

Wheeler Trigg O'Donnell Wins First Asbestos Case Tried in Boston in 10 Years

News

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DENVER - In the first asbestos case to go to verdict in Boston in 10 years - *Balthazar v. Foster Wheeler et al.*, a case closely watched by defense lawyers and equipment manufacturers whose products were often insulated with asbestos by third-parties - Wheeler Trigg O'Donnell lawyers John Fitzpatrick, Erik Nadolink, and Kara Rohe won a defense verdict for their client, Foster Wheeler Energy Corp., a global engineering and construction contractor and power equipment supplier. In 1949, Foster Wheeler had supplied the U.S. Navy with a set of four three-story boilers for a Navy destroyer to which the plaintiff was assigned while serving in the Navy from 1961-1962. Under the original contract, the Navy required that the boiler be insulated internally with refractory materials that contained a small amount of asbestos. Foster Wheeler supplied, but did not manufacture, these materials. The Navy provided additional external insulation that also contained asbestos. The other defendants provided various other parts used in the boiler room, all of which contained and/or were insulated with asbestos.

The plaintiff, who suffers from mesothelioma, a form of cancer that is almost always caused by previous exposure to asbestos, claimed to have contracted his disease as a result of his exposure to all of the asbestos-containing equipment and

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parts that were supplied by the defendants and used on his ship. Further, he alleged the defendants were guilty of a breach of warranty and negligence in failing to warn him of the dangers of asbestos. Of the 47 defendants originally sued, and twelve defendants who began trial, all but four reached a settlement with the plaintiff within the first two weeks of the five-week trial. With two of the remaining defendants - asbestos-containing gasket and packing manufacturers - arguing that the plaintiff's injury was caused by insulation on the boiler, Foster Wheeler quickly emerged as the prime target. Plaintiffs' demand on the eve of trial was in the mid-seven figures.

WTO lawyers argued that Foster Wheeler had no duty to warn the Navy that asbestos could be harmful and was not responsible for asbestos-containing materials - required by the Navy - that it did not manufacture. With ships containing 40 tons of asbestos insulation each, the Navy had extensively studied the potential dangers of asbestos by 1949, and even earlier. Furthermore, the Navy as part of its procurement contracts required that Foster Wheeler supply with its boilers very specific materials - including some that contained asbestos. Further complicating the allegations was the fact that in between 1949 when the original boiler and asbestos-containing insulation was installed and 1961 when the plaintiff joined the Navy and was assigned to the ship at issue, the boilers had undergone extensive overhauls during which substantially all the original furnace refractory materials were replaced by a Navy shipyard.

The jury instructions in this case were significant. One jury instruction - the sophisticated user defense - stated that the defendant could not be held liable for a failure to warn of asbestos hazards already known to the Navy. Another jury instruction stated that the defendant could not be held responsible for injuries caused by asbestos when the defendant did not supply or manufacture the asbestos at

issue, and did not require that asbestos-containing insulation be used on or in its equipment.

On June 1, 2007, the jury found for the defendants on all counts.