ECKERT SEAMANS

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ASBESTOS LITIGATION ALERT

A. FLORIDA JURY AWARDS $20.6 MILLION FOR EXPOSURE TO ASBESTOS DURING COLLEGE

Garrison, et al., v. Union Carbide, No. 10-12353 (Fla. 17th Jud. Cir. Ct., Broward Cty. Sept. 16, 2011).

Charles Garrison contended that his illness stemmed from a home remodeling project he did during college. He claimed that he used Georgia-Pacific joint compound during the four months it took him to complete the attic apartment project, which later caused him to develop mesothelioma. However, Union Carbide, the lone remaining defendant at trial, argued that Garrison did not have mesothelioma, and if he did, it was not due to exposure to asbestos. Further, Union Carbide argued that should the jury find that his illness was caused by asbestos, the liable party should be Georgia-Pacific. Georgia-Pacific had settled with the plaintiff prior to trial.

The jury took less than two hours to find that Garrison's illness was due to his alleged exposure during college to the compound, and awarded him $16.4M, as well as $4M to his wife, Cynthia. Another $246,000 for past medical expenses was included in the award. The jury allocated 80 percent liability to Union Carbide, and the remaining 20 percent to Georgia-Pacific.

B. PENNSYLVANIA APPELLATE COURT FINDS WORKERS' COMPENSATION ACT NOT SOLE REMEDY IN CASE ALLEGING ASBESTOS EXPOSURE TO PH.D STUDENT

Sabol, et al. v. Allied Glove Corp., et al., No. 171 WDA 2011 (Pa. Super. Ct. Sept. 22, 2011)

The wife of decedent, George P. Sabol, filed suit claiming that her husband had contracted mesothelioma as a result of exposure to asbestos as graduate student at the Carnegie Institute of Technology (CMU) in the 1960s. After a discovery dispute which resulted in limiting the scope to glove and furnace products, CMU filed a motion for summary judgment. CMU argued that Sabol's claims were barred by the exclusive remedy provision of the Pennsylvania Workers' Compensation Act, in that Sabol, as a graduate student, was an employee of the school. Summary judgment was awarded to CMU, and Sabol appealed the trial court's decision.

In appealing the summary judgment award, Sabol also contended that the trial court had wrongfully limited the scope of discovery. The appellate court agreed with the trial court as to the limitations on discovery. The court said it was reasonable for the trial court to limit discovery requests to the items Dr. Sabol himself described as having contact with during the time period in question.

However, the court reversed the granting of summary judgment. In its analysis, the court recognized that the issue of whether a graduate student is an employee of a university was one of first impression in the state of Pennsylvania. The court then focused on the definition of employee under the Workers' Compensation Act, and reasoned that Dr. Sabol was, at times, an employee "because he performed services for valuable compensation" for CMU. But, the court said, he was also exposed to asbestos at times while working in a laboratory as a Ph.D. candidate, and the Act does not exclude these claims. "Therefore," the court opined, "we conclude that a fact-finder should resolve the issue of how much asbestos exposure occurred while Dr. Sabol was acting in his capacity as a student, rather than as an employee."

C. CALIFORNIA APPELLATE COURT CITES TAYLOR COMPONENT PARTS DEFENSE IN UPHOLDING REVERSAL OF $16.9 MILLION VERDICT

Woodard, et al. v. Crane Co., et al., No. B219366 (Calif. 2nd App. Dist. Ct. App., Div. 4 Aug. 25, 2011)

Joining a significant line of cases in support of the reasoning in *Taylor v. Eliott Turbomachinery Co., Inc.*, 171 Cal. 4th 564, 2009 Cal. App. LEXIS 214 (Cal. App. 1st Dist. Div. 5 2009), California's Second District Court of Appeal, Div. 4, affirmed the reversal of a $16.9M verdict where the jury had found for the plaintiff based on a failure to warn claim. (See also *Asbestos Litigation Alert,* Aug-Sept, 2009, Oct. 2009, Dec. 2009, Mar. 2010, and Aug-Sept. 2010.)

Taylor and its progeny conflict with *O'Neil et al. v. Crane Co. et al.*, 177 Cal. App. 4th 1019, 2009 Cal. App. LEXIS 1553 (Cal. App., 2d Dist., Div. 5 Sept. 18, 2009), which found the *Taylor* decision flawed in its alleged misunderstanding of the components parts defense articulated in *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* 129 Cal. App. 4th 577, 581(2004): "[T]he manufacturer of a product component or ingredient is not liable for injuries caused by the finished product unless it appears that the component itself was 'defective' when it left the manufacturer." *Id.*

O'Neil stands for the position that component parts designed to be used with asbestos-containing insulation are defective when they leave the manufacturer, regardless of the chain of distribution of the asbestos-containing products, and thus a duty to warn the consumer exists. Whereas in *Taylor*, there is no duty to warn for products manufactured by a third party which might foreseeably be used in conjunction with the defendant's component parts. *Taylor, supra,* at 596. *O'Neil* has been granted review by the California Supreme Court. The high court has declined to review *Taylor.*

Dennis Woodward filed the underlying suit, where he claimed exposure to asbestos during his service on two U.S. Navy ships built in the 1940s. He cited gaskets and packing material in valves made by Crane Co. as the cause of his mesothelioma. After the verdict, Crane Co. moved for judgment notwithstanding the verdict, based on testimony that its materials had been removed and replaced by other companies' products containing asbestos before Woodard ever began his service on the ships. The trial court agreed with Crane Co. that *Taylor* controlled and granted the motion.

In upholding the reversal, the Court of Appeal found that Crane Co.'s valves were not defective when they left their control, in opposition to the reasoning in *O'Neill, supra*. Instead, citing *Taylor*, the court held that a defendant cannot be found strictly liable for products manufactured by a third party, and not under the defendant's control.

D. MDL JUDGE DENIES SUMMARY JUDGMENT BASED ON GOVERNMENT CONTRACTOR DEFENSE

Willis v. BW IP International Inc. et al., MDL No. 875, 2011 WL 3818515 (E.D. Pa. Aug. 29, 2011).

Machinist, Hiram Peavy worked at the Charleston Naval Shipyard from 1973 to 1993. In the litigation that followed the suit filed by Tina Willis, executor of the Peavy estate, Defendants Foster Wheeler LLC, CBS Corp. and Crane Co. filed a motion for summary judgment pursuant to the government contractor

defense, supported by evidence that Navy regulations dictated that contractors adhere to contract specifications in "every detail." They argued that they had supplied products which complied with specific Navy specifications, and were prevented by the Navy, in following these specifications, from putting any warnings on products containing asbestos.

Willis argued against the motion for summary judgment, asserting that military rules did not stop manufacturers from attaching warnings to such products. In addition, she maintained that such regulations should be interpreted as *requiring* warnings on products containing asbestos.

MDL Judge Eduardo C. Robreno ruled that defendants were not entitled to summary judgment, in part because defense witnesses testified that they did not know of any particular case where the Navy prohibited manufacturers from attaching such warnings to products. The judge reasoned that since defense experts, on cross-examination, could not cite a specific situation where the Navy had refused warnings to be attached to products, the plaintiff had succeeded in casting doubt on the defendant's claim that warnings were prohibited on their products.

The judge concluded that since the government contractor defense is an affirmative defense, and that a question of fact exists as to the warnings, the defendants were not entitled to summary judgment.

E. MINNESOTA TRIAL JUDGE CITES LACK OF EVIDENCE, GRANTS SUMMARY JUDGMENT TO TWO DEFENDANTS

Nelson, et al. v. 3M Co., et al., No. 62-CV-08-6245 (Minn. 2nd Jud. Dist. Ct., Ramsey Cty. Aug. 17 and 19, 2011).

Donald Nelson served as a fireman apprentice and boiler tender on board the *USS Shelton* from 1959 to 1963. He died in 2008 from mesothelioma. In the suit brought by Hilaria Nelson on his behalf, defendants IMO Industries Inc. and its corporate predecessor, Delaval Steam Turbine Co., were among several defendants named as responsible for Nelson's exposure to asbestos. The suit alleged that Nelson was present when asbestos-containing packing and insulation were being removed from the turbines and pumps. Citing a lack of evidence that it was its products that caused the injury, IMO moved for summary judgment.

In response, Judge Dale B. Lindman reasoned that, by the time Nelson began working aboard the *Shelton*, asbestos-containing replacement parts by an unknown manufacturer would have been added to the machinery, given the age of the ship. (The ship was built in 1945.) The judge said there was no evidence that IMO sold replacement parts to the Navy to use on the *Shelton*, and that "[e]ven though the evidence suggests the parts installed in Delaval pumps contained asbestos, IMO/Delaval cannot be held liable for asbestos in parts or products manufactured by someone else."

In addition, the judge found no duty to warn of products manufactured by third parties: "Even though Delaval's own products contained asbestos when they were manufactured, and even though Delaval may have known about the dangers of asbestos prior to Mr. Nelson's exposure, Delaval had no duty to warn of the hazards associated with another manufacturer's product over which it had no control and did not place in the stream of commerce."

The judge followed with a similar order on August 19th for Warren Pumps, saying "[t]here is no evidence showing Warren supplied to the *Shelton* asbestos-containing parts along with its pumps, nor is there evidence that Warren supplied any replacement parts used during the time he was aboard the *Shelton*."

F. SIXTH CIRCUIT TOSSES JURY VERDICT, CITES LACK OF CAUSATION EVIDENCE

Moeller v. Garlock Sealing Technologies LLC, No. 09-5670 (6th Cir. Sept. 28, 2011).

Robert Moeller worked as a pipefitter, allegedly using asbestos-containing gaskets manufactured by Garlock Sealing Technologies LLC from 1962 to around 1970. In addition, he had "significant exposure to asbestos insulation" between the years of 1962 and 1975, the appeals court said. However, Moeller's suit blamed exposure to Garlock's gaskets as the primary cause of his mesothelioma. Moeller died in 2008 from the illness. The 2009 jury found Garlock liable for failure to warn of the asbestos danger in the gaskets.

In reversing, the Sixth Circuit said "[t]he record . . . shows that Robert regularly tore out asbestos insulation during the relevant years, and that his exposure to asbestos from insulation would have been thousands of times greater than his exposure from removing gaskets." Thus, the court concluded that "[g]iven that the plaintiff failed to quantify Robert's exposure to asbestos from Garlock gaskets and that the plaintiff concedes that Robert sustained massive exposure to asbestos from non-Garlock sources, there is simply insufficient evidence to infer that Garlock gaskets probably, as opposed to possibly, were a substantial cause of Robert's mesothelioma."

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.