ASBESTOS LITIGATION ALERT

A. STUDY PREDICTS NEARLY 30,000 NEW ASBESTOS CLAIMS WILL BE FILED OVER NEXT THIRTY-FIVE TO FIFTY YEARS

A study by TowersWatson, a risk and financial management consulting company, finds that close to thirty thousand new mesothelioma claims are likely to be filed over the next thirty-five to fifty years. The report, "A Synthesis of Asbestos Disclosures," (found at http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf), is based on Form 10-K filings with the SEC.

TowersWatson maintains a corporate defendant list of over 10,000 companies facing potential current and potential claims. This particular study is based on 213 Form 10-K filings made as of May 1, 2009. The filings reflect an average of over 32,000 cases pending against those companies that responded with detailed information. Further, the filings showed an average of $31.5 million in annual asbestos settlements that now total 158,000 in number to date.

The report found that by the end of 2008, U.S. property and casualty insurers had paid out approximately $42.7 billion in asbestos losses and expenses.

B. NEW JERSEY JURY REJECTS "SYNERGISTIC AFFECT" OF SMOKING AND ASBESTOS EXPOSURE

Olson, et al. v. Port Authority Trans-Hudson Corp., No. HUD-L-1577-07 (N.J. Super. Ct., Hudson Cty. Mar. 16, 2010)

Finding for lone defendant Port Authority Trans-Hudson Corporation, (PATH), a New Jersey jury concluded that Alan Olson's lung cancer was due to his thirty-one years of smoking, and not to asbestos exposure. Olson was employed by PATH from 1986 to 2004. His widow admitted that he smoked, but asserted that PATH did not provide a safe work environment and that he was not warned about the "synergistic affect" of smoking and exposure to asbestos.

The claim was brought under the Federal Employers Liability Act. PATH contended that it did warn of the dangers of smoking, and trained employees in the handling of asbestos, thus providing a safe work environment.

C. SECOND CIRCUIT FINDS NO SUBJECT MATTER JURISDICTION OVER NON-DEBTORS BY BANKRUPTCY COURT WHERE INJUNCTION WAS IN PERSONAM

Johns-Manville Corp. v. Chubb Indemnity Insurance Co. (In re Johns-Manville Corp.), No. 06-2103-bk (2d Cir. Mar. 22, 2010)

The Second Circuit has held that Chubb cannot be bound by a 1986 "Insurance Settlement Order" that stemmed from an insurance agreement with Travelers and other insurers two years earlier, based on lack of due process. Commenting on the decision, Bankruptcy Blogger and attorney Steve Jacubowski said "holding that [a bankruptcy] order can be collaterally attacked on due process grounds twenty-five years later is a pretty novel result."

The litigation began with a Chapter 11 filing in 1982 by Johns-Manville Corporation, which by that time had been hit hard by asbestos lawsuits. The settlement order provided for an injunction from claims against the carriers, directing that all policy claims be submitted to the Manville Trust. As a result, claims began to be filed directly against Travelers and others for independent wrongdoing, as opposed to a legal wrong. Travelers responded in 2002 by asking the bankruptcy court to enjoin these actions under the 1986 Order.

Another settlement agreement was then reached in 2004 in which Travelers agreed to pay $360 million into a fund for statutory direct claims, and $70 million into another fund for common law direct actions. However, Chubb, co-defendant to the common law direct actions, objected to the settlement, seeking to preserve its contribution and indemnification rights against Travelers. Chubb argued that the bankruptcy court lacked jurisdiction to enjoin it from contribution from Travelers, in that "[in the 1980s] it "was in the position of a potential future claimant with no knowledge of its potential future claims . . .."

The appellate court agreed, overturning decisions by the bankruptcy court and district court, indicating both courts had erred in rejecting Chubb's due process argument. The court said that Chubb's claims are "not derivative of Manville's liability and do not seek to collect from the *res* of the Manville estate." Further, the court said, "there is no indication in the record that the sort of claims Chubb seeks too bring against Travelers were contemplated, much less accounted for, during the proceedings that led to the 1986 Orders." Jacubowski summarized the holding as ". . . where the injunction is *rem*-based, then jurisdiction is proper; but where the injunction is *in personam* and lacks a tangible connection to the *res* itself . . . then subject matter jurisdiction is lacking."

D. PENNSYLVANIA JURY AWARDS NAVY MAN $12M

Van Tassel, et al. v. Alfa Laval Inc., et al., No. 001221-2008 (Pa. Ct. Comm. Pls., Philadelphia Cty. Mar. 23, 2010)

John Crane Inc. was the lone defendant when the verdict was rendered in Philadelphia for Navy man Richard Van Tassel. Van Tassel had worked as a boiler tender on the *USS Fletcher* from 1962 to 1966. He was diagnosed in 2008 with mesothelioma and died in 2009.

Crane contended that Van Tassel was exposed to other asbestos-containing products that caused his disease, and that their products were safe. The jury took only four hours to determine that Crane's products were to blame. However, Crane will be responsible for only one-fifteenth of the verdict based upon apportionment by share among the number of settling defendants.

E. CALIFORNIA COURT REMANDS CASE TO STATE, SAYING SETTLING DEFENDANT STILL DESTROYS DIVERSITY

Clark v. BHP Copper Inc. et al., No. C10-1058 TEH, 2010 WL 1266392 (N.D. Cal. Mar. 30, 2010)

U.S. District Judge Thelton E. Henderson ruled that although Metalclad Insulation Corp. settled with plaintiffs George and Judy Clark, Metalclad does not become a "sham defendant," as argued by defendant Honeywell. Honeywell had requested the case be sent to multidistrict litigation the day after settlement with Metalclad was announced. Their theory was that, in light of the settlement with Metalclad, diversity existed in that none of the remaining defendants were from the plaintiffs' home state.

In rejecting Honeywell's position, Judge Henderson quoted from *Dunkin v. A.W. Chesterton Co.*, 2010 WL 1038200 (N.D. Cal. Mar. 19, 2010): "[S]ettlement with a non-diverse party does not establish diversity jurisdiction unless and until that party is dismissed from the action."

F. CONNECTICUT DISTRICT COURT RULES CASE STAYS IN FEDERAL COURT DUE TO NAVY'S "COMPLETE CONTROL" OVER MANUFACTURE AND DESIGN

Beckwith v. General Electric Co. et al., No. 3:09 CV 0216 (AWT), 2010 WL 1287095 (D. Conn. Mar. 30, 2010)

Seventeen plaintiffs filed suit in Connecticut, claiming injuries due to asbestos exposure in their or their decedent's employment with General Dynamics Corp. They worked at the Electric Boat division, where they built and maintained ships for the U.S. Navy. Citing the federal officer removal statute, Buffalo Pumps, joined by GE, removed the case to federal court. The plaintiffs objected, arguing that they had been civilian employees and that there was no showing of federal direction, as required by the statute.

The District Court for the District of Connecticut disagreed, saying the record showed that "the Navy had complete control over the manufacture and design of every piece of equipment on the ships, as well as the nature of the warnings issued, and contractors, such as Buffalo Pumps and GE, would not have been permitted by the Navy to place warning labels or cautionary language on products containing asbestos aboard Navy ships."

G. NEW YORK COURT FINDS NEW OWNER OF BOILER MANUFACTURER LIABLE FOR INJURIES ARISING AFTER SALE

American Standard Inc. v. Oakfabco Inc., No. 44 (N.Y. Ct. App. April 6, 2010)

When Kewanee Boiler Corp., now OakFabco Inc., bought the Kewanee Boiler division from American Standard, the purchase agreement included the provision, "buyer desires to purchase, substantially all the assets of the Seller, real and personal, tangible and intangible belonging to it, which are used in connection with Seller's business and operations . . . subject to all debts, liabilities, and obligations connected with or attributable to such business and operations."

Later, several asbestos injury claims arose, brought by plaintiffs who were exposed to asbestos before the sale occurred. American Standard filed a declaratory judgment action seeking the court's affirmation that Oakfabco had assumed these liabilities as part of the sale. New York's Supreme Court agreed, and the Appellate Court affirmed, but the latter added an injunction barring Oakfabco from re-litigating the issue in the future.

The Court of Appeals agreed with all but the injunction, saying "[n]othing in the nature of the transaction suggests that the parties intended OakFabco, which got all the assets, to escape any of the related obligations." But the court added "[i]t may well be that our decision today will preclude OakFabco from re-litigating the issue we decide, in the sense that any attempt to re-litigate it should be rejected; but OakFabco should not be enjoined from arguing otherwise."

H. $30.3M VERDICT AFFIRMED IN NEW JERSEY

Buttitta, et al. v. Allied Signal Inc., et al., No. A-5263-07T1 (N.J. Super. Ct., App. Div. April 5, 2010)

Mark Buttitta worked three summers as a "parts picker" at a General Motors warehouse in the 1970s. He also claimed household exposure stemming from his father's employment at the same warehouse. Borg-Warner Corp. and Asbestos Corporation Ltd. were the remaining defendants when the original verdict was read, and both entities appealed.

Borg-Warner argued causation, among several other challenges to the $30.3 million verdict. However, the court said that in New Jersey, there is a distinction between where it concerns asbestosis cases and mesothelioma cases in applying the "frequency, regularity and proximity" test. Mesothelioma, the court said, "can develop from the cumulative effects of even minimal and infrequent exposure to asbestos. . . . As a result, it was enough in this case that plaintiff provide sufficient direct or circumstantial evidence from which a reasonable jury could infer that sometime during Mark's work history, he came in close proximity and was exposed to Borg-Warner clutches, frequently and on a regular basis."

The court also ruled against Asbestos Corporation's personal jurisdiction defense, finding it had been rejected in nine other cases, and against their motion for summary judgment, based on inadequate discovery responses.

I. CALIFORNIA OVERTURNS VERDICT AGAINST WILLIAM POWELL CO.

Walton et al. v. William Powell Co., No. B208214, 2010 WL 1612209 (Cal. Ct. App., 2d Dist., Div. 4 Apr. 22, 2010)

In a case involving asbestos added by third parties, California's Second District Court of Appeals, 4th Division has ruled that William Powell Co. is not liable for injuries suffered by Navy metalsmith Edward Walton (see *Asbestos Litigation Alert*, March 2010). A jury had allocated 25% of a $21 million verdict to William Powell Co. for asbestos used in component parts that it said it did not supply.

The court said "the record does not support a reasonable inference that Powell supplied either the packing [or] gaskets that Walton removed from the valves or their replacements." Further, the court ruled that William Powell had no duty to warn, even though its valves were designed to be used with other products containing asbestos. Such a design did not make its valves defective, the court opined, because the imposition of such a standard would require manufacturers to analyze another's products in systems under which they have no control in developing.

J. ALABAMA SUPREME COURT: RULE OF REPOSE RUNS ONLY WHEN A CLAIM ACCRUES

Owens-Illinois Inc. v. Wells, No. 1070213 (Ala. Apr. 23, 2010)

In a ruling where two dissenting justices maintained that the court is interpreting the state's statute of repose as it would the statute of limitations, Alabama's high court said six asbestos cases may proceed where the injuries were not known twenty years before suit was filed. The court cited another controversial ruling, *Collins v. Scenic Homes Inc*., 2009 Ala. LEXIS 164 (Ala. 2009) and said that the rule of repose begins to run when all elements of the claim are present: "Alabama's 20-year common-law rule of repose does not begin to run on a claim until all the essential elements of that claim, including an injury, coexist so that the plaintiff could validly file an action."

Defendant Owens Illinois, Inc. sold the portion of its business in 1958 allegedly culpable for the injuries. That portion manufactured and installed Kaylo, a pipe covering and block insulation material, until that time.

Owens-Illinois maintained that the rule of repose runs, not from the time the plaintiff could have made the claim, but "from the point in time of the defendant's actions giving rise to the claim." Counsel for Owens-Illinois said the effect of the decision makes it such that Alabama's statute of repose will "never be applied, because they're interpreting the 20-year common-law rule of repose in the same way they have . . . many times interpreted a statute of limitations."

The Asbestos Litigation Alert is intended to keep readers current on matters affecting asbestos litigation and is not intended to be legal advice. If you have any questions or would like a copy of any of the above articles, please contact Darlene Wood at 412.566.5938 or dwood@eckertseamans or any other attorneys with whom you have been working.