

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

APPELLATE LITIGATION

AVIATION

BANKRUPTCY, RESTRUCTURING &
CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

CORPORATE COMPLIANCE & WHITE
COLLAR DEFENSE

EMPLOYEE BENEFITS, ERISA, &
EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL
SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE,
DEVELOPMENT & FINANCE

TAX (INTERNATIONAL,
FEDERAL, STATE & LOCAL)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESTATES &
PERSONAL PLANNING

VENTURE CAPITAL &
EMERGING COMPANIES

IN THIS ISSUE:

- Fourth Circuit Has a Change of Heart; Boiler Manufacturer Back in Asbestos Case
- Federal Court Tightens Removal Jurisdiction in Asbestos Case

FOURTH CIRCUIT HAS A CHANGE OF HEART; BOILER MANUFACTURER BACK IN ASBESTOS CASE

Danos v. Avondale Industries, Inc., 07-1094 (La.App. 4 Cir. 7/2/08), ___ So. 2d ___, 2008 WL 2717228

In February, the Fourth Circuit affirmed the Orleans Parish trial court's decision to grant Foster Wheeler's motion for summary judgment. (See [BOILER MANUFACTURER WINS SUMMARY JUDGMENT IN ASBESTOS CASE, April 2008](#).) In a surprising move, the Fourth Circuit has reversed itself in a 3-2 decision.

As with the original appeal, the Fourth Circuit on rehearing considered all of the evidence *de novo* (i.e., under the same criteria that governed the trial court's consideration of whether summary judgment was appropriate). This time, however, the court determined that a genuine issue of material fact existed making summary judgment inappropriate. Generally, material facts are those that potentially insure or preclude recovery, affect the plaintiff's ultimate success, or determine the outcome of a legal dispute.

Golzie Danos worked for Avondale Shipyards for 13 years in various capacities, including electrician's helper, electrician, terminator, and foreman. He later contracted mesothelioma and died. A lawsuit ensued against Avondale and various contractors and manufacturers, including boiler manufacturer Foster Wheeler.

Prior to his death, Danos testified that he performed new construction and repair work on various vessels, including destroyer escorts. Although Danos's job duties did not require him to work on boilers, he testified that he worked around other men who were laying and insulating pipe on and to the boilers. Danos testified that the only vessels on which he worked around boilers were the destroyer escorts. Although he specifically identified several manufacturers whose products he used, Danos did not specifically name Foster Wheeler boilers in his deposition.

In support of the plaintiff's case, the plaintiff offered the testimony of various co-worker witnesses. The co-workers testified generally about the work on or around boilers and how various crafts worked in close proximity to one another. One co-worker, an electrician like Danos, testified that the boilermakers and electricians worked in close proximity to one another. This contributed to the exposure to asbestos from the boiler's asbestos containing parts.

In defense of the plaintiff's claims, Foster Wheeler alleged that it was never a manufacturer of asbestos products, but instead that it was an engineering company that designed power generation equipment, such as boilers. Foster Wheeler's defense was twofold. First, Foster Wheeler argued as an engineering company, its focus was on the inside of the boiler and not the external connections (i.e., the insulated pipes). Interest-

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

APPELLATE LITIGATION

AVIATION

BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESTATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

ingly, Danos' co-worker witnesses confirmed Foster Wheeler's first defense. The witnesses testified that the Foster Wheeler brand appeared only on metal, tubes, and headers, and not on any of the insulation products installed on the boiler.

Second, Foster Wheeler offered evidence that it did not manufacture the boilers on the destroyer escorts, which were the only vessels on which Danos testified he worked around boilers. One of the plaintiff's co-worker witnesses was not as helpful with this defense. In fact, the witness contradicted Foster Wheeler's evidence by testifying that Foster Wheeler manufactured the boilers on the destroyer escorts. Unlike the trial court and the original appeal, the Fourth Circuit on rehearing focused on this conflict in testimony. It was here that the Fourth Circuit found that the plaintiff successfully established a genuine issue of material fact regarding Danos' exposure to asbestos from Foster Wheeler boilers and reversed the trial court and its original decision granting Foster Wheeler summary judgment.

— *Olivia S. Regard*

FEDERAL COURT TIGHTENS REMOVAL JURISDICTION IN ASBESTOS CASE

Cole v. Northrop Grumman Ship Systems, Inc., No. 07-3029 (E.D. La. 7/7/08), ___ F.3d ___, 2008 WL 2651428.

This decision from the United States District Court for the Eastern District of Louisiana limits the availability of federal removal jurisdiction in asbestos personal injury cases. Plaintiff Cole filed this suit in state court in Orleans Parish for damages related to mesothelioma caused by his alleged occupational asbestos exposure at Avondale Shipyards and South Central Bell in the 1960s. Defendant Pete Territo (executive officer of Avondale's owner) removed the case to federal court on the basis of the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1). Cole filed a motion to remand, arguing a lack of subject matter jurisdiction. Eastern District Judge Fallon granted Cole's motion and remanded the case to state court.

In analyzing the Federal Officer Removal Statute, Judge Fallon applied the test elucidated by the United States Supreme Court in *Mesa v. California*, 489 U.S. 121, 131-32, 109 S.Ct. 959, 103 L.E.2d 99 (1989). Under the *Mesa* test, the statute confers federal jurisdiction only if the removing defendant (1) establishes that the tortfeasor or the involved individual who acted under color of federal authority; (2) can demonstrate a causal nexus between the plaintiff's claims and the defendant's actions performed under color of office; and (3) can assert a federal defense to the plaintiff's claim. Territo argued that he acted under color of federal authority, because U.S. Government inspectors closely monitored the shipyard's compliance with safety regulations and contract requirements, including the use of and daily exposure to asbestos. He claimed that a causal nexus existed between his acts committed at the direction of the federal government and Cole's claims and that he could assert colorable defenses due to immunity under the government contractor defense and the Longshore Harbor Workers Compensation Act ("LHWCA").

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

APPELLATE LITIGATION

AVIATION

BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

CORPORATE COMPLIANCE & WHITE COLLAR DEFENSE

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL, STATE & LOCAL)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESTATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

Regarding Cole's failure to warn claims, Judge Fallon held that Territo's argument that he was acting under the authority of a federal office due to contractually mandated regulatory compliance and government monitoring was negated by Cole's evidence—an affidavit of Felix Albert, a U.S. Navy ship inspector at Avondale from 1965–76. There, Albert stated that Avondale employees did not work under the direct orders or direction of a ship inspector and that the U.S. inspectors did not monitor or enforce safety regulations. Judge Fallon also referenced a line of prior cases that required proof “that the federal government restricted the defendant’s ability to warn the plaintiff(s) of asbestos dangers.” *See, e.g., Gauthre v. Asbestos Corp.*, 1997 WL 3255 (E.D. La. 1997). Judge Fallon also found that Territo could not establish a color federal contractor defense, because he could not establish that the government had some direct influence over Avondale’s actions regarding warnings and or a conflict between the contractor’s federal authority and its duties under state law. Judge Fallon thus granted the motion to remand due to lack of federal subject matter jurisdiction.

The *Cole* decision restricts the availability of federal officer removal jurisdiction in asbestos cases by strictly construing the “federal direction” and “causal nexus” prongs of the *Mesa* case together and requiring proof that the government’s direction and control of activities directly interfered with the defendant’s ability to fulfill state-law obligations to warn employees of safety hazards. Mere government involvement in the activities is not sufficient to satisfy the Federal Officer Removal Statute.

– *Judith V. Windhorst*

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ANTITRUST & TRADE REGULATION

APPELLATE LITIGATION

AVIATION

BANKRUPTCY, RESTRUCTURING &
CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

CORPORATE COMPLIANCE & WHITE
COLLAR DEFENSE

EMPLOYEE BENEFITS, ERISA, &
EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL
SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE,
DEVELOPMENT & FINANCE

TAX (INTERNATIONAL,
FEDERAL, STATE & LOCAL)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESTATES &
PERSONAL PLANNING

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

Leon Gary, Jr.
Jones Walker
Four United Plaza
8555 United Plaza Boulevard
Baton Rouge, LA 70809-7000
ph. 225.248.2024
fax 225.248.3024
email lgary@joneswalker.com

Products Liability Practice Group

Ainsworth, Kevin O.	Jenkins, R. Scott
Allgood, Davis B.	Joyce, William J.
Anseman, III, Norman E.	Leitzelar, Luis A.
Balart, L. Etienne	Liddick, Eric Michael
Belter, Sarah B.	Lowenthal, Jr., Joseph J.
Casey, Jr., Thomas Alcade	Nosewicz, Thomas M.
Collins, Donald O.	Ourso, III, A. Justin
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