

# MassDLA

Newsletter  
*January 2012*



## Message from the President: Anthony J. Sbarra, Jr.



## MassDLA Coming Attractions 2012

Sometimes we have all heard enough about the "heavy" issues of the day. With that in mind and with the turn of the new year, I thought I would provide the membership with a preview of some of our upcoming events. I am please to report that 2012 looks to be an active year for the organization.

The MassDLA Winter Social is set for Thursday, February 9, 2012 at the Boston College Club, 100 Federal Street in Boston. The event is from 5:30pm - 8:00pm and is free of charge to all members, who are encouraged to bring prospective new members, also free of charge. Unlike most, this event is not educational in its focus. Rather, it is intended to be an informal social gathering where members have the opportunity to catch up with each other, share experiences or just say hello. We invite all of

### In This Issue

Message from the President  
Article by Craig Waksler and  
Brad Graham  
Blast from the Past!  
After Work Seminar: e-  
Discovery  
Officers 2011-12  
Directors 2011-12  
MassDLA Past Presidents  
MassDLA Defense Lawyers  
of the Year  
Join a Committee!

### Upcoming Events:

2.23.2012

**Young Associates  
Division  
After Work Seminar:  
e-Discovery**  
see more info below

2.09.2012

**Winter Social**  
5:30 - 8:00  
@ BC Club

VISIT THE NEW  
SITE! [www.MASSDLA.org](http://www.MASSDLA.org)

our past presidents and "Defense Lawyer of the Year" recipients and typically have a number of them attend. Camaraderie among our members has always been an important feature of the organization and I invite all of you to stop by for some food, drink and conversation. The Boston skyline views from the building alone are worth the visit.

Our Young Lawyers Division continues to thrive. On February 23, 2012 we will have another Young Associates Division event. This time, board member Chad Brouillard will be discussing the ever evolving issues related to electronic discovery. The "After Work" event will be at Cooley Manion Jones, 21 Custom House Street, Boston. These seminars typically provide excellent opportunities for our younger members to hone their practice skills and perhaps more importantly to network with others. I am sure that this event will do so as well.

We are also beginning the planning of our Annual Meeting. Several board members are developing the theme and lining up speakers for the event. As in past years, we will have a morning of CLE presentations, followed by a luncheon meeting. The board is in the process of selecting a date in May, 2012, and we will provide further information about that shortly. This event has grown in popularity over the years and we will strive to make this one a success as well.

While not an event per se, I urge you to take a look at the MassDLA website; [www.massdla.org](http://www.massdla.org). It has been updated and improved. Visiting members now have access to current information concerning membership, upcoming events, past newsletters, "blasts from the past" and other information. Members who register and log in can input updated profiles, search legal links and browse our membership directory. We are continuing to update the website and intend to make it even more informative and user friendly as we go along.

These events are not all that the organization intends for the coming year. There will be more and we will work to provide the members with as much advance notice of them as we can. I look forward to seeing you at the upcoming events and welcome your suggestions as to how the MassDLA can assist you this year.

**MassDLA President  
Tony Sbarra  
Hermes, Netburn, O'Connor & Spearing, P.C.  
265 Franklin Street  
Boston, MA 02110  
asbarra@hermesnetburn.com  
(617) 210-7755**



---

*~ This Month's Article ~*

## **An Overview of Massachusetts Asbestos Litigation**

**Craig Waksler and Brad Graham  
McGivney & Klugar  
1 State Street, Suite 800  
Boston, MA 20109**

Despite the fact that the first asbestos-related claims were filed decades ago, asbestos litigation rages on in Massachusetts. Approximately 200 to 300 asbestos personal injury cases are filed in this state every year - so many cases that the Superior Court continues to maintain a specialized asbestos docket. This article provides a brief overview of asbestos and its diseases, as well as the related litigation in Massachusetts.

"Asbestos" is the general term given to six naturally occurring minerals (chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite). These minerals share certain qualities, including resistance to heat and chemicals, and have a fibrous structure that allows them to be spun like yarn and woven into fabrics. These qualities make asbestos ideal for numerous commercial and industrial applications. Historically, the most widely used form of asbestos in such applications in the United States was chrysotile, followed by amosite and then crocidolite. Tremolite can sometimes contaminate raw chrysotile fibers, but is seldom seen in commercial products. Some estimates suggest that asbestos has been used in thousands of products over the years, including brake linings, joint compound, gaskets, thermal insulation,

textured paints, siding, floor tiles, and roofing materials. Even everyday household products such as hair dryers contained asbestos components at one time. Asbestos mineral deposits can be found throughout the world, including South Africa, Australia, and the United States. Although many countries have banned asbestos, it is still mined in places such as Canada, Russia, and China, and incorporated into products today.

Asbestos fibers, when bound or encapsulated, pose no danger to humans. If fibers are dislodged and released into the air, they can be breathed into the lungs, where they can potentially lead to disease. The health hazards associated with the inhalation of asbestos fibers (i.e. "exposure") have been suspected since the late 1800s, when lung diseases first started appearing in asbestos workers. Studies in Great Britain in the 1920s and 1930s showed that large numbers of asbestos workers were suffering from asbestosis, or scarring of the lung caused by asbestos fibers. The body's immune response to the presence of fibers causes interstitial fibrosis, resulting in stiffening of the lung tissue and a reduction in lung capacity. Asbestosis is typically caused by long-term inhalation of high levels of airborne asbestos fibers.

The inhalation of airborne asbestos fibers can also lead to malignancies, most notably lung cancer and mesothelioma. The latter is a very rare cancer with few known causes, and the evidence linking the disease to asbestos exposure is very strong. The disease affects the mesothelial lining surrounding the body's internal organs. The most commonly-affected lining in asbestos-related mesotheliomas is the pleura, which surrounds the lungs. These mesotheliomas are also seen in the peritoneum, which lines the abdomen. Prognosis for mesothelioma patients is poor; potential survival is typically measured in months. Treatments for mesothelioma include chemotherapy and radical surgery to remove the affected tissues (most often the lung and pleura).

The latency period for asbestos-related diseases, or the period between first exposure and appearance of disease, is often very long. A disease may not develop until 30 to 50 years after the first inhalation of fibers. This latency period is the reason why asbestos-related personal injury suits are still being filed decades after asbestos was first subject to government health regulation and its use in this country drastically diminished. (The United States has not banned asbestos use entirely.)

The first major waves of asbestos litigation began in the 1970s and early 1980s. These suits led the major asbestos producers to file for bankruptcy protection, among them Johns-Manville, Celotex, Eagle-Picher, Owens-Corning Fiberglass, and Unarco. The bankruptcy reorganization included the creation of asbestos injury trusts; money was set aside to pay future claimants exposed to the bankrupt entities'

products. These trusts still exist and many asbestos plaintiffs submit successful claims. The review process for these claims is often minimal and monies are paid according to an established matrix. A set amount is paid to claimants with asbestosis, and a different set amount is paid to claimants with mesothelioma, for example. As more and more of the major producers have filed for bankruptcy protection, plaintiffs have focused their litigation efforts on entities with a more remote connection to asbestos - distributors, supply houses, and equipment manufacturers whose products incorporated asbestos-containing components such as gaskets. Hundreds of these entities are currently defending active asbestos personal injury suits in Massachusetts.

Most asbestos-related personal injury cases in Massachusetts are filed by a select group of Massachusetts based law firms who are highly experienced in this area of litigation. To manage the overwhelming number of cases filed by these and other national firms, the Massachusetts Superior Court established a single consolidated docket in Middlesex County. All asbestos actions filed in the eastern counties of Massachusetts are transferred to that docket. Recently, a case filed in the western part of the state was also transferred to the consolidated docket by special order. The docket is overseen by a single judge, Judge Charles Hely, who ultimately rules on the parties' motions and presides over trials. However, day-to-day management of the consolidated docket is performed by a Special Master appointed by the court. The Special Master handles discovery disputes, makes recommendations to the court on the parties' motions, and assists the parties with settlement negotiations.

The Special Master is also responsible for establishing the trial calendar each year. Under the pre-trial orders governing the consolidated docket, she is permitted to establish several trial dates throughout the year. As many as 50 cases are assigned to each trial date, although the cases are not consolidated for trial. The pre-trial orders required that all cases must be resolved (through settlement, trial, or otherwise) by the end of the third year following the filing of the complaint. Therefore, most of the cases on the 2012 trial lists were filed in 2009. Plaintiffs' counsel may nominate a limited number of cases for so-called "exigent status", which fast-tracks a case onto a trial list in the near future. Exigent cases typically are those involving living plaintiffs suffering from mesothelioma or lung cancer; the fast-tracking is designed to give these plaintiffs the opportunity to see their cases resolved prior to death.

Once cases are assigned to a trial list, the pre-trial orders set out methods of discovery and a comprehensive discovery and trial preparation schedule. All plaintiffs and defendants are required to serve

responses to standard written discovery, although additional written discovery is not precluded. All plaintiffs are also required to serve a Disclosure Form, which provides defendants with information regarding each plaintiff's personal information (address, date of birth, etc.), brief history of the alleged disease, the asbestos-containing products to which the plaintiff was allegedly exposed, and the sources of evidence to be used against each defendant, such as witnesses and documents. The Disclosure Form is not itself evidence, only a collection of specific allegations. The strongest product identification and exposure evidence typically comes from depositions of eyewitnesses; such depositions must take place on or before the close of fact discovery as established by the Special Master for each trial list. Once fact discovery closes, the defendants are given a brief period to serve dispositive motions. Most motions are based on a plaintiff's failure to produce product identification and exposure evidence against the moving defendant prior to the close of discovery. Unopposed motions are granted administratively by the Special Master; opposed motions are set for oral argument before Judge Hely on or about the first day of trial.

The vast majority of cases on the consolidated docket settle or resolve through motion practice prior to trial. Only four cases have gone to verdict in recent years. All were tried by national plaintiffs' firms that associated themselves with local Massachusetts firms. All four cases resulted in defense verdicts, based on strong arguments and favorable case law available to the defendants. One such defense is the argument that a manufacturer of equipment cannot be held liable for asbestos-containing replacement parts that it did not manufacture, sell, recommend, or specify. Judge Hely has sustained this argument on numerous occasions. When circumstances permit (often cases in which the plaintiffs have alleged exposure to asbestos on Navy ships or in Navy shipyards), defendants have also relied on the government contractor defense. This defense shields a defendant from liability when a plaintiff alleges exposure to a product sold pursuant to a government contract. Both of these defenses were successfully argued before Judge Hely as recently as December 2011 and the plaintiffs have appealed his ruling. Defense counsel will certainly be following the Appeals Court's review closely given the importance of the defenses at issue.


Despite the recent defense verdicts and favorable decisions on defendants' dispositive motions, local plaintiffs' firms continue to file numerous cases and national firms are still attracted to this jurisdiction. There is no doubt the trend will continue for several more years, as recent case filings show no sign that the litigation will end in the near future.



## **Blast from the Past!**

In a new section of our newsletter, we are celebrating our past. Attached is a copy of our "Issue Update" from March 2003 which includes an article from Tony Sbarra on the evolution of MGL Ch. 143, Sec. 51 and strict liability.

[CLICK HERE](#) for MDLA ISSUE UPDATE March 2003



### **MassDLA's Associates Division invites you to attend**

#### ***After Work Seminar: e-Discovery***

**February 23, 2012**

**Cooley Manion & Jones, 21 Custom House St # 600, Boston,  
MA 02110-3536**

The MassDLA Associate Division presents an "after work" seminar on February 23, 2012 on "e-Discovery in State Court Litigation." Chad P. Brouillard, Esq. from Foster & Eldridge LLP will present on recent trends in e-Discovery, Massachusetts Law, and ripe electronic data sources to consider as potential sources of inquiry during litigation. The seminar will also include a basic primer of key e-Discovery concepts. Further topics will include the use of smart phone/tablet/social networking technology in transforming the landscape of traditional discovery.

This event is complimentary for MassDLA members and MassDLA member firms.

Contact Javier Flores at [jflores@cmjlaw.com](mailto:jflores@cmjlaw.com)  
to register and for more information.



---

# Officers 2011-2012

**President**  
**Anthony J. Sbarra, Jr.**  
**Hermes, Netburn, O'Connor & Spearing, P.C.**

**President Elect**  
**Michael Sams**  
**Kenney & Sams, P.C.**

**Secretary**  
**Martin Rooney**  
**Curley & Curley P.C.**

**Treasurer**  
**Janet Pezzulich**  
**LECLAIR RYAN**

**Immediate Past President**  
**Holly M. Polglase**  
**Hermes, Netburn, O'Connor & Spearing, P.C.**

**DRI State Representative**  
**Emily Coughlin**  
**Coughlin Betke LLP**



---

# Directors 2010-2011

**Chad Brouillard**  
**Foster & Eldridge LLP**

**John P. Connelly**  
**Hinckley, Allen & Snyder LLP**

**Brian Cullen**  
**Law Office of Thomas M. Niarchos**

**Javier F. Flores**  
**Cooley Manion Jones LLP**

**Grace Garcia, Esq.**  
**Morrison, Mahoney LLP**

**Christopher Long**  
**Murphy and Riley**

**Scott Machanic**  
**Cunningham Machanic Cetlin Johnson & Harney**

**Matthew Moschella**  
**Sherin & Lodgen, LLP**

**Denise Murphy**  
**Rubin and Rudman LLP**

**Steven O'Brien**  
**Long & Leahy**

**Janet Pezzulich**  
**LeClair Ryan**

**Michael Riseberg**  
**Adler Pollock & Sheehan P.C.**

**Martin Rooney**  
**Curley & Curley**

**Jeff Rotella**  
**Adler Pollock & Sheehan P.C.**

**Michelle Schaffer**  
**Campbell Campbell Edwards & Conroy**

**Craig Waksler**  
**McGivney & Kluger**

**Directors 2011-2012**

**Chad Brouillard  
Foster & Eldridge LLP**

**John Connelly  
Hinckley Allen & Snyder LL**

**Brian Cullen  
Law Office of Thomas M. Niarchos**

**Javier F. Flores  
Cooley Manion Jones LLP**

**Grace Garcia, Esq.  
Morrison, Mahoney LLP**

**Christopher Long  
Murphy and Riley**

**Scott Machanic  
Cunningham Machanic Cetlin Johnson & Harney**

**Matthew Moschella  
Sherin & Lodgen, LLP**

**Mark W. Murphy, Esq.  
Langlois, Wilkins, Furtado & Metcalf, P.C.**

**Steven O'Brien  
Long & Leahy**

**Janet Pezzulich  
LeClair Ryan**

**Michael Riseberg  
Adler Pollock & Sheehan P.C.**

**Martin Rooney  
Curley & Curley**

**Jeff Rotella  
Adler Pollock & Sheehan P.C.**



---

## **MassDLA PAST PRESIDENTS**

**2010 - 2011**

**Holly M. Polglase  
Hermes, Netburn, O'Connor & Spearing, P.C.**

**2009-2010**

**Emily G. Coughlin  
Coughlin & Betke, LLP**

**2008-2009**

**Mark W. Murphy  
Litchfield Cavo**

**2007-2008**

**Susan Donnelly Murphy  
Murphy & Riley, P.C.**

**2006-2007**

**Christopher A. Kenney  
Kenney & Sams, P.C.**

**2005-2006**

**Michael Giunta  
Leclair Ryan**

**2004-2005**

**J. Kenneth Griffin  
Griffin & Goulka**

**2003-2004**

**Eileen P. Kavanagh  
Litchfield Cavo**

**2002-2003**

**Barbara Hayes Buell  
Smith & Duggan, LLP**

2001-2002

Robert A. Curley, Jr.  
Curley & Curley, P.C.

2000-2001

Brian P. Voke  
Campbell, Campbell, Edwards  
& Conroy, P.C.

1999-2000

Christopher A. Duggan  
Smith & Duggan

1998-1999

Paul P. O'Connor  
Milton, Laurence & Dixon

1997-1998

John J. Ryan, Jr.  
Ryan, Coughlin & Betke, LLP

1996-1997

Francis J. Lynch, III  
Lynch & Lynch

1995-1996

Patricia Angell Barbalunga  
Moriarty, Donoghue &  
Leja, P.C.

1994-1995

Daniel J. Griffin, Jr.  
Martin, Magnuson, McCarthy  
& Kenney

1993-1994

James M. Campbell  
Campbell, Campbell, Edwards  
& Conroy, P.C.

1992-1993

Thomas E. Peisch  
Conn, Kavanaugh, Rosenthal,  
Peisch & Ford, LLP

1991-1992

Lee Stephen McPhee  
Morrison Mahoney, LLP

1990-1991

Peter J. Black  
Meehan, Boyle, Black &  
Fitzgerald, P.C.

1989-1990

Scott J. Tucker  
Tucker, Heifetz & Satzman,  
LLP



---

**MassDLA DEFENSE LAWYERS OF  
THE YEAR**

2011

Thomas Federico

2010

Scott Tucker

2009

Donald W. Goodrich

2008

J. Kenneth Griffin

2007

John J. Ryan, Jr.

2006

John S. Donovan, Jr.

2005

John P. Ryan

2004

Robert A. Curley

2003

Francis J. Lynch

2002

Patricia A. Barbalunga

2001

Richard P. Campbell

1998

John P. Fitzgerald

1997

William J. Dailey

1995

Raymond J. Kenney, Jr.

1994

John A. Wickstrom

1993

Lee Stephen MacPhee



## Join a Committee!

Contact a Committee Chair to join...

Insurance and Bad Faith Law \_Michael Riseberg

[mriseberg@apslaw.com](mailto:mriseberg@apslaw.com)

Construction Law

Grace Garcia

[GGarcia@morrisonmahoney.com](mailto:GGarcia@morrisonmahoney.com)

Employment Law \_Co-chairs:

Daniel Blake

[daniel.blake@leclairryan.com](mailto:daniel.blake@leclairryan.com)

Janet Pezzulich

[janet.pezzulich@leclairryan.com](mailto:janet.pezzulich@leclairryan.com)

Products Liability

Holly Polglase

[hpoglase@hermesnetburn.com](mailto:hpoglase@hermesnetburn.com)

**Professional Liability Law**

**Christopher Betke**

[cbetke@coughlinbetke.com](mailto:cbetke@coughlinbetke.com)

