ASBESTOS LITIGATION ALERT

A. JOHN CRANE SEEKS REVIEW OF BOILER INSPECTION ACT PREEMPTION BY U.S. SUPREME COURT; DECISION COULD IMPACT THOUSANDS OF RAILROAD ASBESTOS CASES

John Crane, Inc. v. Atwell, No. 10-272, petition filed (U.S. Aug. 23, 2010).

Arguing pre-emption, John Crane is asking the Supreme Court to overturn a $150,000 verdict in favor of the family of Thomas Atwell. Atwell worked for 40 years as a pipe fitter for Norfolk Southern railway. He allegedly was exposed to asbestos in products used to manufacture locomotives, and died of cancer in 2006.

John Crane moved for nonsuit after the verdict, asserting that the plaintiffs' state-law-based claims are pre-empted by the Boiler Inspection Act (BIA), 49 U.S.C. § 20701. The motion was denied and the matter progressed to the Pennsylvania Superior Court. The court pointed to recent amendments to the Federal Railroad Safety Act, 45 U.S.C. § 421, and the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(4), as reserving the power to regulate health and safety matters to the states, and upheld the verdict. The Pennsylvania Supreme court refused Crane's appeal, and Crane filed a writ of certiorari to the U.S. Supreme Court.

Crane argues that the Superior Court's decision conflicts with the Supreme Court ruling in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). In that case, the Court said Congress' intent, in enacting the BIA, was "to pre-empt the entire field of locomotive equipment and safety, including the design, construction and material of locomotives and their parts." Crane also points to an "avalanche" of state and federal decisions that support their position.

Crane is asking for discretionary review by the Supreme Court given the uncertainty in the law created by *Atwell*. U.S. District Judge Eduardo C. Robreno, who administers the federal asbestos multi-district litigation cases, said recently "[t]here are several thousand cases probably, whose fate will depend upon what the Third Circuit or the United States Supreme Court decides on this issue." (Hr'g Tr. at 32:8-11, *Perry v. A.W. Chesterton, Inc.*, No. 95-1996 (E.D. Pa. July 20, 2010)).

B. FEDERAL MDL JUDGE RULES THAT PLAINTIFF'S PROOFS OF CLAIMS TO BANKRUPTCY TRUSTS ARE DISCOVERABLE

Shepherd v. Pneumo-Abex LLC, MDL No. 875, E.D. Pa. Civil No. 09-91428, 2010 WL 3431633 (E.D. Pa. Aug. 30, 2010)

Defendants Ford Motor Co. and Honeywell International, Inc. asked federal asbestos MDL Judge Elizabeth J. Hey to resolve a dispute concerning their request for information on claims made by the plaintiff to bankruptcy trusts. Plaintiff Shirley Shepherd objected to the discovery request, indicating that to provide such submissions would be tantamount to sharing settlement strategies.

Judge Hey disagreed, ruling that such proofs of claim, including work history, job duties and medical information, were analogous to a complaint, and were discoverable, as long as redactions of specific settlement offers were made.

C. THIRD CIRCUIT RULES THAT STATE-LAW-BASED CLAIMS ARE PREEMPTED BY THE BOILER INSPECTION ACT

Kurns, et al. v. A. W. Chesterton Inc. et al., No. 09-1634, 2010 WL 3504312 (3d Cir. Sept. 9, 2010)

Soon after Pennsylvania's appellate court ruled against a defendant, (see *John Crane, Inc. v. Atwell*, supra), by denying that the Boiler Inspection Act, ("BIA"),(a.k.a. "Locomotive Inspection Act" and "LIA"), 49 U.S.C. § 20701, pre-empted state law claims, a federal court in Pennsylvania found otherwise. The Third Circuit affirmed summary judgment for defendants Viad Corp. and Railroad Friction Products Corp. ("RFPC") in a case where a railroad worker allegedly contracted mesothelioma from his work as a welder and machinist for the Chicago, Milwaukee, St. Paul and Pacific Railroad. Viad was a successor in interest to a company that manufactured engine valves containing asbestos. RFPC made asbestos-containing brake pads. After several other defendants were dismissed from the action, Viad and RFPC removed the matter to the U.S. District Court and sought summary judgment. The court granted the motion, asserting that the BIA "occupies the field regulating locomotive parts used in interstate commerce."

The plaintiffs appealed to the Third Circuit, arguing that the BIA does not pre-empt claims based on failure to warn where the dispute pertains to the repair of locomotives not in service. The federal appellate court disagreed, saying that the aim of the statute was to "prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory in locomotives that would pass through many of them." The court contended that "[if] each state has its own standards for liability for railroad manufacturers, equipment would have to be designed so that it could fit these standards as the trains crossed state lines."

D. PENNSYLVANIA APPEALS COURT APPLIES "FREQUENCY, REGULARITY AND PROXIMITY" TEST; UPHOLDS $1.1 MILLION VERDICT

Moore v. Ericsson Inc. et al., Nos. 2213 EDA 2009 and 2112 EDA 2009, 2010 WL 3609381 (Pa. Super. Ct. Sept. 17, 2010)

After a jury awarded $1 million in damages in favor of laborer/electrician Donnie Moore, who died prior to trial, and the court added delay damages, lone defendant Ericsson appealed the verdict, citing several errors. Ericsson argued that the court should have granted Ericsson's motion for nonsuit and for a directed verdict. In addition, Ericsson contended that the judge should not have instructed the jury that the asbestos-containing products were defective.

Moore retired after 44 years from Kingsport Press in 2004, having worked with wire and cable manufactured by two Ericsson-owned companies. Moore claimed in a videotaped deposition that in the monthly process of cutting and stripping the cables, he was exposed to asbestos-containing dust. He explained that at these times he worked within an "arm's-length" of the asbestos dust, inhaling it. Moore subsequently died of mesothelioma.

In affirming the verdict, the Superior Court's three-judge panel said the plaintiff proved that the Ericsson wire and cable contained asbestos; that Moore inhaled asbestos fibers from these products; and that they were defective. The court said that in order to establish causation in an asbestos case, the plaintiff "must prove the exposure to asbestos caused the injury and that it was the defendant's asbestos-containing product that caused the injury." In order to meet the criteria, the court said, a plaintiff must meet the "regularity, frequency and proximity" test espoused in *Gregg v. V-J Auto Parts Co.*, 943 A.2nd 216 (Pa. 2007), which adopted the approach of *Tragarz v. Keene Corp.*, 980 F.2d 411 (7th Cir. 1992).

Quoting *Gregg*, the *Moore* court opined that "there is no bright-line distinction between direct and circumstantial evidence cases 'because this distinction is unrelated to the strength of the evidence and is too difficult to apply, since most cases involve some combination of direct and circumstantial evidence.'" (*Moore v. Ericsson*, supra, quoting *Gregg*, 943 A.2nd at 226).

Finally, the panel said the trial judge was correct in including an instruction that the products were defective: ". . .[T]he issue was not whether a product was defective because it contained asbestos; . . .[but] 'whether the defendant's particular product contained asbestos, whether the plaintiff was exposed to it, and whether such exposure caused Plaintiff's mesothelioma.'" (*quoting* Trial Court Opinion, 6/4/2009, at 9).

E. TEXAS JURY AWARDS $27.5 MILLION TO PARTS HANDLER

Johnston, et al. v. Alfa Laval Inc., et al., No. 2008-36868 (Texas 11th Jud. Dist. Ct., Harris Cty. Sept. 23, 2010)

John Crane was the lone defendant when the Harris County jury in Texas awarded $27.5 million to a parts handler, Jerry Johnston. Johnston worked at a Dow Chemical facility, replacing asbestos gasket and packing products made by John Crane and others. Plaintiffs making claims on his behalf asserted that Johnston's fatal case of mesothelioma was due to exposure to asbestos.

The jury awarded $7.5 million in compensatory damages and $20 million in exemplary damages, finding that John Crane's products were a substantial contributing factor in the development of his mesothelioma. John Crane was also found to have negligently failed to warn him of the dangers of asbestos. The jury allocated 15 percent liability to John Crane.

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.