JUNE, 2010

McKENNA TOXIC TORT NEWSLETTER

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The McKenna toxic tort practice group is pleased to provide this newsletter on recent developments in the toxic tort arena. This issue begins with an article by Margaret Foster discussing the recent *Simpkins* decision out of the Illinois Fifth District Appellate Court holding that employers have a duty to protect family members of employees from asbestos take home exposure. The next article provides a comprehensive update by Bob Pisani on developments in Chinese Drywall litigation including recent trials and CPSC findings. A final article contains a comprehensive discussion by Tom Hayes of the uses and side effects of chelation therapy. For further information, please feel free to contact the author listed for each article.

If you prefer to receive our newsletter electronically, please e-mail your request to Tom Hayes at thayes@mckenna-law.com. If there are individuals you would like us to add to our circulation list, please e-mail their mailing addresses or e-mail addresses to Tom Hayes. We would also welcome your comments on topics you would like to see addressed in our future newsletters.

You will also find this newsletter posted on our firm website: http://www.mckenna-law.com/. We invite you to visit our website to learn more about our firm and our toxic tort practice group.

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ILLINOIS APPELLATE COURT DETERMINES THAT EMPLOYERS OWE A DUTY TO THE FAMILY MEMBERS OF EMPLOYEES FOR SECONDARY ASBESTOS EXPOSURES

The Fifth District of the Illinois Appellate Court ruled that employers have a duty to protect the family members of its employees from the danger of exposure to asbestos brought home on the clothing of the employees. *Simpkins v. CSX*, No. 5-07-0346 (June 10, 2010).

The complaint alleged that Annette Simpkins developed mesothelioma due to exposure to asbestos brought home on the clothing of her then husband, Ronald Simpkins, during his employment with B&O Railroad from 1958 to 1964. B&O's successor corporation, CSX, filed a motion to dismiss, asserting that it had no duty to warn or protect the family members from take home or secondary exposures to asbestos dust on the work clothes of its employees. CSX asserted that imposing such a duty would expand the liability of employers, and further asserted that the plaintiff's remedy was against manufacturers and not the employer. Judge Stack, who presides over the Madison County asbestos docket until July 30, 2010, granted the motion to dismiss, and plaintiff appealed.

In its analysis, the court noted that the existence of a duty under Illinois law is dependent upon whether the relationship of the parties is one that the would impose an obligation on the defendant to act reasonably for the benefit of the plaintiff, citing *Marshall v. Burger King Corp.*, 222 Ill. 2d.422, 856 N.E. 2d 1048 (2006). The court noted that the relationship need not be contractual, familial or any other particular type of special relationship. The court looked to four factors to determine whether a relationship between the parties will support the imposition of a duty, specifically: 1) the foreseeability of the harm; 2) the likelihood of the injury; 3) the magnitude of the burden of guarding against the harm; and 4) the consequences of placing the duty to protect against the harm on the defendant.

The *Simpkins* court noted that there is a split in decision around the country on the issue of

whether a duty is owed to family members of employees, and cited favorably two decisions which found a duty under similar circumstances, and which the court found persuasive, *Satterfield v. Breeding Insulation Co.*, 266 S.W. 3d 347 (Tenn. 2008) and *Olivo v. Owens-Illinois, Inc.,* 186, N.J. 395, 895 A. 2d 1143 (2006). In *Satterfield,* the Tennessee Supreme Court rejected the employer's argument that it had no duty to the employee's daughter because there was no special relationship, noting that no special relationship was required when the employer did not simply fail to act, but committed an "injurious affirmative act of operating its facility in such an unsafe manner that dangerous asbestos fibers were transmitted outside the facility." The Simpkins court noted "[t]o find that an employer whose workers are exposed to asbestos owes no duty to protect others from exposure – assuming such exposure is both foreseeable and preventable without undue burden – merely because the others do not have particular special relationship with the employer…. would defy logic and lead to grossly unfair results." The *Olivo* court held that the employer should have foreseen that the person who laundered the clothing of its employee would be exposed to the asbestos that infiltrated the employee's clothing.

In addressing the duty factors, the *Simpkins* court noted the importance of foreseeability, and found that the employer, through reasonable care, should have foreseen the risk of harm to Annette Simpkins. Further, the court determined that the likelihood of developing a disease was not remote, the magnitude of harm was great, and that guarding against take home exposures was not unduly burdensome when balanced against the nature of the risk. In its analysis of the fourth factor, the consequences of imposing this duty on the employer, the Simpkins court rejected the defendant's argument that such a duty would expose it to unlimited liability, noting that its liability would be limited by the foreseeability of the risk.

As the only issue before the court was the duty to an employee's immediate family, the court stated that its decision is only that employers owe a duty to protect against take home exposures to the immediate family of its employees. However, the opinion further provides that that this duty was not expressly limited to immediate family by this decision, and that the court may consider whether the duty extends to others who regularly are in contact with employees when an appropriate case is presented. Further, the *Simpkins* court noted that the decision was limited to the pleading issues, and did not address the existence of a breach or proximate cause.

The Appellate decision fails to mention the decision of the Second District of the Illinois Appellate Court, issued in 2009, which addressed the liability of a premises owner/employer for secondary or take home exposures. In *Nelson v. Aurora Equipment Company*, 301 Ill.App.3d 1036, 909 N.E.2d 931 (2nd Dist. 2009), the Appellate Court affirmed summary judgment and declined to extend a duty under a premises liability claim to a person who had no contact with the premises, but who alleged exposure to asbestos. The *Nelson* case, like *Simpkins*, involved a secondary exposure claim of a woman laundering the clothing of her husband, as well as her son, who were employees of the premises owner. The *Nelson* court specifically noted that the only claim presented was a premises liability claim, and expressly did not consider whether "some other theory of liability not pleaded would dictate a different result." However, the court noted the trial court's finding that imposition of a duty would necessarily apply to anyone who came in contact with the clothing of individuals who had been on the premises, and thereby "would create a limitless number of potential plaintiffs."

We will continue to monitor developments and will update you on any further appellate activity in this case or this area.

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CHINESE DRYWALL LITIGATION UPDATE

Since our last report regarding Chinese Drywall litigation in the November 2009 Toxic Tort Newsletter, the situation has continued to evolve. The MDL in New Orleans has seen its first two trials, with judgments entered in favor of homeowners. Further there has been activity in state court in Florida. Finally, the Consumer Products Safety Commission (CPSC) has weighed in on some of the issues currently

being litigated.

First, in the Federal Court MDL, *In re: Chinese-Manufactured Drywall Products Liability Litigation,* MDL No. 2047 (E.D. La.), there have now been two trials. The first was a bench trial held by Judge Eldon Fallon pursuant to a Class Action Complaint which took place in April 2010, after Taishan Gypsum, a Chinese drywall producer was found in default. This resulted in a judgment against Taishan Gypsum in the amount of just under $2.7 million involving seven plaintiffs, all located in Virginia. The court authored a 108 page order containing its conclusions of law and fact. It found that the plaintiffs suffered property damage as a result of the corrosive effects of sulfur off-gassing from the drywall.

The ultimate dollar amounts awarded to the seven plaintiff homeowners involved were derived by calculating the sums required to remediate the plaintiffs' homes, including the cost of removing the existing drywall, replacing corroded piping, wiring and appliances, replacing the removed drywall, and other associated costs. No personal injury awards were made. The court issued a similar order in April 2010 against another Chinese drywall manufacturer defendant who did appear and contested the claim, which involved a judgment of over $160,000. That defendant did not contest that Chinese drywall was defective and not fit for its intended use. The findings of fact and conclusions in both orders are similar.

All of these findings of fact and conclusions of law are too voluminous to report here, but there are some highlights that are worth discussing given that they are likely to be a template for trials going forward. When the American distributor first arranged for an initial shipment, it required that the drywall meet the relevant ATSM standard. This provision was removed based on the representation that the relevant Chinese standard was the same or the equivalent of the ATSM standard, which was not true. No testing for compliance with the ATSM standard was done. Testing to determine whether the drywall met the Chinese standard was performed by agencies of the Chinese government. Certification of compliance with the Chinese standard was issued two years prior to the shipment of the subject drywall. The court noted that the Chinese government effectively controlled Chinese drywall production and testing.

The court determined that Chinese drywall is different than that produced in the U.S. in that it emits a greater amount of sulfur gas than American drywall, and that this gas is corrosive to metal, particularly copper and silver. This corrosion results in premature failure of products that contain these metals, such as pipes, wiring and appliances such as air conditioners and refrigerators. Products containing these metals are ubiquitous in homes built in the U.S. The court found that the tainted environment in the plaintiffs' homes met the criteria established by the CPSC in its document: "Interim Guidance – Identification of Homes with Corrosion from Problem Drywall" as well as other criteria.

In determining the scope of the damages, the court found that removal of just some drywall from the homes (i.e. only the Chinese drywall) was impractical as it was nearly impossible to distinguish from non-Chinese drywall once installed. The court rejected a defense proposition that it was possible to use XRF technology to specifically identify the sheets of Chinese drywall, finding this technology unreliable. The court found other practical impediments to selective removal and determined that removing all installed drywall was more cost efficient. The court also found that all wiring needed to be replaced due to concerns of fire and electrical failure. It found all copper piping needed to be replaced, also due to safety and related concerns as that piping would be in a weakened condition with an increased risk of failure. The court made similar findings regarding air conditioners, refrigerators and other electrical components, as well as flooring, carpets, plumbing fixtures and related items.

The court also found that most of the plaintiffs would be out if their homes for at least four to six months due to the remediation and restoration activity, and noted the plaintiffs could recover the cost of their alternative, temporary accommodations. The court indicated a willingness to make an award for "loss of use and enjoyment" of the homes at some point in the future. The court did reject a diminution of value claim finding it too speculative. Also, while the court did not award damages for personal injury, it did accept that costs related to actions by homeowners, such as moving out due to the

perception of personal injury, could be compensable as part of their property damage claims.

While the court used Virginia law, as that is where the homes that were subject to the initial trial were located, the basic concept of the damages available there is unlikely to differ much from the other states where Chinese Drywall was used, and thus where the damaged property is located. Thus, the results in these two bench trials are likely to serve as a benchmark for recoverable damages in other cases, regardless of where they are venued.

Second, in Florida, a state trial court certified a class in May 2010 in a case called *Harrell v. South Kendall Construction Corp. et al.,* No. 09-008401 (11th Judicial Circuit, Fla.). This is believed to be the first Chinese drywall state court case to be certified for class treatment. The defendants include not only the drywall manufacturers, but also the U.S. distributor, the general contractors and others. The court found that a predominating common issue in each claim was whether the drywall installed in a given home was defective. Because the claimants are all located in discrete subdivisions, each home had the same supplier and builder making class treatment more palatable to the court.

Finally, the CPSC remains active and is working with the Chinese government in trying to find a solution to the problems. As was noted in Judge Fallon's April 2010 orders, entities of the Chinese government are intricately involved in the ownership and operations of the manufacturers of Chinese drywall, as well as the certification of compliance with Chinese standards. In December 2009, the CPSC released some findings from a study performed as part of its investigation of Chinese drywall. These findings show that sulfur gas emitted from this drywall does have a corrosive effect on metal, especially copper and silver. However, it did not find long term health effects, and suggested that the amounts of gas emitted were below the amounts now associated with health effects. This issue is still being studied.

In June 2010, CPSC announced that testing performed by a U.S. National Laboratory showed that most of the drywall that has allegedly caused corroded electrical components in various homes throughout the U.S. was, in fact, manufactured in China. It found that the drywall with highest sulfur emissions was produced in China. Drywall samples manufactured in the United States in the same period contained low or no such detectable emissions. This is consistent with the long standing beliefs of many.

CPSC is also beginning to work with an ASTM committee as part of an effort regarding the formulation of a new standard on inspection of drywall for air quality issues.

The Chinese Drywall litigation continues to evolve. More study and analysis will be done, but the issue of whether this is a real problem appears to have been resolved. The monetary scope of this problem is beginning to become more clear, and it will be large. The one unknown remains the issue of whether there will be recoverable personal injury damages.

We will continue to monitor developments and welcome any questions or comments. Please contact Bob Pisani at 312-558-3959 or rpisani@mckenna-law.com for more information.

CHELATION THERAPY

Chelation (pronounced "key-LAY-shun") therapy is generally thought of as the administration of chelating agents to remove toxic heavy metals from the body. For the most common forms of heavy metal intoxication—those involving lead, arsenic or mercury—the standard of care in the United States dictates the use of dimercaptosuccinic acid (DMSA). Calcium-disodium EDTA chelation is approved by the U.S. Food and Drug Administration (FDA) for treating lead poisoning and heavy metal toxicity.

Chelation therapy has also been used, however, as alternative non-standard medical treatment for a variety of other ailments including heart disease, autism, kidney dysfunction, calcific band keratopathy (an eye disorder), and ovarian cancer. Despite its use by some alternative medicine practitioners, the use of EDTA chelation therapy as a "miracle cure" for coronary artery disease has not been shown to be effective and is not approved by the U.S. Food and Drug Administration (FDA). In fact, the lack of any studies demonstrating the safety and effectiveness of chelation therapy for anything other than toxic metal poisoning and its potential serious side effects have caused the FDA and

many other medical/scientific bodies to disapprove of such use. Also lining up against such alternative uses are the American Heart Association, the American College of Physicians, the National Institutes of Health, the American Medical Association, and the American College of Cardiology.

Chelating agents were originally introduced into medicine as a result of the use of poison gas in World War I. The first widely used chelating agent, the organic dithiol compound dimercaprol (also named British Anti-Lewisite or BAL), was used as an antidote to the arsenic-based poison gas, Lewisite. The sulphur atoms in BAL's mercaptan groups strongly bond to the arsenic in Lewisite, forming a water-soluble compound that entered the bloodstream, allowing it to be removed from the body by the kidneys and liver. BAL had severe side effects.

After World War II, a large number of Navy personnel suffered from lead poisoning as a result of their jobs repainting the hulls of ships. The medical use of EDTA as a lead chelating agent was introduced. Unlike BAL, it is a synthetic amino acid and contains no mercaptans. EDTA side effects were not considered as severe as BAL.

In the 1960s, BAL was modified into DMSA, a related dithiol with far fewer side effects. DMSA quickly replaced both BAL and EDTA, becoming the US standard of care for the treatment of lead, arsenic, and mercury poisoning, which it remains today. The chelating agent may be administered intravenously, intramuscularly, or orally, depending on the agent and the type of poisoning.

Several chelating agents are available, having different affinities for different metals. Some common chelating agents are EDTA (ethylenediaminetetraacetic acid), DMPS (2,3-dimercaptopropanesulfonic acid), TTFD (thiamine tetrahydrofurfuryl disulfide), and DMSA (2,3-dimercaptosuccinic acid). Calcium-disodium EDTA and DMSA are only approved for the removal of lead by the Food and Drug Administration while DMPS and TTFD are not approved by the FDA. These drugs function by binding to heavy metals in the body thereby preventing them from binding to other agents. The resulting less chemically reactive complex is water-soluble, allowing it to enter the bloodstream and be excreted harmlessly. The chelating process, however, also removes vital nutrients such as vitamins C and E which must be supplemented.

The American College for Advancement in Medicine, a controversial organization that promotes "complementary, alternative, and integrative medicine" including chelation therapy for other ailments, estimates that nearly one million patients receive chelation therapy in the United States each year.

There is a low occurrence of side effects when chelation is used at the dose and infusion rates approved by the U.S. FDA as a treatment for heavy metal poisoning. A burning sensation at the site of delivery into the vein is common. Other side effects include fever, headache, nausea, stomach upset, vomiting, convulsions, bone marrow depression (dropping blood cell counts), a drop in blood pressure, cardiac arrhythmias, respiratory arrest, and hypocalcemia. Other concerns include kidney failure, which can require permanent life-limiting and expensive dialysis, or cause death. Research with lab rats in 2007 indicated that giving chelating agent DMSA to rats without high levels of lead may cause lasting cognitive damage.

When EDTA is not administered by a health professional for the treatment of heavy metal poisoning more serious side effects can occur. Chelation therapy can be hazardous, even conducted with the FDA-approved chelation agents. In August 2005, botched chelation therapy conducted by an ACAM member killed a 5-year-old autistic boy; a 3-year-old nonautistic girl died in February 2005, and a nonautistic adult died in August 2003. These deaths were due to cardiac arrest caused by hypocalcemia during chelation therapy. Only the 3-year-old girl had been medically assessed and found to have an elevated blood lead level and resulting low iron levels and anemia, a proper medical cause for chelation therapy to be conducted. More than 30 deaths have been recorded in association with IV-administered disodium EDTA since the 1970s.

In the 1960s scientists started a small-scale study involving 30 patients. However, after two patients died and the others showed no signs of improvement, it was stopped. Also, a recent study of chelation therapy, using currently approved scientific methodology, was done on people with intermittent claudication (peripheral

artery disease in leg arteries). This study found that EDTA chelation therapy was no more effective than a placebo (sugar pill).

In 1998, the U.S. Federal Trade Commission (FTC) pursued the American College for Advancement in Medicine (ACAM) over their advertising of EDTA chelation therapy, with claims including "Chelation therapy is a safe, effective and relatively inexpensive treatment to restore blood flow in victims of atherosclerosis without surgery." The FTC found that "scientific studies do not prove that EDTA chelation therapy is an effective treatment for atherosclerosis", and that the statements by the ACAM were false. In 1999, the ACAM agreed to stop misrepresenting chelation therapy as effective in treating heart disease, avoiding legal proceedings.

A 2002 study entitled "Chelation Therapy for Ischemic Heart Disease" published in the Journal of the American Medical Association followed 84 patients for 27 weeks. All of the patients had coronary artery disease. One-half of the patients received intravenous chelation therapy during the study period and the other one-half received intravenous placebo (fluid with no drug). Neither the physicians nor the patients knew whether they were receiving chelation or placebo. Patients were given exercise tests to see how long they could exercise before their electrocardiogram (ECG) showed changes indicating ischemia. They also answered quality-of-life questionnaires. At the end of the 27 weeks, the patients who received chelation were no better than the patients who received placebo. The authors concluded that "Based on exercise time to ischemia, exercise capacity and quality-of-life measurements, there is no evidence to support a beneficial effect of chelation therapy in patients with ischemic heart disease, stable angina, and a positive treadmill test for ischemia."

The US National Center for Complementary and Alternative Medicine began conducting the Trial to Assess Chelation Therapy (TACT) in 2003 as the first large-scale, multicenter study to find out if EDTA chelation therapy is safe and effective for people with coronary heart disease. The placebo-controlled, double-blind study was to involve 2,372 participants age 50 years and older who have had a heart attack. The trial has been criticized for lacking prior Phase I and II studies, and particularly because previous controlled trials have not indicated benefits. The ACAM has played a part in the adoption of the TACT clinical trial, which has led to further criticism of the trial. As a result, many have argued that methodological flaws and lack of prior probability make this trial "unethical, dangerous, pointless, and wasteful."

The trial is taking place at about 100 research sites across the United States and is testing EDTA chelation therapy by using the most widely practiced means of administering it. The trial began in 2003 with patients receiving 30 weekly intravenous treatments, then 10 more treatments given bi-monthly, over a 28-month period. They also receive high doses of vitamins, which are also often given with chelation therapy. The effect of such vitamin doses will also be examined in the trial. The study is expected to be completed in July 2010.

Among the myriad of potentially useful information found in plaintiffs' medical records, defendants in toxic tort litigation are encouraged to be on the look out for treatment like chelation therapy to provide a complete picture of the relevant medical history.

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