



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 features an article on the long awaited *Nolan* decision of the Illinois Supreme Court ending the long run of the *Lipke* exclusionary rule in Illinois asbestos litigation. You will also find an article on testimony by Greg Cochran before the Illinois Senate and House Judiciary Committees regarding a much needed venue reform bill designed to prevent forum shopping in Illinois. Additional articles address proposed statute of repose legislation potentially impacting Indiana asbestos and silica litigation, a potential new wave of toxic tort litigation regarding Chinese drywall, and beneficial use of potentially toxic coal ash. 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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LIPKE DOCTRINE OVERTURNED IN ILLINOIS

Illinois asbestos defendants received some long awaited good news last month from the Illinois Supreme Court. In *Nolan v. Weil McLain* (No. 103137, 4/16/09), the Court ended the long run of the *Lipke* exclusionary rule in Illinois asbestos litigation. Under the *Lipke* doctrine, Illinois had been the only state precluding asbestos defendants from presenting evidence at trial of plaintiff's other exposures to asbestos. *Nolan* holds that the trial court erred in preventing the sole remaining defendant from presenting evidence of other asbestos exposures in support of its sole proximate cause defense. In so holding, the Court overruled previous appellate court decisions that had erroneously interpreted *Lipke*.

The *Nolan* decision will inject common sense into Illinois asbestos trials by allowing defendants to present evidence of plaintiff's other exposures to asbestos. Although Illinois asbestos defendants will still have to contend with the doctrine of joint and several liability, *Nolan* will permit defendants to show that the conduct of another entity was the sole proximate cause of plaintiff's

injury. The decision should be particularly helpful to low dose defendants and those with a chrysotile defense.

We will continue to keep you advised of significant developments in Illinois law affecting asbestos defendants. For additional information, please feel free to contact **Greg Cochran** at (312) 558-3935 or by e-mail at gcochran@mckenna-law.com.

COCHRAN TESTIFIES IN SUPPORT OF VENUE BILL

Greg Cochran of our firm testified at a Joint Hearing of the Illinois Senate and House Judiciary Committees held on May 5, 2009 regarding proposed tort reform legislation. Mr. Cochran, who is President of the Illinois Association of Defense Trial Counsel (IDC), testified at the request of the Illinois Civil Justice League (ICJL), a group dedicated to advancing civil justice reform statewide. Mr. Cochran testified in support of Senate Bill 1963, a venue reform bill designed to prevent forum shopping in Illinois. The bill takes aim at the abnormally high rates of civil litigation filed in two Illinois counties - Cook and Madison. Under the current Illinois venue statute, a corporate defendant can be sued in any

county where it is doing business. Under the proposed measure, a corporate defendant could only be sued in a county where it has an office or in the county where the cause of action arose. The proposed bill further provides that if none of the defendants have an office in Illinois, the action could only be brought in the county where the cause of action arose. If none of the defendants have an office in Illinois, and the cause of action did not arise in Illinois, the proposed measure provides that the action must be dismissed for lack of proper venue.

INDIANA **ASBESTOS/SILICA LITIGATION**

Favorable court rulings on the Indiana product liability and construction statutes of repose in recent years have brought asbestos and silica litigation in the state to a virtual standstill. As in other states facing similar scenarios, some Indiana legislators are attempting to revive the litigation this year.

In January, Indiana Senate Bill 99 proposed to change the statutes of repose to essentially provide a bonus year to file otherwise reposed cases. A subsequent House version of the bill authored by State Rep. Dennis Tyler (D-Muncie) passed that body after some amendments as House Bill 1167 - Actions Based upon Exposure to Hazardous Substances. As initially proposed, HB 1167 provided statutes of limitations for causes of action for occupational disease, product liability, and deficiencies in the design, planning, supervision, construction or observation of construction of improvements to real property. More importantly, the bill provided for a one-year period, ending July 1, 2010, to file an otherwise time-barred product liability cause of action based on an exposure to a hazardous substance.

Among its many other provisions, HB 1167 eliminated the "mining and selling" exception to the asbestos statute of repose. The bill also made Indiana a "two disease" state as to all injuries from "hazardous substances", not just asbestos-related injuries. To be fair, HB 1167 did propose some defense friendly provisions including the awarding of "attorney fees" to prevailing parties if an action brought, or a defense pursued, is found to be "frivolous, unreasonable, or groundless", and limitations on successor liability under certain circumstances.

As expected, opposition to the original version of HB 1167 centered on the fact that the bill would essentially repeal Indiana's statutes of limitation and repose governing asbestos-related injuries. Opponents were also concerned about the bill's definition of the term "hazardous substance" which was so vague as to potentially include almost any substance.

HB 1167 will now proceed back to the House for consideration of changes made in the Senate. Given the complexity of the issues to be studied, those involved in managing and defending asbestos/silica cases in Indiana are unlikely to see any changes to the litigation for the foreseeable future.

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CHINESE DRYWALL

In the toxic tort arena, drywall materials have traditionally been thought of as being among the myriad of products involved in asbestos litigation. Today, tainted drywall shipped from China in recent years appears poised to trigger a new wave of toxic tort lawsuits. Whether the wave becomes a tsunami is yet to be determined.

At the height of the U.S. housing boom, American construction companies used millions of pounds of Chinese-made drywall because it was abundant and cheap. Homeowners reportedly saved \$1,000 or more by building with the drywall instead of a domestic product. Records reveal that about 500 million pounds of drywall was shipped from China during a four-year period between 2004 and 2007. According to some estimates, the drywall may have been used in more than 100,000 homes, including many houses in the Southeast rebuilt after Hurricane Katrina in 2005. While Florida appears to be the battleground state, Alabama, California, Louisiana, Mississippi, Ohio, Tennessee, Virginia, Washington, Wisconsin, Wyoming, and the District of Columbia have also reported homes as having been built with the suspect material.

The decision to use Chinese drywall is now haunting hundreds of homeowners and apartment dwellers in light of mounting evidence that the gypsum wallboard was tainted with strontium

sulfide and elemental sulfur, which produces a gas when exposed to high heat and humidity. The gas has been found to be strong enough to corrode copper pipes and wiring. More importantly, state health departments have reported homeowner complaints of a variety of symptoms including dizziness, nosebleeds, difficulty breathing, and itchy or irritated skin. While there have been none reported to date, the Centers for Disease Control and Prevention (CDC) advise that the compounds, especially high levels of carbon disulfide, can even lead to death.

"This is a traumatic problem of extraordinary proportions," said U.S. Rep. Robert Wexler, a Florida Democrat who introduced a bill in the House calling for a temporary ban on the Chinese-made imports until more is known about their chemical makeup. Similar legislation has been proposed in the Senate. The Senate Commerce Committee conducted its first hearing on the subject on May 21st.

Early environmental studies show that the drywall causes a chemical reaction that gives off a rotten-egg stench, which grows worse with heat and humidity. Researchers do not know yet what causes the reaction, but possible culprits include fumigants sprayed on the drywall and material inside it. Scientists hope to gain a better understanding of the problem by studying the chemicals in the board. Drywall consists of wide, flat boards used to form walls. It is often made from gypsum, a common mineral that can be mined or manufactured from the byproducts of coal-fired power plants.

The Chinese drywall is also made with a coal byproduct called fly ash that is less refined than the form used by U.S. drywall makers. Fly ash can be gathered before it ever reaches the smokestack, where technology is used to remove sulfur dioxide from the emissions. The process of "scrubbing" the smokestack emissions creates calcium sulfate, or gypsum, which can then be used to make wallboard. Michael Gardner, executive director of the U.S. Gypsum Association, said American manufacturers gather the gypsum from the smokestacks after the scrubbing, which produces a cleaner product.

The U.S. Consumer Product Safety Commission received its first consumer report related to the drywall in December 2008 and has now dispatched teams of toxicologists, electrical engineers and other experts to Florida to study the phenomenon. The commission is also working

with the Environmental Protection Agency (EPA) and the CDC to determine whether there is an actual human health hazard.

A Florida Department of Health analysis found the Chinese drywall emits "volatile sulfur compounds," and contains traces of strontium sulfide, which can produce the rotten-egg odor and reacts with air to corrode metals and wires. The agency says on its Web site, however, that it "has not identified data suggesting an imminent or chronic health hazard at this time."

Companies that produced some of the wallboard said they are looking into the complaints, but downplayed the possibility of health risks. "What we're trying to do is get to the bottom of what is precisely going on," said Ken Haldin, a spokesman for Knauf Plasterboard Tianjin, a Chinese company named in many of the lawsuits now filed.

So far, the problem appears to be concentrated in the Southeast, which blossomed with new construction during the housing boom and where the damp climate appears to cause the gypsum in the building material to degrade more quickly. In Florida alone, experts estimate that more than 35,000 homes may contain the product. In Louisiana, the state health department has received complaints from at least 350 people in recent weeks. Many of the affected homeowners rebuilt after Hurricane Katrina only to face the prospect of tearing down their houses and rebuilding again.

The drywall furor is the latest in a series of scares over potentially toxic imports from China. In 2007, Chinese authorities ratcheted up inspections and tightened restrictions on exports after manufacturers were found to have exported tainted cough syrup, toxic pet food and toys decorated with lead paint. The U.S. has never regulated the chemical ingredients of imported drywall.

In addition to the early lawsuits, "Chinese Drywall" websites are now popping up to "inform and educate" the general public as to the health risks of exposure and, of course, their legal rights. In response to health-related lawsuits, builders have filed their own suits against the drywall's suppliers and manufacturers. Of immediate concern to builders and contractors, however, is whether commercial general liability policies with pollution exclusions will provide coverage for the lawsuits

filed against them. In that regard, many state courts have held that they will not substitute the common definition of a pollutant for that in the policy, particularly when confronted with fumes given off by common everyday products.

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TOXIC COAL ASH

In a related story, potentially toxic coal ash has found many uses beneficial to industry and even the environment despite its link to human health hazards. In fact, to reduce the need to store coal waste products, the Environmental Protection Agency (EPA) is now actually promoting their beneficial reuse.

According to the U.S. Department of Energy, coal supplies more than half of the electricity consumed by Americans today. Just over 1 billion tons of coal was burned for electric power in the United States in 2007. That process produced about 131 million tons of coal combustion products, including fly ash, bottom ash, and boiler slag. Improperly handled ash can leach arsenic, lead, chromium, selenium, and other toxic materials into ground and drinking water.

In 2007, more than 80 percent of coal-plant boiler slag was utilized, mostly for sandblasting or as the grit on roofing shingles. Forty percent of bottom ash became a gravel substitute, fill for embankments, or ice control agent. About 44 percent of fly ash found uses, mostly as a substitute for some of the Portland cement in concrete. The EPA especially encourages the use of fly ash in concrete because any heavy metals in the ash are trapped forever.

Prominent projects where fly ash has replaced significant amounts of Portland cement include the

new I-35W bridge in Minneapolis; the Ronald Reagan Government Office Building, home to the EPA in Washington; and Freedom Tower, the complex being built on the former site of the World Trade Center in New York. California's Department of Transportation is so sold on fly ash's benefits that it requires contractors to replace 15 percent to 35 percent of the Portland cement in road concrete with the ash.

As reported in the previous article, another useful coal combustion product is gypsum. The process that smokestack "scrubbers" use to reduce nitrogen oxide and sulfur dioxide emissions creates high-quality synthetic gypsum. Scrubbers at electric utility PPL Corp.'s Montour plant near Washingtonville, Pennsylvania, generate 500,000 tons of gypsum annually. PPL pipes every bit of it to a new U.S. Gypsum plant right across the road, supplying it with all the gypsum it needs to make 955 million square feet of wallboard a year. The PPL plant also markets all of its ash for beneficial reuse.

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