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Contents

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Asbestos Litigation Reform In 2004

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I. Introduction

According to the most recent news reports, asbestos litigation has bankrupted 78 companies and clogged the courts with more than 200,000 pending cases. Most of these bankruptcies and filings have occurred in the past few years. These forces have led to a well-documented litigation crisis. Now, more than 8,400 defendants have been named in asbestos cases – up from 300 in 1982. Before it ends, the litigation may cost upwards of $200 *billion*. Cancer victims are worried they may not receive adequate or timely compensation.

Lawmakers and jurists on both the federal and state levels are discussing and working to enactment asbestos and other civil justice reform legislation to improve the asbestos litigation environment. This year also will include several key judicial elections that may help influence the litigation environment for the next several years in some states.

II. Federal Action

A. Asbestos Litigation Reform

Congress is working on a comprehensive solution to asbestos litigation. In May 2003, Senate Judiciary Committee Chairman Orrin Hatch introduced S.B. 1125, the Fairness in Asbestos Injury Resolution Act (the "FAIR Act"). The FAIR Act would create a federal trust fund, financed by defendant companies, insurers, and existing private trusts, to compensate asbestos claimants. The level of compensation would vary based on the claimant's documented exposure and injury.

In July 2003, after a series of markup sessions, the Senate Judiciary Committee favorably reported the FAIR Act. There are many outstanding issues in the legislation, such as the fund's impact on pending claims, compensation levels, how the fund will handle a large volume of expected claims in early years, and whether claims would return to the tort system should the fund become insolvent. Serious negotiations have been ongoing for months between employers, insurers, labor, Senate Democrats, and the Senate Republican leadership. Senate Majority Leader Bill Frist has announced that he intends to bring a version of the FAIR Act to the floor for a vote in late March or early April of this year.

B. Mass Action Reform

Class Action Fairness Act legislation being considered by Congress (H.R. 1115 / S. 1751 (formerly S. 274)) also would improve the asbestos litigation climate by giving federal courts jurisdiction to hear "mass actions" – consolidated trials of 100 or more people, each satisfying the traditional $75,000 amount in controversy requirement. (There is a carve-out for mass actions that "arise from an event or occurrence" that took place in the forum state (e.g., hotel fire or tank leaking toxic chemicals)). The core part of the legislation would allow defendants to remove what were formerly non-diverse state law class actions if minimal diversity exits (i.e., one member of the class and one defendant are citizens of different states), the class involves more than 100 people, and the aggregate amount in controversy exceeds $5 million. This effectively would foreclose the fraudulent joinder of nondiverse defendants, which tactic has been used to defeat federal diversity-of-citizenship jurisdiction in multistate class actions.

The Class Action Fairness Act passed out of the House of Representatives in June 2003. Last October, Senate action on the bill was effectively blocked when a floor vote to limit debate on a motion to take up the bill fell one vote short of the sixty votes needed for the motion to pass. Subsequent to that vote, however, three Democrats who voted "no" – Democratic Senators Chris Dodd of Connecticut, Charles Schumer of New York, and Mary Landrieu of Louisiana – reached an agreement with Senate Majority Leader Frist on compromise changes to the bill's language.

Senator Frist has indicated that he would like to bring the compromise bill to the floor soon. The November compromise appears to provide the votes needed for the bill to clear the Senate, but the trial lawyers and their allies have been working to galvanize opposition to the bill. If the legislation clears the Senate, the House most likely would act quickly to send the bill to the President. President Bush supports class action reform.

III. State Action

A. Key State Legislative Action

1. Ohio

In Ohio, asbestos litigation reform has advanced in both chambers of the Ohio General Assembly. The Ohio Senate passed an "asbestos plus general tort reform" bill (S.B. 80) in June 2003. Claimants who are unable to demonstrate actual asbestos-related impairment would have their cases dismissed, but would be permitted to refile should an impairing condition later develop.

The general tort reform measures in S.B. 80 include a 10-year statute of repose applicable to many product liability actions, a cap on noneconomic damages in tort actions, and limits on punitive damages awards. The legislation also would provide for comparative fault in product liability actions, allow parties to introduce evidence of the plaintiff's right to receive collateral source benefits, and limit contingency fees, among other reforms.

When S.B. 80 reached the Ohio House of Representatives, the Speaker broke the bill into two smaller bills. H.B. 292, which contains the asbestos-related provisions of S.B. 80, passed out of the House in December 2003. As of press time, H.B. 292 has been sent back to the Senate and referred to the Senate Criminal Justice Committee. The general tort reform bill remains in the

House Judiciary Committee.

We expect the Senate Criminal Justice Committee to hold a series of hearings on the asbestos medical criteria legislation and for the bill to pass out of the Senate later this year. The bill would then be sent back to the House for approval or to go to conference. The bill may end up on the Governor's desk later this year. Indications are that he would sign it into law.

Ohio asbestos personal injury lawyer Tom Bevan has said that if asbestos reform legislation is enacted, he will initiate a petition drive to force a referendum on the November 2004 ballot. Ohio law is somewhat peculiar in that asbestos reform supporters would need to win the ballot referendum for the law to take effect. Plans to respond to a potential ballot referendum are underway.

2. Mississippi

Governor Haley Barbour has put tort reform atop his legislative agenda. In late February 2004, the Mississippi Senate passed S.B. 2736, a comprehensive tort reform package that would bring about needed venue and joinder reform in the state. The bill also includes: a $250,000 cap on noneconomic damages; abolishes joint liability; protects innocent sellers and would address the fraudulent joinder of local defendants for the purpose of defeating federal diversity-of-citizenship jurisdiction; would cut the existing caps on punitive damages in half; and reform premises owner liability. In addition, the bill would help bring about more balanced and representative juries in Mississippi courts, among other provisions.

These reforms would have a significant impact on asbestos litigation. The RAND Institute for Civil Justice has reported that Mississippi is among five states that handled 66% of all asbestos filings between 1998 and 2000. In Jefferson County, Mississippi, 21,000 plaintiffs filed asbestos claims from 1995-2000, despite the fact that the County only has less than 10,000 residents.

Achieving reform in the Mississippi House will be difficult, but success is possible. Grassroots efforts will be key to pressuring the House to act on the Senate-passed legislation.

3. Maryland

In Maryland, a bill has been introduced in the General Assembly (H.B. 1346) to overturn opinions from Maryland's highest court exempting most asbestos cases from Maryland's statutory cap on noneconomic damages. In *John Crane, Inc. v. Scribner,* 800 A.2d 727 (Md. 2002), the court held that the cap applies only to plaintiffs whose last exposure to asbestos occurred after the cap's effective date, July 1, 1986. H.B. 1346 would clarify that the cap shall apply to any latent disease or injury claim in which the plaintiff was diagnosed with or manifested symptoms of legally compensable injury or disease after July 1, 1986, even if the exposure occurred before that date.

B. State Judicial Action

1. Inactive Dockets

In January 2004, the Circuit Court for Madison County, Illinois joined the growing list of courts that have adopted an inactive asbestos docket to give trial priority to claimants that can demonstrate actual asbestos-related impairment. Similar docket management plans were recently adopted in New York City (December 2002), Syracuse, New York (January 2003), and Seattle, Washington (December 2002). Under these plans, the claims of individuals who cannot meet objective medical criteria specified by the court are suspended. Otherwise applicable statutes of limitations are tolled so that claimants may sue later should they develop an asbestos-related impairment. Claimants on the inactive docket can have their cases removed to the active docket and set for trial when they develop an impairing condition.

The Michigan Supreme Court is now considering a Petition filed by nearly seventy companies and numerous *amici* asking the court to adopt a statewide inactive asbestos docket. The court held an administrative hearing on the matter, *In re Pet. For An Admin. Order*, No. 124213, in January 2004.

2. Mississippi

In February 2004, the Mississippi Supreme Court amended the Mississippi Rules of Civil Procedure to narrow the criteria by which plaintiffs can choose to join their cases or be consolidated into joint trials. Specifically, the court changed its previous position that broad joinder was appropriate under Mississippi Rule of Civil Procedure 20. In the past, Mississippi courts have allowed plaintiffs to join numerous claims that few, if any, courts outside the state would permit to be joined together.

Now, plaintiffs seeking joinder under Rule 20 must have a "distinct litigable event linking the parties." If they do not, the Mississippi Supreme Court now advises that trial courts should consider "whether different injuries, different damages, different defensive postures and other individual factors will be so dissimilar as to make management of cases consolidated under Rule 20 impractical." The court also has required plaintiffs to make the factual basis for joinder known "as early as practicable," and said that trial courts are to resolve joinder issues "sufficiently early to avoid delays in the proceedings."

In addition, the Mississippi Supreme Court has acknowledged that some consolidations under Mississippi Rule of Civil Procedure 42 "may be prejudicial" and that consolidation should be invoked only where "the issues of law or fact justifying consolidation predominate over individual issues which will be heard in the consolidated proceedings."

Finally, the court amended Rule 82 of the Mississippi Rules of Civil Procedure to recognize the doctrine of forum non conveniens. New Rule 82(d) permits a trial court to transfer any civil action to any court in which the action might have been properly brought if it would be convenient for the parties and

witnesses or in the interest of justice to do so.

The new Rule changes were issued the day after the Court, sitting en banc, determined that it was improper for 56 plaintiffs to be joined in a single Propulsid trial. The court's ruling in that case, *Janssen Pharmaceutica, Inc. v. Armond*, and the recent Rule amendments demonstrate that advocacy efforts aimed at bringing Mississippi into the "mainstream" of American tort law are having an impact on the court.

IV. State Judicial Elections

The Association of Trial Lawyers of America ("ATLA") has embarked on an aggressive campaign to challenge the constitutionality of state tort reform legislation. The plan focuses on utilizing state constitutional provisions to nullify tort policy decisions set by legislatures. ATLA's efforts have been successful in some, but not most, states. The trial bar's successes, however, demonstrate that "court reform" must stand on equal footing with "tort reform" if meaningful asbestos and other civil justice reform enactments are to remain on the books. There are a number of key state judicial elections in November 2004.

In Ohio, a bare 4-3 majority of the Ohio Supreme Court can now be characterized as restrained. This November, four of seven seats on the Ohio Supreme Court will be decided: Chief Justice Thomas Moyer ® – restrained); Justice Paul Pfeifer ®-activist); Justice Terrence O'Donnell (R-restrained); and an open seat created because Justice Francis Sweeney has reached the mandatory retirement age of 70. In December 2003, Sixth District Court of Appeals Judge Judith Ann Lanzinger filed a petition to run as a Republican candidate for the seat being vacated by Justice Sweeney.

The November 2004 elections also are likely to determine the composition of the Mississippi Supreme Court for the next several years. Four of nine seats on the court are up in 2004. Justices William Waller, Jr. and George Carlson, Jr. are generally well-liked by the business community. Justice James Graves, Jr. is considered an activist judge whose rulings have been anti-business. Chief Justice Edwin Lloyd Pittman is not seeking reelection.

In West Virginia, incumbent Democratic Justice Warren McGraw faces a primary challenge from Circuit Judge Jim Rowe, a former majority leader and chairman of the Judiciary Committee in the West Virginia House of Delegates. Judge Rowe has a restrained judicial temperament, while Justice McGraw is strongly supported by the state's trial bar. Judge Rowe's election would not tip the balance of the West Virginia Supreme Court, but it would help provide more balance on the court.

Finally, there will be a key race for a seat on the Illinois Supreme Court. The race will be between Lloyd Karmeier (K), who is supported by the Illinois Civil Justice League, and Gordon Maag (D), the hand-picked Democrat/trial lawyer candidate, and former member of the Lakin law firm in Madison County. This race also would not tip the balance on the court, but would be a significant step toward a more balanced Illinois Supreme Court.

V. Conclusion

Congress and the states must act to solve the asbestos litigation problem. This year, there are several opportunities to help improve the asbestos litigation environment. These reforms will be difficult, but some are possible. State judicial races also will influence the asbestos litigation environment in some key jurisdictions. Now is the time for those who want to improve the litigation climate to become active and take advantage of the opportunities for reform developing in 2004.■

Protecting Environmental Consultants' Work from Discovery: *United States v. Torf* Extends the Work-product Privilege

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When will an environmental consultant's writings be considered – and protected as – work product? The answer to that question is finally becoming a bit clearer in our federal courts.

This last November, the Ninth Circuit joined the First, Second, Third, Seventh, Eighth and D.C. Circuits when it adopted the rule that an expert's "dual purpose" documents may be protected when they are prepared "because of the prospect of litigation." More specifically, the Ninth Circuit held that documents prepared by an environmental consultant for a client who had been threatened with prosecution can be protected from discovery as work product even when they also serve a non-litigation purpose. *United States v. Torf (In re: Grand Jury Subpoena)* 350 F. 3d 1010 (9th Cir. 2003)(amended by *United States v. Torf (In re: Grand Jury Subpoena)* 357 F. 3d 900 (9th Cir. 2003).

In this recent Ninth Circuit case, the Ponderosa Paint Company (Ponderosa) was notified by the Environmental Protection Agency (EPA) and the Department of Justice (DOJ) that it was being investigated for hazardous waste violations. The EPA and DOJ claimed that Ponderosa unlawfully transported and disposed of hazardous materials when, after selling most of its assets and inventory, it distributed leftover products to its employees. Ponderosa retained an attorney to represent their interests in the anticipated civil and criminal litigation. Their attorney, in turn, hired environmental consultant Mark Torf to investigate the properties at issue, interview witnesses, sample and test products, and conduct other investigatory work.

Torf provided the information he gathered to Ponderosa's attorney, who then used it to prepare an answer to a

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Information Request. Thereafter, Ponderosa entered into a Consent Order which required them to undertake certain cleanup and disposal operations. The Order also required that all documents relating to the cleanup be maintained for ten years and be made available to the EPA upon its request. The Order, however, also specifically preserved Ponderosa's ability to later claim work product protection.

Torf assisted in the cleanup effort mandated by the Consent Order. Two years later, a grand jury investigating Ponderosa issued a subpoena to Torf for the production of "any and all records relating in any way to any work contemplated by you or your company concerning the disposal of waste materials or any other material whatsoever from Ponderosa ..." *United States v. Torf* 350 F.3d at 1014.

Ponderosa's motion to quash the subpoena was granted by the magistrate judge, but the federal government sought review at the district court level. The district court held that the documents could not be protected as work product because they would have been prepared even if there had not been any threat of prosecution. Torf was held in contempt for refusing to produce the documents, although the district court stayed its contempt order pending further review by the Ninth Circuit.

Federal Rule of Civil Procedure 26(b)(3) shields from discovery tangible items prepared by a party in "anticipation of litigation." This "qualified protection" has been held to apply to lawyers as well as investigators hired by lawyers. The question before the Ninth Circuit in *Torf*, however, was twofold: (1) do the environmental consultant's documents constitute work product; and, (2) even assuming they do fall under that "qualified protection," should an exception apply because substantially similar documents would have to have been prepared even if no litigation had been anticipated? This two-fold question came into consideration because the documents created by Torf for Ponderosa essentially served a "dual purpose:" that of preparing for litigation, and responding to the EPA's information request.

As the Ninth Circuit reasoned, even those documents which served that dual purpose were prepared because of the prospect of litigation. In deciding this case, the Ninth Circuit held that consultant documents deserve work product protection when the facts surrounding their creation reveal that "their litigation purpose so permeates any nonlitigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Id.* at 1018.

The "because of"standard, was thoroughly discussed by the Second Circuit in *United States v. Adlman* 134 F.3d 1194 (2nd Cir. 1998). In *Torf,* the Ninth Circuit noted that this standard, as defined by the *Adlman* court, "considers the totality of the circumstances and affords protection when it can fairly be said that the 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]'" *United States v. Torf* 350 F.3d at 1016 (quoting *United States v. Adlman* 134 F.3d at1195). The Ninth Circuit further noted that:

> *"Here, there is no question that all of the documents were produced in anticipation of litigation. [Ponderosa's attorney] hired Torf because of Ponderosa's impending litigation and Torf conducted his investigations because of that threat. The threat animated every document Torf prepared, including the documents prepared to comply with the Information Request and Consent Order, and to consult regarding cleanup."*

United States v. Torf 350 F.3d at 1016.

The government argued that the Torf documents should not be protected under the "because of" standard because substantially similar documents would have been necessarily created to comply with the EPA's request and order, despite the anticipated litigation. In support of their argument, the government relied on language from the *Adlman* opinion stating that "the 'because of' formulation ... withholds protection from documents ... that would have been created in essentially similar form irrespective of litigation." *United States v. Adlman* 134 F.3d at 1202. The Ninth Circuit, however, rejected that interpretation of *Adlman* and followed the reasoning of the Seventh Circuit.

In deciding whether to extend work product protections to "dual purpose" documents, the Seventh Circuit considered whether their independent purpose is distinguishable and separable from the anticipation of litigation. In *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980), the Seventh Circuit held that documents prepared by attorneys both in anticipation of litigation and to file mandatory state Board of Election reports were protected. However, in *United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999), the Seventh Circuit held that documents drafted by attorneys for use both in preparing tax returns and in preparation of litigation were not protected.

According to the Ninth Circuit, The distinction between the two Seventh Circuit opinions is that tax preparation was a readily separable purpose and did necessarily require the assistance of attorneys, while the request for the election reports "was grounded in the same set of facts that created the anticipation of litigation." *Unites States v. Torf* 350 F.3d at 1017. Thus, the election reports in *In re Special September* enjoyed work product protection, while the tax reports in *Frederick* did not.

In *Torf*, the Ninth Circuit held that the purposes of complying with the EPA's request for information and Consent Order, and drawing up documents for prelitigation purposes could not be so easily separated or distinguished. As such, the documents were shielded from discovery.

Unites States v. Torf sheds some more light on the scope of the work product protection as it applies to environmental consultant's documents created in anticipation of litigation, specifically when those documents

have a second, non-litigation purpose. *Torf* strengthened the "because of" standard, and more clearly defined when "dual purpose" documents will enjoy protection.■

A Defense Verdict Is Obtained in the Country's First Wrongful Death, Toxic Mold Case to Proceed Through Jury Trial

In *Dayton v Beatty, et al.,* an eight-week trial in San Bernardino, California, stemmed from the sale of a mobile home to a 60-year old grandmother and her two-year old grandson. Kevin Gramling and Steve Pratt, both shareholders of Klinedinst PC, defended the seller of the mobile home and the park where the mobile home was situated.

The plaintiffs claimed that the mobile home was infested with mold, to include a potentially toxic mold, stachybotrys. The plaintiffs claimed to have suffered physical ailments as a result of their exposure to mold, including respiratory problems, skin rashes, chronic fatigue and immune suppression. Plaintiffs' attorneys had projected future medical expenses for the grandson of over $8 million ($1.5 million when discounted to present value). When one of the plaintiffs died in 2001, plaintiffs' pathologist determined the cause of death was an overwhelming fungal infection in her lungs. The plaintiffs had asked the jury for over $7.5 million.

During trial, the defense attorneys were able to demonstrate that the mobile home was not infested with mold, and that indoor mold levels were consistent with outdoor mold levels. They further proved that the defendants were reasonable in their repair efforts to the mobile home, both before and after the plaintiffs moved in.

The defense also successfully demonstrated to the jury that any alleged exposure to mold did not cause the physical ailments which plaintiffs were claiming, and did not cause the death of the lead plaintiff. They were able to prove to the jury that the plaintiffs' immune systems were not suppressed as a result of living in the mobile home, and that the grandson would not require lifelong medical care.

The jury deliberated for only three hours, and then returned their defense verdict. The jury found for the defendants 12-0 on negligence, fraud, negligent infliction of emotional distress, and wrongful death. While the jury found 10-2 that the defendants breached a contract, they did not award any damages.

For more information on this trial, you can contact defense counsel, Kevin Gramling directly at Klinedinst PC's Orange County office (714) 542-1800.