ASBESTOS LITIGATION ALERT

A. CALIFORNIA COURT RULES NAVY CAN BE APPORTIONED FAULT DESPITE IMMUNITY

Collins et al. v. Plant Insulation Co., No. A124268, 2010 WL 2197697 (Cal. Ct. App., 1st Dist. June 3, 2010)

Citing *Taylor v. John Crane, Inc*., (113 Cal. App. 4th 1063 (Cal. Ct. App., 1st Dist. 2003), California's 1st District Court of Appeals said the U.S. Navy may be included with other defendants in the allocation of fault, despite the fact that it is immune from liability. A jury had awarded the family of Navy welder Ulysses Collins $1.8 million in noneconomic damages, finding Plant Insulation Co. 20 percent liable, and excluded the Navy in finding four other parties 80 percent liable. Collins died in 2005 from mesothelioma, having worked at two shipyards beginning in 1960.

Prior to the verdict, Plaintiffs filed a motion to exclude the Navy, based on federal sovereign immunity, from the slate of parties that could be found liable. Trial judge Harry R. Sheppard granted the motion. Plant appealed the judgment, arguing "the Navy's immunity is essentially from suit and does not mean the service owes no duty of care . . . and thus cannot be characterized as 'tortfeasor.'"

In finding for Plant, the court said the Navy should be included among those to which fault is allocated in asbestos matters, and ordered a retrial on apportionment among the Navy, Plant and the four other entities previously found liable by the jury. In explaining its position, the court said "[f]ederal sovereign immunity is . . . grounded not on the notion the government is infallible and can do no wrong, but on the jurisdictional theory it must consent to suit before it can be sued for its wrongful conduct."

B. DETROIT DIESEL CORP. DEFENDS AGAINST ALLEGATION OF SUCCESSOR LIABILITY

Pichon et al. v. Garlock Sealing Technologies LLC et al., No. 2010-CA-0570, *opposition brief filed* (La. Ct. App., 4th Cir. June 4, 2010)

Leon Pichon worked on the premises at Halter Marine in New Orleans from 1967 until 2004. His survivors claimed exposure to asbestos during the years of 1955 through 1975 at Halter Marine caused his lung cancer and mesothelioma. One of the entities sued was Detroit Diesel Corp, who argued in a motion for summary judgment that it did not exist until 1988, when GM sold assets of the Detroit Diesel Allison Division. DDC said the sales agreement with GM made it clear that DDC did not agree to assume any of GM's liabilities. DDC also argued that Pichon's survivors did not claim he was exposed to its products after 1988.

DDC prevailed in the motion and the Plaintiffs have appealed. DDC is again asserting that La. Civ. Code Article 1821 requires that an assumption of an obligation must be made in writing. Further, DDC argues that their Petition for Damages did not allege exposure after 1975.

C. OHIO SUPREME COURT UPHOLDS OHIO PREMISES LIABILITY REFORM LAW; DENIES CLAIM FOR TAKE-HOME EXPOSURE

Boley et al. v. Goodyear Tire & Rubber Co., No. 2009-0542, 2010 WL 2330349 (Ohio June 10, 2010)

Cheryl Boley brought a claim on behalf of her deceased parents, Clayton and Mary Adams, and against Goodyear Tire and Rubber Co. and others for off-site exposure to asbestos. She claimed her mother came into contact with asbestos from laundering her father's asbestos-laden work clothes worn home from his work with Goodyear. Mary Adams contracted mesothelioma.

In its motion for summary judgment, Goodyear pointed to Ohio's 2004 premises liability reform law, Ohio Rev. Code § 2307.941(A)(1). The statute reads:

> A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

Goodyear successfully argued that the law prohibits a finding of liability for a premises owner unless the exposure takes place while the claimant is on the property.

The Adams' estate appealed, arguing that the law's phrase "exposure to asbestos on the premises owner's property," means that the statute applies only to those individuals making claims who were exposed on the property. Whereas, other claimants pursuing claims for exposure away from the property could still recover under tort law.

The Ohio Supreme Court ruled that such a construction would obviate the legislative intent of the statute so as to make it meaningless. Justice Maureen O'Conner, in a concurring opinion, added that the Plaintiff could still pursue the manufacturer or supplier.

D. ILLINOIS FINDS A DUTY OF CARE TO FAMILY MEMBERS OF EMPLOYEES IN TAKE-HOME EXPOSURE CASES

Simpkins v. CSX Corp. et al., No. 5-07-0346, 2010 WL 2337778 (Ill. App. Ct., 5th Dist. June 10, 2010)

Reinstating several claims for asbestos exposure after appeal of a motion to dismiss, Illinois' 5th District court has found that "employers owe the immediate families of their employees a duty to protect against take-home asbestos exposure." The court based their decision on "general principles of duty under Illinois law" in finding liability against CSX. CSX is the successor to B&O Railroad, where Ronald Simpkins worked from 1958 until 1964.

Ronald's wife, Annette Simpkins, contracted mesothelioma as a result of exposure to fibers brought home by Ronald. She died after filing suit, and her daughter appealed CSX' motion to dismiss.

The court cited four factors to be considered for a finding of liability for off-premises exposure: foreseeability of the harm; likelihood of the injury; the burden required to guard against the take-home exposure; and the consideration that the establishment of such a duty not lead to "limitless liability" on the defendant, a fear expressed by CSX.

E. OHIO DEEMS SMOKER'S DOCTOR REPORTS SUFFICIENT FOR PRIMA FACIE CASE

Hoover v. Norfolk Southern Railway Co., Nos. 93479 and 93689, 2010 WL 2539664 (Ohio Ct. App., 8th Dist., Cuyahoga Cty. June 24, 2010)

David Hoover admitted to smoking two to four packs of cigarettes for over fifty years. He also worked for Norfolk Southern Railway Co. from 1970 to 2002. He claimed that his lung cancer was due to exposure to asbestos-wrapped pipes, which his co-worker described as being "worn and in poor condition."

In support of his claim, he submitted reports by his long-time treating physician, his treating pulmonologist, and another physician who reviewed Hoover's medical history. Upon review, Dr. Rao rendered an opinion that "his exposure to asbestos dust and diesel fumes substantially contributed in the development of his lung cancer." Hospital records also showed that Hoover had contracted several lung diseases, including lung cancer, pulmonary fibrosis, and COPD.

Norfolk argued to the trial court that Hoover failed to make a *prima facie* case as required under Ohio Rev. Code Ann. § 2307.92(C). The statute requires the claim to be supported by evidence from "a competent medical authority" that asbestos exposure is a "substantial contributing factor" in the contraction of lung cancer. The trial court denied Norfolk's motion to dismiss and Norfolk appealed. The 8th District Court of Appeals sided with the trial court in saying "the evidence submitted was sufficient to establish a causal link between Hoover's lung cancer and his asbestos exposure."

F. ILLINOIS NAVY EXPOSURE CASE REMANDED TO STATE COURT; JUDGE SAYS REQUIREMENTS OF 28 U.S.C. § 1442 NOT MET

Glein v. Goeing Co. et al., No. 10-452-GPM, 2010 WL 2608284 (S.D. Ill. June 25, 2010)

In a Navy take-home exposure case, Plaintiff Betty Glein claimed exposure to asbestos on the skin, hair and clothing of her ex-husband, who had worked as an aviation mechanic from 1970 to 1974. Suit was filed in Madison County Circuit Court and United Technologies removed the case to federal court under the federal officer removal statute, 28 U.S.C. § 1442. The Plaintiff moved for remand.

U.S. District Judge G. Patrick Murphy, in finding no colorable federal defense, said the requirement that the contractor show that "the United States approved reasonably precise specifications for the products or equipment" was not met. In order to satisfy this requirement, the court said "a defendant must show that the government itself dictated an inadequate warning that was meant to accompany a product." Judge Murphy said "the fact that warnings required prior USN approval does not mean that UTC was prevented from giving adequate warnings about the asbestos contained in the aircraft engines . . ., only that UTC had to have USN approval for the warnings that accompanied its products."

G. PENNSYLVANIA SUPREME COURT REVERSES SUMMARY JUDGMENT; ALLOWS SMOKERS' ASBESTOS CLAIMS TO PROCEED AGAINST UNION CARBIDE

Summers et al. v. Union Carbide Corp. et al., No. J-62-2009 (Pa. July 21, 2010)

In a stinging rebuke to the lower court, Pennsylvania's high court reversed the summary judgment rendered in two smoker's consolidated claims, ruling that the Superior Court had applied the wrong standard of review in upholding the trial court's decision in favor of Union Carbide. The Court said it was error to apply an "abuse of discretion" standard where a plenary review was called for in a case hinging on expert reports.

The two plaintiffs, Frederick Summers and Richard Nybeck, had originally filed separate actions in 2001 which were later consolidated. Summers claimed exposure to asbestos in his work as a saw operator at an asbestos manufacturing plant between 1959 and 1960, and later on at Southeastern Pennsylvania Transit Authority, where he worked as a plumbing and heating contractor. Nybeck claimed exposure to asbestos during his enlistment with the U.S. Navy from the 1950s until the 1970s. The trial court ruled that it was impossible to causally relate their shortness of breath to asbestos-related conditions, given their history of smoking. Dr. Jonathan Gelfand was the expert physician in both cases. He said that asbestos exposure had substantially contributed to their lung disease, but acknowledged that their history of smoking could be a factor.

In reviewing the trial court's summary judgment, the Superior Court agreed, saying "just because a hired expert makes a legal conclusion does not mean that a trial judge has to adopt it if it is not supported by the record and is devoid of common sense." However, the Supreme Court said that it was wrong to consider the credibility and weight of experts' opinions at the summary judgment stage: "The resolution of any conflict between competent, competing medical evidence, under clear precedent, must be left for a jury."

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.