ASBESTOS LITIGATION ALERT

A. CALIFORNIA JURY AWARDS $22.7 MILLION TO NAVY BOILER OPERATOR

Pfeifer, et al. v. Buffalo Pumps Inc., et al., No. BC416536 (Calif. Super. Ct., Los Angeles Cty. Nov. 18, 2010)

After less than eight hours of deliberations, a California Superior Court jury found for plaintiffs William and Anne Pfiefer, awarding them $8.2M in compensatory damages and $14.5M in punitive damages. The jurors found John Crane 70 percent liable for causing William Pfiefer's mesothelioma.

The Pfiefers claimed that William was exposed to asbestos through the gaskets and packing manufactured by John Crane while he worked as a boiler operator in the U.S. Navy. The jurors found a failure to warn of the dangerous propensities of the products, and that the products were defectively designed and marketed.

B. PENNSYLVANIA SUPREME COURT ALLOWS PLAINTIFFS CONSTITUTIONAL CHALLENGE IN ASBESTOS DISPUTE

Johnson v. American Standard, No. J-6A-C-2010 (Pa. Nov. 18, 2010)

In a matter that began with suits against a successor in interest to an asbestos manufacture, J. Max Baer has ruled that the plaintiffs have standing to challenge a state law under the Commerce Clause. The plaintiffs, whose cases had been consolidated on appeal, argue that Section 1929.1 (15 Pa. Cons. Stat. §1929.1) was unconstitutional in that it favors in-state companies' asbestos liability over that of out-of-state corporations' doing business in Pennsylvania.

The lower courts had previously found in favor of Crown Cork, which had asserted that the plaintiffs were not in the "zone of interest" protected by the Commerce Clause. These plaintiffs, the appellate court said, were not protected because they were free to assert causes of actions against other asbestos manufacturers.

However, J. Baer found otherwise, saying that the "zone of interest" analysis is "merely a guideline used to aid courts in finding immediacy [of interest]," a showing of which is required in Pennsylvania for standing to bring a constitutional challenge. The court said that there is no requirement "that one be in the zone of interests for the immediacy prong of a standing analysis to be satisfied."

This dispute arose after Crown Cork purchased company in 1963 having a small division that manufactured asbestos products, and then selling it within 90 days of purchase. Subsequently, Crown Cork became subject to asbestos litigation, paying out hundreds of millions of dollars on asbestos claims, due to Pennsylvania's rules of successor liability.

Pennsylvania's remedy in 2001 to such litigation was to adopt §1929.1, which states "the cumulative successor asbestos-related liabilities of a domestic business corporation that was incorporated in [Pennsylvania] prior to May 1, 2001, shall be limited to the fair market value of the total assets of the transferor determined as of the time of the merger or consolidation, and such corporation shall have no responsibility for successor asbestos-related liabilities in excess of such limitation." (15. Pa.C.S. §1929.1(a)1(2010)).

Crown Cork, citing §1921.1, sought dismissal of all pending cases. Its motion was granted, but the state's supreme court soon ruled thereafter that the statute was unconstitutional in its application to complaints filed before the statute's effective date. *Ieropoli v. AC&S Inc.*, 842 A.2d 919 (Pa. 2004). The statute was then amended to make it applicable to asbestos claims for which the two-year statute of limitations began to run after Dec. 17, 2001, the original effective date of the statute.

Crown Cork then filed its second global summary judgment motion to dismiss, and the plaintiffs responded with this constitutional challenge to the statute. It is now in the hands of the state superior court for a ruling on the matter.

C. ASBESTOS PLAINTIFFS SHOULD RELEASE CLAIMS INFORMATION IN MATTERS BEFORE BANKRUPTCY TRUSTS, SAY DEFENDANTS

In re AC&S Inc., No. 02-12687; *AC&S Asbestos Settlement Trust et al. v. Hartford Accident & Indemnity Co. et al.*, Adv. No. 10-53702, *amicus brief filed* (Bankr. D. Del. Nov. 18, 2010)

Citing the plaintiffs' bar as the "underlying force" behind a preliminary injunction filed October 27, 2010 in the U.S. Bankruptcy Court for the District of Delaware to restrict the discovery of claims information, several insurance companies, joined by other corporate defendants as *amica curiae*, are opposing the motion. They say that preventing the discovery of trust claims information could lead to double-dipping as a result of the filing of inconsistent claims against different trusts.

Filing the injunction were counsel for several trust advisory committees representing asbestos claimants who are pursuing claims before several asbestos bankruptcy trusts. The defendants argue that the information being sought in discovery is the same as that which would be discoverable in the tort system, but for the bankruptcy of the debtor.

D. MICHIGAN JUDGE REJECTS DEFENSE'S CHALLENGE TO ADMISSIBILITY OF MEDICAL EXPERTS

Martinez v. Sure Seal Products Co. Inc., No. 06-603775-NP; *McLaughlin v. Sure Seal Products Co. Inc.*, No. 06-603776-NP; *Swett v. Sure Seal Products Co. Inc*., No. 06-603784-NP (Mich. 3rd Jud. Cir. Ct., Wayne Cty. Nov. 19, 2010)

In September, 2010, several defendants sought to bar the testimony of two doctors, asserting that Dr. George E. Metropoulos's findings were flawed since they were based on an even more flawed report by a second expert, Dr. Ella Kazerooni. However, Judge Columbo Jr. found that the motion to exclude the admissibility of Dr. Metropoulos was an improper *Daubert* challenge. Rather, he said, it was "really about whether this Court should believe Dr. Ella Kazerooni."

The defense's objection to Dr. Metropoulos was based in part on his reliance on "five-year old B-reads by Dr. Ella Kazerooni which were supplied to him by [the plaintiffs' law firm]." They said Dr. Kazerooni's B-reads had been given no weight in the past by the court, and were unreliable and inaccurate. Dr. Metropoulos himself was characterized as a kind of fall-back expert, having been chosen by the plaintiffs after the court discredited the opinions of the original doctor. They said he had was not an expert in pulmonary medicine and had never treated a patient for asbestos-related maladies.

The court said "the evidence is overwhelming that Dr. Kazerooni is qualified to conduct B-reads and does them in accordance with her certification as a B-reader. As for Dr. Metropoulos, the court said "[h]e can rely upon others . . . Moreover, it is apparent . . . that [he] considers other causes before diagnosing asbestosis." The court emphasized that because Dr. Metropoulos takes a medical history with respect to past medical conditions, "he is considering these conditions with respect to his diagnosis. He does not have to state it expressly in his evaluation."

E. MARYLAND COURT FAULTS EVIDENCE OF EXPOSURE AT WORKSITE, IN AFFIRMING SUMMARY JUDGMENT

Reiter v. Pneumo Abex, No. 72 Sept. Term, 2008 (Md. Ct. App. Nov. 19, 2010)

Citing insufficient evidence that the defendants' asbestos-containing products were actually used in the plaintiffs' specific work sites, a Maryland court of appeals affirmed an award of summary judgment to defendants.

The claims were filed by widows of several former steelworkers employed by Bethlehem Steel Corp. Defendants filed for summary judgment, asserting that there was insufficient evidence for a finding of substantial factor causation. In awarding summary judgment, the trial court said ". . . plaintiffs must do more than simply place themselves in the same massive facility in which

overhead cranes were utilized and must do more than simply show that they or co-workers saw cranes being utilized overhead and they helped to hook up loads onto cranes; they must demonstrate that they were proximate to or in the vicinity of a particular manufacturer's crane brakes at a time when such might have been expelling respirable fibers . . ."

In affirming, the appellate court said "[w]hile a 'boiler room' or an 'engine room' may constitute a specific site, a factory the size of an airplane hangar does not."

F. MDL COURT ALLOWS IN LATE EXPERT REPORTS, CITES LACK OF BAD FAITH

Bohannon v. CSX Transportation, No. 09-74483 (E.D. Pa. Nov. 30, 2010)

It was only after Defendant Ford moved for summary judgment that the plaintiff provided expert opinions in this MDL case. Ford continued to argue in its motion for summary judgment that the plaintiff had not filed timely expert reports, and filed a motion to exclude the reports.

However, the MDL court opined that "Plaintiff's late disclosure was inadvertent and not willful disregard of a Court order," in refusing to exclude the reports. Further, the court said that the 3rd Circuit had ruled that the exclusion of evidence should only be employed as an "extreme sanction." In addition, the court said that the Ford had not shown that any prejudice incurred was irreversible.

But the court did order that the plaintiff pay Ford for reasonable fees and expenses due to the motions.

G. EMPTY-CHAIR DEFENDANTS SHOULD HAVE BEEN ASSIGNED LIABILITY, KENTUCKY SUPREME COURT RULES

CertainTeed Corp. v. Dexter, et al., No. 2008-SC-000886-DG (Ky. Dec. 16, 2010)

In reversing an intermediate appellate court order, the Kentucky Supreme Court found that jurors had gone against the weight of the evidence in their verdict finding no liability on any of the empty-chair defendants. The court found that there was sufficient evidence to support the assignment of liability against the parties who did not participate in the trial.

This matter arose from a suit filed by James G. Dexter, who worked as a pipefitter for almost 40 years, He claimed that he came into contact with asbestos in his work on asbestos-containing pipes, gaskets, and insulation. He was also a smoker, and developed lung cancer.

In the first trial of this matter, the jury allocated 35 percent to Dexter; 35 percent to Garlock; and 30 percent to CertainTeed. The verdict was over $5M in damages. No liability was assigned to

the empty-chair defendants, even though, as the high court said, "[m]uch of the evidence that support the jury's finding of liability against CertainTeed and Garlock . . . was just as applicable to the empty-chair defendants. In addition to that evidence, other evidence related specifically to the empty-chair defendants was also introduced." The court also noted that a "substantial amount of asbestos fibers" were found in his lungs.

After the initial trial, Garlock and CertainTeed argued that the verdict was not sustained by the evidence, and moved for a new trial. Their motion was granted, and in the second trial, the jury allocated 21 percent liability to the empty-chair defendants, 60 percent to Dexter, 17 percent to Garlock, and 2 percent to CertainTeed. The plaintiffs appealed, asserting that the trial court erred in granting the new trial. An appellate court found for the plaintiffs and reinstated the original judgment, which brought the matter to Kentucky's highest court.

In holding that the trial court did not err in granting a new trial and reversing the appellate court decision, the Supreme Court remanded the case to the trial court to address CertainTeed's cross-appeal of the second verdict and other unresolved issues.

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.