does not define "seaman," the task of defining "seaman" has been left to the courts.

In *Wilkes v. Mississippi River Sand & Gravel Co.*[11] the Sixth Circuit set forth a three-part test to determine whether a claimant was a seaman within the meaning of the Jones Act. These requirements provide that:

(1) the vessel be in navigation;
(2) the claimant have a more or less permanent connection with the vessel; and
(3) the claimant be aboard primarily to aid in navigation.

The Sixth Circuit has continued to utilize this analysis.[12]

The Fifth Circuit, however, adopted its own status test in *Offshore Co. v. Robison.*[13] *Robison* has been followed in both the First and Fourth Circuits.[14] The status test set forth in *Robison* provides that:

(a) the injured workman must be assigned permanently to a vessel or performed a substantial part of his work on the vessel, and
(b) if the capacity in which the workman was employed, or the duties which he performed, contributed to the function of the vessel or to the accomplishment of the mission or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips, then status as a seaman is met.

Immediately following the *Robison* decision, the permanency requirement was rather liberally construed.[15] However, the more recent case of *Barrett v. Chevron U.S.A., Inc.*[16] suggests a tightening of the permanency requirement.

The Third and Seventh Circuits have adopted a more restrictive approach. The Third Circuit places significant importance on the third factor of the seaman status requirements set forth in *Wilkes.*[17] The Seventh Circuit has adopted an equally restrictive approach.[18]

D. Causes of Action

As noted above, damages may be sought in either state or federal court; however, practical considerations determine whether a particular case is brought in state or federal court. The causes of action alleged in state court are similar to those alleged in federal court. Specifically, claims for relief based upon products liability, negligence, breach of warranty, the Jones Act, general maritime law or civil conspiracy may be asserted in either state or federal court.

The most common practical considerations are related to the length of time from filing to trial, varying discovery procedures, the court's prior experience with asbestos litigation and applicable prior decisions of the jurisdiction relating to asbestos litigation. In state courts, as in the federal courts, asbestos litigants have created a substantial body of law. State court decisions relating to interpretation of statutes of limitations, retroactivity, revival of causes of action, admissibility of evidence, causation, punitive damages, and many other areas have become increasingly common over the past decade.[19] These decisions have followed a trend similar to those in federal court, expanding access to the judicial system through favorable decisions relating to substantive, procedural and evidentiary issues.

E. Case Law

The effect of asbestos litigation on the law of negligence and product liability has been impressive. Regardless of whether one represents plaintiffs or defendants, the lesson learned from asbestos litigation is obvious -- good facts make good law. Another, and perhaps more important lesson has been learned from the judiciary's response to the obvious need for compensation for victims of asbestos disease. Those representing defendants in mass tort litigation should learn from this experience that it is absolutely necessary to evaluate your defenses -- both legal and factual -- in the context of the larger problems presented to the judicial system by the mass tort. Some of those who failed to recognize this concept provided an impetus for significant decisions in the following areas of substantive and procedural law.

In the landmark decision of *Borel v. Fibreboard Paper Prods.* Corp.[20] the court first addressed the many issues which have been raised repeatedly in asbestos litigation over the past two decades. In *Borel*, the court determined that asbestos litigants were entitled to damages based upon the theory of products liability, relying specifically upon section 402A of the Restatement (Second) of Torts.[21] The court rejected the contention that the defendants did not have knowledge of the harmful effects of their products and therefore had no obligation to provide warnings to the ultimate consumer.[22] In so holding, the court reviewed the evidence before it and concluded that there was substantial medical evidence available to the defendants beginning in the 1930's from which, had they so desired, they could have determined the dangerous nature of the products they were manufacturing and provided appropriate warnings to the ultimate consumer.[23]

In providing relief to the plaintiff, the court determined that the products of the defendants were defective and unreasonably dangerous to users;[24] section 402A of the Restatement (Second) of Torts applied;[25] the defendants were negligent;[26] plaintiffs were entitled to seek punitive damages;[27] and defendants were jointly and severally liable for the plaintiff's damages based upon the ability of asbestos exposure to combine to produce an injury that is not reasonably capable of being divided.[28]

Of great significance, the court rejected the defendant's claim that the industry's failure to make an effort to discover and convey the danger of its product to the end user would relieve the defendant of liability under section 402A of the Restatement of (Second) Torts.[29] This early rejection of the state of the art defense by the *Borel* court set the stage for a jurisdiction-by-jurisdiction litigation of this same issue.[30] The majority of courts which subsequently addressed this issue followed the *Borel* interpretation of section 402A, refusing to relieve the manufacturer of liability based upon its failure to determine the hazardous nature of its product. Rather, many courts held the manufacturer to the knowledge and skill of an expert with liability imposed, not based upon the manufacturer's negligence, but on the unreasonably dangerous nature of the product.[31]

The impact of *Borel* and its progeny on products liability law, and the interpretation of section 402A of the Restatement (Second) of Torts has been significant. The majority of jurisdictions have adopted the *consumer* test explicit in the *Borel* decision. Concepts of negligence have repeatedly been rejected in products liability litigation, as the distinction between negligence and products liability has become better defined.

As with the state of the art defense, many other issues have been litigated nationwide over the past decade. For example, the concept of offensive collateral estoppel has been addressed in asbestos litigation.[32] In *Hardy v. Johns-Manville Sales Corp.*[33] and *Migues v. Fibreboard Corp.*[34] the Fifth Circuit rejected use of offensive collateral estoppel in asbestos litigation. Instead, the court suggested that to acheive [*sic*] a similar purpose, cases with similar issues of law and fact should be consolidated.[35] In *Cimino v. Raymark Indus.*[36] and in *In Re*

Fibreboard Corp.[37] the Fifth Circuit approved consolidation procedures which allowed the litigation of common issues of law and fact, creating in effect, a hybrid of offensive collateral estoppel.[38]

The evidentiary rules have also been impacted by the unique nature of asbestos litigation. In *Jackson v. Johns-Manville Sales Corp.*[39] the court addressed the issue of whether an individual, whose statistical likelihood of contracting cancer was less than 50 percent, was still entitled to recover damages for the fear of cancer associated with his asbestos exposure. The court determined that this fear of cancer was a compensable consequence of the exposure to asbestos and indicated that upon retrial, the plaintiff should be allowed to prove mental distress from the fear of cancer.[40] In the same decision, the court determined that if the plaintiff ultimately developed cancer, a separate cause of action would lie at the time of the *discovery* of that disease, thus allowing the plaintiff to retain the cause of action for cancer if ultimately contracted.[41]

The *Jackson* court also determined that certain papers, including correspondence written by officers of the defendant Johns-Manville, were admissible despite objections by the defendants as to their authenticity. The court weighed the probative value of these documents, the evidence supporting their authenticity, and determined that the trial court had not abused its discretion in admitting the documents.

Similarly, in *Nelson v. Fibreboard, Corp.*[42] the court determined that the trial court had not abused its discretion in refusing to allow a defendant to utilize the deposition of a corporate representative where it was alleged that the witness was unavailable due to his wife's longstanding illness.

The defense of government specifications utilized effectively by the defendants in the *Agent Orange* litigation,[43] has also been proffered by the asbestos defendants. Again, the majority of the courts considering this defense in asbestos litigation have rejected the defendants' contention that reliance upon government specifications provide an absolute defense to liability.[44] Courts have unanimously rejected the applicability of the government specifications defense in asbestos litigation, narrowing the scope of the defense considerably. The courts have determined that asbestos manufacturers did not alter their products in conformity with government specifications but, in fact, participated in drafting the specifications ultimately applied by the government to the use of their products.

The issue of punitive damages, most recently addressed by the United States Supreme Court in *Pacific Mutual Life Ins. Co. v. Haslip*,[45] has long been an issue in asbestos litigation. Again, courts which have considered the defendants' plea for freedom from multiple awards of punitive damages have rejected the defendants' claims that multiple awards of punitive damages in mass tort litigation violate provisions of the United States Constitution. The decisions of the trial and appellate courts in asbestos litigation on issues of punitive damages provided a precursor to the United States Supreme Court's most recent rejection of this position.

Many of the cases set forth above have been followed in multiple jurisdictions, and in both state and federal court, to create the present body of law utilized by asbestos plaintiffs. The admissibility of various documents relating to the defendants' knowledge of the hazards of its products, fear of cancer, punitive damages, use of depositions, the nature of the evidence required to prove causation, state of the art defense, and others, have established for the present asbestos plaintiff a framework within which to proceed to secure compensation. It is impossible, within the limits of this paper, to discuss the many other areas, both procedural and substantive, which have been significantly impacted by asbestos litigation. Literally hundreds of reported decisions involving the asbestos litigant have been rendered by various courts of this country. Clearly this body of case law will provide greater access to the legal system to future victims of mass torts.

F. Bankruptcy

No discussion of asbestos litigation would be complete without some reference to the various bankruptcies which have resulted from this litigation. On August 26, 1982, the Johns-Manville Sales Corporation and its related companies sought Chapter 11[46] protection. Over a period of approximately six years, in excess of $100 million dollars in legal fees and expenses was expended in order to establish a trust from which the victims of Johns-Manville's asbestos products could seek damages.

Within a period of less than three years, the trust acquired additional protection from the bankruptcy court and in an unprecedented action[47] Judge Jack Weinstein, a federal district judge for the Eastern District of New York, sitting specially in the Bankruptcy Court in the Southern District of New York, undertook the use of Fed. R. Civ. P. 23(b)(3) to create a class settlement of the claims pending against the Manville Trust. Judge Weinstein, whose previous experience included the often-criticized resolution of the Agent Orange litigation, used the class certification procedure of Fed. R. Civ. P. 23(b)(3), relying on the concept of a "limited fund," to revise the previously certified re-organization plan without benefit of the bankruptcy code provisions.

At the same time, Judge Weinstein urged other asbestos defendants who had not yet sought Chapter 11 protection to file class certification documents pursuant to Fed. R. Civ. P. 23(b)(3), claiming that the existence of a limited fund to pay asbestos victims allowed the certification of a class of victims in order to create a de facto limit upon the liability of the defendant without the necessity of seeking Chapter 11 protection. Thus far, no other asbestos manufacturer has successfully used this procedure without the benefit of Chapter 11 protection. However, this creative use of class certification procedures presents an innovative, and arguably unconstitutional, approach to the limitation of liability in mass tort litigation.[48] Whether this proposed use of Fed. R. Civ. P. 23 should be allowed presents the challenge of the next decade to both plaintiffs and defendants in mass tort litigation.

II. Compensation

A. Generally

Most state compensation acts, the Longshore and Harbor Workers' Compensation Act,[49] and the Federal Employees' Compensation Act[50] use the last injurious exposure rule as a means to assign liability between two or more employers and their respective insurers. This rule was adopted primarily on the basis of Professor Larson's analysis[51] and through the use of case law, rather than statute. Similarly, the Longshore and Harbor Workers' Compensation Act adopted this rule as a result of case law.[52]

Asbestos litigation, during the past decade, has significantly affected the interpretation of the last injurious exposure rule, as well as requiring adaptation by the compensation systems in regard to third-party recovery, establishing rates of compensation, determining the date of injury, and applicable law.

B. Longshore and Harbor Workers' Compensation Act

In *Travelers v. Cardillo*[53] the last injurious exposure rule was applied to occupational disease claims arising under the Longshore and Harbor Workers' Act. The rule was adopted to assign liability to the employer who last exposed the claimant to injurious stimuli. The question posed by the last injurious exposure rule is whether the exposure experienced by the claimant was such that if continued for an indefinite period of time it would have the capacity to cause the disease from which the claimant suffers.

The influx of asbestos litigation into the Longshore and Harbor Workers' system has resulted in a multitude of factual situations requiring interpretation of the applicability of this rule as well as other provisions of the Longshore and Harbor Workers' Act.

One of the first issues was the determination of the date of injury, as a substantial period of time usually had elapsed since the date of last exposure and the manifestation of disease. In *Todd Shipyards Corp. v. Black*[54] the Ninth Circuit determined that "the time of manifestation approach best accomplishes the purposes of the Longshore and Harbor Workers' Compensation Act." By adopting the "time of manifestation" approach, the court determined that a claimant's date of injury is fixed as of the date that the disease manifests, rather than the date of last exposure.[55]

As a result of the court's decision in *Black* substantial difficulties arose in determining the average weekly wage and compensation rate of the claimant. Many claimants were no longer participants in the labor market and determination of their rate of compensation was left to a case-by-case determination. In response to this difficulty, Congress, in its 1984 amendments to the Longshore and Harbor Workers' Compensation Act, added 33 USC § 910(d)(2) which establishes that the compensation rate of a worker who has not actively participated in the labor market within the 52 weeks prior to his or her date of injury must utilize the national average weekly wage applicable to the date of injury or manifestation of disease.[56]

The *Black* decision also has required the court to determine what law is applicable -- that of the date of last exposure or that of the date of manifestation. In *SAIF Corp. v. Johnson*[57] the court held that the law which existed on the date of injury (defined in *Black* as the date of manifestation or diagnosis) applies to determine the jurisdictional prerequisites and compensability of a longshore claim. The claimant in *Johnson* would not have been covered under the Longshore and Harbor Workers' Compensation Act on the date that he was last employed and exposed to asbestos. The 1972 and 1984 amendments to the Longshore and Harbor Workers' Act brought Johnson's claim within the jurisdiction of the Act.

Because asbestos victims, often many years from their last exposure, are unable to recall specifically the nature of their exposure or prove that exposure with precision, the Benefits Review Board, in *Susoeff v. San Francisco Stevedoring* Co.[58] provided the asbestos victim with a more favorable interpretation of the last injurious exposure rule. In *Susoeff*, the administrative law judge erroneously shifted, to the claimant, the burden of proving which employer had last exposed the worker to injurious stimuli. The Benefits Review Board rejected the administrative law judge's attempt to shift the burden of proof to the claimant and stated:

> [I]n the case of an occupational disease, the responsible employer is the employer during the last employment covered under the Act in which the employee was exposed to injurious stimuli prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising out of his employment.[59]

The Board further noted:

> [T]he last injurious exposure rule is not a rule of compensability. Rather it is a judicially created rule for allocating liability among employers in cases where an occupational disease develops after prolonged exposure. If claimant establishes exposure with a covered employer, it is not also the claimant's burden to prove no other employer is liable.[60]

Susoeff is consistent with the authors' contention that asbestos litigants have presented unique issues which have required innovative responses. Responses have most frequently been

fashioned to provide the asbestos litigant with the compensation to which the victim is entitled. Solutions to the problems of mass tort litigation have not been limited in their use in the courts to asbestos litigants. The reasoning of the Benefits Review Board in *Susoeff* can easily be applied to other victims suffering from occupational disease, for example hearing loss, and as such, will have a lasting impact.

One other area which has been the subject of recent litigation reflects the interrelationship between the compensation and tort systems. 33 U.S.C. § 933 provides the compensation employer or insurer with the ability to secure reimbursement from the claimant's successful tort litigation. An increasing body of case law has recently addressed the distribution of funds from this third-party litigation period.

In many asbestos cases, the third-party litigation involves not only the claimant, often a widow or widower, but adult children who are entitled to recovery in the tort system as a result of wrongful death or survivorship statutes. Division of the third-party proceeds or the amount of credit to which the employer or insurer is entitled has become an area of dispute. In *Lustig v. Todd Shipyards Corp.*[61] the Benefits Review Board did not allow the claimant to reduce the amount of the employer's credit by amounts alleged by claimant's counsel to be allocated to adult children who were not beneficiaries under the Act. The Board's decision was based primarily on the absence of proof as to the amounts to which the adult children were entitled.

In *Ponder v. Peter Kiewit Sons' Co.*[62] the Benefits Review Board held that the employer was not entitled to a credit for recovery of state compensation benefits by non-dependent adult children who were not entitled to benefits under the Longshore and Harbor Workers' Act.[63]

Whether an employer or insurer will be entitled to credit for amounts received by non-dependent adult children who are not beneficiaries under the Longshore and Harbor Workers' Act, where those amounts are well-defined or have been awarded by a court or jury, has not yet been determined.

C. State Compensation

State compensation acts have responded similarly to the Longshore and Harbor Workers' Act in expanding claimants' access to the compensation system and providing appropriate compensation benefits. In *Runft v. SAIF, Corp.*[64] the Oregon Supreme Court limited the defensive use of the last injurious exposure rule in a manner similar to the Benefits Review Board's decision in *Susoeff.* The court held that attempts by the employer or its insurer to shift responsibility to a later employer required the employer to join the party alleged to have provided the claimant with later exposure.[65] In *FMC Corp. v. Liberty Mut. Ins. Co.*[66] the Oregon Supreme Court concluded, as did the Ninth Circuit recently in its decision in *Todd Pac. Shipyards v. Director, Office of Workers Compensation Programs,*[67] that minimal exposure to asbestos may provide a basis for assignment of liability to an employer under the Workers' Compensation Act. The last injurious exposure rule does not require that the degree of exposure be sufficient to cause the disease, but only sufficient, if continued for an indefinite period of time to cause or contribute to the disease. Therefore the nature of the exposure, rather than the degree, is the subject of inquiry.

Not all state court decisions have expanded claimants' access to the Workers' Compensation process. In *Johnson v. State Accident Ins. Fund Corp.*[68] the Oregon Court of Appeals held that the same claimant, Grover Johnson, who later prevailed before the Ninth Circuit,[69] was not entitled to benefits under the State of Oregon compensation act because his exposure had occurred prior to the date that Oregon had adopted an occupational disease law, and under Oregon law, the date of injury is the date of last exposure, contrary to the ruling of the Ninth Circuit in *Black.*[70]

Conversely, in *Scarino v. SAIF Corp.*[71] the Oregon Court of Appeals rejected the carrier's effort to assign to a widow that portion of the third-party proceeds received by the adult children who were not beneficiaries under State Compensation Law.

Conclusion

The purpose of this article has been to set forth examples of the impact of asbestos litigation upon both tort and compensation systems. Because of the unique nature of asbestos litigation, the lengthy period of time from exposure to manifestation, and the significant evidence available to prove manufacturer negligence and strict liability, as well as the many appeals initiated primarily by the defendants and employers, asbestos litigation has had a substantial impact on the law. While the litigants who have met most recently with little success would like to limit the consequences of their appeals to the unique facts of asbestos litigation, they are unable to accomplish this result. Hearing loss cases, chemical exposure cases, products liability cases, and many other areas of the law have been affected. Citations to decisions involving asbestos litigation will permeate appellate decisions for many years. Rules fashioned to accommodate massive litigation resulting from asbestos disease will affect the law for the indefinite future.

If you are a plaintiff or claimant, look for an asbestos case to support your position. If you are a defendant or employer, consider not only your facts but also potential impact on the law before filing a notice of appeal.

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2. 33 U.S.C. §§ 901–950 (1988).

3. *See* 28 U.S.C. § 1332 (1988).

4. *See* 28 U.S.C. § 1333 (1988).

5. 662 F.2d 225, 232 (4th Cir. 1981).

6. 662 F.2d 234, 238 (4th Cir. 1981), *overruled by* Oman v. Johns-Manville Corp., 764 F.2d 224, 227 (4th Cir. 1985).

7. 698 F.2d 967, 969 (9th Cir. 1983).

8. 741 F.2d 1119, 1122 (9th Cir. 1984).

9. 46 U.S.C. app. § 688 (1988).

10. 33 U.S.C. §§ 901–950 (1988).

11. 202 F.2d 383, 388 (6th Cir. 1953).

12. *See generally* Luckett v. Continental Eng'g Co., 649 F.2d 441 (6th Cir. 1981); Searcy v. E.T. Slider, Inc., 679 F.2d 614 (6th Cir. 1982); Peterson v. Chesapeake and 0. Ry., 784 F.2d 732 (6th Cir. 1986).

13. 266 F.2d 769, 779 (5th Cir. 1959).

14. *See* Stafford v. Perini Corp., 475 F.2d 507, 510 (1st Cir. 1973); Lewis v. Rowland E. Trego & Sons, 501 F.2d 372, 373 (4th Cir. 1974).

15. *See* Roberts v. Williams-McWilliams Co., 648 F.2d 255 (5th Cir. 1981).

16. 781 F.2d 1067 (5th Cir. 1986).

17. *See* Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 964 (3rd Cir. 1979).

18. *See* Johnson v. John F. Beasley Constr. Co., 742 F.2d 1054 (7th Cir. 1984).

19. *See, e.g.,* Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (Wash. 1989); Lockwood v. AC & S, Inc., 109 Wash.2d 235, 744 P.2d 605 (Wash. 1987).

20. 493 F.2d 1076 (5th Cir. 1973).

21. *Id.* at 1087.

22. *Id*. at 1092–93.

23. *Id.; see also* George v. Celotex Corp., 914 F.2d 26 (2d. Cir. 1990) (holding that the fact that a 43 year old report, offered by the plaintiffs to show that dangers in the product were knowable by the manufacturer had not been published, did not preclude a finding that the report was part of the state of the art and that the dangers which it set forth were reasonably foreseeable).

24. *Borel,* 493 F.2d at 1091.

25. *Id.* at 1087.

26. *Id*. at 1089–1092.

27. *Id*. at 1086.

28. *Id*. at 1095–1096,

29. *Id*. at 1090 ("Nor may a manufacturer rely unquestioningly on others to sound the hue and cry concerning a danger in its product.").

30. *See, e.g., Celotex*, 914 F.2d at 28.

31. *See* Kisor v. Johns-Manville Corp., 783 F.2d 1337 (9th Cir. 1986); Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982).

32. *See generally* Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986).

33. 681 F.2d 334 (5th Cir. 1982).

34. 662 F.2d 1182 (5th Cir. 1981).

35. *Hardy*, 681 F.2d at 338; *Migues*, 662 F.2d at 1187.

36. 751 F. Supp. 649 (E.D. Tex. 1990).

37. 893 F.2d 706 (5th Cir. 1990).

38. *Cimino*, 751 F. Supp. at 665; *In re Fibreboard*, 893 F.2d at 712.

39. 781 F.2d 394 (5th Cir. 1986).

40. *Id.* at 411–12.

41. *Id.*

42. 912 F.2d 469 (9th Cir. 1990) (unpublished disposition).

43. *In re* Agent Orange, 506 F. Supp. 762 (E.D.N.Y. 1980).

44. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 511 (1988).

45. ____ U.S. ____ 111 S. Ct. 1032, 113 L.Ed. 2d 1 (1991).

46. 11 U.S.C. §§ 1, *et seq.* (1988).

47. Findley v. Blinken (*In re* Johns-Manville Corp.), 129 B.R. 710 (Bankr. E. and S.D.N.Y. 1991).

48. *See In re* Temple, 851 F.2d 1269 (11th Cir. 1988) (where a similar approach to the use of an involuntary fund of class certification was rejected by the court based upon the lack of commonality of the claims).

49. 33 U.S.C. §§ 901–950 (1988).

50. 5 U.S.C. §§ 8101–8193 (1988).

51. 4 A. Larson, *The Law of Workmen's Compensation, §§* 95.10, 95.24 (1989).

52. *See* Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), *cert. denied,* Ira S. Bushey & Sons, Inc. v. Cardillo, 350 U.S. 913 (1955).

53. *Id.*

54. 717 F.2d 1280, 1289 (9th Cir. 1983).

55. *Id*.

56. *See* Todd Pac. Shipyards Corp. v. Director, Office of Workers' Comp. Programs, 914 F.2d 1317, 1320 (9th Cir. 1990).

57. 908 F.2d 1434, 1435 (9th Cir. 1990).

58. 19 Ben. Rev. Bd. Serv. (MB) 149 (1986).

59. *Id*. at 150.

60. *Id*. at 151.

61. 20 Ben. Rev. Bd. Serv. (MB) 207 (1988), *aff'd in pertinent part,* Lustig v. United States Dept of Labor, 881 F.2d 593 (9th Cir. 1989).

62. 24 Ben. Rev. Bd. Serv. (MB) 46 (1990).

63. *See also,* Garcia v. Nat'l. Steel & Shipbuilding Co., 21 Ben. Rev. Bd. Serv. (MB) 314 (1988), (employer entitled to credit for state disability benefits for which benefits are also sought under the Longshore and Harbor Workers' Act).

64. 303 Or. 493, 739 P.2d 12 (1987).

65. *Id*. at 502–504.

66. 73 Or. App. 223, 698 P.2d 551 (1985).

67. 914 F.2d 1317 (9th Cir. 1990).

68. 78 Or. App. 143, 714 P.2d 1098, *reh'g denied*, 301 Or. 240, 720 P.2d 1279 (1986).
69. SAIF v. Johnson, 908 F.2d 1434, 1435 (9th Cir. 1990).
70. Todd Shipyards Corp. v. Black, 717 F.2d 1280, 1289 (9th Cir. 1983).
71. 91 Or. App. 350, 755 P.2d 139 (1988).