## A. N.J. SUPREME COURT DENIES CERT PETITION IN EMPLOYEE/TAKE-HOME DUAL EXPOSURE CASE AGAINST EXXON

*Anderson, et al., v. A.J. Friedman Supply Co., et al.*, No. C-422 Sept. Term 2010 066898 (N.J. Sup. Ct. Apr. 5, 2011)

The Linden Bayway Refinery, owned by Exxon Mobil Corp, employed Bonnie Anderson from 1974 to 1986. The same refinery also employed Bonnie's husband from 1969 to 2004. After Bonnie contracted mesothelioma, the Andersons brought suit against Exxon claiming Bonnie's mesothelomia was caused from exposure to asbestos not only while she was employed at the refinery, but also while laundering John's work clothing. A jury agreed, finding Bonnie's bystander exposure was a substantial contributing factor to her mesotheliomia.

On appeal, Exxon argued for allocation of fault between its status as Bonnie's employer and its status as her husband's employer. However, the New Jersey Superior Court ruled that the workers' compensation bar precluded Exxon from being a party in the litigation in its status as Bonnie's employer. Although Exxon held two roles in Bonnie's exposure, there was no need to allocate responsibility between the two. In addition, the court held that the plaintiffs' claims were not barred by the exclusive remedy provisions of the Workers' Compensation Act because Bonnie's bystander exposure was a foreseeable risk.

The New Jersey Supreme Court has declined to review the Appellate Division's decision.

## B. DISCOVERY STAYED PENDING U.S. SUPREME COURT APPEAL IN SUIT AGAINST ASBESTOS PLAINTIFF LAW FIRM

*CSX Transportation Inc., v. Gilkinson, et al.*, No. 05-00202 (N.D. W.Va. Mar. 8, 2011)

CSX brought suit against an asbestos plaintiff law firm claiming asbestos plaintiff attorneys "deliberately fabricate[d] and prosecute[d] objectively unreasonable, false and fraudulent asbestosis claims against CSX." CSX originally asserted claims for fraud, negligence and punitive damages, but amended its complaint in 2007 to add civil RICO, common law fraud and civil conspiracy claims. The district court dismissed all but two of CSX's claims, ruling that CSX failed to establish fraudulent intent.

On December 30, 2010, the U.S. Court of Appeals for the Fourth Circuit reinstated the lawsuit, ruling that CSX was not put on notice of the RICO claims at the time the fraud occurred because nothing "clearly appear[ed]" on the face of the complaint to show CSX knew or ought to have

known about the alleged fraud. The statute of limitations did not begin to run until after CSX had reason to suspect the fraud. Therefore, all the facts of the case must be determined before the court can decide when CSX became aware of the fraud.

The parties agreed to stay discovery while defendants pursue an appeal with the U.S. Supreme Court.

## C. PENNSYLVANIA SUPERIOR COURT REVERSES ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF ASBESTOS DEFENDANT

*Linster, et al. v. Allied Signal Inc., et al*., No. 2011 PA Super 86 (Pa. Super. Ct. Apr. 21, 2011)

On February 17, 2006, Patricia and Matthew Linster filed a civil complaint against several companies, including Crane Co., alleging Mr. Linster developed mesothelioma as a result of his occupational exposure to asbestos containing products during his employment at the Philadelphia Naval Shipyard. Specifically, the Linsters averred Crane Co. manufactured and sold asbestos containing products. Mr. Linster died from mesothelioma.

After completion of discovery, Crane Co. filed a motion for summary judgment arguing both that plaintiffs failed to identify any product attributable to Crane Co. and that the evidence did not establish that the products were manufactured and/or supplied by Crane Co. Relying on the deposition testimony of Mr. Linster and the testimony of his co-workers, the plaintiffs opposed the motion. In addition, the plaintiffs pointed to Crane Co.'s answers to interrogatories in which Crane Co. admitted that it manufactured asbestos containing packing and pumps during the time of Mr. Linster's employment. The trial court granted Crane Co.'s motion and the plaintiffs appealed.

Viewing the record in a light most favorable to the plaintiffs, the Pennsylvania Superior Court held that the facts and circumstances of the case are sufficient to establish the required product identification and causal connection between Mr. Linster's mesothelioma and Crane Co. gaskets and packing. The court also held that the fact that Mr. Linster may have worked with other brands of asbestos containing products relates to the apportionment of liability among co-defendants and does not affect whether the plaintiffs met their burden of proof.

## D. MASSACHUSETTS SUPREME COURT REVERSES SUMMARY JUDGMENT IN BRAKE REPLACEMENT CASE

*Morin, et al., v. Autozone Northeast Inc.*, No. 09-P-1816 (Mass. Sup. Jud. Ct. Mar. 14, 2011)

AutoZone Northeast Inc., Great Dane Trailers Inc. and Orleans Auto Supply Inc. filed for summary judgment in a case involving a produce supplier. Kathleen Morin claimed her mother, Geraldina Medeiros, was exposed to asbestos-containing products in automobile parts while running her produce business from 1952 to 1991. The trial court granted the defendant's motion and the plaintiff appealed.

On appeal, the Massachusetts Supreme Court recited three things a plaintiff must establish in order to show causation in an asbestos case: 1. Product identification; 2. Evidence of exposure; and 3. Proof that the exposure was a substantial contributing factor in causing the harm.

While the court affirmed the grant of summary judgment for Great Dane because of "multiple layers of speculation," it reversed the dismissal of claims against AutoZone and Orleans Auto Supply. The court determined that "[e]ven without close proximity, a jury could infer that Geraldina was exposed to asbestos fibers from [the defendants'] parts which spread into her office and down the runway from the mechanics' use of the air hose." Accordingly, dismissal of AutoZone and Orleans Auto Supply was improper.

## E. PENNSYLVANIA LAW APPLIES IN RHODE ISLAND CHOICE OF LAW CASE

*Carlson et al. v. 84 Lumber Co. et al.*, No. PC 09-3298, 2011 WL 1373508 (R.I. Super. Ct. Apr. 7, 2011)

A Rhode Island judge decided Pennsylvania law applies in an asbestos lawsuit where plaintiffs alleged David S. Carlson's exposure to defendants' alleged asbestos containing products in Michigan caused and/or contributed to his development of mesothelioma in Pennsylvania. Carlson died in 2009 and the suit was commenced by his wife, Mary Carlson, and the executor of his estate.

The alleged exposure occurred during Mr. Carlson's employment from 1961-1968 and 1973-1979 in Michigan. Mr. Carlson moved to Pennsylvania in 1992 and was diagnosed with mesothelomia and treated there. Defendants argued Michigan law applied to the matter. Michigan law does not have joint and several liability while Pennsylvania law currently does.

Addressing the choice of law question, Superior Court Judge Alice Gibney observed that "the deference accorded a plaintiff's choice of forum has never been intended to guarantee that the plaintiff will be able to select the law that will govern the case." However, Judge Gibney applied Rhode Island's "interest-weighing" approach to determine the appropriate law and held Pennsylvania has the most significant interest in the case because of, inter alia, Mr. Carlson's residence in the state and the manifestation of his injuries in Pennsylvania.

## F. CALIFORNIA JURY AWARDS $1.4 MILLION TO PLAINTIFF IN KENT CIGARETTE CASE

*Lenney v. Armstrong International Inc. et al.*, No. CGC-10-275529, verdict returned (Cal. Super. Ct., S.F. County Mar. 3, 2011)

Plaintiff Donat Lenney smoked Kent cigarettes from 1952 until 1956. The cigarettes were manufactured by Lorillard Tobacco using Micronite filters made by Hollingsworth & Vose. After Lenney's development of mesothelomia, he brought suit alleging causes of action in negligence, strict liability and fraudulent concealment.

After finding that the cigarettes were a substantial contributing factor to Lenney's mesothelomia, the jury awarded him $969,700 and awarded his wife $400,000 for loss of consortium. Moreover, the jury allocated Lorillard 35 percent of the liability and H&V 25 percent. Asbestos suppliers were allocated the remaining liability.

## G. PNEUMO ABEX FILES BRIEF WITH WISCONSIN APPEALS COURT, ARGUES "SOPHISTICATED USER" DEFENSE

*Singer v. Pneumo Abex LLC et al.*, No. 2010 AP 2614, brief filed (Wis. Ct. App., Dist. I Mar. 14, 2011)

Harnischfeger Corp. employed John Pender as a glass setter and painter of industrial cranes equipment for 40 years before Pender died of mesothelioma in 2006. Pender's daughter brought suit against 18 companies, alleging those companies supplied asbestos-containing products to Harnischfeger. Singer sought claims for negligence, failure to warn under strict products liability and negligence theories, and negligence and strict products liability claims under a risk contribution theory.

At trial, the remaining defendant, Pneumo Abex, LLC ("Abex"), moved for summary judgment based on the sophisticated user defense and on the basis that the plaintiff failed to present

evidence that Pender was exposed to Abex's products. The Milwaukee County Circuit Court denied the motion and the jury returned a verdict of approximately $1.5 million in favor of the plaintiff. Abex appealed.

In Abex's brief, the company first argues for the application of the sophisticated user defense which eliminates the duty to warn because "there is no duty to warn members of a trade or profession about dangers generally known to the trade or profession." Abex contends Harnischfeger was a sophisticated user of asbestos-containing brake linings. Second, Abex maintains that its brake linings were component parts incorporated into the cranes Harnischfeger manufactured. Accordingly, Pender was not an end user of the brake linings and the brake linings were not "products" for purposes of Singer's strict liability claim. Lastly Abex claims the jury verdict is not supported by any credible evidence because Singer did not present evidence proving that Pender was exposed to Abex's products or that Abex's warnings caused Pender injury. Singer's repose brief is due May 31, 2011.

*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.*