

# NEWS & VIEWS

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Attorney Advertisement

## LIPSITZ & PONTERIO & THE FIRM'S CLIENTS LOBBY IN WASHINGTON, D.C.

The subject in Washington, D.C., when the Science Advisory Board (SAB) of the Environmental Protection Agency's Asbestos Committee met in July was the potential for asbestos to cause cancer, in particular to cause malignant mesothelioma. Under consideration was a proposed change in the EPA's risk assessment for a type of asbestos fiber known as chrysotile used in 90% of all asbestos-containing products sold throughout the United States. A lower exposure standard for this type of asbestos would have a damaging effect on public health and seriously hinder the ability of victims of asbestos disease to recover damages in legal proceedings. Asbestos companies would urge a lower exposure standard as evidence that chrysotile asbestos does not cause mesothelioma, a position at odds with the weight of scientific opinion on this issue.

Attorney John Comerford and two of the Firm's clients traveled to Washington to appear at the hearing and to voice their concerns regarding the Board's intentions. Numerous public health experts throughout the United States and Canada attended the hearing to speak against a weakening of the EPA's regulations on asbestos.

John Comerford presented testimony from two clients at the hearing regarding their exposure to brake dust and the resultant mesothe-



lioma disease which developed from such exposure. Mrs. Girton, from Greene, New York, testified that her husband was exposed to brakes for over 30 years, and provided heartfelt testimony about the terrible consequences mesothelioma had on her husband and family. Mr. Bennett Scott Hoser, of New Jersey, testified that his exposure to farm tractor brakes caused his malignant mesothelioma. Mr. Comerford presented lung studies of both clients showing that their lungs were loaded with chrysotile asbestos fibers from brake exposure. "We attended this hearing in Washington, D.C. to address the Board on the true and very real dangers of chrysotile asbestos," said John Comerford. "Our clients supported this effort by testifying that exposure to chrysotile can and does cause malignant mesothelioma, and that this issue should not be ignored or watered down." ■

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## COURT ISSUES LANDMARK RULING FOR DYING WIDOW OF ASBESTOS WORKER

Who can file a lawsuit against the manufacturers and distributors of asbestos-containing products for a disease, like mesothelioma, caused by exposure to asbestos dust? Is it only the workers who handled the products directly? Or can the wife of an exposed worker who breathed in the dust from her husband's work clothes also bring a lawsuit when she, too, develops mesothelioma? This was the question answered earlier this year by a distinguished retired New York State Supreme Court Justice sitting as a Judicial Hearing Officer supervising the asbestos docket in Western New York.

Our client was married to a career construction worker employed by a plastering contractor which distributed and applied a variety of asbestos-

containing products, including products sprayed on ceilings for soundproofing. Our client's husband was also employed by an asbestos insulation contractor performing work at a large oil refinery where lengths of asbestos pipe covering were cut, manipulated and applied to hot pipes, giving rise to large amounts of visible dust.

Our client routinely laundered the dust-laden work clothes brought home by her husband. Neither our client nor her husband knew of the dangers of exposure to the deadly dust. Eventually, our client's husband died of asbestosis and cancer. Years later, our client was herself diagnosed with malignant mesothelioma. She hired us to file suit against her husband's former employers for damages. ...continued on page 2

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The companies that were sued protested that they could not legally be held responsible for our client's injuries because she never handled the products they sold and distributed to the various work sites where her husband worked. Incredibly, the defendants

*‘Neither our client nor her husband knew of the dangers of exposure to the deadly dust.’*

also argued that, even if they could have foreseen the eventual injury to our client, they still should not be held responsible, and that no New York court had ever squarely decided this issue in favor of a plaintiff in a household exposure case. The defendants were right about one thing: no court in New York had ever reached the conclusion that the distributor of a toxic product was potentially liable to pay legal damages to a family member injured by dust brought home on a worker's clothing, at least, not until now.

On April 18, 2008 the Court ruled in favor of the plaintiff. In reaching its decision, the Court considered the affidavit of an industrial hygienist who detailed the history of the dangers of asbestos exposure, what was known and when it was known. In

the opinion of the expert, those involved in the marketing of asbestos products should have been aware of the risk of serious disease posed to household members by exposure to contaminated clothing at some point between 1956 and 1960.

In rejecting the defendants' argument that the plaintiff had no right to relief from her husband's past employers, the Court eloquently wrote about justice and the rights of innocent bystanders. The Court stated that:

“The ultimate purpose of the strict products liability cause of action is to cast the burden on the manufacturer who put the product in the marketplace and on those who facilitate the distribution and eventual use of a defective or dangerous product. To deny a right to relief to persons injured by a defective or dangerous product solely on the ground that they were not themselves its users would be neither reasonable nor just. To restrict recovery only to those who are users of asbestos products is unrealistic in view of the fact that innocent bystanders such as the plaintiff have less opportunity to learn of the danger where the product carries no warning. As a matter of policy mandated by both justice and common sense, the plaintiff should be entitled to pursue her strict products liability cause of action...” ■

## LIPSITZ & PONTERIO CHAMPIONS CAUSE OF POLICYHOLDERS IN LANDMARK INSURANCE CASE

The Appellate work of Lipsitz & Ponterio lawyers, Kathleen Burr and John Lipsitz, was instrumental in their clients' big win at the New York Court of Appeals in the case of *Bi-Economy Market, Inc. v. Harleysville Insurance Co. of New York*, 10 N.Y.3d 187 (2008), reargument denied, 10 N.Y.3d 890 (2008).

The case involved two Rochester businessmen who co-owned the former Bi-Economy Meat Market once located at 175 Jay Street in Rochester. On October 19, 2002, the Bi-Economy Market caught fire and was badly damaged, causing business operations to cease.

After the fire, property losses, business equipment losses, and business income losses were presented to the insurer, Harleysville Insurance Company of New York. But, as alleged by these business owners, Harleysville proceeded to breach the insurance contract by refusing to timely adjust the claims, by employing delaying tactics, and by presenting under-valued offers, all to the ultimate demise of the business which never could resume operation.

The Court of Appeals held that Bi-Economy's owners could state a claim for breach of contract and seek recovery of foreseeable

*‘This is a ground-breaking decision in the realm of first party insurance...’*

consequential damages, in Bi-Economy's case, the value of the lost business. This is a ground-breaking decision in the realm of first-party insurance because, for the first time, it exposes insurers in New York to a risk of extra-contractual consequential damages for which the insurer could be liable outside of the coverage limits of the insurance policy. The win secured by Lipsitz & Ponterio, LLC in the Bi-Economy case will greatly help New York policyholders and promote fairer claims-handling practices by first-party insurers who are covering the homes, the cars, the health and the very lives of this state's consumers. ■



## LIPSITZ & PONTERIO LAUNCHES RE-DESIGNED WEBSITE

We are pleased to announce the launch of our re-designed website located at [www.lipsitzponterio.com](http://www.lipsitzponterio.com). The user-friendly website offers information about the Firm's practice areas, attorneys, worker job sites, as well as publications and news relative to mesothelioma and toxic torts. The website also includes videos featuring workers who describe their trades at various facilities throughout Western New York.

"Our website was redesigned in an effort to provide our prospects and clients with valuable legal information relative to our practice areas," said John N. Lipsitz, one of the founding partners of the Firm. "Our goal is to ensure that all information on the Firm's website is easily accessible and useful for all victims of toxic exposure who seek legal representation in New York State."

We welcome you to visit our new website located at [www.lipsitzponterio.com](http://www.lipsitzponterio.com). If you have any questions regarding our Firm or its practice areas, please let us know by clicking the "Contact Us" button or by calling us at 716.849.0701. ■

## AUTOPSIES ARE AN IMPORTANT TOOL IN ESTABLISHING OCCUPATIONAL DISEASE

The attorneys and staff at Lipsitz & Ponterio, LLC understand that the sickness and death of a close family member can be difficult and traumatic. The decision to ask for an autopsy may be a very emotional one. The family may have moral or religious objections to an autopsy, as well.

Where occupational disease is merely suspected and has not yet been diagnosed, an autopsy may be critical in proving the case and, without it, there may be no basis to go forward with a claim. An autopsy is also an extremely useful tool in obtaining Workers' Compensation benefits for the surviving spouse and/or family of the decedent. In some instances, the autopsy report has been the main medical report relied upon in establishing a Workers' Compensation claim for death benefits.

Each client's circumstances are different, and despite our general recommendation for an autopsy, we encourage you to discuss this important issue with your loved ones prior to the time of passing. Your family members, treating physicians and funeral director also need to be advised of your decision whether or not to undergo an autopsy.

You may want to sign a Designation of Agent form in order to authorize an autopsy following your death. Should you decide to undergo an autopsy, we recommend that you send the signed designation to the agent you have selected, to your health care proxy, if applicable, to your primary doctor and to the funeral director. You should also keep a signed copy with your own records.

If you would like to request a Designation of Agent form, please contact our office toll-free at 866.238.1452 or visit the "Contact Us" section of our website. ■

## welcome aboard!



Our Firm continues to grow, and we are pleased to welcome ten new staff members to our office: Tammy Michalski, Kim Kijowski, Suzanne Meyer, Heather Teeter, Nick Novack, Marlene Potter, Tamara Wehr, Cassandra Palmateer, Debra Tredo and Makenzi Rasey.

Tammy Michalski, Suzanne Meyer, Kim Kijowski and Debra Tredo have been hired as legal secretaries. Tammy assists Kathleen A. Burr, Esq. and paralegal, Katherine Kulczycki. Suzanne assists the Rochester Lead practice group, including, Neil J. McKinnon, Esq. and paralegal, Jill Platt. Kim assists Michael A. Ponterio, Esq. and paralegal, Tamara Wehr. Debra assists John M. Pullano, our licensed Workers' Compensation Representative.

Marlene Potter serves as the Firm's Director of Marketing. She oversees initiatives including brand management, public and client relations, marketing collateral and website design.

Heather Teeter and Cassandra Palmateer has been hired to assist our Asbestos Bankruptcy Team. They will assist in completing and filing claim forms with bankruptcy trusts on behalf of our asbestos clients.

Nick Novack and Makenzi Rasey have been hired as legal assistants. They assist in the research and discovery process involved in both asbestos bankruptcy and asbestos lawsuit actions. ■



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## ATTORNEY SPOTLIGHT

### Kathleen A. Burr, Esq.

A dedicated attorney, Kathleen A. Burr is a key member of Lipsitz & Ponterio's Lead Practice Group. She has been with the Firm since 2002 and represents children injured by lead paint poisoning. Kathy has over 10 years of lead paint litigation experience and brings this to the children and families she now represents.

Over the years, Kathy has been involved in a number of appellate court cases that helped to form the legal standards that govern lead poisoning litigation in New York State. Kathy also has a strong background in insurance coverage issues. The policyholder cases handled by Kathy involve property and business income losses caused by fire and weather-related conditions. Her work on behalf of two Rochester business owners in a fire loss case resulted in a significant recent decision by the New York Court of Appeals in the arena of first-party insurance disputes. The case, *Bi-Economy Market Inc. v. Harleystown Insurance Co. of New York, et al.*, 10 NY 3d 187 (2008), gives policyholders a much-needed remedy to claim consequential damages as a result of improper or wrongful claims-handling by insurers.

"I truly enjoy working closely with the Firm's clients and helping people who are going through a difficult time," Kathy explains. "It is eye-opening how much you can learn from those who are suffering and trying to make ends meet. Over the years, I have met some incredible individuals who have become an inspiration to me and other members of our Firm."

Kathy enjoys spending her free time with her family. An avid sports fan, she regularly attends Buffalo Bills and Buffalo Sabres games, and enjoys golf outings with friends. ■

News & Views has been prepared by the attorneys at Lipsitz & Ponterio, LLC and is intended for general information purposes only and should not be considered legal advice. You are urged to contact an attorney concerning any specific questions you have relating to your own situation. Prior results do not guarantee a similar outcome.

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## \$5 MILLION VERDICT IN SYRACUSE, N.Y.

On July 10, 2008, after nearly a three week trial, a Syracuse jury awarded \$5 million to a former United States Navy boiler technician living with mesothelioma. The verdict is believed to be the largest yet for a mesothelioma victim in upstate New York. Keith R. Vona, an attorney at Lipsitz & Ponterio, was co-counsel for the trial that focused on important legal issues concerning the defendant's assertions of government and military blame.

The client was exposed to asbestos-containing insulation through the repair and maintenance of steam boilers, valves, pumps and other equipment onboard a Navy destroyer in the 1960's. The Court soundly rejected Foster Wheeler's attempts to shift responsibility onto the shoulders of the Navy. The jury found that Foster Wheeler had negligently failed to warn the plaintiff of the hazards associated with the operation, repair and maintenance of its product. The jury also found Foster Wheeler, the sole remaining defendant at trial, 31% responsible for the verdict. ■

## LOCAL #6 IRON WORKER RECEIVES \$2.4 MILLION SETTLEMENT

A Local #6 Iron Worker represented by Lipsitz & Ponterio, received settlements exceeding \$2.4 million for his asbestos-related injuries, which include mesothelioma, lung cancer and asbestosis. The case, which fully settled on the eve of trial in late June of 2008, was brought against numerous product manufacturers, contractors and site owners.

The client had been exposed to various asbestos-containing products, including insulation, fireproofing material and raw asbestos fiber throughout his forty year career as an iron worker. The client's exposure occurred at sites throughout Western New York including: Durez Plastics, Niagara Mohawk (Huntley and Dunkirk facilities), Ashland Oil, Bethlehem Steel, General Motors (Chevy plant, Tonawanda, NY), and the Donovan Building. The attorneys at Lipsitz & Ponterio were pleased to have settled the case successfully despite the involvement of numerous site owners and product manufacturers. ■

## CROSSING U.S. BORDERS – WHAT YOU NEED TO KNOW

On June 1, 2009, the U.S. government will implement the full requirements of the land and sea phase of the Western Hemisphere Travel Initiative (WHTI). The proposed rules require most U.S. citizens entering the United States at sea or land ports of entry to have a passport, passport card or WHTI compliant document. For those who live in New York State, this includes the much anticipated Enhanced Driver's License.

The New York State Enhanced Driver's License is an approved travel identification document for land and sea border crossings between the U.S., Canada, Mexico, Bermuda and the Caribbean. This document is not acceptable for air travel between these countries, or for travel to and from any foreign country not listed above. If you would like to travel to countries excluded from this list, you will still need to obtain the traditional passport book. New Yorkers can apply for an Enhanced Driver's License at their local DMV office.

The New York State Enhanced Driver's License is only available to those who are residents of New York State and U.S. citizens. Alternatively, the passport card is available to any U.S. citizen and is a less expensive and a portable alternative to the passport book. For more information on the New York State Enhanced Driver's License, visit the New York State Department of Motor Vehicles website: [www.nysdmv.com](http://www.nysdmv.com). For further information regarding WHTI and updates on U.S. passport requirements visit the U.S. Department of State website: [travel.state.gov](http://travel.state.gov). ■

## what is long-term care?



Long-term care is different from traditional medical care. Someone with a prolonged physical illness, a disability, or a cognitive impairment such as Alzheimer's Disease often needs long-term care. Long-term care services may include help with daily activities, home health care, respite care, hospice care, adult day care, care in a nursing home or care in an assisted living facility. It is important to understand that Medicare and Medicare supplemental insurance do not cover extended long-term care. Long-term care may be an important consideration when planning your estate.

A recent article in the *Buffalo News* estimated the average annual cost of a skilled nursing facility in Western New York to be about \$85,000. At this rate, and increasing every year, your estate can be quickly consumed. You need to decide if long-term insurance is something that you should purchase. For worksheets on how to compare policies and features, take a look at "A Shopper's Guide to Long-Term Care Insurance" from the National Association of Insurance Commissioners. To request your free copy of the Shopper's Guide visit the National Association of Insurance Commissioners website located at [www.naic.org](http://www.naic.org). ■

*(This article was adapted from the National Association of Insurance Commissioners)*

## LUNG CANCER CASE ESTABLISHED ON APPEAL

The New York State Workers' Compensation Board once held that a deceased worker's lung cancer could not be attributed to occupational exposure to asbestos unless the disease asbestosis was present in the lungs of the deceased worker. (Asbestosis is ordinarily defined as the scarring of the lung tissue secondary to exposure to asbestos dust.) Our client passed away from lung cancer, but did not have evidence of asbestosis. At the initial hearing level, the Administrative Law Judge ruled against the decedent's widow and denied her benefits.

Upon appeal, a Board Panel of the Workers' Compensation Board reversed the Administrative Law Judge. The Panel ruled that the decedent's widow was entitled to benefits even absent evidence of asbestosis.

In this case, there was sufficient evidence of actual asbestos fibers found in samples taken from the decedent's lungs, together with testimony from a co-worker that the decedent was exposed to asbestos on the job. Qualified physicians also testified that exposure to asbestos can lead to lung cancer even in the absence of evidence of asbestosis itself. This is an enormous victory not only for the widow in this case, but for victims across the State of New York who have contracted lung cancer caused by occupational exposure to asbestos. ■

## ASBESTOS BANKRUPTCY UPDATE

As part of our continued representation of clients suffering from asbestos disease, Lipsitz & Ponterio files claims against bankrupt asbestos companies. Because these companies have declared bankruptcy, it is impossible to sue them. The claims process thus becomes the only way for clients to recover money for their asbestos disease from exposure to asbestos-containing products manufactured or distributed by bankrupt companies. (Even in instances where a lawsuit against viable companies is time-barred, very often bankruptcy claims can still be filed.) Because there are very specific medical and product exposure guidelines for each Bankruptcy Trust, not every client has a valid claim against every Trust.

For recent developments concerning the following bankrupt asbestos companies, visit our Firm's website:

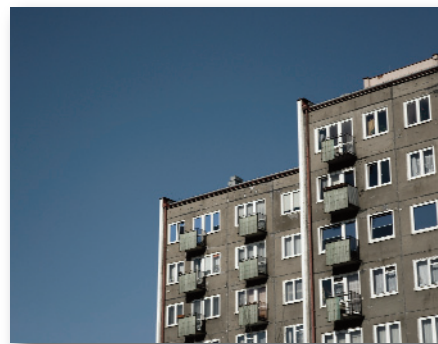
[www.lipsitzponterio.com/asbestos](http://www.lipsitzponterio.com/asbestos)

- Armstrong World Industries
- ASARCO, LLC
- Babcock & Wilcox
- Combustion Engineering
- Federal Mogul
- Dresser Industries (Harbison-Walker/Halliburton)
- Kaiser Aluminum
- Owens Corning/Fibreboard
- U.S. Gypsum/A.P. Green
- W.R. Grace

## LEAD POISONING CLAIMS & MUNICIPAL HOUSING AUTHORITIES

In order to pursue a claim against a municipality, such as a city, town, village or municipal housing authority, it is necessary to file a Notice of Claim within 90 days of the injury. Unbelievable as it may seem, this is true even for a child of the tender age of three. Filing a Notice of Claim is a prerequisite to the later filing of a lawsuit. What happens, then, when a lead poisoned child's parents fail to file the requisite Notice of Claim within 90 days of the occurrence of the lead poisoning, and the child, upon reaching the age of 18, finally files the Notice of Claim herself? It may be rejected as "late," just as it was by the Rochester Housing Authority (RHA) in the case of Tiara Rose. The trial court overruled the RHA and allowed the late filing of the Notice of Claim. The RHA appealed to the Appellate Division in Rochester, NY.

In *Tiara Rose v. Rochester Housing Authority*, 859 N.Y.S.2d 806 (4th Dept. 2008), the Appellate Division upheld the trial court's ruling that the plaintiff, Tiara Rose, should be allowed to file her Notice of Claim. Anne E. Joynt, an attorney at the Firm, filed the initial Notice of Claim against the RHA, and presented the case before the Appellate Division. Ms. Joynt argued that the RHA could not claim lack of knowledge of the essential facts underlying Ms.



Rose's case. The RHA was notified in 1991 that the plaintiff had been diagnosed with lead poisoning. In response, the RHA arranged to have the premises inspected for lead paint a mere one

week after the child's diagnosis. The Court found that in this case the RHA could not claim any prejudice, given the knowledge that they had of the situation so soon after it occurred. Furthermore, the plaintiff was only three years old when she was lead-poisoned, and could not seek legal representation for her injury on her own.

This decision marks a major victory in holding municipalities accountable for injuries caused to children. No longer can a municipal housing authority hide behind the requirement of filing a Notice of Claim within 90 days where it can be shown that the RHA knew the essential facts of the child's injurious exposure at or near the time it occurred. ■