A. DEFENDANTS MOVE FOR RECUSAL OF JUDGE AFTER LARGEST PLAINTIFF'S ASBESTOS VERDICT IN U.S. HISTORY IS AWARDED

Brown v. Phillips, 66 Co. et al., No 2006-196, motion for recusal filed (Miss. Cir. Ct., Smith County May 16, 2011)

On May 4, 2011, a Mississippi jury awarded $322 million to former mud-mixer Thomas Brown. Brown contended that he was exposed to asbestos in various defendants' products and brought claims for failure to warn and design defect. Prior to trial, Brown had settled with all defendants but Chevron Phillips Chemical Company and Union Carbide Corporation.

At trial, presided over by Judge Eddie Bowen, the defendants asserted that their products were not defectively designed, that no other feasible alternative design existed, and that their products functioned as expected. Defendants also averred that although plaintiff was unable to read the products warning labels, their warning complied with OSHA standards.

The $322 million verdict is the largest plaintiff's asbestos verdict in U.S. history and was comprised of $22 million in compensatory damages and $300 million in punitive damages. After entry of the judgment, defendants filed a motion for recusal of Judge Bowen, citing a conflict of interest. During the trial Judge Bowen made several remarks "off the cuff" and off the record to attorneys regarding his father's possible exposure to asbestos. Defendants uncovered that Judge Bowen's parents were plaintiffs in work place exposure asbestos litigation concerning the same type of asbestos in the Brown lawsuit. Defendants pointed out that although Judge Bowen dismissed potential jurors from the case because they or their immediate family members were connected to asbestos litigation, the Judge continued to preside over the case.

In addition to their motion for recusal, defendants also reserved the right to request a mistrial and/or new trial. As of May 23, plaintiffs had not filed an opposition brief.

B. KENTUCKY APPEALS COURT AFFIRMS $1.5 MILLION VERDICT, DEFENDANT ACTED WITH MALICE

Garlock Sealing Technologies LLC v. Robertson, No. 2009-CA-000483-MR, 2011 WL 1811683 (Ky. Ct. App. May 13, 2011)

Beginning in 1961, Thomas Robertson worked as a pipe fitter for 40 years when he was allegedly exposed to asbestos in gaskets. Robertson died of lung cancer in 2006 and his wife,

Dolores, brought suit against various defendants, most of whom settled prior to trial. Garlock and DuPont were the only remaining defendants.

After trial, a Jefferson County Circuit jury awarded the plaintiff $1.5 million, found Garlock 25 percent at fault, and assessed a $400,000 punitive damages award against Garlock.

On appeal, Garlock contended that the plaintiff failed to present evidence that Garlock manufactured defective gaskets and that the punitive damages award was unconstitutional. In affirming the judgment, the appeals court held that Garlock's own advertisements stating that it started making asbestos-free gaskets in the 1970's were evidence of an available alternative to asbestos during the time that plaintiff was exposed.

In regards to the punitive damages award, the court considered five-factors laid out in *State Farm v. Campbell*, 538 U.S. 408 (2003) to determine whether Garlock's conduct was reprehensible:

1. The harm caused was physical as opposed to economic;
2. The tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
3. The target of the conduct had financial vulnerability;
4. The conduct involved repeated actions or was a isolated incident;
5. The harm was the result of intentional malice, trickery or deceit, or mere accident.

Due to evidence that Garlock interfered with its gaskets testing to minimize the appearance of risk, the court found intentional malice on behalf of Garlock and held the jury's decision was based on reasonable conclusions.

C. ASBESTOS DEFENDANTS LOSE ON PRETRIAL MOTION BUT PREVAIL AT TRIAL

Brown v. Ford Motor Co., et al., No. 702689 (Ohio Ct. Comm. Pls., Cuyahoga Cty. May 2, 2011)

Michael Brown claimed his peritoneal mesothelioma was caused by exposure to chrysotile asbestos in brakes. Brown brought suit against multiple defendants, of which only five remained at trial: Honeywell International, Pneumo Abex Corp., Dana Corp., John-Deere and Vermeer Manufacturing Co.

Prior to trial, Honeywell International argued that the plaintiff's evidence connecting chrysotile asbestos exposure to the development of peritoneal mesothelioma should be excluded from trial because it did not satisfy the *Daubert* admissibility test. The Ohio Court of Common Pleas for

Cuyahoga County denied the motion, finding that the defendants' failed to prove the plaintiff's doctor's conclusion is unreliable and not based on sufficient methodology. Despite the plaintiff's favorable ruling on the motion, the Ohio jury reached a decision in favor of the defendants.

D. CALIFORNIA JURY AWARDS $41 MILLION TO FORMER PLUMBER

Casey, et al., v. FDCC California Inc., et al., No. CGC-10-275517 (Calif. Super. Ct., San Francisco Cty. May 12, 2011)

John Casey was exposed to asbestos-containing products during his 40 year career as a plumber. As a result of his exposure, Casey developed mesothelioma and brought suit against several defendants. At the time of trial, Kaiser Gypsum Co. Inc. and FDCC California Inc. were the only remaining defendants.

On March 17, 2011, the jury found Kaiser Gypsum's joint compound and wallboard material products had defective designs and were the cause of Casey's mesotheliona. A mistrial was declared regarding only whether the plaintiffs were entitled to punitive damages. On May 11, 2011, a new jury found Kaiser Gypsum guilty of oppression or malice, making it liable for punitive damages. The Caseys were awarded $255,000 in past and future medical expenses; $1,018,421 in economic damages; $15 million in non-economic damages; $5 million in loss of consortium; and $20 million in punitive damages. Kaiser Gypsum was allocated 3.5 percent liability while FDCC California Inc. was allocated 7 percent liability.

E. FORMER COMPANY PRESIDENT AND VICE-PRESIDENT FACE CRIMINAL CONVICTIONS FOR ASBESTOS RELATED CONSPIRACY

U.S. v. Yi, C.D. Cal., No. 10cr00793, sentencing June, 6, 2011

The president and vice-president of now-defunct Millennium-Pacific Icon Group were both criminally convicted by a federal jury for their involvement in a conspiracy to violate the Clean Air Act asbestos work practice standards. Millennium-Pacific is the parent company to Forest Glen Development Partners, which had bought real estate for the purpose of renovation.

A jury found that in 2006 Charles Yi and John Bostick, president and vice president of no-defunct Millennium-Pacific, ignored prior asbestos tests, ignored their prior experience regarding

the need for a property asbestos survey, hired unlicensed workers to remove asbestos, and failed to warn workers of the presence of asbestos.

On March 29, the U.S. District Court for the Central District of California convicted Yi, president of Millennium-Pacific, of five felony counts including failure to:

1. inspect for asbestos;
2. notify of asbestos removal;
3. provide a person properly trained in asbestos removal;
4. properly remove regulated asbestos-containing materials; and
5. dispose to asbestos waste properly.

Yi's co-conspirators Bostick and Joseph Yoon pleaded guilty to the conspiracy charges. Bostick, was sentenced to six months confinement, 150 hours of community service, and three years probation. Yoon will be sentenced in July, 2011.

F. TENNESSEE SUPREME COURT ISSUES LANDMARK DECISION REGARDING ASBESTOS SELLER'S LIABILITY

Nye v. Bayer Cropscience, Tenn., No. E2008-1596 (Tenn. Supreme Court June 7, 2011)

On June 7, 2011, the Tennessee Supreme Court held a seller of asbestos containing products is subject to suit in strict liability because the manufacturers of the product were not subject to service of process. Hugh Todd Nye's employer, DuPont, purchased asbestos containing products from North Brothers Inc. Nye worked at DuPont's Chattanooga, Tenn. facility from 1948 to 1985.

Nye brought claims of negligence, strict liability, and breach of warranty against manufacturers, sellers and distributors of asbestos containing products. Before trial, Nye's claims against the manufacturers were dismissed because those manufacturers were not subject to service of process.

At trial, the jury was instructed that if it found that the consumer, DuPont, was already aware of danger in connection with the use of the products or if DuPont was adequately warned, then North Brothers could not be held liable for failure to warn. Although the jury found that North Brother's products caused or contributed to Nye's mesothelioma, the jury decided DuPont was solely responsible for Nye's damages.

On appeal, the Tennessee Court of Appeals held that the jury instructions were erroneous and ordered a new trial. The state Supreme Court affirmed, holding that the jury instruction was erroneous because "it applied the learned intermediary doctrine, which the courts of this state have limited to medical products and pharmaceuticals" and "the jury instruction misidentified the consumer as the employer, when the consumer who was required to be warned was the employee, Mr. Nye."

G. U.S. SUPREME COURT TO REVIEW BOILER INSPECTION ACT PREEMPTION

Kurns v. Railroad Friction Products Corp., U.S., No. 10-879, cert. granted (U.S. June 6, 2011)

On June 6, 2011 the U.S. Supreme Court granted certiorari to review whether the one-hundred year old Boiler Inspection Act ("the Act") preempts state law personal injury claims. In 1926 the U.S. Supreme Court held that the Act was intended to occupy the field of design and construction of locomotives. (*Napier v. Atlantic Coast line Railroad Co.*, 272 U.S. 605 (1926)).

Plaintiff George M. Corson sued Viad Corp. and Railroad Friction Products Corp. after he contracted malignant mesothelioma. Corson worked at the Chicago, Milwaukee, St. Paul & Pacific Railroad from 1947-1994 where he removed asbestos insulation from locomotive boilers and installed asbestos-containing brake shoes on locomotives. Corson later died and his widow and estate executor continued with the lawsuit.

After Corson brought suit in state court for failure to warn about hazardous substances released during repair of locomotives that are not in service, the defendants removed the matter to the U.S. District Court for the Eastern District of Pennsylvania. The District Court granted defendants' motion for summary judgment regarding preemption under the Act and the plaintiffs appealed.

On appeal, plaintiffs argued that for purposes of removal under the Act, there is a distinction between when locomotives are in use and when they are not in use. Because Corson worked on locomotives that were not in use, plaintiffs averred their claims are not preempted by the Act. The Third Circuit court rejected the argument and held the distinction is not relevant for purposes of the scope of preemption. The court also ruled that all of the plaintiffs' claims fall within the scope of the Act.

H. AMICUS BRIEFS FILED IN PENNSYLVANIA OVER VALIDITY OF EXPERT TESTIMONY

Betz v. Pneumo Abex LLC et al., No. 38 WAP 2010, amicus brief filed (Pa. Apr. 25, 2011).

The Pennsylvania Supreme Court will consider whether to affirm or reverse a trial court's grant of summary judgment to various defendants in an automobile exposure case. In February 2005 Charles Simikian brought suit against various manufacturers and suppliers of asbestos-containing products, claiming he was exposed to the products during his career as an automobile mechanic. Simikian later died and the executor of his estate, Diana Betz, continued the suit.

Testifying for the plaintiff at trial was a pathologist, John C. Maddox. Maddox stated under oath that "each and every exposure to asbestos contributes to the development of mesothelioma in a cumulative and dose-related manner and that low-dose exposure to asbestos is sufficient to cause mesothelomia." Defendants, including DaimlerChrysler Corp, Volkswagen of America, Ford Motor Co., General Motors Corp. and Allied Signal Inc., moved for summary judgment averring that Maddox's testimony failed the applicable standard as laid out in *Frye v. United States*, 293 F. 1103 (D.C. Cir. 1923). Under Pennsylvania law and the *Frye* standard, expert testimony must be deduced from studies and methodologies that have gained standing and scientific recognition among authorities in the field in question.

The Common Pleas Court granted defendants' motion and the Superior Court reversed. In an amicus brief submitted to the Pennsylvania Supreme Court, numerous scientists contend the methodology used by Maddox is "unacceptable and unaccepted in the relevant scientific community of experts in the toxicology and epidemiology of asbestos and the diseases caused by asbestos." The brief also points out the fact that all humans have some degree of asbestos exposure beginning in childhood.

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.