

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

IN RE: ASBESTOS LITIGATION	:	
	:	
Limited to: Hartgrave, Robert	:	C.A. No. 09C-07-303 ASB
	:	
Attwood, Raymond	:	C.A. No. 09C-01-021 ASB
	:	
Fuller, Sharon	:	C.A. No. 08C-04-087 ASB

UPON DEFENDANT EVONIK DEGUSSA CORPORATION’S MOTION TO
DISMISS FOR LACK OF PERSONAL JURISDICTION
GRANTED

This 6th day of December, 2011, it appears to the Court that:

Defendant Evonik Degussa Corporation (“EDC”) has filed three Rule 12(b)(2) Motions to Dismiss for Lack of Personal Jurisdiction in three separate but related asbestos-exposure lawsuits. All Plaintiffs have filed suit against numerous defendants, alleging that they were harmed by occupational exposure to asbestos in Cedar Rapids, Iowa beginning in the 1950s. None of the Plaintiffs are Delaware residents, nor do any of them allege any connection to Delaware. As will be set forth more fully hereafter, Plaintiffs’ attempt to gain personal jurisdiction over EDC, solely by virtue of sporadic sales of unrelated products to Delaware businesses, long after Plaintiffs’ alleged exposure to Defendant’s products, is insufficient under both Delaware’s long arm statute and the Due Process Clause of the United States Constitution. Because Plaintiffs have failed to establish *in personam* jurisdiction over EDC, the Motions to Dismiss are GRANTED.

I. Facts

All of these cases arise from alleged occupational exposure to asbestos in Cedar Rapids, Iowa and present virtually identical facts for purposes of this Motion. Robert and Anna Hartgrave (“Hartgraves”), residents of Fairfax, Iowa, allege that Mrs. Hartgrave developed mesothelioma as a result of occupational exposure to Defendants’ asbestos-containing products through her employment in Cedar Rapids, Iowa between 1962 and 1984.¹ Sharon Fuller (“Fuller”), a resident of Cedar Rapids, Iowa, filed a lawsuit on behalf of decedent Alyce Riess, whom she alleged was harmed from exposure to asbestos at her place of employment in Cedar Rapids, Iowa from 1962 to 1984.² Finally, Raymond and Irene Attwood (“Attwoods”), who are residents of Cedar Point, Iowa, filed a lawsuit alleging that Mr. Attwood developed an asbestos-related illness from occupational exposure to Defendants’ asbestos-containing products at his place of employment in Cedar Rapids, Iowa from 1956 until 1999 as well as through Mr. Attwood’s service in the United States Army from 1954 to 1956 in Georgia and Alaska.³ The Hartgraves, Fuller, and the Attwoods (collectively, “Plaintiffs”) all identified more than a

¹ *In re: Asbestos Litig. (Hartgrave)*, C.A. No. 09C-07-303 ASB (Del. Super. Jul. 30, 2009) (Complaint).

² *In re: Asbestos Litig. (Fuller)*, C.A. No. 08C-04-087 ASB (Del. Super. Aug. 27, 2008) (Second Amended Complaint).

³ *In re: Asbestos Litig. (Attwood)*, C.A. No. 09C-01-021 ASB (Del. Super. Jan. 7, 2009) (Complaint).

dozen defendants in their lawsuits. None of the Plaintiffs reside in Delaware or allege any connection to Delaware.

Defendant EDC is an Alabama corporation. It is not registered in Delaware and does not regularly conduct business in this state. EDC's corporate records reveal that it sold non-asbestos containing chemical products for use as raw materials to Delaware businesses on a number of occasions between 2004 and 2011. For the years 2004-2010, EDC earned revenue ranging from \$278,834 to \$575, 515 from its sales to Delaware businesses.⁴ Overall, sales to Delaware businesses generated less than 0.05 percent of EDC's total corporate income for each of those years.⁵ Under the terms of EDC's standard purchasing agreement, title to the products passed to the buyer at the time the products were loaded onto the buyer's third party carrier outside of Delaware.⁶

II. Standard of Review

Because the facts and arguments in all three cases are virtually identical, the Court will consider EDC's Motions to Dismiss in a single decision. EDC seeks dismissal of Plaintiffs' complaints against it pursuant to Superior Court Civil Rule 12(b)(2), on the ground that the exercise of jurisdiction over EDC would be improper as EDC has no meaningful contacts with the State of Delaware.

⁴ Virginia Pettinelli Discovery Dep. Tr., May 12, 2011, Ex. 3.

⁵ Virginia Pettinelli Affidavit, Nov. 10, 2011, at ¶ 8.

⁶ *Id.* at ¶ 5.

A plaintiff bears the burden of establishing a basis for jurisdiction over a non-resident defendant.⁷ In determining whether a plaintiff has satisfied this burden, Delaware courts apply a two-step analysis.⁸ First, the Court considers whether jurisdiction is appropriate under Delaware’s long-arm statute, and second, whether asserting such jurisdiction would violate the Due Process Clause of the United States Constitution (the so-called “minimum contacts” requirement).⁹ In making this determination, the Court must view all factual disputes in a light most favorable to the plaintiff.¹⁰

III. Discussion

A. Delaware’s Long Arm Statute

Plaintiffs argue that EDC’s sales of chemical products to Delaware corporations is sufficient to subject EDC to this Court’s general jurisdiction under Delaware’s long-arm statute. 10 *Del. C.* 3104(c)(4) gives this Court personal jurisdiction over any nonresident who “[c]auses tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct or derives substantial revenue from services, or things used or consumed in the State.”¹¹ Plaintiffs argue that by

⁷ *Aeroglobal Capital Mgmt. v. Cirrus Indus.*, 871 A.2d 428, 437 (Del. 2005); *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984).

⁸ *Aeroglobal*, 871 A.2d at 437.

⁹ *Waters v. Deutz Corp.*, 479 A.2d 273 (Del. 1984).

¹⁰ *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1155 (Del. Super. 1997).

¹¹ 10 *Del. C.* §3104(c)(4).

selling chemical products to Delaware businesses from 2004 through March 2011, EDC engaged in a persistent course of conduct in Delaware from which it derived substantial revenue, thereby establishing a basis for holding EDC liable in Delaware for tortious injury allegedly caused by EDC outside of Delaware.

Delaware courts have interpreted section 3104(c)(4) as a general jurisdiction provision.¹² General jurisdiction allows Delaware courts to exercise jurisdiction over nonresident defendants even when the plaintiff's claims are not connected to the defendant's activities within the forum state.¹³ Traditionally, courts have broadly construed 10 *Del. C.* §3104(c) to confer jurisdiction to the maximum extent possible under the due process clause.¹⁴ However, Delaware courts have also required that "the defendant's activities in [Delaware] must be continuous and substantial" to confer jurisdiction over an out-of-state defendant under 10 *Del. C.* §3104(c)(4).¹⁵

Plaintiffs argue that EDC engaged in a persistent course of conduct by making ten sales of chemical products to Delaware between 2004 and the first quarter of 2011. When considering whether to assert general jurisdiction on the basis of a persistent course of conduct, Delaware courts have looked for continuous and deliberate conduct with this state. Thus, in *LaNuova D&B v. Bowe Co., Inc.*,

¹² See, e.g., *Boone*, 724 A.2d at 1155.

¹³ *Id.*

¹⁴ *Mayhall v. Nempco, Inc.*, 1994 WL 465545, *2 (Del. Super. Jul. 29, 1994).

¹⁵ *Id.* (citing *Sears Roebuck & Co. v. Sears plc and Sears Financial Services Ltd.*, 744 F.Supp. 1289, 1304 (D.Del. 1990)).

¹⁶ the Supreme Court held that it was proper for a Delaware court to assert general jurisdiction over an Italian roofing manufacturer that had agreed to insure manufacturers' warranties through its exclusive distributor even though only two such warranties had been sold in Delaware at the time of the incident that gave rise to the litigation. Noting that LaNuova had agreed to insure the warranties "with the intention that claims against the use of its product in Delaware would be protected," the Court held that this "elaborate marketing device [...] is persistent in both plan and implementation."¹⁷

Similarly, in *Boone v. Oy Partek Ab*,¹⁸ the Superior Court held that a Finnish asbestos manufacturer whose product had reached three Delaware manufacturing plants could be subject to the jurisdiction of Delaware courts because the company had placed its products into the stream of commerce. The Court found that "there was an intent or purpose on the part of the manufacturer to serve the Delaware market with its product."¹⁹

On the other hand, Delaware courts have also held that sporadic or attenuated sales within Delaware by foreign entities are not sufficient to assert general jurisdiction. For example, in *Mayhall v. Nempco, Inc.*,²⁰ the Court held that section 3104(c)(4) did not permit the Court to assert general jurisdiction over

¹⁶ 513 A.2d 764 (Del. 1986).

¹⁷ *Id.* at 769.

¹⁸ 724 A.2d 1150 (Del. Super. 1997).

¹⁹ *Boone*, 725 A.2d at 1158.

²⁰ 1994 WL 465545 (Del. Super. Jul. 29, 1994).

the Taiwanese manufacturer of motorcycle parts that were re-sold in Delaware by a third party, noting, “[t]here exists no evidence indicating Ming Tar knew Nempco only distributed through a catalog or Ming Tar’s products would necessarily be sold through this catalog.”²¹ Similarly, the United States District Court for the District of Delaware declined to exercise jurisdiction over a North Carolina-based manufacturer of lighting protection systems that was not licensed to do business in Delaware, did not operate in Delaware, and did not ship any of its systems to Delaware.²²

The evidence here presents a close question for the Court. On the one hand, there is evidence that EDC made shipments to Delaware between 2004 and 2011, despite the fact that EDC is not licensed to conduct business in Delaware and maintains no business operations here. On the other hand, there is no evidence at this stage of the litigation that EDC has actively sought to serve the Delaware market. The Court is skeptical of Plaintiffs’ claims that ten deliveries to Delaware over a period of seven years can be considered a persistent course of conduct.

More importantly, the Plaintiffs have presented no evidence that EDC sold any products to Delaware between 1956 and 1999, the years during which Plaintiffs claim exposure to EDC’s asbestos-containing products. Although the Court recognizes that general jurisdiction does not require a nexus between the

²¹ *Mayhall*, 1994 WL 465545 at *4.

²² *Plumb v. Cottle*, 492 F.Supp. 1330, 1334 (D.Del. 1980).

defendant's contact with the forum and the plaintiff's lawsuit, the Court struggles to understand how evidence of sales to Delaware in the past seven years should constitute sufficient contacts with the state to justify asserting jurisdiction related to conduct that occurred more than fifty years ago. There is no evidence before the Court of a persistent course of conduct on EDC's part to serve the Delaware market, particularly during the period of time during which Plaintiffs allege exposure to EDC's products. Nor can the Court conclude that EDC's conduct in recent years established contacts with Delaware such that it would be appropriate for the Court to assert general jurisdiction over EDC with regard to Plaintiffs' claims.

Plaintiffs' alternative argument, that EDC is subject to the general jurisdiction of this Court because it has derived substantial revenue from things used or consumed in this state is not convincing for the same reason. Plaintiffs have not shown that EDC derived substantial revenue from conducting business in Delaware *during the period of Plaintiffs' alleged exposure*. Accordingly, the Court finds there is no basis to confer jurisdiction over EDC under any provision of Delaware's long-arm statute.

B. The Due Process Clause

Alternatively, the Court holds that Plaintiffs cannot establish personal jurisdiction over EDC under the Due Process Clause of the Fourteenth Amendment

as Plaintiffs have failed to establish minimum contacts between EDC and Delaware. Plaintiffs maintain that EDC's sales of chemical products to Delaware customers between 2004 and the first quarter of 2011 was a purposeful and deliberate direction of activities toward the State of Delaware by EDC, and demonstrates that EDC has purposely invoked the benefits and protections of Delaware laws. Plaintiffs submit, therefore, that EDC has established minimum contacts with the State of Delaware and that the exercise of jurisdiction over them is proper under the Due Process Clause. Plaintiffs additionally argue that EDC could reasonably expect to be haled into court in Delaware by virtue of the operation of a branch of the corporation from its Parsippany, New Jersey offices.

The Due Process Clause of the Fourteenth Amendment permits the exercise of personal jurisdiction over a nonresident defendant when that defendant has purposefully invoked the benefits and protections of a State's laws, and the exercise of that jurisdiction does not offend "traditional notions of fair play and substantial justice."²³ Due process also requires that the defendant's conduct in connection with the forum state be such that a defendant "should reasonably anticipate being haled into court" in the forum state.²⁴ This fair warning requirement is satisfied if the defendant has "purposefully directed" his activities

²³ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

²⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

toward residents of the forum state,²⁵ and the litigation arises out of or relates to those activities.²⁶

Plaintiffs' principal evidence in support of their argument that EDC purposefully directed their activities into Delaware consists of sales of chemical products to Delaware businesses between 2004 and the first quarter of 2011. Plaintiffs argue that EDC placed a product into the stream of commerce and distributed its products to Delaware by placing them on the third-party common carrier used by the buyer of the products to ship them to Delaware.

The minimum contacts analysis, as applied by the courts of this State and by the United States Supreme Court, generally requires more than “mere awareness that [the defendant’s products] would ultimately reach the forum State” to establish minimum contacts.²⁷ For example, this Court held that it would violate the Due Process Clause to assert personal jurisdiction over a Taiwanese manufacturer whose products were subsequently resold by an American seller, which purchased the products in Taiwan before marketing them in the United States as its own.²⁸

On the record presently before the Court, the due process analysis in this case is similar to the analysis under Delaware’s long-arm statute described above.

Although there is evidence that EDC shipped products to Delaware in recent years,

²⁵ *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984).

²⁶ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

²⁷ *Mayhall*, 1994 WL 465545 at *5 (discussing *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987)).

²⁸ *Id.* at *5.

there is little evidence that EDC purposefully directed its activities towards Delaware, as EDC does not conduct operations in Delaware and there is little evidence that it made direct marketing efforts in Delaware. Moreover, the products sold in Delaware since 2004 are not asbestos-containing and Plaintiffs provide no evidence that EDC sold any asbestos-containing products – or made any efforts to do so – during the years that Plaintiffs were allegedly exposed to asbestos. It is therefore difficult to conceive how EDC’s sales of non-asbestos containing products in Delaware since 2004 could have provided it with fair warning that it might be brought into Delaware courts over claims of alleged exposure to asbestos products in Iowa predominantly in the 1960s.

Plaintiffs also assert that EDC has established minimum contacts by operating a branch of its corporation in Delaware from its Parsippany, New Jersey operation, a fact not set forth in any of Plaintiffs’ Complaints but argued in Plaintiffs’ brief. It appears from EDC’s reply brief and Exhibit 1 to the deposition of EDC’s corporate representative that Plaintiffs are referring to Degussa International, Inc., a subsidiary holding company of EDC that has an office with a single employee in Newark, Delaware. In any event, it is well-established that ownership or control of a Delaware corporation is not sufficient to constitute substantial activities in a forum.²⁹ Furthermore, the Delaware Supreme Court has

²⁹ *Intellimark, Inc., v. Rowe*, 2005 WL 2739500 (Del. Super. Oct. 24, 2005).

suggested that ownership of a Delaware corporation or subsidiary might only serve as a basis for personal jurisdiction where the underlying cause of action arises from the creation and operation of a Delaware corporation for the express purpose of acting within the State.³⁰ Here, Plaintiffs allege no connection with the EDC's Delaware operation and the sales to Delaware businesses, nor do they allege any connection between the Delaware operation, the 2004-2011 sales, and Plaintiffs' alleged exposure to EDC asbestos-containing products some fifty years ago. Accordingly, the alleged existence of an EDC subsidiary operating in Delaware is not sufficient to establish minimum contacts with the State.

IV. Conclusion

Plaintiffs have failed to meet their burden of establishing that this Court has jurisdiction over EDC under either Delaware's long-arm statute or the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs' efforts to use sales of chemical products to Delaware companies in the past seven years does not establish jurisdiction over EDC because those sales are too minimal, and too attenuated from the time period and the subject matter of Plaintiffs' claims, to establish either a persistent course of conduct under Delaware's long-arm statute or minimum contacts under the Due Process Clause.

Plaintiffs' complaints as to EDC must therefore be dismissed.

³⁰ *Aeroglobal*, 871 A.2d at 439-40.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve