

ASBESTOS LITIGATION ALERT

A. CO-WORKER'S TESTIMONY HELPS PLAINTIFF OVERCOME MOTION FOR SUMMARY JUDGMENT

Morgan v. Aurora Pump Co. et al., No. 63923-4-1, 2001 341804 (Wash. Ct. App., Div. 1 Jan. 31, 2011).

After reviewing testimony and affidavits from plaintiff's former co-worker and several medical experts, a three-judge panel in the Division 1 Court of Appeals found the trial court erred in dismissing plaintiff's claims on summary judgment. The three-judge panel reversed a King County Superior Court decision granting summary judgment in favor of defendants / manufacturers / suppliers Aurora Pump Co., Buffalo Pumps Inc., IMO Industries Inc., Warren Pumps LLC, Weir Valves Controls USA Inc. and Wm. Powell Co.

James and Kay Morgan brought negligence and product liability actions alleging James was exposed to asbestos while working at the Puget Sound Naval Shipyard in Washington. James Morgan died in January 2008 before his deposition could be completed. After the trial court granted defendant's motion for summary judgment, plaintiff Kay Morgan appealed. The appellate court determined that testimony and other evidence provided by decedent's co-worker and medical experts was sufficient to create a factual issue on the questions of whether decedent worked with valves that included packing material containing asbestos and that his mesothelioma was caused by his exposure to asbestos in the defendants' products. Thus, the case was remanded for trial.

B. FEDERAL BANKRUPTCY JUDGE APPROVES AGREEMENT FIXING GENERAL MOTORS' ASBESTOS LIABILITY AT \$625 MILLION

In re: Motors Liquidation Co., et al., No. 09-50026 (S.D.N.Y. Bkcy. Feb. 14, 2011)

On February 14, 2011, a federal bankruptcy judge in the Southern District of New York approved an agreement in General Motors Corp.'s Chapter 11 bankruptcy case that set the debtors' aggregate liability for asbestos personal injury claims at \$625 million.

Motors Liquidation Co. f/k/a General Motors Corp. and its affiliated debtors filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of New York in June 2009. Pursuant to the debtors' plan of reorganization, on the effective date all asbestos personal injury claims will be directed to and satisfied in accordance with an asbestos trust consisting of funds amounting to the debtors' liability for asbestos personal injury claims.

In November 2010, debtors filed an Estimation Motion asking the Bankruptcy court to estimate the debtor's aggregate liability in regards to all present and future asbestos personal injury claims. In the meantime, debtors' were able to reach an agreement with respect to their aggregate liability. In addition to the debtors, other parties to the agreement include Dean M.

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Trafalet, in his capacity as legal representative for future asbestos claimants, and the Official Committee of Unsecured Creditors of Motors Liquidation Co.

The debtors financial statement anticipated about \$650 million for present and future asbestos claims over the next 10 years. However, the Official Committee of Unsecured Creditors believed that the debtors' reserve substantially surpassed the \$650 million estimate while Dean Trafalet believed that the \$650 million figure was materially less than the debtors' actual aggregate liability. Nonetheless, the parties reached agreement and fixed the debtors aggregate liability for asbestos personal injury claims at \$625 million. The \$625 million agreement was approved February 14, 2011 by a New York federal bankruptcy judge.

C. CALIFORNIA FEDERAL JUDGE GRANTS DEFENDANTS MOTION TO STAY

Vest et al. v. Allied Packing & Supply Inc. et al., No. C 11-00061, 2011 WL 333241 (N.D.Cal. Jan. 31 2011)

In a take home exposure case, Judge Jeffrey White of the Northern District of California granted defendant's motion to stay the proceedings pending transfer to the MDL because the case involved common questions of fact with actions previously transferred to the MDL.

Plaintiff, Timothy Vest, claims he was exposed to asbestos fibers that his father, while employed by World Airways Inc. brought home on his work clothes. Vest also asserts some of his exposure to asbestos occurred when he visited his father at work. This exposure, Vest claims, resulted in his development of malignant mesothelioma.

Defendant McDonnell Douglas Corp. removed the matter to federal court by asserting federal officer jurisdiction. McDonnell Douglas then filed a tag-long action seeking to have the lawsuit transferred to the asbestos MDL because the issues in Vest's case have been addressed in other MDL cases. In response Vest filed an emergency motion to remand contending that McDonnell Douglas failed to establish that it has a military contractor defense.

Judge White declined to consider Vest's motion but granted McDonnell Douglas' motion to stay after finding that the jurisdictional issue has been raised in MDL proceedings. However, Judge White also stated that if the MDL proceedings regarding the transfer become unreasonably protracted or if Vest's medical circumstances change, Vest could move to lift the stay.

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D. CALIFORNIA JURY AWARDS FRICTION PLAINTIFF \$17.5 MILLION

Allied Packing & Supply Inc., No. RG10502243 (Calif. Super. Ct., Alameda Cty. Jan. 6, 2011)

In a case involving asbestos exposure from brake linings, a California jury awarded a long-time parts-man \$1,470,000 in economic loss damages, \$1.5 million in non-economic damages, \$1 million in loss of consortium damages, and \$13.5 million total in punitive damages.

Plaintiffs Gordon and Emily Bankhead contended that Gordon was exposed to asbestos-containing brakes in the course of his employment for Sea-Land Shipping Co. The Bankhead's claimed PneumoAbex LLC and Carlisle Corp. manufactured most of the brake linings with which Bankhead worked. Those brake linings were then sold by Rockwell International Corp. (n/k/a ArvinMeritor Inc.) and Fruehauf Corp. (n/k/a/ Kelsey-Hayes Co.) to Sea-Land Shipping.

Defendants asserted that their products contained chrysotile asbestos, which does not cause mesothelioma. Also, defendants contended that as a brake mechanic, Bankhead was not at an increased risk of developing mesothelioma.

The jury charged Carlisle Corp., and PneumoAbex LLC with 30% liability and ArvinMeritor Inc. and Kelsey-Hayes Co. with 15% liability each. Consolidated General Transport and Sea-Land were assigned the remaining 10%.

E. MDL JUDGE FINDS LACK OF PRODUCT IDENTIFICATION GROUNDS FOR DISMISSAL

Travis, et al. v. 3M Co., et al., No. 09-70104 (E.D. Pa. Jan. 28, 2011)

The U.S. District Court for the Eastern District of Pennsylvania adopted a magistrate judge's report and recommendation that plaintiff failed to present sufficient evidence that defendant's product contained asbestos.

Plaintiff, Francis Bruce Travis, contended he developed mesothelioma as a result of his service in the U.S. Navy where he was exposed to Curtiss-Wright asbestos-containing engines. Defendant, Curtiss-Wright, filed a motion for summary judgment on product identification grounds asserting that Travis failed to put forth sufficient evidence showing he was exposed to Curtiss-Wright's engines.

Applying New York law, the magistrate judge said that the plaintiff must show he was exposed to defendant's product and that this exposure was more likely than not a substantial factor in his mesothelioma development. The magistrate judge agreed with Curtiss-Wright and found the product identification and causal connection between plaintiff and defendant's product were too tenuous to withstand summary judgment.

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F. OHIO COURT REVERSES DISMISSAL OF PRODUCT SUPPLIER

Fisher v. Alliance Machine Co. et al., No. 94836, 2011 WL 304791 (Ohio Ct. App., 8th Dist., Cuyahoga County Jan. 27, 2011)

An Ohio Appeals Court reversed a trial court's dismissal of supplier Arthur Lois Supply Co ("Louis Supply"). Eugene Fisher Sr., claimed he contracted mesothelioma after working with asbestos-containing products supplied by both Clark Insulation Co. and Louis Supply. The former electrician died June 21, 2006 and his son Eugene Jr. was substituted as plaintiff.

The trial court granted both defendant's motions for summary judgment, finding that Fisher's estate failed to produce any evidence that Fisher was exposed to asbestos products supplied by defendants. On appeal, the three judge panel said under Ohio statutory law, a plaintiff must prove that exposure to each defendant's product was a substantial factor in causing her injury. In determining whether exposure to a particular defendant's asbestos was a substantial factor, the court should consider:

1. The manner in which the plaintiff was exposed to the defendant's asbestos;
2. The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;
3. The frequency and length of the plaintiff's exposure to the defendant's asbestos;
4. Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

Fisher's estate put forth evidence that Fisher worked alongside pipe fitters during his career and that Louis Supply provided insulation products at the time of Fisher's employment. Based on this evidence, the appeals court found Fisher's estate presented sufficient evidence to create a question of fact regarding whether those products were a substantial factor in causing Fisher's mesothelioma. Accordingly, the dismissal of Louis Supply was reversed.

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.