A. DELAWARE BANKRUPTCY JUDGE REFUSES TO ENJOIN DEFENDANT'S DISCOVERY REQUESTS

In re AC&S Inc., No. 02-12687, 2011 WL 744913 (Bankr. D. Del. Feb. 22, 2011).

A U.S. Bankruptcy Judge in the District of Delaware found that the court had no subject matter jurisdiction over discovery requests directed against several asbestos bankruptcy trusts.

Several insurance companies sought information from the trusts pertaining to claimants' work sites, work history and specific products they were exposed to in order to prevent the claimants from filing inconsistent claims against different trusts. The trusts argued that the court should require subpoenas of individual plaintiffs in order for the insurance companies to obtain the information.

Before Judge Judith K. Fitzgerald got to the merits of each parties' argument, she examined whether the court had continuing jurisdiction. Judge Fitzgerald concluded that the court "recognize[s] the desire of the Trusts to have a uniformly applicable principle regarding their obligations to comply with discovery requests…[n]onetheless, this court has no jurisdiction to create a 'one size fits all' peremptory rule of discovery."

B. 4TH CIRCUIT COURT OF APPEALS REVERSES DISMISSAL OF ASBESTOS DEFENDANT

Lucas et al. v. Hopeman Bros. Inc. et al., No. 2010-CA-1037, 2011 WL 543309 (LA. Ct. App., 4th Cir. Feb. 16, 2011)

In an opinion written by Judge Max N. Tobias, the 4th Circuit Court of Appeal reversed the dismissal of defendant Hopeman Bros. while affirming the dismissal of defendants Westinghouse/CBS, Foster Wheeler and Reilly Benton.

Plaintiffs alleged Lois Lucas died from occupational exposure to asbestos-containing products from various contractors, product manufacturers and product suppliers during the course of his nine year employment as an assistant pipefitter for Avondale Shipyards, Inc. At the close of discovery the trial court granted each defendant's motion for summary judgment because the plaintiffs did not meet their burden of proof.

The appeals court held that deposition testimony of a witness for the plaintiffs established that it was "more probable than not" that the decedent was exposed to asbestos-containing wallboard used and installed by Hopeman Brothers. The court concluded a genuine issue of material fact

remained as to whether the decedent's exposure to the asbestos-containing wallboard installed by Hopeman Brothers was a significant contributing factor in his contraction of asbestosis. In affirming the dismissal of defendants Westinghouse/CBS, Foster Wheeler and Reilly Benton, the court stated the plaintiffs failed to show that these companies' products were a cause in fact of the decedent's harm.

C. JUDGE ROBRENO REFUSES TO IMPLEMENT MODERN "SEPARATE DISEASE" TREND UNDER VIRGINIA LAW

Kiser v. A.W. Chesterton Co., No. 2:11-cv-60039 (E.D. Pa., Mar. 17, 2011)

In multi-district litigation, the U.S. District Court for the Eastern District of Pennsylvania held that Virginia's two-year statute of limitations on personal injury claims bars an asbestos suit brought twenty-one years after the plaintiff was first diagnosed with nonmalignant pleural thickening and asbestosis.

Orvin Kiser Sr. first brought suit for his injuries in 1990. After being diagnosed with mesothelioma in 2009, Kiser died in March 2010. Eleven months after his mesothelioma diagnosis, Kiser's estate brought a wrongful death suit against various defendants including A.W. Chesterton Co., Crane Packing Co., and Exxon Mobil Corp.

Defendants averred that Virginia's "one disease" rule barred plaintiffs' suit because the cause of action accrued when Kiser was diagnosed with asbestosis in 1998. The plaintiffs asserted that the legislature carved out a statutory exception to the "one disease" rule with regard to asbestos plaintiffs. After reviewing the statutory language, the court held that the statute merely establishes that the time an asbestos plaintiffs' injury occurs is when the injury is "first communicated to [the plaintiff] by a physician." As Kiser was originally diagnosed with asbestosis in 1998, the two year statute of limitations had run.

The court also refused to implement the national trend in favor of a rule establishing that a plaintiff may bring suit for a nonmalignant asbestos-related disease without triggering the two year statute of limitations for any malignant asbestos-related diseases that may later develop. The court urged the plaintiffs to direct their arguments to Virginia's legislature or high court.

D. TEXAS JURY AWARDS $9 MILLION TO WORKER'S ESTATE

Henderson v. Dow Chemical Co., No. 10-07003 (Tex. Dist. Ct. Mar. 16, 2011)

Robert Henderson worked as a contract employee for Dow Chemical Co. at their Freeport, Texas plant for ten months. Henderson died from mesothelioma and his estate brought negligence claims against Dow, Alcoa, Crane Co. and Haveg.

All defendants except Dow reached settlement with plaintiffs who contended Dow did not test air quality at the plant, did not warn workers, and did not provide protective equipment. Meanwhile, Dow emphasized Henderson's short term of employment at their plant.

After trial, the Texas jury awarded plaintiffs $5 million for Henderson's pain and suffering and $4 million for wrongful death claims.

E. VIRGINIA JURY AWARDS NEARLY $25 MILLION IN SHIPYARD CASE

Minton v. ExxonMobil Corp., No. CL09-01505F-15 (Va. Cir. Ct. Mar. 17, 2011)

A 7th Judicial Circuit Court jury awarded approximately $25 million in favor of plaintiff Rubert Minton who was exposed to asbestos during his work on Exxon ship repairs dating back to 1956. In the course of his employment for Newport News Shipyard, Exxon presented work assignments to the shipyard who then gave the assignments to Minton

The parties agreed that Minton was exposed to asbestos during his course of employment for Newport News Shipyards. However, because shipyards are immune from worker's asbestos lawsuits, Minton brought suit against Exxon, as ship owner, under Section 905b of the Longshore and Harbor Workers Compensation Act. Under Section 905b, a shipyard worker can file suit against a ship owner for injuries if the worker can show that the ship owners, agents, or crew performed one of the following:

1. Controlled the shipyard worker's work;
2. Participated in the work; or
3. Failed to warn the worker of dangers known to the ship owner.

At trial, Exxon argued that when their ships were in the shipyard, Exxon was entitled to rely on Newport News Shipyards to protect Minton because the shipyard maintained supervision over workers. Meanwhile, the plaintiff put forth evidence demonstrating that Exxon had asbestos control procedures in place as early as 1937, but did nothing to warn or train ship workers.

Agreeing with the plaintiff, the jury awarded Minton $12 million in compensatory damages, $430,963 in medical expenses, and $12.5 million in punitive damages.

F. ILLINOIS JURY AWARDS ALMOST $90 MILLION IN CONSPIRACY CASE

Gillenwater v. Honeywell Inc. et al., No. 10L117 (Ill. Cir. Ct., McLean Cty. Mar. 11, 2011)

Only four defendants remained at verdict when an Illinois jury awarded a former pipefitter $89.6 million for mesothelimoa caused by exposure to asbestos containing products during the 1970s. Charles Gillenwater sued Owens-Illinois Inc., Pneumo Abex, and Honeywell International Inc., alleging those defendants conspired to conceal information regarding asbestos hazards. Gillenwater brought a direct exposure claim against John Crane Inc. The Illinois jury awarded compensatory damages of $9.6 million, $40 million in punitive damages against Owens-Illinois, and $20 million in punitive damages against both Honeywell and Pneumo Abex. Vowing to appeal the verdict, Owens-Illinois said in a statement, "Owens-Illinois did not conspire with anyone concerning asbestos health hazards, continues to deny these conspiracy claims, and will challenge this verdict, if necessary, in the Illinois Appellate Courts."

G. PLAINTIFFS TEST FOR ASBESTOS INSUFFICIENT, B-READER READING REQUIRED BY OHIO STATUTE

Bland et al. v. Ajax Magnathermic Co. et al., No. 95249, 2011 WL 917707 (Ohio Ct. App., 8th Dist. Mar. 17, 2011)

In August 2009, Albert and Mary Bland filed an asbestos-related suit against Dana Companies LLC, Foseco Inc., Industrial Holdings Corp., Trane US Inc. and Traco Construction Services alleging injury to Albert from workplace exposure to asbestos-containing products. Albert died later that year.

Defendants moved to administratively dismiss the complaint for failure to provide the required prima facie evidence to establish a claim for asbestosis as provided for by Ohio Rev. Code Ann. § 2307.92(B). The statute requires an asbestos plaintiff to put forth evidence from a chest X-ray graded by a B-certified reader. The National Institute for Occupational Safety and Health deems an expert a B-reader if they are proficient in reading X-rays. The trial court dismissed the case and the plaintiff appealed.

Because the plaintiffs only produced a diagnosis of asbestosis based upon a high-resolution CT scan, they appeals court said they failed to meet the statutory standard. The court also refused to modify the statute to allow another medical diagnostic tool for a prima facie showing under the statute. Accordingly, the court affirmed the trial court's dismissal of the case.

H. CALIFORNIA COURT RULES THAT PACKAGE LABEL IS HEARSAY WHEN USED TO IDENTIFY CONTENTS OF PACKAGE

Smalley et al. v. Pneumo Abex LLC, No. B 223233, 2011 WL 1049506 (Cal. Ct. App., 2d Dist. Mar. 24, 2011)

Family members of Donald Smalley, who died of mesothelioma, brought a wrongful death suit against Pneumo-Abex, LLC ("Abex"). Plaintiffs alleged Smalley's mesothelioma was caused in part by his exposure to Abex's asbestos-containing brake products.
To establish causation, Plaintiffs offered deposition evidence from Smalley's sons Mitchell and Michael. Mitchell testified that he knew his father used Abex brakes because he saw Abex–labeled packaging holding the brake parts. Michael testified that he knew his father purchased Abex brakes because he would hear his father ask for Abex brakes at the auto parts store.

In its motion for summary judgment, Abex argued Mitchell's statement was inadmissible pursuant to *DiCola v. White Brothers Performance Products, Inc.* 158 Cal.App.4th 666 (Cal. Ct. App. 2008). *DiCola* held that a package label is hearsay when used to identify the product in the package. (*Id.* at p. 680). Abex also contended Michael's testimony was inadmissible hearsay because it relied on out-of-court statements offered for the sole purpose of proving Smalley purchased Abex brakes. Plaintiffs did not address Abex's hearsay arguments in their opposition to the motion for summary judgment. Accordingly, the trial court granted summary judgment in favor of Abex and the Second District Court of Appeal affirmed.

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.