ASBESTOS LITIGATION ALERT

A. DEFENDANTS JOIN FLORIDA ATTORNEY GENERAL IN URGING RETROACTIVE APPLICATION OF ASBESTOS REFORM LAW

American Optical Corp. et al. v. Spiewak et al., No. SC08-1617, *amicus brief filed* (Fla. Dec. 2, 2009)

Several defendants are making much the same arguments that Florida Attorney General Bill McCollum made in his *amicus* brief filed last August in the above matter (See *Asbestos Litigation Alert*, August-September, 2009). In seeking to overturn the 4th District's ruling that bars retroactive application of Florida's 2005 Asbestos and Silica Compensation Fairness Act (Fla. Stat. § 774-201), defendants argue that the asbestos reform law is procedural in nature, and as such passes constitutional muster where it concerns retroactive legislation.

The asbestos law requires a *prima facie* showing of physical impairment caused by exposure to asbestos. Plaintiffs argue that retroactive application leaves them without legal remedy where their exposure has created asbestosis, a condition involving scarred lung tissue, but no other signs of disease. This, plaintiffs say, makes it impossible to meet the *prima facie* showing required.

Defendants say this argument misinterprets the law, pointing out that, as a practical matter, plaintiffs can still seek a diagnosis from any qualified doctor, not just specialists in reading lung x-rays. And, echoing the Attorney General, they emphasize that the purpose of the law is to deal with the massive number cases filed by individuals who have merely been exposed to asbestos, but who are not manifesting any signs of illness.

B. SUMMARY JUDGMENT STANDARD FOR APPEAL TOO HIGH, MASS. PLAINTIFF SAYS

Morin v. AutoZone Northeast Inc. et al., No. 2009-P-01816, *brief filed* (Mass. App. Ct. Dec. 16, 2009)

Kathleen Morin's mother worked for the family's produce company and she alleged she would often come into contact with asbestos fibers in the shipping area of the firm. Her theory was that the air hoses used by mechanics on the fleet would stir up fiber-laden dust from brake products. Gerry Medeiros was diagnosed in 2003 with mesothelioma and died two years later.

In granting summary judgment to several auto parts companies, the trial judge said the plaintiff was unable to identify a specific situation when repairs where being made on the defendants' products. However, in her appeal, Morin argues that the standard in *Welch v. Keene Corp*., 575 N.E. 2d 766 (Mass. App. Ct. 1991), the decision establishing the standard for overcoming summary judgment in a products case, is not that high. The plaintiff argues that she need only show she worked on or around a defendant's products. To require more is unfair, she says: "It is effectively impossible for any witness to remember on which days 20 or 30 years ago he was removing [a defendant's] brake or clutch and recall whether on that day [she] was walking by the pit."

C. PENNSYLVANIA RAILROAD WORKER'S SUIT NOT PREEMPTED BY FEDERAL LAWS

Atwell v. John Crane Inc., No. 2892 EDDA 2008, 2009 WL 4844374 (Pa. Super Ct. Dec. 17, 2009)

Thomas F. Atwell worked as a pipe fitter for 40 years with the Norfolk Southern Railway and its predecessors before contracting lung cancer in 2003. Suit was filed in Philadelphia County after his death in 2006. A verdict was reached against John Crane, A.W. Chesterton Inc., and Garlock. Crane, arguing federal preemption, appealed to the Superior Court. Crane cited the Boiler Inspection Act, 49 U.S.C. § 20701, the Safety Appliance Act, 49 U.S.C. § 20301, and the Federal Employers' Liability Act, 45 U.S.C. § 51 as preempting state laws over railroad workers.

In affirming the verdict, the court said federal law does not preempt states historic police powers governing health and safety without Congress's clear intent in the statute that it do so. The court also said that the Federal Railroad Safety Act and the OSHA do not preempt state laws relating to property damage, personal injury or death, unless the state laws conflict with the federal mandates.

D. PLAINTIFF APPEALS TRIAL COURT FINDING THAT "HABIT EVIDENCE" INSUFFICIENT TO SATISFY OHIO PRODUCT LIABILITY LAW

Cantrell v. Borg-Warner Corp., No. CA-09-093944, *brief filed* (Ohio Ct. App., 8th Jud. Dist., Cuyahoga Cty. Dec. 23, 2009)

Plaintiff Alice Cantrell worked at a General Motors plant where she claims she was exposed to asbestos while working in the transmission department from about April, 1978 until August or September, 1979. As proof, she supplied evidence that GM purchased Borg-Warner products in the 1950s and 1960s, and asked the court to infer that the defendant's products were present at the time she was there. She also provided an industrial hygiene survey showing Borg-Warner products were in the plant in 1977.

In granting Borg-Warner's summary judgment, Judge Leo Spellacy said Cantrell failed to produce direct evidence that GM used the Borg-Warner automatic-clutch on site at the time in question. Borg-Warner termed Cantrell's evidence "habit evidence" and described its use as "a novel and last-ditch effort" to circumvent Ohio product liability law.

Plaintiff is appealing, and General Electric Co. has filed an *amicus* brief in the matter. Although they are no longer a defendant, GE is alarmed at the plaintiff's use of "an increasingly attenuated evidentiary basis" in this matter. GE says that companies like theirs, with indirect connections to asbestos products, would be hard hit with litigation costs should they be forced to defend actions "unsupported by any actual evidence whatsoever."

E. DEFENSE VERDICT IN CALIFORNIA ASBESTOS CIGARETTE FILTER CASE

Cox, et al. v. Asbestos Corp., Ltd., No. BC409474 (Calif. Super. Ct., Los Angeles Cty. Jan. 19, 2010)

After Lorillard Tobacco Co. presented a "state-of-the-art" defense at trial, the jury reached a verdict in their favor in less than a day. Plaintiff Robert Cox claimed that his mesothelioma was caused in part by exposure to asbestos contained in the filters of the Kent cigarettes that he smoked during the 1950s. Cox also claimed exposure from his work as a heating and cooling repairman.

Lorillard argued that in the 1950s, the use of asbestos in filters was reasonable in that asbestos was also used in gas masks, respirators, and hospital operating rooms at the time. While the jury found that Cox had smoked Kent cigarettes, they found no design defect. Further, they found that Lorillard and Hollingsworth & Vose, the maker of the cigarettes' filter media, were not negligent and had no duty to warn, based on the "generally recognized scientific knowledge at the time of the manufacturer and distribution."

The jury also found that the plaintiff was not exposed to asbestos in products made by two other defendants in the case, Rheem Manufacturing Co. and Dowman Products, Inc. They manufactured the heating and cooling products alleged to have been used while he was working as a repairman.

F. CALIFORNIA APPELLATE COURT SAYS PLAINTIFF'S REASON FOR RE-FILING TEXAS ACTION IN CALIFORNIA WAS "COGENT AND BENIGN"

Union Carbide Corp. v. The Superior Court of Los Angeles County, et al., No. B216591 (Calif. 2nd Dist. Ct. App., Div. 2 Jan. 15, 2010)

The Second District Court of Appeal of California appellate court found no evidence of "abusive litigation tactics" and warned the lower court that "before a trial court finds an attorney guilty of egregious misconduct sufficient to support evidence preclusion, a trial court is well advised to conduct a thorough evidentiary hearing." Defendant Union Carbide had sought exclusion of a deposition taken in Alabama under Texas Rules of Civil Procedure in a case that was originally filed in that state, dropped, and re-filed in California.

Plaintiff John Washington was a California resident. He also had a residence in Alabama, where the deposition was taken. He claimed exposure to asbestos while working in maintenance at the Los Angeles Unified School District. Washington died after the action was filed in California.

Union Carbide had been served with the action two months before the deposition and did not question the plaintiff. The court pointed out that although Texas rules limit depositions to six hours, the rules can be modified by court order. Thereafter, Plaintiff's counsel objected to further depositions in California. As for the movement of the litigation to California, Plaintiff's counsel argued that dismissal in Texas and re-filing in California was done as a precaution, given that several other defendants had filed motions to dismiss based on inconvenient forum.

Union Carbine wanted the deposition precluded, claiming it had been obtained under "abusive litigation practices." The trial court denied the motion but voiced disapproval of the "games" employed in obtaining the testimony. However, the appellate court said the plaintiff's precautionary step of filing suit in California was a "cogent and benign reason for the dismissal of the Texas action and the filing of the underlying action in California."

G. LIBBY, MONTANA RESIDENTS CAN SUE W.R. GRACE FOR FAILURE TO WARN

In re: W.R. Grace & Co., No. 08-3697 (3d Cir. Dec. 31, 2009)

Upholding a U.S. Bankruptcy Court decision, the Third Circuit ruled that residents of Libby, Montana, can bring injury claims against W.R. Grace. Plaintiffs claimed that the state of Montana and Grace failed to warn them of the dangers of asbestos from a Vermiculite mine. The mine was in operation from 1963 to 1990.

Montana sought to add Grace as an additional defendant to the numerous lawsuits that it was facing in 2005 for asbestos claims related to the mine's operation. By that time, Grace had entered Chapter 11 bankruptcy proceedings, and was under an automatic stay of litigation. When Montana asked the bankruptcy court to grant relief from the stay, Grace sought to expand the preliminary injunction to include the claims that had been filed against Montana. In 2007, the bankruptcy court denied Grace's motion, asserting that it "lacked subject matter jurisdiction to grant the requested relief."

Grace's motion was appealed until the Third Circuit's ruling in December. The court found that the bankruptcy court lacked statutory foundation for jurisdiction in the matter, saying "The existence of a bankruptcy proceeding itself has never been and cannot be an all-purpose grant of jurisdiction." The three-prong foundation requires that the matter arise in, arise under, or be related to the bankruptcy.

(Also see *Asbestos Litigation Alert*, May, 2009, regarding criminal proceedings relative to the Libby mine.)

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.