ASBESTOS LITIGATION ALERT

A. PARTIES FILE RESPONSES TO AMICI BRIEFS IN CALIFORNIA SUPREME COURT COMPONENT PARTS DISPUTE

O'Neil, et al., v. Crane Co., et al.,, No. S177401, petition filed (Calif. Sup. Ct. Sept. 18, 2009)

In a dispute over component parts in California's Supreme Court, both parties filed responses to *amici* briefs on Sept. 21 and 23, 2010. At issue is whether defendants in an asbestos action can be held liable for replacement packing and/or insulation.

Plaintiff argues that while serving as an officer on a U.S. Naval ship, her husband was exposed to asbestos. Plaintiff brought actions in negligence, negligent failure to warn, strict liability for failure to warn and strict liability for design defect on the consumer expectation theory.

At trial, the judge granted Crane Co. and Warren Pumps' motion for nonsuit based upon the component parts defense. The Second District reversed finding that defendants pumps and valves were not component parts under the Restatement Third of Torts. In reaching its decision, the Second District Court disagreed with the recent First District Court of Appeal's holding in *Taylor v. Elliot Turbomachinery Co., Inc*. 171 Cal.App.4th 564 (Cal.Ct.App. February 29, 2009). *Taylor* held that the component parts defense was available to a manufacture whose equipment operated as part of a larger system. The Second District opposed this holding and instead found "no relevance to the fact that the injury was caused by the operation of its product in conjunction with a replacement part which is no different than the original."

In their recently filed reply brief, Defendants. ask the Supreme Court to reverse, arguing that because they did not market or sell the asbestos containing products, they should not be held liable. Defendants argue that the plaintiff's interpretation of the stream of commerce doctrine is misunderstood. Defendants' brief states, "The label attached to the defendant, whether 'manufacturer,' 'supplier,' 'retailer,' etc., does *not* determine whether it is within the stream of commerce. Even 'passive' retailers or distributors in the chain of distribution of a product are considered to be within the stream of commerce. Conversely, courts have held that manufacturers are not part of the stream of commerce when they are outside the chain of distribution for the product that actually caused the injury."

Additionally, defendants argue that plaintiff misunderstands the concept of foreseeability, and that foreseeability is only applicable after a defendant is determined to be in the stream of commerce. Only then may a defendant be held liable if injury occurs during foreseeable use of its product.

B. MISSISSIPPI SUPREME COURT BARS COMPLAINT ON STATUTE OF LIMITATIONS GROUNDS

Garlock Sealing Technologies, et al., v. Pittman, et al., No. 2008-IA-01572-SCT (Miss. Sup. Ct. Oct. 14, 2010).

In 2002 Lonnie Pittman and Robin C. Nettles filed an asbestos lawsuit which was ultimately barred by the statute of limitations. After plaintiffs filed their original complaint, a defendant filed a suggestion of death showing Pittman's death occurred on March 11, 2001. After Lonnie Pittman's wife, Mary Pittman was substituted as a plaintiff, the defendants moved to dismiss, or alternatively sever the claims, arguing Lonnie Pittman had predeceased the lawsuit's filing date.

The trial court severed the claims and Mary Pittman filed an amended complaint as executrix of the estate. Defendants challenged the amended complaint, asserting a statute of limitations defense for the first time. Defendants also argued that the lawsuit was a nullity since Lonnie Pittman was deceased. In response, Mary argued that Rule 17(a) of the Mississippi rules of Civil Procedure, which does not require the original plaintiff to have capacity to sue, permits her amended complaint.

The Supreme Court agreed with the defendant, citing Mississippi case law ruling that a deceased person cannot bring a lawsuit. The Court expressly rejected Mary's argument as it stated, "because the December 2002 complaint was a nullity, a valid action was never commenced…and where a valid action does not exist, Rule 17(a) does not apply. In a similar vein, we find further than an amended complaint cannot relate back to an original complaint that was a nullity. The basic rationale is that there is simply nothing to amend. As a result, where the original complaint is a nullity, any amended complaints filed later must stand on their own merits."

The three year statute of limitations for Mary's claim began to run at Pittman's death in 2001, therefore Mary's 2005 amended complaint was untimely. The defendants did not waive the statute of limitations defense because no defendant actively participated or advanced the litigation.

C. CALIFORNIA JURY AWARDS $1.6 MILLION IN ASBESTOS-CONTAINING AUTO PRODUCTS CASE

Harrell, et al. v. Allied Packing & Supply, et al., No. BC423696 (Calif. Super. Ct., Los Angeles Cty. Aug. 8, 2010).

In a lawsuit against Ford Motor Co. and Navistar Inc. over asbestos-containing auto products, a California jury awarded $1.6 million to plaintiffs William and Judy Harrell. After finding that Ford Motor and Navistar were liable in negligence for asbestos-containing original equipment pieces, the jury allocated $647,000 for future economic loss, $647,000 in non-economic loss; and $325,000 for Judy's loss of consortium claim.

The jury allocated 10 percent of liability to both Ford Motor and Navistar, with the remaining liability allocated to 10 other defendants not involved in the case at the time of the verdict. The jury also rejected plaintiff's strict liability claims for original equipment manufactured by defendants, declined to assign liability for replacement products that the defendants did not manufacture, and found that neither Ford Motor nor Navistar engaged in conduct with malice, oppression or fraud.

D. MASSACHUSETTS SUPERIOR COURT SAYS CRANE CO. CAN NOT BE HELD LIABLE FOR ASBESTOS-CONTAINING REPLACEMENT PARTS IT DID NOT MANUFACTURE OR SUPPLY

Dombrowski, et al. v. Alfa Laval inc., et al., Massachusetts Asbestos Docket, Middlesex CA 08-1938 (Mass. Super. Ct. July 26, 2010)

In granting motions for summary judgment, a Massachusetts Superior Court ruled that defendant Crane Co. could not be held liable for asbestos containing replacement parts it did not supply or manufacture and that to impose liability would "exceed all reasonable limits." In five companion cases plaintiffs alleged that they were exposed to asbestos-containing gaskets and packing in Crane Co.'s valves on several U.S. Naval ships.

In one of the five cases the plaintiff served on two ships that were launched twenty years prior to his presence on them. By the time of plaintiff's service, all of the original asbestos-containing products were replaced. Accordingly, the Court found no evidence that Crane Co. supplied the replacement asbestos-containing products.

The plaintiff also asserted a negligent failure to warn and negligent design actions. These claims were rejected by the Court as it stated, "the asbestos gaskets and packing supplied by Crane Co. were long gone from the valves by the time of Mr. Dombrowski's service. The plaintiffs seek to apply a warning or design duty to Crane Co.'s 1943 and 1944 valves, engineering drawings and materials lists that would make Crane Co. liable for Mr. Dombrowski's exposure to asbestos from another company's gaskets and packing 17 or more years later. This would create a legal duty… that would exceed all reasonable limits."

E. IN MESOTHELIOMA CASE, ENGLAND AND WALES APPEALS COURT FINDS NO ACTIONABLE INJURY AT TIME OF ASBESTOS EXPOSURE

Employers' Liability Policy "Trigger" Litigation, No. [2010] EWCA Civ 1096, England and Wales App.

An English appeals court reversed a ruling that insurers are liable to pay compensation to claimants who develop mesothelioma as a result of asbestos exposure in the workplace if they insured the employer at the time the exposure occurred.

The High Court ruled that the victims' injuries were sustained when caused and the disease was contracted when it was caused. Thus, the claimants, employers and employees, were entitled to coverage from the insurers at the time of exposure.

On appeal the insurers argued that based on the wording in the relevant insurance policies, the claimants injuries did not occur until the onset of mesothelioma. The appeals court agreed and held that in a mesothelioma case, there is no actionable injury at the time of asbestos exposure.

F. MESOTHELIOMA SUIT REMAINS IN FEDERAL COURT DUE TO FEDERAL CONTRACTOR DEFENSE

Hagen v. Benjamin Foster Co. et al., No. 07-63346, 2010 WL 3745297 (E.D. Pa. Sept. 24, 2010).

After being sued in New Jersey state court for alleged asbestos exposure, defendants Foster Wheeler and General Electric removed the suit to New Jersey federal court, asserting that they would raise a federal defense. The case was transferred to the MDL and plaintiff Donna Hagen, decedent of Malcolm Hagen, motioned for remand. The court denied the motion.

The judge found that the defendants raised a colorable federal defense to the product liability action, thus making a federal forum appropriate. The specific defense raised was the government contractor defense which is applicable when the U.S. government approved reasonably precise specifications for a defendant-contractor, the defendant conformed to those specifications and the defendant warned the United States about dangers known to the company but not to the government. Notably, the judge said a defendant does not have to win its case in order to justify removal and federal law creates a broad removal right.

G. ASBESTOS PLAINTIFF WITHDRAWS APPEAL IN PENNSYLVANIA

Stralo, et al. v. Yarway Corp., et al., No. 0187 (Pa. Ct. Comm. Pls., Philadelphia Cty. June 11, 2010)

A plaintiff in an asbestos action withdrew her appeal of a Pennsylvania Court of Common Pleas decision. Claims brought on behalf of Ronald Stralo, who served in the U.S. Navy and who suffered from malignant pleural mesothelioma, were dismissed on summary judgment by a Philadelphia trial court in 2008. In a June 11 opinion the Court affirmed its decision. While in the Navy Stralo allegedly worked with products manufactured by defendants Yarway Corp. and Crane Co. Defendants sought dismissal of the case on product identification grounds.

The Court found that plaintiffs failed not only to show that the defendants' products contained asbestos, but also that the defendants' products were on the ship plaintiff worked on. Moreover, plaintiffs also failed to prove that decedent actually came into contact with any of defendants' products. Plaintiff appealed then subsequently filed a discontinuance of appeal in the Pennsylvania Superior Court on October 8, 2010.

H. PENNSYLVANIA COURT FINDS PLAINTIFF ESTABLISHED CAUSATION, AFFIRMS MORE THAN $1 MILLION JUDGMENT

Moore, et al. v. Ericsson inc., et al., No. 2010 PA Super 173 (Pa. Super. Ct. Sept 17, 2010)

Plaintiffs' Donnie and Judith Moore sued Ericsson Inc. contending that Donnie's mesothelioma was caused by exposure to asbestos dust while working for the company. After a jury awarded plaintiffs $2 million, the Court entered a judgment holding Ericsson's successor-in-interest, Anaconda, for $1,190,654. Ericsson Appealed asserting issues relating to causation.

The Pennsylvania Superior Court held that issues of whether plaintiff was exposed to defendant's products, whether defendant's products contained asbestos, and whether plaintiff's exposure was a substantial contributing factor of his injury were for the jury to decide. After considering the evidence in a light most favorable to the plaintiff, the Court found that the plaintiffs satisfied their burden of proving that exposure occurred with regularity, frequency, and proximity.

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.