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WHAT'S INSIDE

RULES OF EVIDENCE

Asbestos location map can be used in Hess refinery workers' suits, judge says

By Kenneth Bradley

A U.S. Virgin Islands judge has ruled that a map indicating where asbestos was found at a Hess Corp. oil refinery during a 17-year period can be admitted into evidence in cases where a plaintiff worked at the facility during the same period the map covers.

In re Asbestos, Catalyst & Silica Toxic Dust Exposure Litigation, No. SX-15-cv-96, 2018 WL 1940487 (V.I. Super. Ct., St. Croix Div. Apr. 24, 2018).

However, it would be unfairly prejudicial to admit the map for plaintiffs whose alleged duration of exposure did not substantially coincide with the map's timeframe, Virgin Islands Superior Court Judge Robert A. Molloy said in an April 24 opinion.

The decision involved 12 cases that were bellwethers for a group of about 120 plaintiffs, most of whom were former workers claiming they had been exposed to asbestos at a Hess refinery on the island of St. Croix.

The cases were grouped to manage discovery and pretrial motions.

The defendants are Hess and subsidiary Hess Oil Virgin Islands Corp.

The plaintiffs' expert, epidemiologist Martin D. Barrie, prepared a map showing places where asbestos was found in the refinery between 1982 and 1999.

The defendants moved to exclude the map from evidence, arguing it would confuse the jury because it does not show remedial steps

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EXPERT ANALYSIS

Combatting substance abuse in the legal profession

Link Cristin of Caron Treatment Centers discusses substance abuse in the legal profession and how law firms and professional organizations can help fight the problem.

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Combatting substance abuse in the legal profession

By Link Cristin
Caron Treatment Centers

The legal community has been harboring an open secret for decades: Substance abuse among practicing lawyers is rampant.

In 2016 the Hazelden Betty Ford Foundation and the American Bar Association conducted a study, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," and the results were alarming:

- 36 percent of responding attorneys were deemed hazardous drinkers (in comparison, only 15 percent of doctors could be characterized this way).
- 85 percent reported alcohol use in the past year, while the rate among the population is 65 percent.
- 5.6 percent used cocaine, crack, stimulants and opioids.
- 10.2 percent used marijuana and hash.
- 16 percent used sedatives.

While law firms and other professional legal associations have a reputation for hosting alcohol-fueled events in a "work-hard, play-hard" culture, the harsh reality is that lawyers are suffering from substance-abuse disorders and mental health issues that often have a devastating impact on themselves, their families and their workplaces.

The 2015 tragic death of a high-powered, seemingly successful lawyer from an overdose — a victim of an addiction that no one even suspected — attracted major national attention and sparked action when his ex-wife told his story in summer 2017. As she investigated his final months, she uncovered the truth about addiction in the legal community and shared her findings in The New York Times.

Nine professional law organizations and experts formed the National Task Force on Lawyer Well-Being and authored a report titled "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change."

The report acknowledged the issues and proposed steps law firms can take to address the heightened rates of depression, anxiety and addiction among lawyers. The release of the report was a defining moment for the entire profession, but there is still a long path ahead in fostering a healthy environment for lawyers. The work lies not only with national organizations but also with law firms and individual lawyers.

UNDERSTANDING THE ENABLING WORKPLACE

Some attorneys are working 60-hour weeks or more, and they are expected to be on call much of the time — especially early in their careers. Many can be classified as workaholics. When substance-abuse disorders come into play, the result is often a "high-functioning" addict, or someone who is masterful at hiding the addiction.

Natural talents for problem-solving and superior critical thinking skills — the same characteristics that help lawyers shine in the courtroom and boardroom — allow them to hide their addictions from others and convince themselves that their condition is manageable.

These "high-functioning" lawyers will put all their sober hours and energy into their work, even as the rest of their lives crumbles around them. This can go on for decades. In a typical law firm culture, colleagues and partners may not notice or acknowledge these problems as long as the work is getting done.

Like enabling families, law firms can unwittingly enable attorneys to sink further into addiction. When workplace successes are celebrated — regardless of the cost to the successful lawyer's mental health or whether colleagues and assistants covered missed appointments or minor mistakes — a struggling lawyer can perpetuate the illusion there is no problem.

While high-functioning lawyers may be able to keep up with their work responsibilities for extended periods of time, the effort it takes to maintain high performance at work while supporting an addiction at home eventually takes its toll. When they finally unravel, these attorneys can be a risk to themselves as well as their firms.

RECOGNIZING, PREVENTING AND RESOLVING PROBLEM BEHAVIORS

Firms must know how to identify addiction and mental health disorders, and should have a plan in place to encourage treatment. Like many diseases, addiction and mental health disorders will become progressively worse if left untreated and are best managed with early intervention. Firms should ensure staffers know how to monitor for signs in themselves and others.

Common signs and symptoms include:

- Isolation
- Change in regular patterns
- Disappearing at unexpected times
- Changes in physical appearance, such weight loss or gain

Link Cristin is the executive director of the legal professionals program at **Caron Treatment Centers**.

- Red eyes
- Mood swings
- Lateness
- Strained relationships
- Unsteady gait
- Increased irritation

Law firms would be wise to invest in a resource that provides training on recognizing and confronting the signs. Approaching a high functioning lawyer about their substance use disorder can be difficult.

Lawyers in these straits are often deep in denial, as their efforts to conceal the problem have convinced them as well as others that they can "handle it." Further, professional and personal reputation is vital to their self-worth and success, and they often fear that seeking help will cause clients and colleagues to think less of them.

Firms need to combat this perception by first establishing a confidential path to disclosure for both self-reporting and alerting management to colleagues who are exhibiting troubling signs.

Partners and management should stress that a healthy person is a productive person and that seeking treatment will ultimately improve workplace effectiveness. They should also make it abundantly clear that admitting to a substance-abuse disorder will not result in retaliation.

If possible, they should issue this policy in writing, in a firm newsletter or email, or hold a short meeting on it with appropriate literature. This is perhaps the most basic of recommendations, but it can have the most impact. If lawyers fail to follow through with treatment or are unable to maintain recovery, the firm then has the option to prevent them from practicing.

Supporting those who enter treatment and protecting those who express concerns about fellow lawyers are tremendous first steps. But steps must also be taken to change a workplace culture centered for decades around "working hard and playing hard."

This takes time. Firms can make small changes, such as planning events that don't revolve around alcohol, offering classes in exercise and meditation, and reducing the number of hours lawyers are expected to bill.

Personal prevention

While firms and national organizations do their part to bring about change, lawyers must also do theirs. The release of the task force's report has spurred many professionals to examine their own behaviors. The report offers tips for creating and maintaining a healthy mindset in stressful careers. The best approach for lawyers is to practice self-care and find a good work/life balance.

A good first set of steps is to disconnect from technology whenever possible; set realistic boundaries when it comes to taking on additional work and clients; take vacations and other paid time off; and make time to exercise and eat properly

Some law firms are beginning to create spaces for exercise, meditation and yoga, and to make more nutritious dietary options available. The simplest precautions are often the most important.

For lawyers who have undergone treatment and remain in recovery, it is important to remember that the risk of relapse increases when self-care lapses.

Before re-entering the workplace after treatment, recovering lawyers should have a plan for reducing stress and preventing a return to prior risky behaviors. This could include working a more reasonable number of hours and having a strategy when attending — or choosing to avoid — firm-sponsored events where alcohol will be served.

To help lawyers succeed, firms should partner with experts to create a gradual and accountable return to work.

Supporting those who enter treatment and protecting those who express concerns about fellow lawyers are tremendous first steps. But steps must also be taken to change a workplace culture centered for decades around "working hard and playing hard."

Thankfully, national organizations such as the American Bar Association are beginning to recommend standards for firms and law schools to face the issues of substance abuse and mental health.

To create healthier work environments, we need to de-stigmatize addiction, depression and anxiety. We also need to help all attorneys understand that a sound mind and body are the most important keys to a long and successful career.

TREATMENT AND SUCCESSFUL RETURN TO WORK

Addiction is a chronic disease that can be successfully treated. So why are so many lawyers choosing not to seek treatment or unable to stay sober afterward?

The first answer, as alluded to earlier, is that they deny the problem and believe they can handle the situation themselves. Typically, impaired lawyers appear high functioning for years, and career is the last part of their lives they lose to substance abuse.

Families, children, spouses, friends, activities, health and balance all are discarded before career. In the lawyers' minds, they are not addicts or alcoholics as long as they are still working. They discipline themselves to complete assignments, meet deadlines and appear robust at the office.

The 2016 survey reports that a reluctance to seek help is the primary obstacle to treatment. Lawyers with substance-abuse problems usually don't reach out unless the consequences have become serious enough to provoke assistance from others (e.g., an intervention) or to create a willingness or desperation that motivates them to seek help on their own.

Once that hurdle is cleared, the most effective route is for a professional to perform a chemical/behavioral health assessment to identify and quantify the addiction or mental health issue. Substance-abuse disorders, for example, can be mild, severe or somewhere in between.

This assessment is often coupled with a recommendation for level of care. The broad range of available options includes attending a sobriety program, meeting with an addiction therapist and attending intensive outpatient therapy.

Some people may need a residential treatment program away from work and family. Medication can also be an important part of recovery. The assessment, often conducted by a professional at an outpatient or inpatient facility, is usually free of charge. Many facilities accept insurance, so treatment is often available for attorneys with limited resources.

I have personally treated impaired lawyers for seven years now, all at residential facilities and participating in intensive outpatient therapy. My own experience is that, generally, lawyers are acutely ill and deep into their disease by the time they admit they need help.

Because of this, the appropriate level of care for them starts with residential treatment, where they are away from their jobs and families for 30 to 60 days. Otherwise, they will remain enmeshed with their careers and homes as well as the stress — and its attendant drinking and drug patterns — that is part of their addiction.

Attorneys rarely believe they can afford to be away from work for that long, but in fact they can. The world will go on. A support system to monitor the lawyer's work and clients can be quickly established, electronic devices can be strategically accessed on a limited basis during treatment.

The best way to get better is to receive intense and focused treatment, and 30 to 60 days in the context of a long career is comparable to the recovery time needed after a heart attack.

Another challenge is maintaining healthy, long-term recovery after residential treatment ends. Two elements are critical to long-term success: a robust aftercare program, and a safe and structured return to work.

As for aftercare, the treatment center will work with the individual lawyer to determine how much additional treatment is necessary. Potential recommendations include an extended period in treatment; living in sober housing for up to six months; outpatient or intensive outpatient therapy connecting with a good therapist; and attending 12-step meetings and finding a sponsor.

Recovery really begins after residential treatment, so a support system is an essential part of the continuum of care.

Not surprisingly, lawyers typically want to go back to work as soon as possible and hit the ground running. They feel bad about their prolonged absence and the caseload left behind for others to cover. They want to show they have been "fixed." This mindset is an almost-guaranteed recipe for relapse.

I counsel all my patients to return gradually to work over at least six months so they will have time for all the recovery activity necessary early on, and avoid the massive stress of jumping into the same situation they left. There should be alcohol and drug monitoring in the first year, much like that required of doctors and pilots.

Monitoring can be accomplished through the treatment center or independent organizations. It can be organized so that employers know the lawyers are not using (and can feel comfortable about them working with its clients) and lawyers do not have to worry about not being trusted.

Each of the issues raised in this overview could warrant its own in-depth analysis. Hopefully, the global picture depicted here provides a snapshot of the problems and solutions for one of the most serious threats to the profession.

Just as other diseases and impairments have risen above stigma and shame, addiction and behavioral health problems can, and should, follow suit. WJ

GOVERNMENT CONTRACTOR DEFENSE

Insulation supplier beats asbestos suit on government contractor defense

A trial court rightly granted summary judgment to the manufacturer of asbestos-containing insulation in a wrongful-death suit, in part because the product the company provided to the Navy conformed to government specifications, a California appeals court has ruled.

Tarjani et al. v. Metalclad Insulation Corp., No. A140577, 2018 WL 1870722 (Cal. Ct. App., 1st Dist. Apr. 19, 2018).

Defendant Metalclad Insulation Corp. also showed it had warned the government about the product's dangers, about which the United States was unaware, a three-judge panel of the 1st District Court of Appeal said in an April 19 opinion.

John Ball sued several companies in the San Francisco County Superior Court in February 2011, alleging he contracted asbestos-related diseases from exposure to insulation while working as a joiner and shipwright on nuclear submarines at Mare Island Naval Shipyard in Vallejo, California, from 1965 to 1972.

Metalclad supplied the Navy with Unibestos, an insulation for stainless steel piping in the reactor area of nuclear submarines, according to the opinion.

Ball raised claims for product design defect and failure to warn. He died in October 2011, his wife died in 2013 and his adult daughters have taken over as plaintiffs, the opinion said.

Metalclad moved for summary judgment on the design-defect claim based on the government-contractor defense, which shields military contractors from state tort liability for defects in military equipment supplied to the United States.

The defendant also argued it was entitled to judgment on the plaintiffs' negligent and strict liability failure-to-warn claims because it was not possible for the supplier to warn Ball about the dangers of exposure to Unibestos.

Placing a warning would not have prevented Ball's exposure, Metalclad argued, so the absence of one was not the legal cause of his injuries.

The trial court agreed, finding that, as a government contractor, Metalclad was not liable for Ball's injuries.

The plaintiffs appealed.

The appeals panel said the fact pattern here was similar to the one in *Kase v. Metalclad Insulation Corp.*, 6 Cal. App. 5th 623 (Cal. Ct. App., 1st Dist. 2016), in which Metalclad also won summary judgment in a Navy exposure suit.

The defendant presented much of the same expert and other evidence here as it presented in *Kase*, the panel noted.

As in *Kase*, the opinion said, Metalclad met the three elements of the government-contractor defense: The United States approved reasonably precise product specifications, the equipment conformed to those specifications and the supplier warned the United States about the dangers in using the product.

Summary judgment also was appropriate on the failure-to-warn claims as there were no triable fact issues regarding causation, the panel said, again citing *Kase*.

Speculation about whether a warning would have come to Ball's attention is not enough to raise a triable issue, the panel said in affirming the judgment. WJ

Related Filings:
Opinion: 2018 WL 1870722

See Document Section A (P. 17) for the opinion.

Evidence destruction shifts burden to defendant, worker's family says

A company that destroyed files on its asbestos-insulation activities should have the burden of showing its employees did not perform work near a laborer who later died of asbestos-related disease, according to his survivors.

Ganoe et al. v. Metalclad Insulation LLC, No. B282011, opening brief filed, 2018 WL 1910720 (Cal. Ct. App., 2d Dist. Apr. 13, 2018).

A defendant's spoliation of evidence requires courts to shift the burden of proof to that party, Mark Ganoe's widow, Rosemarie, and her adult children argue in a brief filed April 13 in California's 2nd District Court of Appeal.

The plaintiffs are appealing a 2017 decision in favor of insulation subcontractor Metalclad Insulation LLC in the asbestos wrongful-death and survival action they filed in the Los Angeles County Superior Court.

The family said Ganoe worked at the Goodyear Tire & Rubber manufacturing plant in Los Angeles from 1968 to 1979 in a department that processed raw rubber for vehicle tires.

Metalclad worked with asbestos-containing insulation at the plant during the installation of a machine used for rubber processing, exposing Ganoe to asbestos fibers, the suit alleged.

The defendant asserted there was no proof that the work it did at the plant occurred in the area where Ganoe worked.

The Ganoes say in their brief that the proof is missing because Metalclad intentionally disposed of files that would have shown the specific type, date and location of the work it did at the Goodyear facility.

SHIFTING BURDEN OF PROOF

Metalclad won judgment in a bench trial last year.

The plaintiffs are seeking a retrial, arguing the court should have granted their request to require Metalclad to show substantial evidence that it did not work with asbestos-containing insulation in Ganoe's department at the Goodyear plant.

Normally, a plaintiff has the burden of proving exposure to the defendant's asbestos-containing products, the plaintiffs acknowledge in their brief, citing Cal. Evid. Code § 500.

> Public policy requires a court to alter the burden of proof in the event of a defendant's spoliation of the evidence the plaintiffs need to prove their case, the appellants say.

Public policy, however, requires a court to alter the burden of proof in the event of a defendant's spoliation of evidence the plaintiffs need to prove their case, Ganoe's family says.

In *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal. 4th 1 (Cal. 1988), the California Supreme Court said, "Intentional destruction of evidence is a grave affront to the cause of justice and deserves our unqualified condemnation."

The plaintiffs also point to *Galanek v. Wismar*, 68 Cal. App. 4th 1417 (Cal. Ct. App., 4th Dist. 1999), in which a California appeals court said public policy requires a shift in the burden of proof in the event of negligent destruction of evidence.

"When the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove 'proximate causation' conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery," the *Galanek* court said.

The trial court should have applied the burden-shifting principle here, and if Metalclad removed or installed asbestos-containing insulation in Ganoe's department during the relevant time, it should be held responsible for its role in his injuries, the plaintiffs say. WJ

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Related Filings:
Opening brief: 2018 WL 1910720

See Document Section B (P. 20) for the brief.

Navy equipment makers say asbestos exposure suit belongs in federal court

A woman's wrongful-death lawsuit against two turbine makers belongs in federal court because some of her husband's alleged asbestos exposure took place on Navy vessels, the defendant companies say in a brief filed with the 9th Circuit.

Pelker v. CBS Corp. et al., No. 18-35114, opening brief filed, 2018 WL 1914047 (9th Cir. Apr. 16, 2018).

Although plaintiff Maxine Pelker dropped any claims related to her husband's asbestos exposure on Navy ships, that does not warrant remanding the suit to state court, defendants CBS Corp. and General Electric Co. tell the 9th U.S. Circuit Court of Appeals in an April 16 brief.

Pelker filed suit in Oregon's Multnomah County Circuit Court in 2016, alleging her husband, Rex D. Pelker Jr., died of lung cancer caused by occupational asbestos exposure from 1960 to 1980.

He worked at construction sites and shipyards and as an insulator, according to court records.

CBS, the successor to a company that produced Navy turbines, and GE removed the suit to the U.S. District Court for the District of Oregon.

The removal was based on the plaintiff's allegations that some of her husband's exposure took place when he overhauled Navy ships at Swan Island Shipyard in Oregon, court records said. The defendants said they could invoke the federal officer defense, 28 U.S.C.A. § 1442(a)(1), to allow for jurisdiction by the District Court.

The defense allows for "a federal forum in any case where a federal official is entitled to raise a defense arising out of his duties," the defendants said, quoting *Goncalves v. Rady Children's Hospital San Diego*, 865 F.3d 1237 (9th Cir. 2017).

In this case, the defendants said, they were acting under the direction of a federal official to the extent they might have provided asbestos-containing products to the Navy.

The Navy-related allegations were not in the complaint but in a request for information that Maxine Pelker's attorney sent to the defendants. The request sought evidence about the companies' connection to equipment used on two Navy ships that Pelker's husband worked on: the USS Henry B. Wilson and the USS Stein, according to court records.

Pelker sought remand, saying the assertion that her husband was exposed to asbestos on a Navy vessel was made in error and that she would assert no such claim.

GE and CBS opposed remand.

DISTRICT COURT REMANDS

Because the waived claim was the only basis for federal jurisdiction, U.S. District Judge Michael H. Simon remanded the suit to the Multnomah County Circuit Court.

"Absent claims that arise from exposure on U.S. Navy vessels, this case belongs in state court," Judge Simon said in a Feb. 2 opinion and order.

CBS and GE appealed to the 9th Circuit, saying Judge Simon erred in ordering remand based on Pelker's post-removal disclaimer of her intent to pursue claims based on her husband's contact with the defendants' Navy equipment.

The plaintiff is seeking damages based on her husband's injuries that are indivisible from those allegedly caused in part by exposure to Navy equipment, the opening brief says.

The federal officer defense "demands that — to the extent plaintiff's remaining claims can somehow be freed from defendants' colorable federal law-based defense despite the indivisible nature of Mr. Pelker's injury — that process must take place in a federal court, not a state court," the defendants assert.

Even if Pelker could pursue a claim based solely on non-Navy-related exposure, the District Court could have remanded only if it did not have original jurisdiction over the suit, according to the defendants.

That is not the case here because the District Court has admiralty jurisdiction, regardless of whether there are Navy-based claims, the defendants say. WJ

Related Filings:
Opening brief: 2018 WL 1914047

Shell Oil, Chevron must face strict liability claims for radioactive pipe scale

By Conor O'Brien

A Louisiana federal court has greenlighted a lawsuit alleging Shell Oil Co. and Chevron Corp. are strictly liable for injuries suffered by a worker who cleaned radioactive scale from oil and gas pipeline equipment.

Spring v. Shell Oil Co. et al., No. 17-cv-1754, 2018 WL 1914293 (M.D. La. Apr. 23, 2018).

U.S. District Judge John. W. deGravelles of the Middle District of Louisiana said plaintiff Charles Spring's allegations were adequate "at this early stage" to survive the companies' motion to dismiss.

Spring, who worked for Houma, Louisiana-based pipe descaling company Shield Coat Inc. from 1973 to 1983, filed a complaint Nov. 15 in the of East Baton Rouge Parish 19th Judicial District Court.

Spring's complaint says the cleaning process pulverized the scale and caused it to become airborne, exposing him to dangerous levels of radiation and causing a lump to develop on his thyroid gland. He says he now has breathing problems and an increased risk of cancer.

The suit further also alleges the oil companies owned some of the pipes Spring descaled, and their employees often were present to observe the cleaning process. The defendants never identified the pipe or scale as radioactive, the complaint says.

Shield Coat is not a defendant in the suit.

Shell Oil removed the suit to the District Court Dec. 11 and filed a motion to dismiss about a month later. Chevron adopted the motion, which argued that Spring's complaint failed to allege the elements of a strict liability claim under Louisiana law.

STRICT LIABILITY

According to Shell's motion, the pipes were not inherently defective — a requirement to trigger strict liability. Rather the radioactive scale was a foreign substance that temporarily made the pipes dangerous, the motion said.

Shell also argued that the pipe-descaling process itself injured the plaintiff, rather than the company's pipes, and that they were not under Shell's custody or control at the time the descaling occurred.

Judge deGravelles said Spring's claims that the scale adheres permanently to pipes until they are industrially cleaned were adequate to infer that the pipes may have been defective.

The judge also ruled that Spring's complaint "reasonably permits the conclusion" that the scale, as an inherent defect in the pipes, was a cause-in-fact of his injuries, even though Spring allows for the possibility that the cleaning process contributed to his injuries.

The complaint supports a finding that, although other entities such as Shield Coat may have controlled the pipes during the cleaning process, Shell and Chevron did so as well, Judge deGravelles ruled.

MEDICAL MONITORING

Shell's motion also challenged Spring's request for medical monitoring costs, saying they were not supported under Louisiana law.

The relevant state law, La. Civ. Code Ann. art. 2315, requires a plaintiff seeking medical monitoring costs to plead manifest physical injury or disease.

Judge deGravelles ruled that Spring's allegations of "some manifest physical injury" were sufficient to meet his "relatively light burden" to survive a motion to dismiss. WJ

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Defendants: Deborah Kuchler, Janika D. Polk, Michele H. DeShazo, Mark E. Best, Skylar B. Rudin, Joshua J. Doguet and Kristyn L. Lambert, Kuchler Polk Weiner LLC, New Orleans, LA; Michael R. Phillips, Brett P. Fenasci and Shannon S. Cobb, Kean Miller LLP, New Orleans, LA

Related Filings:
Order: 2018 WL 1914293

REUTERS/Toby Melville

REUTERS/Lucy Nicholson

The suit accuses Shell Oil Co. and Chevron Corp. of exposing a worker to dangerous levels of radiation.

South Africa miners reach $400 million silicosis settlement with mining companies

(Reuters) – South African gold producers agreed to a 5 billion rand ($400 million) class action settlement May 3 with law firms representing thousands of miners who contracted the fatal lung diseases silicosis and tuberculosis, officials said.

The most far-reaching class action settlement ever reached in South Africa follows a long legal battle by miners to win compensation for illnesses they say they contracted over decades because of negligence in health and safety.

The six companies involved had already set aside the settlement amount in provisions in previous financial statements and it should not affect future earnings, unless the number of claimants who come forward exceed the current provisions.

Estimates for the number of potential claimants range from tens of thousands to hundreds of thousands. Three smaller gold producers are not party to the settlement and the class action against them will continue.

The class-action suit was launched six years ago on behalf of miners suffering from silicosis, an incurable disease caused by inhaling silica dust from gold-bearing rocks.

It causes shortness of breath, a persistent cough and chest pains and also makes people highly susceptible to tuberculosis.

Almost all the claimants are black miners from South Africa and neighboring countries such as Lesotho, whom critics say were not provided with adequate protection during and after apartheid rule ended in 1994.

The settlement is broken into three parts and a trust will have 12 years to track down the claimants and distribute the funds — no easy task as many are in remote rural areas and may do not have proper medical and other records.

Out of the 5 billion rand, 845 million rand will be used to cover the administration expenses of the trust over the 12 years and 370 million rand will be paid to the law firms.

The remainder is for compensation and the final total will depend on the number of claims that are processed.

"If there are more claimants the actuaries have estimated, then that 5 billion number could increase. If there are less then it will decrease," Graham Briggs, who chaired the Occupational Lung Disease Working Group, a unit put together by the six companies, told a news conference.

In addition to the anticipated settlement payout, there is also close to 4 billion rand in a compensation fund which companies have been contributing to for years.

The companies involved are Harmony Gold, Gold Fields, African Rainbow Minerals, Sibanye-Stillwater, AngloGold Ashanti and Anglo American South Africa. The latter no longer has gold assets but historically was a bullion producer.

SAME BALL PARK

"Our numbers differ slightly from the industry, we think there are more claimants and that the numbers will be higher than what they anticipate. While we differ slightly with the industry we think it's all in the same ball park," said Richard Spoor, one of the lawyers representing the mine workers.

It is the first class-action settlement in South Africa involving so many companies and claimants.

"The settlement is the product of commercial negotiation and compromise, but we believe this is a beneficial settlement," said Carina du Toit, a lawyer with the Legal Resources Centre, one of the law groups representing the workers.

Abrahams Kiewitz Inc. and Richard Spoor Attorneys and two other companies also represented the mine workers.

The parties said the compromise settlement was preferable for all concerned rather than a lengthy and expensive litigation process, and would enable the claimants to receive compensation and relief for their conditions more quickly.

The settlement still needs approval by the Johannesburg High Court before being implemented.

In recent years the gold mining industry has taken precautions to prevent its workers from contracting silicosis, including the use of masks and other measures. WJ

(Reporting by Ed Stoddard and Patricia Aruo; editing by James Macharia and Richard Balmforth)

No coverage owed to installer of toxic drywall, judge says

By Rae Theodore

An excess insurer does not owe coverage to a subcontractor for lawsuits stemming from its installation of Chinese-made defective drywall at a Florida luxury condominium development, a federal judge in Miami has ruled.

Peninsula II Developers Inc. et al. v. Westchester Fire Insurance Co., No. 09-cv-23691, 2018 WL 1957815 (S.D. Fla. Apr. 25, 2018).

Ruling in the 9-year-old case, U.S. District Judge Patricia A. Seitz of the Southern District of Florida said the insurer satisfied its policy obligations when it defended and indemnified the subcontractor in an earlier state court action.

DEFECTIVE DRYWALL

According to the judge's order, Peninsula II Developers Inc. hired Gryphon Construction LLC to build a 223-unit luxury condominium development in Aventura, Florida. Gryphon subcontracted with Skyline Systems Inc. to supply and install drywall.

American Home Assurance Co. provided primary commercial general liability coverage for the construction of the project from May 2005 to March 2008, and Westchester Fire Insurance Co. provided excess liability coverage, according to the order. Peninsula was the named insured and Gryphon and Skyline were also listed as insureds, the order said.

Skyline installed Chinese drywall with approval from Peninsula and Gryphon, according to the order.

"At the time of the installation, no one knew or should have known that the drywall was defective," the order said.

Since early 2009, more than 10,000 lawsuits have alleged defective drywall made in China corroded electrical wiring and copper piping in homes and emitted sulfur dioxide and hydrogen sulfide that created a rotten-egg smell and sickened some people.

While the suits have been filed nationwide, the claims are concentrated in the South, especially in Florida and Louisiana, which were hit hardest by drywall shortages following numerous hurricanes between 2005 and 2008. Builders normally use drywall manufactured in the United States, but the shortages prompted companies to go to China for supplies.

Following complaints in February 2009 by Aventura condominium unit owners for drywall-related property damage and health issues, Peninsula confirmed that the drywall used in the project came from China. Peninsula demanded that Gryphon remedy the situation and defend and indemnify it with respect to all claims, according to a 2009 declaratory judgment complaint filed by American Home in Florida federal court.

$5.6 MILLION SETTLEMENT

In response Gryphon and Skyline filed counterclaims against American Home and third-party complaints against Westchester for indemnification.

In May 2011 Peninsula sued Gryphon and Skyline in the Miami-Dade County Circuit Court for claims related to the drywall. American Home settled the next month with Peninsula, Gryphon, Skyline and others and paid out its policy limit, the order said.

Pursuant to the terms of the settlement, American Home paid Peninsula $1.6 million for defense costs, as well as the $4 million policy limit, the order said. The $4 million was paid on behalf of Skyline to settle certain claims asserted by Peninsula stemming from the Chinese drywall, the order said.

According to the order, Westchester subsequently provided a defense to Gryphon and Skyline in the state court case, and judgment was entered against Gryphon and Skyline.

Westchester provided Skyline with a defense in a second state court action that had been filed against it, and again judgment was entered against Skyline, the order said. Westchester then negotiated a settlement of both judgments entered against Skyline and paid that amount, according to the order.

As a result of the settlement, Peninsula dropped its claims against Westchester in the federal lawsuit, and the remaining parties filed amended pleadings, which resulted in Peninsula, Gryphon and Skyline becoming plaintiffs in the case and Westchester becoming the defendant, the order said.

In an amended pleading Skyline sought a declaratory judgment and asserted causes of action for breach of contract and bad faith. The subcontractor sought $3 million in lost profits.

Westchester moved for summary judgment.

NO INDEMNITY OBLIGATION

Judge Seitz agreed with Westchester that the June 2011 settlement agreement did not give rise to an indemnity obligation because it did not release any of Skyline's liability. Skyline released any claim to unpaid money from the work it had performed but remained liable for damage related to its installation of the Chinese drywall, she said.

"Once judgments were actually obtained against Skyline in the state court suits, Westchester fulfilled its indemnity obligation by settling the state court judgments and paying the negotiated settlement amount," Judge Seitz said.

The judge added that Skyline fell short in establishing that the damages it seeks are covered by the Westchester policy.

"Westchester's policy language limits its insuring obligations to that which is covered by the American Home policy — money ordered by a court," she said.

Judge Seitz pointed out that the June 2011 settlement agreement is not a court order.

Absent coverage, Skyline's bad-faith claim fails, she said. WJ

Related Filings:
Order: 2018 WL 1957815

Monsanto develops product to deactivate controversial farm chemical

(Reuters) – Monsanto Co. is launching the first product that deactivates a controversial weed killer inside spraying equipment after it is used, the company said April 24, its latest attempt to prevent unintended crop damage associated with the herbicide.

The product aims to stop farmers from accidentally applying traces of the herbicide, known as dicamba, on crops that cannot tolerate it when the chemical's residue remains in spraying equipment.

Growers across the U.S. farm belt said last summer that dicamba herbicides, which are also sold by BASF SE and DowDuPont Inc., vaporized and drifted away from where they were sprayed on soybeans and cotton that Monsanto engineered to resist the chemical. This damaged millions of acres of other crops, triggering lawsuits against the manufacturers.

Monsanto has blamed much of last year's field damage on improper applications, including by farmers who did not adequately clean spraying equipment. The company has said its dicamba-based herbicide is safe when used properly.

The product that deactivates dicamba will be launched in the coming weeks, as U.S. farmers advance crop plantings, said Ryan Rubischko, Monsanto's dicamba portfolio lead.

"Having technologies like this, it helps farmers be able to really just focus in further on ensuring their sprayer systems are clean and preventing this from happening," he said about equipment contamination.

Monsanto and a company called Adjuvants Unlimited tested the product, which does not have a name yet, over the past few years, according to a statement.

REUTERS/Brendan McDermid

Weed experts doubted it would do much on its own to prevent the type of crop damage associated with dicamba in 2017.

"That's not going to solve the problem," said Bob Hartzler, an agronomy professor at Iowa State University.

Last year's problems were more commonly associated with dicamba evaporating in a process known as volatilization and drifting, experts said.

In Indiana, contaminated spraying tanks were linked to 3 percent of complaints about crop damage associated with dicamba, according to a Purdue University presentation.

"That did not make but just a small fraction of the claims," said Fred Whitford, director of Purdue's pesticides program.

Monsanto, which is being acquired by Bayer AG, is banking on its dicamba-based herbicide and soybean seeds engineered to resist it to dominate soybean production in the United States, the world's second-largest exporter.

Facing complaints last year, the company proposed changes to the herbicide's label instructions that the U.S. Environmental Protection Agency approved for 2018. WJ

(Reporting by Tom Polansek; editing by Tom Brown)

West Virginia high court keeps lid on suit against governor's coal companies

By Michael Nordskog

West Virginia's Supreme Court of Appeals has affirmed a lower court decision that coal mine operator Dynamic Energy Inc. and parent company Mechel Bluestone Inc., which are owned by Gov. Jim Justice, did not contaminate 16 families' water wells.

Belcher et al. v. Dynamic Energy Inc. et al., No. 17-168; Dynamic Energy Inc. et al. v. Belcher et al., No. 17-169, 2018 WL 1701419 (W. Va. Apr. 5, 2018).

The state high court rejected the families' arguments that jury interference and witness intimidation, among other issues, justified a new trial of the matter in Wyoming County Circuit Court.

A jury found in 2016 that Dynamic and Bluestone were not responsible for high concentrations of heavy metals found in well water close to the Coal Mountain mine near Clear Fork, West Virginia.

Dynamic operates the mine, which is owned by Bluestone. Both companies are owned by the Republican governor, according to an April 9 story in the West Virginia Record.

The Supreme Court also remanded the defendants' related appeal, saying the Circuit Court should have dissolved an injunction requiring replacement water service for the plaintiffs' domestic use.

CITIZENS SUE OVER WELL CONTAMINATION

Clifford and Rachel Belcher and other individual plaintiffs sued the defendants in 2014, saying they had discovered lead and arsenic in their well water and attributing the contamination to surface mining activities atop nearby Coal Mountain.

After the Circuit Court consolidated the suits, the plaintiffs filed an amended complaint asserting claims including property damage, public nuisance, trespass, negligence and violations of the West Virginia Surface Coal Mining and Reclamation Act, W. Va. Code Ann. § 22-3-1.

In December 2014 the Circuit Court issued a preliminary injunction under Section 22-3-24 of the SCMRA, requiring the defendants to provide replacement water to the plaintiffs until issues of liability had been resolved.

The Circuit Court held a trial more than a year later and the jury returned a verdict in favor of the defendants in May 2016.

In January 2017 the court denied the plaintiffs' motion to set aside the verdict and hold a new trial. It also rejected the defendants' request to dissolve the injunction.

The parties separately appealed these rulings.

NO JURY INTERFERENCE OR WITNESS INTIMIDATION

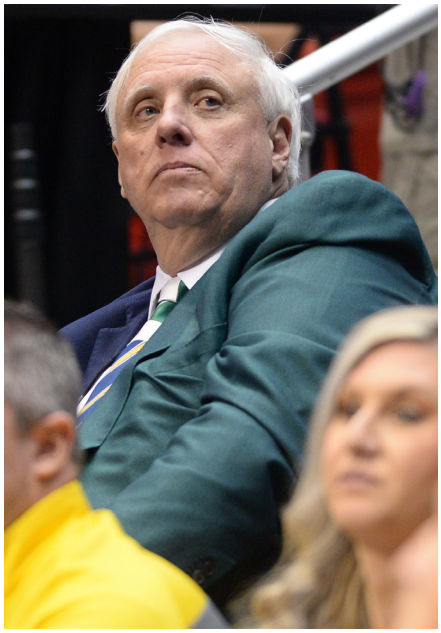
The Supreme Court rejected the plaintiffs' argument that United Mine Workers of America members attending the trial interfered with the jury and intimidated one of the plaintiffs' potential witnesses.

The union members' alleged discussion of evidence as jurors walked past them did not support the plaintiffs' request for a mistrial declaration. "We must assume that a jury has the fortitude to withstand this type of public scrutiny," the court said, quoting *State v. Richey*, 298 S.E.2d 879 (W. Va. 1982).

The plaintiffs also said the union members caused one of their potential witnesses, a former Dynamic employee, to change his story about having dumped mine slurry outside designated areas.

The Supreme Court found the claim of witness tampering to be unsupported, however, because the former employee did not testify and nothing in the trial record indicated that his account had actually changed.

The plaintiffs also unsuccessfully argued that a juror should have been disqualified due to his relationship with a Dynamic representative. The court rejected this contention because the plaintiffs' lawyers had not raised the issue during jury selection.



REUTERS/Orlando Ramirez

Finally, the court said the weight of the evidence supported the verdict, finding no indication of prejudicial error in the record or that "substantial justice has not been done," quoting *In re State Public Building Asbestos Litigation*, 454 S.E.2d 413 (W. Va. 1994).

INJUNCTION SHOULD HAVE BEEN DISSOLVED

The Supreme Court reversed the Circuit Court's decision not to dissolve the water-service injunction after the defendants were absolved of liability for contaminating the wells.

The Circuit Court had ruled that legally mandated water replacement cannot be discontinued until the deadline for filing an appeal with the West Virginia Supreme Court of Appeals had passed or the appeal had been resolved, citing Section 22-3-24(h) of the SCMRA.

The Supreme Court said the statute also establishes that replacement water service

ends when West Virginia's Department of Environmental Protection authorizes discontinuation of service, which it did by letter in July 2016.

However, because the defendants stopped providing water to the plaintiffs in December 2017 while the preliminary injunction was still in effect, the Supreme Court remanded to the Circuit Court for further proceedings over the defendants' noncompliance with the court's order. WJ

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Related Filings:
Supreme Court of Appeals opinion: 2018 WL 1701419
Respondents' brief: 2017 WL 6611785
Circuit Court June 2016 opinion: 2016 WL 4441690
Circuit Court January 2017 opinion: 2017 WL 6551055
Belcher complaint: 2014 WL 12503144

Hess

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the defendants took to abate the asbestos beginning in the mid-1980s.

Without the abatement records, "Barrie's map admittedly misrepresents the asbestos found in the refinery at any given point in time," the defendants said in their motion to exclude.

The plaintiffs countered that the map should be admitted because the defendants' tests showed that asbestos was found in nearly every corner of the facility, according to the opinion.

The map is based on Hess' own data, and its value outweighs any possible prejudice to the defendants, the plaintiffs argued.

FIRST-IMPRESSION EVIDENTIARY QUESTION

In deciding how to rule, Judge Molloy looked to Virgin Islands Rule of Evidence 1006, which is based on Federal Rule of Evidence 1006.

> Virgin Islands Rule of Evidence 1006 says a proponent may "use a summary, chart or calculation to prove the content of voluminous writings, recordings or photographs that cannot be conveniently examined in court."

No other Virgin Islands court previously had construed the rule, which makes the issue one of first impression, he noted.

Under the rule, a proponent may "use a summary, chart or calculation to prove the content of voluminous writings, recordings or photographs that cannot be conveniently examined in court," the judge said.

Judge Molloy noted the rule speaks to charts, not maps, but courts have found that maps are covered by the equivalent federal rule.

He added that since the cases would be tried individually, the map's admissibility should be decided on a case-by-case basis.

For example, in the case of a plaintiff who claimed exposure to asbestos at the refinery for 40 years, the map should be admitted, the judge said.

However, in the case of a plaintiff who began working there in 1989, after remediation measures had begun, the map would contain information prejudicial to the companies that should not be admitted, he said.

Judge Molloy therefore denied the defendants' motion in part and granted it in part. WJ

Related Filings:
Opinion: 2018 WL 1940487

CASE AND DOCUMENT INDEX