Legal Backgrounder

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FEDERAL APPEALS COURT URGES CONGRESSIONAL ACTION ON ASBESTOS LIABILITY CRISIS

by

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The U.S. Court of Appeals for the Third Circuit recently added one more voice to the myriad calls for Congressional action to ease the worsening asbestos litigation crisis. The case involved an attempt by U.S. and international automakers and others to transfer hundreds of thousands of asbestos claims into the Federal-Mogul bankruptcy so that a "global *Daubert* hearing" could be held to determine whether asbestos claims based on alleged exposure to automotive friction products satisfied the threshold standard of scientific validity established in the U.S. Supreme Court's 1993 *Daubert* decision. The Third Circuit in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), held that it was prohibited by statute from reviewing a lower court's ruling that denied the transfer motions. Although the Third Circuit said that its hands were tied, it suggested that Congressional action could ameliorate what it termed "the crisis created by the current asbestos litigation."

Asbestos Product Liability Lawsuits at Crisis Level

Asbestos claims are flooding the U.S. tort system with no end in sight. The number of claims filed to date exceeds 600,000 and the number of pending claims is estimated at more than 200,000, with tens of thousands of new claims being filed each year. *See* Stephen J. Carroll, Deborah Hensler, *et al*., RAND Institute for Civil Justice, *Documented Briefing: Asbestos Litigation Costs and Compensation, An Interim Report* (Sept. 2002) ("RAND") at vi; *The Fairness in Asbestos Compensation Act: Legislative Hearing on H.R. 1283, Before the House Comm. On the Judiciary*, 106th Cong. 4 (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School) (reporting that the number of cases between 1993 and 1999 doubled from 100,000 to more than 200,000). *See also* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1. Future claims have been estimated anywhere from many hundreds of thousands to one or two million. RAND at 78.

Moreover, up to 80 percent of the new claims are brought by asymptomatic or otherwise unimpaired plaintiffs. *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad:*

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Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S.C. L. REV. 815, 823 (2002); Jennifer Biggs *et al*., *Overview of Asbestos Issues and Trends* 3 (Dec. 2001). Payments to these unimpaired claimants are rapidly depleting scarce resources and threaten the ability of those who are truly sick to obtain compensation.

The Increasing Role of the Bankruptcy Courts

At least sixty defendants, including virtually all of the traditional defendants that mined and manufactured asbestos, have filed for bankruptcy. These bankruptcies create serious economic consequences for employees of the companies, including lost jobs and lost retirement plans. *See* Joseph E. Stiglitz, Jonathan M. Orszag and Peter R. Orszag, THE IMPACT OF ASBESTOS LIABILITY ON WORKERS IN BANKRUPT FIRMS, Sebago Assoc., Dec. 2002 (http://www.aiadc.org/Files/Public/StiglitzReport.pdf).

These bankruptcies have consequences that extend far beyond the consequences on the debtor company and its employees. As the companies go bankrupt, plaintiffs' attorneys attempt to shift liabilities to the remaining solvent defendants. As the number of bankruptcies mount, plaintiffs' attorneys extend their lists of defendants to more and more peripheral companies. Today, there are over 6,000 asbestos defendants in this country. RAND at vi. Although many of these companies have no more than a peripheral connection to asbestos, the impact of the claims against them is significant. As claims mount against corporations such as Dow, Halliburton, and Honeywell, their stock prices suffer. Declining stock prices equate to an enormous loss in net worth for each of these companies, which turns into a loss in 401K contributions and other benefits for their employees as well as a loss to those who invest in these companies.

Filing claims against peripheral defendants creates a vicious cycle. Payments to unimpaired plaintiffs encourage more filings by individuals who are not sick. The increasing amount of payments to those who are not sick further depletes the assets of remaining defendants, forcing many of the defendants into bankruptcy. The bankruptcies shift liability onto solvent defendants and new peripheral defendants. Ultimately, these companies see their stock prices impacted or file for bankruptcy protection themselves.

The Claims Against the Automobile Manufacturers

Tens of thousands of plaintiffs have brought personal injury or wrongful death claims in state courts throughout the country alleging injuries caused by asbestos used in "friction products," such as brake pads. The plaintiffs have sued various manufacturers and distributors of friction products, including Federal-Mogul Global, Inc. ("Federal-Mogul"), the debtor in a Chapter 11 bankruptcy case in Delaware. Among the named defendants in this litigation are such household names as are Daimler-Chrysler, Ford, General Motors, Nissan, Volkswagen, Mercedes-Benz, BMW, Harley-Davidson, B.F. Goodrich, and Honeywell.

Transferring the Friction Products Claims in an Effort to Streamline Asbestos Cases

Federal-Mogul filed its bankruptcy case in October, 2001. The bankruptcy filing stayed all pending litigation against Federal-Mogul and prohibited the filing of new suits. Other defendants in these lawsuits (the "Defendants") subsequently began removing the claims against them from state courts to federal district courts under 28 U.S.C. §§ 1452(a) and 1334(b), which permit removal of cases "related to" a pending bankruptcy case. The Defendants alleged that their cases were "related to" Federal-Mogul's bankruptcy because the Defendants would be seeking indemnification or contribution from Federal-Mogul. The Defendants further asked the various federal courts to which the lawsuits had been removed to transfer them

to Delaware, so they could be heard together as part of the Federal-Mogul bankruptcy case.

The District Court's Ruling Denying Transfer and Remanding the Asbestos Litigation to State Courts

The Defendants argued that transfer of all these cases to Delaware would permit "a common issues trial devoted to the core issue of whether brakes and other automotive parts cause the [asbestos] diseases claimed." *In re Federal-Mogul Global,* 300 F.3d at 374. Specifically, the Defendants wanted the district court to conduct a global *Daubert* hearing, in which the district court would determine whether the evidence that their products harmed the claimants is based on reliable scientific methodology. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). The Defendants argued that such a global *Daubert* hearing had the potential to excise[ ] [the Friction Product Claims] from the American judicial system in one fell swoop." *Id*.

Rather than transferring the claims, however, Senior U.S. District Judge Alfred M. Wolin held that the district court lacked subject matter jurisdiction over the removed claims because the claims were not sufficiently "related to" the Federal-Mogul bankruptcy proceedings, as required for the court to exercise bankruptcy jurisdiction. The court found that the Third Circuit's decision in *Pacor, Inc. v. Higgins (In re Pacor)*, 743 F.2d 984 (3d Cir. 1984), precluded the exercise of "related to" jurisdiction over personal injury claims against the Defendants "without the filing and adjudication of a separate claim for indemnification" against Federal-Mogul. *In re Federal-Mogul Global, Inc.*, No. 01-10578 (D. Del. Feb. 15, 2002). In its ruling, the district court recognized that any recovery by the claimants against the Defendants might give rise to future claims, "indeed very substantial claims," by the Defendants against the debtor Federal-Mogul. *Id*. However, the court found that judgments against the Defendants would not bind Federal-Mogul or directly threaten assets of the estate, and therefore the claimants' suits against the Defendants were not "related to" the Federal-Mogul bankruptcy. *Id*.

The court also found that, even if it had jurisdiction, it should exercise its discretion to abstain in favor of the state court proceedings, and deny the motions to transfer. The court determined that "centralizing virtually all Friction Product asbestos litigation, nationwide, in this bankruptcy . . . would be a disaster for the orderly management of this chapter 11 proceeding." *Id*. As a result, the court concluded, "the interests of justice and comity weigh heavily in favor of abstention and remand of the Friction Products Claims." *Id*.

The Third Circuit's Ruling

The Defendants appealed the district court's ruling. The Third Circuit determined that it lacked appellate jurisdiction because of federal statutes that preclude review, "by appeal or otherwise," of district court remand orders. The court also noted that decisions to deny transfer are generally not reviewable except on appeal at the end of the case. Construing the Defendants' appeal as a petition for an extraordinary writ of mandamus, the Third Circuit determined that Defendants had not met the "rigorous standard for the issuance of the extraordinary writ of mandamus" as to the District Court's denial of the motion to transfer.

Yet Another Call for Change

The Third Circuit in *Federal-Mogul* believed its hands were tied in reviewing the merits of the Defendants' appeal. However, the court acknowledged that both the Federal-Mogul bankruptcy and the Defendants' attempt to remove state court lawsuits to Delaware based on that bankruptcy case were symptoms of what the court termed "the crisis created by the current asbestos litigation." Specifically, the

court said it was "neither unaware of nor unsympathetic to the argument of the Friction Product Defendants that the crisis created by the current asbestos litigation would be ameliorated were there a single proceeding" to determine whether the claimants' evidence could meet the *Daubert* threshold. The court acknowledged the Defendants' argument "that we are faced with the question 'whether the American judicial system is capable of dealing with the recent explosion of automotive friction product asbestos claims in a fair and rational manner.'" The court went on to say that "[a]rguably, a procedure authorizing the aggregation of state court cases, such as the Friction Product Claims, into a nationwide class action would provide a mechanism for a *Daubert* hearing like the one Defendants seek." However, the court noted, "such proposals, frequently made, have not passed both houses of Congress."

In closing, the court quoted the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), in which Justice Ginsburg stated: "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution." *Id*. at 628-29.

Both the Third Circuit's comment in *Federal-Mogul* and Justice Ginsburg's statement in *Amchem* mirrored the Supreme Court's observation in *Ortiz v. Fibreboard Corp*. , 527 U.S. 815 (1999), that "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation." *Id*. at 821. The Court at that time stated that "to date Congress has not responded." *Id*. at 821 n.1. Concurring, Chief Justice Rehnquist stated, "were I devising a system for handling these claims on a clean slate, I would . . . approve the near-heroic efforts of the District Court in this case to make the best of a bad situation" (approving a class action settlement of asbestos claims). *Id*. at 865. However, the Chief Justice noted that the Supreme Court was "not free to devise an ideal system for adjudicating these [asbestos] claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court's opinion correctly states the existing law." *Id*.

These judges and many others, as well as numerous other commentators, recognize that something needs to be done to change the way asbestos litigation is conducted in this country. In spite of the repeated requests by courts, judges, insurers, plaintiffs, defendants, and their respective counsel, Congress has yet to act. Congress has considered the asbestos litigation problem several times with no tangible result. *See* Steven L. Schultz, *In re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged—A proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 BROOK. L. REV. 553, 555 (1992) ("The sheer number of asbestos cases pending in the courts has led to calls for congressional action by commentators, district judges, circuit court judges and even by a judicial conference chaired by the Chief Justice of the Supreme Court. Yet despite the increasingly desperate situation faced by the courts, Congress has consistently failed to adopt a national response to the crisis." (footnotes omitted)).

Unless the courts themselves take steps to address the problem, the longer Congress waits to take action, the worse the asbestos litigation crisis will become. One by one, the defendants in the growing surge of asbestos cases find themselves in bankruptcy. As time passes and the asbestos dockets continue to grow, more and more bankruptcies are certain.

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