

# NEWS & VIEWS

Spring 2015

Attorney Advertisement

## W.R. GRACE ESTABLISHES A BANKRUPTCY TRUST FOR ASBESTOS-RELATED DISEASES

On August 25, 2014, the W.R. Grace Asbestos Personal Injury Trust (The Trust) commenced operations and began accepting claims. Asbestos bankruptcy trusts are typically established by companies that manufactured or distributed asbestos products. As a result, these companies are facing claims from people who were exposed to these products and are now suffering from an asbestos-related illness, such as mesothelioma or lung cancer. Companies like W.R. Grace often resort to filing for bankruptcy and reorganizing their debts so that they can pay off their liabilities.

In 1938, W.R. Grace began manufacturing asbestos-containing products intended primarily for use by people in the construction trade, including drywall installers, insulators, and those in the acoustical installation trades. Fireproofing materials, plaster compounds and insulating cements were sold under a variety of W.R. Grace brand names, such as Zonolite, Monokote and Perltext. Many of these products came in a dry form and had to be mixed with water before being sprayed onto walls and ceilings. Those who worked with or around these asbestos-containing products were often exposed to airborne dust that was generated through their various applications.



*Pictured above: Zonolite vermiculite insulation. Zonolite was manufactured by W.R. Grace and contains amphibole asbestos from its mine in Libby, Montana.*

A majority of these products were manufactured utilizing asbestos-containing vermiculite mined and processed in Libby, Montana, home to W.R. Grace's deadly mining operation. The Environmental Protection Agency (EPA) found W.R. Grace to be an egregious polluter of the Libby community after it was discovered that its vermiculite mines generated large quantities of airborne asbestos fibers, which

contaminated local residences, schools, businesses, and even the community's water and soil. The EPA currently lists the former W.R. Grace operation on its National Priorities List (NPL),

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## THE CENTER FOR OCCUPATIONAL AND ENVIRONMENTAL MEDICINE OPENS AT ECMC

The Center for Occupational and Environmental Medicine (COEM-WNY) has officially opened its doors to workers suffering from work-related injuries and diseases. It is located at the Erie County Medical Center on the first floor of the main building. The Center is part of the New York State Occupational Health Clinic Network, the nation's only state-based network of its kind. The Center's medical staff will examine and evaluate active and retired workers suffering from a variety of work-related injuries and diseases, and it will partner with area labor unions, employers, community activist groups and other physicians in Western New York.

The Center at ECMC is headed by its Medical Director, Dr. Wajdy Hailoo, and will employ a multidisciplinary team of seven staff members. Dr. Hailoo and his staff will provide several med-

ical treatment options to injured, ill or impaired workers who suffer from workplace hazards, such as asbestos exposure, smoke inhalation, toxic chemical exposure, falls and other dangerous workplace conditions. The Center's mission also aims to prevent work-related illnesses and injuries by increasing awareness and health education. Services provided by the Center include: screening examinations, pre-employment and annual exams, certification exams, such as Department of Transportation (DOT) and respirator use, and other Occupational Safety and Health Administration (OSHA), Department of Health (DOH) and Environmental Protection Agency (EPA) required exams. Workers' compensation and disability management, expert opinion assessment, industrial hygiene and social work services will also be provided.

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## W.R. GRACE ESTABLISHES BANKRUPTCY TRUST FOR ASBESTOS-RELATED DISEASES

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designating it as one of the most hazardous sites in the U.S. In addition, the Agency for Toxic Substances and Disease Registry (ATSDR) conducted a review of Libby death certificates from 1979-1998, finding that when compared to Montana and U.S. mortality, there was a twenty to forty percent increase in nonmalignant and malignant respiratory deaths in Libby.

In 2009, W.R. Grace was ordered to pay the U.S. government more than \$54 million to cover cleanup costs related to its mining operation after it was revealed that company executives were aware as early as the 1970s that asbestos exposure could lead to various illnesses. Further, a U.S. Department of Justice investigation revealed

that, prior to requesting bankruptcy protection, W. R. Grace transferred several billion dollars to its subsidiaries. W.R. Grace was ordered to bring back \$1 billion to be used for The Trust, and it is estimated that The Trust will contain up to \$1.8 billion by 2034.

Today, The Trust is operated by trust fund officers who review claims and determine proper settlement amounts. To qualify for payment, a claimant must provide credible exposure and medical evidence. Those who worked with or around any of W.R. Grace's asbestos-containing products and are suffering or suffered from an asbestos-related illness, may be eligible for compensation from The Trust. ■

## THE CENTER FOR OCCUPATIONAL AND ENVIRONMENTAL MEDICINE OPENS AT ECMC

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Dr. Wajdy Hailoo received advanced training in occupational medicine at Mount Sinai Hospital in New York City, where he studied under Dr. Irving Selikoff, the renowned father of research in asbestos-related diseases in the United States.

The Buffalo clinic was originally established in the 1980s, when several clinics opened throughout New York State. Today, there are ten such clinics. Dr. Hailoo is not new to the Buffalo area. He first came here in the late 1980s to manage the original clinic, at that time called the Union Occupational Health Clinic, also located at ECMC. After helping to set up the local program, he was hired by the Occupational Health Program at SUNY/Stony Brook Medical School. In the years following Dr. Hailoo's departure from the Buffalo area, the original clinic began to depart from its core mission and was eventually defunded by the State.

According to Dr. Hailoo, "The movement to reopen the Center actually began in Buffalo about two years ago. Local union leaders, community activists, industrial hygienists and physicians saw the need to reestablish this program, here in Buffalo, because of the amount of work-related injuries and diseases that still exist in this area. With the help of these same union leaders, labor activists and leaders in the Buffalo community, we applied to the State to get funding. We were approved, an advisory board was established and we were able to form the new Center." The Center will serve all workers in the community, including residents of Tonawanda and Niagara Falls who were exposed to environmental pollution.

Even though the presence of heavy industry has declined steeply in the Buffalo area, Dr. Hailoo decided to return to Buffalo in 2014 to serve as the Center's Medical Director because of the great need for occupationally-related medical services. "In my travels and in my practice, I have screened patients in New York City and throughout the world, including England and Italy. I have assessed a variety of worker illnesses and diseases, and even to this day, I have not seen such a prevalence of occupational-related diseases anywhere but in Buffalo. The giant steel mill is gone, but there is still a great need for a clinic like this in this community, and I am proud to be involved with the Center at ECMC," said Dr. Hailoo.



Members of the Center's staff pictured above from left to right: Yvonne Stephens, Elaine Laskowski, Nellie Brown and Dr. Wajdy Hailoo.

It is the policy of The Center for Occupational and Environmental Medicine that medical services are provided at no cost to the worker. Workers' Compensation, employer health funds and insurance will be billed for services provided. Priority and extra care will be given to the medically underserved and to those who are medically challenged.

Lipsitz & Ponterio partner John N. Lipsitz currently serves on the Center's advisory board. Its additional members are comprised of representatives from the New York State Departments of Health and Labor, local union leaders, labor activists, lawyers and other community members who will help guide the Center to fulfill its mission.

The Center will also collaborate with community organizations, such as the Western New York Council on Occupational Safety and Health (WNYCOSH), to assist with training programs, education and patient outreach. The University at Buffalo Toxicology Research Center will participate in training and research, and residents in The University at Buffalo Department of Occupational Medicine program will assist with patient treatment and medical services.

We encourage you to contact The Center for Occupational and Environmental Medicine at ECMC to discuss your health needs and what can be done to meet those needs. The staff may be reached at 716-898-5858. ■



## LIPSITZ & PONTERIO HOSTS FORUM FOR DUREZ NEIGHBORHOOD RESIDENTS

On March 3, 2015, Lipsitz & Ponterio held an open forum on health issues for the residents of the neighborhood surrounding the former Durez Plastics facility on Walck Road. It was held at the Knights of Columbus Banquet Hall on Erie Avenue in North Tonawanda, New York. Approximately fifty current and former residents of the neighborhood braved the blustery winter weather to attend.

Until Durez closed its doors in the 1990s, a variety of toxic chemicals were used in the manufacturing of plastics and other materials. The site is surrounded by residential properties on its northeast boundaries, residential and light commercial properties on its southwest and south boundaries, and industrial properties on its east and southeast boundaries, including the former National Grinding Wheel.

Volunteers from the Knights of Columbus made everyone feel welcome. Lawyers and staff from Lipsitz & Ponterio were present, and light refreshments were provided for the guests. Dr. Mary Reid from Roswell Park Cancer Institute and Dr. Paul Kostyniak from the University at Buffalo's Toxicology Research Center were invited to comment on health and environmental concerns regarding chemical pollution from the plant. Law partner John N. Lipsitz explained that between 1959 and 1979 Durez used thousands of tons of asbestos to make plastic molding compound, which was sold throughout the United States. Durez combined asbestos with other raw materials in giant mixers. Dust collecting units were used to siphon off the dust from these mixers. However, asbestos escaped into the neighborhood contaminating the air surrounding the plant and settling on nearby surfaces.

Based on the information presently available it is apparent that concentrations of asbestos fibers permeated the streets, fields, playgrounds, homes and businesses for many blocks around the perimeter of the plant grounds.

*“Although the New York State Department of Environmental Conservation currently reports that soil sediments no longer present any significant health risks, some residents at the forum were clearly skeptical about such official assurances.”*

After discussing asbestos contamination and the several related cases of mesothelioma among area residents, Mr. Lipsitz turned to soil and groundwater contamination in the neighborhood. Until 1971, Durez manufactured phenol from formaldehyde and benzene. Some of the by-products of this manufacturing process,



*Pictured above: Lipsitz & Ponterio partner, John N. Lipsitz, giving his presentation at the firm's March 3rd forum regarding toxic exposure and the Durez neighborhood.*

known as the Raschig Process, contained carcinogenic dioxins and furans. Contamination of the soil and groundwater continued even after the Raschig Process was dismantled in 1971. Although the New York State Department of Environmental Conservation currently reports that soil sediments no longer present any significant health risks, some residents at the forum were clearly skeptical about such official assurances.

From 1930 until approximately 1973, Occidental Chemical and its predecessor companies owned and operated 14 separate disposal sites on the grounds of the Durez plant. The company disposed of nearly 28,000 tons of industrial waste at this site, and a substantial amount of this waste was dumped, without containers, in liquid or solid form. Wastes included quantities of phenol tar, including a substantial amount containing chlorinated benzene; phenol bearing material, including phenolic resins and molding compounds; and calcium aluminum oxide and calcium phosphate catalyst. Other organic compounds suspected to be present at the Durez site include toluene, xylene, benzene and other toxic substances.

Dioxins and furans seeped into the plant's storm and sanitary sewers and ultimately entered the Pettit Creek Flume, which empties into the Niagara River. The Pettit Creek Flume is one of the primary storm sewers in North Tonawanda. It runs near many residential and public properties, including the former Lowry Middle School and Gilmore Elementary School.

A number of people who attended the forum discussed their concerns regarding groundwater and soil contamination in their neighborhood, particularly focusing on residential basements, backyards and drainage ditches. Residents gave personal accounts of their experiences with unusual environmental conditions. Some people reported that black sludge would seep into their basements

## LIPSITZ & PONTERIO HOSTS FORUM FOR DUREZ NEIGHBORHOOD RESIDENTS

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during heavy rainfalls. Others talked about areas in the neighborhood where grass never grew and the ground never froze. Many people who grew up in the neighborhood during the 1940s, 50s and 60s, talked about the drainage ditch where they played as children and reported that the water was curiously colorful. A number of people talked about their health issues and concerns, and they commented on the unusually high incidences of leukemia, brain cancer, breast cancer and thyroid cancer affecting their neighbors.

Dr. Paul Kostyniak responded to questions about how the body absorbs chemical substances from the environment. Dr. Kostyniak currently serves as the Director of the University at Buffalo's Toxicology Research Center, and his primary research program has focused on the toxicology of heavy metals, chlorinated organics and antidote development.

Dr. Reid provided an overview of how cancer clusters are investigated and the ways in which Durez residents can report suspected cancer clusters. Dr. Reid also talked about the challenges of investigating a cancer cluster and the process by which residents can conduct health surveys. Mary Reid, MSPH, PhD, is the Director of

Cancer Screening and Survivorship at Roswell Park Cancer Institute, and she is currently a Professor of Oncology in the Department of Medicine.

The Center for Disease Control and Prevention (CDC) defines a cancer cluster as a "greater-than-expected number of cancer cases that occurs within a group of people in a geographic area over a period of time." A cancer cluster may be suspected when family members, friends and neighbors have been diagnosed with the same or related types of cancer. Because elevated numbers of any particular cancer can occur in any neighborhood by chance, only the rare cancer cluster is confirmed following a detailed scientific investigation.

Mr. Lipsitz's presentation was followed by a lively session of questions and comments from those in attendance. No one present at the forum could recall the last time so many neighborhood residents had come together to exchange information about unexplained health issues in the neighborhood, and for this reason alone the forum can be considered a success. ■

## THE GRANDPARENT SCAM....DON'T LET IT HAPPEN TO YOU

**Y**ou're a grandparent and you get a phone call or an e-mail from someone who identifies himself as your grandson. "I've been arrested in another country," he says, "and I need money wired quickly to pay my bail. And oh, by the way, don't tell my mom or dad because they'll only get upset!"

This is an example of what has come to be known as "the grandparent scam"—a fraud that preys on the elderly by taking advantage of the love and concern they have for their grandchildren.

Thanks to social networking sites on the internet, criminals can easily uncover personal information about their targets, making the impersonations more believable. For example, the actual grandchild may mention on his or her social networking site that he or she is a photographer who often travels to Mexico. When contacting the grandparents, the phony grandchild will say he or she is calling from Mexico, where someone stole his or her camera equipment and passport.

### COMMON SCENARIOS INCLUDE:

- A grandparent receives a phone call (or sometimes an e-mail) from a "grandchild." If it is a phone call, it's often late at night or early in the morning when most people aren't thinking clearly. Usually, the person claims to be traveling in a foreign country and has gotten into a bad situation, like being arrested for drugs, getting in a car accident, or being mugged...and needs money wired immediately. The caller does not want his or her parents to know.

- Sometimes, instead of the grandchild making the phone call, the criminal pretends to be an arresting police officer, a lawyer, a doctor at a hospital, or some other person. Sometimes the phony grandchild talks first and then hands the phone over to an accomplice to further spin the fake tale.
- Military families have also been victimized. After perusing a soldier's social networking site, a con artist may contact the soldier's grandparents, sometimes claiming that a problem came up during a military leave, and in order to resolve the issue, a wire transfer or bank deposit is necessary.

Commonly called the grandparent scam, criminals may also claim to be a family friend, a niece or nephew, or another family member. For more information visit [www.fbi.gov](http://www.fbi.gov). ■

### tips to keep you safe

#### To avoid being victimized in the first place:

1. Resist the pressure to act quickly.
2. Try to contact your grandchild or another family member to determine whether or not the call is legitimate.
3. Never wire money based on a request made over the phone or in an e-mail...especially overseas. Wiring money is like giving cash—once you send it, you can't get it back.

## IMPORTANT DECISION ISSUED BY THIRD DEPARTMENT APPELLATE DIVISION ON BEHALF OF WORKERS INJURED BY TOXIC CHEMICALS

This past December, the Third Department Appellate Division issued an important decision on behalf of workers injured by toxic chemicals.

The Workers' Compensation Law, enacted in 1914, represents a compromise between the interests of employers and employees. It protects businesses by forbidding employees from suing their employers for work-related injuries under almost all circumstances. It protects workers by setting up a streamlined claims process, which imposes a lower burden of proof than a traditional suit in state court and costs less to prosecute.

The case was filed in the matter of a former employee of the Goodyear Tire & Rubber Company located in Niagara Falls. Lipsitz & Ponterio represented the widow of a chemical lab technician who had been exposed to an unusual carcinogen called ortho-toluidine. This chemical is absorbed through the skin, collects in the kidneys and passes from the bladder. Workers who are exposed to ortho-toluidine may develop bladder cancer as a result.

The claimant's late husband developed an extremely rare cancer of the ureter, the tube that connects the kidney to the bladder. In an action for workers' compensation benefits, Lipsitz & Ponterio showed that ortho-toluidine passed through the decedent's ureter and

*“If the appeals court had agreed with the employer, the effect would have made it increasingly difficult and expensive to hold companies responsible when their employees develop rare occupational diseases.”*

that the ureter was lined with exactly the same kind of cells as the bladder. The Workers' Compensation Board awarded the chemical lab technician's widow lifetime survivor's benefits.

The decedent's employer appealed the decision, arguing that the Compensation Board should have applied a tougher standard of proof. If the appeals court had agreed with the employer, the effect would have made it increasingly difficult and expensive to hold companies responsible when their employees develop rare occupational diseases. The court agreed that it would be against the purpose of the Workers' Compensation Law to change the standard of proof and upheld the widow's award. ■

## ASBESTOS CLAIMS DENIED OR DELAYED BY BERKSHIRE HATHAWAY SUBSIDIARIES

Berkshire Hathaway (Berkshire), Warren Buffett's multinational conglomerate holding company, is actively distorting the civil justice system by delaying or denying insurance claims for victims of asbestos exposure. Asbestos defendants rely on insurance providers to pay claims made by plaintiffs injured by asbestos-containing products. Many of these providers are taking advantage of Berkshire's willingness to take over the risk for these asbestos claims. Berkshire subsidiaries that handle its asbestos and pollution policies, including Resolute Management, Inc. (Resolute), are acting in bad faith by delaying payments to victims because the longer the money is invested, the greater the potential return. As a result, it is not uncommon for victims of mesothelioma or lung cancer to pass away before realizing any of the money they are entitled to.

In the late 1990s, Berkshire began to acquire these insurance policies to capitalize on the associated long-term “float,” the money insurance companies hold between the time customers pay premiums and the time the insurance company makes payments on claims. Insurance policies covering asbestos exposure and disease have an extraordinarily long “float,” because of the latency period between the time of exposure and the onset of illness. In a 2011 letter to Berkshire shareholders, Buffett boasted that the long term floats associated with asbestos coverage would allow the company to profit “just as we would if some party deposited \$70.6 billion with us, paid us a fee for holding its money and then let us invest its funds for our own

benefit.” It is estimated that by 2012, Berkshire's “float” had grown to \$73 billion.

In order to take full advantage of this investment opportunity and maximize profits for Berkshire, Resolute is engaging in calculated delay tactics to ensure that it achieves the highest possible return on its investment, despite being fully aware that deserving claimants are unlikely to live long enough to receive the settlements. In addition, by delaying court proceedings until an injured party dies, Resolute avoids facing juries which often award more money to living victims. Resolute is not acting as a typical insurance company, but instead is consistently betting that those suffering from mesothelioma or lung cancer will die before being able to tell their story in court.

Rarely in litigation do plaintiffs and defendants agree on central issues, but even corporations are angered by Resolute's cynical strategy. Ford Motor Company and Estee Lauder Companies are among some of the corporations that have filed lawsuits against Berkshire to recover for reimbursement of fines, legal fees and payments of injury claims caused by Resolute's misconduct. These fines, fees and payments are the result of Resolute's policy of placing profits before justice through the use of unreasonable delay tactics.

Despite Resolute's attempts to frustrate plaintiffs' journeys through the civil justice system, the attorneys at Lipsitz & Ponterio continue to push even harder to obtain accelerated trial dates for their clients suffering from asbestos-related illnesses. ■

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## JOHN E. RICHMOND JOINS LIPSITZ & PONTERIO

Lipsitz & Ponterio is pleased to announce that John E. Richmond has joined the firm as an associate attorney. Mr. Richmond will focus his practice on representing individuals suffering from occupational diseases, including mesothelioma and lung cancer.

Prior to joining the firm, Mr. Richmond served as an associate attorney at a New York City asbestos litigation law firm where he gained valuable experience in asbestos and toxic tort litigation.

Mr. Richmond received his J.D. from Seton Hall University School of Law, and his B.A. from Miami University. While pursuing his Juris Doctor degree at Seton Hall University, Mr. Richmond served on the executive board of Interscholastic Moot Court. He was also the recipient of an award for drafting the Best Brief of



the 2009 Cardozo/BMI Entertainment Law Competition.

Mr. Richmond was born and raised in Rochester, New York. While attending Miami University, he was the goaltender on Miami's Division 1

ice hockey team and was awarded the 2006 scholar athlete award ■