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Asbestos Litigation

Court ruling gives new life to thousands of suits

May 29, 2008

By: Bud Newman

The 4th District Court of Appeal breathed new life into thousands of pending asbestos-related lawsuits Wednesday by invalidating retroactivity in a state law designed to limit the number of people eligible to sue.

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Plaintiff attorneys hailed the ruling as a victory for thousands of people still awaiting their day in court, while an industry lawyer expressed disappointment and said an appeal to the Florida Supreme Court is likely.



Joel Perwin

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An appeal would be based in part on a conflict between the 4th DCA in West Palm Beach and the 3rd District Court of Appeal in Miami, which concluded the retroactivity provision was valid.

The 4th DCA ruling certified a conflict between the two appellate courts, paving the way for possible high court review.

Judge Gary Farmer wrote for the unanimous court that the Florida Asbestos and Silica Compensation Fairness Act "may not constitutionally be applied to eliminate the existing vested rights in the lawsuits pending when the act became effective" July 1, 2005. Judges W. Matthew Stevenson and Carole Taylor concurred.

The ruling reversed 13 decisions by Palm Beach Circuit Judge Elizabeth Maass upholding retroactivity. Some of the cases date back to 1999. The decision revives them in the lower court.

"It certainly means that there are thousands of cases that were in the pipeline that were retroactively thrown out by this legislation that now may see new life," said Miami solo practitioner Joel Perwin, who helped handle the 4th DCA appeal for plaintiffs.

The 2005 law set impairment standards for plaintiffs. People with nonmalignant asbestosis must have lost at least 20

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percent of their breathing capacity to sue, and those with lung cancer would have to have asbestosis and diminished breathing capacity to discount the effects of smoking.

"There are limits to legislative power," Perwin said. "You don't take away rights that have already been accrued when you're passing new laws."

Coral Gables attorney David Jagolinzer, a partner in the Ferraro Law Firm who has represented asbestos victims at the trial level, said he is "extremely happy" with the new ruling.

He said it could restore as many as 4,000 asbestos illness cases statewide.

"The importance of this decision is that the whole statute is unconstitutional," Jagolinzer said. The law "established a level of sickness, a level of impairment which you never had before" as a threshold for a lawsuit.

The appeals court said it could not sever the provisions of the act dealing with retroactivity from other provisions.

"The act in its entirety may not constitutionally be applied to require claimants with accrued causes of action for damages resulting from exposure to asbestos to plead and prove that any malignancy or physical impairment results from their exposure to asbestos," the court ruled. "Instead, their accrued causes of action required them to show only that they suffered from an injury from an asbestos-related, nonmalignant disease."

The ruling means the 2005 law cannot be applied to anybody with an asbestos-related disease whether or not they sued before the law took effect, Jagolinzer said.

Perwin said the ostensible purpose of the law was to get a handle on the volume of asbestos suits and better manage all the litigation. However, he said, "it attempted to do so in a very sweeping manner and, in the process, it trampled all over the rights of litigants to our courts."

John Pelzer, who handled the appeal for the industry, said he was "disappointed" by the ruling.

The law was designed to "put people who were sick at the head of the line" for compensation from a limited fund ahead of people who were exposed to asbestos but not yet sick, said Pelzer, a partner at Ruden McCloskey Smith Schuster & Russell in Fort Lauderdale.

The 4th DCA ruling is an attempt "to undo that effort and put us back to what I call the Dark Ages of asbestos litigation where people who aren't really sick are cutting in the line ahead of people who are sick," he said.

Jagolinzer responded, "We were never in the Dark Ages." Despite the larger number of asbestos cases, the litigation "has not clogged the courts."

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Joel Perwin photo by A.M. Holt

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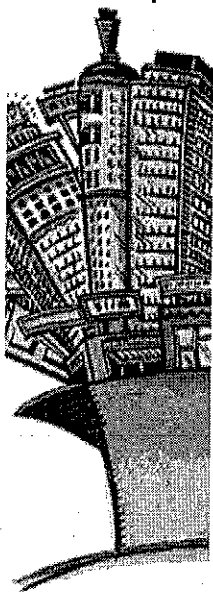
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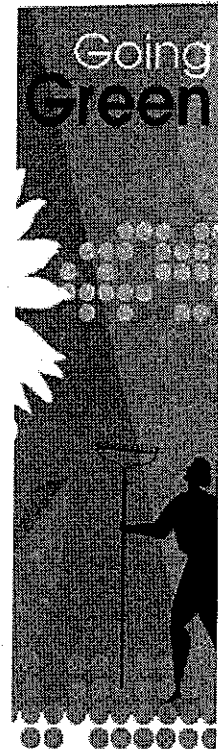


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