

ASBESTOS LITIGATION ALERT

A. MDL JUDGE GRANTS DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON GOVERNMENT CONTRACTOR DEFENSE

Faddish v. General Electric Co. et al., No. 09-70626 (E.D. Pa. Oct. 20, 2010)

In a failure to warn case, Judge Robreno granted defendant's motion for summary judgment based upon the government contractor defense.

Plaintiff, wife of John Faddish, brought suit against General Electric ("GE") alleging that Mr. Faddish's death from mesothelioma was related to asbestos-containing GE products aboard the U.S.S. Essex. Mr. Faddish was a serviceman in the U.S. Navy who served on the U.S.S. Essex from 1958 to 1961.

GE filed a motion for summary judgment asserting the government contractor defense. The government contractor defense as laid out in *Boyle v. United Technologies Corporation* 487 U.S. 500, 512 (U.S. June 27, 1988), provides that independent contractors are immune from state law tort claims when (1) the United States Government approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications; and (3) the contractor warned the United States about dangers in the use of the equipment that were known to it, but not known to the United States.

In reliance on *Dorse v. Eagle-Pitcher Industries, Inc.*, 898 F.2d 1487 (11th Cir. Apr. 25, 1990), plaintiff argued that to satisfy the first prong of the test in a failure to warn case, the removing defendants must provide evidence that there was a government directive specifically prohibiting a warning.

The MDL judge rejected plaintiff's argument and articulated the "prevailing view that an independent contractor does not have to show an express government prohibition on all warnings, but rather, must establish that the government 'exercised its discretion' regarding warnings to be placed on defendant's product. The court found GE met this standard by producing sufficient evidence relating to the government's warning directives. The court also found that GE complied with the military specifications and that the United States Navy possessed superior knowledge regarding the hazards of asbestos and that therefore GE had no duty to warn the Navy about the hazards of asbestos insulation. Accordingly, GE's motion for summary judgment was granted.

B. FEDERAL JURY FINDS IN FAVOR OF DEFENDANTS IN MDL ASBESTOS PRODUCTS LIABILITY CASE

Schumacher v. American Biltrite Inc., et al., No. 10-1627 (E.D. Pa Nov. 16, 2010)

After a day-and-a-half of deliberations in an asbestos case, a federal court jury reached a verdict in favor of defendants Azrock Industries and John Crane. Originally filed in the Pennsylvania Court of Common Pleas, the underlying case was removed to the U.S. District Court for the Eastern District of Pennsylvania after dismissal of the last non-diverse defendant.

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The Plaintiff claimed he contracted mesothelioma from exposure to asbestos in floor tiles while working for a flooring company in high school and also while serving aboard a U.S. Navy vessel. Arguing that plaintiff's injuries were a result of exposure to other asbestos-containing products, defendants offered evidence that their products contained low levels of asbestos and that the plaintiff did not even work with their allegedly harmful products.

C. LAND OWNER GRANTED SUMMARY JUDGMENT IN PREMISES LIABILITY SUIT

Lindemann v. Ohio Edison, et al., No. 07-63080(E.D. Pa. Oct. 19, 2010)

In a premises liability action, the court overseeing the federal asbestos MDL found the plaintiff failed to prove that the defendant occupied the land with the intent to control.

Plaintiff claimed that George Lindemann was exposed to asbestos while employed by Foster Wheeler. During Lindemann's employment, Foster Wheeler was an independent contractor working in the Bruce Mansfield Power Plant owned by Ohio Edison. The complaint named Ohio Edison as defendant for its role as premises owner.

Ohio Edison filed a motion for summary judgment arguing both that an out of possession owner could not be held liable and that plaintiff failed to prove Ohio Edison breached its duty to business invitees. In deciding whether Ohio Edison could be held liable as premises owner, the court stated that under Pennsylvania law, "the mere title to a premises is not a sufficient basis for subjecting a party to the duties of premises liability. Instead there must be possession, meaning 'occupation of land with intent to control it.'"

The U.S. District Court for the Eastern District of Pennsylvania found that there was insufficient evidence that Ohio Edison had occupation of the land with intent to control and accordingly dismissed the claims.

D. N.Y JURY AWARDS \$1 MILLION TO FORMER TUGBOAT WORKER IN ASBESTOS CASE

Schuderer, et al. v. A.W. Chesterton Co., No. 2008-8545 (N.Y. 5th Jud. Dist. Ct., Onondaga Cty. Nov. 12, 2010).

A New York Jury in the 5th Judicial District Court awarded \$1 million to the family of a former tugboat worker for the New York Canal System. The jury awarded \$700,000 for past pain and suffering and \$300,000 for loss of household services. The sole defendant at the time of verdict, John Crane, was allocated 60 percent liability.

Plaintiffs asserted that while employed from 1954 to 1978, Richard Schuderer was required to work with asbestos-containing gaskets manufactured by John Crane. At trial John Crane argued that its gaskets did not release sufficient amounts of fibers to cause mesothelioma and that the gaskets in question contained chrysotile asbestos, which has not been proven to cause mesothelioma.

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E. PARTIES REACH SETTLEMENT AFTER LIABILITY VERDICT ENTERED IN FAVOR OF PLAINTIFF

Wood, et al. v. John Crane Inc., et al., No. 10-C-91 (W.Va. 1st Jud. Cir Ct. Nov. 3, 2010).

In a lawsuit against John Crane Inc. over asbestos-containing products, a West Virginia jury entered a liability verdict in favor of plaintiffs. The parties subsequently reached a confidential settlement.

Plaintiffs, Robert and Candice Wood, claimed that during Robert's 40 year career as a pipefitter he was exposed to asbestos in John Crane's products and that John Crane was aware of asbestos-related dangers as early as 1930. The West Virginia 1st Judicial Circuit Court jury found John Crane negligent in failure to warn and that defendant's product was defective.

Following the verdict, the parties entered into a confidential settlement based on an earlier agreement.

F. N.C. APPELLATE COURT AFFIRMS REDUCTION OF EMPLOYER'S LIEN TO NOTHING

Kingston v. Lyon Construction Inc., et al., No. COA10-193(N.C. Ct. App. Nov. 2, 2010).

In a dispute over an employer's lien on an asbestos claimant's settlement funds, a North Carolina appellate court found in favor of the asbestos claimant and affirmed the trial court's decision to reduce the liens to zero.

Carl Kingston was awarded a workers' compensation claim for his alleged exposure to asbestos while working for Lyon Construction. Kingston also filed a separate civil action against the manufacturers of the asbestos containing products. After reaching settlement agreements in the civil action, Kingston asked the court to reduce or eliminate Lyon Construction's and its insurance carrier's liens on the settlement funds because of the severity of his illness and the fact that some of the settling parties were in bankruptcy. In response Lyon Construction moved to introduce new evidence. The trial court denied Lyon Construction's motion and reduced the lien to nothing.

The North Carolina Court of Appeals affirmed, finding no fault with the trial court's decision not to allow new evidence.

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G. CALIFORNIA APPEALS COURT FINDS SOPHISTICATED PURCHASER DEFENSE UNAVAILABLE WHEN PRODUCT DEFECTIVE

Stewart v. Union Carbide Corp., No. B216193, (Cal. Ct. App. Nov. 16 2010).

In a products liability law suit for failure to warn, a California appellate court found that the trial court properly refused to instruct a jury on a “sophisticated purchaser defense.” The appellate court said that the defense does not apply when the product is defective.

Larry Stewart, who was exposed to joint compound at construction sites, and his wife brought suit against Union Carbide Corp., which supplied asbestos to joint compound manufacturers. At trial Union Carbide requested the jury instruction that a raw material supplier has no duty to warn of the product's potential hazards where it is sold to a sophisticated purchaser who knows or should know about its risks. After the trial court rejected the proposed jury instruction the jury found for the Stewarts and awarded compensatory and punitive damages.

The Court of Appeal for California's second appellate district said the sophisticated purchaser defense is an extension of the bulk supplier/component parts doctrine, under which a raw material supplier is not liable for injuries caused by a finished product unless the component raw material was defective when it left the supplier. The court said that raw asbestos is a defective product. Accordingly, the court concluded that the defense is not available to Union Carbide.

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.

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