

EOD 8-12-88

FILED  
U. S. DISTRICT COURT  
EASTERN DISTRICT OF TEXAS

IN RE

EASTERN DISTRICT OF TEXAS

ASBESTOS CASES

AUG 11 1988

MURRAY L. HARRIS, CLERK  
By Joy Vandover  
Deputy

GENERAL ORDER

The court sitting en banc in Tyler, Texas, July 29, 1988, conducted a hearing concerning the future course of ending asbestos cases in the Eastern District of Texas.

Counsel for the parties, plaintiffs and defendants, appeared and addressed the various issues of concern to the court.

The judges of the Eastern District were essentially current with asbestos litigation at the conclusion of the Jenkins class action. The class action disposed of all but a few cases filed on or before December 31, 1984. The settlement the court approved in Jenkins contained an alternate dispute resolution (ADR) plan for cases filed subsequent to December 31, 1984. The court's experience with the ADR plan has made it unacceptable to the court. The plan has not been successful for the following reasons:

1. The court set aside the ADR plan for those cases filed in the Marshall Division wherein plaintiffs were represented by Rex Houston, Esquire and Scott Baldwin, Esquire. The reason for the court's action was a finding that both plaintiffs' and defendants' counsel had demonstrated a lack of commitment to alternate dispute resolution and had, in fact, not participated in the plan in good faith.

2. In the Beaumont Division, the effect of the actions and inactions of the defendants involved in the Wellington facility since implementation of ADR has been to create delay and reduce the number of cases processed each month. Defendants have consistently resisted a realistic flow rate of cases.

3. Plaintiffs' counsel have accommodated defendants' efforts to impair the effectiveness of ADR by reducing the number of cases processed each month.

4. The parties have unilaterally modified the plan and circumvented the efforts of the monitor, Magistrate Earl Hines, of Beaumont.

5. Many defendants originally members of the Wellington claims facility have withdrawn from the facility, raising serious questions concerning whether the facility remains a viable entity.

6. The participating defendants have on the one hand continued to assert the absence of a limited fund, and on the other hand, have consistently posed economic reasons for the inability to process more than a few cases each month. These economic reasons have related to coverage difficulties, cash flow problems, and difficulties experienced by certain members of the facility regarding funding of settlements.

7. Pending asbestos cases in the Eastern District have grown at an alarming rate. As of July 1, 1988, of the 5,565 pending civil cases, 2,894 are asbestos. The asbestos cases

comprise fifty-two percent of the pending caseload of the Eastern District, and the average age of each asbestos case is twenty-seven months. The ADR plan has resulted in closing approximately twenty cases a month for the past two years, and the present filing rate of these cases is sixty per month.

The court's experience with ADR, as constituted in the Eastern District, has persuaded a unanimous en banc court that it no longer provides an effective means for disposing of asbestos cases in the Eastern District of Texas and that it should be set aside and discontinued.

Therefore, it is ORDERED that the Alternate Dispute Resolution Plan for the Eastern District of Texas shall be, and it is hereby, set aside.

The court is reluctantly persuaded that, as a result of the inability of defendants to proceed in a concerted manner, a class action is the only probable realistic alternative for the disposition of these cases, either a Jenkins type class action or a mandatory class action.

However, the court remains committed to ADR as the most sensible way to resolve these disputes; therefore, the court will attempt again to implement a workable ADR program. The court will permit the parties to attempt to reach an agreement for an ADR plan. Any agreement shall be filed with the court, for court approval, on or before September 15, 1988. For counsels' guidance, it appears to the court that the following criteria

must be met before the court could approve a new Alternate Dispute Resolution Plan.

1. An agreement to participate by substantially all plaintiffs.

2. An agreement to participate by substantially all defendants.

3. That the defendants agree among themselves to an apportionment of contribution to settlements facilitating one entity or counsel to speak for all defendants.

4. That the plan contain a flow rate of at least 150 cases per month.

5. That the parties commit to meaningful participation in ADR and proceed in good faith.

6. That the plan be district-wide.

7. That the plan make provisions for monitoring the actual success of the plan.

In the event substantially all defendants elect to participate and some defendants elect not to participate, the court may approve the ADR with a class action against non-participating defendants.

The court designates the following counsel to coordinate the parties efforts in attempting to reach a new agreement:

For the plaintiffs:

Walter Umphrey

Wayne Reaud

Jim Mehaffey.

For the defendants:

Richard Josephson

Gary Elliston

Sandra Clark.

It is further ORDERED that all pending asbestos cases in the Eastern District shall be, and they are hereby, STAYED, pending the parties' efforts regarding this order, with the exception of the six cases set for trial in the month of August, 1988, in the Marshall Division.

It is so ORDERED.

SIGNED this 10<sup>th</sup> day of August, 1988.

  
CHIEF JUDGE

1432E

Wellington - O.J.Weber

A. C. & S., Inc.  
Armstrong World Industries, Inc.  
Celotex Corporation  
CertainTeed Corporatin  
Pfizer, Inc.  
Turner & Newall  
Fibreboard Corporation  
Flexitallic Gasket Company, Inc.  
Flintkote Company  
GAF Corporation  
Pittsburgh-Corning Corporation  
Union Carbide Corporation  
H. K. Porter  
Keene Corporation  
National Gypsum Company  
Owens-Illinois, Inc.  
Rock Wool Manufacturing Company  
U. S. Gypsum Company

Bean & Manning  
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Eagle Picher Industries, Inc.

Bailey and Williams  
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Owens-Corning Fiberglas

Orgain, Bell & Tucker  
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3M

Crain, Caton, James & Womble Crown Cork & Seal  
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Garlock

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G. A. Pacific

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Babcock & Wilcox

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