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# International Asbestos Liability

## **Asbestos In France: One Step Forward, Two Steps Back**

*by*  
*Sylvie Gallage-Alwis*  
*and*  
*Delphine Lapillonne*

*Hogan Lovells*

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# Commentary

## Asbestos In France: One Step Forward, Two Steps Back

By  
Sylvie Gallage-Alwis  
and  
Delphine Lapillonne

*[Editor's Note: Sylvie Gallage-Alwis and Delphine Lapillonne joined the Litigation team of the Paris office of Hogan Lovells in 2007 and 2010, respectively. They are both specialized in commercial litigation and product liability issues. They have, in this respect, developed particular expertise in all types of asbestos-related litigation. They assist clients before the French Commercial Courts, Social Security Courts, Labor Courts, Criminal Courts and Arbitral Tribunals as well as in the scope of their relations with the French authorities or other companies. They further advise companies on legislation and case law in relation to a broad range of issues (gross negligence claims, asbestos workers' early retirement scheme, third party claims, asbestos remediation issues, acquisition/selling strategies, etc.). They regularly publish articles on asbestos-related litigation in France. More generally, Sylvie Gallage-Alwis also regularly provides advice to leading groups regarding international product recalls and product safety issues. She has, in this respect, managed a certain number of recalls related to asbestos-containing products. Copyright © 2012 by Sylvie Gallage-Alwis and Delphine Lapillonne. Responses are welcome.]*

Asbestos litigation and asbestos-related legislation have been subject to many evolutions in the past few years, which have mainly been negative for corporations. Indeed, French courts and the French Government, which are constantly pressurized by French plaintiffs' associations and Counsel, have favored, these past years, a "punitive" approach against companies which have (legally) used asbestos, even if this meant putting aside basic principles of French civil law, such as the principle according to which one must prove a breach by the company of its safety obligation, a loss and a causal link between the breach and the loss in question.

This being said, we have observed, during the first semester of 2012, a slight shift in favor of corporations. French courts have indeed started to increasingly refuse to compensate employees who have been exposed to asbestos on the ground of the disruption in their living conditions, thus restricting the endless list of heads of loss for which potentially exposed people could be compensated (I).

However, in parallel, the French Government, although it was held liable by the French Supreme Administrative Court (*Conseil d'Etat*) in 2004 and should, therefore, try to legislate with the view of decreasing the judicial risk for corporations, has decided to once again strengthen asbestos-related legislation by implementing a certain number of reforms to further protect potentially exposed people and, therefore, increase the financial and legal burden imposed on corporations (II).

### I. Disruption In Living Conditions: Going Back To Basic Liability Principles?

On May 11, 2010, in the scope of claims related to the asbestos' workers early retirement scheme, the *Cour de Cassation* (French Supreme Court) allowed plaintiffs to be compensated for anxiety of developing an asbestos-related illness in the future. The Court, however, rightly refused to award damages on the ground of the alleged economic loss from which they suffered when they left on early retirement (the early retirement allowance equals 65% of the last salary) on the ground that the plaintiffs cannot suffer from a loss when they voluntarily chose to benefit from a legal scheme.<sup>1</sup>

In order to circumvent the *Cour de Cassation's* position on the economic loss, plaintiffs started to rely on new heads of loss and notably focused on the notion of disruption in the living conditions. They started to claim that when they have not yet developed an asbestos-related illness, they are entitled to receive compensation on the ground of their "*contamination by asbestos*", which triggers both anxiety and disruption in living conditions. Although what this means remains slightly unclear (plaintiffs regularly change their reasoning on this ground), this notion generally refers to the loss of life expectancy and the subsequent impossibility to make plans for the future. Indeed, plaintiffs argue that, as they have been exposed, there is a risk that they will develop an illness, which *per se* has an impact on their current living conditions. One should note that plaintiffs who have already developed an illness are compensated for this loss before the Social Security Courts as well as for other heads of loss resulting from their illness. Companies should, therefore, be very careful and check whether or not the plaintiffs have already been compensated for this head of loss.

Although case law is still shaky on the matter<sup>2</sup>, the past six months have shown a return to basic liability principles.

On December 1, 2011, the Paris Court of Appeal handed down a very troublesome decision by which it completely agreed with the plaintiffs' arguments. It, indeed, ruled that exposure to asbestos gives rise to contamination, which triggers both anxiety and disruption in living conditions, which should both be compensated. It assessed the disruption in living conditions at 12,000 Euros per plaintiff, taking the same "lump sum" compensation approach as for anxiety.

The first consequence of such a decision is that all plaintiffs started claiming for 12,000 Euros without proving any breach by the employer of its safety obligation, the actual disruption from which they allege they are suffering or the causal link between the breach and the disruption. The second consequence of this decision is that, as it is the case for anxiety, Labor Courts started to automatically grant damages for this head of loss, thus multiplying the companies' exposure. The third consequence is that this decision meant that the presumptions of liability which, up until then, only

applied in gross negligence claims before Social Security Courts, could be applied by other Courts in pure civil liability cases.

It is, therefore, positive to note that other Courts of Appeal have recently handed down rulings in which they once again apply French liability rules and thus dismiss such claims.

The Amiens Court of Appeal, on March 13, 2012, notably ruled that "*the reality or materiality of such loss must be assessed in concreto, since the reaction towards anxiety or worry varies depending on each personality*" and refused to award damages for disruption in living conditions on the ground that plaintiffs had not brought any proof that they would have "*become concerned about the risk of developing an asbestos-related illness that may lower their life expectancy which would have led them to take decisions that would have pejoratively modified their living conditions or projects*"<sup>3</sup>.

On April 26, 2012, the Dijon Court of Appeal also held that the alleged loss was not proven because "*nothing in the [plaintiffs'] file established this mentioned loss [disruption in living conditions], separate from the one already compensated by [the early retirement scheme] and from the one compensated on the ground of anxiety*"<sup>4</sup>.

Less than a month later, on May 3, 2012, the Toulouse Court of Appeal also ruled in favor of employers<sup>5</sup>. It considered that "*if the inhalation of asbestos dust generates a high risk of appearance of an asbestos-related illness, this situation does not necessarily trigger for employees a loss made of a disruption in living conditions that would be separate from anxiety*".

In all three cases, the Courts of Appeal focused on the necessity to prove the existence of a loss and thus demonstrate that they are reluctant to consider that the disruption in the living conditions would be an automatic head of loss that would entitle each plaintiff exposed to asbestos to a lump sum.

The three abovementioned Courts of Appeal, however, grant damages for anxiety even though the plaintiffs did not prove their alleged anxiety and do, therefore, not apply the same procedural rules to anxiety and to the disruption in living conditions. This should nevertheless

not prevent companies, when faced with anxiety claims, from raising arguments based on the lack of evidence of a loss or causal link. Indeed, from a logical standpoint, plaintiffs should also be expected to prove the existence of a state of anxiety, especially since an official survey conducted by Social Security highlights that only about 20% of employees exposed to asbestos are actually anxious that they may, one day, develop an illness<sup>6</sup>.

One can therefore only encourage courts to apply the same rules to anxiety, which should not be automatically compensated as it is right now. Indeed, when reading the *Cour de Cassation's* ruling, one can see that a permanent state of anxiety must be proven. To date, however, to the best of our knowledge, only very few courts (notably the Labor Court of Forbach) strictly comply with the *Cour de Cassation's* ruling<sup>7</sup>.

The question therefore arises as to why courts have decided to treat anxiety and disruption in living conditions differently. A possible explanation is that French Courts surely find it more difficult to precisely identify to what the notion of disruption in living conditions refers. Indeed, it was first used to overcome the *Cour de Cassation's* refusal to award damages for economic loss. At that time, plaintiffs referred to a sacrifice of part of their income. It was also defined as a loss of chance to have a normal career. It is now applied a definition that is very close, if not similar, to anxiety. Another explanation could be that, unlike anxiety, this head of loss has not yet been examined by the *Cour de Cassation*, so that lower Courts do not have any guidelines which they can follow.

It is, therefore, important to monitor these cases and, in particular, decisions by the *Cour de Cassation* which we can only hope will confirm this step forward and apply classic French civil liability rules as it did when ruling on the economic loss claims.

## II. A Reform Of Asbestos-Related Prevention Measures

While French courts are taking a step in favor of companies, the French Government is not. It indeed enacted two new pieces of legislation at the beginning of this year following the recommendation of the Afsset (*Agence Française de Sécurité Sanitaire de l'Environnement et du Travail*, French Agency for Environmental

and Occupational Health and Safety) according to which the legislation protecting workers exposed to asbestos should be strengthened<sup>8</sup>. These pieces of legislation thus aim at strengthening existing obligations and adding new ones, increasing the financial and legal burden imposed on companies only. Indeed, no obligation is imposed on the State, despite it having been held liable for not enacting asbestos-related rules before 1977.

On February 23, 2012, the Government first issued a Ministerial Order amending and updating the conditions in which workers that may be exposed to asbestos have to be trained on the risks triggered by such exposure.

Indeed, French legislation provides for strict conditions with regards to the type of training that has to be provided to workers who carry out asbestos-related work. For instance, issues that have to be addressed during these trainings are specifically listed, as well as how often workers must attend training sessions, and on which grounds workers should be assessed.

The new Ministerial Order goes further and notably creates a new type of training for workers carrying out more than one type of asbestos-related work (indeed, trainings are specific to the type of work the worker will carry out). It also adds further requirements that have to be complied with by the certified bodies in charge of the asbestos-related training. Certification bodies are also subject to additional obligations.

These changes have been criticized by plaintiffs' associations as insufficient. However, they will give rise to costly consequences for companies. Indeed, workers who have been trained before the reform will have to follow other training sessions before January 1, 2013 and each company will have to audit the measures they have implemented up until now to determine what more needs to be done in light of this new Ministerial Order. If companies do not comply with these changes, they will face investigations by the Labor Inspection and, potentially, criminal investigations.

More importantly, a Decree dated May 4, 2012 has modified the legislation regarding exposure of workers to asbestos<sup>9</sup>.

The essential change is that the maximum exposure of workers to asbestos has been divided by 10. Companies have three years to meet this new very stringent requirement.

Moreover, the measurement of asbestosdust will have, from July 1, 2012 onwards, to be carried out following a specific method (*microscopie électronique à transmission analytique*, electronic microscopy with analytical transmission), which is not compulsory anywhere else in the world. With this method, small asbestos fibers can now be taken into account, when they were not visible with the method that was previously used and, therefore, not taken into account when measuring the level of exposure.

Companies that carry out asbestos-related works will also have to comply with stricter requirements regarding certification and the rules applicable to protective measures and equipment will be strengthened.

This new reform, which is likely to deeply impact companies, shows that the Government still pays a lot of attention to the risks linked to exposure to asbestos although its use has been prohibited for more than 15 years and its removal is highly regulated. Companies should, however, anticipate the fact that employees may use this reform to argue that the now repealed legislation was not protective enough, which could potentially increase the number of claims on the ground of anxiety relating to the development of an illness in the future<sup>10</sup>. Companies will, however, here be able to argue that only significant exposure could possibly lead to an illness. Furthermore, to our knowledge, the number of people who develop an asbestos-related illness linked to exposure after 1997 (year of the national ban) is quasi nonexistent.

### Conclusion

The first semester of 2012 shows that asbestos is still a high risk issue for companies, even if the latter used it in compliance with French regulations. The French Government is constantly on the lookout for new ways to strengthen asbestos-related legislation and French Courts are struggling to find a balance between their desire to compensate plaintiffs who have been exposed to asbestos (regardless of whether they have developed an illness or not) and the application of basic French law principles designed to protect the defendants' interests.

In light of these constant evolutions, companies should always pay attention to the possible ways their business may be impacted.

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### Endnotes

1. *Cour de Cassation* (French Supreme Court), Social Chamber, May 11, 2010, ZF Masson, no. 08/44.952 and 08/45222; *Cour de Cassation*, Social Chamber, May 11, 2010, Ahlstrom, no. 09/42241 to 09/42257.
2. See notably Paris Court of Appeal, December 1, 2011, no. 10/004605 and see "*Asbestos Litigation In France: More People Soon to Be Entitled To Compensation?*" by the same authors, Mealey's International Asbestos Liability Review, December 2011.
3. Amiens Court of Appeal, March 13, 2012, no. 11/03264.
4. Dijon Court of Appeal, April 26, 2012, no. 12/00567.
5. Toulouse Court of Appeal, May 3, 2012, no. 10/01233.
6. Study on French Health Insurance carried out between October 2003 and December 2005 in the Rhône-Alpes, Haute Normandie, Basse Normandie and Aquitaine regions.
7. Forbach Labor Court, September 28, 2011, no. F 10/00579.
8. Recommendations and reports of Afsset of February 2009 and August 2009.
9. Decree no. 2012-639 of May 4, 2012 regarding risks of exposure to asbestos.
10. See "*Asbestos Litigation in France: Compensation Options For Employees Keep on Growing*", by the same authors, Mealey's International Asbestos Liability Review, June 2011. ■



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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA  
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)  
Email: [mealeyinfo@lexisnexis.com](mailto:mealeyinfo@lexisnexis.com)  
Web site: <http://www.lexisnexis.com/mealeys>  
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