ECKERT SEAMANS

MARCH 2012

ASBESTOS LITIGATION ALERT

A. STATE OF THE ART AND PRODUCT IDENTIFICATION DEFENSES SUCCEED IN WISCONSIN TAKE HOME CASE

Streng v. Building Service Industrial Sales Co., et al., No. 06-CV-5841 (Wis. Cir. Ct., Milwaukee Cty. Jan. 18, 2012).

Directed verdicts were entered in a case involving take-home exposure claims by the wife of a school janitor, a 30-year employee of the Milwaukee Public Schools. Audrey Streng claimed that her mesothelioma was caused by exposure to asbestos brought home in her husband's work clothes. She blamed products manufactured by defendant Owens-Illinois Inc. and supplied by Building Service Industrial Sales Co. for her illness.

Before the trial commenced, the defendants filed motions for summary judgment arguing that there was no duty to warn since they were unaware of the risks of take-home exposure. The court agreed, granting summary judgment on the duty to warn claims, but allowed the case to proceed on plaintiffs' "failure to test" claims.

Midway through the case, both defendants moved for a directed verdict. Owens-Illinois repeated its contention that it had no knowledge that secondary exposure could be harmful, and further maintained that Wisconsin does not recognize a claim for failure to test. Building Service Industrial Sales argued that the plaintiffs had not properly established product identification. It also asserted that, as a supplier, it had no duty to warn beyond the manufacturers' warnings.

In awarding the directed verdicts, the court cited state-of-the-art evidence that in the 1950s, take-home exposure was not known to be a factor in causing injury. Moreover, the court said, there was insufficient evidence linking the products to the schools in question.

B. WISCONSIN COURT OVERTURNS $1.5M VERDICT

Singer v. Pneumo Abex LLC, No. 2010AP2614 (Wis. Ct. App. Jan. 18, 2012).

Catherine Singer filed suit against Pneumo Abex LLC and other manufacturers after her father died of mesothelioma in 2006, alleging that the asbestos-containing products they supplied to the Harnischfeger Corp. plant caused his illness. Her father, John Pender, had been employed at one of the crane manufacturer's plants from 1952 through 1993. Part of his job as a painter and glass setter required him to sweep up asbestos-containing dust expelled in the process of grinding brake shoes for truck cranes.

Singer sued under the theories of negligence, products liability, and risk contribution. At the time of trial, only claims for negligence and strict products liability remained against Abex, who was the lone, remaining defendant. Singer established that her father had worked primarily in building 35, the National Avenue plant in Milwaukee, and a witness testified that from 1966 through 1976, brake shoes were ground in that building. The summary judgment record also showed that Abex supplied brake shoes to Harnischfeger from 1976 through late 1982. However, the court noted, "[a]t least nine different companies, including Abex, supplied brake shoes to Harnischfeger between 1966 and 1986," and

Harnischfeger had numerous other plants, in Milwaukee and outside of Wisconsin. Further, Abex delivered the brake shoes primarily to another plant on Orchard Street.

The jury awarded Singer close to $1.5 million. Abex appealed, citing Singer's lack of evidence that their products were ever used at Harnischfeger's National Avenue plant. The court agreed with Abex. In overturning the verdict, the court said that while Abex was one of Harnischfeger's suppliers, there was no proof that Pender had ever been exposed to asbestos from Abex' brake shoes at that particular location. The court declared that it would require "speculation and conjecture" to conclude he was exposed to Abex products when there was no proof they were used at the facility.

C. ILLINOIS COURT VACATES DEFAULT JUDGMENTS; WITNESS'S STATUS AS AN EMPLOYEE MUST BE ESTABLISHED UNDER RULE 237(B)

Hoogerwerf v. Honeywell International Inc., No. 4-11-0329 (Ill. App. Ct. Feb. 2, 2012);
Legate v. Honeywell International Inc., No. 4-11-0505 (Ill. App. Ct. Feb. 2, 2012).

Default judgments entered in two asbestos-related civil conspiracy actions were ruled as improperly granted by Justice Robert W. Cook of the Illinois Appellate Court, Fourth District. Vacated were a $2.9 million verdict entered in *Hoogerwerf* and stipulated damages of $750,000 in *Legate*.

In the underlying cases, a potential witness for Honeywell International Inc. refused to appear for trial as demanded by the plaintiffs pursuant to Rule 237(b). Rule 237(b) authorizes a trial court to demand the appearance of a party's officer, director, or employee at trial. Plaintiffs Vickie Hoogerwerf and Antoinette Legate argued that Rule 237(b) applied to Joel Charm because he was a frequent witness and advisor for Honeywell, and could also testify as to its asbestos litigation. Charm had been chief of product safety for AlliedSignal Inc. before it merged with Honeywell.

Honeywell contended that Charm was outside the scope of Rule 237(b) because he was not a current employee. Honeywell cited *White v. Garlock Sealing Technologies LLC*, 398 Ill. App. 3d 610 (2010) in support of their position that Rule 237(b) "does not allow a court to order a party to produce at trial any person who is not at the time of trial an officer, director, or employee of that party." However, the trial court sided with the plaintiffs, and entered default judgments on liability and causation based on Charm's refusal to testify.

On appeal, the court opined that the default judgments were improperly granted because Charm's status as an employee was never conclusively established. The court said "[a]side from Honeywell's unsupported assertions that Charm is not a current employee, . . . the parties have failed to frame their Rule 237(b) argument as an argument of Charm's status as either an employee or an independent contractor as those 'limited and legal terms of art' have come to be defined by the courts."

D. $10M VERDICT SURVIVES CALIFORNIA APPELLATE COURT REVIEW

Cundiff v. Lone Star Industries Inc., No. B218420 (Cal. Ct. App. Feb. 9, 2012).

Rejecting defendant Lone Star's multiple arguments that the trial court abused its discretion with regard to several evidentiary rulings, the California Court of Appeal upheld a jury's award of $10 million in non-economic damages to a former machinist mate, Charles Cundiff, who had worked aboard the USS Kitty Hawk. Cundiff was also awarded $506,000 in economic damages, and his wife was awarded $1.5 million for loss of consortium. Lone Star was found 19 percent at fault.

Cundiff alleged that he was exposed to asbestos in *Insulag*, a powder insulation supplied by Lone Star Industries Inc. to the aircraft carrier while it was docked at the Puget Sound Naval Shipyard. Cundiff said he contracted mesothelioma from the dust created when Insulag was being mixed during an overhaul of the ship from 1964 to 1965.

Of the various evidentiary arguments, Lone Star argued that testimony from two witnesses should have been precluded. One witness, Dr. Edwin Holstein, was prevented by Lone Star from consulting the plaintiff's deposition transcript during his own deposition. Lone Star then moved to preclude his testimony at trial, citing his inability to testify at deposition as to Insulag being a substantial factor in causation. The court found that Holstein was prepared at deposition but that Lone Star refused to let him refer to the record. Lone Star also objected to Holstein's testimony because he read product brochures after his deposition in preparation for his testimony at trial, but this was also overruled.

Another witness, Robert Hendricks, had been aboard the Kitty Hawk with Cundiff. He was offered as a rebuttal witness, confirming that Insulag was delivered to the ship. Lone Star objected, arguing that Hendricks' testimony should have been presented in the plaintiff's case-in-chief. However, the court said his testimony was proper in that it was responsive to evidence first introduced by Lone Star.

Lone Star also asserted that Cundiff's complaint expressly disclaimed any cause of action for injury at a federal enclave, and argued that the shipyard itself was a federal enclave. The court rejected this argument and said Lone Star failed to establish that the area was a federal enclave, and even it were, Lone Star had not proven that the overhaul had been performed while it was at the shipyard.

Finally, the court also ruled that the verdict amount was not "so high that it shocks the conscience and suggests passion or prejudice on the part of the jury."

E. CRANE APPEALS $32 MILLION VERDICT IN NEW YORK, ASSERTS COMPONENT PARTS DEFENSE

Dummitt, et al. v. A.W. Chesterton, et al., No. 190196/10 (N.Y. Sup. Ct. New York Cty. Sept. 2011).

Crane Co. has moved to set aside the $32M verdict rendered in *Dummitt* last August, asserting the component parts defense that has been successfully argued elsewhere since their motion was filed in September. See *O'Neill v. Crane Co.*, 53 Cal. 4th 335; 2012 Cal. LEXIS 3, (Cal. Jan. 12, 2012) (See also

Asbestos Litigation Alert, January/February 2012). Crane notes in its brief that Dummitt's exposure to asbestos came from products manufactured and supplied by third parties, and that the only remaining claim against Crane Co. was based on a failure to warn with regard to these component parts.

Dummitt was one of two cases heard by the same jury. In the other asbestos case, the jury awarded the plaintiff $19M for past and future pain and suffering. (see *Asbestos Litigation Alert*, Sept. 2011). Crane has asked the court to consider that the verdict amount for *Dummitt* was unreasonable, saying ". . . the jury did not even follow Plaintiffs' counsel's inflated value of the case; the verdict essentially doubles the impermissibly inflated award that Plaintiffs' counsel requested in closing arguments ($17M)." The jury allocated 99 percent liability to Crane Co.

Dummitt worked on seven different Navy ships and claimed exposure to asbestos during the removal of lagging pads, gaskets and packing from Crane Co. valves.

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.