

BB REVIEW

Product Liability and Casualty Litigation Update

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2010 UPDATE - WOOD DUST EXPOSURE LAWSUITS

Recent Alabama Lawsuit Asserts that Prolonged Exposure to Wood Dust Causes Cancer

Wood dust exposure lawsuits filed in the past year have targeted a broad array of defendants. Defendants in these suits have had varying degrees of success defeating the claims.

A personal injury case litigated in 2009 in Alabama is part of an emerging trend of lawsuits to hit the construction and woodworking industries that have claimed wood dust is the cause of occupational disease. In December of 2008, James Lemley sued his former employer, a kitchen and bath installation company, claiming that he had developed sinonasal cancer as a result of his exposure to wood dust during his employment. *Lemley v. Midwest Automation, Inc.*, 2009 U.S. Dist. LEXIS 45083 (May 29, 2009) (preliminary determination that Florida substantive law will apply in the case). This case is significant in that the plaintiffs sued not only the employer, but also the manufacturers of the equipment and power tools used by the company, as well as the manufacturers of the respiratory masks that were used by the company employees.

Lemley was employed by the company for 17 years as a technician and installer. The suit alleged that his sinonasal cancer was caused by exposure to wood dust from tools, equipment, machinery, and wood products used during woodworking. The Lemleys' case was removed to federal court in Mobile, Alabama and is currently in the discovery process, although Lemley has already settled with some of the defendants for undisclosed amounts. The court has yet to rule on the remaining defendants' motions to dismiss.

The *Lemley* case is only the newest in a quietly growing line of cases where plaintiffs have targeted the inhalation of wood dust during the course of their employment as the cause of their health problems. Also, this case shows that it is not only employers who must be concerned with wood dust lawsuits; companies supplying equipment to any industry in which wood dust is a byproduct may face potential liability.

To date, most "wood dust litigation" has blamed wood dust for illnesses such as cancer, allergic reactions, and asthma. For example, in *Chakuroff v. Boyle*, 667 A.2d 1256 (R.I. 1995), a plaintiff successfully recovered personal injury damages for

his wood dust induced disability. The plaintiff convinced the court that wood dust exposure was the cause of his developing occupational asthma.

A similar wood dust injury case from the Southeast was recently decided. In that case, the wife of a deceased employee sued a furniture company for worker's compensation for her husband's death, claiming he died as a result of occupational disease. *Johnson v. Thomasville Furniture Co.*, 673 S.E.2d 166 (N.C. Ct. App. Feb. 17, 2009). The employee, who suffered from type 2 diabetes and sleep apnea, had worked for nearly forty years in a manufacturing department through which furniture passed prior to shipment. In early 2004, he began experiencing fatigue, weight loss, swelling, joint pain, and anemia, was admitted to a hospital for treatment, and died soon thereafter of multi-organ failure.

The employee's wife hired consultants to prepare reports regarding her husband's on the job exposure to chemicals and dust. One medical consultant concluded that wood dust was the cause of the employee's disease, but when deposed, he testified that he did not know the nature of the employee's job, how much contact he had had with wood dust, or what type of wood was used at the work site. Further, the air quality at the facility was found to be within federal regulatory standards for both chemicals and dust. The court concluded that there was insufficient evidence regarding causation of employee's illnesses and accordingly denied the wife's claim for worker's compensation.

Scientific Evidence of the Link between Wood Dust Exposure and Cancer

The *Johnson* case illustrates that plaintiffs seeking to recover for wood dust related injuries still face a significant hurdle in proving causation. This is the result of the conflicting results reached by epidemiological studies that have examined the relationship between wood dust exposure and cancer. While some studies have found no link at all, even those studies that have found a relationship between wood dust and cancer have conceded that the degree of exposure that is needed to develop cancer is quite high. It is estimated that one would need to be exposed to large volumes of wood dust for several hours a day for twenty to thirty years to develop the disease.

The only type of cancer that has been consistently linked to wood dust is a type of sinonasal cancer called nasal adenocarcinoma. Instances of nasal adenocarcinoma are extremely rare; in the United States, less than one in one million diagnosed cancer cases are nasal adenocarcinoma. Also, the specific carcinogenic element of occupational wood dust is still not known, although hardwood dust particles are suspected to be significantly more harmful than softwood particles. Industries considered being at high risk for wood dust exposure include wood or wood product manufacturers, furniture manufacturers, wood cabinet sanders, and construction workers.

A recent study, published in 2005 by Tulane University, confirmed the difficulty plaintiff's face in establishing causation. The study, which was one of the most expensive and well-designed to date, concluded that wood dust exposure levels at furniture and cabinetry manufacturing facilities were not statistically correlated to the subsequent development of sinonasal cancer.

However, not all studies have reached the same result. The International Agency for Research on Cancer, the Occupational Safety & Health Administration, and the American Cancer Society all list wood dust exposure as a carcinogen, with long term exposure being a risk factor for the development of sinus cancers. Also, some studies have examined other possible cancer risks caused by wood dust. In 2008, the American Journal of Industrial Medicine published a study which investigated the effect of exposure to wood dust on the risk of laryngeal cancer. The study found that high exposures to either hardwood or softwood dust led to an increased risk of laryngeal cancer, with hardwood dust in particular being found to be especially harmful.

Given that at least some studies have found wood dust exposure is potentially carcinogenic, it is not surprising that some plaintiff's law firms have created websites entirely devoted to attracting cases of nasal cancer caused by occupational exposure to wood dust. It remains to be seen whether these cases will gain momentum

similar to asbestos lawsuits, or if they will be largely rejected by courts in the same fashion as silica and mold based lawsuits. The disposition of the *Lemley* case will be helpful in indicating whether Alabama courts are receptive to such claims.

Conclusion

Despite the conflicting medical evidence and court rulings on the subject of wood dust exposure, it is clear that companies in industries in which wood dust is a byproduct should be aware of the potential for lawsuits stemming from their employee's exposure to wood dust. These lawsuits, in their myriad forms, promise to continue in 2010. Balch & Bingham's Product Liability and Casualty attorneys are on top of this emerging trend and have the experience and expertise to navigate clients through it.

Balch & Bingham, LLP – Product Liability and Casualty Litigation Practice Group Toxic Tort Area

The attorneys in Balch & Bingham LLP's Product Liability and Casualty Litigation Practice Group have extensive experience in individual, mass, and class action environmental and toxic tort litigation. They have litigated personal injury, property damage, and wrongful death claims relating to alleged exposures to and/or releases of agricultural herbicides and pesticides, asbestos, benzene, boron trifluoride (BF₃), chlorinated solvents, formaldehyde, industrial waste water, carbon black, carbon dioxide, isocyanate compounds (MDI and TDI), lead-based paint, Ilemite dust, maleic anhydride mercury, mixed-dust, polychlorinated biphenyls (PCBs), particulate matter, perlite, petroleum hydrocarbons, radioactive material and waste, rutile dust, silica, trimellitic anhydride Tordon, and welding fumes. Balch & Bingham LLP's Product Liability and Casualty Litigation Practice Group also has extensive experience in insurance coverage matters related to such exposures and releases.

Balch & Bingham LLP is in the forefront in the defense of woodworking machinery and power tool manufacturers, distributors and dealers in product liability litigation throughout the United States. Products have included shapers, fixed and sliding table saws, gang rip saws, moulders, panel saws (including stationary and sliding as well as vertical and horizontal panel saws), jig and band saws, double end tennenors, jointers, drilling and boring machines, sanders, miter saws, hand-held circular saws, pneumatic nailers and a wide variety of computer numerically controlled machines. Attorneys in this practice group have worked closely with the leading experts in the industry and have had extensive dealings with the applicable ANSI and OSHA standards and have successfully defended both domestic and foreign companies in cases in over 35 states. The firm is national product liability counsel for one of the world's largest manufacturers and distributors of industrial woodworking machinery.

Balch & Bingham attorneys enjoy membership in a number of professional associations, including the highly-selective American College of Trial Lawyers, the International Association of Defense Counsel (IADC), the Federation of Defense and Corporate Counsel (FDCC), DRI, and the Alabama Defense Lawyers Association (ADLA), including one partner currently serving as President and two partners serving on its Board of Directors. A number of Balch & Bingham litigators are listed in *The Best Lawyers in America*, with several included in the new category of "Bet The Company" litigators. Balch & Bingham's more than 250 attorneys serve our clients from offices in Alabama, Georgia, Mississippi and Washington, D.C.

