ECKERT SEAMANS

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ASBESTOS LITIGATION ALERT

A. CALIFORNIA SUPREME COURT RULES THAT MANUFACTURERS ARE NOT LIABLE FOR A THIRD PARTY'S COMPONENT PARTS

O'Neill v. Crane Co., 53 Cal. 4th 335; 2012 Cal. LEXIS 3, (Cal. Jan. 12, 2012).

In reversing the California Court of Appeal, Second Appellate District, the California Supreme Court resolved a critical split in asbestos litigation among the state's lower courts. The much-anticipated, unanimous decision addressed the issue of whether manufacturers should be held strictly liable for products designed to be used with a third-party's asbestos-containing products. The court ruled:

> [A] product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product. The only exceptions arise when the defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm, (citing *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.*, 129 Cal. App. 4th 577, 585), or because the defendant participated substantially in creating a harmful combined use of the products (citing *DeLeon v. Commercial Manufacturing & Supply Co.*, 148 Cal. App. 3d 336, 343).

O'Neill, supra, at 363.

The court opined ". . . the foreseeability of harm, standing alone, is not a sufficient basis for imposing strict liability on the manufacturer of a nondefective product, or one whose arguably defective product does not actually cause harm." *Id.*

The court also found that manufacturers may not be held liable in negligence:

> [An] expansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law." *Id.* at 365.

A decision consistent with *O'Neill* is expected by the high court in *Woodard et al. v. Crane Co.*, No. S196969, *review granted* (Cal. Nov. 16, 2011). In that case, a $16.9M verdict was overturned when the trial court granted JNOV. The trial court decision was affirmed by California's Second District Court of Appeal, Div. 4. (See *Asbestos Litigation Alert*, Oct. 2011). As in this case, the court relied in part on the reasoning in *Taylor v. Eliott Turbomachinery Co., Inc.*, 171 Cal. 4th 564, 2009 Cal. App. LEXIS 214 (Cal. App. 1st Dist. Div. 5 2009) in finding that Crane Co.'s valves were not defective when the products left the company's control.

B. MISSISSIPPI SUPREME COURT VACATES $322 MILLION VERDICT; PRESIDING TRIAL JUDGE FAILED TO DISCLOSE PARENTS' ASBESTOS SUITS

Brown v. Phillips 66 Co., et al., No. 2006-196 (Miss. Cir. Ct., Smith Cty Dec. 22, 2011).

Two months after the Mississippi Supreme Court granted defendant Union Carbide's motion to recuse trial Judge Eddie H. Brown, Special Judge William F. Coleman has vacated what is probably the largest asbestos verdict in U.S. history. (see *Asbestos Litigation Alert*, November 2011). In filing their motion for recusal, Union Carbide said Judge Brown had unfairly prejudiced the defendants in his failure to disclose that his parents had filed asbestos claims. The high court said Judge Brown's impartiality was in question after he dismissed all jurors with family ties to asbestos claims, but did not reveal his father's asbestos litigation.

In addition to vacating the verdict, all rulings and orders by Judge Brown dating from October 10, 2010, until the recusal was ordered in October, 2011, were declared void and vacated.

C. TEXAS JURY AWARDS $8.4 MILLION TO PIPEFITTER

Gensler, et al. v. Hercules Inc., No. DC10-08454-D (Texas 68th Civil Dist. Ct., Dallas Cty. Dec. 29, 2011).

Hercules Inc. was the lone defendant when a Dallas jury awarded a former insulator and pipefitter $8.4M for damages due to his exposure to asbestos. Plaintiff John Gensler had worked for contractors at the Dow Chemical Co. plant in Freeport, Texas, during the 1960s and 1970s. He died of mesothelioma at age 61 prior to trial.

His suit claimed exposure to asbestos in pipe insulation, Haveg pipe, and gaskets. Haveg pipe, a Hercules product, was alleged to have a much higher amount of asbestos than is usually found in refinery pipes. However, Hercules argued that he was not exposed to a dosage sufficient to have caused his mesothelioma. Instead, Hercules said other exposure caused his disease, including take-home exposure from his father's clothing. Nonetheless, the jury found Hercules 20 percent at fault for Gensler's illness and death.

The jury was split 11-1 as to punitive damages. Short of unanimity by the jury, punitive damages cannot be awarded in Texas. Hercules has indicated the company will appeal the verdict.

D. FEDERAL JUDGE ALLOWS LIMITED DISCOVERY OF ALCOA'S MEDICAL DIRECTOR

Millsaps v. Aluminum Co. of America, No. 10-84924, 2012 U.S. Dist. LEXIS 8017 (E.D. Pa. Jan. 24, 2012).

Magistrate Elizabeth T. Hey of the U.S. District Court for the Eastern District of Pennsylvania ruled that Alcoa's consultative medical director may be deposed, because he has "relevant information concerning Alcoa's historical policies and programs respecting the health and welfare of its employees, including asbestos." *Id.* at 7-8. Alcoa sought to quash plaintiff's subpoena and asserted the protections of *Rule 26(b)(4)(D), Expert Employed Only for Trial Preparation*, to prevent the deposition of Dr. Mark R. Cullen. Dr. Cullen has worked at Alcoa since 1997 as a medical advisor.

The case involves a take-home exposure suit on behalf of Brenda Lee Millsaps, who died of mesothelioma. Her suit claims that she was exposed to asbestos fibers on her father-in-law's work clothes. He had worked at an Alcoa plant in Tennessee from 1965 to 1996. While Plaintiff maintained that Cullen can testify as to Alcoa's historical policies and programs, Alcoa argued that he is a non-testifying consulting witness without relevant information.

The court addressed the "exceptional circumstances" requirement under *Rule 26(b)(4)(D)* before a party may compel an expert who has not been retained by another party in anticipation of litigation. The court said this requirement "does not bar a deposition where the witness has relevant knowledge outside his . . . role as a consulting expert, and appropriate precautions can be taken at the deposition under *Rule 30(c)(2)* with respect to the witness's protected information." *Id.* at *6 (citing *R. 26(b)(4)* advisory committee's note to 1970 amendments).

The judge said, "[a]lthough the relevance of Dr. Cullen's opinions is at best limited in that he had not been identified as a trial witness by either party, I am not prepared to say that his opinions are beyond the bounds of discoverable information."

E. FEDERAL COURT FINDS MANUFACTURERS NOT LIABLE DUE TO THIRD PARTIES' ASBESTOS-CONTAINING PARTS

Conner v. Alfa Laval Inc., No. MDL-875, cons. (E.D. Pa. Feb. 1, 2012).

Like the California Supreme Court in *O'Neil*, *supra*, the Federal asbestos MDL judge has held that there is no liability on manufacturers for products designed to be used with asbestos-containing component parts. The U.S. District Court for the Eastern District of Pennsylvania found no liability under maritime law for the makers of products used with asbestos insulation, gaskets and packing.

The opinion consolidated three cases transferred from the Central District of California involving workers who claimed exposure to asbestos while aboard various U.S. Navy ships. They claimed their mesothelioma was caused by the foreseeable use of asbestos-containing component parts with the products made by several defendants.

In granting Summary Judgment, the court joins the Sixth Circuit and the Supreme Courts of California and Washington state in finding no liability on manufacturers of products that do not contain asbestos. Judge Eduardo C. Robreno said the plaintiffs had failed to establish causation since there was no evidence that the defendants had manufactured or distributed the asbestos products alleged to have caused plaintiffs' injuries.

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.