



|| SCHIRRMESTER || DIAZ-ARRASTIA || BREM LLP ||

# The Future of Benzene Litigation: Emerging Products, New Types of Exposure, and Where the Cases are Being Filed

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# Emerging Products



# No Safe Level Theory

- ❖ Based on Theory That Any Benzene Causes Cancer
  - No safe level
  - One molecule theory
- ❖ Hydrocarbon solvents allegedly contaminated with trace benzene
  - Refining technology cannot ensure 100% benzene free solvents
  - OSHA recognizes this principle and permits up to 0.1% benzene
- ❖ Potentially Unlimited Number of Products
  - Any product that has a hydrocarbon solvent



# No Safe Level

## ❖ Peter Infante, Dr.P.H., D.D.S.

- George Washington University
- 25 years with OSHA, 3 years with NIOSH
- Author of Pliofilm studies, on which OSHA Benzene Standard was based



## ❖ No safe level

- Q Every level above zero contributes to the development of AML?
- A Yes.



# No Safe Level

## ❖ Myron Mehlman, Ph.D.

- Former Head of Toxicology at Mobil
- Adjunct Professor of Environmental and Community Medicine at UMDNJ-Robert Wood Johnson Medical School
- Adjunct Professor of Medicine at the Mt. Sinai School of Medicine in New York
- Adjunct Professor of Environmental Toxicology – PCMH at University of Texas Medical Branch in Galveston

## ❖ No Safe Level

- Q. And you believe there's no safe level of exposure to benzene?  
A. Yes.





# No Safe Level

## ❖ Martyn Smith, Ph.D

- University of California at Berkeley
  - Professor of Toxicology
  - Deputy Head, Division of Environmental Science

## ❖ No Safe Level

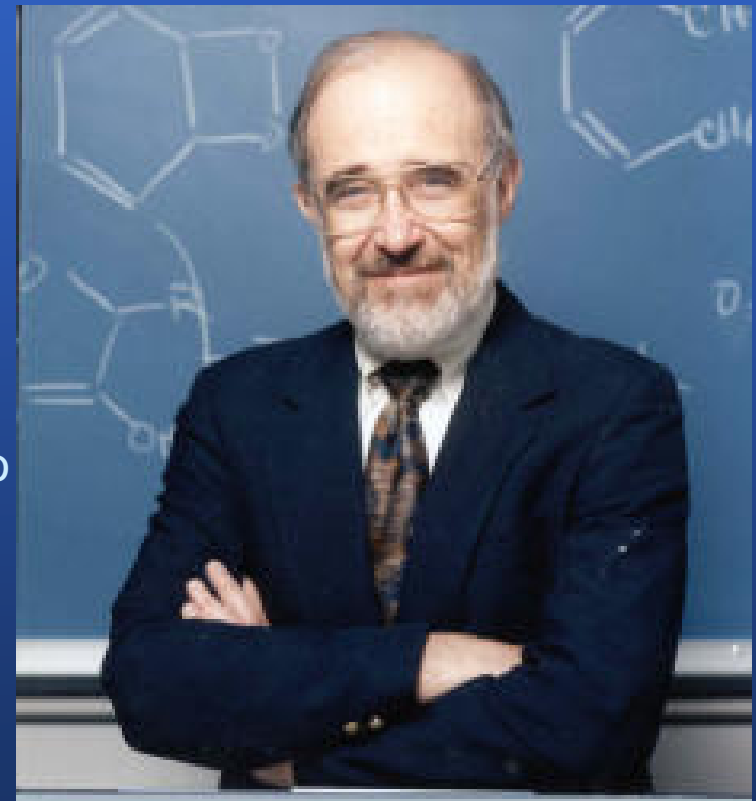
- Q. With regard to exposure of one part benzene in the air for 12 hours, can it cause AML?  
A. It's likely to be a significant contributor to the AML.
- A. We see hematological changes in people at less than one part per million
- Q. And not all doses can cause an injury?  
A. That assumes there is a safe dose. For benzene I've stated I don't think there is a safe dose.
- Q. Under any circumstances?  
A. Under any circumstances.





# One Molecule Theory

- ❖ Bernie Goldstein, M.D.
  - University of Pittsburgh School of Public Health
  - Board certified in hematology, toxicology, internal medicine
- ❖ One molecule theory
  - Q At what level of benzene exposure do you believe increases one's risk of acquiring AML?
  - A Again, I mean, if it's just a question of is there any risk at 1 molecule, you know, you could argue that theoretically there's a risk of 1 molecule.





# Products Cases

### ❖ Potentially Unlimited Occupations

- Mechanics and auto body painters
- Newspaper deliverers
- Carpet manufacturing workers
- Janitors
- Home builders
- Industrial painters
- House painters
- Gas station attendants
- Automobile manufacturing plant workers
- Dry cleaners
- Printers
- Oil field workers
- X-ray developers
- Truck drivers

### ❖ Potentially Unlimited Occupations

- Aircraft plant workers
- Auto parts store salesmen
- Paint manufacturing workers
- Masons and concrete finishers
- Tire builders and tire finishers
- Furniture finishers
- Gunniters
- Wallpaper hangers
- Air conditioning installers and repairmen
- Laboratory technicians
- Firefighters
- Coast guard workers
- Adhesive production workers
- Newspaper press workers
- Paper and pulp plant workers
- Rubber workers



# Newspaper Delivery

## ❖ Delivering Newspapers

- Exposure to airborne solvents from printing process
- Ink was wet on paper when picked up
- Hands covered in ink from delivery

## ❖ Judge's Comment

- I never heard of anyone getting sick from reading the newspaper

## ❖ The Literature

- A few studies exist for workers in certain printing industries, but not for casual exposure





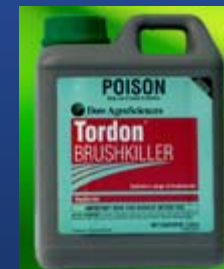
# School Janitor

- ❖ Decedent was school custodian for 30 years
- ❖ Exposed to cleaning solvents:
  - Colgate Palmolive Dishwashing Liquid Detergent
  - Lysol All-Purpose Cleaner
  - Lysol Brand Ready Brush Toilet Bowl Cleaner
  - Dawn Manual Pot and Pan Detergent
  - Dawn Automatic Dishwashing Soap
  - Glance Super Concentrate
  - Stride Citrus
  - Tar & Adhesive remover
  - Oasis 100 Detergent
- ❖ Plaintiff Non-Suited Case



# Pesticides

- ❖ Plaintiff worked 9 years in US Virgin Islands
- ❖ Exposed to pesticides, insecticides, and herbicides :
  - Isotox
  - Bug-Be-Gone
  - Weed-B-Gone
  - Lindane
  - Isotox-Lindane
  - Tordon
- ❖ Magistrate transferred case to Kentucky
- ❖ U.S. District Judge reversed and kept case

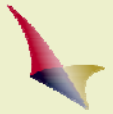




# Carpet Manufacturers

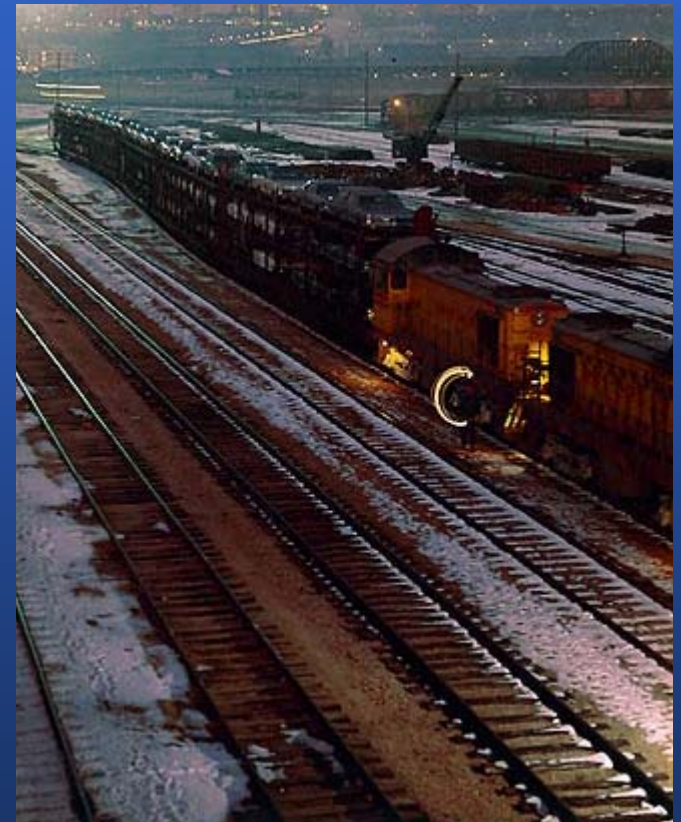
- ❖ Plaintiff - 46 years with Carpet Manufacturer
- ❖ Head Color Coordinator
- ❖ Exposed to solvents, chemicals, glues, dyes, and thinners:
  - Carpet Dyes
  - Dyeing assistants
  - Carpet Protectors
  - Antistatic Agents
  - Carpet and Rug Conditioners
  - Carpet Finishing Chemicals
  - Carpet backing glues and chemicals
  - Antimicrobial carpet treatment
  - Specialty carpet chemicals





## Railroads

- ❖ Railroad Yard Worker – 40 years
- ❖ Hairy Cell Leukemia
- ❖ Exposed to:
  - Diesel fumes
  - Solvents
- ❖ FELA applies
  - Relaxed standard of proof of causation
  - Admissibility standard (e.g. Daubert) not relaxed





# X-Ray Technician

- ❖ 30 years at hospitals
- ❖ Acute Myelogenous Leukemia
- ❖ Exposed to:
  - Developers
  - Fixers
- ❖ Content?
  - Benzene
  - Hydroquinone
- ❖ Confounding factor?
  - Radiation is cause of AML





# Respirator Manufacturers

## ❖ Respirators Failed to Protect Plaintiff

- Did not stop exposure
- No training
- No warnings
- Didn't specify proper respirator for application
- Defendants knew respirators are not used properly

## ❖ Appropriate Use Required

- Appropriate respirator selection
- User must be certified for respirator use
- No facial hair
- Regular changing of filters
- Training on how to use and how to recognize respirator break-through





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# New Types of Exposure



# Tobacco Smoking

- ❖ Smoking now accepted cause of AML
- ❖ U. S. Surgeon General
  - Smoking is associated with AML
- ❖ Most plaintiffs have history of smoking
  - Alternate causation
  - Contributory negligence
- ❖ Cigarette manufacturers – future defendants?
  - Direct action by plaintiffs
  - Third party action by defendants
  - Designated as party responsible to reduce proportionate liability





# Arthritis Drugs

## ❖ Remicade (infliximab)

- Warnings for
  - Lymphoma
  - Leukopenia
  - Neutropenia
  - Thrombocytopenia
  - Pancytopenia



## ❖ Humira (adalimumab)

- Warnings for
  - Lymphoma

## ❖ Informed consent forms

## ❖ Future defendants?

- Drug manufacturers
- Prescribing doctors







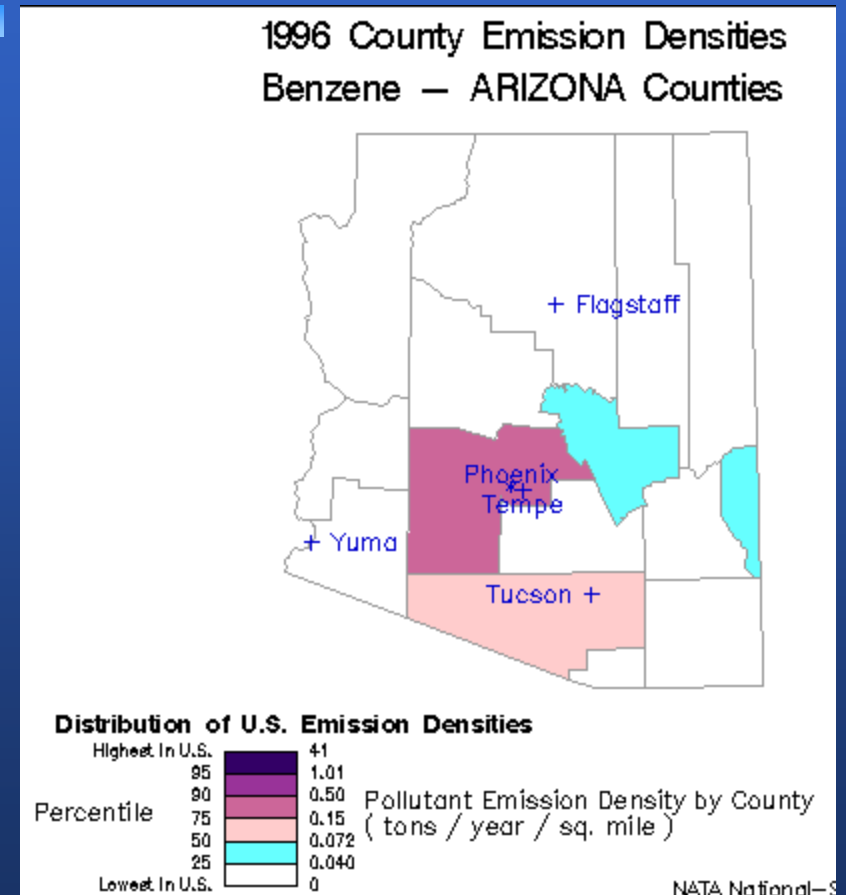
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# Water & Vapor Migration



# Arizona Human Exposure

- ❖ EPA Region 1 –  
1996 Estimated  
County Median  
Exposure  
Concentration of  
Benzene—  
Arizona Counties



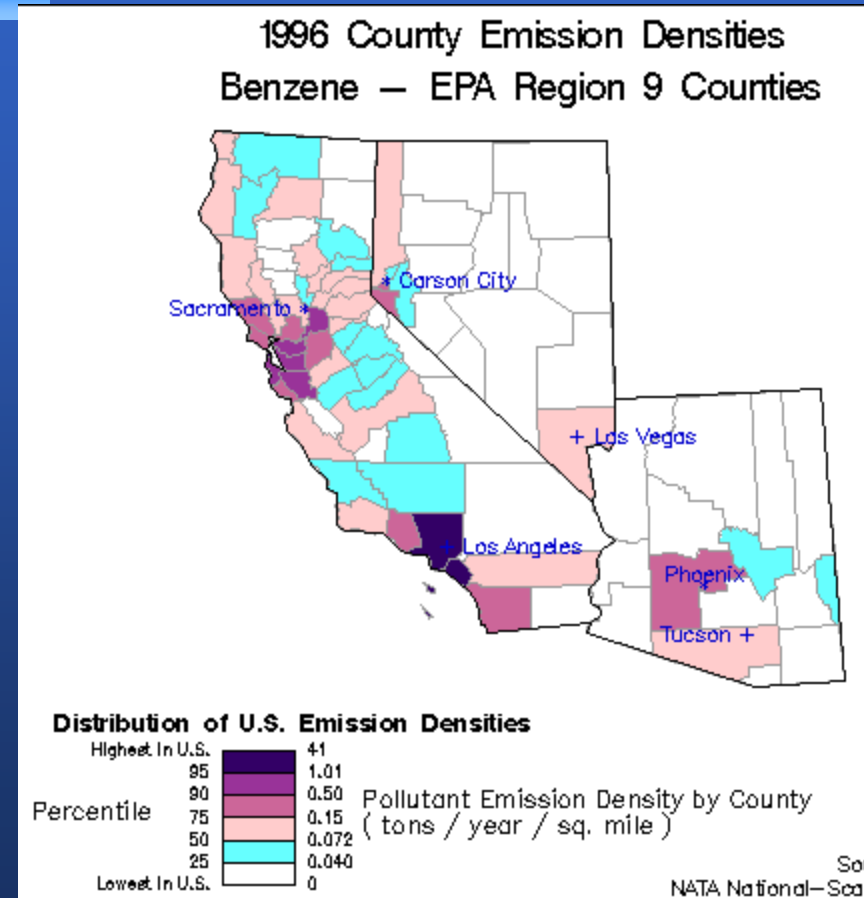
Source: US EPA/QAQPS

NATA National-Scale Air Toxics Assessment



# Region 9 Human Exposure

- ❖ EPA Region 9 – 1996 Estimated County Median Exposure Concentration of Benzene

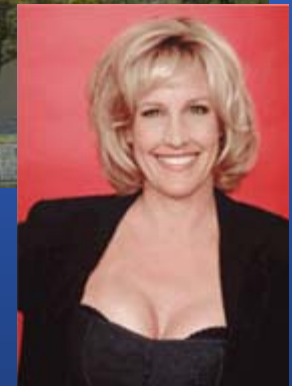


Source: US EPA/QAQPS

NATA National-Scale Air Toxics Assessment



# Beverly Hills High School



- ❖ More than 1000 former students at Beverly Hills High School
- ❖ Originally filed by Masry & Vittitoe (“Erin Brockovich Law Firm”)
- ❖ Oil wells on campus
  - Benzene caused numerous cancers
- ❖ Court granted summary judgment on causation for first 12 cases
- ❖ Plaintiffs moved to dismiss remaining cases
- ❖ Plaintiffs counsel recommending payment of \$450,000 to school district and city



## Ryan v. BP Amoco

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- ❖ Plaintiff lived 500 feet from refinery from 1956 to 1960
  - Leukemia
- ❖ In 2005, Independence, Mo. Jury Awarded \$13,300,000
- ❖ Confidential post-trial settlement



# Groundwater Contamination

- ❖ Numerous Sources dating back decades
  - Gas stations with leaking tanks
  - Old plants
  - Landfills
  - Oil fields
  - Hazardous waste sites
- ❖ Groundwater migration takes years to reach



## Landfill Contamination

**Pollock v. City of San Antonio, 155 S.W.3d 176 (Tex. App.-San Antonio 2004)**

- ❖ Child diagnosed with acute lymphocytic leukemia
- ❖ Plaintiffs' home abutted city landfill
- ❖ During pregnancy, benzene leaked into home and backyard
- ❖ Judgment for \$20,000,000 (including \$10,000,000 punitive)
- ❖ Appellate Court affirmed actual damages, reversed punitive damages against city
- ❖ On appeal to Texas Supreme Court, review granted



## Groundwater Contamination

Makofski v. Exxon, 116 S.W.3d 176 (Tex. App.-Houston 2003)

- ❖ Benzene contaminated drinking water due to oilfield leak 50 yrs ago
- ❖ Bellwether trial, six residents
  - Child lived in subdivision 6 yrs – acute lymphocytic leukemia
  - Child 6 months after birth – anemia, nosebleeds, asthma, skin rashes
  - Four Adults – anemia, skin lesions; skin rashes, acne, fungal infections, benign fibroid growth, excessive menstrual bleeding, skin de-pigmentation, and bronchial infections attributed to “immune suppression”
- ❖ Jury awarded \$7,300,000
  - No present injury for adults
  - Trial court reduced award; appellate court excluded experts, reversed and rendered take nothing judgment



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# Where Cases are Being Filed



## Primary Venues

- ❖ Jefferson County, Texas
  - Traditional premises cases
- ❖ Orange County, Texas
  - Cases from numerous states and Texas counties with no relationship to jurisdiction
- ❖ Wilmington, Delaware
  - No new cases filed by Simmons Cooper
- ❖ Madison County, Illinois
- ❖ Brazoria County, Texas
- ❖ Los Angeles, California



## Other Venues

- ❖ St. Croix, US Virgin Islands
  - Pesticide case
- ❖ Roswell, New Mexico
- ❖ Jena, Louisiana
  - Auto painter
- ❖ New Jersey
  - Expanding docket
- ❖ Scattered Filings
  - No longer limited jurisdictionally



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# The Impact of Borg Warner



# Borg-Warner v. Flores

- ❖ 2007 WL 1650574, 50 Tex. Sup. Ct. J. 851 (Tex. June 8, 2007)
- ❖ Specific Causation Requirements
  - Plaintiff must produce evidence of “dose” in toxic tort cases
  - Plaintiff must produce dose evidence for individual defendants
  - Fact finder must evaluate
    - Plaintiff’s quantity of toxic exposure
    - Whether that quantity was a substantial factor in causing plaintiff’s illness
    - “Some” exposure insufficient
  - “Substantial factor” measured against literature as required by *Havner*
    - Statistically significant doubling of the risk
    - Multiple studies among differing populations
    - Plaintiff’s dose similar to dose in the studies



# Borg-Warner v. Flores

## ❖ Sample interrogatory:

- For each Defendant listed in Plaintiffs' Petition, please provide:
  - a. The approximate dose of each product manufactured or sold by each Defendant to which Plaintiff was exposed that is alleged to have caused harm to Plaintiff;
  - b. The methodology used to calculate the dose; and
  - c. Evidence that the dose was a substantial factor in causing the harm to Plaintiff.