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U.S. Supreme Court Reverses Ahearn Class Settlement In 7-2 Decision

WASHINGTON, D.C. — The U.S. Supreme Court in a 7-2 decision June 23 reversed and remanded the Fifth Circuit U.S. Court of Appeals' decision affirming the global class action Ahearn settlement of Fibreboard Corp.'s asbestos personal injury liabilities (Esteban Ortiz, et al. v. Fibreboard Corp., et al., No. 97-1704, U.S. Sup.).

(Text of Decision in Section A. Mealey's Document #01-990702-101.)

Writing for the majority, Justice David H. Souter said the \$1.5 billion settlement did not meet the requirements of Federal Rule of Civil Procedure 23 (b)(1)(B) for certifying a mandatory settlement class on a limited fund theory. Certification failed on the issues of inclusiveness of the class and fairness of distributions to class members, said the justice.

The class definition did not include those with present and future claims, such as people with unfiled present claims, people with present claims withdrawn without prejudice or people who previously settled with Fibreboard while retaining the right to sue upon development of an asbestos-related disease.

"It is a fair question how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class," the majority opinion said, "but there can be no question that such a mandatory settlement class will not qualify when in the very negotiations aimed at a class settlement, class counsel agree to exclude what could turn out to be as much as a third of the claimants. . . ."

Regarding intraclass equity, the settlement treats claims of the immediately injured the same as those with projected future injuries, the opinion said. "The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen," wrote Justice Souter.

The justice noted that the settlement provided for a fund smaller than the assets available for payment of the mandatory class members' claims. "With Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members," he wrote.

Also addressed were the "potential for gigantic fees" inherent in class action settlements and conflict of interest. "Any assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims," wrote Justice Souter.

"The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in Amchem resulting from divergent interests of presently injured and future claimants," he added.

Dissenting were Justices Stephen G. Breyer and John Paul Stevens. Justice Breyer wrote he would uphold the Fifth Circuit's finding that settlement could be certified under Rule 23(b)(1)(B) "as long as there was a significant 'risk' that the total assets available to satisfy the claims of the class members would fall well below the likely total value of those claims. . . ."

Justice Breyer pointed out that asbestos litigation is unique in the volume of claims, not the nature, and that many plaintiffs may not have an alternative to a class action settlement because of the cost and length of litigating individual claims.

\$1.5 Million Settlement Reached In Radiation Class Action Suit

DAYTON, Ohio — Employees at a nuclear weapons production facility, the facility contractors and the U.S. Department of Energy have agreed this month to settle a radiation exposure class action suit for more than \$1.5 million, which includes medical insurance for any disease related to the site (Katherine E. Levell v. Monsanto Research Corp., et al., No. C3-95-312, S.D. Ohio, Western Div.).

(Text of Settlement Agreement in Section C. Mealey's Document #15-990625-107.)

Katherine E. Levell, a representative of the class, asserted claims for negligence, fraud, negligence per se, and injunctive relief against Monsanto Research Corp. (MRC) and EG&G Mound Applied Technologies Inc. Level maintained before the U.S. District Court for the Southern District of Ohio, Western Division that the defendants failed to properly monitor workers' radiation exposure and concealed information regarding workplace hazards and worker exposures to radioisotopes.

The class includes two subclasses: (1) Class A consists of all people presently employed by EG&G at the Mound facility who were exposed to any radioactive element or isotope and (2) Class B consists of all people who formally worked at the Mound facility for either EG&G or Monsanto who were exposed to any radioactive element or isotope.

MRC was the prime contractor at the Mound facility from the date it opened in 1948 through 1988. EG&G Mound was the prime contractor at the Mound facility from 1988 through 1997. MRC and EG&G deny any wrongdoing and believe that they have affirmative defenses to each of the claims alleged against them. The Mound facility has always been owned and controlled by the U.S. Department of Energy (DOE) and its predecessor agencies.

Diseases Defined

Lists of occupational diseases as defined by the settlement agreement include leukemia, female breast cancer, thyroid cancer, bladder cancer, bone cancer, lung cancer, pancreatic cancer, digestive cancer, multiple myeloma, non-hodgkins lymphoma, pharynx oral cancer and brain/nervous system cancer.

Under the terms of the settlement agreement, DOE will provide primary insurance to cover the cost of medical care services for any disease related to the site. DOE will provide initial funding not to exceed \$200,000 to cover the anticipated costs of coverage for the first three years of the policy, according to the agreement. After that time, coverage will continue to be provided subject to availability of funds.

The settlement terms also stipulate that DOE will enhance the Radiation Protection Program that was in place at the Mound facility in June 1996 by installing personnel contamination monitors, among other things. Additionally, DOE agreed to provide up to \$250,000 for an independent expert to recommend improvements as necessary.

"DOE and defendants agree to pay a lump sum payment not to exceed \$926,000 to establish a 'Settlement Fund' that shall be distributed to members of Group 2 of settlement subclass A and for incentive fees for class representatives as approved by the court. Group 2 of settlement subclass A consists of the active prime contractor employees as of March 1, 1997," the agreement says. "Class representatives will receive an amount not to exceed \$16,500 per person for their time, effort, and expenses as class representatives."

DOE and the defendants also agreed to pay a lump some payment of \$180,000 for attorney fees and \$32,000 for administrative costs.

A fairness hearing has been scheduled for July 2.

The DOE is represented by Mary Anne Sullivan of the Office of General Counsel for the DOE in Washington, D.C. MRC and EG&G are represented by Richard D. Schuster of Vorys, Sater, Seymour and Pease in Columbus, Ohio. The plaintiffs are represented by Rueben Guttman of Provost & Umphrey in Washington, D.C., Robert Laufman of Laufman, Raugh and Gerhardstein in Cincinnati, John M. Elliott and Timothy T. Myers of Elliot, Reihner, Siedzikowski & Egan in Blue Bell, Pa., and Kathleen Hostetler of Oil, Chemical and Atomic Workers International Union of Lakewood, Colo.

**Calif. Proposed Class Asserts
Medical Monitoring Claim
In Chemical Exposure Suit**

LOS ANGELES — California residents filed a proposed class action suit on April 9, arguing that a spontaneous chemical explosion caused personal injury and property damage and they are entitled to the establishment of a medical monitoring program (Manuel Santana, et al. v. Santa Clarita Greenwaste and Construction Recycling Facility, et al., No. PC023279, Calif. Super., Los Angeles Co.).

Manuel Santana says that he was diagnosed as having excessive levels of arsenic and other hazardous substances in his blood, bone and tissue. The proposed class action includes all people who have been exposed to hazardous contaminants requiring medical monitoring, and people in the Santa Clarita Valley, Calif., who claim that their property has been damaged.

Defendants include Santa Clarita Greenwaste and Construction Recycling Facility, Ray & Sons Recycling Co., Santa Clarita Greenwaste Inc., Henry Arklin, Chevron Oil, County of Los Angeles, Calif., and City of Santa Clarita, Calif.

Santana claims that one or more stockpiles maintained at the recycling facility spontaneously combusted in August 1998 and released arsenic, lead, chloromethane, phenols, benzene, and toluene into the soil, air, surface water runoff and groundwater.

Additionally, Santana maintains that in September of 1998 there was a second spontaneous combustion at the facility, which released more hazardous contaminants. Santana further alleges that as a result of the hazardous contaminant releases, contamination plumes have migrated through various areas of neighborhoods of Santa Clarita City.

Claims Asserted

The complaint, filed in the California Superior Court for Los Angeles County, asserts claims of negligence, continuing trespass, permanent trespass, negligence per se, absolute liability for ultrahazardous activity, fraudulent concealment, battery, unfair business practices, and breach of mandatory duties.

"Plaintiffs and all others similarly situated have been, and continue to be, significantly exposed to hazardous, toxic, and carcinogenic substances and materials. By reason of this exposure, plaintiffs and all others similarly situated have suffered a reasonable and significant risk of contracting serious latent diseases including, but not limited to, cancer. As a result, medical monitoring and surveillance are reasonable and medically necessary to protect the present and future health of plaintiffs," the complaint asserts.

Santana adds that the defendants' acts and omissions constitute numerous and repeated violations of state and federal environmental and health statutes and regulations, including the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the California Health and Safety Code and the California Fish and Game Code.

Santana seeks an unspecified lump sum for the medical monitoring fund, compensation for property damages and punitive damages.

The plaintiffs are represented by Barry I. Goldman, David A. Rosen and Christopher P. Ridout of Rose, Klein & Marias in Los Angeles.

[Editor's Note: The complaint is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-017. 55 pages. Subscriber price: \$1 per page, plus \$15.]

Defendants In Redlands Litigation Seek To Overturn Medical Monitoring, Punitive Damage Classes

SAN DIEGO — A state court judge erred in certifying medical monitoring and punitive damage classes in a groundwater contamination case because there is no evidence establishing the existence of an ascertainable class, individual issues predominate, and the class representatives are inadequate, three defendants say in a petition for review to the Fourth District California Court of Appeal (Lockheed Martin Corp., et al. v. Superior Court of California, Calif. App., 4th Dist., Div. 2; See 6/4/99, Page 12).

Lockheed Martin Corp., Highland Supply Corp. and FMC Corp. filed a petition for alternative and peremptory writs of

mandamus, prohibition and review on June 3.

In April, San Bernardino County Superior Court Judge Ben T. Kayashima, ruling in the Redlands Tort Litigation, certified medical monitoring and punitive damage classes of all individuals within a defined area of the City of Redlands, Calif., who were exposed to water contaminated with trichloroethylene, ammonium perchlorate or other chemicals "at levels at or in excess of the dose equivalent" of regulatory maximum contaminant levels "or in excess of the safe dose" for some part of a day, for more than half a year, for one or more years from 1955 to the present.

The defendants say this action is not an exception to the California Supreme Court's pronouncement in Jolly v. Eli Lilly & Co. (44 Cal. 3d 1103, 1123 [1988]) that mass tort, personal injury actions are frequently not appropriate for class certification due to the variety of individual issues presented.

"The proliferating and predominating individual issues extant in personal injury claims are multiplied in a claim seeking medical monitoring damages for up to an estimated 50,000 to 100,000 individuals because each claimant must satisfy the strict and highly individualized standards set forth in Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965 (1993) and Gutierrez v. Cassiar Mining Corp., 64 Cal. App. 4th 148 (1998) before liability to pay for medical monitoring of an individual may be imposed on a defendant," the companies say.

Additionally, even before the Potter issues can be reached, thousands of highly individualized inquiries, such as determination of dosage, must be conducted to ascertain class membership, the defendants argue.

The trial court, the defendants say, certified the class based upon an erroneous conclusion that proof of dosage is unnecessary at this stage of the proceedings. Not only did plaintiffs present no evidence of dosage, but defendants presented uncontradicted evidence that most of the geographic class area received no contaminated water from taps and that it was highly doubtful that any identifiable class member received contaminated water for as much as half a year during the 40-year period, defendants say.

Inadequate Representatives

The defendants also point to the alleged inadequacy of the class representatives who, unlike most of the class members, are simultaneously pursuing individual damage claims against the defendants.

"Given that medical monitoring is simply part of the damages for invasion of a single primary right, the actions of the class representatives in this mandatory class will likely have the effect of waiving any other damages claims potentially possessed by members of the class," the defendants say, arguing that such "claim splitting" violates California Supreme Court precedent.

In addition, certification of the punitive damage class cannot stand because the medical monitoring class was improperly certified and punitive damages can only be assessed after compensatories have been awarded, the companies argue. Furthermore, since this litigation involves dissimilarly situated plaintiffs, several defendants and conduct occurring over a 40-year period, "the analysis required under California law before punitive damages can be properly imposed cannot be performed on a class-wide basis."

The trial court's certification is unprecedented in the state and poses a severe risk of harm to litigants as well as to residents of the class area and the state's justice system, the defendants contend.

"Government authorities have identified a large number of ground water plumes in the State," the defendants say. "If this Court does not promptly address the trial court decision here, it is obvious that the plaintiffs' bar will seek to replicate these 'medical monitoring classes' throughout the State."

Lockheed Martin and Highland Supply are represented by Robert S. Warren, Robert W. Loewen and Daniel S. Floyd of Gibson, Dunn & Crutcher of Los Angeles and Linnea Brown of Holme Roberts & Owen of Denver. FMC is represented by John D. Dwyer and Anthony S. Thomas of Bowman & Brooke of Torrance, Calif.

[Editor's Note: The defendants' petition is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-027. 49 pages. Subscriber price: \$1 per page plus \$15.]

New York Building Owners Face \$8 Billion In Claims For Mold, Fungi Contamination

NEW YORK — Two New York apartment building owners face approximately 125 new lawsuits which seek \$8 billion and assert that mold and fungi contamination caused personal injury and property damage, plaintiff sources told **Mealey Publications**.

Among those suits is a complaint filed on behalf of a family which seeks more than \$136 million and claims that fungi and mold have damaged personal property and created conditions which required detoxification (Ellia Munoz, et al. v. Henry Phipps Plaza South, et al., No. 109895/99, N.Y. Sup., N.Y. County).

(Text of Munoz Complaint in Section B. Mealey's Document #15-990625-103.)

Ellia Munoz and members of his family claim that from 1996 through the present, his apartment has had continuing water leaks, toxic mold and fungi.

Defendants Phipps Plaza South (Plaza South) and Phipps Housing Services Inc. own the apartment building. Plaza South operated, maintained, managed and controlled the common areas, the building structure, and was responsible for the overall building maintenance. Phipps Housing was responsible for the maintenance and upkeep of the building.

In his May 12 complaint, Munoz maintains that the Phipps defendants have been notified of the water and fungi conditions. Munoz further claims that the fungi and mold conditions have caused interior structural damage in the apartment, created conditions which required detoxification and damaged personal property.

Munoz asserts negligence, carelessness and recklessness claims against the Phipps defendants. Other claims against the Phipps defendants include personal injury, loss of consortium, pain and suffering, and reimbursement for money spent on health care. The total amount sought on behalf of the Munoz plaintiffs is more than \$136 million, with \$50 million designated as punitive damages.

According to the source, the 125 complaints are filed on behalf of families that include an average of three to five people. Among the personal injury claims are approximately 100 asthma claims, the source said. The source added that there is a possibility that the complaints could be consolidated for trial purposes, but said that there is no movement towards class certification.

The plaintiffs are represented by Steven F. Goldman of Goldman & Goldman in New York and Paul H. Maloney in New York. Counsel for the Phipps defendants include Nancy Ledy-Gurren of Leddy-Gurren & Blumenstock in New York.

\$818,390 Awarded On Apartment Residents' Mold Contamination Claims

Delaware

Case name and number: Elizabeth Stroot, et al. v. New Haverford Partnership, et al., No. 95C-05-074 HLA

Plaintiff(s)/Decedent(s): Elizabeth Stroot, Joletta Watson, Angela McCarthy, Lois Schindler

Verdict(s): \$818,390 total compensatory damages after reductions for comparative negligence, which ranged from 22 percent to 41 percent

(Text of Original Verdict Form in Section E. Mealey's Document #15-990625-110.)

Date: May 11

Court: Del. Super., New Castle Co.

Judge: Haile L. Alford

Defendant(s): New Haverford Partnership, MidAtlantic Realty, Edward Davidson, Richard Deery

Claim: personal injuries and breach of habitability caused by mold and fungi contamination of apartments

Background: Plaintiffs are former residents of a low-rent, three-story garden apartment complex in Delaware. The apartments had a long history of various water problems and the property's owner and management company failed to properly remediate the water problems, which resulted in pervasive microbial contamination, plaintiffs alleged.

Stroot and Watson had personal injury claims, alleging the mold and fungi contamination made them sick. Stroot alleged aggravation of pre-existing asthma, cognitive deficits and osteopenia, which she blamed on her use of prednisone to control her asthma. Watson alleged she suffered from bronchitis and immune system abnormalities.

Stroot, McCarthy and Schindler brought landlord-tenant claims, asserting the contamination made the apartments uninhabitable.

Defense: Disputing causation, defendants argued Watson was not sick and conditions at the apartment complex did not worsen Stroot's asthma or cause her cognitive deficits. Defendants also filed Daubert-type challenges to plaintiffs' expert causation testimony. Defendants argued the apartments were not uninhabitable and were not contaminated. Also, they asserted the plaintiffs failed to establish that defendants breached a local standard of care under the Landlord-Tenant Code.

Plaintiff Expert(s): Eckardt Johanning, M.D., occupational and environmental medicine, Albany, N.Y.; Cecile Rose, M.D., internal medicine, pulmonologist, occupational and environmental medicine, Denver; Chin S. Yang, Ph.D., mycologist, Cherry Hill, N.J.; Michael Lynn, architect, Washington, D.C.; Wayne Gordon, Ph.D., neuropsychologist, Mt. Sinai Hospital, New York

Defense Expert(s): Arnold Lentnek, M.D., infectious disease specialist, Atlanta; Gerald Cooke, Ph.D., forensic neuropsychologist, Plymouth Meeting, Pa.; Paul Epstein, M.D., pulmonologist, Philadelphia; Fred Quercetti, expert on building ownership and management, local standard of care and fact witness, Claymont, Del.

Other: Deery and Davidson were partners in New Haverford Partnership, which owned the apartment complex. MidAtlantic Realty was the management company. The claims of two other plaintiffs were withdrawn on the first day of trial.

The jury found for the plaintiffs on claims of common law negligence, breach of lease agreement, and violations of the New Castle County Housing Code and the Landlord-Tenant Code. The jurors found the defendants' negligence proximately caused Stroot's and Watson's personal injuries, awarding them \$1 million and \$40,000, respectively. The jurors, however, failed to award Stroot, McCarthy or Schindler any damages for breach of lease agreement. Finding for the plaintiffs on claims that the defendants failed to properly maintain the rental units, the jury awarded Stroot \$5,000, McCarthy \$1,500 and Schindler \$3,700.

The jurors assessed contributory negligence as follows: Stroot and Watson, 22 percent each; Schindler, 35 percent; McCarthy, 41 percent. The jury did not award punitive damages.

Defendants filed post-trial motions to reduce the amount of the damages awarded to Stroot and Watson. A source said the defendants will also appeal the whole verdict.

Plaintiff Attorney(s): Guy Keith Vann of New York, Susan Parker and Kathleen Miller of Smith, Katzenstein & Furlow of Wilmington, Del.

Defense Attorney(s): James F. Kipp and William Doerler of Trzuskowski, Kipp, Kelleher & Pearce of Wilmington, Del.

\$43.7 Million Settlement Reached In Alabama

PCB Contamination Suit

PELL CITY, Ala. — Alabama property owners who claimed that polychlorinated biphenyl (PCB) contamination diminished the value of their property reached a \$43.7 million settlement June 9 with the owners of a manufacturing facility (Thomas C. Dyer, et al. v. Monsanto Co., et al., No. CV-93-250, and Shelter Cove Management, et al. v. Monsanto Co., et al., No. CV-94-50PH, Ala. Cir., St. Claire Co.).

Class representative Donna N. Rosendahl and other riparian property owners claim that PCB contamination caused diminution of property value and interfered with the use and enjoyment of the property. Rosendahl asserted claims based upon theories of negligence, wantonness, international misconduct, public and private nuisance and strict liability. Rosendahl also asserted a punitive damages claim.

Settling defendants are Monsanto Co., Solutia Inc. and William L. DeFer, who is a former plant manager (collectively, Monsanto). Solutia was formerly the chemical businesses of Monsanto. The PCB contamination stems from the manufacturing facility and adjoining properties previously or presently owned and operated by Monsanto and Solutia in Alabama. Monsanto denied all claims, but say that it has spent more than \$30 million on a comprehensive program of environmental investigation and remediation.

Settlement Terms

According to the terms of the settlement agreement, a general fund will be established in which Monsanto will pay \$22.7 million into an interest bearing account within 30 days of the court's approval of the settlement. The general fund will be used to compensate the class representatives and to pay attorneys' fees and other costs incurred by the class.

Additionally, the settlement agreement provides that Monsanto will pay \$21 million for PCB investigation and remediation activities. The parties agreed that a credit will be given for money spent by Monsanto on PCB investigation and remediation, including a \$3.1 million credit for work performed prior to April 1999 and a credit for all amounts to be spent on behalf of Monsanto between April 1999 and the date on which the remediation fund is established.

A fairness hearing has been set for July 30 before the Alabama Circuit Court for St. Claire County, Alabama Pell City Division.

Plaintiffs' counsel include D. Frank Davis of Burr & Forman in Birmingham, Ala., A. Dwight Blair III of Blair & Parsons in Pell City, Ala., and William J. Trussell of Trussell & Funderberg in Pell City, Ala. Defense counsel include Warren B. Lightfoot, Adam Peck, Jere F. White, Harlan Parter, William Cox and Suzanne Alldredge of Lightfoot, Franklin & White in Birmingham, Ala., and Billy L. Church of Church & Seay in Pell City, Ala., Walter W. Kennedy in Pell City, Ala., and Mike Kelly of Smith Helms Mills & More in Charlotte, N.C.

[Editor's Note: The settlement agreement is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-023. 33 pages. Subscriber price: \$1 per page, plus \$15.]

\$2 Million Settlement Reached With Ohio Waste Management Co.

CINCINNATI — An Ohio waste management company reached a \$2 million settlement agreement on June 1 with an environmental group that claimed a waste disposal site emitted pollutants, contaminants, odors, fumes and gas into the air, water and soil (Communities United For Action, et al. v. Waste Management of Ohio, et al., No. C-1-96-1129, S.D. Ohio).

Defendant Waste Management of Ohio Inc. (WMO), a wholly owned subsidiary of Waste Management Inc., is in the business of solid waste disposal and is the owner and operator of the now closed ELDA Recycling and Disposal Authority in Cincinnati.

Plaintiff Communities United for Action (CUFA) is a nonprofit organization dedicated to protecting the environment whose memberships include groups, churches and neighborhood development corporations in the immediate

vicinity of the ELDA site.

CUFA and five residents sued WMO in the U.S. District Court for the Southern District of Ohio, alleging that the ELDA site has emitted and will continue to emit pollutants, contaminants, odors, fumes, gas and other hazardous substances into the air, water and soil. However, WMO countered that there is no imminent or substantial endangerment to health or environment, and that the ELDA site is in compliance with applicable federal, state and local laws.

Settlement

In a June 1 settlement agreement, WMO and CUFA agreed that a portion of the settlement money will be used to perform a landfill assessment which will allow CUFA to determine whether the ELDA site is releasing chemical substances through migration.

The agreement also provides that WMO will design and install a barrier or additional extraction wells to reduce gas migration from the ELDA landfill. Additionally, the agreement provides that WMO will submit quarterly progress reports of any environmental corrective measures performed.

Under the agreement, WMO will develop an operation and maintenance manual which will provide a description of the methods used to contain the release of landfill gas, including the subsurface migration of gas and its release into the air.

Further, the agreement stipulates that a significant portion of the settlement funds will be used for health exams for people in designated areas, providing that CUFA will not use information developed from those examinations for any purpose other than the medical diagnosis, treatment or prevention of illness. The agreement adds that the funds are not to be used to carry out any study linking illness or disease to the operation of the ELDA site.

Under the settlement agreement, WMO will pay legal fees and expenses to the plaintiffs of \$350,000. The agreement also provides that WMO will pay an additional \$150,000 to D. David Altman Co. L.P.A. Trust Account for future legal fees and expenses to be provided by plaintiffs' counsel in connection with the settlement agreement.

CUFA is represented by Kevin Patrick Braig of Dinsmore & Shohl in Cincinnati, Amy Jo Leonard Altman & Calardo Co. in Cincinnati, Stephen Paul Calardo in Cincinnati and Dennis David Altman of D. David Altman Co. in Cincinnati.

WMO is represented by Stephen Joseph Butler of Thompson, Hine & Flory in Cincinnati and Robert E. Leininger of WMO in Livonia, Mich.

[Editor's Note: The settlement agreement is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-001. 30 pages. Subscriber price: \$1 per page, plus \$15.]

Mass. Appeals Court Finds Real Estate Agent Not Liable In Oil Fume Case

BOSTON — After finding that a real estate agent did not make any misrepresentations that influenced a woman to buy a mobile home that had an ongoing problem with oil fumes, The Massachusetts Court of Appeals on June 3 affirmed that the real estate agent is not liable (Lois E. Augustine v. Raymond A. Rogers, et al., No. 97-P-0311, Mass. App.).

The appeals court further affirmed the reduction of a damages award against the former property owner.

After purchasing a mobile home in 1988, Lois Augustine sued her real estate agent and the former property owner for failure to disclose that the mobile home had an ongoing problem with fumes from an oil burner on the premises. Raymond Rogers is the former property owner, and Donald Vieira and Vieira Realty Inc. are the real estate agents.

The case was tried to an advisory Superior Court jury over a three-day period. The jury found that the defendants were liable for intentional misrepresentation and assessed damages at \$60,000. The judge, exercising the rights the

parties had reserved to him by agreement, rejected the jury's conclusions on the liability of Vieira and reduced the damages against Rogers to \$20,064.

Upon receipt of Augustine's notice of appeal, Rogers filed a petition to pay the judgment amount into the court to stop the incurring of interest during any period of appeal. Augustine opposed the motion, but did not request that the funds deposited be held in an interest bearing account. The trial judge allowed the motion with no provision for interest. Augustine appealed to the Massachusetts Court of Appeals.

Agent's Liability

Addressing the real estate agent's liability, the appeals court noted that the judge found that Vieira did not make any misrepresentations that influenced the buyer. The court further found that Vieira did not receive any information regarding the home heating fuel oil contamination at the mobile home.

"Although, as plaintiff argues, there was evidence from which a fact finder could have found liability against Vieira, and the advisory jury did so, there was also evidence to the contrary, which the judge was entitled to credit," the appeals court ruled.

The appeals court further decided that the exclusion of Augustine's expert environmental consultant testimony on the minimum cost of remediation was proper.

"The plaintiff also argues that the judge erred in not granting her the recession she sought in her complaint," the court continued. "That recession was an available remedy does not lead to the conclusion that it was required, particularly here where, after requesting such relief in her complaint, the plaintiff never raised the issue again until her brief on appeal. . . . There was no abuse of discretion here."

Regarding Augustine's opposition to Rogers' petition to pay the judgment into court, the appeals court decided not to address the issue on the merits because neither party has raised issues on this matter.

Vieira is represented by Bernardo J. Cabral of New Bedford, Mass. Augustine is represented by Douglas A. Hale of Wynn & Wynn in Raynham, Mass.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-003. 3 pages. Subscriber price: \$1 per page, plus \$15.]

Louisiana Appeals Court Holds Herbicide Suit Time-Barred

LAKE CHARLES, La. — The Third Circuit Louisiana Court of Appeals ruled June 2 that a plantation owners' action against an herbicide manufacturer is properly barred by the state's one-year statute of limitations (Louis J. Cornay, et al. v. FMC Corp., et al., No. 98-1312, La. App., 3rd Cir.).

Louis and Jeanne Cornay sued a herbicide manufacturer and a herbicide application company, alleging that the spraying of the herbicide Command on an adjacent farm damaged several oak trees on their plantation. The plaintiffs seek damages for property damage and mental anguish.

The action was filed in May 1992, but the alleged damage occurred from Command applications that occurred in 1988 and 1989. The trial court granted the defendants' motion to dismiss based upon the one-year statute of limitations.

Knowledge Of Damage

On appeal, the Cornays argued they were not fully aware that the damage to their oak trees was caused by Command until June 1991, when they received a report from arborist Jim Foret, who had inspected their property. Foret's report linked the damage to the oak trees to the herbicide.

FMC Corp., the manufacturer of Command, argued that the Forays had ample information in 1990 and at the latest

in April 1991 that the damage to their oak trees may have been attributable to Command.

Looking at the evidence, the appeals court agreed with FMC. The Cornays noticed a white film over some of its trees and on its property following the Command applications, the appeals court said.

The appeals court further found that the Cornays raised concerns over possible exposure to Command to the Department of Agriculture in 1989. Additionally, the court found that an inspector was sent out to look at their plantation and he noticed some chemical exposure but was unable to assess whether damage would result.

The appeals court noted that in April 1991, the inspector again examined the Cornays' property and advised in his report that the Cornays contact FMC to determine if Command was killing their trees.

The appeals court found that the evidence supports the trial court's ruling that the limitations period began to run no later than April 1991 when the Cornays received the second report from the Department of Agriculture.

'Sufficient Notice'

"While the plaintiffs urge this court to conclude that the record supports only a finding that the cause of action accrued when Mr. Cornay was privy to Foret's June-July 1991 findings, we disagree. Our review of the above-related evidence demonstrates that, at the latest, Mr. Cornay had information providing evidence of sufficient notice of chemical exposure in April 1991," the appeals court held.

Additionally, the appeals court rejected the Cornays' argument that the doctrine of *contra non valentem* applies and tolled their limitations period until July 1991. The Cornays argued the doctrine applies because of statements by an FMC employee that Command did not cause the type of damage the Cornays incurred.

The appeals court said that the Cornays have not produced any evidence indicating FMC's assurances were misrepresentations or that FMC concealed any information that the herbicide could cause the type of damage alleged.

"Further," the appeals court ruled, "it appears that even if these statements were misrepresentations, which we do not find they were, the plaintiffs had sufficient outside information which would have also given notice that there could be some problem with the herbicide application."

Counsel for FMC include John G. Gomila Jr. of Jones, Walker, Waechter, Poitevent, Currence & Denegre in New Orleans.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-009. 8 pages. Subscriber price: \$1 per page, plus \$15.]

10th Circuit: Formal Chemical Warning Could Be Modified By Employee's Verbal Statement

DENVER — A federal appeals court on June 16 reversed a dismissal decision after finding that an employee's statement at a carbon dioxide recovery plant may be considered to have modified prior, more formal chemical exposure warnings and creates a factual dispute regarding the adequacy of the plant's warnings ([Gilbert Ybarra, et al. v. Amoco Production Co.](#), No. 98-2189, 10th Cir.).

(Text of Decision in Section D. Mealey's Document #15-990625-113.)

Amoco Production Co. operates a carbon dioxide recovery plant in Texas and hired Hydroblast Corp. in 1994 to pressure test the tubes in the heat exchanger system to find any leaks in the system. Selexol, manufactured by Union Carbide Corp., is a chemical solvent used in the heat exchangers to maximize carbon dioxide recovery.

Hydroblast employees Gilbert Ybarra and Michael Bownds (collectively, Ybarra) were part of a crew sent to the plant. In 1996, the employees brought a diversity action against Amoco and Union Carbide, raising strict liability and

negligence claims involving the design, manufacture and sale of the chemical. The employees also asserted a negligence claim for failure to adequately warn of the danger posed by the chemical.

Subsequently, Union Carbide settled, and the employees dropped their claims involving the design, manufacture and sale of Selexol. Amoco moved for summary judgment on the remaining failure to warn claim, which the trial court granted. The trial court held that Amoco provided adequate warnings to Tom Miller, the owner and manager of Hydroblast, regarding the danger posed by Selexol and, therefore, was relieved from further burden of warning Ybarra directly.

Before the 10th Circuit U.S. Court of Appeals, Ybarra did not contest the trial court's finding that Amoco adequately warned Miller of the dangers associated with the Selexol system at the Amoco facility. Instead, Ybarra maintained that there is a factual dispute regarding whether those warnings were invalidated or modified by statements made by an Amoco employee to Randy Hinds, Hydroblast's crew foreman, when the crew arrived at the facility to begin the testing.

In an unpublished opinion, the appeals court noted that Hinds testified that when the Hydroblast crew arrived at the site, an Amoco employee told him that there was nothing within the tubes that could cause harm. According to the appeals court, Hinds testified in his deposition that he had neither been warned of the dangers of Selexol nor even heard of the chemical prior to the accident. The court further noted that Hinds testified that had he known of the dangers associated with the use of Selexol, he would have required the crew to wear protective slicker suits.

The court ruled the Amoco employee's statement at the facility may be considered to have modified the prior, more formal warnings Amoco gave to Miller and creates a factual dispute regarding the adequacy of Amoco's warnings. Therefore, the court ruled that Amoco has not met its burden of showing that there are no factual disputes regarding what proximately caused plaintiffs' injuries.

Ybarra is represented by James W. Klipstine Jr. in Lovington, N.M., and Orlando A. Quintana in Clovis, N.M. Amoco is represented by Kenneth L. Harrigan and Donald A. Decandia of Mordrall, Sperling, Roehl, Harris & Sisk in Albuquerque, N.M.

Defense Verdict For HVAC Contractor In RADS Case

Indiana

Case name and number: Gwenith A. Surber v. Freyn Brothers Inc., No. 49D12-9509-CT-1470

Plaintiff(s)/Decedent(s): Gwenith A. Surber

Verdict(s): defense

Date: Feb. 5

Court: Ind. Super., Marion Co.

Judge: Susan Macey Thompson

Defendant(s): Freyn Brothers Inc.

Claim: pulmonary injuries leading to development of Reactive Airways Dysfunction Syndrome (RADS)

Background: Gwenith Surber was working as a manager of a Railroadmen's Bank branch in Indianapolis on Oct. 6, 1993, when some substance entered the air at the bank, causing Surber and other employees to cough and experience other symptoms. Surber and her co-workers were transported to the hospital. All employees were released that day except Surber, who stayed for three days complaining of respiratory difficulties. She was eventually diagnosed with RADS.

Surber sued Freyn Brothers Inc., which serviced and repaired the heating, ventilation and air conditioning system in the bank building. Surber alleged Freyn negligently repaired the HVAC system, creating a weakened solder joint in the refrigerant line. Plaintiff alleged the solder joint broke on the date of the incident, releasing refrigerant which decomposed when it came into contact with the backup electric heating elements of the HVAC system. Surber alleged the decomposition products of the refrigerant, including hydrogen chloride, caused her injuries.

Defense: disputed that it improperly serviced or repaired the HVAC system and disputed that a leak of refrigerant occurred in the system on Oct. 6, 1993; disputed the theory that refrigerant can be decomposed by the backup electric heating elements of the HVAC system, creating sufficient amounts of harmful products that would harm bank employees; disputed extent of plaintiff's alleged medical and economic damages.

Plaintiff Expert(s): J. Jeff Berty, C.P.A., Indianapolis; Michael Blankenship, vocational rehabilitation expert, Indianapolis; David Cook, M.D., pulmonologist, internist, Indianapolis; Mark Farber, M.D., pulmonologist, Indianapolis; Michael Freeman, environmental specialist, Zionsville, Ind.; David Huffer, emissivity expert, chemist, Muncie, Ind.; Karl Muszar Jr., P.E., metallurgist, Indianapolis; Robert Pribush, Ph.D., chemist, Butler University, Indianapolis; Jerome Schreier, thermal photography expert, Carmel, Ind.

Defense Expert(s): Joe G.N. Garcia, M.D., F.A.C.P., pulmonologist, Johns Hopkins University, Baltimore; Jack E. Leonard, Ph.D., toxicologist, Indianapolis; William Murphy, C.P.A., economist, Indianapolis; Cliff Nicholson, meteorologist, Indianapolis; John C. Ramsey, M.D., urologist, Indianapolis; Charles C. Roberts Jr., P.E., emissivity expert, Big Rock, Ill.; James Wood, HVAC expert, Indianapolis

Other: No post-trial motions were filed and no appeal was filed by the deadline, sources said.

Freyn Brothers was insured by Zurich/Maryland Casualty.

Plaintiff Attorney(s): Thomas A. Deal of Speedway, Ind., and Margaret Lois Jansen of Indianapolis

Defense Attorney(s): Patricia Polis McCrory and Thomas G. Safley of Harrison & Moberly of Indianapolis

U.S. Judge: Leukemia Lawsuit Sought More Than \$75,000 Damages, Removal Untimely

GALVESTON, Texas — It was readily apparent that a state court lawsuit for leukemia caused by chemical exposure sought more than \$75,000 in damages and should have been removed to federal court within 30 days of initial filing, a Texas federal court has ruled, remanding the case for untimely removal (William L. Carleton, et al. v. CRC Industries Inc., et al., No. G-99-094, S.D. Texas, Galveston Div.).

William and Jane Carleton sued CRC Industries Inc., Berwind Industries Inc. and Berwind Corp., alleging that William contracted leukemia from exposure to defendants' toxic chemicals and carcinogenic products. The Carletons brought claims for negligence, gross negligence, strict products liability, loss of consortium and punitive damages.

The Carletons' lawsuit was originally filed on Nov. 9, 1998, in Texas state court. On Feb. 12, 1999, the defendants, asserting diversity jurisdiction, removed the lawsuit to federal court.

The Carletons sought remand, arguing the removal was untimely because defendants failed to file a notice of removal within 30 days of the initial pleading's filing.

Defendants argued that their removal was timely because they were unaware the action was removable until they received the Carletons' responses to discovery requests, which revealed that the amount in controversy exceeded the federal jurisdictional minimum of \$75,000.

Damages 'Apparent'

In a May 14 opinion, Judge Samuel B. Kent of the U.S. District Court for the Southern District of Texas said that

although plaintiffs' initial pleading did not announce a dollar amount of damages sought or affirmatively state the damages exceeded the minimum federal amount in controversy, "it is readily apparent from any reasonable analysis of Plaintiffs' allegations that such was the case."

Citing the claimed medical injury of leukemia, as well as the numerous causes of action alleged and the request for punitive damages, Judge Kent said it was "undeniably facially apparent" that plaintiffs sought damages exceeding \$75,000.

"Defendants' arguments to the contrary are utterly specious," the judge said. "Preliminary diagnostic testing alone in cancer cases can often exceed \$75,000, and it is a matter of common knowledge that damage awards in cases involving fatal illnesses far exceed that amount."

Finding removal untimely, the judge remand-ed for lack of subject matter jurisdiction.

The Carletons are represented by David H. Burrow of Burrow and Parrott of Houston. Defendants are represented by Vic Houston Henry of Henry Oddo Austin and Fletcher of Dallas.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-99-0625-022. 2 pages. Subscriber price: \$1 per page plus \$15.]

Jones Act Amendment Allowed In Oil Rig Worker's Lawsuit

NEW ORLEANS — An oil rig worker should be allowed to amend his exposure lawsuit to add a Jones Act claim in the event he qualifies for status under the federal law, a Louisiana federal judge ruled June 2 ([Ryan Jenkins v. Bill Lawrence Inc., et al.](#), No. 97-2777 Section E/3, E.D. La.; See 6/4/99, Page 19).

Ryan Jenkins alleged he suffers from severe and permanent injuries resulting from chronic and acute exposure to benzene and other hazardous and toxic chemicals while employed by Bill Lawrence Inc. (BLI) as an oil rig platform operator. Jenkins contends that in October 1996, his supervisor instructed him to wade out into the water to find a defect in rigging equipment from which a chemical release was emanating. Following his supervisor's orders, Jenkins was soaked with toxic chemicals, including benzene, the complaint alleged.

Jenkins asserted an intentional act claim against BLI, as well as claims against North Central Oil Inc., Forcenergy Inc. and Ashlawn Energy Inc.

Jenkins moved for leave to file an amended and restated complaint, adding claims against BLI under the Jones Act for negligence and unseaworthiness.

Defendant American National Fire Insurance Co., which is the Jones Act insurer for BLI, opposed the motion, arguing that Jenkins cannot qualify as a Jones Act seaman and that the amendment comes 16 months after the original complaint.

Time On Vessels

Jenkins argued that although he was an oil field worker, during the course of his employment he spent a substantial amount of time on vessels performing various duties and, at one time, spent most of his day servicing outlying wells accessible only by boat.

Noting that discovery has been ongoing, Judge Marcel Livaudis Jr. of the U.S. District Court for the Eastern District of Louisiana said Jenkins has not unduly delayed filing the amendment or acted in bad faith.

"Nor has plaintiff repeatedly failed to cure deficiencies or prejudiced the defendant," the judge said. "Likewise, the Court does not find that the amendment is futile, but recognizes that in the end, plaintiff may not succeed in establishing Jones Act status."

The judge continued: "While defendant objects to the amendment because the suit has been pending over 16 months, trial is not set until October, 1999. If the allegations of a Jones Act claim are truly baseless, defendant can seek Rule 11 sanctions. However, considering the rules allowing for liberal amendment of pleadings, the plaintiff should be allowed to amend his complaint."

Jenkins is represented by Stephen G. Lindsey and Veronica Angela Collins of Fine & Associates of New Orleans. American National is represented by Christopher E. Carey of Montgomery, Barnett, Brown, Read, Hammond & Mintz of New Orleans.

New York Judge Finds Benzene Exposure Action Time-Barred

NEW YORK — A New York trial court on June 17 held that a wrongful death action is time-barred because the decedent knew that benzene exposure was a potential cause of his illness seven years before suit was filed (Creighton E. Miller v. Acheson Industries, et. al., IA Part 9, N.Y. Sup., N.Y. Co.).

Creighton E. Miller sued on behalf of decedent Richard L. Dickens in 1997, claiming that the decedent suffered and died from chronic lymphocytic leukemia as a result of exposure to benzene and other chemical carcinogens while he sailed as a merchant mariner aboard various vessels. Miller's action is based upon the Jones Act, general admiralty law and maritime law. The Miller case is one of seven benzene cases brought in New York by the Jacques Admiralty Law Firm.

Defendants American Trading & Production Corp., General Gulf Lines Inc., Eastern Enterprises, Marine Transport Lines Inc. and Puerto Rico Maritime Shipping Authority moved for summary judgment on the grounds that Miller's claim is barred by the applicable statute of limitations under the Jones Act or general maritime law. Other defendants later joined the summary judgment motion.

The trial court first noted that the Jones Act incorporates and makes available to seamen the recovery provisions of the Federal Employers Liability Act (FELA). The court further noted that actions under the Jones Act, FELA, and general maritime law must be brought within three years from the day the cause of action accrued.

Leukemia Link Recognized

"Defendants have presented convincing authority to show that, in September 1990, when decedent was diagnosed with leukemia, the potential link between benzene and leukemia was already recognized in the legal and medical communities," the court found. "Plaintiff's survival and wrongful death causes of action are time-barred because Dickens died more than three years after being diagnosed with leukemia, without commencing a personal injury lawsuit."

The court added that the undisputed evidence showed that Dickens was diagnosed with leukemia more than three years before he died, and at a time when the Jacques Admiralty Law Firm was already representing him in prosecuting all claims for the maritime-related occupational afflictions.

"Even if the 1989 retainer was intended, as plaintiff claims, to be limited to illnesses caused by Dickens' exposure to asbestos only, the retainer demonstrates that, commencing as early as 1989, Dickens suspected that he suffered from occupationally caused illness(es)," the court said. "On September 4, 1990, Dickens knew of his injury and knew or had reason to know that benzene was a potential cause."

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-016. 6 pages. Subscriber price: \$1 per page, plus \$15.]

Michigan Court Reverses Venue Decision In Benzene Wrongful Death Action

DETROIT — The Michigan Court of Appeals held June 4 that because manufacturers of benzene and benzene products failed to waive applicable statute of limitations defenses, a trial court incorrectly dismissed a wrongful death action on the ground of forum non conveniens (Creighton E. Miller, et al. v. Allied Signal Inc., et al., No. 203395, Mich. App.).

Creighton E. Miller, an Ohio resident, filed a wrongful death action alleging causes of action under general maritime and admiralty law. The decedent, a California resident, died from multiple myeloma. Miller asserts numerous theories of liability and maintains that the decedent's benzene exposure was the cause of death.

Named as defendants are the manufacturers of benzene or benzene products: Allied Signal Inc., a/k/a Allied Chemical; Amerada Hess Corp.; Amoco Corp., a/k/a Standard Oil of Indiana; Arco Chemical Co.; Atlantic Richfield Co. Inc.; Chevron Chemical Co., a/k/a Gulf Oil Chemicals Co.; Chevron U.S.A. Inc., a/k/a Gulf Oil Corp.; Citco Petroleum, a/k/a Cities Service Co.; Dow Chemical U.S.A.; Drew Chemical Co.; E.I. du Pont de Nemours & Co.; Exxon Chemical Americas; Exxon Co. U.S.A.; Exxon Corp.; Fina Oil & Chemical Co., a/k/a Fina Oil; Hess Oil Virgin Islands Corp.; Marathon Oil Co.; Mobil Oil Corp.; Monsanto Co.; Pennzoil Products Co.; Phillips Petroleum Co.; Shell Oil Co.; Southwestern Refining Co. Inc.; Sun Oil Co.; Texaco Inc.; Union Carbide Corp.; and Unocal, a/k/a Union Oil Co. of California (collectively, Allied Signal).

Allied Signal moved to dismiss on improper venue and forum non conveniens, arguing that there were no allegations that the decedent was exposed to benzene in Michigan, sustained injury in Michigan, or had any connection to Michigan whatsoever. The Michigan Circuit Court for Wayne County dismissed the action on the ground of forum non conveniens.

No Michigan Residence

The Michigan Court of Appeals noted that the decedent's widow, treating physicians, employers and co-workers do not reside in Michigan. The court further noted the Miller himself does not reside in Michigan, and the decedent's employment records and medical records are not in Michigan.

"In spite of the lack of interest in the forum, plaintiff filed suit in Michigan on the last day of the limitations period. Thus, when the court was presented with and ruled on the issue of forum non conveniens, there was no other available forum for plaintiff to refile his suit, and defendants refused to waive any statute of limitations defenses they would have if the suit was filed elsewhere. Because defendants failed to waive applicable statute of limitations defenses and because there was no other forum available, we are bound to hold that the court abused its discretion in dismissing the case on this ground," the court held.

The appeals court further decided that it is unnecessary to determine whether the dismissal of a case for improper venue is permissible because there was sufficient information in Miller's amended complaint to allow the trial court to transfer venue out of Wayne County.

"Defendants contend that it is impossible to determine which Michigan county provides proper venue for this action, and therefore, dismissal is the only appropriate remedy. We disagree with defendants and find that plaintiff's amended complaint provided sufficient information to transfer venue out of Wayne County once the trial court determined that Wayne County provided an improper venue," the court held.

After finding that Miller alleged that Dow Chemical has its principle place of business in Midland, Mich., the court decided that Midland County is an appropriate venue for this action.

Miller is represented by Michael J. Connor of the Jaques Admiralty Law Firm in Detroit. Counsel for Allied Mutual include Jill M. Wheaton of Dykema Gossert in Detroit.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-004. 6 pages. Subscriber price: \$1 per page, plus \$15.]

Federal Court: No Link Between Manufacturer's Actions, Exposure Claims

HARTFORD, Conn. — A beryllium exposure action is time-barred and failed to establish a link between a beryllium product manufacturer's actions and alleged personal injuries, a Connecticut federal court said in a May 3 decision (Cipriano Pinto Sr. v. Texas Instruments Inc., et al., No. 3:96-CV-01575 (WWE), D. Conn.).

Cipriano Pinto Sr. worked for Handy & Harmom, a precious metal refinery, from 1973 to 1987 and from June 1989 to the present. Pinto maintains that Texas Instruments Inc. (TII) manufactured and sold products containing beryllium alloys and sold or consigned its product to Hand & Harmon for refining.

Pinto claims that he sustained injuries as a result of being exposed to beryllium dust and particles from TII's products. His injuries were allegedly not diagnosed until June 1995. He sued TII in 1996, and TII maintained that Pinto's claims were time-barred.

Before the U.S. District Court for the District of Connecticut, TII argued that the time limit for bringing a claim pursuant to Connecticut's Product Liability Act is set forth in Section 52-577a of the General Statutes. The court noted that the statute sets a three-year statute of limitation and a 10-year statute of repose. The court further noted that if Pinto is entitled to workers' compensation benefits, the 10-year limitation runs from the date TII last parted with possession or control of the product.

"Pinto has acknowledged in his memorandum of law in opposition to TII's summary judgment motion that (1) he is eligible for workers' compensation benefits and (2) TII parted with possession of the product more than ten years before the suit was filed," the court said.

Appropriate Statute

However, the court noted that Pinto argued that the appropriate statute of limitations is not Section 577a, but instead is Section 52-577c of the act, which applies to claims in which the damages are caused by exposure to hazardous chemical substances or mixtures of hazardous pollutants.

TII countered that it hired Handy & Harmon to refine gold scrap, and that the gold scrap material was shipped to Handy & Harmon in the form of a hard metal. The court said that in the hard metal form in which the scrap product was provided to Handy & Harmon by TII, it is impossible for it to release beryllium dust or particles.

"If it was the refining/processing procedures performed by Handy & Harmon which exposed Pinto to beryllium dust and particles, there is no legal causation between TII's actions and Pinto's claimed injuries and the claim against TII is time-barred. Inasmuch as Pinto has not disputed this affidavit or . . . [disputed] that his claim is time-barred pursuant to Section 52-577a, the court holds that the appropriate statute is Section 52-577a and that Pinto's claim against TII is untimely," the court decided.

TII is represented by Peter C. Schwartz and Doreen West Amata of Gordon, Muir & Foley in Hartford, Conn. Pinto is represented by Michael A. Stratton of Koskoff & Bieder in Bridgeport, Conn.

[Editor's Note: The order is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-005. 3 pages. Subscriber price: \$1 per page, plus \$15.]

Carbon Monoxide Exposure Suit Time-Barred, Wisconsin Court Affirms

MADISON, Wis. — A Wisconsin appeals court on May 19 ruled that a carbon monoxide exposure action was time-barred because the alleged injuries and cause were known no later than the filing date of a workers' compensation claim (Lee Neerhof v. R.J. Albright Inc., et al., No. 98-1611, Wis. App., Dist. II).

Lee Neerhof worked for Velvet Products Inc., a stain and varnish producer. Velvet moved into a newly constructed building in 1990. R.J. Albright Inc. was the general contractor on the construction of the building. Central Heating Service Inc. installed the building's heating, ventilating and air conditioning system, which was designed by Temperature Systems Inc.

Neerhof began suffering from respiratory and other problems, which he suspected were caused by the new building's faulty furnace and ventilation system. Neerhof sued in 1997, claiming that the HVAC system was negligently completed and unsafe for occupants of the building because it emitted carbon monoxide.

R.J. Albright, Central Heating and Temperature Systems (collectively, Albright) sought summary judgment on the grounds that Neerhof discovered, or should have discovered, his alleged injuries three years prior to his March 1997 complaint. The Wisconsin Circuit Court for Winnebago County decided that Neerhof's complaint was barred by the statute of limitations.

Complaints Since 1992

The District II Wisconsin Court of Appeals noted that in 1992, Neerhof consulted a doctor and complained that his workplace had a faulty furnace and ventilation system. The court further noted that from 1992 forward, Neerhof visited several physicians and specialists in pursuit of his contention that his memory problems and other ailments were related to carbon monoxide levels in his workplace.

Additionally, the court found that in 1992, Neerhof had the gas company come to the workplace to check for carbon monoxide. Moreover, the court found that Neerhof asserted a workers' compensation claim, in which he said that 1994 was his injury date and that his injury was caused by carbon monoxide poisoning.

"In 1992, Neerhof had an objective basis for believing that he had been injured by the faulty HVAC system. In any event, Neerhof certainly knew of his injury and its cause no later than February 1, 1994, when he filed a workers' compensation claim on those grounds," the court said. "Neerhof's March 4, 1997, action was commenced outside of the three-year statute of limitations period and was properly dismissed."

Central Heating is represented by Donald M. Lieb of Otjen, Van Ert, Stangle, Lieb & Weir in Milwaukee. Neerhof is represented by Daniel J. Hoff of Glen & Hoff in Appleton, Wis.

[Editor's Note: The decision is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-006. 3 pages. Subscriber price: \$1 per page, plus \$15.]

La. Federal Court Allows Failure To Warn Claim In Fume Exposure Case

NEW ORLEANS — A Louisiana federal court on June 14 allowed a failure to adequately warn claim in a noxious fume exposure suit to stand, and rejected a manufacturer's argument that causation evidence fails to establish that a portable Plasmarc cutting package caused the release of the fumes ([Pamela Breshears, et al. v. Florida Power Corp., et al.](#), No. 98-114 Section C, E.D. La.).

Pamela Breshears and others claim that while using a portable Plasmarc cutting package, called an L-Tec, to disassemble magnetohydrnamic (MDH) units, the plasma-arc torch contacted compounds coating the MHD units and released a neurotoxic gas which caused permanent and disabling injuries. Breshears sued The ESAB Group Inc., which manufactures the L-Tec unit.

Before the U.S. District Court for the Eastern District of Louisiana, ESAB moved for summary judgment. The court noted that Breshears only opposed the motion on the claim for inadequate warning under the Louisiana Products Liability Act.

The court found that the adequacy of the warnings on the L-Tec unit is a triable issue.

"The clarity of the language is sufficiently controverted for purposes of summary judgment, especially as to the severity of the resulting injury," the court said. "Here, there is no evidence of a pictogram on the L-Tec unit. Although the language in the manual is more descriptive of the danger, the determination whether a warning provided in an owner's manual is adequate or should have been placed on the product itself requires consideration of a number of factors including the nature and severity of the danger to be warned against, the likelihood that the product will be

used by persons who have not read the manual, the practicality and the effectiveness of placing the warning on the product itself, and any other relevant factors."

Additionally, the court denied summary judgment as to the causation issue, noting that ESAB argued that Breshears' causation proof fails to establish that the L-Tec unit caused the release of the noxious fumes. The court reasoned that whether or not the oxy-acetylene torch or the L-Tec unit was being used when the fumes were released is an issue of fact for the jury.

Therefore, the court dismissed all claims except for the adequacy of warning claim, and held that summary judgment as to the causation issue is inappropriate.

Breshears is represented by Leonard A. Radlauer of Radlauer & Bernstein in New Orleans. ESAB is represented by Michael Mossy Christobich and Lisa Cuittito Winter of Deutsch, Kerrigan & Stiles in New Orleans.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-019. 2 pages. Subscriber price: \$1 per page, plus \$15.]

Product Liability Claim Upheld In California Hair Coloring Dispute

LOS ANGELES — Upon rehearing a dispute between a group of men and two manufacturers of hair coloring containing lead acetate, a California appeals court concluded June 16 that all claims but one were barred by the doctrine of res judicata or the Food, Drug and Cosmetics Act (FDCA).

The court affirmed its previous decision in upholding the products liability claim (American International Industries, et al. v. The Superior Court of Los Angeles County, et al., No. B121824, Calif. App., 2nd Dist., Div. 3; See 5/7/99, Page 13).

American International Industries (All) and Combe Inc. petitioned for a writ of mandate directing the Los Angeles County Superior Court to vacate its Feb. 18 order denying the motion for judgment on the pleadings.

The Second District California Court of Appeal in March held that all claims filed by six men against the two manufacturers are barred except for a product liability allegation. Certain claims were barred by the doctrine of res judicata because a settlement with the same defendants was previously reached, the court said.

Matthew Urbach and five other plaintiffs filed a proposed class action in the trial court over the marketing and sale of hair coloring products that did not contain warnings about lead acetate, a color additive. All and Combe manufacture and distribute Grecian Formula and other hair coloring products.

The suit accused the companies of violating the Consumers Legal Remedies Act, fraud by concealment, false and misleading advertising, and violating the Safe Drinking Water and Toxic Enforcement Act (Proposition 65) and the Business and Professions Code. A failure to warn claim was later added and personal injury claims were specifically excluded.

All and Combe moved for judgment on the pleadings in February 1998, arguing that the suit should be dismissed because a judgment made in a separate action in San Francisco barred the claims under the doctrine of res judicata.

In the San Francisco action, California Attorney General Daniel Lungren negotiated a settlement agreement between the Center for Environmental Health (CEH) and the companies that resulted in a stipulated judgment in January 1998. Among other concessions, the defendants agreed to reformulate their products and reduce the amount of lead acetate by 50 percent. According to the agreement, settlement terms could not be disclosed until after the reformulation was completed.

Res Judicata Requirements

The appeals court agreed March 29 to rehear the dispute.

Judge Bruce E. Mitchell wrote res judicata requirements are met in that the San Francisco judgment was a final judgment and that, while the Urbach plaintiffs were not party to the settlement, privity existed between them and CEH and the attorney general because the San Francisco action was brought in the public interest.

Regarding the identity of issues requirement, the judge said that the Urbach plaintiffs' allegations under Business and Professions Code Section 17200 and the Toxic Enforcement Act are the same as those resolved in the settlement. Also barred is the false advertising claim because although CEH did not raise that claim, it could have done so, he wrote.

Because the res judicata requirements were met, the Urbach plaintiffs' interests were adequately protected in the Los Angeles action, according to Judge Mitchell.

However, the judge said that three other claims were not barred by res judicata: allegations of fraud by concealment, products liability and violation of the Consumers Legal Remedies Act because CEH did not and could not litigate those claims.

A consumer may recover damages under the Consumers Legal Remedies Act, but CEH was not a consumer, Judge Mitchell noted. Also, the other two claims "were beyond the scope of the San Francisco action," and therefore were not barred by the settlement, he added.

FDCA

The judge also examined the effect of the FDCA on the claims not barred by res judicata. He said there was no private right of action, writing that "the Urbach plaintiffs improperly seek to enforce FDCA requirements by way of state law claims." If the fraud by concealment and violation of the Consumers Legal Remedies Act claims were allowed to proceed, the court would "intrude into an area of federal regulation within the expertise of the Food and Drug Administration," wrote Judge Mitchell.

Because the FDA has statutory responsibility for interpreting the FDCA, those claims are barred, the judge held.

However, the product liability claim is not barred by the FDCA under the preemption provision of 21 U.S. Code Section 379s, which says that no state may establish packaging or labeling requirements that differ from federal regulations.

The Urbach plaintiffs are represented by Gary J. Sodikoff of Santa Ana, Calif., and Louis M. Marlin of Marlin & Saltzman of Los Angeles. Gene Livingston and Rebecca M. Ceniceros of Livingston & Mattesich in Sacramento, Calif., represent All and Combe.

[Editor's Note: The decision is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 14-990625-002. 20 pages. Subscriber price: \$1 per page plus \$15.]

Opinion Based On Differential Diagnosis Is Reliable, 4th Cir. Rules

RICHMOND, Va. — Expert opinions offered in a chemical exposure case were based on a reliable differential diagnosis and a strong temporal relationship between exposure and the onset of symptoms and should therefore have been admitted, the Fourth Circuit U.S. Court of Appeals ruled June 14 ([Hannelore Anderson v. Quality Stores Inc., et al.](#), No. 98-2240, 4th Cir.).

Relying on its own three-week-old ruling in [Westberry v. Gislaed Gummi](#) (No. 98-1540[L]; See 6/4/99, Page 14), the panel reversed and remanded a ruling by Judge Frederick P. Stamp Jr. of the U.S. District Court for the Northern District of West Virginia entering summary judgment for Quality Stores Inc. in a suit brought by the estate of Wesley G. Anderson.

Anderson began experiencing breathing difficulties after using black flat spray paint purchased from Quality Stores on April 26, 1995. He was admitted to the hospital on April 29, suffering from generalized weakness in his legs and arms, chest congestion and indigestion and was diagnosed with acute respiratory distress syndrome (ARDS). He died three weeks later.

Anderson's wife, Hannelore Anderson, acting on her own behalf and on behalf of his estate, sued in federal court, alleging that his death resulted from inhalation of toluene in the paint and asserting causes of action for strict liability, negligence and breach of warranty.

At trial, the estate sought to offer testimony by two experts that Anderson's condition was caused by exposure to the paint. The District Court entered summary judgment for Quality, holding that the experts' opinions were not reliable because there was no evidence quantifying the level of exposure and finding that in the absence of additional testimony on causation, the evidence was not sufficient to raise a genuine issue of fact. The estate appealed.

Reversing and remanding, the Fourth Circuit cited its holding in Westberry.

"In Westberry v. Gislaved Gummi AB, No. 98-1540(L) [4th Cir. May 20, 1999], we held that an expert's opinion based upon a reliable differential diagnosis and a strong temporal proximity between the exposure and the onset or worsening of symptoms is sufficiently trustworthy to satisfy the reliability prong of Rule 702," the panel said. "It is undisputed that the Material Data Safety Sheet and medical literature supported a conclusion that the presence of significant amounts of chemicals from the spray pain in the lungs could result in pulmonary problems and that Anderson painted 22 shutters with spray paint; thus, his exposure was substantial. Because the expert opinions proffered by Anderson were based on a reliable differential diagnosis and a strong temporal relationship between a substantial exposure to the paint fumes and the onset of Anderson's symptoms, the district court abused its discretion in rejecting the opinions as unreliable."

Anderson is represented by David B. Rodes of Goldberg, Persky, Jennings & White in Pittsburgh. Quality Stores is represented by James R. Miller of Dickie, McCamey & Chilcote in Pittsburgh.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-020. 6 pages. Subscriber price: \$1 per page, plus \$15.]

Kansas Court Finds Causation Testimony Unreliable, Dismisses Rabon Exposure Suit

TOPEKA, Kan. — Holding that expert testimony offered on the issue of causation is unreliable, a federal judge has dismissed a suit alleging that exposure to the larvicide Rabon caused a farmer and his family personal injury and caused his cattle to die (Charles Koch, et al. v. Shell Oil Co., et al., No. 92-4239-DES, D. Kan.; See 10/9/98, Page 22).

U.S. Judge Dale E. Saffels of the District of Kansas held May 4 that absent the disallowed expert testimony, Charles Koch has failed to establish a prima facie case against Shell Oil Co., Occidental Chemical Corp. and Feed Specialties Inc.

From April 1979 thorough October 1981, Koch fed his dairy cows Rabon Oral Larvicide Premix (R.O.L. Premix), a feed additive containing Rabon. Rabon is made and sold by Shell and Occidental; R.O.L. Premix is distributed by Feed Specialties. A significant number of Koch's cattle died between May 1979 and July 1986.

Koch sued in November 1991, alleging that Rabon exposure was responsible for the death of his cattle and for health problems which he and his family suffered. All three defendants moved for summary judgment and to exclude Koch's expert witnesses as unreliable under Daubert. Finding the expert testimony inadmissible, Judge Saffels granted the summary judgment motions and denied the Daubert motions as moot.

The Experts

Specifically, Judge Saffels held that testimony by Dr. James Ruth about the presence of Rabon in a sample from one of Koch's cattle is unreliable because his technique has not been tested, his methodology was not subject to peer review, the rate of error is not sufficiently precise and there is no evidence that the theory has general acceptance in the scientific community. Testimony by Dr. Harvey Loomstein regarding the cause of brain damage suffered by Koch is "relevant to illustrate Mr. Koch's current medical condition for the issue of damage," but "is not scientifically reliable nor relevant on the issue of causation," the judge said.

Further, testimony by Dr. Aristo Vojdani on damage to the immune systems of members of the Koch family is not relevant to the issue of causation because Vojdani "had no way of knowing to which chemicals the plaintiffs may have been exposed," Judge Saffels said.

Finally, Judge Saffels said, testimony offered by Dr. Gunnar Heuser is unreliable because he admitted during deposition that he had not asked Koch what other chemicals he used during the relevant time period.

Without the expert testimony, the court ruled, Koch is unable to make out a prima facie case. As a result, the defendants are entitled to summary judgment and the motions to exclude the evidence under Daubert are rendered moot, the judge said.

Koch is represented by Robert V. Eye of Irigonegaray & Associates in Topeka, Kan., and Ronald P. Hein and Stephen P. Weir of Hein & Weir in Topeka. Shell is represented by Hal D. Meltzer and Gregory N. Pottorff of Turner & Boisseau in Overland Park, Kan. Feed Specialties is represented by James P. Nordstrom of Fisher, Patterson, Saylor & Smith in Topeka. Occidental is represented by Bryce A. Abbott of Martin, Churchill, Blair, Hill, Cole & Hollander in Wichita, Kan.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990618-024. 12 pages. Subscriber price: \$1 per page plus \$15.]

La. Court: Class Actions Barred In Workers' Comp Suits

BATON ROUGE, La. — Louisiana's regulation barring class actions in workers' compensation cases does not violate state law, The First Circuit Louisiana Court of Appeal held May 14 in a chemical exposure case (Brenton P. Johnson v. Louisiana Department of Labor, Office of Workers' Compensation, No. 98-CA-0690, La. App., 1st Cir.).

Brenton Johnson filed a workers' compensation claim in October 1995, alleging injuries from on-the-job exposure to toxic substances while working at Southern Scrap Material Co.

In August 1996, Johnson requested class certification of his compensation case on behalf of all present and former employees of Southern Scrap with similar claims. Several days later, the director of the Office of Workers' Compensation (OWC) issued an emergency rule stating no class actions are permitted in workers' compensation cases.

Relying on the emergency rule issued by the OWC, the compensation judge denied Johnson's motion to request class certification. The emergency rule was later replaced with a permanent rule to the same effect.

Johnson sued the OWC in 1997, alleging the emergency rule was invalid. Johnson argued that the permanent rule is inconsistent with Louisiana law and violates the Louisiana Constitution. The trial court granted the OWC summary judgment and Johnson appealed.

Regulation Valid

The appeals court held that the regulation barring class actions in workers' compensation cases does not violate state law and that the OWC had the power to deviate from traditional case law.

"Many of the procedures applicable to workers' compensation cases differ from other provisions of Louisiana law, in recognition of the unique relationship between the employee and employer, and in order to effectuate the prompt

and equitable handling of such claims," the appeals court said. Louisiana Statute 23:1317[A] allows a workers' compensation judge to deviate from "technical rules of procedure," the appeals court held.

If the Legislature intended for workers' compensation cases to apply the provisions of the Louisiana Code of Civil Procedure, it would not have granted the director of the OWC authority over workers' compensation law, the appeals court said.

"The legislature has granted the OWC the power to make procedural law governing workers' compensation proceedings, and has not reserved that power solely to itself. Moreover, the limitation in the challenged rule does not 'repeal' the class action provisions in any way; it merely makes those provisions unavailable to workers' compensation claimants," the appeals court ruled.

Ex Parte Communication

The appeals court also rejected Johnson's arguments that his due process rights had been violated by ex parte communication between the OWC and representatives of Southern Scrap. The appeals court held that the bar against ex parte communication does not extend beyond those actually charged with making findings of fact and conclusions of law in pending cases.

Additionally, the appeals court said any alleged irregularities in the creation of the emergency rule were cured by the actions taken in the promulgation of the permanent rule, where all parties are given opportunities to comment on the proposed regulation.

"These procedures exist so those who have legitimate concerns about the proposed rule can voice them," the appeals court held.

Johnson is represented by John B. Lambremont, L. Stephen Rastanis and Frederick A. Stolzle Jr. of Baton Rouge, La., and John L. Grayson of Fleming, Hovenkamp & Grayson of Houston. The OWC is represented by Kim M. Hoffman of the Office of the Attorney General of Baton Rouge, La.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-008. 5 pages. Subscriber price: \$1 per page, plus \$15.]

Louisiana Court Affirms \$1.5 Million Award To Dairy Farmer In Stray Voltage Case

LAKE CHARLES, La. — After finding that expert testimony was properly admitted in a case where a dairy farmer claimed that stray voltage injured his dairy herd, a Louisiana appeals court on June 11 affirmed a \$1.5 million award against an electric company (Charles R. James v. Beauregard Electric Cooperative Co., No. 99-71, La. App., 3rd Cir.).

Beauregard Electric Cooperative Inc. provided electricity to the Charles R. James dairy farm. James sued Beauregard, claiming that stray voltage from 1989 to 1991 adversely affected his dairy herd and caused him economic losses.

After a seven-day trial, a jury found that the stray voltage exposure to the dairy cows caused James damage and that Beauregard was 55 percent at fault, with James 45 percent at fault. The jury awarded damages of \$770,000. Subsequently, the trial court granted James' motion for judgment notwithstanding the verdict (JNOV), increasing the award to \$1.5 million. Beauregard appealed to the Third Circuit Louisiana Court of Appeal.

On appeal, Beauregard argued that the jury erred in finding it liable, the trial court erred by not granting its JNOV motion on liability, and that the trial court erred in denying its motion for directed verdict. Beauregard also argued that the trial court erred when it granted James' motion for JNOV, and objected to the admission of certain expert testimony.

Expert Testimony

The appeals court first addressed the deposition testimony of Dr. Charles Griffin, who was the first person who informed James of the stray voltage exposure. Griffin testified as an expert in animal science, specializing in dairy herd management.

"As an expert in dairy herd management, Dr. Griffin was aware that stray voltage can cause problems at dairies. Admittedly, he was not an expert on stray voltage, but he was the first person to discover this potential problem at the James dairy," the court said. "We agree with the trial court that Dr. Griffin did not express any opinions that were beyond his expertise. Furthermore, it was made quite clear that Dr. Griffin was not an expert in electricity, much less stray voltage, other than the fact that it could affect somatic cell count."

Turning next to the testimony of Gerald Bodman, the court noted that Bodman testified for James as an expert agricultural engineer. The court noted that trial courts have broad latitude in the application of Daubert factors, including peer review. The court added that testimony should not be excluded just because an expert's expertise is based purely on experience.

"Although Bodman's field research has not been peer reviewed, we find that his credentials are impressive enough which, when combined with the vast amount of research that he has done, lends to the reliability of his testimony," the appeals court held. "The trial court correctly limited his testimony to the effect of stray voltage on the dairy side since this is where he did his field research."

Concerning the nine photographs taken by Bodman when he examined James' dairy that were introduced into evidence, the court held that while the trial court erred in admitting the photographs, it was harmless error. The court reasoned that the photographs were not relevant to the controversy at issue.

Jury Instructions

After finding that Beauregard failed to object at the trial court level to the jury instruction that electric companies owe a high degree of care to protect persons who may be harmed by electricity, the trial court held that it is not properly before the appeals court.

However, the court found that Beauregard did properly object to other jury instructions, including the trial court's failure to instruct that it could consider whether an expert's opinion was in the mainstream of his field. Beauregard argued that this instruction would have aided the jury in evaluating Bodman's testimony. For the same reasons which it held that Bodman's testimony was properly admitted, the court held that the trial court did not err in its jury instructions.

"The majority of the testimony at trial centered around James' cows being exposed to stray voltage on the milk pipeline. The jury was aware that it was James' contention that the exposure of the cows to stray voltage caused his economic loss. The jury instructions as a whole made it clear that James had to prove that the cows had to be damaged by the stray voltage and that Beauregard Electric was responsible," the court said. "We have reviewed the jury instructions in this case and find that they are correct statements of the law and were sufficient for the purposes of this case."

Additionally, the trial court found that there was sufficient evidence for the jury to conclude that Beauregard was 55 percent at fault in causing economic damage to James because stray voltage affected the health of his herd which eventually caused him to shut down his dairy. Therefore, the court held that the trial court was correct in denying Beauregard's JNOV motion and directed verdict motion.

Regarding the trial court's decision to increase the damages award to \$1.5 million, the appeals court noted that the trial judge is in a better position to make a damages assessment than the appeals court.

"It appears from the testimony that the jury believed that James lost little more than his cows as a result of the stray voltage. However, we agree with the trial court that this is an unreasonable figure. Without the dairy cows, the dairy could not operate which would result in substantially more losses including lost profits and the inability to pay debts," the court said. "The trial court's award of \$1,500,000 as damages resulting from the presence of stray voltage which affected James' dairy herd was not an abuse of discretion."

James is represented by John Anderson and Scott Westerchil of Tillman and Anderson in Leesville, La. Beauregard is represented by William Nolen of Jones, Tete, Nolen, Hanchey, Fonti & Belf in Lake Charles, La.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-026. 13 pages. Subscriber price: \$1 per page, plus \$15.]

NIH Study Finds No Evidence That EMFs Cause Cancer

BETHESDA, Md. — The National Institute of Environmental Health Sciences (NIEHS) released a study June 15 finding that there is little evidence showing a risk of cancer and other human diseases from electromagnetic fields (EMFs) around power lines.

The study, called "Health Effects From Exposure to Power-Line Frequency Electric & Magnetic Fields," determined that the scientific evidence suggesting that EMF and extremely low frequency (ELF) exposures pose any health risk is weak.

"The strongest evidence for health effects comes from associations observed in human populations with two forms of cancer: childhood leukemia and chronic lymphocytic leukemia in occupationally exposed adults. While the support from individual studies is weak, the epidemiological studies demonstrate, for some methods of exposure, a fairly consistent pattern of a small, increased risk with increasing exposure that is somewhat weaker for chronic lymphocytic leukemia than for childhood leukemia," the study said.

The NIEHS concluded that ELF-EMF exposure cannot be recognized as entirely safe because of weak scientific evidence.

"In our opinion, this finding is insufficient to warrant aggressive regulatory concern. However, because virtually everyone in the United States uses electricity and therefore is routinely exposed to ELF-EMF, passive regulatory action is warranted such as a continued emphasis on educating both the public and the regulated community on means aimed at reducing exposures," the report said.

EPA Lacks RCRA Authority To Assess UST Penalties Against Federal Facility, Hearing Board Rules

WASHINGTON, D.C. — An administrative law judge ruled on May 19 that the U.S. Environmental Protection Agency lacks statutory authority to impose proposed administrative penalties against Tinker Air Force Base, Okla., for alleged violations of underground storage tank laws ([In the Matter of United States Air Force Tinker Air Force Base](#), No. UST-6-98-002-AO-1, EPA Hearing Board).

EPA filed a complaint in January 1998 under Section 9006 of the Solid Waste Disposal Act under RCRA, charging that the Air Force, at Tinker AFB, violated the act, as well as the Oklahoma Corporation Commission's General Rules and Regulations Governing Underground Storage Tanks. The agency proposed a compliance order and civil administration penalty of \$96,703.

The Air Force filed a motion to dismiss on the ground that the hearing board and the Administrative Law Judge (ALJ) lacked jurisdiction to resolve a legal dispute between two federal agencies and that the Office of the Attorney General is the mandatory forum for such resolution pursuant to Executive Order 12146. In the alternative, the Air Force moved for summary judgment — or an accelerated decision — on the basis that the waiver of sovereign immunity in RCRA Section 9006 does not authorize the EPA to impose administrative penalties against federal facilities.

The ALJ, while denying the Air Force's motion to dismiss, agreed that the agency lacks the statutory authority under RCRA to impose administrative penalties.

Summary Judgment

The court agreed with the Air Force that the EPA has no statutory authority to impose a civil administrative penalty for the UST violations against a federal facility, saying there are concerns about separation of powers among the branches.

The legislative history of RCRA Section 6001(a) shows that Congress clearly included a waiver of sovereign immunity as to penalties, both coercive and punitive, to federal facilities. However, the application of Section 6001(a) to EPA administrative enforcement actions is not clear.

The Air Force successfully argued that EPA's authority to commence an administrative enforcement action against a federal agency pursuant to the UST provisions of RCRA do not provide the EPA with plenary authority to impose a monetary penalty against a federal agency, the ALJ said.

Relying upon a U.S. Supreme Court decision in U.S. Department of Energy v. Ohio (503 U.S. 607, 615 [1992]), which held that any waiver of the government's sovereign immunity must be unequivocal and "must be construed in favor of the sovereign" and "not enlarged . . . beyond what the language requires," the ALJ said that the Supreme Court in that case compelled Congress to enact clear and express language that addressed fully the issues and concerns as to the governing provisions in RCRA.

The ALJ found that Sections 6001, 9001, 9006 and 9007 of RCRA do not contain clear and concise language from Congress authorizing the EPA to assess punitive penalties against Federal agencies for UST violations.

First, the judge found that statutory text of RCRA and the UST provisions failed to provide a strong basis for finding a clear statement from Congress that the EPA is authorized to assess penalties against federal facilities. Also, the legislative history failed to support the conclusion that Congress expressed such authority, the ALJ said.

While Section 6001(b) could be construed as authorizing penalties in administrative enforcement actions, the court said that "such plausible construction . . . does not meet the requisite standard requiring a 'clear' or 'express' statement of Congressional intent authorizing the EPA to administratively assess civil penalties against a Federal agency," the ALJ said. "Such constrained conclusion does little to assuage the frustration of dealing with the problematic question of separation of powers or accepting the well-established principle of sovereign immunity especially when applied to the EPA's daunting task of protecting the environment."

Motion To Dismiss

Tinker AFB argued that the sovereign immunity is a jurisdictional issue in this case, and that the ALJ cannot resolve disputes about sovereign immunity since the attorney general is the appropriate forum. The Air Force added that the interpretation of a waiver of sovereign immunity is a matter of constitutional law and that administrative venues are not appropriate to resolve such questions.

The ALJ disagreed, saying that although Executive Order 12146 confers to the attorney general, at the request of appropriate officials, the authority to resolve disputes between executive agencies, Congress has given the EPA the primary responsibility for interpreting RCRA through promulgations of rules and regulations and administrative adjudication.

Here, an ALJ's ruling on the issue of the EPA's authority to impose on a department penalties for UST violations is not contrary to the executive order, the judge said.

"Such a ruling within the Executive Branch does not preclude the EPA or [Defense Department] from seeking an opinion from the Attorney General at the relevant time," the ALJ said.

The judge added that the executive order says that agencies, such as the EPA and the Defense Department, submit to a dispute "prior to proceeding in any court." However, the hearing board is not considered a "court" since its powers are limited. The ALJ said that the board cannot grant injunctive relief, as can state and federal courts of law.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-018. 31 pages. Subscriber price: \$1 per page plus \$15.]

New York Appeals Court Says Tank Action Is 'Timely'

ALBANY, N.Y. — The Third Department of the New York Supreme Court Appellate Division on June 10 said that a leaking underground storage tank cleanup action is "timely" pursuant to New York's three-year statute of limitations for such actions (Walter E. Christy, d/b/a/ Luke's Fix-N-Wash v. Ed J. Harvey, d/b/a Harvey Construction Co., et al., No. 83781, N.Y. Sup., App. Div., 3rd Dept.).

The appeals court affirmed a trial court's ruling denying a construction company's motion to dismiss upon the basis that the action was time-barred by the six-year statute of limitations applicable for claims for breach of contract. The appeals court said that, actually, since the plaintiff is seeking to recover for damage to his property caused by the leak, Civil Practice Law and Rules (CPLR) 214-c applies with its three-year limitations period. CPLR 214-c provides that the limitations period to recover damages for an injury to property caused by the latent effects of exposure to a substance must begin on the date of discovery of the injury, or from the date when through due diligence, the injury should have been discovered.

Leaking Tanks

Walter E. Christy, doing business as Luke's Fix-N-Wash, a gas station and automotive repair business, sued SUNYS Petroleum Corp., a distributor of petroleum products, and a construction company for breach of contract and negligence, seeking to recover for the cost of cleanup and diminution of property value after an underground storage tank the defendants installed leaked.

SUNYS and Christy made arrangements to install three USTs at the service station in 1988. While there is some dispute in the record, the appeals court said that it appeared that the actual installation of the tanks was done by Ed J. Harvey, doing business as Harvey Construction Co. The tanks were installed by November 1989.

In February 1997, Christy discovered a significant amount of gasoline leaking from a line near or at one of the new tanks. Harvey and SUNYS filed the motion to dismiss pursuant to the six-year breach of contract limitations period. The trial court denied the motion, saying there was a question of fact as to privity of contract between Christy and Harvey.

CPLR 214-c

The appeals court affirmed the trial court ruling, however, for different reasons. The court said that it is in fact CPLR 214-c which applies to this suit, since Christy is seeking to recover for damage to his property caused by a fuel leak.

Section 214-c was "enacted to 'provide relief to injured New Yorkers whose claims would otherwise be dismissed for untimeliness simply because they were unaware of the latent injuries until after the limitation period had expired,'" the court said, citing Jensen v. General Elec. Co. (82 N.Y.2d 77, 84, 603 N.Y.S.2d 420, 623 N.Y.2d 547, quoting Mem. of Senator R.B Stafford, 1986 NY Legis Ann. at 287).

In this suit, Christy alleged that the discovery of the leak happened in February 1997 and unlike in previous cases where a plaintiff's reconciliation process and personal observations showed a leak years before actual discovery, "there is nothing in the record here to suggest that plaintiff should have been on notice of such a problem prior to February 1997," the court said.

Richard P. James of MacKenzie, Smith, Lewis, Michell & Hughes in Syracuse, N.Y., represents Harvey and SUNYS. Frank A. Bersani of Syracuse represents Christy.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-012. 2 pages. Subscriber price: \$1 per page plus \$15.]

Connecticut Oil Storage Company, Corporate Officers

Held Liable For Tank Spills

NEW BRITAIN, Conn. — The Hartford/New Britain District of the Connecticut Superior Court on May 3 upheld a final order from the state's Department of Environmental Protection (DEP) which found that two corporate officers were personally responsible for polluting their facility, as well as state waters and soil (BEC Corp., et al. v. The Department of Environmental Protection of Connecticut, No. CV 980492627S, Conn. Super., Hartford/New Britain Dist.).

The order also found that BEC Corp., as owner of the site, discharged pollutants into state waters without a permit. The property has been used by BEC and its predecessors as an oil storage and distribution facility since 1944 until about 1995. The site includes a barge docking area for unloading oil barges, aboveground oil storage tanks, loading racks and piping to carry the oil from the docking facility to the oil storage tanks.

BEC argued that the evidence was insufficient to support the final decision; that the hearing officer erred in using the burden of proof standard; that the DEP erred in imposing personal liability on the owners/operators of BEC, Irvin and Michael Shiner; and that the DEP erred in submitting certain evidence at the reopened hearing in October 1997.

Site Conditions

The oil storage tanks held between 5,000 and 15,000 barrels of oil. The tanks were in a tank farm which had an intermittent spring run through it. The court said that the floor of the tank farm is often wet and frequently covered in water from the spring water and precipitation. Another tank farm was close to the West River and was surrounded by several inches of water during high tide, the court said.

The court said that there is a history of oil spills at the site. In one, approximately 900 gallons of oil spilled onto the floor of one of the tank farms when a tank overflowed. Another spill involved leaching of oil into the West River. While a private contractor was hired to clean up the spill, it wasn't until the U.S. Coast Guard became involved that the source of the spill and the spill were eventually remediated, the court said.

Several other overflows or leaks were detected during the history of the site until, in 1995, the Shiners decided to have the tanks removed from the site.

Irvin Shiner was president of the BEC predecessor, Connecticut Refining Co., from 1968 until it merger with Benzoline Energy Co. Benzoline eventually changed its name to BEC. Michael Shiner served as vice president/secretary of CRC and then Benzoline from 1975 until 1995. In the 1980s, Michael Shiner took over more responsibility for the site, including overseeing the company's environmental compliance tasks. In that capacity, Michael Shiner coordinated the response to spills.

DEP Order

The DEP issued its order under Connecticut General Statutes 22a-432, which provides that when "any person has established a facility or created a condition . . . or is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state," the DEP may issue an order to that person to take necessary steps to correct the source of pollution.

The court said it found substantial evidence to support the issuance of the order. The record, the court said, established a history of oil spills directly into the water and into the soil at the site. The court added that little, if any, remediation was undertaken to clean up the site and the evidence established that the site is in fact polluted.

Also, according to the state's Clean Water Act, the DEP is authorized to issue an order to "any person" who has established or created a condition that would create a source of pollution, thus the court agreed that assigning personal liability to Irvin and Michael Shiner was appropriate.

Personal Liability

The Shiners, however, argued that the DEP should have been limited to the traditional tests for piercing the corporate veil when it considered assigning personal liability. The court disagreed.

Citing Connecticut Building Wrecking Co. v. Carothers (218 Conn. 580, 595, 590 A.2d 447 [1991]), the state Supreme Court upheld the imposition of personal liability on owners of a company which was improperly operating

a solid waste facility by dumping hazardous substances.

"The Carothers case does not contain a discussion of the personal liability theory, but implicitly recognizes the appropriateness of the imposition of personal liability on corporate owners and/or officer under the environmental laws," the court said.

Even in federal courts, personal liability for environmental violations does not require a piercing of the corporate veil, the court said, citing United States v. Northeastern Pharmaceutical & Chemical Co. (810 F.2d 726, 744 [8th Cir. 1986], [NEPACCO], cert. denied, 484 U.S. 848, 108 S. Ct. 146, 98 L. Ed. 2d 102 [1987]) and State of New York v. Shore Realty Corp. (759 F.2d 1032, 1052 [2d Cir. 1985]).

The Superior Court said that in the NEPACCO decision, the U.S. Supreme Court specifically said that personal liability in the environmental violation context is "distinct from the derivative liability that results from 'piercing the corporate veil.'"

The state court added that NEPACCO distinguishes piercing the corporate veil cases, where the owner does not honor the corporate structure, from the personal liability cases, which are based on the personal involvement of the decision maker.

Here, Irvin Shiner was president and owner of BEC and its predecessors since at least 1970, the court said, adding that his father had created the business and he assumed his father's control and responsibilities.

"Irvin Shiner's actions and inactions facilitated the violations, despite the repeated oil spills and leaks, there was no investigation or long-term remediation at the site," the court said.

Michael Shiner also met the responsible corporate officer test in that he was responsible for the day-to-day environmental compliance, the court said.

"In this capacity, Michael Shiner communicated with the environmental agencies including the Federal Environmental Protection Agency, the Coast Guard and the DEP concerning environmental issues," the court said.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-021. 12 pages. Subscriber price: \$1 per page plus \$15.]

Illinois Court Finds Gas Station Owner Liable For Migrated Contamination

CHICAGO — A Illinois federal court has said a gas station owner is liable under RCRA for contamination caused when an underground storage tank system leaked gasoline which migrated onto private property (Sandra Mondry v. Speed Way SuperAmerica LLC, No. 96 C 2159, N.D. Ill., Eastern Div.).

The Eastern Division of the U.S. District Court for the Northern District of Illinois on May 12 said Speed Way SuperAmerica (SSA) LLC was liable for contamination on Sandra Mondry's property in Lockport, Ill. Mondry sued SSA under RCRA's citizen suit provision seeking injunctive relief and remediation of her property. Mondry also sued under the state common law theories of nuisance and trespass.

SSA was the owner of a UST system which was installed in October 1998. The system passed a tightness test, however, in May 1989, the Illinois Environmental Protection Agency (IELA) notified SSA that its tanks may be leaking. A malfunctioning spill containment manhole was the cause of the leak, the court said, adding that SSA, after contact with the state agency, hired an environmental consultant to perform tests and eventually an environmental cleanup contractor.

Mondry bought the property across the street from SSA's gas station in December 1993 for \$90,000. In January 1995, Mondry sought a loan using the property as collateral. The loan was contingent upon an environmental survey of the site. An environmental firm discovered that contamination from the SSA leaks had migrated to Mondry's property and the loan was denied, even though SSA offered to indemnify the bank.

The District Court found that Mondry had standing to bring her RCRA action and that SSA was in violation of RCRA by not doing an investigation of Mondry's property to determine if the gasoline had migrated.

Injunctive Relief

The court granted Mondry injunctive relief requiring SSA to abate the nuisance and trespass and comply with all federal and state environmental laws. Also, SSA was ordered to prepare and deliver to Mondry a corrective action plan meeting all IEPA requirements. Mondry was ordered to allow access to her property for the work, the court said.

However, the court did not grant Mondry's request for diminution of her property value under RCRA. The court said that granting her both remediation and property value claims would be considered double recovery. Mondry was entitled to submit costs under her state common law claims for out-of-pocket expenses, including those incurred investigating the contamination on her property, applying for the loan and other similar costs, the court said.

Also, the court granted Mondry's request for attorneys' fees. The court said that as the prevailing party, Mondry was entitled to reasonable attorneys' fees under RCRA.

Mondry is represented by Sidney Margolis of the Law Office of Sidney Margolis in Chicago and Karl August Karg and H. Alfred Ryan of the Law Offices of H. Alfred Ryan in Chicago.

SSA is represented by John L. Leonard and Ronald Ward Teeple of Defrees & Fiske in Chicago and Christopher A. Kreid of Metge, Spitzer & Kreid in Chicago.

[Editor's Note: The order is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-025. 13 pages. Subscriber price: \$1 per page plus \$15.]

Expert Testimony Unnecessary When Jury Is Capable Of Determining 'Reasonable' Conduct, Oregon Court Says

SALEM, Ore. — The Oregon Supreme Court on June 11 said that a jury may determine whether or not an attorney followed his client's instructions to limit underground storage tank/environmental liabilities without hearing expert testimony in a malpractice suit

(Larry J. Vandermay, et al. v. Paul D. Clayton, No. SC S44717, Ore. Sup.).

Larry J. Vandermay and his wife, Tamara, filed a malpractice suit against their former attorney seeking more than \$550,000 for failing to thoroughly explain an environmental indemnification provision in an agreement of sale of his oil company. Vandermay signed the agreement believing he would only be responsible for \$5,000 in cleanup costs, the court said, but the indemnification provision left him open to whatever liability was available under the law.

Sales Transaction

Vandermay and Bob Wester bought an oil company in Oregon in 1977 and hired Paul D. Clayton, Wester's brother-in-law, as legal counsel. In 1986, Vandermay sought to sell the company, VanWest Oil Co. He continued to expand and improve upon the business until David Harris made an offer on the company in 1989.

Prior to Harris' offer, Vandermay sought to improve one of his service stations in Astoria, Ore., and sought a \$400,000 loan. The loan required an environmental assessment be performed on the property prior to approval, the court said. The assessment revealed soil contamination at five, 10 and 15 feet below the surface. Vandermay never reported the results to the state Department of Environmental Quality and estimated it would only cost a few thousand dollars to remedy the situation. Vandermay also said he believed the source of the contamination was from underground storage tank leaks throughout the years.

Harris' offer included an indemnification provision requiring that Vandermay hold Harris harmless against any claims, environmental or otherwise, existing before the sale. Harris also said he would accept the loan-related soil survey as the environmental review of the property.

In January 1990, Vandermay said he found out that his loan application had been rejected for the Astoria site. He also found out there was contamination at one of VanWest's bulk plants, although insurance coverage — with a deductible of \$25,000 — would cover any cleanup costs. However, Vandermay became concerned about his continuing liability at the Astoria site due to the indemnity provision in Harris' offer, the court said.

Vandermay had estimated it would cost about \$2,500 to clean up the Astoria site, based upon the 1989 survey. He ordered Clayton to draw up an indemnity agreement which limited his cleanup liability to \$5,000.

The sale of VanWest closed on March 1990, however, Harris told Vandermay that the new indemnity agreement was unacceptable and another agreement was drawn up, the court said. Harris agreed to limit VanWest's liability to \$5,000 for the Astoria site, however, the company would be liable for any costs of more than \$5,000 under applicable federal and state environmental laws, the court said.

During this time, Vandermay never gave any indication that he was willing to pay more than \$5,000 for the site cleanup. However, Clayton allegedly encouraged Vandermay to sign the agreement anyway. Vandermay told the court that he agreed to sign when he saw that the \$5,000 limit was still present in the new agreement, but added that had he known about the open ended liability, he would never have sold the company.

In October 1990, more soil tests revealed extensive contamination at the Astoria site, resulting in the state environmental agency ordering Harris and Vandermay to clean up the site. Ultimately, the parties settled the litigation, with Vandermay paying \$585,000.

Expert Witness

Vandermay sued Clayton alleging malpractice. He called one witness, a lawyer, who specialized in environmental law at a large firm in Portland, Ore. Vandermay sought to learn what a lawyer in Clayton's position might have done, while exercising due care and diligence, regarding the indemnity agreement. Clayton objected, saying that Vandermay had failed to establish whether the expert was familiar with the quality of care that ordinarily is exercised by general practitioners in small law firms. Clayton also moved for a directed verdict, saying that without expert testimony on breaching the standard of care, Vandermay had failed to present sufficient evidence. The trial court agreed.

The Oregon Court of Appeals refused to reverse the trial court's verdict, saying any error in excluding the expert's testimony would not justify a reversal. However, the appeals court agreed with Vandermay that expert testimony was not required since Clayton either did or did not comply with Vandermay's specific instructions that would have limited his liability.

The Oregon Supreme Court agreed with that reasoning and reversed the trial court ruling. While the court said it never reviewed whether expert testimony is required in legal malpractice suits, it has reviewed similar professional malpractice cases and determined that expert testimony is required to establish what the reasonable practice is in the community, unless the jury is able to decide whether the conduct was reasonable, the court said, citing Getchell v. Mansfield (260 Ore. 174, 179, 489 P.2d 953 [1971]). Legal malpractice suits are no different, the court said.

"Viewing the evidence in the light most favorable to plaintiff, plaintiff would not have sold VanWest if he had understood that he would be liable after the sale for substantially more money to clean up the Astoria site," the court said. "Harris rejected the indemnity agreement that defendant had drafted at plaintiff's request and submitted another indemnity agreement at the closing meeting, but those facts did not alter plaintiff's directives to defendant to obtain the indemnification that plaintiff requested."

Regardless of whether Clayton had failed to warn Vandermay that the indemnification agreement did not contain the protection Vandermay insisted upon, this suit is straightforward, the court said.

"If defendant failed to do so, then he breached the standard of care he owed to his client," the court said. "the trial court therefore erred in granting defendant's motion for a directed verdict on the ground that, without expert testimony, plaintiff failed to present evidence from which the jury could find that defendant breached the standard of care."

The Vandermayns are represented by Thomas W. Brown of Cosgrave, Vergreer & Kester in Portland, Ore., and Barbara L. Johnston of Brisbee & Stockton in Hillsboro, Ore.

Clayton is represented by Jeanyse R. Snow of Snow & Snow in Astoria.

[Editor's Note: The opinion is available 24 hours a day by fax from Mealey's Document Service. FedEx or mail requests processed the same day if placed by 4 p.m. Eastern time. Call (800) 925-4123 or (610) 768-7800. Document number 15-990625-011. 8 pages. Subscriber price: \$1 per page plus \$15.]

EPA Issues Leaking Storage Tank Data

WASHINGTON, D.C. — The U.S. Environmental Protection Agency has released an update on the number of active and closed underground storage tanks, substance releases, cleanups initiated and completed and emergency response through the first half of fiscal year 1999.

(Text of EPA Table in Section F. Mealey's Document #15-990625-115.)

The agency listed the information by state and by EPA region. Also included are the number of regional corrective actions for tanks in "Indian Country." Nationally, the EPA reported there are 824,465 active tanks, 1,325,829 closed tanks, 385,927 confirmed releases, 327,210 cleanups initiated, and 211,637 cleanups completed.

The EPA imposed a deadline of Dec. 22, 1998, for all storage tanks to be in compliance with new agency regulations. The regulations require that tanks have spill and overfill prevention devices and corrosion protection systems for any metal parts. The agency reported in March that it estimates about 30 percent of underground storage tanks are out of compliance with the new regulations (See 3/3/99, Page 25).

[Editor's Note: The following cases appeared in **Mealey's Litigation Reports** covering asbestos, breast implant, drugs and medical device, fen-phen and insurance litigation. For more information, call 1-800-MEALEYS (1-800-632-5397).]

Study Finds No Link Between Implants, Disease

WASHINGTON, D.C. — The Institute of Medicine released a study June 21 that found no link between silicone gel breast implants and cancer, immune diseases or neurological problems.

The study, called "Safety of Silicone Breast Implants," reviewed scientific literature on the safety of silicone breast implants and found that the most serious problems associated with their use arise when the tissue around the implants contracts, when the implant ruptures, or when infection occurs.

The Institute of Medicine study follows the breast implant MDL national panel of scientific experts' determination that there is no link between implants and autoimmune disease, immune systemic abnormalities, connective tissue disease and atypical tissue disease.

N.D. High Court Strikes Down Statute Of Repose Defense In Asbestos Case

BISMARCK, N.D. — The North Dakota Supreme Court on May 24 struck down the statute of repose defense for asbestos manufacturers and distributors in actions related to construction of or improvements to real property (Leslie Blikre, et al. v. ACandS Inc., et al., Nos. 980307-980311, N.D. Sup.).

The court said that its statute of repose does not bar an action for injury allegedly caused by exposure to a defective product during construction brought against a manufacturer or distributor of the product, even though the defendant installed the product as part of an improvement to real estate. The court added that just because the defendants installed their own asbestos products does not protect them from product liability tort.

Mealey's Document #01-990604-101

New Jersey Court Remands \$50,000 Medical Monitoring Award Against Owens Corning

TRENTON, N.J. — A New Jersey appellate court has agreed to remand a \$50,000 medical monitoring award in a pipefitter's asbestos action to determine if offsets should be applied. But the court upheld a decision that asymptomatic pleural thickening is a compensable disease May 25 in Owens Corning's appeal of a \$201,000 award (Stanley S. Manel Jr., et. al. v. Owens-Corning Fiberglas Corp., et al., No. A-3090-97T5, N.J. Super., App. Div.).

Mealey's Document #01-990604-102

Employer's Failure To Notify Of Disability Tolls Limitations Period, Colorado Court Rules

DENVER — The Colorado Court of Appeal, Division Two, on May 27 ruled that because an employer failed to file notice of a disability with the Workers' Compensation Division, the five-year statute of limitations for filing a claim is tolled (Edward Eugene Miller v. The Industrial Claim Appeals Office of Colorado, et al., No. 98CA1275, Colo. App., Div. 2).

The appeals court vacated and remanded an Industrial Claim Appeals Office of Colorado ruling upholding an Administrative Law Judge's order barring a claim for silicosis by a former underground mine worker. The ALJ found that Edward Eugene Miller, who worked for San Juan County Mining, had contracted silicosis while working in the underground mines.

Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years

WASHINGTON, D.C. — Asbestos litigation is expected to keep going strong for another 10 to 20 years and more efficient and equitable ways of resolving cases must developed, according to a report to U.S. Supreme Court Chief Justice William Rehnquist.

A report on the December 1998 meeting of the Advisory Committee on Civil Rules and the Working Group on Mass Torts was completed in February and recently released to the public.

Participants, including asbestos attorneys and judges, focused on asbestos litigation and whether it is unique to mass tort litigation. Issues debated included asymptomatic claimants, future claims, joint and several liability, alternative dispute resolution, potential legislation, and the impact of the Amchem and Georgine settlements. Also discussed was bringing mass tort litigation to federal court to promote feasible case management and fairness.

OSHA's Technical Bulletin Released, Industry Responds

WASHINGTON, D.C. — The Occupational Safety and Health Administration has released its controversial technical

information bulletin addressing the potential for latex allergy in the workplace ("Technical Information Bulletin: Potential for Allergy to Natural Rubber Latex," U.S. Dept. of Labor).

Held up for several months, the release of OSHA's April 12 bulletin was immediately met with protest from the health care industry, which claimed the bulletin could lead to standards upon which some states may base future legislation.

The bulletin, consisting mostly of background text along with a section outlining the prevalence of latex allergy among a variety of occupations, outlines several strategies for the reduction and eventual eradication of latex allergy within the health care industry.

Mealey's Document #33-990528-107

In Face Of Apparent Deal, Norplant Defendants File For Summary Judgment

BEAUMONT, Texas — In the midst of conflicting reports that a nationwide settlement is imminent, Norplant defendants have filed four separate motions for summary judgment in an attempt to end the multidistrict litigation in Texas (In Re: Norplant Contraceptive Products Liability Litigation, MDL Docket No. 1038, E.D. Texas).

Defendant Wyeth Laboratories filed the four partial motions May 25 in the U.S. District Court for the Eastern District of Texas. The Norplant manufacturer is seeking summary judgment on grounds it provided adequate warning to physicians and users of the contraceptive device and that the learned intermediary doctrine governs the plaintiffs' failure to warn claims.

The defendants also argue that many of the complaints are barred by their respective statutes of limitations and the plaintiffs' inability to link Norplant to a rash of what Wyeth calls exotic injuries.

Mealey's Document #28-990618-103

In N.J., Diet Drug Maker Seeks Appointment Of Scientific Expert Panel

NEW BRUNSWICK, N.J. — Saying that the Vadino fen-phen medical monitoring class action will hinge upon aggressively contested scientific issues, American Home Products Corp. has asked the judge overseeing the scheduled July 12 trial to appoint a scientific panel of nationally recognized experts modeled after a similar panel appointed in the federal breast implant litigation (In Re: Diet Drug Litigation, Case Code No. 240; Lynn Vadino v. American Home Products Corp., et al., No. MID-L-425-98MT., N.J. Super., Middlesex Co.).

AHP's request for appointment of a scientific expert panel — the first request of its kind in fen-phen litigation — came in its proposed trial plan and in response to plaintiffs' proposal for trying the Vadino class action with two personal injury "test" cases next month.

Mealey's Document #35-990618-105, #35-990618-106

Underlying Complaint Alleges Property Damage, Calif. Appellate Court Finds

SAN FRANCISCO — An underlying complaint alleges property damage, is not based on a breach of contract and an aircraft exclusion is inapplicable in a coverage action arising from strawberry growers who purchased plants that were allegedly sprayed with a herbicide, the First District California Court of Appeal held June 9, reversing a trial

court (Melvin Hendrickson, et al. v. Zurich American Insurance Company of Illinois, et al., No. A080108, Calif. App., 1st Dist.).

Mealey's Document #03-990615-103