

In The
Supreme Court of the United States

October Term, 1989

ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, and WYOMING,

Plaintiffs,

- against -

W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, USC CORPORATION, AMERICAN BILTRITE, INC., ARMSTRONG WORLD INDUSTRIES, INC., AZROCK INDUSTRIES, INC., BASIC INCORPORATED, CAREY-CANADA, INC., THE CELOTEX CORPORATION, CERTAINTEED CORPORATION, CROWN CORK & SEAL COMPANY, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, THE FLINTKOTE COMPANY, GAF CORPORATION, GEORGIA-PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., KEENE CORPORATION, KENTILE FLOORS, INC., OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., PFIZER, INC., RAYMARK INDUSTRIES, INC., SPRAYED INSULATION, INC., and TURNER & NEWALL PLC,

Defendants.

MOTION OF THE STATE OF NEW JERSEY TO
INTERVENE AS A PARTY PLAINTIFF AND BRIEF
IN SUPPORT OF MOTION

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MOTION TO INTERVENE

Pursuant to *Fed. R. Civ. P.* 24(a)(2) the State of New Jersey moves to intervene of right as a party plaintiff in this action. In the alternative, the State of New Jersey moves for permissive intervention pursuant to *Fed. R. Civ. P.* 24(b)(2).

STATEMENT OF THE CASE

The State of New Jersey moves pursuant to *S.Ct. R.* 9.2 and *Fed. R. Civ. P.* 24 to intervene as a party plaintiff in a matter pending before this Court on a motion for leave to file a complaint pursuant to *S.Ct. R.* 9.3.

On January 30, 1990, 29 sovereign States petitioned this Court to exercise its original jurisdiction pursuant to *U.S. Const.* art. III, §2 and 28 *U.S.C.* §1251(b)(3) to permit the filing of a complaint against various miners, manufacturers and distributors of asbestos products. The complaint seeks recovery of the costs incurred in removing asbestos-containing products from public buildings and equitable relief as may be fashioned by the Court. The complaint asserts the grievous health hazards associated with exposure to asbestos-containing products, hazards which affect not only State employees working in public buildings but also visitors to those premises. (Complaint, para. 5, 9). The complaint further avers the defendants' knowledge of the health risks associated with exposure to asbestos, their duty to provide safe products or to warn the plaintiffs of the risks of asbestos and their failure to exercise that duty. (Complaint, para. 6-8, 13-14). The complaint asserts the plaintiffs' assumption of defendants'

obligation to abate the asbestos hazards present in public buildings and the resultant costs incurred by plaintiffs in connection with the exercise of abatement measures. (Complaint, para. 14-17).

The State of New Jersey now seeks to intervene as a plaintiff to protect its interests in the health and safety of its citizens, employees, and visitors by maintaining the environmental integrity of its public buildings.

The New Jersey Legislature has appropriated in excess of \$26 million for asbestos remediation in State-owned buildings. (Ex. 1, para. 3). These appropriations have been expended almost completely. (Ex. 1, para. 2). The State Department of Treasury, however, has estimated that the cost of remediation of the asbestos hazards in State buildings will require the expenditure of an additional \$100 million. (Ex. 1, para. 5). This figure, staggering in its own right, takes on an added significance in times of shrinking revenues which produce severe fiscal constraints, a situation currently being faced by the State of New Jersey. (Ex. 1, para 3). As a result of these fiscally austere times, non-emergent remediation of asbestos hazards has been suspended. (Ex. 1, para. 4).

The issue of building environmental safety, which includes recognition of the health hazards associated with the presence of asbestos, has commanded legislative and regulatory concern in New Jersey for the past several years. In 1984, the New Jersey State Legislature enacted the Asbestos Services Act, *N.J. Stat. Ann.* 34:5A-32 *et seq.* (1984), which requires the licensing by the State Commissioner of Labor of companies and workers who perform asbestos remediation contracts in public and private

buildings and further requires the Commissioner of Health to certify standardized training courses applicable to the abatement of asbestos hazards. The Departments of Labor and Health have adopted comprehensive regulations implementing their respective responsibilities of the Act. *N.J. Admin. Code* tit. 12:120-1.1 *et seq.* (1985); *N.J. Admin. Code* tit. 8:60-1.1 *et seq.* (1985). The Governor, by virtue of N.J. Gov. Exec. Order No. 59 (1984), created an Asbestos Policy Committee to develop a State asbestos policy and to coordinate the operational activities of various State cabinet-level departments addressing the asbestos issue.

Concerns of the deleterious effect of environmental health hazards in the public work place, including asbestos, resulted in the enactment of the Public Employee Occupational Safety and Health Act, *N.J. Stat. Ann.* 34:6A-25 *et seq.* (1984) which provides for the development and enforcement of occupational health and safety standards applicable to public employers and employees. A regulatory scheme adopted pursuant to the provisions of the Act specifically addresses safeguards to be implemented for the benefit of public employees exposed to asbestos-laden environments. *N.J. Admin. Code* tit. 12:100-12.1 *et seq.* (1986). In addition, the State's Uniform Construction Code, *N.J. Stat. Ann.* 52:27D-119 *et seq.* (1975) was expanded to include a comprehensive regulatory subcode addressing Asbestos Hazard Abatement in private, State-owned and State-leased buildings. *N.J. Admin. Code* tit. 5:23-8.1 *et seq.* (1985).

Further, in 1984 the State Legislature passed the State School Aid Act for Asbestos, *N.J. Stat. Ann.* 18A:58-68 *et seq.* (1984) which established procedures by which local

school districts may seek State assistance in the identification of asbestos hazards and receive partial reimbursement in the form of State school aid for the costs of remediating the hazards. The State's Commissioner of Education adopted a regulation implementing the Act. *N.J. Admin. Code* tit. 6:20-5.5 (1986).

The complaint in the underlying action reflects the claims of the State of New Jersey against the defendants. Therefore, the State adopts each and every allegation of the complaint and seeks recovery from each and every named defendant.

John Ellis, plaintiffs' lead counsel, has consented on behalf of the named plaintiffs to New Jersey's participation in this action. (Ex. 2, para. 2).

ARGUMENT

THE MOTION OF THE STATE OF NEW JERSEY TO INTERVENE OF RIGHT UNDER *FED. R. CIV. P.* 24(a)(2) SHOULD BE GRANTED BECAUSE THE STATE HAS AN INTEREST IN THE LITIGATION, DISPOSITION OF THE CASE MAY IMPAIR THE STATE'S ABILITY TO PROTECT ITS INTEREST AND BECAUSE THE STATE'S INTEREST IS INADEQUATELY REPRESENTED. ALTERNATIVELY, PERMISSIVE INTERVENTION UNDER *FED. R. CIV. P.* 24(b)(2) IS WARRANTED BECAUSE THE STATE'S CLAIM AND THE MAIN ACTION INVOLVE COMMON QUESTIONS OF LAW AND FACT AND INTERVENTION WILL NOT PREJUDICE OR DELAY ADJUDICATION OF THE RIGHTS OF THE PARTIES.

In this matter, the State of New Jersey moves to intervene as a party plaintiff in an action seeking this

Court's exercise of its original jurisdiction. In such cases, practice and procedure are governed by the Federal Rules of Civil Procedure. S.Ct. R. 9.2. Intervention is addressed generally in Rule 24 and includes both intervention of right and permissive intervention. *Fed. R. Civ. P.* 24(a)(2) provides that intervention of right is warranted

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In interpreting the three elements of the rule, the courts have tended to a practical interpretation liberally construed in favor of the applicant seeking intervention. *Washington State Building and Construction Trades v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982); *cert. den. sub nom. Don't Waste Washington Legal Defense Foundation v. Washington, et al.*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983); *Corby Recreation v. General Electric*, 581 F.2d 175, 177 (8th Cir. 1978); *Guaranty National Insurance Co. v. Pittman*, 501 So.2d 377, 384 (Sup. Ct. Miss. 1987) (interpreting a state rule of civil procedure identical in terms to *Fed. R. Civ. P.* 24). Consideration of whether the applicant has demonstrated an interest sufficient to satisfy the first element of Rule 24(a)(2) has focused on the underlying policy of the rule, "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Neusse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969); *FDIC v. Jennings*, 816 F.2d 1488, 1491 (10th Cir. 1987). The applicant need not establish a direct

interest in the action. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967); *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 578 F.2d 1341, 1344 (10th Cir. 1978). Rather it is sufficient for the applicant to claim an interest relating to the property or transaction at issue, without demonstrating the likely success of the merits of the claim. *American National Bank and Trust of Chicago v. Bailey*, 750 F.2d 577, 585 (7th Cir. 1984), *cert. den.* 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985); *Williams and Humbert Limited v. W&H Trademarks Limited*, 840 F.2d 72, 75 (D.C. Cir. 1988).

The second element, which is closely related to the first, requires the applicant to demonstrate that his ability to protect his interest may be impaired by disposition of the action. This element of the rule is satisfied if disposition of the action would place the applicant at a practical disadvantage in protecting his interest, which disadvantage has been defined to include the "inhibiting effect of *stare decisis*." *Corby Recreation v. General Electric*, *supra.* at 177. An applicant must demonstrate only that his interest *may* be impaired; it is not necessary to establish impairment to a certainty in order to satisfy this criterion. *Little Rock School District v. Pulaski County Special School District, #1*, 738 F.2d 82, 84 (8th Cir. 1984); *Howard v. McLucas*, 782 F.2d 956, 958-959 (11th Cir. 1986); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124-25 (5th Cir. 1970); *cert. den. sub nom. Trefina v. U.S.*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970); *reh. den. Trefina v. U.S.*, 400 U.S. 1025, 91 S.Ct. 580, 27 L.Ed.2d 638 (1971); *Smuck v. Hanson*, *supra.* at 180.

The third prerequisite to intervention under *Fed. R. Civ. P.* 24(a)(2) is that the applicant's interests are not adequately protected by the parties to the action. This requirement is satisfied if the applicant demonstrates that representation of his interest *may* be inadequate. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972). The burden on the applicant to satisfy this element is minimal. *Trbovich v. U.M.W.*, *supra.*; *SEC v. Flight Transportation Corp.*, 699 F.2d 943, 948 (8th Cir. 1983).

An analysis of the facts demonstrates that the State of New Jersey has satisfied all of the elements of *Fed. R. Civ. P.* 24(a)(2). The State of New Jersey clearly has an interest in the transaction at issue. As a sovereign State, New Jersey must protect the health and welfare of its citizens. As an employer, the State has an obligation to protect the health and safety of its employees. One course embarked upon by the State to satisfy its responsibilities to its citizens and employees is to maintain the environmental integrity of its buildings. Both State legislative and executive actions demonstrate recognition of the serious health hazards occasioned by exposure to asbestos products. Comprehensive regulatory schemes administered by several cabinet level departments of the State attest to the interest of the State of New Jersey in protecting its citizens, employees and visitors by maintaining environmentally safe buildings and workplaces. The State of New Jersey, thus, clearly has an interest in the action brought by the plaintiffs.

Further recognition of the interest of the State of New Jersey is evident when one considers that New Jersey's

claims against the defendants are as defined by the existing pleadings. New Jersey adopts each and every allegation of the complaint and seeks the relief requested against each and every defendant. The interest, then, of the State of New Jersey is identical to the interest of the named plaintiffs. Granting the State's motion to intervene would foster judicial economy and prevent duplicative litigation. Further, because the State's claims mirror those of the plaintiffs, the addition of New Jersey as a party plaintiff would not introduce differing legal issues or proofs. For these reasons, the initial requirement of *Fed. R. Civ. P.* 24(a)(2) is satisfied.

The State's ability to protect its interest in maintaining the environmental integrity of public buildings for the protection of its citizens, employees and visitors may be substantially impaired should this matter be disposed of without the State's participation. Given the present posture of the proceedings, it is difficult to aver that the State of New Jersey would be impaired by a ruling on the merits in defendants' favor. However, it is possible that legal theories and defenses may be advanced by the defendants and accepted by the Court, thus providing the defendants with a basis to defend, citing principles of *stare decisis*, a subsequent action by the State of New Jersey. Moreover, a substantial question remains as to whether there exists any other forum in which the State of New Jersey could pursue claims of recovery against all of the defendants. Therefore, it is submitted that the State's interest may be impaired if the original action is disposed of without New Jersey as a participant. The second element of *Fed. R. Civ. P.* 24(a)(2) is satisfied.

Finally, it is indisputable that the State of New Jersey's interests are not adequately represented by the plaintiffs. No one but New Jersey is capable of protecting New Jersey's interest. The plaintiffs cannot seek redress of damage resulting to buildings owned by the State of New Jersey. The plaintiffs cannot seek recovery for the \$26 million expended by the State of New Jersey on remediation measures. The plaintiffs cannot advocate that the defendants recognize their duty to the State of New Jersey and continue remediation efforts directly resulting from the presence of defendants' products in buildings owned by New Jersey. Clearly, then the interests of the State of New Jersey are not adequately represented by the plaintiffs.

In summary, the State has demonstrated that it satisfies the three requirements of *Fed. R. Civ. P.* 24(a)(2). and thus the State's motion for intervention of right should be granted.

Even assuming that the State does not have a right to intervene, permissive intervention is clearly warranted under *Fed. R. Civ. P.* 24(b)(2). Permissive intervention rests in the discretion of the Court in situations where there exist common questions of fact or law in the main action and the applicant's claim or defense and where intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. *Fed. R. Civ. P.* 24(b)(2). This provision of the rule has been liberally construed to allow intervention even in those instances where the applicant has no direct personal or pecuniary interest in the subject matter of the main action. *SEC v. United States Realty and Improvement Co.*, 310 U.S. 434, 459, 60 S.Ct. 1044, 1055, 83 L.Ed. 1239 (1940); *In re Estelle*, 516

F.2d 480, 485 (5th Cir. 1975). *cert. den.* 426 *U.S.* 925, 96 *S.Ct.* 2637, 49 *L.Ed.2d* 380 (1976); *reh. den.* 429 *U.S.* 873, 97 *S.Ct.* 192, 50 *L.Ed.2d* 155 (1976). A ruling on an application for permissive intervention lies within the sound discretion of the Court, taking into consideration undue prejudice or delay resulting to the original parties. *Lipsett v. U.S.*, 359 *F.2d* 956 (2nd Cir. 1966); *Ellender v. Schweiker*, 550 *F.Supp.* 1348 (D.C.N.Y. 1982).

The State's application satisfies the requirements of *Fed. R. Civ. P.* 24(b)(2). The State's claim is identical to those of the plaintiffs; thus there exist common issues of law and fact between New Jersey's claims and the claims of the underlying action. Secondly because this litigation is in its infancy, none of the parties would be prejudiced or unduly delayed by New Jersey's participation in the actions. Therefore intervention under *Fed. R. Civ. P.* 24(b)(2) is warranted.

CONCLUSION

For the reasons expressed herein, it is respectfully submitted that the motion of the State of New Jersey to intervene of right under *Fed. R. Civ. P.* 24(a)(2) should be granted. In the alternative, it is submitted that the motion to intervene should be granted under the provisions of *Fed. R. Civ. P.* 24(b)(2).

Respectfully submitted,

ROBERT J. DEL TUFO
Attorney General of New Jersey

By: _____
MICHAEL R. CLANCY
Assistant Attorney General

NO. 116 ORIGINAL
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA,
CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, IN-
DIANA, IOWA, LOUISIANA, MAINE, MISSOURI, MON-
TANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK,
NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLA-
HOMA, RHODE ISLAND, SOUTH DAKOTA, TENNES-
SEE, TEXAS, UTAH, VERMONT, WASHINGTON, and
WYOMING,

Plaintiffs,

- against -

W.R. GRACE & COMPANY, NATIONAL GYPSUM COM-
PANY, UNITED STATES GYPSUM COMPANY, USG
CORPORATION, AMERICAN BILTRITE, INC., ARM-
STRONG WORLD INDUSTRIES, INC., AZROCK INDUS-
TRIES, INC., BASIC INCORPORATED, CAREY-
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TAINTEED CORPORATION, CROWN CORK & SEAL
COMPANY, INC., EAGLE-PICHER INDUSTRIES, INC.,
FIBREBOARD CORPORATION, THE FLINTKOTE COM-
PANY, GAF CORPORATION, GEORGIA-PACIFIC COR-
PORATION, H.K. PORTER COMPANY, INC., KEENE
CORPORATION, KENTILE FLOORS, INC., OWENS-
CORNING FIBERGLAS CORPORATION, OWENS-ILLI-
NOIS, INC., PFIZER, INC., RAYMARK INDUSTRIES,
INC., SPRAYED INSULATION, INC., and TURNER &
NEWALL PLC,

Defendants.

STATE OF NEW JERSEY)
) ss.
COUNTY OF MERCER)

AFFIDAVIT OF THOMAS H. BUSH

THOMAS H. BUSH, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed by the State of New Jersey, Department of Treasury as Director of the Division of Building and Construction. My responsibilities include planning, construction, reconstruction, improvement and repair of public buildings.

2. In the exercise of my responsibilities, I award contracts for the remediation of asbestos hazards in public buildings. Appropriations in excess of \$26 million had been made through fiscal year 1989 to pay the costs associated with such contracts.

3. The remaining amount of appropriations currently available for asbestos remediation work is less than \$1 million. No appropriations for this work were made in fiscal year 1990, nor does the proposed budget for fiscal year 1991 include any appropriations.

4. As a result of the budgetary constraints, asbestos remediation in non-emergent situations has been suspended.

5. My staff has prepared a cost analysis based upon available data and methodologies which estimate additional costs in excess of \$100 million to remediate asbestos in public buildings.

/s/ Thomas H. Bush
Thomas H. Bush

Sworn to and subscribed before
me this 14th day of March, 1990.

/s/ Maureen Adams
Attorney at Law
State of New Jersey

NO. 116 ORIGINAL
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA,
CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, IN-
DIANA, IOWA, LOUISIANA, MAINE, MISSOURI, MON-
TANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK,
NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLA-
HOMA, RHODE ISLAND, SOUTH DAKOTA, TENNES-
SEE, TEXAS, UTAH, VERMONT, WASHINGTON, and
WYOMING,

Plaintiffs,

- against -

W.R. GRACE & COMPANY, NATIONAL GYPSUM COM-
PANY, UNITED STATES GYPSUM COMPANY, USG
CORPORATION, AMERICAN BILTRITE, INC., ARM-
STRONG WORLD INDUSTRIES, INC., AZROCK INDUS-
TRIES, INC., BASIC INCORPORATED, CAREY-
CANADA, INC., THE CELOTEX CORPORATION, CER-
TAINTEED CORPORATION, CROWN CORK & SEAL
COMPANY, INC., EAGLE-PICHER INDUSTRIES, INC.,
FIBREBOARD CORPORATION, THE FLINTKOTE COM-
PANY, GAF CORPORATION, GEORGIA-PACIFIC COR-
PORATION, H.K. PORTER COMPANY, INC., KEENE
CORPORATION, KENTILE FLOORS, INC., OWENS-
CORNING FIBERGLAS CORPORATION, OWENS-ILLI-
NOIS, INC., PFIZER, INC., RAYMARK INDUSTRIES,
INC., SPRAYED INSULATION, INC., and TURNER &
NEWALL PLC,

Defendants.

STATE OF NEW JERSEY)
) ss.
COUNTY OF MERCER)

AFFIDAVIT OF MAUREEN ADAMS

MAUREEN ADAMS, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a Deputy Attorney General in the Division of Law in the New Jersey Department of Law and Public Safety. I have been assigned to prepare the necessary motion papers to support the State of New Jersey's intervention in the above matter.

2. In anticipation of filing the within motion, I spoke with John Ellis, plaintiffs' lead counsel. In response to my inquiry as to the plaintiffs' position regarding New Jersey's motion, Mr. Ellis represented plaintiffs' consent to New Jersey's participation in the above matter.

/s/ Maureen Adams
Maureen Adams

Sworn to and subscribed before
me this 14th day of March, 1990.

/s/ Gayl R. Mazuco
Attorney at Law
State of New Jersey
