



GOLDBERG SEGALLA ^{LLP}

CaseWatch: Asbestos

A national asbestos litigation newsletter

December 2010 • Vol. III, No. 1

Editors: [Toni L. Frain](#), [Joseph J. Welter](#)

CaseWatch provides timely summaries of and access to asbestos litigation news, including verdicts and decisions from the nation's appellate courts, and is distributed monthly via e-mail. Links to full text decisions where available are found in individual case titles. We appreciate your interest in our newsletter, and welcome your feedback. We also encourage you to share the newsletter with your colleagues. If others in your organization are interested in receiving the publication, or if you do not wish to receive future issues, please contact [Toni L. Frain](#)

Verdicts

Tennessee Jury Awards FELA Plaintiff \$8.6 Million

In *Payne v. CSX Transportation Inc.*, Winston Payne died from lung cancer. His estate filed a Federal Employers Liability Act lawsuit against CSX Transportation Inc. in Knoxville County, Tennessee, alleging that Mr. Payne was exposed to asbestos, radiation and diesel fumes. Plaintiff alleged that the trains moved metal and barrels contaminated with radiation and released asbestos and diesel exhaust.

Mr. Payne's physicians opined that his smoking history contributed to his disease. The railroad argued that Mr. Payne's lung cancer and death arose solely from his cigarette smoking and that the CSX Transportation Inc. train engines did not contain asbestos.

On November 30, 2010, after a two-week trial and one day of deliberations, the jury awarded \$8.6 million to Mr. Payne's estate. The jury held CSX Transportation Inc. 62% responsible for Mr. Payne's injury. However, the jury held the railroad liable for two violations of the Federal Locomotive Inspection Act.

California Jury Awards \$22.7 Million Against John Crane Inc.

In *Pfeifer v. Buffalo Pumps, Inc.*, William Pfeifer was diagnosed with mesothelioma. Mr. Pfeifer was exposed to asbestos during his 30-year work history as a boiler operator in the United States Navy and at various military locations. Mr. Pfeifer used asbestos-containing gaskets and packing manufactured by John Crane Inc.

John Crane Inc., the last remaining defendant at trial, argued that its products did not cause Mr. Pfeifer's mesothelioma.

On November 18, 2010, the Los Angeles County jury found that John Crane Inc.'s products were a substantial factor in Mr. Pfeifer's mesothelioma. The jury determined that John Crane Inc.'s products were defective and the company negligently failed to warn of their hazards. The jury's award consisted of \$8.2 million in compensatory damages and \$14.5 million in punitive damages. The jury held John Crane Inc. 70% responsible.

Pennsylvania Jury Returns Defense Verdict

In *Schumacher v. Azrock Industries Inc. & John Crane Inc.*, John Schumacher was diagnosed with mesothelioma. Mr. Schumacher and his wife, Bonnie, filed suit in the Philadelphia County Court of Common Pleas. Defendants removed plaintiffs' claims to the United States District Court for the Eastern District of Pennsylvania and the case was consolidated in the federal asbestos multidistrict litigation of that court.

The only remaining defendants at the time of verdict were John Crane Inc. and Domco Products Texas Inc., formerly known as Azrock Industries Inc. Plaintiffs alleged that Mr. Schumacher was exposed to John Crane Inc.'s asbestos-containing products while serving on ships in the United States Navy. As against Azrock Industries Inc., plaintiffs alleged Mr. Schumacher was exposed to asbestos while employed at a floor tile company.

Defendants argued that Mr. Schumacher's mesothelioma was caused by exposure to asbestos contained in other materials, including insulation products. Defendants also argued that plaintiffs produced insufficient evidence that Mr. Schumacher worked with their products.

On November 16, 2010, jury found that asbestos was a substantial contributing factor to Mr. Schumacher's mesothelioma. However, the jury found that plaintiff was not exposed to asbestos from defendants' products.

Verdict Challenges

Washington Federal Court Denies Motion to Stay Judgment as Premature

In the August and December 2009 issues of *CaseWatch: Asbestos*, we reported on *Barabin v. Albany International Corp.* In that case, Henry Barabin was exposed to asbestos-containing dryer felts during his employment at the Crown-Zellerbach paper mill in Camas, Washington from 1968 until 2001. Mr. Barabin was diagnosed with mesothelioma in 2006. On August 18, 2009, the United States District Court for the Western District of Washington denied the summary judgment motions of AstenJohnson, Inc. and Scapa Dryer Fabrics, Inc., manufacturers who supplied asbestos-containing dryer felts to the Camas paper mill where Mr. Barabin worked.

Mr. Barabin settled with all defendants except for AstenJohnson, Inc. and Scapa Dryer Fabrics, Inc. At trial, the defendants argued that their products did not release asbestos fibers because they were wet and because asbestos fibers were encapsulated within the product.

On November 19, 2009, after three days of deliberations, the jury rejected defendants' contentions, finding that defendants' products were not reasonably safe as designed, that their failure to provide adequate warnings rendered their products not reasonably safe, and that their products proximately caused Mr. Barabin's mesothelioma. The jury ruled that both defendants were jointly liable for the full amount of damages - \$700,000 in economic damages, \$8 million in noneconomic damages and \$1.5 million in loss of consortium damages for Mr. Barabin's wife, Geraldine.

On December 6, 2010, the court denied defendants' motions to continue the automatic 14-day stay for an additional 30 days. The purpose of the stay permits the defendants sufficient time to allow consideration of post-judgment motions and appeals. Here, however, no final judgment had been entered and no appeal was pending that would warrant a stay under the Federal Rules of Civil Procedure.

Additionally, the court held that defendants' motion to apportion the judgment equally between them was also premature. Parties are allowed a stay of judgment by supersedeas bond if an appeal is filed. Supersedeas bonds are general the entire amount of the judgment plus appeal costs, interest and damages for delay. However, as with defendants' motion for a stay, the court noted that final judgment had not yet been entered. Granting equal apportionment of supersedeas between defendants before entering final judgment or approving a supersedeas amount would unnecessarily bind the Court's discretion.

Courts Address Summary Judgment Motions

Nine Defendants Obtain Summary Judgment in Federal MDL

In *Seigfried v. Allegheny Ludlum Corp.* (E.D. Pa. December 7, 2010), William Seigfried died from mesothelioma which resulted from asbestos exposure during his service in the United States Navy from 1950 until 1954 and while employed as a bricklayer at various industrial sites from 1957 until 1987. The action was commenced in Washington County, Pennsylvania. Defendant General Electric Co. removed the action to the United States District Court for the Western District of Pennsylvania. The case was then transferred to the federal asbestos multidistrict litigation in the Eastern District of Pennsylvania.

Nine defendants moved for summary judgment: Sealite Inc., Allied Glove Inc., Oglebay Norton Co., Honeywell Inc., DeZurik Inc., Dravo Corp., Goulds Pumps Inc., General Electric and CBS Corp. The court stated that a plaintiff in an asbestos products liability action must establish that his injuries were caused by a product manufactured by the particular defendant. To survive summary judgment, plaintiff must establish that he worked with the defendant's product with the necessary frequency and regularity, and in close enough proximity to the product to create a genuine issue of material fact as to whether the specific product was a substantial factor in plaintiff's asbestos-related condition. The court stated that mere fact that the defendants' products were located in the facility does not show that decedent worked where these specific products were delivered or ever breathed asbestos fibers released from them.

The court granted defendants' motions, holding that plaintiff's evidence was lacking in two crucial ways. First, Mr. Seigfried repeatedly testified that he did not know if he worked with or around any asbestos-containing materials manufactured or supplied by any of the defendants. Second, none of the product identification witnesses placed Mr. Seigfried near any of those materials.

With respect to defendant Sealite Inc., plaintiff established that Mr. Seigfried worked for two months between 1960 and 1966 at U.S. Steel, Homestead Works in Pennsylvania on the annealing furnaces. According to a co-worker affidavit and deposition in another case, Sealite Inc. manufactured asbestos-containing rope packing used at the site in the open hearth, structural mill, and forge departments in the 1960s and 1970s. The court held that this evidence does not sufficiently demonstrate Mr. Seigfried's exposure to asbestos as a result of Sealite Inc.'s products. No evidence was presented that Mr. Seigfried used or was in the proximity of others using the materials. Mr. Seigfried worked in a different area from where the co-worker placed Sealite Inc.'s products, and the co-worker did not testify that he saw Mr. Seigfried working with or around the materials.

With respect to Allied Glove, Inc., the president of the company testified at depositions that the company distributed asbestos-containing gloves to various plants and industrial facilities from the mid-1960s until approximately 1984. Plaintiff presented deposition testimony of a co-

worker who wore gloves and mittens manufactured by Allied Glove while casting the furnaces at the Wheeling-Pittsburgh Steel plant in Monessen, Pennsylvania from 1955 until 1986. Mr. Seigfried worked for one month between 1958 and 1966 at the steel plant. Plaintiff also presented evidence that a co-worker used Allied Glove's asbestos-containing gloves during the time he worked as a utility analyst from 1965 to 1984 at U.S. Steel, Homestead Works.

However, the court noted that Mr. Seigfried never mentioned Allied Glove products at either facility and never mentioned Allied Glove at all during his deposition. Additionally, Mr. Seigfried did not testify at his deposition that he ever worked with or around any asbestos-containing gloves, regardless of manufacturer, at either of these facilities. There was no evidence that Mr. Seigfried worked in the same department at either facility with any of the witnesses plaintiff presented. Additionally, the court noted that the co-workers admitted that the only reason they believed the gloves contained asbestos was because the gloves withstood high temperatures. The court noted that opinion testimony that a product contains asbestos merely because it withstood high temperatures was insufficient, as an evidentiary matter, to establish that the products actually contained asbestos.

With respect to defendant Oglebay Norton Company, plaintiff argued that the company admitted that its Ferro division sold asbestos-containing hot top materials to the Wheeling-Pittsburgh Steel plant in Monessen from 1947 until 1969. Plaintiff also submitted co-worker evidence that the company's asbestos-containing hot top materials were used at the plant from the mid-1960s through the 1970s. However, the court noted that Mr. Seigfried testified that he only worked at this plant in 1958. Since Mr. Seigfried testified that he could not recall working at the plant after 1958, plaintiff's proof regarding the presence of Oglebay Norton Company's hot tops at the plant from the mid-1960s through the 1970s was irrelevant. The court noted that there was no other evidence that Mr. Seigfried worked with Oglebay Norton Company's asbestos-containing products.

With respect to the defendant Honeywell, Inc., plaintiff claimed that defendant admitted that components of certain of its valves manufactured between 1949 and the 1980s included asbestos-contained gaskets and packing. Plaintiff presented the deposition testimony of two co-workers that Honeywell valves were present throughout the mill at U.S. Steel, Homestead Works including in the open hearth, structural mill and forge department in the 1960s and 1970s.

The court held that this evidence was insufficient to justify denying Honeywell's motion. The court found that neither Mr. Seigfried nor the co-workers testified that Mr. Seigfried worked with Honeywell asbestos-containing valves. Additionally, none of the testimony submitted placed Mr. Seigfried in the areas where Honeywell valves were used.

With respect to defendant DeZurik, Inc., plaintiff argued that defendant admitted in answers to interrogatories that it sold asbestos-containing valves until the 1990s and presented co-worker testimony that DeZurik valves were used throughout the U. S. Steel, Homestead Works plant. The court held that there was no testimony from Mr. Seigfried that he ever worked with or around any DeZurik products during the time that he worked at the plant. The court also held that Mr. Seigfried's work in the annealing furnaces between 1960 and 1966 did not overlap

with the co-workers' work in the open hearth, structural mill and forge division at the plant in the 1960s, 1970s and 1980s.

With respect to defendant Dravo Corp., plaintiff claimed that Dravo's contract division installed various asbestos-containing materials during the 1970s. Plaintiff also argued that invoices established that Dravo supplied gaskets in 1962 and cement to the Wheeling-Pittsburgh Steel plant in Monessen, Pennsylvania for a blast furnace reline in 1966. Additionally, plaintiff submitted affidavits and deposition testimony from co-workers that at various times during the 1960s, 1970s and 1980s, Dravo employees performed work on the blast furnace at the plant using asbestos-containing cement, pipe covering and gaskets.

The court found that this evidence did not preclude summary judgment to the extent that Mr. Seigfried did not testify that he worked with or around any asbestos-containing products installed by Dravo. Additionally, Mr. Seigfried testified that he worked at the plant for only two months in 1958. Accordingly, the co-worker testimony concerning events that took place at the plant in the 1960s, 1970s and 1980s was not relevant to the case.

With respect to defendant Goulds Pumps, Inc., plaintiff argued that Goulds admitted that it sold pumps with asbestos-containing case gaskets and packing until 1985. A co-worker testified that he used asbestos-containing packing and gaskets on Goulds Pumps throughout the U.S. Steel, Homestead Works plant from the 1950s through the early 1980s. Mr. Seigfried worked at the plant for two months between 1960 and 1966. However, the court found that this evidence was insufficient to justify denying Goulds' motion for summary judgment. The court found that Mr. Seigfried did not testify that he worked with or around any Goulds pumps. Additionally, the co-worker did not testify that he observed Mr. Seigfried working around pumps between 1960 and 1966.

With respect to defendant General Electric Company, plaintiff argued that General Electric admitted in answers to interrogatories that it supplied asbestos-containing contact/panel boards to the U.S. Steel, Homestead Works and Wheeling-Pittsburgh Steel plants. General Electric also admitted in answers to interrogatories that it manufactured, sold, or supplied a generator system for use aboard the *USS Yarnall*, where Mr. Seigfried worked from 1950 until 1953. Plaintiff also presented deposition testimony placing General Electric products at the plants and on the ship.

The court granted summary judgment in favor of General Electric, stating that there was no testimony from plaintiff or any of the co-workers that Mr. Seigfried worked around General Electric contact/panel boards during the brief time that he worked at the two plants. Additionally, neither of the co-workers testified that they or Mr. Seigfried were ever exposed to an asbestos-containing product while they were aboard the ship.

Finally, with respect to defendant CBS Corp., plaintiff argued that the company admitted in answers to interrogatories that it manufactured, sold, or supplied asbestos-containing turbines to Wheeling-Pittsburgh Steel. Additionally, Naval documents showed that there were CBS-Westinghouse forced draft blowers aboard the *USS Yarnall* during the relevant time period.

Plaintiff also presented co-worker deposition testimony regarding Mr. Seigfried's work aboard the *USS Yarnall* and establishing that asbestos-containing contact boards/panel boards manufactured by CBS-Westinghouse were present throughout the entire U.S. Steel, Homestead Works facility between 1965 and 1986.

The court found that this evidence was not sufficient to defeat CBS Corp.'s motion for summary judgment. Mr. Seigfried did not testify that he worked with or was around any asbestos-containing product manufactured by CBS Corp. while he worked at U.S. Steel, Homestead Works or while he was aboard the *USS Yarnall*. Additionally, none of the co-workers testified that William Seigfried ever worked with or was exposed to any asbestos-containing product manufactured by CBS Corp.

The court granted all nine of the defendants' motions for summary judgment, stating that while plaintiff's evidence may generally show that Mr. Seigfried and certain asbestos-containing materials were in certain places at the same time, the evidence failed to specifically show that Mr. Seigfried worked either with, or in the vicinity of, any of those products on a frequent and regular basis.

United Gilsonite Laboratories and Globe Manufacturing Co.
Obtain Summary Judgment

In *Travis v. 3M Co.* (E.D. Pa. December 2, 2010), Francis Bruce Travis was diagnosed with mesothelioma. He commenced an action in New York Supreme Court, New York County, against several defendants, including United Gilsonite Laboratories ("UGL") and Globe Manufacturing Co. The case was removed to the United States District Court for the Southern District of New York, and consolidated in the federal asbestos multidistrict litigation in the United States District Court for the Eastern District of Pennsylvania.

Mr. Travis allegedly was exposed to asbestos-containing joint compound and joint cement manufactured by UGL while he was employed as a maintenance worker at the Pennbrook Apartment Complex in Pennsylvania for nine to ten months. Mr. Travis testified that his primary duties at the Pennbrook Apartment Complex included wall repair and painting. When asked to identify the manufacturers of products he used at the apartment complex, Mr. Travis responded, "I thought the outfit in the Scranton area, something labs, G-E-L [...] Yes, that was wallboard, drywall." On the second day of his deposition, Mr. Travis testified that, "the company in Scranton, Pennsylvania, UGL or something like that" manufactured the drywall Mr. Travis worked with at the Pennbrook Apartment Complex. Mr. Travis recalled using UGL drywall or wallboard about eighteen times in replacements and possibly for patching up holes. Mr. Travis testified that to the best of his knowledge, UGL was the only manufacturer of the drywall.

According to Thomas White, a corporate representative for UGL, UGL has never manufactured, sold, or supplied any drywall, wallboard or sheetrock.

UGL moved for summary judgment, arguing that there was no evidence that Mr. Travis was exposed to any UGL asbestos-containing products. On November 29, 2010, the federal magistrate granted UGL's motion and plaintiff filed objections.

On December 2, 2010, plaintiff's objections were overruled. The court held that plaintiff's argument that his reference to wallboard, a product UGL did not manufacture, was intended to refer to "wallboarding", a process involving joint compounds, was a distortion of the deposition testimony. The court held that at no point in his deposition did plaintiff identify UGL as the manufacturer of any joint compound material he worked with.

Accordingly, summary judgment was properly granted in favor of UGL.

With respect to Globe Manufacturing Co. ("Globe"), plaintiff alleged that he wore structural firefighting gear while serving as a firefighter for the Naval Air Station New York ("NASNY") from 1957 until 1962. Plaintiff contends that he was exposed to Globe asbestos-containing fire suits while serving as a firefighter at the NASNY. Mr. Travis testified that part of his protective gear was a "turn-out coat." He wore two different coats as protective gear, one as part of his crash gear and one as part of his structural firefighting gear. He testified that Globe was the manufacturer of the structural firefighting gear. He testified that the coat which was part of his structural gear contained reflective tape manufactured by 3M Co. and that the tape contained asbestos. Mr. Travis also testified that he was given used crash gear, including a used turn-out coat which contained asbestos, likely manufactured by Globe. Mr. Travis claimed that people in the Navy told him that his gear contained asbestos.

Globe argued that it never sold aluminized crash gear turn-out coats which contained asbestos and never sold any firefighter protective gear containing asbestos. According to Douglas Towle, Vice President of Globe, Globe sold two types of gear to distributors, structural firefighting suits and "approach suits." Mr. Towle testified that aluminized approach suits made up less than five percent of Globe's product line.

For a brief period of time beginning in 1960, Globe experimented with a new material in its aluminized crash gear. This "Type 73 material" was supplied by 3M Co. It was supplied to limited customers at no charge and was never sold or included in any production line because it did not perform well. In 1958, Globe used an aluminized rayon material purchased from 3M Co. to make approach fire gear. This was Type 82 material. Globe sent a swatch of this material to be chemically tested and the results confirmed that asbestos could not be present in the sample. Mr. Towle testified that Globe never sold products directly to the government and that when someone in the military wore a Globe product, it would have been purchased from the inventory of a Globe supplier to meet an urgent need. Moreover, most Globe distributors did not stock approach suits because they were expensive and so any suits, which went to the military, were likely structural suits.

Plaintiff submitted two advertising sections from August 1959 and July 1970 of Fire Engineering magazine, where Globe was listed as a manufacturer of asbestos-containing coats. In his deposition, Mr. Towle testified that this was likely an administrative error.

Globe moved for summary judgment, arguing that Globe never incorporated asbestos into its aluminized crash coats and never sold any firefighter protective gear containing asbestos. The federal magistrate granted Globe's motion on September 28, 2010 and plaintiff filed objections.

On December 2, 2010, plaintiff's objections were overruled. The court held that Globe presented sufficient evidence that the only time it manufactured asbestos-containing coats was during the short experimentation period and that it never sold those coats, but only provided them to some customers. Additionally, Globe did not supply products directly to the United States Navy. While one of the experimental coats supplied to a customer may have been provided to the Navy, the experimental line constituted less than 5% of Globe's production line. Accordingly, any finding linking plaintiff to the product would be speculation.

Accordingly, summary judgment was properly granted in favor of Globe Manufacturing Co.

**New York Court Denies Goodyear Tire & Rubber Co. &
Goodyear Canada Inc.'s Summary Judgment Motions**

In *Green v. A.O. Smith Water Products Co.* (N.Y. Sup. New York County November 30, 2010), Thomas Joseph Green worked as a pipe fitter for J. Hart & Son Plumbing in Albany, New York at residential sites from 1971 to 1973 and while a member of the pipe fitters union from 1977 until 2005. As a pipe fitter, plaintiff testified he was responsible for installing piping systems in new houses and removing piping and boilers from older homes. Specifically, plaintiff testified that while tearing out and replacing old piping systems and boilers, he was required to scrape off gaskets used in conjunction with these pipes and boilers and then cut new gaskets to be fitted onto flanges. While plaintiff testified that he came into contact with gaskets manufactured by the defendants, he was unsure whether those products were the source of his exposure. Mr. Green was diagnosed with lung cancer.

Defendants Goodyear Tire & Rubber Co. and Goodyear Canada Inc. moved for summary judgment alleging, among other things, that (1) plaintiff did not know whether the gasket material that he identified contained asbestos; (2) plaintiff described products which fit the description of Goodyear's asbestos-free gasket material; and (3) Goodyear ceased manufacturing asbestos-containing gaskets two years before plaintiff worked with Goodyear products. In opposition, plaintiff alleged, among other things, that (1) plaintiff described gasket material which matched the description of asbestos-containing material manufactured by the defendants; and (2) Goodyear's answers to interrogatories provide sufficient proof that its gaskets contained asbestos.

The court denied defendants' motions. The court noted Goodyear Canada's admission that it produced asbestos-containing gaskets until 1973, during the time period plaintiff worked as a pipe fitter. However, even if both companies ceased production in 1969, it was still possible that Goodyear's asbestos-containing gaskets were still sold and used in the marketplace during the relevant time, and that plaintiff worked with these asbestos-containing gaskets in the course of his employment.

Mr. Green testified that he used Goodyear gaskets, but could not confirm exposure to asbestos as a result. The court, however, held that this defect did not require summary judgment if other evidence allowed an inference that he worked with the product. Mr. Green originally testified to using silverfish-gray gasket material from Goodyear that he contended matched the description of asbestos-containing gaskets manufactured by Goodyear. Even though Mr. Green provided more specific testimony suggesting that he worked with its non-asbestos-containing materials, Goodyear did not explore this aspect of Mr. Green's testimony in sufficient detail to eliminate all issues of fact. Additionally, Mr. Green's testimony that the products he worked with were "gray with little streaks of red in them" did not match Goodyear's evidence closely enough to warrant summary judgment.

Accordingly, the court denied defendants' motion for summary judgment.

**New York Court Finds Question of Fact Based on
Identification of Kaiser Gypsum from Photographs**

In *Orszulak v. A.O. Smith Water Products* (N.Y. Sup. Ct. New York County November 29, 2010), Krzysztof Orszulak was born in Poland in 1941 and came to the United States in 1976. Mr. Orszulak was exposed to asbestos during renovation and demolition work while employed as a laborer at various residential and commercial sites in Brooklyn, Queens and Manhattan. Mr. Orszulak was unable to recall the name "Kaiser Gypsum" or that of any other manufacturer at his deposition, but identified the defendant as the producer of asbestos-containing joint compound with which he worked by signing his initials on a photograph depicting Kaiser Gypsum joint compound. The photograph depicting Kaiser Gypsum joint compound, along with approximately twenty others, were provided to Mr. Orszulak by plaintiffs' counsel prior to the deposition.

Kaiser Gypsum moved for summary judgment arguing that: (1) Mr. Orszulak could not have worked with asbestos-containing joint compound from 1976 to 1979 because Kaiser Gypsum ceased manufacturing asbestos containing materials in 1975; and (2) Mr. Orszulak had no independent recollection of using Kaiser Gypsum products prior to being shown the photographs by plaintiffs' counsel. Plaintiffs argued that: (1) defendant's claim that it stopped manufacturing asbestos-containing products prior to the relevant time period was irrelevant given the theory of residual usage; and (2) the use of photographs to identify asbestos-containing products is a well-settled form of product identification.

The court denied Kaiser Gypsum's motion. The court held that even if Kaiser Gypsum ceased manufacturing asbestos-containing joint compound in 1975, it was possible that Kaiser Gypsum's products were still sold and used in the marketplace during the relevant time period, and that Mr. Orszulak worked with these products in the course of his employment in 1976. Mr. Orszulak testified that he was exposed to asbestos as a result of the dust created when mixing and sanding the joint compound less than one year after Kaiser Gypsum closed its New Jersey plant. Kaiser Gypsum produced no evidence that it could not have manufactured the joint compound to which Mr. Orszulak was exposed.

The court also rejected Kaiser Gypsum's contention that Mr. Orszulak had no independent recollection of products it manufactured. The court noted that witnesses often cannot recall key pieces of evidence and that a writing or other object may be used to refresh their recollection. The court noted that photographs are a well-accepted form of refreshing a witness' recollection and have been used by counsel to aid a witness in his identification of asbestos-containing products in other cases. The court noted that the use of photographs is only improper where it would "furnish a witness with imaginative materials or a false memory."

Here, Mr. Orszulak testified in detail regarding the nature of his job and his exposure to asbestos when working with or in close proximity to others using the joint compound depicted in the photograph. Accordingly, he could hardly be said to have had no independent recollection of the matter. In fact, the court held, the use of said photographs was critical given Mr. Orszulak's inability to read, speak, or write in English.

The court also held that there was nothing to indicate that the photo array was provided to Mr. Orszulak in a way that created a substantial likelihood he would single out the Kaiser Gypsum for identification. Counsel provided him with a group of twenty photographs prior to the deposition and asked him to initial the photographs portraying the products he recognized. Out of the twenty photographs, Mr. Orszulak initialed only ten. Additionally, Mr. Orszulak was repeatedly asked to and did in fact separate the photographs into two piles, one containing images of products he recalled working with during the relevant time period, and one containing products he did not recall working with during the relevant time period. Mr. Orszulak consistently placed the photograph containing Kaiser Gypsum joint compound in the pile containing products he believed he worked with during the relevant time period. As such, the method by which the Kaiser Gypsum joint compound was identified by Mr. Orszulak was not unduly suggestive.

The court held that at best, Kaiser Gypsum's arguments regarding Mr. Orszulak's recollection and the allegedly suggestive nature of the identification procedure go to Mr. Orszulak's credibility and the weight of the evidence, not its admissibility.

Accordingly, the court denied Kaiser Gypsum's motion for summary judgment.

**California Appeals Court Rules That An Oil Refinery Boiler
Was An Improvement to Real Property**

In the March/April 2010 issue of *CaseWatch: Asbestos*, we reported on *McCann v. Foster Wheeler* (Cal. February 18, 2010). In that case, Terry McCann moved to California in 1975. He retired in 2001 and was diagnosed with mesothelioma in 2005. He filed a lawsuit in the Los Angeles County Superior Court, alleging that his mesothelioma resulted from exposure to asbestos insulation added to a steam generator his employer purchased from Foster Wheeler, a New York company, in 1957. Mr. McCann worked as a sales trainee for Tulsa Refinery Engineering Co. in Oklahoma. D-X Sunray Oil Co. affixed the Foster Wheeler generator to a concrete foundation, and a third party added the insulation.

Foster Wheeler moved for summary judgment, arguing that Oklahoma's statute of repose barred the lawsuit. Under that statute, a tort action arising from the design of an improvement to real property must be brought within 10 years of the substantial completion of the improvement. Plaintiff argued that the lawsuit was allowed under California law, which allows an exception permitting state residents to bring causes of action that may be time-barred under other states' laws.

The lower court held that Foster Wheeler was the designer of the generator and that its associated boiler was an improvement to real property and applied Oklahoma's statute of repose. The Second District Court of Appeal reversed, holding that choice-of-law principles dictate against applying the Oklahoma statute of repose. The court held that "California's interest in providing [McCann] with a remedy is far more significant than Oklahoma's interest in protecting a nonresident defendant from excessive financial burden."

The California Supreme Court reversed the Second District Court of Appeal. The court held that although California has a legitimate interest in affording plaintiff a remedy, that interest is limited when the defendant's conduct occurred in another state where the plaintiff was present and was a resident. The court stated, "Oklahoma's interest in the application of its statute of repose applies as fully to out-of-state companies that design and construct improvements to real property in Oklahoma as to Oklahoma companies that design and construct such improvements." The court held that when a state limits liability for certain conduct with the intent of creating what it believes is a fair treatment of that conduct, the state has an interest in having that policy applied to out-of-state companies conducting business in the state. This allows the state to foster an atmosphere that attracts out-of-state companies to the state.

Accordingly, applying California law would impair Oklahoma's interests more than applying Oklahoma's statute of repose would impair California's interests. The court remanded the case with instructions to apply Oklahoma law and consider plaintiff's argument that the trial court incorrectly found that the installation of Foster Wheeler's boiler was an improvement to real property.

On November 29, 2010, the California Second District Court of Appeal held that substantial evidence suggests that the boiler was in fact an improvement to real property. The court held that Oklahoma courts do not define “improvement to real property” but rely on five factors in making the determination: (1) the product’s tax treatment as either ad valorem or personal property; (2) whether the product is owned by the property owner; (3) the product’s permanence; (4) the product’s effect on the value of the property; and (5) the intentions of the property owner and supplier of the product.

The court held that the boiler had a single owner, and was essentially permanent. Although the 25-story boiler could have been unbolted from its concrete pad and disassembled, this merely suggested a conflict in the evidence. The court could still have reasonably concluded that the boiler was permanent. The boiler was also part of the oil refinery’s product process and increased the refinery’s value. The court rejected plaintiff’s argument that a distinction existed between the value of the land and the value of the business, finding that outside of agriculture and certain natural resource industries, any improvement to the commercial use of land will increase the land’s value. Also, the fact that evidence suggested that Oklahoma taxes refinery boilers as personal business property, this is only one factor weighing in plaintiff’s favor. It is not dispositive and the parties presented no evidence on the boiler’s actual tax treatment.

Accordingly, the oil refinery boiler was an improvement to real property triggering the 10-year statute of repose.

Goldberg Segalla LLP is a Best Practices law firm with offices in Philadelphia, New York, Princeton, Hartford, Buffalo, Rochester, Syracuse, Albany, White Plains and on Long Island and with affiliated offices in Europe. We counsel and represent individuals and businesses in specialized areas of civil litigation, contractual and extra-contractual disputes and regulatory matters before state and federal agencies. Our Asbestos Litigation Team consists of the following attorneys:

Partners

[William J. Greagan](#)

[John J. Jablonski](#)

[Patrick B. Naylor](#)

[David S. Osterman](#)

[Michael D. Shalhoub](#)

[Susan E. Van Gelder](#)

[Joseph J. Welter](#)

Special Counsel

[Sandra J. Sabourin](#)

[Melanie S. Wolk](#)

Associates

[Sarah X. Fang](#)

[Toni L. Frain](#)

[Paul C. Steck](#)

PHILADELPHIA

1700 Market Street / Suite 1418, Philadelphia, Pennsylvania 19103-3907
Telephone: 267.519.6800 Fax: 267.519.6801

NEW YORK

1200 Avenue of the Americas / 3rd Floor, New York, New York 10036-1615
Telephone: 646.253.5400 Fax: 646.253.5500

PRINCETON

902 Carnegie Center / Suite 100, Princeton, New Jersey 08540-6530
Telephone: 609.986.1300 Fax: 609.986.1301

HARTFORD

100 Pearl Street / 7th Floor, Hartford, Connecticut 06103-4506
Telephone: 860.402.6643 Fax: 860.241.0062

BUFFALO

665 Main Street / Suite 400, Buffalo, New York 14203-1425
Telephone: 716.566.5400 Fax: 716.566.5401

ROCHESTER

2 State Street / Suite 805, Rochester, New York 14614-1342
Telephone: 585.295.5400 Fax: 585.295.8300

SYRACUSE

5786 Widewaters Parkway, Syracuse, New York 13214-1840
Telephone: 315.413.5400 Fax: 315.413.5401

ALBANY

8 Southwoods Boulevard / Suite 300, Albany, New York 12211-2364
Telephone: 518.463.5400 Fax: 518.463.5420

WHITE PLAINS

11 Martine Avenue / Suite 750, White Plains, New York 10606-1934
Telephone: 914.798.5400 Fax: 914.798.5401

LONG ISLAND

200 Old Country Road / Suite 210, Mineola, New York 11501-9801
Telephone: 516.281.9800 Fax: 516.281.9801

EUROPE

We are affiliated with:

Studio Legale Casini, C.so di Porta Romana, 63 20121 Milano, Italy
Telephone: 011-39-02-54113609 Fax: 011-39-02-54116314
Via M. Coppino, 273, 55049 Viareggio, Italy
Telephone: 011-39-05-84388797 Fax: 011-39-05-84388798

FOR EDUCATIONAL PURPOSES ONLY

© COPYRIGHT 2011 Goldberg Segalla LLP, ALL RIGHTS RESERVED

