WORKPLACE TOXIC TORTS

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I. Introduction

Advances in medical research and technology have increased the plaintiffs' potential success in toxic tort personal injury cases. Most commonly, exposure occurs at the workplace. Many employers as well as their insurers underestimate the legal advantages the plaintiffs bar exercise in this legal arena. A plaintiff may bring a toxic exposure claim under several theories and against a number of potential defendants. First, the plaintiff who suffered toxic exposure at the workplace may bring an employment intentional tort claim against his/her employer. Secondly, a child may bring a cause of action against the employer for simple negligence if that child was injured from toxic exposure at the mother's workplace during her pregnancy. The parent or the child may also entertain product liability and simple negligence claims against the manufacturers and distributors of the product.

II. Claims brought directly by the employee for employment intentional tort.

A. Introduction

The Workers Compensation Act grants immunity from liability to the employers who comply with the workers compensation system. The Ohio Supreme Court has carved out an exception to this immunity provision in those cases where the employer acted as if it intended to injure the employee. In *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, the Supreme Court set forth the standard for establishing an intentional tort claim against an employer. In order to prove an employer intentional tort, the employee must prove by a preponderance of the evidence the following three elements:

(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;

(2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and

(3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

B. The first element: dangerous condition.

The first element requires the employee to prove that: (1) a dangerous condition existed within the employer's business operations; and (2) that the employer had knowledge that the dangerous condition existed. See *Dailey v. Eaton Corp. (2000) 138 Ohio App.3d 575, 581-82.*

The dangerous condition must fall outside dangers inherent to the nature of the plaintiff's work. Therefore, mere exposure to chemicals is not enough to establish that this was a dangerous condition. It is excessive exposure to chemicals that makes the condition fall into the realm of intentional torts. For example, in *Jurasek v. Gould Electronics, Inc.*, 2002 Ohio 6260, the plaintiff worked as a chemist at the defendant's laboratory. She claimed that she suffered injury from exposure to toxic chemicals. The court noted that exposure to chemicals is a fact of a chemist's job. To prove the existence of a dangerous condition beyond the hazards inherent to her job, she had to prove exposure to *dangerous levels* of chemicals.

In *Renwand v. Brush Wellman, Inc.*, 2002 Ohio 5849, the plaintiff contracted chronic beryllium disease (CBD) as a result of his exposure to beryllium at the workplace. The court noted that CBD is a potential hazard of processing beryllium, which was the plaintiff's work. CBD can be a fact of industrial employment. In order to prove that he was exposed to a dangerous condition beyond the hazards inherent to his line of work, the plaintiff must prove that he was *overexposed* to beryllium.

To decide whether the employer had knowledge that such a condition or procedure was dangerous, a court must examine whether the employer actually knew of the dangerous condition. See *Dailey, 138 Ohio App.3d at 582*, citing *Fultz v. Baja Boats, Inc. (Feb. 18, 1994),* Crawford App. No. 3-93-10, 1994 Ohio App. LEXIS 623; *Dailey, 138 Ohio App.3d at 582;* see also *Brunn v. Valley Tool & Die* (Nov. 9, 1995), Cuyahoga App. No. 68811, 1995 Ohio App. LEXIS 4992, *Youngbird v. Whirlpool Corp.* (1994), 99 Ohio App.3d 740, 746. In the context of toxic torts, such knowledge may be derived from prior accidents or the labels, warnings and material safety data sheets (MSDS) provided by the manufacturer.

C. The second element: substantial certainty

The second element requires the employee to prove that the employer knew if the employee is exposed to such dangerous condition, injury or death are a substantial certainty. Proof beyond negligence or recklessness is required to prove an intentional tort. The mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St. 3d 100, paragraph six of the syllabus, modified as set forth above and explained.)" *Fyffe,* supra.

As it is always difficult to prove the existence of actual knowledge, circumstantial evidence is used in most cases. Most common evidence to show prior knowledge includes prior similar accidents, prior citations of the same or similar hazard by OSHA, prior complaints by employees of the dangerous condition, or any other evidence that the employer had prior notice that the dangerous condition existed.

Prior accidents are probative of the employer's knowledge whether an injury is substantially certain to result from a dangerous condition. *Taulbee,* 120 Ohio App.3d at 20, *Yoder v. Greensteel Corp.* (Nov. 3, 1998), Stark App. No. 1998CA00106, 1998 Ohio App. LEXIS 5671; *Ross v. Maumee City Sch.* (1995), 103 Ohio App.3d 58. If employees complained of exposure to the chemical or developed adverse health reactions to the chemical, such prior incidents would most likely suffice as prior notice for purposes of intentional torts.

OSHA citations issued before the accident are admissible to prove prior knowledge, given that certain evidentiary requirements are met. For instance, if the employer was cited for failure to follow Hazard Communication requirements outlined by OSHA, for failing to provide proper personal protective equipment or for exceeding permissible exposure limits, such prior citations (assuming they were substantially similar) may be used as evidence to establish knowledge to a substantial certainty. The admissibility and effect of post-accident OSHA citations, however, have caused conflict among appellate courts.[1]

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[1]Some courts have held that OSHA citations issued after the accident are probative in employer intentional tort cases. *Brookover v. Flexmag Indus.*, 2002 Ohio 2404; *Felden v. Ashland Chem. Co., Inc.* (1993), 91 Ohio App.3d 48, 631 N.E.2d 689; *Slack v. Henry* (Dec. 1, 2000), Scioto App. No. 00 CA 2704, 2000 Ohio App. LEXIS 6336; *Maddox v. L.O. Warner* (Feb. 7, 1996), Montgomery App. No. 15468, 1996 Ohio App. LEXIS 380 disc. appeal den. (1996), 76 Ohio St.3d 1425.

Other courts have held that OSHA citations issued after the accident are not probative of the employer's intent. *Shreve v. United Elec. & Constr. Co.*, 2002 Ohio 3761; *Vermett v. Fred Christen and Sons Co.* (2000), 138 Ohio App.3d 586, 603; *Cross v. Hydracrete Pumping Co.* (1999), 133 Ohio App.3d 501, 507 ; *Fleck v. Snyder Brick and Block* (Mar. 16, 2001), Montgomery App. No. 18368, 2001 Ohio App. LEXIS 1197; *Floyd v. Master Indus., Inc.* (Dec. 10, 1999), Darke App. No. 1489, 1999 Ohio App. LEXIS 5876; *Thomas v. Barberton Steel &*

Many authorities have held that employers are not deemed to have knowledge to a substantial certainty where an employee fails to follow the employer's safety instruction. *Sanek v. Duracotte Corp.* (1989), 43 Ohio St.3d 169; *Russel v. The Nippert Co.*, 2003 Ohio 6016; *McConville v. Jackson Comfort Sys. Inc.* (1994), 95 Ohio App.3d 297; *Breininger v. Harborside of Ohio Ltd. Partnership* (Feb. 20, 1998), Williams App. No. WM-97-011, 1998 Ohio App. LEXIS 610; *Ortiz v. Elyria Foundry Co.* (Oct. 21, 1992), Lorain App. No. 92CA005302, 1992 Ohio App. LEXIS 5431; *Bader v. Therm-O-Disc, Inc.* (Sept. 5, 1990), Richland App. No. CA-2732, 1990 Ohio App. LEXIS 4231; *Baggs v. Clarklift of Columbus*, (April 9, 1996) Franklin App. No. 1996 Ohio App. LEXIS 1434; *Goodin v. Columbia Gas of Ohio* (2000), 141 Ohio App.3d 207. In toxic torts, this issue would surface where the employee failed to follow proper chemical handling procedures or failed to use proper personal protective equipment provided by the employer.

D. The third element: required to work with dangerous condition.

In order to satisfy the third prong of an employer intentional tort case, the plaintiff must show that the employer required him to work in a dangerous environment. *Gibson v. Drainage Products, Inc.* 95 Ohio St. 3d 171, 2002-Ohio-2008 modified the standard of proof on this third element. Gibson was employed by Drainage Products. The company policy was that if work was completed, the employee was required to inform supervisor and look for additional work. An extruder broke on the day of the accident, and Gibson offered to help a fellow employee to repair it. As his supervisor approached, the machine forcefully discharged hot plastic, injuring the plaintiff. The trial court directed the verdict in favor of the employer because the plaintiff failed to prove that he was required to work with the dangerous condition or instrumentality. The appellate court affirmed. The Ohio Supreme Court reversed both decisions. The majority held that the third part of the test was met because Gibson was required to seek additional work. This decision impacts current body of law discussing "specific direction for a specific act."

E. Subrogation and contribution.

Employers should be wary of rights of subrogation from their co-defendants. If the product manufacturer is in the case, it may argue that the employer failed to follow labels and warnings on MSDS and will try to seek contribution for any damages assessed against it. See e.g. *Conley v Brown Corporation of Waverly, Inc.* (1998), 82 Ohio St.3d 470. Of course, any third party tortfeasor is required to prove the intentional conduct of the employer under the *Fyffe* standard discussed above.

Iron, Inc. (Apr. 1, 1998), Summit App. No. 18546, 1998 Ohio App. LEXIS 1360; *Heyman v. Stoneco* (Aug. 2, 1991), Wood App. No. 90WD071, 1991 Ohio App. LEXIS 3656.

This is often a difficult task and one that should be carefully considered before filing any cross-claims.

The employer, on the other hand, <u>cannot</u> file such a cross-claim against a co-defendant based on contribution/indemnity. Under Ohio law, an intentional tortfeasor cannot seek contribution or indemnity against any other tortfeasor. ORC §§ 2307.31 and 2307.32.

F. Traditional defenses.

Contributory negligence and assumption of risk are not defenses to an employer intentional tort action. The plaintiff does not have to prove that the employer's wrongdoing was the only cause of the accident; only that it was the proximate cause of his accident. See generally *Lawrence v. LTV Steel Co. Inc,* (Dec. 7, 2000), Cuyahoga App. No. 77560, 2000 Ohio App. LEXIS 5720, citing *Cremeans v. Willmar Henderson Mfg.* (1991), 57 Ohio St.3d 145.

Although assumption of risk is not a complete bar to recovery, courts have granted summary judgment in those circumstances where the employee's own voluntary actions lead to his injuries. See e.g. *Tipton v. Bernie's Elec. Sales & Servs.*, 2003 Ohio 1629; *Swartout v. BGR Co., Inc.,* 2003 Ohio 1874; *Harris v. Diamler Chrysler Corp*, 2002 Ohio 5911; *Bare v. Warren Cons. Indus.*, 2001 Ohio 4321.

G. Statute of limitations.

The employee has two years within which to file an employer intentional tort claim. O.R.C. 2305.10. A recent Supreme Court decision has effectively extended the time within which an employee can file a lawsuit. *Norgard v. Brush Wellman, Inc.*, 2002 Ohio 2007. In *Norgard,* the plaintiff-employee broke out in a rash and suffered other complications within a few weeks of his employment. The employer told the employee not to worry and treated him. The employee was laid off from October 1981 until March 1984 and received pay. The employee was called back and still had severe exposure reactions. The employee received other tests in 1992, which formally diagnosed him as having chronic beryllium disease, a debilitating, and sometimes fatal, lung disease, caused by his exposure to beryllium. The employee's earlier-filed workers' compensation claim was amended to reflect this diagnosis, and he was immediately placed on disability leave. In 1992, he joined a CBD support group and, together with his wife, became one of the facilitators of the group. Between 1993 and 1995, Norgard and his group members contacted the EPA, OSHA, legislators and doctors familiar with the disease. In 1995, he read an article about beryllium lawsuits against the employer and contacted the law firm listed in the article. The attorney involved in these lawsuits told the employee that the employer withheld information about beryllium for years. The employee filed suit.

The employer was successful in dismissing the lawsuit based on the statute of limitations. On appeal, the Ohio Supreme Court decided that the statute began to run in 1995, when the employee found additional facts to prove the claim of intentional tort. The court held that the cause of action based upon the employer's intentional tort accrued when the employee discovered, or by the exercise of reasonable diligence should have discovered, the workplace injury and the wrongful conduct of the employer.

H. Conclusion

Although a hefty burden of proof, intentional torts have become less and less difficult to pass the summary judgment stage and proceed to the jury. Confusion among lower courts and fear of reversal has reduced the proof required in intentional torts to glorified negligence. This burden is substantially reduced when the claim is brought on behalf of a child who suffered injuries at the mother's workplace while she was pregnant.

III. Claims for prenatal injuries.

A. Introduction

A great area of concern for employers is the potential of prenatal injury at the workplace. Most employers mistakenly believe that the cloak of workers' compensation immunity applies to their employees' fetuses. All jurisdictions to have considered the issue have held that no such immunity provisions apply to a child's cause of action. In other words, a child or the parent on behalf of the child can bring a cause of action for negligence against the employer.[2] Advancements in the science of human teratology have enabled the plaintiffs' bar to file and, sometimes, succeed in actions for prenatal harm at the workplace.

B. Teratogenic hazards at the workplace

Human teratology is the study of causes, mechanisms, manifestations, and prevention of congenital defects. Shepard, *Encyclopedia of Human Biology*, vol. 7, "Human Teratology." The

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[2]*Thompson v. Pizza Hut of America, Inc.* (N.D.Ill. 1991), 767 F.Supp. 916; *Ransburg Industries v. Brown*, 659 N.E.2d 1081, 1995 Ind.App.LEXIS 1636; *Hitachi Chemical Electro-Products, Inc. v. Gurley* (1995), 219 Ga.App. 675, 466 S.E.2d 867; *Pizza Hut of America, Inc. v. Keefe* (2000), 900 P.2d 97, 1995 Colo.LEXIS 306; *Meyer v. Burger King Corp.*, 101 Wash.App. 270, 2 P.3d 1015; *Snyder v. Michael's Stores, Inc.* (1997), 16 Cal.4th 991, 68 Cal.Rptr.2d 476.

word "teratogen" means an "agent capable of causing malformations in embryos." The field of teratology encompasses a range of disciplines, including pediatrics, anatomy, pharmacology, pathology, developmental biology, and more. A number of interest groups and organizations are dedicated to advancements in scientific studies, medical research, and publications on this subject. See e.g., *The Teratology Society*, http://www.teratology.org.

The plaintiffs' bar and medical experts use teratology to link a child's congenital defects to the mother's exposure to chemical agents at various stages of fetal development. Teratology divides the prenatal life into three periods: early implanted ovum, embryonic, and fetal. The ovum period occurs for eleven to twelve days after fertilization. The embryonic period lasts for the first 60 days from the time of fertilization. The fetal period occurs from the end of the embryonic period until the date of birth. The stage of development controls the sensitivity to different teratogens and the type of defect produced. See Shepard, *supra*, at 411-13.

Reproductive hazards in the workplace have been identified by several occupational safety organizations and medical scientists. National Occupational Health & Safety Commission, "Reproductive Health and Pregnancy." OSHA, for instance, has long recognized the reproductive hazards associated with exposure to excess levels of lead, glycol ethers, methylene chloride, and other common workplace toxins. See also, *Annotated Catalog of Teratogenic Agents* (which lists over 2,000 agents that have been studied for teratogenesis in humans and animals).

A good example of a teratogen is carbon monoxide. Carbon monoxide can be transported across the placental barrier and poses a special risk to the fetus. Interestingly, the recommended exposure limits for employees vary widely. OSHA's permissible exposure level (PEL) for carbon monoxide is currently set at 50 parts per million (ppm) over an eight-hour time-weighted average. The National Institute for Occupational Safety and Health (NIOSH) has established an exposure limit of 35 ppm, while international standards set the limit as low as 25 ppm. See "International Safety Card 0023." This type of conflict creates substantial uncertainty for employers, who are required to balance production needs with the reproductive health of their employees.

Another example is the regulations governing noise levels. Sound is a pressure variation that the ear can detect, and, when measured, is usually converted into decibels (dB). OSHA requires hearing protection equipment when sound levels exceed 90 dBa (decibels on the "A" scale) over an eight hour shift. 29 C.F. R. § 1910.95(a). Whenever average exposures over an eight hour day exceed 85 dBa, the employer must implement and administer an effective hearing conservation program. 29 C.F.R. § 1910.95 (c)(1).

Nothing in these regulations addresses the risk to a fetus. Indeed, OSHA requires noise levels to be measured on the "A" scale of a sound meter rather than the less discriminatory "C" scale, which can better measure all of the sound penetrating the mother's abdomen. Sound levels measured on the C scale will include all frequencies, including low frequency sound. An OSHA dBa reading will be generally lower than a dBc reading.

Noise levels that may be safe to adults can cause hearing impairment in fetuses. "Noise: A Hazard for the Fetus and Newborn," *Pediatrics*, vol. 100, no. 4 (Oct. 4, 1997). According to American Conference of Governmental Industrial Hygienists (ACGIH), noise exposures in excess of a time weighted, 8 hour average of 115 decibels (dBc) beyond 5 months of pregnancy can cause hearing loss in the fetus. The American Academy of Pediatrics has found that exposure to excessive noise during pregnancy may result in high frequency hearing loss in newborns. This organization specifically recommends that OSHA give consideration to pregnant women when setting occupational noise standards. Under the current regulations, OSHA-compliant employer may be routinely exposing the unborn child to excessive occupational noise without any protection.

As demonstrated in these common examples, OSHA regulations are outdated in light of current scientific knowledge. Mere compliance with federal regulations neither ensures adequate protection for the unborn children of employees nor shields employers from tort liability. In short, the current state of law creates the worst of both worlds for employers.

C. Right to recover for prenatal injury

All states recognize the right to maintain a cause of action for prenatal injury, at least when the injury is inflicted on a viable fetus later born alive. Prosser & Keeton, *The Law of Torts*, §55, at 368 (5th ed. 1984). Some courts have recognized the right of a wrongful death action even if the unborn child was not viable at the time it was injured. See, e.g., *Citron v. Ghaffari* (2000), 246 Ga.App. 826, 542 S.E.2d 555; *Smith v. Borello* (2002), 370 Md. 227, 804 A.2d 1151.

D. Lack of federal preemption

As a general matter, federal statutes such as OSHA and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) do not preempt state negligence actions for prenatal injuries. OSHA regulations governing toxic substances contain a provision specifically preempting any conflicting state rules. 29 C.F.R. §1910.1200(a)(2). OSHA, however, contains a savings clause stating that "nothing in (OSHA) shall be deemed to be exempt or relieve any person from any liability, duty, penalty provided by any present or future law of any State. . . ." 42 U.S.C. §2000e-7.

In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* (1977), 430 U.S. 442, 445, the United States Supreme Court noted that OSHA establishes a new statutory duty for employers and creates a new remedy, regardless of whether or not an employee was injured. Existing state statutory and common law remedies for actual injury and death remain unaffected. See also, *Pedraza v. Shell Oil Co.* (1st Cir. 1991), 942 F.2d 48 (enactment of the "savings clause" further evidenced the Congress's intent to spare general provisions of state law from preemption). The *Pedraza* court cited the Solicitor of Labor, who explained that OSHA "would in no way affect the present status of the law with regard to workmen's compensation legislation or *private tort actions*." *Id.* at 54 n.8, citing *Pratico v. Portland Terminal Co.* (1st Cir. 1985), 783 F.2d 255.

An appellate court in New York also found that FIFRA did not preempt a child's action against his mother's employer. *Mann v. H.W. Andersen Products, Inc.* (1998), 246 App.Div.2d 68, 676 N.Y.S.2d 658. The plaintiff's pregnant mother was exposed to ethylene oxide at her workplace. The plaintiff charged the employer with liability for failure to warn and with negligence. The court held that FIFRA did not preempt the child's right to recovery. According to the court, the action for common law failure to warn is "not the type of warning claim that falls within FIFRA preemption." 676 N.Y.S.2d at 661. The court distinguished the case on the ground that it dealt with "a defendant's alleged failure to caution and protect a workplace employee, and, in turn, her fetus, from the dangers of exposure to the raw material itself." *Id.*

Neither state workers compensation schemes nor federal regulations tend to specifically preempt a child's cause of action for prenatal injury at the workplace. Prenatal injury claims of this nature pose a unique problem for employers because the standard of care is vague and most traditional defenses are unavailable.

E. Employers' duty of care to unborn fetuses

The employer's duty of care is the greatest area of uncertainty in prenatal injury cases. A duty of care to an unborn fetus is defined by the employer's actual or constructive knowledge of whether the occupational hazards pose unreasonable health risks to the unborn child.

The difficulty arises in establishing what the employer should have known about reproductive risks at the time of the alleged exposure. A term search combining the chemical in question and "reproductive health" is certain to produce hundreds of Web site links. Some of the information about reproductive health risks originates from legitimate sources. Other sources are unscientific, such as chat rooms or Web sites hosted by individuals with no medical background. Consequently, it is difficult to determine the point at which the scientific knowledge reaches a level of legitimacy sufficient to impose constructive knowledge on the employer.

One can venture onto OSHA's Web site and type in "reproductive health" into a key term search. The Web site generates a number of links, one of which is to a NIOSH publication, *The*

Effects of Workplace Hazards on Female Reproductive Health. The publication lists a number of chemicals that are "reproductive hazards for women in the workplace." If NIOSH lists a chemical as a reproductive hazard, does this listing give the employer constructive knowledge of the hazard? Perhaps the availability of federal publications is a fact sufficient to impute knowledge to the employer. The courts may even charge employers with knowledge higher than the information contained in federal regulations.

Federal publications may not contain up-to-date scientific data about reproductive hazards; and mere compliance with the regulations may not absolve the employer from liability. In some areas, OSHA lags behind other occupational health organizations in setting appropriate workplace exposure standards as they relate to the unborn. OSHA's levels of permissible exposure to chemical substances (PELs) were based on recommendations that were made 25 years ago. AIHA's *White Paper on Permissible Exposure Limits* (2002). Those organizations have long since updated their standards, which are based on good science and undergo extensive scientific peer review.

This issue is further complicated by tolling the statutes of limitations for minors. The plaintiffs may delay the action to take advantage of advances in medical knowledge. In these instances, the defense lawyer should emphasize that the relevant state of knowledge should be based upon the date of the exposure, not the date of trial. This "state of the art" defense is used frequently in product liability cases. Prenatal injury claims should be subject to the same attack. Employers should argue that the knowledge of reproductive hazards could not be confirmed by valid scientific studies at the time of the exposure.

F. Discriminatory fetal protection policies are unconstitutional

Employers' risk management efforts may be frustrated by workplace discrimination law, which makes it illegal to implement fetal protection policies at the workplace. Safety-conscious employers may take actions that expose them to liability for sexual discrimination. Such was precisely the result in *International Union v. Johnson Controls, Inc.* (1991), 499 U.S. 187.

Johnson Controls' manufacturing process involved exposure to lead as a primary occupational risk. In one particular section of the plant, eight pregnant female employees had lead levels above those mandated by OSHA regulations. The employer established a policy excluding all women who were capable of bearing children from being placed in jobs involving exposure to lead. The United States Supreme Court found that this was impermissible sex discrimination under Title VII.

The decision in *Johnson Controls* has hampered employers' ability to effectively protect childbearing employees from exposure to hazards that may harm their unborn children. The decision, combined with the child's right of action for work-related exposure, creates a double-edged sword for the employer. On one hand, an employer choosing to protect the employee's fetus from known occupational hazards may be exposing itself to discrimination liability. On the other hand, inaction may result in liability for negligence by omission.

Johnson Controls attempts to address this concern in dicta but creates no valuable precedent. The Court seems to suggest that if "the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." 499 U.S. at 208. Despite the Court's intentions, this language has assisted state courts in defeating employers' public policy pleas against civil suits for fetal work exposure. See, e.g., *Snyder v. Michael's Stores*, *Inc.* (1997), 16 Cal.4th 991, 68 Cal.Rptr.2d 476. At least one court has rejected a preemption argument stating in a footnote that "we do not have before us facts which placed [the employer] in the position where it was impossible to comply with both federal and state law requirements." *Ransburg Industries v. Brown* (1995), 659 N.E.2d 1081, 1086, 1995 Ind. App. LEXIS 1636, at *15.

Johnson Controls limits the possibility of preemption to those situations where the employer "was not otherwise negligent." An employer can arguably meet its duty of care by using non-discriminatory means to protect unborn children of its employees, such as implementation of stricter air quality standards and use of less harmful products. While the non-discriminatory means may seem feasible to jurors, they may completely ignore the reality of a production process.

G. Traditional defenses are not available

An employer's legal position is further confounded by the absence of many traditional defenses to prenatal injury claims. One of these unavailable defenses is the argument that the parents, not the employer, need to be the primary protectors of the child's well-being.

It is intuitive that parents bear the greatest responsibility for the health of their children. A parent who accepts child-bearing responsibilities should be expected to make the decisions necessary to protect his or her unborn from harm. This decision-making process begins to occur even before the child is conceived. The parent is in the best position to insulate her child from external harm. A parent who is fully informed of the risks of exposure to her fetus should be charged with a fiduciary duty to avoid such exposure. The mother rather than the employer is in the best position to avoid exposure to the fetus, given a full disclosure of the risks entailed in her job. Unfortunately, the courts disagree.

In many states, parents do not have the power to waive their children's cause of action for personal injuries. Typically, the state's interests in protecting the minor children will outweigh a

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parent's right to waive a child's own future cause of action resulting from a third party's negligence. *Munoz v. II Jaz Inc.* (1993), 863 S.W.2d 207, 1993 Tex.App.LEXIS 2250; *Scott v. Pacific West Mountain Resort* (1992), 119 Wash.2d 484, 834 P.2d 6; *Cooper v. Aspen Skiing Co.* (2002), 48 P.3d 1229, 1236, 2002 Colo. LEXIS 528, at *21. Obtaining a written waiver in these states is not likely to protect an employer from suit by the child for prenatal exposure. But see, *Hohe v. San Diego Unified School District* (1990), 224 Cal.App.3d 1559, 274 Cal.Rptr. 647.

The parent's superseding or intervening acts have not precluded the child's recovery in some states. In cases pertaining to preconception torts, the Mississippi and New Jersey Supreme Courts found that the actions taken by the mother after the negligent act of the physician did not constitute a superseding cause. See *Sweeney v. Preston* (2000), 642 So.2d 332, 1994 Miss.LEXIS 200; *Lynch v. Scheininger*, 162 N.J. 209, 744 A.2d 113.

In *Lynch*, the plaintiff mother had two stillbirths as a result of erythroblastosis fetalis, which is related to the Rh factors in the fetus's blood. The defendant physician did not provide immunizations against Rh factors and, consequently, all her subsequent pregnancies could result in stillbirths. The Supreme Court of New Jersey found "no basis for concluding that the Lynches' decision to conceive Joseph constituted a superseding cause that extinguished Dr. Scheininger's liability as a matter of law." 744 A.2d at 128. See also, *Graham v. Keuchel* (Okla. 1993), 847 P.2d 342; *Yonce v. SmithKline Beecham Clinical Laboratories* (1996), 111 Md.App. 124, 680 A.2d 569.

In most jurisdictions, contribution claims against a negligent parent are barred by the doctrine of parental immunity. *Pedigo v. Rowley* (1980), 101 Idaho 201, 610 P.2d 560; *Smith v. Sapienza* (1981), 52 N.Y.2d 84, 436 N.Y.S.2d 236; but see, *Petersen v. Honolulu* (1969), 51 Hawaii 484, 462 P.2d 1007; *Carey v. Meijer Inc.* (1987), 160 Mich.App. 461, 408 N.W.2d. 478; *Teeter v. Missouri Highway & Transportation Commission* (1995), 891 S.W.2d 817, 1995 Mo. LEXIS 5; *France v. A.P.A. Transport Corp.* (1970), 56 N.J. 500, 267 A.2d 490.

A few courts have addressed the issue of parents' contributory negligence in prenatal injury cases. In 2000, a trial court in New York heard a case brought by the parents of an injured child who was born with various birth defects as a result of the parents' exposure to chemical substances at the workplace. In *Ruffing v. Union Carbide Corp.* (2000), 186 Misc.2d 679, 720 N.Y.S.2d 328, the defendant claimed that the parents were guilty of child neglect by working around hazardous and toxic substances. The court limited contributory negligence or negligent supervision defenses to instances where the parents' neglect affects third parties, not the child itself. Where the mother's continued work with chemicals only affected the fetus, there was no finding of comparative negligence. 720 N.Y.S.2d at 336; see also, *Bellefontaine & Indiana Railroad Co. v. Snyder* (1968), 18 Ohio St. 399; *Slone v. Ohio Department of Highway Safety* (1989), 61 Ohio Misc.2d 64, 573 N.E.2d 806 (negligence of a parent cannot be imputed to the child to bar its right of action for injuries resulting from their wrongful acts).

It appears that the reluctance to impute liability to the parent is dictated by the concern for the child's ability to receive money for serious injuries. Although mothers are in the best physical position to prevent injuries to their unborn, employers are in a better financial position to cover the child's medical expenses. In the absence of traditional defenses, there is no bright-line approach to handling claims of this nature. Employers and their counsel must devise a strategy best suited to the facts and circumstances of each case.

H. Conclusion

The potential for future claims for prenatal injuries against employers and chemical manufacturers is significant. The defense practitioner should be aware that the exclusivity of state workers compensation schemes is unlikely to shield most employers from claims presented by the injured child. Since many traditional defenses may be unavailable to the employer, defense counsel must devise non-traditional approaches to attacking the plaintiffs' claims. As science advances, however, it will become more challenging to defeat claims of this nature. While a legislative solution would be welcomed by employers, prudent defense practitioners should be proactive in alerting clients to these issues and assisting them in establishing non-discriminatory means of protecting the unborn in the workplace.

IV. Claims for product liability brought by parent or child

A. Introduction

A parent or her child can also entertain an action for product liability under theories of product defect, manufacturing defect, failure to warn or failure to conform to a representation. R.C 2307.71 *et. seq.* Chemical substances fall within the product liability statute, which defines a "product" as any object, substance, mixture, or raw material that constitutes tangible personal property and satisfied all of the following: (a) is capable of delivery itself, or as assembled whole in a mixed or combined state, or as a component or ingredient, (b) is produced, manufactured, or supplied for introduction into trade or commerce, and (c) is intended for sale or lease to persons for commercial or personal use. R.C. 2307.71(L).

A manufacturer is liable in product liability if a preponderance of the evidence shows (1) any one of the four defects and (2) that the defect was a proximate cause of the harm for which the claimant seeks to recover compensatory damages. R.C. 2307.73. In toxic torts, the plaintiffs bear a dual burden. First, they must demonstrate, most often through expert testimony, that the product was defective. Secondly, they must prove through toxicological and medical evidence that the levels at which the plaintiff was exposed to the product can and did cause harm to the plaintiff.

B. Defect in manufacture

A chemical product is defective in manufacture or construction if, when it left the control of its manufacturer, it (1) deviated in a material way from the formula or performance standards of the manufacturer; or (2) deviated from otherwise identical products manufactured to the same formula.

C. Defect in design

A product may be defective even if the manufacturer exercised all possible care in manufacture. R.C. 2307.74.A product is defective in design or formulation if either of the following apply: (1) at the time it left the control of its manufacturer, the foreseeable risks associated with its design or formulation exceed the benefits associated with that design or formulation; or (2) it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. R.C. 2307.75. These two prongs are more commonly known as the "risk-benefit test" and the "consumer expectation test."

Under the risk-benefit test, the plaintiff must prove that at the time the product left the control of its manufacturer, the foreseeable risks associated with the design or formulation exceed the benefits. The foreseeable risks associated with the design or formulation of a product are determined by considering, but not limited to, the following factors: (1) the foreseeable risks and the benefits associated with the design or formulation of a product: (2) the nature and magnitude of the risks of harm, (3) the likely awareness of product users, (4) the likelihood of harm in light of intended and reasonably foreseeable uses; and (5) the extent to which the design or formulation conformed to standards that were in effect when the product left the manufacturer. R.C. 2307.75(B).

"Benefits" associated with the design are determined by considering factors including, but not limited to, the following: (1) the intended or actual utility of the product, including any performance or safety advantages; (2) the technical and economic feasibility, when the product left the control of its manufacturer of using an alternative design or formulation; and (3) the nature and magnitude of foreseeable risks associated with an alternative design or formulation. R.C. 2307.75(C).

The second prong of the test for determining a design or formulation defect is the "consumer expectation test". Under the consumer expectation test, "a product is defective in design or formulation if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." R.C. 2307.75(A)(2).

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Product defects can be established by circumstantial evidence. If a product is destroyed, making it impossible for a claimant to establish by direct evidence that the product was defective, or if the claimant is unable to establish by direct evidence that a product was defective, then the claimant may present circumstantial or other competent evidence that establishes by a preponderance of the evidence, that the product was defective. R.C. 2307.73(B).

Prior similar accidents can also be used to establish a product liability claim. In order to admit evidence of other accidents, the plaintiff must show the probative value of the prior incidents by proving they are "sufficiently similar in time, place, or circumstances." *Olin-Mathieson Chemical Corp. v. Allis-Chalmers Mfg.* (6th Cir. 1971), 488 F. 2d 833. The substantial similarity requirement is not satisfied by a mere showing that the products are within the same product category. Rather, it requires a showing that the design aspects of the products involved in the prior accidents or incidents are the same as those of the subject product. Plaintiff must also establish that the prior accidents or incidents are similar in time, place or circumstances.

In Ohio, evidence of subsequent remedial measures can be admitted in a products liability action. Ohio Rule of Evidence 407. Federal rules, on the other hand, prohibit the use of subsequent remedial measures to establish negligence or product liability.

D. Failure to warn

The most common product liability claims against chemical product manufacturers are for failure to warn or provide instructions for the safe use of a product. A product is defective due to inadequate warning or instruction if at the time it leaves the manufacturer's control, the manufacturer knew or, in the exercise of reasonable care should have known, about a risk associated with the product that allegedly caused the harm for which the claimant seeks to recover compensatory damages and failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning the risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover and in light of the seriousness of that harm. R.C. 2307.76(A)(1)(a) and (b).

The manufacturer's knowledge of the risks associated with its chemical products may be derived from direct or circumstantial evidence. This evidence may include federal regulations such as Federal Hazardous Substances Act (FHSA) or the Fair Packaging and Labeling Act (FPLA, administered by Federal Trade Commission and Food and Drug Administration). The evidence may also include industry standards, such as the standards from the American National Standards Institute (ANSI), National Paint and Coating Association guidelines and any other guidelines applicable to the specific industry.

Mere compliance with standards may not insulate the manufacturer from liability. The state of scientific knowledge, the competitors' practices and the general knowledge within the industry may also be used to infer that the manufacturer had knowledge of the risks associated with its product. In *Mason v. Texaco, Inc.*, (1991), 948 F.2d 1546, cert. den. 504 U.S. 910, the plaintiff argued that his exposure to benzene caused his cancer and sued the manufacturer for failure to warn of the risks associated with exposure to benzene. The court upheld a jury verdict because Texaco knew of dangers associated with benzene. The key evidence used in the case was a 1948 study, commissioned by the American Petroleum Institute, of which Texaco was a member, concluding that there were well-documented cases of leukemia from benzene exposure.

A warning may be deemed deficient because it is incomplete or does not convey the sense of urgency proportionate to the danger associated with the product. For instance, in *Burne v. SCM Corp.*, (D. Ill. 1989), 182 Ill. App.3d 523, the plaintiff developed cognitive problems from exposure to epoxy paint. The label affixed to the product instructed the consumer to use only with "good" ventilation and that air-supplied respirators "should" be worn in confined areas. The plaintiff's experts testified that the sense of urgency was lacking from the warnings. The warning should have used the word "must" instead of "may".

Post-sale warnings may also be required in certain circumstances; and a plaintiff can bring a cause of action for the manufacturer's failure to provide post-sale warnings or instructions. To prove that a product is defective because of an inadequate post-marketing warnings or instructions, a claimant must prove that: (1) the manufacturer knew or, in the exercise of reasonable care should have known, of a risk associated with the product that allegedly caused harm for which the claimant seeks to recover compensatory damages; or (2) the manufacturer failed to provide the post-marketing warning or instruction that a manufacturer exercising reasonable care would have provided concerning the risk, in light of the likelihood that the product would cause harm of the type alleged by plaintiff and in light of the likelihood of the seriousness of that harm. R.C. 2307.76(A)(2). This requirement of post-marketing warnings places an obligation on the manufacturer to add a warning or to update the existing warning if there is a need for a warning after the product leaves the manufacturer's control.

A product is not defective due to a lack of warning or inadequate warning or instruction if the risk is open and obvious or a matter of common knowledge. R.C. 2307.76(B). In toxic tort cases, this defense becomes more difficult to prove because many risks associated with chemical products are not commonly known to ordinary consumers.

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E. Failure to conform to a representation

A product is defective if it did not conform, when it left the manufacturer's control, with a representation made by that manufacturer, even if the manufacturer did not act fraudulently, recklessly or negligently in making the representation. R.C. 2307.77. A "representation" is an express representation of a material fact concerning the character, quality or safety of a product. R.C. 2307.71(O). A representation such as "safe for use with children" on a product with highly flammable propellant would probably qualify under this category.

F. Supplier liability

Suppliers of chemical materials are also subject to product liability claims. A "supplier" is a person that, in the course of business conducted for that purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in placing the product in the stream of commerce or installs, repairs, or otherwise maintains any aspect of a product that allegedly causes harm. R.C. 2307.71(P)(1).

A supplier is liable for compensatory damages based on a product liability claim if the claimant establishes by a preponderance of the evidence that either (1) the supplier was negligent and that negligence was the proximate cause of the harm or (2) the product did not conform to a representation made by the supplier when it left the supplier's control. The supplier is liable for such a representation even though it was not made fraudulently, recklessly or negligently. R.C. 2307.78(A).

The courts will probably apply the common law negligence standard and hold that a supplier has a "duty of reasonable care . . . that protects the consumer from physical injury, whether to person or property. *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40. In a negligence products liability case against a supplier, a supplier can assert the defense of implied assumption of the risk. R.C. 2315.19 for actions arising prior to April 9, 2003.[3] Therefore, if the consumer's own negligence, considering factors of assumption of the risk, outweighs any negligence of the supplier, the supplier cannot be held liable for negligence under Id. Courts have recognized the common law assumption of the risk defense to a strict product liability action under R.C. 2307.78. If the claimant assumed a risk and such risk was a direct and proximate cause of the harm for which the claimant seeks to recover damages, then the express or implied assumption of the risk

[3] For causes of action accruing after April 9, 2003, see R.C. 2307.01.1, 2307.22-29, 2315.22-46.

is a complete bar to the recovery. R.C. 2315.20(B)(1) and (2), *Sproles v. Simpson Fence Co*. (1994), 99 Ohio App.3d 72.

A supplier is liable as if it were a manufacturer if the manufacturer is or would be subject to liability for compensatory damages and: (1) the manufacturer is not subject to judicial process in the state, (2) the manufacturer is insolvent, (3) the supplier owns the manufacturer, (4) the manufacturer owns the supplier, (5) the supplier created or furnished the manufacturer with the design or formulation, (6) the supplier altered, modified or failed to maintain the product after it came into its possession and before it left its possession, (7) the supplier marketed the product under its own label or trade name, or (8) the supplier failed to respond timely and reasonably to a written request by or on behalf of the claimant to disclose the name and address of the manufacturer. R.C. 2307.78(B).

G. Traditional defenses

Generally, comparative negligence (the plaintiff's own negligence) is not a defense in a strict liability products case for claims arising prior to April 9, 2003 (see discussion, *infra*). Comparative negligence is only a defense in a *negligence* claim for *suppliers*. Comparative negligence is not admissible in any other strict liability claim against a supplier. For example, in cases where the supplier stands in the shoes of a manufacturer, comparative negligence does not apply prior to April 9, 2003.

Express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim. If the claimant assumed a risk and such risk was a direct and proximate cause of the harm for which the claimant seeks to recover damages, then the express or implied assumption of the risk is a complete bar to the recovery of those damages. R.C. 2315.20(B)(1) and (2). However, in the context of strict product liability, an employee will be deemed to have voluntarily exposed herself to a risk only when she has elected to use a defective product. The defense of assumption of the risk is *not* available when the employee is required to encounter the risk while performing normal job duties. *Cremeans v. Willmar Henderson Mgf. Co.* (1991), 57 Ohio St.3d 145.

Recent legislative changes have renewed the defense of contributory negligence to a strict liability claim. In 2003, the General Assembly reverted back to the contributory negligence scheme set forth in HB 350, now permitting contributory negligence as an affirmative defense in strict liability actions arising after April 9, 2003.

Under both common law and OPLA, a substantial modification or alteration of the product after it left the control of the manufacturer is a defense in a strict product liability action.

Intervening cause is a viable defense so long as the jury is not instructed to compare the parties' relative degrees of fault. If a plaintiff's actions completely eliminate the effect of a defendant's acts or omissions, then there is a lack of proximate cause and the defendant may not be held liable.

Unforeseeable misuse is a defense in a strict liability action. A manufacturer is only liable for reasonably foreseeable uses of a product under R.C. 2307.75. Therefore, an unforeseeable risk, or the plaintiff's misuse of the product relieves the manufacturer of liability under the statute.

The OPLA does not contain a statute of limitations. Common law provides for a 2-year limitations period for personal injury or damage to personal property and four years for damage to real property. *McAuliffe v. Western Imports Co., Inc.*(1995), 72 Ohio St.3d 534.

Merely because employers are subject to liability to their employees or for prenatal injuries at the workplace does not insulate the product manufacturers from liability. Manufacturers and suppliers of chemical products must therefore take appropriate steps to ensure that they have a reliable, methodical and consistent approach to hazard assessment and periodic review of the warnings contained in their labels and material safety data sheets.

V. Causation: the greatest challenge in toxic tort cases.

Based on numerous common law limitations, the employers and their defense counsel should vigorously challenge the plaintiff's evidence of causation. The defense should seek a court order limiting the scope of discovery and request a causation hearing at early stages of litigation. A causation hearing in prenatal injury cases may dispose of the entire action before significant resources are spent on other discovery.

Regardless of liability issues, the plaintiff bears the ultimate burden of proof on causation. This burden is dual. First, the plaintiff must prove that the defendant's product was capable of causing the health effects in question (general causation). Next, the plaintiff must establish that the exposure to the defendant's product was the specific cause of injury (specific causation). See *In re Joint Eastern & Southern District Asbestos Litigation* (2d Cir. 1995), 52 F.3d 1124, 1131 .

Two methods for identifying human teratogens have evolved: 1) epidemiologic studies; and 2) identification of a rare exposure event with a rare type of congenital defect. Shepard, *supra*, at 415. Epidemiological studies are expensive, time-consuming, and require large numbers of patients to gain any statistical significance. Such studies are also prone to influence by bias of the mother who seeks an explanation for the child's malformations. The second method of identification, on the other hand, produces very small numbers of affected individuals. The plaintiffs' experts rely at large on these general studies and research

Epidemiological studies relate to general causation. "Epidemiological studies are the primary generally accepted methodology for demonstrating a causal relation between a chemical compound and a set of symptoms or a disease." *Conde v. Velicol Chemical Corp.* (S.D.Ohio 1992), 804 F.Supp. 972, 1025-26. At least in the context of epidemiological studies, some courts have adopted a rule of law that a plaintiff's evidence must be rejected if the plaintiff's expert relies on a theory that has a relative risk of less than 2.0. *Allison v. McGhan Medical Corp.* (11th Cir. 1999), 184 F.3d 1300, 1315 n.16, citing the Federal Judicial Center's *Reference Manual on Scientific Evidence* 168-69 (1994); see also, *Wilson v. Merrell Dow Pharmaceuticals Inc.* (10th Cir. 1990), 893 F.2d 1149, 1154-55; *Renaud v. Martin Marietta Corp.* (D.Colo. 1990), 749 F.Supp. 1545; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (9th Cir. 1995), 43 F.3d 1311, 1320-22.

Differential diagnosis is another tool employed by plaintiffs' attorneys to attribute the illness to the exposure. Differential diagnosis is a process by which a clinician can identify possible diseases the patient may have and, through process of elimination, rule out diseases until one disease or symptom is left as a diagnosis. At least one court has held that differential diagnosis does not by itself *prove* the cause, even for the particular patient. If anything, differential diagnosis provides a list of possible causes. *In re Breast Implant Litigation* (D.Colo. 1998), 11 F.Supp.2d 1217, 1229.

Expert testimony will not meet the standard set forth by the United States Supreme Court in *Daubert v. Merrell Dow* when the plaintiff's expert merely relates the temporal sequence of exposure to the onset of illness. "Temporality at best addresses the issue of specific causation; therefore, evidence of temporality is inadmissible where no admissible evidence of general causation exists." *In re Breast Implant Litigation*, 11 F.Supp.2d at 1232. Many courts have also held that even as to specific causation, temporality cannot withstand *Daubert* scrutiny. See *Cuevas v. E.I. DuPont de Nemours & Co.* (S.D.Miss. 1997), 956 F.Supp. 1306; *Cartwright v. Home Depot USA, Inc.* (M.D.Fla. 1996), 936 F.Supp. 900; *Schmaltz v. Norfolk & Western Railway Co.* (N.D.Ill. 1995), 878 F.Supp. 1119; *Cavallo v. Star Enterprise* (E.D.Va. 1995), 892 F.Supp. 756 ; *Sanderson v. International Flavors & Fragrances, Inc.* (C.D.Cal. 1996), 950 F.Supp. 981.

Federal courts have also dismissed actions where the plaintiff failed to prove the exposure to the defendant's product was at levels that could cause the type of injuries sustained by the plaintiffs. *Mascarenas v. Miles, Inc.* (W.D.Mo. 1997), 986 F.Supp. 582; *Latimer v. SmithKline & French Laboratories* (5th Cir. 1990), 919 F.2d 301; *Wright v. Willamette Industries, Inc.* (8th Cir. 1996), 91 F.3d 1105 (roof exposure to toxic substance in levels known to produce harm required to make admissible case on causation issue); *In re "Agent Orange" Product Liability Litigation* (2d Cir. 1993), 996 F.2d 1425; *Maddy v. Vulcan Materials Co.* (D.Kan. 1990), 737 F.Supp. 1528;

Thompson v. Southern Pacific Transportation Co. (5th Cir. 1987), 809 F.2d 1167; *Davis v. DuPont* (E.D.Ark. 1989), 729 F.Supp. 652; *Abuan v. General Electric Co.* (9th Cir. 1993), 3 F.3d 329 ; *Chikovsky v. Ortho Pharmaceutical Corp.* (S.D.Fla. 1993), 832 F.Supp. 341.

Current *Daubert* challenges may lose their effectiveness when the applicable statute of limitations for minors has expired. At that time, scientists may have proven a causal connection to a particular hazard. The defense bar must argue that the relevant state of scientific knowledge is not what it is at the time of trial, but what it was at the time of the exposure. Current scientific knowledge may be enough to prove causation. However, it is not relevant to the employer's state of mind at the time the exposure was taking place. Before an employer is imputed with knowledge of teratogenic hazards at the workplace, the plaintiffs must show that the medical knowledge at the time of the exposure was scientifically reliable.

VI. Conclusion

Employers, chemical manufacturers and chemical distributors face a number of legal challenges in handling toxic exposure cases, whether those cases sound in employment intentional tort, product liability or simple negligence. The plaintiffs' bar has a greater challenge, however. Plaintiffs must prove that the suspect chemical is capable of causing the specific harm and that it did, indeed, cause that harm. Defense counsel should take advantage of this obstacle and attack evidence of causation from the very start of litigation. Plaintiffs' counsel usually count on the sympathy factor to convince the jury to find in their favor. Aggressive pre-trial discovery and procedural measures are necessary to avoid this potential of prejudice. Steps should be taken to ensure that plaintiffs are required by the court to produce some evidence of causation in the early stages of litigation. Early motions on admissibility of experts and evidence of causation as well as hearings on admissibility of plaintiffs' experts may be necessary in these types of cases.

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