ECKERT SEAMANS

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ASBESTOS LITIGATION ALERT

A. ILLINOIS APPELLATE COURT RULES PARALLEL CONDUCT INSUFFICIENT FOR A FINDING OF CONSPIRACY

Rodarmel v. Pneumo Abex LLC, No. 4-10-0463 (Ill. App. Ct. Sept. 15, 2011)

In a take-home exposure case that originally brought a $2.5 million verdict, the Illinois Appellate Court for the Fourth District has held that there was no conspiracy where companies decided to withhold results of a scientific study involving the affects of asbestos on mice. The study involved experiments performed from 1936 until 1943, the results of which found a correlation between exposure to asbestos fibers and tumors in mice.

The study originated when Johns-Manville's general counsel contacted a pathologist with Saranac Laboratory in New York for experiments with asbestos dust in a quest for more information about asbestosis. Nine companies commissioned the study, including defendants Honeywell International Inc. and Pneumo Abex LLC. The results of the experiments were to be the sole property of the companies, and they would decide whether to publicize the results once the tests were completed.

When the experiments concluded, the corporations agreed to release the findings omitting any reference to cancer and tumors. They characterized the study as lacking in adequate controls and needing further study.

Regarding the case at hand, Juanita Rodarmel, who allegedly contracted mesothelioma from her husband's work clothes, chose not to file suit against her husband's employer, Union Rubber & Asbestos Co. (UNARCO). Pursuing a novel theory of civil conspiracy, Rodarmel claimed that Honeywell and Pneumo Abex had conspired with UNARCO to withhold the negative results of the study about asbestos. In support of her civil conspiracy theory, she cited the parallel conduct theory established in *McClure v. Owens Corning Fiberglass Corp.*, 188 Ill. 102 (1999).

The Illinois 4th District Court of Appeals reversed, finding that defendants, having no employer or supplier connection to the plaintiff, had no duty to warn. Rodarmel appealed, arguing that, *inter alia*, the appeals court misstated the record. (See also *Asbestos Litigation Alert*, Sept. 2011.)

In affirming the lower court's decision, the court opined that it was not unlawful to withhold information about a study that apparently held little significance. Further, the court ruled that circumstantial evidence of a conspiracy must be clear and convincing where there is no direct evidence that the corporations made an agreement to suppress the results of the research.

In finding no duty to warn, the court looked at the current knowledge of the dangers of asbestos during the 1950s when Rodarmel's husband was working with the product. In doing so, the court noted that the first study evidencing take-home exposure dangers was in 1964. Plaintiff's own expert also conceded that mesothelioma was not known to be specifically associated with asbestos during the 1950s.

B. PENNSYLVANIA MDL JUDGE DENIES SUMMARY JUDGMENT MOTION BASED ON SOPHISTICATED USER AND GOVERNMENT CONTRACTOR DEFENSES

Grammer, et al. v. Advocate Mines Ltd., et al., No. 09-92425 (E.D. Pa. Dec. 2, 2011)

Contradictory testimony as to whether the Navy required reasonably precise specifications for warnings on products made by Foster Wheeler precludes an award of summary judgment based on the government contractor and sophisticated user defenses, ruled MDL Judge Eduardo Robreno of the U.S. District Court for the Eastern District of Pennsylvania. In addition, a discrepancy as to whether the Navy had knowledge of the dangers of asbestos at the time Kenneth Grammer served on the U.S. Naval ship *Ashtabula* during the years between 1956 and 1963 also precluded an award of summary judgment.

Foster Wheeler asserted the two defenses in denying that it owed a duty to Grammer, who died of mesothelioma after the suit was initiated. Defendant Foster Wheeler argued that the government participated in the design and manufacture of asbestos-containing products on board Navy ships, and was instrumental in the development of specifications for materials, equipment, manuals and label plates. Foster Wheeler maintained that it was entitled to summary judgment based on the government contractor and sophisticated user defenses in that they complied with government specifications while supplying their products to the Navy.

However, Foster Wheeler presented evidence that other manufacturers *did* provide warnings on asbestos products, and that the Navy did not block manufacturers from placing warnings as to the hazards associated with asbestos on their products. In addition, Grammer's experts showed that such manufacturers themselves were often significantly involved in the development of military specifications. The court held that such contradictory testimony raised a genuine fact issue as whether the Navy had required appropriate specifications for the warnings.

The judge opined that other testimony in the case also raised a genuine issue of material fact in that two admirals claimed they had not been told of the dangers of asbestos until the late 1970s, whereas a Naval doctor testified that the Navy had relied on a 1946 Fleisher-Drinker Report, debunking the dangers of asbestos.

C. NEW YORK JURY FINDS HEDMAN RESOURCES LTD. 100% LIABLE FOR $2M AWARD

Failing v. Asbestos Corp., Ltd., et al., No. 142698 (N.Y. Sup. Ct., 8th Jud. Dist., Niagara Cty. Dec. 7, 2011)

After a two-week trial, a jury awarded a former plastic worker $2 million for damages due to mesothelioma allegedly caused by exposure to raw asbestos fibers. Gerald Failing worked making plastic molding compounds starting in 1966, and claimed he mixed raw asbestos provided by Hedman Resources into the compounds.

Hedman Resources, the lone defendant at the time of the verdict, denied that their product caused his illness, and asserted that it was caused instead by amphibole asbestos. The defendant also contended that plaintiff's testimony held inconsistencies pointing to the possibility that he had never worked with the product at all. The jury allocated 100 percent liability to Hedman.

D. PHILADELPHIA JURY RENDERS DEFENSE VERDICT FOR CRANE CO.

Amsler v. Fisher Scientific Co., et al., No. 3050; *Miller v. Garlock Sealing Technologies*, No. 3262 (Pa. Ct. Comm. Pls. 1st Jud. Dept. Dec. 8, 2011)

In a consolidated trial that originally began with four cases, a jury in Philadelphia found that Crane Co. was not a "factual cause" in the development of plaintiffs' mesothelioma. Crane Co. was the lone defendant at verdict.

Crane Co. argued that that it was not liable for replacement parts manufactured by others and incorporated into their valves. In addition, Crane Co. asserted that the replacement gaskets and packing were encapsulated and could not have released enough asbestos to have caused plantiffs' illnesses.

E. S. D. N.Y. FINDS NO DUTY TO WARN AGAINST DEFECTS IN THIRD PARTY PRODUCTS

Surre v. Foster Wheeler LLC, 07-CV-9431 (S.D.N.Y. Dec. 20, 2011)

In granting Crane Co.'s motion for summary judgment, the U.S. District Court for the Southern District of New York has ruled that there is no duty to warn of defects in third-party products where the manufacturer had no control over the products' production and had no role in placing them into the stream of commerce. The case involved a Navy serviceman, John Surre, who claimed exposure to asbestos while aboard the *U.S.S. Cassin Young* from 1957 to 1959. Surre worked as an equipment maintenance man and allegedly came into contact with asbestos-containing insulation. Later, he worked as an apprentice insulator from 1963 to 1964, applying insulation to Pacific boilers for Quality Insulation.

Crane Co. admitted that it sold Pacific boilers, but said the plaintiff had no proof that Crane supplied the asbestos-containing block and cement that he applied to the outside of the Pacific boilers. Further, Crane argued that Surre never identified Crane Co. as the manufacturer of the suspect equipment or insulation on the *U.S.S. Cassin Young*. Surre's complaint alleged that Crane Co. had a duty to warn the plaintiff with regard to asbestos dangers because it knew, or had reason to know, that the insulation for the boilers would contain asbestos.

The court began its reasoning with the 4 pronged test enunciated in *Adebiyi v. Yankee Fiber Control Inc.*, 705 F. Supp. 2d 287 (S.D.N.Y. 2010). In that case, the court reasoned that for a failure to warn claim to succeed, a showing must be made that "(1) Defendant had a duty to warn, (2) Defendant breached that duty, (3) the defect was the proximate cause of the Plaintiff's injury, and (4) Plaintiff suffered damages as a result of the breach." *Id.* at 290.

While acknowledging that a manufacturer has a duty to warn against latent dangers of a product resulting from foreseeable usage, the court drew a line at assigning a duty where it concerns third party products. The court analogized the circumstances in *Surre* with the facts of *Tortoriello v. Bally Case, Inc.*, 200 A.D.2d 474 (1st Dep't. 1994), where the manufacturer of a freezer was sued under the theory that it failed to warn the plaintiff of the dangers of quarry tile flooring inside the freezer unit. Since the manufacturer had not been instrumental in selecting the flooring where the plaintiff fell, the court in *Tortoriello* ruled that no duty arose. The *Surre* court held that only where additional circumstances exist which increase the connection between the manufacturer's product and the third party's defective one, would a duty arise. Examples of such circumstances would be making the defective product a necessary component of the finished product, or requiring the defective product according to contract specifications.

Since Crane Co. did not manufacture the asbestos, select it, require it for the boilers, or place it into the stream of commerce, the court held that Crane Co. had no duty to warn Surre. The fact that it was foreseeable that asbestos would be used on the boilers was not sufficient because ". . . a duty to warn against the dangers of a third party's product does not arise from foreseeability alone."

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.