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RAWLE'S REPORTS

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PENNSYLVANIA TOXIC TORTS

A Long and Winding Road: Unique *Frye* Motion Granted in Allegheny County

Eric K. Falk

On July 22, 2015, the Court of Common Pleas of Allegheny County decided a *Frye* issue that had been pending for over two years in *January v. Koppers, et al.* The road travelled by Rawle & Henderson LLP partner Eric K. Falk and his client, GrafTech International Holdings, f/k/a UCAR Carbon Company ("GrafTech") was indeed a long and winding road, to steal a line from The Beatles.

The *January* case is the lead case in Allegheny County's "Coal Tar Pitch Litigation." Approximately 70 cases have been filed by former employees of various Alcoa aluminum smelting plants, alleging that each plaintiff contracted cancer as a result of his exposure to coal tar pitch volatiles (CTPV's) emitted during the aluminum smelting process. Plaintiffs worked at Alcoa smelters in Rockdale, Texas; Point Comfort, Texas; Badin, North Carolina; Wenatchee, Washington; Warrick, Indiana; Ferndale, Washington; and Alcoa, Tennessee, among other plants. The cancers include bladder cancer, kidney cancer, lung cancer, stomach cancer, lymphoma and leukemia.

GrafTech was one of several companies that supplied carbon cathodes and graphite sidewall blocks, among other products, to some of the Alcoa smelters at various points in time. Coal tar pitch (CTP) is a constituent used in the manufacturing of the cathodes and sidewall blocks. GrafTech baked the constituents, including the CTP, for carbon cathodes to temperatures in excess of 800C, and for graphitized sidewall blocks to temperatures in excess of 3000C, for 26-50 days. Among the goals of baking at such temperatures for such extended periods of time is to volatilize and release all CTPV's during the baking process, which results in a fully carbonized or graphitized product.

GrafTech, and the other defendants in the cases, contended that this manufacturing process, resulting in fully carbonized and graphitized products, meant that there were no CTPV's "still remaining" in those products when sold to Alcoa, which, in turn, could have been released during the smelting operations and which could have resulted in CTPV exposure. GrafTech filed a Motion for Partial Summary Judgment on claims of exposure to those products, supported by appropriate documentation, expert reports and Alcoa's own testimony, back in 2009. Other defendants filed similar motions in 2013.

Plaintiffs responded with a lengthy report from an expert in chemistry, who opined that the carbonization and graphitization processes used by GrafTech and the other defendants was insufficient, and that the temperature had to reach at least 2000C. Defendants responded with a Joint Motion to exclude that particular expert based on the lack of general acceptance of his methodology. In that Motion, defendants contended that the expert merely had a hypothesis about CTPV's "surviving" until 2000C; that he had not tested his hypothesis to see if CTPV's had "survived" the baking process over 26-50 days; that there was no peer reviewed literature supporting his hypothesis and confirming the presence of CTPV's in these products, baked over these times and temperatures; that his hypothesis was in fact contradictory to all the published literature in the field of Carbon Science; and that even if he was correct, the graphitized products clearly exceeded his own temperature of 2000C.

After several rounds of briefing and argument, the Court decided that a *Frye* hearing was warranted. The Court directed that plaintiffs should take the deposition of the expert in question, limited to the issue of general acceptance of his methodology, with defendants then cross-examining the expert on that issue. Defendants could then depose any witness they wanted on the issue of the general acceptance of the methodology, with plaintiffs cross-examining those witnesses.

The deposition of the expert in question took place in August 2014 over two days. Defendants elected to not depose anyone, having felt that the record in the expert's deposition established the lack of general acceptance of his methodology. Further briefing took place based on the expert's deposition and the exhibits discussed therein, followed by a lengthy argument held on February 9, 2015.

In its Opinion and Order of July 22, 2015, the Court reviewed the contentions of the parties, the concessions of the expert, and the specific exhibits that plaintiffs contended supported his claim to a general acceptance of his methodology. In rejecting the contentions of plaintiffs and in its findings that the expert did not use a generally accepted methodology, the Court noted:

- No peer reviewed publications supported the expert's contention that CTPV's were not baked out until 2000C;
- None of the publications upon which the expert relied considered any kind of carbon product being baked at both the times and temperatures used by the Defendants;
- None of the publications upon which the expert relied offered any opinions as to whether all CTPV's would be fully baked out if baked for at least 26 days at temperatures

at least 800C;

- The purpose of the publications upon which the expert relied was not to study and make findings regarding these particular baking times and temperatures;
- The authors of those publications never suggested that the findings in their publications could assist other scientists in ascertaining the minimum temperatures that must be reached in order to fully bake all the CTPV's in a carbon product;
- The expert did not provide any peer-reviewed scientific publications that supported his methodology and theory.

The Court summarized all of this by stating, "In other words, plaintiff has not shown that his expert used generally accepted principles and methodologies. Plaintiff's expert's opinion is grounded on his own interpretations of others' studies, and those studies never addressed, and were never intended to address, the theory plaintiff's expert has proffered."

GrafTech expressed its delight in this result and thanked Rawle and its team for what amounted to six years of hard and patient work on this particular issue.

Henry January, et al. v. Koppers, Inc., et al., CCP Allegheny County, G.D. No. 04-006970

Eric K. Falk, a partner in our Pittsburgh office, focuses his practice in the area of toxic tort litigation, defending Fortune 500 companies and regional businesses against allegations of various diseases due to exposures to asbestos, silica, coal tar pitch and coal tar pitch volatiles, and a variety of chemicals and solvents, including benzene, toluene, xylene, isocyanates and various other aromatic and chlorinated hydrocarbons. Eric has handled cases involving a wide variety of disease claims, including mesothelioma, lung cancer, esophageal cancer, the various leukemias, lymphomas, kidney cancer, bladder cancer, colon cancer, toxic encephalopathy and other neurological deficits. He has represented his clients in a variety of jurisdictions, including Pennsylvania, West Virginia, Texas, Washington, Minnesota, Tennessee, New York, Mississippi, Florida, Georgia, Indiana, Illinois, Wisconsin and Arkansas.

He was selected as a 2013 Top Rated Lawyer in Mass Torts by Martindale-Hubbell, and he has been rated AV Preeminent by Martindale-Hubbell from 2005 to 2015. He is currently a Vice Chair of the ABA Toxic Tort and Environmental Law Committee. He is a past chair of the DRI Industrywide Litigation Committee and a past newsletter editor for the DRI Toxic Tort Committee. He has been a speaker/presenter at various DRI and ABA Asbestos and Toxic Tort seminars.

Eric received his J.D. in 1984 from the University of Pittsburgh School of Law and his B.S. with Honors in 1981 from the American University in Washington, D.C. He is admitted to practice in Pennsylvania and West Virginia as well as the U.S. District Court for the Western District of Pennsylvania, the U.S. District Courts for the Southern and Northern Districts of West Virginia, and the U.S. Court of Appeals for the Fourth Circuit.

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PBI SEMINAR

Carl D. Buchholz, III

Carl D. Buchholz, III, a partner in our Philadelphia office, spoke at a CLE program in August 2015 sponsored by the **Pennsylvania Bar Institute** on *Traumatic Brain Injury: The Medical and Legal Aspects of Brain Injury Litigation*. Carl addressed the ethical issues confronting counsel for a TBI victim in his session on *"Ethics, Who is Your Client? Incapacity Under the Pennsylvania Roles of Civil Procedure – The Guardian Ad Litem."* The program was held in the CLE Conference Center in the Wanamaker Building in Philadelphia.

Carl is Chair of the Maritime, Insurance Coverage and Appellate Sections of Rawle & Henderson LLP. His federal appellate practice includes an argument before the United States Supreme Court, as well as numerous arguments before the U.S. Court of Appeals for the Third Circuit. His state appellate practice includes seven arguments before the Pennsylvania Supreme Court, as well as numerous arguments before the Pennsylvania Superior Court and Commonwealth Court. In 2006, the Pennsylvania Supreme Court appointed Carl to the Disciplinary Board of the Supreme Court of Pennsylvania. In 2010, the Pennsylvania Supreme Court designated Carl as Chair of the Disciplinary Board. He graduated from Muhlenberg College in 1967 and Villanova Law School in 1970 where he was a member of the ***Villanova Law Review*** and graduated with honors. Carl has been rated AV Preeminent by Martindale-Hubbell and has been selected as a 2015 Pennsylvania Super Lawyer by ***Law & Politics*** Magazine.

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WORKERS' COMPENSATION SEMINAR

Claudio J. DiPaolo and **Christian M. Stein** presented a seminar on ***Insurance Coverage of Workers' Compensation Claims*** to a group of claims professionals in Charlotte, North Carolina, in August 2015. The seminar included a discussion on performing a thorough workers' compensation coverage analysis, focusing on the insurers' and insureds duties and offering case examples to ensure claims are accurately processed.

Claudio J. DiPaolo, Chair of the firm's Workers' Compensation Section, has focused his practice in the area of workers' compensation for over 15 years. He has defended workers' compensation claims on behalf of self-insured corporations, insurance carriers, and various political entities. He has given presentations to various groups and clients throughout the country in regard to establishing workplace safety programs, reducing workers' compensation costs, compliance with federal and state employment laws, and effective claims handling. Claudio studied Art History in Rome, Italy, and Political Science at Duquesne University. He earned his J.D. from the Widener University School of Law in 1993. He has been selected as a **2015 Pennsylvania Super Lawyer**.

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Christian M. Stein, Counsel to the firm in our Pittsburgh office, focuses his practice on all facets of Pennsylvania workers' compensation law, representing insured and self-insured employers, as well as insurance companies and third party administrators. He also consults clients on workers' compensation issues in New York, Ohio and Florida. His practice includes work at all appellate levels arguing before the Workers' Compensation Appeal Board, the Commonwealth Court, and the Supreme Court of Pennsylvania. Mr. Stein also counsels clients on issues pertaining to compliance with federal, state and local laws in reducing workers' compensation liability for workplace injuries, occupational exposures and diseases. He earned a J.D. from the University of Pittsburgh School of Law in 2000, a Master in the Art of Teaching from The Citadel in 1997 and a B.A. from Case Western Reserve University in 1993. He is a member of the Bar of the Supreme Court of Pennsylvania and the U.S. Supreme Court.

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