In-house counsel face a number of challenges their colleagues on the outside do not and these challenges often implicate or touch on the ethical rules applicable to all lawyers. Outside counsel who take the time to understand the needs and worries of the in-house attorneys managing their cases make themselves valuable partners in the relationship. A thorough understanding of the ethical rules and issues that impact this relationship will go a long way toward ensuring that in-house counsel provide the best possible service to a company in need of legal services.

Starting with the selection of an attorney to handle a matter on the local level, in-house counsel have the same obligation to provide competent representation to their client as any other lawyer. See Model Rules of Prof’l Conduct r. 1.1. Thus, not only must in-house counsel be competent and thoroughly prepared but they are responsible to ensure that outside counsel is also capable of providing the advice and counsel necessary to the task. In-house counsel have an obligation to determine the competency of the attorneys they hire and to monitor their performance to ensure that they continue to provide the level of skill that the matter requires. Outside counsel can assist in this endeavor by keeping the client informed as to the progress of the matter and by providing a detailed description of events such as depositions.

The selection of outside counsel should take into consideration not only the need for competent representation but also the ethical requirement to expedite litigation consistent with
the interests of the client. See Model Rules of Prof’l Conduct r. 3.2. Thus, the use of budgets, estimates and the like, are valuable tools for prediction and also to measure performance. In addition, the use of tools such as early case evaluation and informal discovery to obtain information as early as possible in the case are vital to ensuring that cases which should resolve, do resolve and that they resolve early rather than after protracted litigation.

In-house counsel need to take into consideration the ethical requirement that lawyers not charge unreasonable fees. See Model Rules of Prof’l Conduct r. 1.5. Understanding and agreeing to a workable fee structure which matches the complexity of the case should be done at the outset and it should be in writing. Requests for fee increases should be discussed before a formal written request is made to ensure that the request accommodates the budgetary and timing needs of the client.

In retaining outside counsel, in-house attorneys are often asked to address conflict of interest waivers. See Model Rules of Prof’l Conduct r. 1.7(b). It is important for both sides to understand what conflicts may be waived and what conflicts may not be waived. It is also vital that any waiver be a “knowing” waiver, i.e., in-house counsel is given all the information needed to waive the conflict.

Outside lawyers often represent more than one company in the same industry. Thus, in selecting outside counsel, in-house attorneys must keep in mind the tenet requiring lawyers to keep client information confidential and ensure that their attorneys protect competitively sensitive information. See Model Rules of Prof’l Conduct r. 1.6. In addition, outside counsel must have sufficient safeguards on their computer systems to ensure that client data in the hands of law firms remains secure.
Understanding the ethical rules which impact in-house lawyers particularly is important for outside counsel to provide the service and advice that the company needs. In-house lawyers must not only comply with the ethical rules themselves but they must ensure that the attorneys they hire follow those rules as well. As with most aspects of the in-house/outside attorney relationship the key to success is knowledge, vigilance and communication.

**ABA MODEL RULES IMPACTING IN-HOUSE COUNSEL**

**ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.1**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.2**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

**ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.5**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will
charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable.

ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(6) to comply with other law or a court order; or
(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
While the Supreme Court’s opinion in *Bristol-Myers Squibb Co. v. Superior Court* (BMS), 137 S.Ct. 1773 (2017) curtailed the reach of litigation tourists in multi-plaintiff litigation, it did not expressly state that its holding applies to class actions. Naturally, district courts are now divided as to its application to unnamed, non-resident plaintiffs in class actions.

Federal courts in California appear to be leading the charge in declining to extend BMS in this context. These courts rely on a distinction between mass tort actions, where all plaintiffs are named in the complaint and are thus considered real parties-in-interest, and class actions, where a plaintiff injured in the forum seeks to represent a class of similarly situated but unnamed individuals. In *Fizhenry-Russel*, for example, the citizenship of the unnamed plaintiffs was not taken into account when examining personal jurisdiction regardless of the fact that 88 percent of the purported class members were not California residents. *Fizhenry-Russel v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017).

Recently, the Northern District of California reasoned that functional differences set class actions apart (i.e. plaintiffs must meet Rule 23 requirements) such that the fairness required by due process is satisfied. *Allen v. ConAgra Foods, Inc.*, Case No. 3:13-cv-01279, 2018 WL 6460451 (N.D. Cal. Dec. 10, 2018).

By contrast, federal courts in Illinois have rejected the exercise of personal jurisdiction over claims of unnamed, non-resident class members. These courts rely on the Supreme Court’s emphasis that a sufficient nexus between the defendant, the forum and the underlying claims is required. Even before BMS was decided, the Northern District of Illinois recognized the due process concerns and dismissed out-of-state plaintiffs and nationwide claims because they were brought on behalf of non-residents whose claims did not arise out of the defendant’s activities in Illinois. *DeMaria v. Nissan N. Am., Inc.*, No. 15-c-3321, 2016 WL 374445 (N.D. Ill. Feb. 1, 2016). The *DeBernardis* court later predicted that “it is more likely than not based on the Supreme Court’s comments about federalism that the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions in a forum . . .

As the Northern District of Illinois reasoned, the Supreme Court’s due process concerns about federalism “suggest that it seeks to bar nationwide class actions in forums where the defendant is not subject to general jurisdiction,” particularly given that under the Rules Enabling Act a defendant’s due process interest should be the same in the class context as it is in individual or mass actions. *Chavez*, 2018 WL 2238191, at *10. Federal courts in other jurisdictions generally align with the Northern District of Illinois and have applied *BMS* to class actions. See *e.g.*, *Spratley v. FCA US LLC*, No. 3:17-cv-0062, 2017 WL 4023348 (N.D. N.Y. Sept. 12, 2017); *In re Dental Supplies Antitrust Litig.*, 16-civ-696, 2017 WL 4217115 (S.D. N.Y. Sept. 20, 2017); *Wenokur v. AXA Equitable Life Ins. Co.*, No. 17-00165, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017).

Other courts have circumvented application of *BMS* by holding that federalism concerns in *BMS* apply only to state court claims. See *e.g.*, *Sloan v. General Motors LLC*, 287 F. Supp. 3d 840 (N.D. Cal. 2018); *Swamy v. Title Source, Inc.*, No. 17-01175, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017); *Sanchez v. Launch Technical Workforce Solutions LLC*, 297 F. Supp. 3d 1360 (N.D. Ga. 2018).

Finally, at least one court has avoided application of *BMS* under the pendent personal jurisdiction doctrine—i.e. exercising jurisdiction over a claim that itself lacks a connection to the federal forum because it arises out of a common nucleus of operative facts with other claims properly before the court. *Sloan*, 287 F. Supp. 3d at 861-62. The court reasoned that there would only be a *de minimis* burden on defendant who would otherwise face piecemeal litigation.

This divide over applying *BMS* to class actions will continue to evolve and likely make its way to the U.S. Courts of Appeals. Until then, defendants should continue to raise and preserve their personal jurisdiction arguments, even if they find themselves before a court that has already declined to extend *BMS*.

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express written consent of the American Bar Association. The views expressed in this article are those of the author(s) and do not necessarily reflect the positions or policies of the American Bar Association, the Section of Litigation, this committee, or the employer(s) of the author(s).
Parties submitting class action settlements for preliminary and final approval in the Northern District of California should review and follow these guidelines to the extent they do not conflict with a specific judicial order in an individual case. Failure to address the issues discussed below may result in unnecessary delay or denial of approval. Parties should consider this guidance during settlement negotiations. Parties should also consider the suggested language below when drafting class notices. In cases litigated under the Private Securities Litigation Reform Act of 1995, follow the statute and case law requirements that apply to such cases, such as regarding reasonable costs and expenses awards to representative plaintiffs, and this procedural guidance to the extent applicable.

**Preliminary Approval**

1) **INFORMATION ABOUT THE SETTLEMENT**—The motion for preliminary approval should state, where applicable:

   a. If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

   b. If a litigation class has been certified, any differences between the settlement class and the class certified and an explanation as to why the differences are appropriate in the instant case.

   c. If a litigation class has not been certified, any differences between the claims to be released and the claims in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

   d. If a litigation class has been certified, any differences between the claims to be released and the claims certified for class treatment and an explanation as to why the differences are appropriate in the instant case.

   e. The anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.

   f. The proposed allocation plan for the settlement fund.

   g. If there is a claim form, an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.

   h. In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instant case.
2) SETTLEMENT ADMINISTRATION—In the motion for preliminary approval, the parties should identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel’s firms’ history of engagements with the settlement administrator over the last two years. The parties should also address the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs. The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing.

3) NOTICE—The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members. The notice should include the following information: (1) contact information for class counsel to answer questions; (2) the address for a website, maintained by the claims administrator or class counsel, that has links to the notice, motions for approval and for attorneys’ fees and any other important documents in the case; (3) instructions on how to access the case docket via PACER or in person at any of the court’s locations. The notice should state the date of the final approval hearing and clearly state that the date may change without further notice to the class. Class members should be advised to check the settlement website or the Court’s PACER site to confirm that the date has not been changed. The notice distribution plan should be an effective one.

Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.

The notice distribution plan should rely on U.S. mail, email, and/or social media as appropriate to achieve the best notice that is practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c)(2). If U.S. mail is part of the notice distribution plan, the notice envelope should be designed to enhance the chance that it will be opened.

Below is suggested language for inclusion in class notices:

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This notice summarizes the proposed settlement. For the precise terms and conditions of the settlement, please see the settlement agreement available at www.____________.com, by contacting class counsel at ______________, by accessing the Court docket in this case, for a fee, through the Court’s Public Access to Court Electronic Records (PACER) system at https://ecf.cand.uscourts.gov, or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, [insert appropriate Court location here], between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.

PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK’S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.
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4) OPT-OUTS—The notice should instruct class members who wish to opt out of the settlement to send a letter, setting forth their name and information needed to be properly identified and to opt out of the settlement, to the settlement administrator and/or the person or entity designated to receive opt outs. It should require only the information needed to opt out of the settlement and no extraneous information. The notice should clearly advise class members of the deadline, methods to opt out, and the consequences of opting out.
5) OBJECTIONS—Objections must comply with Federal Rule of Civil Procedure 23(e)(5). The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filings. The notice should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement. The notice should clearly advise class members of the deadline for submission of any objections.

Below is suggested language for inclusion in class notices:

“You can ask the Court to deny approval by filing an objection. You can’t ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you must object.

Any objection to the proposed settlement must be in writing. If you file a timely written objection, you may, but are not required to, appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for hiring and paying that attorney. All written objections and supporting papers must (a) clearly identify the case name and number (_________ v. __________, Case Number ___________), (b) be submitted to the Court either by mailing them to the Class Action Clerk, United States District Court for the Northern District of California, [insert appropriate Court location here], or by filing them in person at any location of the United States District Court for the Northern District of California, and (c) be filed or postmarked on or before _________________.”

6) ATTORNEYS’ FEES—The court will not approve a request for attorneys’ fees until the final approval hearing, but class counsel should include information about the fees they intend to request and their lodestar calculation in the motion for preliminary approval. In a common fund case, the parties should include information about the relationship among the amount of the award, the amount of the common fund, and counsel’s lodestar calculation. To the extent counsel base their fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class. Counsel’s lodestar calculation should include the total number of hours billed to date and the requested multiplier, if any. Additionally, counsel should state whether and in what amounts they seek payment of costs and expenses, including expert fees, in addition to attorneys’ fees.

7) INCENTIVE AWARDS—Judges in this district have different perspectives on extra payments to named plaintiffs or class representatives that are not made available to other class members. Counsel seeking approval of incentive awards should consult relevant prior orders by the judge reviewing the request. The court will not approve a request for incentive awards until the final approval hearing, but the parties should include information about the incentive awards they intend to request as well as the evidence supporting the awards in the motion for preliminary approval. The parties should ensure that neither the size nor any conditions placed on the incentive awards undermine the adequacy of the named plaintiffs or class representatives. In general, unused funds allocated to incentive awards should be distributed to the class pro rata or awarded to cy pres recipients.

8) CY PRES AWARDEES—If the settlement contemplates a cy pres award, the parties should identify their chosen cy pres recipients, if any, and how those recipients are related to the subject matter of the lawsuit and the class members. The parties should also identify any relationship they or their counsel have with the proposed cy pres recipients. In general, unused funds allocated to attorneys’ fees, incentive awards, settlement administration fees and payments to class members should be distributed to the class pro rata or awarded to cy pres recipients.
9) TIMELINE—The parties should ensure that class members have at least thirty-five days to opt out or object to the settlement and the motion for attorney’s fees and costs.

10) CLASS ACTION FAIRNESS ACT (CAFA)—The parties should address whether CAFA notice is required and, if so, when it will be given. In addition the parties should address substantive compliance with CAFA. For example, if the settlement includes coupons, the parties should explain how the settlement complies with 28 U.S.C. § 1712.

11) PAST DISTRIBUTIONS—Lead class counsel should provide the following information for at least one of their past comparable class settlements (i.e. settlements involving the same or similar clients, claims, and/or issues):

   a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to each cy pres recipient, the administrative costs, and the attorneys’ fees and costs.

   b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons or debit cards or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members’ interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in easy-to-read charts that allow for quick comparisons with other cases.

12) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or WordPerfect) of all proposed orders and notices should be submitted to the presiding judge’s Proposed Order (PO) email address when filed. Most judges in this district use Microsoft Word, but counsel should check with the individual judge’s Courtroom Deputy.

Final Approval

1) CLASS MEMBERS’ RESPONSE—The motion for final approval briefing should include information about the number of undeliverable class notices and claim packets, the number of class members who submitted valid claims, the number of class members who elected to opt out of the class, and the number of class members who objected to or commented on the settlement. In addition, the motion for final approval should respond to any objections.

2) ATTORNEYS’ FEES—All requests for approval of attorneys’ fees must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. Counsel should be prepared to submit copies of billing records themselves at the court’s order.

Regardless of when they are filed, requests for attorneys’ fees must be noticed for the same date as the final approval hearing. If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions. The motion for attorneys’ fees should refer to the history and facts set out in the motion for final approval.
3) INCENTIVE AWARDS—All requests for incentive awards must be supported by evidence of the proposed awardees’ involvement in the case and other justifications for the awards.

4) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or Word Perfect) of all proposed orders and judgments should be submitted to the presiding judge’s Proposed Order (PO) email address at the time they are filed.

Post-Distribution Accounting

1) Within 21 days after the distribution of the settlement funds and payment of attorneys’ fees, the parties should file a Post-Distribution Accounting, which provides the following information:

   a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys’ fees and costs, the attorneys’ fees in terms of percentage of the settlement fund, and the multiplier, if any.

   b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members’ interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in an easy-to-read chart that allows for quick comparisons with other cases.

2) Within 21 days after the distribution of the settlement funds and award of attorneys’ fees, the parties should post the Post-Distribution Accounting, including the easy-to-read chart, on the settlement website.

3) The Court may hold a hearing following submission of the parties’ Post-Distribution Accounting.
Introduction

For those of us who defend motor vehicle and motor vehicle component part manufacturers in asbestos cases involving lung cancer, the fact that a plaintiff smoked cigarettes has long been considered a plus. For years we have developed such a plaintiff’s smoking history and argued, persuasively, that it was the smoking, and not the alleged friction asbestos exposures, that caused the disease. The longer and more intensive the smoking the better, and we strove for pages and pages of smoking testimony with a goal of achieving the highest “pack year” history possible. We then took that history to our medical experts and, bingo, there was the lung cancer causation.

That may be changing. Asbestos plaintiffs’ attorneys are turning to a new, and potentially dangerous theory. They are arguing that exposures from smoking cigarettes combine with asbestos exposures to, collectively, cause lung cancer. By so doing, they seek to hold tobacco companies jointly liable with asbestos-containing product manufacturers for their clients’ damages.

This argument is, not surprisingly, made by typical plaintiffs’ asbestos experts. Steven B. Markowitz, MD Dr.PH, Professor of Occupational and Environmental Medicine at the School of Earth & Environmental Sciences at Queens College in New York is a proponent of the smoking/asbestos combination. “The interactions between asbestos, asbestos exposure and smoking, and their influence on lung cancer risk are incompletely understood. In our study of a large cohort of asbestos-exposed insulators and more than 50,000 non-exposed controls, we found that each individual risk factor was associated with increased risk of developing lung cancer, while the combination of the two risk factors further increased the risk and the combination of all three risk factors increased the risk of developing lung cancer almost 37-fold.” American Journal of Respiratory and Critical Care Medicine (ATS), April 12, 2013.

This phenomenon has been studied elsewhere. In England, Gillian Frost of the Health and Safety Laboratory, Harper Hill, authored a paper entitled The Joint Effect of Asbestos Exposure and Smoking on the Risk of Lung Cancer Mortality for Asbestos Workers (1971-2005). The study found evidence of an interaction between asbestos exposure and smoking. For that study’s cohort group, an estimated 3% of lung cancer deaths were attributable to asbestos only, 66% to smoking only and 28% to the interaction of asbestos and smoking. HSE, 2011.

There are numerous other studies/opinions which speak of combined causation, or a “synergistic” relationship between smoking and asbestos exposures.
The Smoking/Asbestos Causation Combination at Trial - The Summerlin Case

Given the argument that smoking and asbestos exposure can combine to cause lung cancer, it was only a matter of time before a claim was made against both tobacco companies and asbestos-containing product manufacturers. In late 2018, a Massachusetts (Suffolk County Superior Court) jury returned a $43.1 million verdict against R.J. Reynolds Tobacco Company in the first consolidated asbestos-tobacco trial in the United States. The case was Summerlin v. Philip Morris USA Inc., et al. (15-5255). Damages included $5.3 million for pain and suffering, $3.5 million for loss of consortium, $4.3 million in wrongful death, and $30 million in punitive damages. The jury found two other defendants not liable for the plaintiff’s damages - cigarette manufacturer Philip Morris USA Inc. and brake manufacturer Hampden Automotive Sales Corporation. The jury found that Philip Morris and Hampden both breached the implied warranty of merchantability by selling products that were defective due to inadequate warnings, but also found that neither product was a substantial contributing cause of Mr. Summerlin’s lung cancer. The case was heard before Judge Heidi Brieger over the course of six weeks before an 11-person jury. The plaintiff was represented by Jerry Block of Levy Konigsberg and Michael Shepard of the Shephard Law Firm and Hampden was represented by David Governo of Smith, Duggan, Buell & Rufo.

Background Issues:

The plaintiff Joanna Summerlin brought the claim individually and on behalf of her deceased husband, Louis Summerlin. Mr. Summerlin died of lung cancer at the age of 73 in 2015 after 53 years of smoking. He smoked Kool Cigarettes (an R.J. Reynolds product) for approximately 25 years and then smoked Marlboro Menthol Cigarettes (a Phillip Morris product) for another 25 years. The plaintiff brought suit against the cigarette manufacturers, alleging that nicotine and menthol in the cigarettes caused her husband’s addiction and lung cancer. She also sued several brake companies, including Hampden, alleging that asbestos brake dust contributed to Mr. Summerlin’s development of the disease. She argued that her husband’s inhalation of asbestos dust “combined” with his smoking to create a “synergistic” effect that caused the cancer. Mr. Summerlin allegedly installed thousands of Hampden brakes as a mechanic between 1959 and 1964. Hampden was the only brake manufacturer left at trial. All other asbestos defendants, including several brake manufacturers, settled prior to trial.

Hampden made a number of arguments at trial, including that it was following the industry standard by using asbestos in its brakes during the relevant time period. It also argued that asbestos warnings on brakes did not exist until the 1970s, well after the time period in which Mr. Summerlin worked with its products. Furthermore, Hampden argued that Mr. Summerlin would not have heeded such warnings had they existed. Hampden further contended that even had Mr. Summerlin breathed in asbestos fibers from his brake work, he would not have been exposed to a sufficient amount of asbestos to have increased his risk of developing cancer. Hampden relied throughout the trial on the lack of epidemiological studies showing that asbestos-containing brakes cause lung cancer.
Friction Expert Testimony:

As noted, the plaintiff alleged that Mr. Summerlin installed and removed many Hampden brakes while working as a mechanic for a five year period. His deposition testimony was read to the jury wherein he described clouds of dust from blow out and from sanding/grinding new brakes. The plaintiff called three experts to testify about the brake work, Drs. Gerald Markowitz, Michael Ellenbecker and Christine Oliver.

Dr. Markowitz purports to be an asbestos historical expert. He testified regarding occupational health and state of the art in asbestos. He contended that based on his research and review of scientific articles and studies published before that time period, by 1959 there was a sufficient basis for understanding the causal link between asbestos and lung cancer. During cross examination, Hampden stressed that while there were some studies showing a link between asbestos and disease, before 1964 there were no studies or articles stating that asbestos in brakes caused disease in mechanics such as Mr. Summerlin.

Dr. Ellenbecker, the plaintiff’s industrial hygiene expert, testified that he considered 50-100 fibers/cubic centimeter to be a high exposure to asbestos fibers that can increase a risk of developing lung cancer. Like Dr. Markowitz, Dr. Ellenbecker testified that the health hazards of high exposure to asbestos were well known by 1959. He stated that each time Mr. Summerlin completed a brake-related task he would have been exposed to and inhaled sufficient levels of respirable asbestos dust to increase his risk of developing lung cancer. He also testified that Hampden should have warned workers that its brakes contained asbestos and provided information on how to minimize hazardous exposure. During cross examination, Hampden highlighted that many of the studies Dr. Ellenbecker relied on for his opinions involved work and products different from Mr. Summerlin’s work with Hampden brakes.

Dr. Oliver, the plaintiff’s occupational medical expert, testified that based on Mr. Summerlin’s testimony, she believed he was exposed to asbestos from his work as a brake mechanic and that this exposure caused his lung cancer. She then testified to the “synergistic relationship” between smoking and asbestos exposures. Dr. Oliver opined that Mr. Summerlin’s development of lung cancer was causally related to his exposures to asbestos as a brake mechanic. She explained that synergies are biologic interactions between two or more toxins that create a toxic effect that is greater than the simple sum of the two agents involved. Here, cigarette smoke and asbestos interacted biologically to cause lung cancer. Dr. Oliver testified that some medical scholars believe asbestos and smoking have a “supra-additive” effect that made Mr. Summerlin’s risk for cancer greater because of exposures to both asbestos and cigarettes. During cross-examination, Hampden sought to highlight that many of the studies upon which Dr. Oliver relied involved mesothelioma and not lung cancer. It also emphasized several epidemiological articles that concluded that there was no increased risk of lung cancer among automotive workers and others performing brake work. Hampden also questioned Dr. Oliver about studies showing that the chrysotile asbestos found in brakes is a less potent form of asbestos and other studies concluding that asbestos fibers in brakes are encapsulated in a resin material and less likely to be inhaled.

Hampden countered the plaintiff’s experts with the testimony of Drs. Sheldon Rabinovitz and Victor Roggli. Dr. Rabinovitz, Hampden’s industrial hygiene expert, testified regarding air sampling studies establishing that potential asbestos exposures vary in automotive work depending on the type of brake work being performed and, further, noted that some activities did not release toxic levels of asbestos fibers. He also testified about forsterite conversion,
beginning with the concept that when asbestos-containing brakes are worn or ground down the resin is broken and explaining how heat factors into that conversion. Because of this, the dust caused by work on brakes does not contain a significant amount of asbestos. Dr. Rabinovitz then testified that many fibers released from brakes are less than 5 microns in length and do not have the ability to cause an increased risk of asbestos-related disease. Dr. Rabinovitz further testified that during the relevant time frame there was no reason to suggest that Hampden should have put warnings regarding the dangers of asbestos on its products because no one believed asbestos encapsulated in brakes was dangerous at that time and other brake manufacturers were not including such warnings on their products. Dr. Rabinovitz calculated Mr. Summerlin’s level of exposure from his work with brakes at a level of 0.07 fibers per cubic centimeter. He then multiplied the exposure levels for each of the years Mr. Summerlin worked and concluded that Mr. Summerlin did not have a dose level sufficient to increase the risk of lung cancer. Plaintiff’s counsel sought to undermine Dr. Rabinovitz’s credibility and the credibility of the studies upon which he relied.

Hampden’s pathology expert, Dr. Roggli, testified that the cause of Mr. Summerlin’s lung cancer was cigarette smoke, only, and that Mr. Summerlin’s exposure to asbestos was not a significant contributing factor at all. He based his opinion on the fact that Mr. Summerlin’s case did not meet the Helsinki Criteria for diagnosing asbestos-related diseases. Dr. Roggli did not believe that Mr. Summerlin was exposed to chrysotile asbestos for a long enough period of time or in high enough doses to develop an asbestos-related disease. He did concede that smoking and exposure to some forms of asbestos can act synergistically in causing lung cancer. He testified that he did not believe, however, that in Mr. Summerlin’s case, the two acted in this manner. He based this opinion on the grounds that existing synergy cases involved individuals with heavy exposures to asbestos, far more exposure than Mr. Summerlin would have had from his work as a mechanic. Dr. Roggli also testified that there is different risk depending on the type of asbestos fiber and that chrysotile asbestos in brakes is much less potent than other forms of asbestos.

Analysis of Hampden Verdict:

As noted, the jury found that Hampden’s brakes did breach the implied warranty of merchantability (the Massachusetts equal of a strict product liability finding) because they were sold without warnings about the health hazards of asbestos. Because the jury found that such a warning was required, it appears that the jurors accepted the testimony from Drs. Ellenbecker and Oliver that asbestos in brake dust, as a general proposition, can cause lung cancer, at least when combined with smoking. By definition, therefore, the jury rejected the testimony from Dr. Rabinovitz that working with brakes will, in essence, never cause disease and that Hampden did not need to warn. Significantly, however, the jury did not find that Hampden’s warranty breach was a substantial contributing cause of Summerlin’s disease. From this, it seems that the jury believed either Dr. Rabinovitz’s testimony that the dust exposure levels were too low to cause disease, or Dr. Roggli’s testimony that smoking was the sole cause, or some combination of both of their opinions.
Conclusion

These tobacco/asbestos cases are coming. We have already seen another one in Massachusetts, filed in late January 2019. National plaintiffs’ asbestos firms see the joint attack as a new frontier and motor vehicle/motor vehicle component part manufacturers should expect to be involved in cases alongside tobacco companies in the future.