NO. 116 ORIGINAL

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, USG CORPORATION, AMERICAN BILTRITE, INC., ARMSTRONG WORLD INDUSTRIES, INC., AZROCK INDUSTRIES, INC., BASIC INCORPORATED, CAREY-CANADA, INC., THE CELOTEX CORPORATION, CERTAIN-TEED 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.

REPLY BRIEF OF PLAINTIFF STATES

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Defendants.

REPLY BRIEF OF PLAINTIFF STATES

ARGUMENT IN REPLY

The complexities of this case, amply demonstrated by the Asbestos Companies, are the very reason the Court should assume jurisdiction over this controversy. Indeed, the collective effort of the thirty States, including New Jersey, to take the seldom-traveled jurisdictional path to this Court established by the Constitution is motivated by these very complexities.

We have come to the Court because the Nation faces more than just an asbestos problem threatening the health and safety of many of its citizens; it faces an asbestos litigation problem which threatens the effective functioning of the federal and state courts. Traditional American trial procedures have proven inadequate to the task. Innovative efforts have been rebuffed. *See, e.g., In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (vacating pretrial order consolidating 3,031 asbestos cases for trial, while acknowledging the "ongoing struggle with the problems presented by the phenomenon of mass torts").

This case offers the Court an opportunity to heed the call expressed by Chief Judge Clark of the Fifth Circuit, who, joined by four of his colleagues in *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1333 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986), stated:

> The Supreme Court, as the only institution other than Congress capable of imposing the uniformity necessary to resolve this [asbestos litigation] problem, should be afforded the chance to deal with the singular problem presented by these cases.

The Third Circuit has echoed much of Chief Judge Clark's plea in a passage only too apropos:

> This appeal must be decided against the backdrop of the asbestos scene, an unparalleled situation in American tort law. To date (1986), more than 30,000 personal injury claims have been filed... An estimated 180,000 additional claims of this type will be on court dockets by the year 2010. Added to those monumental figures are the claims for property damage — the cost of removing or treating asbestos-based materials used in building construction.

In re School Asbestos Litigation, 789 F.2d 996, 1000-1001 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

Additionally, the asbestos litigation problem is multi-faceted and far-reaching. It encompasses such matters as: (1) the disproportion between comparatively small recovery for victims as opposed to the enormous litigation expenses; (2) inordinate delays occasioned by "reinventing the wheel" through seemingly endless individual trials

involving relitigation of common issues; and, (3) the delays in disposition of other types of cases resulting from the massive number of asbestos cases clogging the dockets. 789 F.2d at 1001, *citing* Rand Corporation, *Asbestos in the Court* (1985).

This case offers the vehicle for this Court to address the concerns of its brethren about these grave problems. It will provide an opportunity for consolidated discovery and uniform resolution of issues such as the hazards of asbestos, the Asbestos Companies' knowledge of those hazards, and their failure to conduct prudent tests and to warn purchasers of the hazards.

The nationwide dimension of the asbestos litigation problem and the inadequacy of the traditional dispute procedures of the judicial system to alleviate the problem in any meaningful sense distinguish this case from the cases in which the Court declined to hear cases lying within its original, but non-exclusive, jurisdictional domain. For example, cases such as *Washington v. General Motors Corp.*, 406 U.S. 109 (1972) and *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), did not present the Court with overarching national issues of judicial administration. Problems of judicial administration *internal* to the Court informed the decision to decline jurisdiction in those cases. Major problems of judicial administration *external* to the Court should inform the decision to accept jurisdiction here.

Of course, two kinds of complexity are present in this case. One involves the merits, and the other involves the process for reaching the merits. At this stage, the complexity of the merits need not long detain the Court. Original jurisdiction cases of great complexity, with far-reaching effects, have been standard fare for the Court throughout its history. In modern times, through the Colorado River litigation, the Court has announced complicated rules governing the development of the southwestern United States. *Arizona v. California*, 373 U.S. 546 (1963). In the Pecos River litigation, the Court, in conjunction with its Special Master, has grappled with hydrologic and mathematical concepts lying at the frontiers of science and economic models designed to approximate regional development over a third of a century. *Texas v. New Mexico*, 462 U.S. 554 (1983). Certainly, the merits of this case will present complexities no greater — and probably less — than those other cases.

The more daunting complexity here is one of process. The States admit it; indeed, they have been forced into a reluctant embrace of the proposition. It is why thirty of them, on behalf of far more than half of the Nation's citizens, have come together to the Court. Realistically, they have no other judicial forum available to them collectively. If the problems of judicial administration daunt the Court, they would positively incapacitate the only other type of judicial forum even theoretically available. A state trial court in Wisconsin validates this observation. *See, Sisters of St. Mary v. Aaer Sprayed Insulation*, No. 85-CV-5952 (Wis. Cir. Ct. Dane Co. 1987), *aff'd*, 151 Wis. 2d 708, 445 N.W. 2d 723 (Ct. App.), *review denied*, 449 N.W. 2d 275 (Wis. 1989).

In deciding whether to assert its non-exclusive jurisdiction in cases of this type, the Court asks the critical question of whether a suitable alternative forum exists. *E.g., Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 464 (1945). It cannot be seriously disputed that no such forum exists here for the States collectively. Certainly no other judicial forum has the jurisdiction, the resources, and the stature to chart a course out of this procedural thicket.

Thus the alternative for the States is to do what the Asbestos Companies suggest: file thirty individual cases in state courts. The result would be thirty duplicative tracks of discovery and trial litigating the issues common to the cases. The States' Attorneys General will not resign themselves to such an immense waste of scarce public resources if a more efficient path is available. This Court's original jurisdiction appears to be the only such path.

* * * * *

The States nevertheless recognize that there are several difficult issues to resolve, other than the suitability of alternative forums. We offer the following in response to the Asbestos Companies' contentions regarding jurisdiction, which law to apply, and the validity of the States' position regarding the well-recognized dangers of asbestos.[1]

[1] Although the Asbestos Companies suggest that they have a right to a jury trial, consideration of the issue is premature. Indeed, the parties may choose not to demand a jury trial even if one is available under the Seventh Amendment.

1.Contrary to the Asbestos Companies' arguments, the Court's assumption of jurisdiction is not foreclosed by the absence of complete diversity. The same clause of the Constitution identifies the jurisdictional predicate for the federal courts' power to entertain both controversies "between Citizens of different States" and "between a State and Citizens of another State." U.S. Const. Art. III, § 2, cl. 1. No reason exists as to why the Court's interpretation of the reach of the former grant in *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967), should not likewise govern the latter which is involved here. *Cf. California v. Southern Pacific Co.*, 157 U.S. 229, 259-60 (1895) (dictum) (disagreeing with characterization of removal statute as permitting removal when parties were non-diverse and not reaching issue if characterization were correct).

It is of no consequence that clause 2 of this same section provides the Court with appellate jurisdiction to review controversies between citizens of different states while, on the other hand, it establishes original jurisdiction for controversies between a state and citizens of another state. The extent of the judicial power of the United States is defined in Article III, § 2, cl. 1. Clause 2 which follows merely distributes the power so defined between this Court and the lower courts. The Asbestos Companies' interpretation of these constitutional provisions leads to the absurd result that no federal court has the power to entertain the States' action although the judicial power of the United States must be read, given *Tashire*, to include this controversy between minimally-diverse parties.[2] A ruling which recognizes the Court's power to entertain this action more logically follows. It serves to re-affirm the "rank and dignity" of the states which the Constitution's framers recognized when they determined "to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State . . . ." *Ames v. Kansas*, 111 U.S. 449, 464 (1884). *Accord South Carolina v. Regan*, 465 U.S. 367, 397 (1984) (O'Connor, J., concurring) (quoting *Ames*).

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[2] We do recognize that this gap in jurisdiction arguably could be filled by a legislative enactment providing the district courts with power to entertain controversies between states and minimally-diverse citizens. *See United States v. California*, 297 U.S. 175, 187 (1936).

In any event, the Asbestos Companies' jurisdictional arguments exalt form over substance. Even if they were correct that complete diversity is required, such a result could be achieved through the class action device or amended pleadings by individual states which then could be consolidated. *Cf. Southern Pacific Co.*, 157 U.S. at 263-64 (Harlan, J., dissenting) (once Court had jurisdiction over state and diverse citizen, it could prescribe its mode and form of proceeding to deal with non-diverse parties).

2.The Asbestos Companies also contend that this Court should decline to exercise jurisdiction due to the presumed inherent insurmountable obstacles a federal court confronts when addressing state law issues. They fail to acknowledge, however, that this Court long ago rejected that contention in *Meredith v. Winter Haven*, 320 U.S. 228 (1943):

> [T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> * * * *
>
> [I]t has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of judgment.

Id at 234 (citations omitted).

The import of *Meredith* is particularly significant since the question before the Court was whether a district court could decline to exercise jurisdiction solely because the decision on the merits turned on unsettled state statutory and constitutional law. *Id.* at 229; *accord Louisiana Power & Light Co v. City of Thibodaux*, 360 U.S. 25, 27 (1959). Similarly, the Court is not obligated to decline jurisdiction solely because unsettled state law issues may arise at some point in the future. In addition, while the Court later may be asked to consider diverse, settled state laws, this too should not be determinative of whether it exercises its original jurisdiction. *See, e.g., In re School*

Asbestos Litigation, 789 F.2d 996 (upholding nationwide class certification notwithstanding diversity of applicable state laws).

Moreover, the Asbestos Companies' argument that this Court's resolution of state issues intrudes into the statutory and judicial framework of state practice and procedure is plainly presumptuous. *Cf. Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. at 35 (Brennan, J., dissenting). The States themselves have come forward seeking this Court's resolution of the asbestos problem as it affects the thirty states. Notwithstanding the Asbestos Companies' assertions to the contrary, there is no rule of law which precludes this Court from creating federal common law under the circumstances of this case. *Compare Boyle v. United Technologies Corp.*, 487 U.S. 500, ___, 108 S.Ct. 2510, 2514 (1988), *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987), and *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 n.3 (1972) (calling into question the precedential value of the Court's analysis in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493).

3.The States seek restitution for costs associated with their asbestos abatement programs. These programs are designed for the management of asbestos problems and provide for monitoring, encapsulation, enclosure or removal of ACM, as appropriate under the circumstances. Once the merits of the States' claims are reached — and that is not now — then one issue will be whether the abatement was necessary.

Thus, contrary to the suggestions of the Asbestos Companies, the States' claim for the cost of abatement does not mean removal in every instance. Moreover, contrary to the Asbestos Companies' misleading references to a "growing consensus" against the States' abatement programs, these abatement programs are thoroughly consistent with the real consensus among knowledgeable scientists and with the EPA policies based on that consensus.

The strong scientific consensus is that asbestos is a known carcinogen, that it is widely present in public and commercial buildings, including the States' buildings, that there is no established

threshold below which exposure is safe, and that ACM must be identified and managed to minimize the risk.[3] The mere presence of ACM does not pose an immediate hazard in every instance, but it does in every instance require identification and management. And, in many instances it does pose an immediate hazard, necessitating encapsulation, enclosure or removal.

The States' asbestos management programs will result in huge future expenses. In addition, contrary to the suggestions of the Asbestos Companies, the States have already expended many millions of dollars on completed abatement work, for which the States seek restitution.

CONCLUSION

For all of the foregoing reasons, as well as those presented in the States' Brief in Support of Motion for Leave to File Complaint, the States' Motion for Leave to File Complaint should be granted.

Respectfully submitted

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April 24, 1990

[3] *See, e.g.*, letter by Robert C. McNally, Chief, Abatement Programs Development Branch, Office of Toxic Substances, U.S. Environmental Protection Agency, reprinted in *Asbestos Issues*, at 22 (April 1990), responding to *Science Magazine* article; *Hearings Before the Subcommittee on Health and Saftey of the House of Representatives Committee on Education and Labor*, 101st Cong., 2nd Sess. (April 3, 1990) (Statement of Linda J. Fisher, Assistant for Pesticides and Toxic Substances, U.S. Environmental Protection Agency (re-produced in Brief of Defendant National Gypsum Company in Opposition to Plaintiffs' Motion for Leave to File Complaint herein, at Appendix A-11).