

## PRODUCT LIABILITY

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*On April 5, 2019, the French Supreme Court expanded the ability for employees to make claims for damages related to anxiety attributed to the fear of developing an asbestos-related disease. This broadened scope has companies worrying that the decision will be the starting point for employee cases claiming fear of disease due to exposure to other types of toxic substances.*

## Fear of Cancer: The Start of a New Worrying Era in France

### ABOUT THE AUTHOR



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### ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Asbestos-related litigation started in France later than in the US with, at first, a legal regime that made it quite difficult for plaintiffs to prevail. Third party claims, product liability claims, and tort claims all failed one after the other.

What did work, however, and has been working since are employee claims against employers having used asbestos either in their manufacturing processes or for insulation purposes (for instance, in ovens, electrical systems or protective equipment against heat). These cases are tried before Labor Courts, which are composed, in France, of elected representatives of both employees and employers. Indeed, at this stage, employers and employees are judged by their peers – not career judges – in practice more in equity than law. At the appellate level however - bearing in mind that in France, lodging an appeal is a right (there is no filter whatsoever) and the case is fully tried again (de novo) - the judges are career judges. The same for the Supreme Court (where again, it is a right to lodge an appeal before the Supreme Court), which is composed of highly experienced judges.

### **The Starting Point: Claims Filed by Employees who are Sick**

French asbestos-related litigation started with claims filed by former employees who had developed an asbestos-related disease and argued that their employer was grossly negligent in its management of the working conditions. The French Government has published a list of diseases which are almost automatically deemed as being linked to asbestos exposure with no possibility for the employer to argue otherwise (for instance,

the smoker's defense is not admissible in France): pleural plaques & caps, asbestosis, mesothelioma and lung cancer.

In such cases, the employer will be deemed liable as soon as it is proven that it could have known about the dangers linked to asbestos and that it did not take protective measures that were sufficient and efficient enough.

Once an employee has developed a disease, the Courts almost automatically consider that the protective measures implemented by the employer were not sufficient and efficient enough. The Supreme Court even ruled that "merely" complying with the law was not sufficient and that companies were expected to take further measures because of their insider knowledge of the dangers linked to asbestos. Condemnations are, therefore, almost systematic with employers having to put forward a very strong case to prevail.

This being said, this case law has never really surprised colleagues and clients from the rest of the world as asbestos-related diseases often give rise to easy compensation. On the other hand, what is surprising is the level of compensation, which is deemed high for French people but low for others. Statistics published by the French Asbestos Victims' Fund show that the average amount of damages granted per disease is as follows: €20K for pleural plaques, €41K for asbestosis, €143K for mesothelioma and €152K for lung cancer.

### The Recognition of the Fear of Cancer

So, if cases relating to employees who have developed a disease are not what worries companies who do business in France, what does worry them? **Since May 11, 2010, the real exposure of companies are the claims filed by employees who are not sick but fear to potentially develop an asbestos-related disease in the future.** The "fear of cancer" has indeed been recognized by the French Supreme Court in May 2010 with, since then, the creation of a new specific legal regime which goes against all standard principles of civil liability.

Indeed, the French Government has created a list of sites having used asbestos in France for the purpose of determining who can benefit from early retirement because of such an exposure (allowing employees, under certain conditions, to opt for retirement at as early as 50 years old on the basis that they might not benefit from a long and standard retirement should they develop a disease in the future). This list contains more than 600 sites located in France, the main criteria for being listed being that between 5 to 15% of employees have been exposed to asbestos. For each site, the Government has identified a specific period of time during which such exposure was deemed significant. Note that some companies have themselves asked to be on this list in order to have their elderly employees benefit from the early retirement scheme and carry out a replacement of the workforce at a lower cost.

Based on the existence of this list, the French Supreme Court has developed case law whereby **each employee of these sites can**

**almost automatically obtain damages as soon as they can prove that they worked on such sites** during the years identified by the French Government as those during which asbestos was used. The Supreme Court decided not to make any difference between the 15% of exposed employees and the others. In other words, a worker who handled asbestos and an accountant who always worked in his/her office, in a separate building, are given the same right to compensation and generally the same amount (between €8K and €12K each). This is explained by the fact that the Supreme Court considers that the mere belief that there was asbestos on a site, even if there was no exposure, is sufficient to develop anxiety. **The legal regime was so favorable to employees that the Supreme Court even considered that they did not have to bring medical evidence** to prove their anxiety and that the behavior of the employer was not relevant. Representing a company in such cases made it very difficult to prevail and the financial exposure was very large as all employees of these sites were plaintiffs (some companies have faced more than 3,000 claims).

This being said, everyone thought that these cases would soon be over thanks to specific case law on the statute of limitations, which determined that almost all claims brought after June 2013 are time-barred. Asbestos anxiety cases were, therefore, seen as a thing of the past.

### The Broadening of the Scope of the Fear of Cancer Case Law

On April 5, 2019, the French Supreme Court, in its Plenary Session (i.e. the most

important bench), ruled that all employees, even those who worked on sites that are **not** on the French Government's list, should now be allowed to claim for damages for their anxiety to develop an asbestos-related disease.

This case law is a big surprise as, for almost a decade, the Supreme Court had refused to extend its case law to employees of sites which are not listed, the Presiding Judge of the Social Section of the Supreme Court having admitted that the developed case law was going too far and endangered too many companies when the plaintiffs are not actually sick.

The impact of this decision that no one saw coming, could become very significant. Indeed, the pool of potential plaintiffs is now unlimited: anyone who has been exposed to asbestos at some point in his/her career (there is no threshold or minimum required by the Supreme Court and there is no requirement that the employee actually handled asbestos leaving the door open to environmental exposure).

Some have reacted by stating that it will not be that easy for employees to win such cases as the Supreme Court has ruled that two conditions will have to be met:

- First, for these employees, evidence of the employers' breach of its safety obligation will have to be provided. However, it is obvious that no company has perfect records of the working conditions on its sites back in the 60s, 70s or 80s. Therefore, one can fear that courts will always

manage to identify a breach on the basis of lack of perfect evidence.

- Second, evidence of anxiety will have to be provided to the Court. However, knowing how evidence works in France, with no expert testimony during trials, one can think that a single written statement by the plaintiff's family doctor mentioning that the plaintiff is anxious will be sufficient.

Therefore, pessimism should be the right feeling for companies right now when reading this decision.

Even more so as a number of people have stated that **this decision will be the starting point of cases filed by employees for exposure to other types of substances/chemical products**. Damages for anxiety exist in France in asbestos-related cases but have also recently developed in the medical devices industry (for instance, the breast implant cases). A decision that explains the conditions under which the liability of a company can be recognized in general terms, without having the French Government play any role whatsoever, is therefore worrying. Plaintiffs' counsel have tried several times to extend the asbestos anxiety case law to other substances. The Supreme Court's answer was, up until now, that this damage could only be recognized for employees exposed to asbestos on the listed sites. The answer is today completely the opposite. . . .

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