

SEP 30 2003

03-0895

NO. _____

MOTION

IN RE ANDREW WEBER, Clerk
By _____ Deputy

ASBESTOS LITIGATION

§ JUDICIAL PANEL
§
§ ON MULTIDISTRICT
§
§ LITIGATION

MOTION FOR TRANSFER

Union Carbide Corporation (Union Carbide) moves pursuant to sections 74.161-.164 of the Texas Government Code and Texas Rule of Judicial Administration 13 for transfer of the related asbestos-exposure cases listed in Appendix A to a pretrial court for consolidated and coordinated pretrial proceedings. In support of its motion, Union Carbide would show the MDL panel as follows:

INTRODUCTION

Litigation in Texas of asbestos-exposure claims currently is costing litigants enormous amounts in time and money. Literally thousands of cases are pending currently—and more are filed nearly every day. These cases involve common questions of fact that are litigated over and over again in separate cases. This repeated litigation merely enriches counsel for both sides at the expense of all of the litigants.

It is beyond dispute that asbestos litigation has reached crisis proportions for both plaintiffs and defendants. Courts across Texas have struggled to manage the crisis with varying—and sometimes admirable—results. The recently-enacted Texas MDL legislation, together with recent amendments to Rule of Judicial Administration 11, offer Texas a way to fairly and efficiently handle all asbestos cases at the pretrial stage without the necessity of relitigating those pretrial matters in each case, while preserving

each case for trial in the court in which it was filed. Indeed, there can be no area of litigation more suited for the MDL procedure than asbestos.

ARGUMENTS AND AUTHORITIES

A. The asbestos cases in Appendix A involve common questions of fact.

In order to transfer cases to a pretrial court for consolidated or coordinated pretrial proceedings, the cases must involve one (or more) common questions of fact. TEX. GOV'T CODE ANN. § 74.162. Like other asbestos-exposure cases, the cases listed in Appendix A, each of which was filed on or after September 1, 2003, involve many common questions of fact.

For example, many of the same defendants are involved in multiple asbestos cases. At issue in each of those cases is the respective knowledge of those defendants concerning the dangers of asbestos. The same witnesses often are deposed and testify regarding that knowledge, and the same documentary evidence frequently is used. Likewise, at issue in all asbestos cases are general causation questions—whether exposure to asbestos causes particular diseases. The same experts repeatedly testify (usually by deposition) as to these causation issues.

These are simply examples of common questions of fact in asbestos cases.

Other common questions include

- the sufficiency of warnings of the dangers of asbestos,
- where and when each defendant supplied asbestos or asbestos-containing products or used asbestos-containing materials,
- the degree to which each defendant took or recommended safety precautions for handling asbestos or asbestos-containing materials, and

- the state of scientific knowledge regarding the dangers of asbestos at particular time periods.

The asbestos cases listed on Appendix A unquestionably satisfy the requirement that the related cases involve a common question of fact.

B. Transfer of these related cases would be convenient for the parties and witnesses and would promote the just and efficient conduct of the cases.

Given the number of asbestos cases that certainly will continue to be filed and the current need to litigate pretrial issues in each and every case, there also can be no question that consolidated and coordinated pretrial proceedings would further the dual objectives of convenience and efficiency. *See* TEX. GOV'T CODE ANN. § 74.162. Indeed, recognizing this, many Texas courts have made valiant efforts to coordinate certain pretrial matters such as pleadings and discovery within their own courts to the extent possible. Even some litigants who oppose MDL treatment admit that efficiencies are gained from these types of procedures. The MDL statute now gives Texas a way to implement these efficiencies, over time, in all cases.

Discovery is likely the most significant area in which convenience and efficiencies will be attained. Discovery of defendants' documents is virtually identical in all cases. Many courts even utilize master discovery files, a method that could be used by a pretrial court on a statewide basis. Many defendants keep document repositories with all relevant documents available for inspection, but the use of repositories often sparks discovery motion practice in different courts (sometimes with different results). And the discovery efficiencies are not limited to defendants. Each side of the bar generally uses

the same experts in most of the cases, and both sides repeatedly seek to depose those experts and many of the same fact witnesses. Coordinating those depositions will reduce greatly expenses and time associated with that discovery and prevent the needless duplication of depositions.

Other pretrial matters also can be handled more conveniently and efficiently through coordinated pretrial proceedings. Experts' qualifications and methodology are challenged repeatedly. The same issues (for example, product identification, causation, and bulk supplier's duty to warn) repeatedly are raised in motions for summary judgment. Forum non conveniens motions are raised in multiple cases and, while somewhat dependent on individual facts, they often involve recurring questions, especially for non-Texas plaintiffs who suffered no exposure within Texas. Even settlement procedures could be streamlined.

Consolidated pretrial proceedings would mean efficiencies for trial, too. An experienced pretrial court could weed out nonmeritorious cases, preserving funds for legitimate claimants. The pretrial court also could ensure that those claimants with the most serious injuries have priority in remand for trial. In multiple plaintiff cases, the pretrial court might wish to consolidate certain claims for a common trial, but in doing so could ensure that like claims are consolidated so that no party is prejudiced by the consolidation. Finally, each case will be remanded with the benefit of consistent rulings, so that all litigants are treated fairly and arrive at trial on an equal playing field. Such a result is the very essence of the convenience and efficiencies sought to be achieved by the new MDL procedure.

C. Rule 11 provides a way to assure coordination with asbestos cases filed before September 1, 2003.

Rule 13, and the legislation pursuant to which it was promulgated, apply only to cases filed on or after September 1, 2003. TEX. R. JUD. ADMIN. 13.1(b); H.B. 4, 78th Leg., R.S., § 23.02(a) & (d). Rule 11, however, which applies to cases filed before September 1, 2003, recently was amended to include provisions intended to assure coordination of pretrial proceedings between post-September 1 and pre-September 1 cases. Specifically, rule 11.7(c) requires that the presiding judge of an administrative judicial region, after September 1, 2003, consult with the chair of the MDL panel in assigning a pretrial judge under rule 11. TEX. R. JUD. ADMIN. 11.7(c). In addition, rule 11.7(d) requires that the rule 11 pretrial judge, in conducting pretrial proceedings and deciding pretrial matters, consult with the pretrial judge to which related cases have been transferred by the MDL panel under rule 13. *Id.* at 11.7(d). Generally, rule 11 is to be construed and applied “so as to facilitate the implementation of Rule 13 to the greatest extent possible.” *Id.* at 11.7(a).

Simultaneously with the filing of this motion, Union Carbide is in the process of filing motions in most of its pre-September 1, 2003 asbestos-exposure cases, seeking to have the presiding judges in eight of the state’s nine administrative judicial regions assign a pretrial judge to such cases pending against it in a particular region.¹

¹ Union Carbide is filing rule 11 motions in virtually all pre-September 1, 2003 cases pending against it except for cases in which a settlement is pending or anticipated or which, for some similar reason, assignment of a pretrial judge would be inappropriate. No motion is being filed in the single case pending against Union Carbide in the ninth administrative judicial region, that is not the subject of a pending or anticipated settlement.

Pursuant to rule 11.7, each presiding judge will be required to consult with the chair of this panel in making the requested assignment, and pretrial judges who are assigned under rule 11 will be required to consult with the rule 13 judge designated by the MDL panel “[i]n conducting pretrial proceedings and deciding pretrial matters.” *Id.* at 11.7(d). In this manner many of the advantages of convenience and efficiency sought in this motion for cases filed after September 1, 2003, also can be achieved for pre-September 1 cases.

Efficiencies could be maximized if this panel designates an active district judge to conduct pretrial proceedings for post-September 1 cases. Should that occur, the chief justice, pursuant to rule 11.3(d), could assign that judge to each of the judicial administrative regions so that the respective presiding judges could assign the judge to pre-September 1 cases as well.² With that procedure, virtually all pending and future related asbestos cases could be brought within the jurisdiction of a single judge, and the benefits of statewide consolidation and coordination could be achieved immediately.

Since rule 11 has been amended to apply only to cases filed before September 1, 2003, the cases to which it can apply are limited, and the number of those cases necessarily will decline over time as cases are settled, tried, or dismissed. All

² Rule 11.3(d) states, “The Chief Justice of the Supreme Court may assign an *active* district judge to other administrative regions to allow the judge to be assigned as a pretrial judge under this rule.” TEX. R. JUD. ADMIN. 11.3(d) (emphasis added). Rule 11 authorizes presiding judges only to assign “active” judges as pretrial judges. *See id.* at 11.3(a). While the assignment provisions of the Government Code are broader and extend to retired judges, *see, e.g.*, TEX. GOV’T CODE §§ 75.002(a)(1)&(3), 74.057, assignments relating to pretrial proceedings in related pre-September 1, 2003 cases presumably are governed by rule 11.

future cases will be subject only to rule 13 regarding consolidated and coordinated pretrial proceedings, making the advantages of a statewide pretrial court under rule 13 increasingly available to all litigants.

D. All parties do not agree to this motion.

Counsel for Union Carbide has made inquiries to determine whether all parties agree to this motion. All parties do not agree.

Respectfully submitted,

BAKER BOTTS L.L.P.

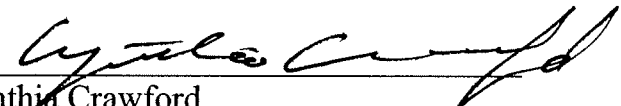
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ATTORNEYS FOR UNION CARBIDE

CERTIFICATE OF SERVICE

I certify that on September 29, 2003, true and correct copies of this motion for transfer were provided by either receipted overnight courier or messenger delivery to each member of the MDL panel and by certified mail, return receipt requested, to all counsel who have appeared for parties in the cases listed in Appendix A or who are known by me routinely to represent parties that have not yet appeared, all as required by rule 13.3(f) and (h), and that the notice required by rule 13.3(i) has been or is being filed with the trial court in each related case.


Cynthia Crawford

APPENDIX A

Cause No. 03-CV-1402

Audry Amelia Adams et al

v.

American Standard, Inc. et al

56th Judicial District Court of Galveston County, Texas

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Defendants:					
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George Lachapelle and Ruth Lachappelle

vs.

American Standard, Inc. et al
191st Judicial District Court of Dallas County, Texas

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Northrop Grumman Systems Corporation	Unknown at this time				
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Union Carbide Corporation	Gary D. Elliston Todd Suddleson	Dehay & Elliston 901 Main St, Ste 3500 Dallas, TX 75202	(214) 210-2400	(214) 210-2500	gde@dehay.com tks@dehay.com
Viacom Inc.	John G. Bissell	Strong, Pipkin, Bissell & Ledyard 1111 Bagby, Ste. 2300 Houston, TX 77002-2546	713-651-1900	713-651-1920	jbissell@strongpipkin.com
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Giuseppe Cappelli and Virginia Cappelli

vs.

Allis-Chalmers Corp. et al

116th Judicial District Court of Dallas County, Texas

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Cause No. 03CV1485

Roy Tittle et al

vs.

Quigley Company, Inc. et al

212th Judicial District Court of Galveston County, Texas

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Theodore Platz et al

vs.

Able Supply Company et al

116th Judicial District Court for Dallas County, Texas

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Georgia Pacific	Mel D. Bailey Laura Ellis Kugler Troy D. Helling	Bailey Crowe & Kugler 901 Main St, Ste 4600 Dallas, TX 75202	(214) 231-0555	(214) 231-0556	mbailey@bcklaw.com lkugler@bcklaw.com thelling@bcklaw.com	
Goodrich Corporation	Arthur R. Almquist	Mehaffy Weber 2615 Calder Avenue Beaumont, TX 77704	409-835-5011	409-835-5177	artalmquist@mehaffyweber.com maryalycecox@mehaffyweber.com lisagregory@mehaffyweber.com lisawebb@mehaffyweber.com	

Goulds Pumps, Inc.	Jay Old	Germer Gertz, LLP 333 Clay, Ste 4105 Houston, TX 77002	(713) 650-1313	(713) 739-7420	jrold@germer.com
Guard-Line, Inc.	Robert W. Wilkinson	Dogan & Wilkinson, PLLC 726 Delmas Avenue Pascagoula, MS 39568-1618	228-762-2272	228-762-3223	rwilkinson@safeharborlaw.com
Gulf States Utilities Company	David Tollin	Germer Gertz, LLP 333 Clay, Ste 4105 Houston, TX 77002	(713) 650-1313	(713) 739-7420	dtollin@germer.com
Hercules Incorporated	Karen K. Maston Raul Calderon	Connelly, Baker, Wotring & Jackson 700 Louisiana Street, Ste 1850 Houston, Texas 77002	(713) 980-1704	(713) 980-1707	knaston@connellybaker.com rcalderon@connellybaker.com sgarcia@connellybaker.com
IDEX Corporation	Unknown at this time				
IMO Industries	J. Michael Jordan	Gardere Wynne Sewell 1000 Louisiana, Ste 3400 Houston, TX 77002-5007	(713) 276-5500	(713) 276-5555	rfaulk@gardere.com jjordan@gardere.com
Ingersoll-Rand Company	Laura Frase	Forman Perry Watkins Krutz & Tardy 2001 Bryan Street, Ste. 1300 Dallas, TX 75201	214-905-2924	214-905-3976	lafrase@fpwk.com dodsonje@fpwk.com
John Does 1-100	Unknown at this time				
Kelly Moore	Todd Wade Jason Irvin	Brown McCarroll 111 Congress Ave, Ste 1400 Austin, TX 78701-4043	(512) 472-5456	513-479-1101	twade@mailbmc.com jirvin@mailbmc.com jadams@mailbmc.com
Kimberly Clark Corporation	Clay M. White Jeff Shaver	Sammons & Parker 218 N. College Tyler, TX 75702	(903) 595-4541	(903) 595-3766	cwhite@sammons-parker.com jparker@sammons-parker.com jshaver@sammons-parker.com
Metropolitan Life	Ken Rhodes	Dunn, Kacal, Adams, Pappas & Law One Riverway, Ste. 1200 Houston, TX 77056	713-529-3992	713-529-8161	kdrhodes@dkapk.com

North American Pipe Corporation	Unknown at this time					
Oakfabco, Inc.	Nicholas S. Baldo	Stevens, Baldo & Freeman, LLP 550 Fannin Street, Ste. 400 Beaumont, TX 77704	409-835-5200	409-838-5638	baldo@sbf-law.com	
Owens Illinois, Inc.	Peter Moir	Quilling, Selander, Cummiskey & Lownds 2001 Bryan Street, Ste. 1800 Dallas, TX 75201	214-871-2100	214-871-2111	pmoir@qscipc.com	
Peerless Pump Company	Unknown at this time					
Pfizer, Inc.	Walter G. Watkins, Jr.	Forman, Perry, Watkins, Krutz & Tardy 1200 One Jackson Place 188 E. Capital Street Jackson, MS 39225	601-960-8600	601-960-3241	wwatkins@fpwk.com	
Plymouth Products, Inc.	Karen K. Maston Raul Calderon	Connelly, Baker, Wotring & Jackson 700 Louisiana Street, Ste 1850 Houston, Texas 77002	(713) 980-1704	(713) 980-1707	kmaston@connellybaker.com rcalderon@connellybaker.com sgarcia@connellybaker.com	
Proko Industries, Inc.	Lee Ruffin Wilson	Bowers Orr, LLP Suite 400 8910 Two Notch Road Columbia, SC 29224	803-788-5220	803-788-6767	lwilson@bowersorr.com	
Quigley Company, Inc.	James H. Powers Wayne Young Lori Wiese	Powers & Frost 2400 One Houston Center 1221 McKinney Houston, TX 77010-2007	713-767-1553	713-767-1799	jpowers@powersfrost.com wyoung@powersfrost.com lwiese@powersfrost.com	
Riley Stoker Corporation	Gary D. Elliston	Dehay & Elliston 901 Main St, Ste 3500 Dallas, TX 75202	(214) 210-2400	(214) 210-2500	gde@dehay.com	
Sepco Corporation	Ernest W. Boyd	Mehaffy Weber 2615 Calder Avenue Beaumont, TX 77704	409-835-5011	409-835-5177	butchbody@mehaffyweber.com	

Sherwin-Williams Company	David Ledyard	Strong Pipkin Bissell & Ledyard 599 Orleans, Ste 1400 Beaumont, TX 77701	(409) 981-1000	(409) 981-1010	dledyard@strongpipkin.com tray@strongpipkin.com
SIHI Pumps, Inc.	Unknown at this time				
Smith-Sharpe Company	Unknown at this time				
Stone & Webster Oil Company, Inc.	Unknown at this time				
Stone & Webster, Inc.	Unknown at this time				
Sulzer Pumps (US) Inc.	Unknown at this time				
Tuthill Corporation	Joanne Early	Gardere, Wynne, Sewell, LLP 1601 Elm Street, Ste. 3000 Dallas, TX 75201-4761	512-542-7000	512-542-7100	jearly@gardere.com
Union Carbide Corporation	Gary D. Elliston Todd Suddleson	Dehay & Elliston 901 Main St, Ste 3500 Dallas, TX 75202	(214) 210-2400	(214) 210-2500	gde@dehay.com tks@dehay.com
Van Buren Pipe Corporation	Unknown at this time				
Viacom Inc.	John G. Bissell	Strong, Pipkin, Bissell & Ledyard 1111 Bagby, Ste. 2300 Houston, TX 77002-2546	713-651-1900	713-651-1920	jbissell@strongpipkin.com
Warren Pumps, Inc.	Unknown at this time				
Xcel Energy Services, Inc.	Unknown at this time				
Zurn	Rob Wright	Forman Perry Watkins Krutz & Tardy 2001 Bryan Street, Ste. 1300 Dallas, TX 75201	214-905-2924	214-905-3976	rwwright@fpwk.com