IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

KENNETH S. REYNOLDS,

Plaintiff,

v. Civil Action No. 01-C-538
(Judge Bloom)

A & I COMPANY, GRANITE STATE INSURANCE COMPANY, NEW HAMPSHIRE INSURANCE COMPANY, TRAVELERS INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, OHIO FARMERS INSURANCE COMPANY, and SCOTTSDALE INSURANCE COMPANY,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY SETTLEMENT CLASS CERTIFICATION, PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT, AND APPROVAL OF CLASS NOTICE

Plaintiff, through his undersigned counsel, argues in support of his Motion for Preliminary Settlement Class Certification, Preliminary Approval of Proposed Class Settlement, and Approval of Class Notice as follows:

Introduction

A&I Corporation ("A&I") is a West Virginia corporation that filed articles of dissolution on November 5, 1999 and that supplied and/or installed asbestos insulation at various industrial sites in West Virginia, and to a limited extent in eastern Ohio and Kentucky, in the 1950s through 1970s, and removed asbestos in the 1970s and 1980s. A&I has been a defendant in numerous asbestos-related lawsuits brought principally in West Virginia. A&I filed articles of dissolution on November 5, 1999, and thereafter published notice pursuant to W. Va. Code § 31-1-48, pursuant to which any claims

against A&I not filed by November 5, 2001 (the "Bar Date") would be extinguished.

Plaintiff Kenneth S. Reynolds had substantial occupational exposure to asbestos supplied or installed by A&I, but has not been diagnosed with any asbestos-related disease. On behalf of a Class of those similarly situated, Plaintiff brought this action before the Bar Date against A&I, and subsequently joined its insurers, including AIG Companies and Travelers (the "Settling Insurers"),[1] seeking declaratory, equitable and ancillary relief to enable those who manifest a disease resulting from exposure to A&I's asbestos after the Bar Date to recover notwithstanding A&I's filing of articles of dissolution.

The Settling Insurers filed motions to dismiss, which are pending. The motions argue, among other things, that because class members had not manifested an asbestos-related injury at the time of A&I's dissolution, Settlement Class members could not assert a "claim or right existing or liability incurred" at the time of A&I's dissolution, as required under W. Va. Code § 31-1-48 for a claim against a dissolved corporation. In part because of uncertainty regarding the outcome of this and other issues raised by the pending motions, which if resolved against the Settlement Class would result in the Settlement Class members

[1] In keeping with the parties' terminology, "AIG Companies" refers to Granite State Insurance Company and New Hampshire Insurance Company and related entities, and "Travelers" refers to Phoenix Insurance Company and related entities (as defined in the parties Stipulation of Settlement, attached as Exhibit A to Plaintiff's Motion). This memorandum incorporated by reference the other definitions in the Stipulation of Settlement.

receiving no compensation from the Settling Insurers for future claims against A&I, the parties have engaged in extended settlement negotiations.

Through Settlement Counsel, A. Andrew MacQueen, Esq., a former Judge of this Court, Plaintiff has agreed on behalf of the Settlement Class to a settlement of claims against the Settling Insurers, subject to this Court's approval.[2] Under the settlement, a trust will be established for payment of claims by Class members if and when they manifest an asbestos-related disease.

Presently before the Court is Plaintiff's Motion for Preliminary Certification of Settlement Class, Preliminary Approval of Proposed Class Settlement, and Approval of Class Notice. Plaintiff seeks to represent a Settlement Class defined as:

> All persons who have been exposed to asbestos for which A & I Corporation ("A&I") is alleged to be liable, except those who either (i) have a pending unsettled lawsuit filed on or before November 5, 2001, or (ii) have settled, released or had adjudicated a claim for mesothelioma against A&I or its insurers in connection with such exposure.

Plaintiff also seeks preliminary approval of a proposed settlement with the Settling Insurers in the amount of $13,135,000 to be paid over five years, and approval of a form and method of notice to apprise the Settlement Class of the certification and the proposed settlement. The Settling Insurers do not object to class certification, conditioned upon approval of the parties' proposed settlement. It is Plaintiff's position that this case should be certified as a class action because the central issue herein is common to the Settlement Class; that the proposed settlement should be preliminarily approved because public policy favors settlement of complex class actions, and this proposed settlement was fairly made and does not contravene law or public policy; and

[2] Settlement Counsel is still negotiating with other insurers, who have additional coverage for A&I's liability.

that the proposed notice should be approved because it is reasonably calculated to inform absent Class members of their rights.

Argument

I. Class Certification is Appropriate under W. Va. R. Civ. P. 23.

> Before certifying a class under Rule 23 of the *West Virginia Rules of Civil Procedure*, a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a) - numerosity, commonality, typicality, and adequacy of representation - and has satisfied one of the three subdivisions of Rule 23(b). As long as these prerequisites to class certification are met, a case should be allowed to proceed on behalf of the class proposed by the party.

Rezulin Litigation, 214 W. Va., 585 S.E.2d at syl. pt. 8.

Plaintiff urges the Court to consider the following six principles in determining whether class certification is warranted: (i) Like all of the West Virginia Rules of Civil Procedure, Rule 23 "shall be construed to secure the just, speedy and inexpensive determination of every action";[3] (ii) class certification is left to the sound discretion of the trial court;[4] (iii) because Rule 23 was promulgated by the West Virginia Supreme Court, it is the Court's intent that governs interpretation of the Rule;[5] (iv) The West Virginia Supreme Court has recognized the authority of trial courts to devise innovative techniques for orderly and efficient disposition of mass tort cases;[6] (v) the Court has

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[3] W. Va. R. Civ. P. 1; Arlan's Dep't Store of Huntington, Inc. v. Conaty, 162 W. Va. 893, 253 S.E.2d 522 (1979); *see* Amos v. Carr, 170 W. Va. 150, 291 S.E. 2d 465 (1982) (rules are liberal and seek substantial justice).

[4] *See* Mitchem v. Melton, 167 W. Va. 21, 277 S.E.2d 895, syl. pt. 5 (1981) ("Whether the requisites for a class action exist rests within the sound discretion of the trial court").

[5] *See* State v. Mason, 157 W. Va. 923, 205 S.E.2d 819 (1974).

[6] *See* Appalachian Power Co. v. MacQueen, 198 W. Va. 1, 6, 479 S.E.2d 300, 305 (1996) ("It is essential that trial courts have the authority to create judicial management procedures. 'Trial courts have the inherent power to manage their judicial

also specifically recognized the value of the class action as a tool for streamlining mass litigation;[7] and (vi) a class action is especially appropriate when class members have too little at stake to warrant prosecution of individual actions.[8]

A. The threshold requirements of numerosity, commonality, adequacy and typicality are clearly met. W. Va. R. Civ. P. 23(a).

1. The Class is so numerous that joinder of all members is impracticable. W. Va. R. Civ. P. 23(a)(1).

"A party seeking class certification is not required to prove the identity of each class member or the specific number of members. A court may properly rely on reasonable estimates of the number of members in the proposed class." Rezulin Litigation, 214 W. Va. at 66, 585 S.E.2d at 66. "There is no 'magic minimum number that breathes life into a class' . . . . . Courts have certified class actions when there have been as few as seventeen to twenty members of the class; thirty-five to seventy members; seventy members; 123 members; and 204 members." *Id.* at 65 (citations omitted).

In the present case, experts retained by the parties in the course of settlement negotiations have estimated that 3,000 or more Settlement Class members have or may

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affairs that arise during proceedings in their courts, which includes the right to manage their trial docket.'") (citation omitted).

[7] *See* In re West Virginia Rezulin Litigation, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003) ("The rule is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims. Rule 23 provides trial courts with a tool to vindicate the rights of numerous claimants in one action when individual actions might be impracticable."). *Cf.* McFoy v. Amerigas, Inc.,170 W. Va. 526, 533, 295 S.E.2d 16 (1982) ("class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers").

[8] *See* Rezulin Litigation, 214 W. Va. at 62, 585 S.E.2d at 62 ("A primary function of the class action is to provide a mechanism to litigate small damage claims which could not otherwise be economically litigated.").

manifest asbestos-related disease. All of these, plus many more who have exposure to A&I asbestos but will not manifest resulting disease, make up a Settlement Class too large for joinder of all members to be practicable.

Moreover, even if numbers alone did not make joinder impracticable, to identify and locate the Settlement Class members would present insuperable difficulties.[9] In the Rezulin case, the Court found that "it would be highly impractical for plaintiffs' counsel to find, let alone join in the instant action, all persons who . . . consumed the drug Rezulin in West Virginia". *Id.* at 66. In the present case it would be even more impractical to locate or join all persons who have been exposed to asbestos for which A&I is alleged to be liable, because exposure was not limited by prescription. *Cf. Id.* at syl. pt. 9 ("The test for impracticability of joining all members does not mean 'impossibility' but only difficulty or inconvenience of joining all members.").

2. There are questions of law or fact common to the Class. W. Va. R. Civ. P. 23(a)(2).

"A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of 'commonality' is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members." Rezulin Litigation, 214 W. Va., 585 S.E.2d at syl. pt. 11. "[O]ne significant common question of law or fact will satisfy this requirement." *Id.* at 67.

Here, the principal question to be resolved is whether one who was exposed to

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[9] The inability to identify the class members is not a barrier to class certification. *See* State ex rel. Metropolitan Life Ins. Co. v. Starcher, 196 W. Va. 519, 474 S.E.2d 186, syl. pt. 2 (1996) ("To demonstrate the existence of a class pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, it is not required that each class member be identified, but only that the class can be objectively defined.").

asbestos for which A&I is alleged to be liable but who has not asserted a claim before the Bar Date for injury manifested before A&I's dissolution may nevertheless maintain a claim against A&I. This question affects - indeed controls - the claims of all class members alike.[10]

3. Plaintiff's claims are typical of the claims of the Class. W. Va. R. Civ. P. 23(a)(3).

"A representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. . . . . When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." Rezulin Litigation, 214 W. Va., 585 S.E.2d at syl. pt. 12.

Here, Plaintiff's claim that he will be entitled to recover from A&I's insurers if he later manifests asbestos-related disease based on precisely the same equitable and legal theories sought to be invoked on behalf of the entire Settlement Class.

Although some Settlement Class members reside or were exposed to A&I's asbestos in states other than West Virginia, Plaintiff's claim is nevertheless typical of the claims of all Settlement Class members, wherever they reside, since all members' claims turn on the effect of a West Virginia corporation's dissolution.[11] "The local law of

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[10] Although it is not necessary for class certification under Rule 23(b)(2), Plaintiff notes that the common question of the effect of A&I's dissolution predominates over any questions affecting only individual Class members. *Cf.* Burks v. Wymer, 172 W. Va. 478, 481, 307 S.E.2d 647, 650 (1983) ("there are some contexts where predominance will exist with only a single issue being common; that issue is simply so overwhelming in its centrality to the litigation that it, in and of itself, satisfies predominance").

[11] *Cf.* State ex rel. Chemtall Inc. v. Madden, 2004 W. Va. LEXIS 166, *31 - *32 (holding that West Virginia representative plaintiffs' claims "cannot be typical" of claims of out-of-state class members which are governed by significantly different law).

the state of incorporation will be applied to determine such issues [involving the rights and liabilities of a corporation], except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties . . . ." Restatement (Second) of Conflict of Laws § 302(2), *quoted in* State ex rel. Elish v. Wilson, 189 W. Va. 739, 744, 434 S.E.2d 411, 416 (1993) (concluding that "The general rule regarding choice of law requires that the substantive law of the place of incorporation is to be applied unless another state has a more substantial connection or the application of the other state's law would be contrary to our public policy."). *See also, e.g.*, Gross v. Houghland, 712 F.2d 1034, 1040 (6th Cir. 1983) ("whether an action has abated because of the dissolution of a corporation is controlled by the law of the state of incorporation"); Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257, 259-60 (1926) ("The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.").[12]

Because the claim in this action is governed by West Virginia law for all Settlement Class members, Plaintiff's claims are typical of those of the Settlement Class.

4. Plaintiffs will fairly and adequately protect the interests of the class. W. Va. R. Civ. P. 23(a)(4).

"First, the adequacy of representation inquiry tests the qualifications of the attorneys to represent the class. Second, it serves to uncover conflicts of interest between the named parties and the class they seek to represent." Rezulin Litigation,

[12] *Cf.* Fed. R. Civ. P. 17(b) ("The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized.").

214 W. Va., 585 S.E.2d at syl. pt. 13.

In the present case, Plaintiff has retained counsel with extensive experience in asbestos litigation and class actions. Plaintiff's Litigation Counsel, Goldberg, Persky & White, P.C., The Segal Law Office and Motley Rice, L.L.C., have litigated thousands of asbestos cases in West Virginia, and have served as class counsel in major class actions in West Virginia and elsewhere.

Plaintiff's Litigation Counsel represent individuals who assert that they have sustained bodily injury as a result of exposure to A&I asbestos and who have pre-Bar Date cases pending against A&I. To ensure that resolution of claims in this action would not be affected by any potentially conflicting interest of Litigation Counsels' other clients, Plaintiff retained A. Andrew MacQueen, Esq. to act as independent Settlement Counsel to the Class. Mr. MacQueen, who represents no claimants against A&I except as counsel in this case, has been solely responsible for negotiating on behalf of Plaintiff with respect to the proposed settlement in this case, based on his independent judgment about the best interests of the Plaintiff and Settlement Class members and without regard to the effect the settlement would have on any other claims that have been asserted against A&I by anyone at anytime. As a result of his extensive experience in West Virginia asbestos litigation as a judge of the Circuit Court of Kanawha County, Mr. MacQueen is highly qualified to assess the value of the claims asserted by Plaintiff in this action. His independent advice on the issues presented in this action provides fair and adequate protection of the interests of the Settlement Class.

Moreover, Plaintiff has no conflict of interest or ulterior agenda; his interests are fully aligned with the interests of every other Settlement Class member. Thus, the

requirement of adequate representation is also met.

B. Injunctive and declaratory relief is appropriate with respect to the Class as a whole. W. Va. R. Civ. P. 23(b)(2).

> Rule 23(b)(2) allows a court to certify a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and the representatives are seeking "final injunctive relief or corresponding declaratory relief" for the entire class. Class action treatment is particularly useful in this situation because it will determine the propriety of the behavior of the party opposing the class in a single action.

Rezulin Litigation, 214 W. Va. at 70, 585 S.E.2d at 70. There can be no serious question that Defendants have acted on grounds generally applicable to the Settlement Class. A&I's dissolution was a unitary act toward the world at large, which absent a remedy herein would cut off all Settlement Class members' future recourse in an identical manner; and Defendants' assertion that the dissolution statute bars all claims that mature or are asserted after the Bar Date is likewise uniformly directed toward all of the Settlement Class.

Moreover, it is clear that Plaintiff is seeking injunctive and declaratory relief, in the form of an equitable receivership or trust and a declaration of a conditional right to a future monetary recovery. *Cf. id.* ("Injunctive relief embraces all forms of equitable judicial orders, whether they be mandatory or prohibitory."); Christian v. Sizemore, 181 W.Va. 628, 383 S.E.2d 810 (1989) (permitting declaratory judgment action against insurer prior to obtaining judgment against insured). Because the requested equitable and declaratory relief would resolve the claims of all Settlement Class members alike, certification is appropriate under Rule 23(b)(2).[13]

[13] Although class certification under Rule 23(b)(2) does not require a finding of "superiority", Plaintiff notes that a class action is superior to other available methods for the fair and efficient adjudication of the present controversy. *See* Appalachian Power, 198 W. Va. at 6, 479 S.E.2d at 305 (holding that joint determination of common issues

II. The Proposed Settlement is Fairly Made and Does Not Contravene Law or Public Policy.

Under W. Va. R. Civ. P. 23(e), court approval is required before a class action may be dismissed or compromised. *See* Bd. of Ed. of County of Monongalia v. Starcher, 176 W. Va. 388, 392, 343 S.E.2d 673, 677 (1986). West Virginia courts have long encouraged the resolution of controversies by settlement rather than by litigation. *See* Devane v. Kennedy, 205 W. Va. 519, 534, 519 S.E.2d 622, 637 (1999); McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 716, 447 S.E.2d 912, 917 (1994). "Settlement of litigation is essential to the effective administration of justice." Burden v. United States Army Corps of Eng'rs, 794 F. Supp. 184 (S.D.W. Va. 1992). Strong public policy in West Virginia supports and encourages of settlements; thus, it is the practice of the courts to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. *See* Buckhannon-Upshur County Airport Auth. v. R & R Coal Contracting, Inc., 186 W. Va. 583, 413 S.E.2d 404 (1991); F.S. & P. Coal Co. v. Inter-Mountain Coals, Inc., 179 W. Va. 190, 366 S.E.2d 638 (1988). In particular, both the West Virginia legislature and the Supreme Court of

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is "indispensable in handling mass litigation cases" in order to "eliminate the costly, time-consuming repetition of testimony"); Mitchem, 167 W. Va. At 31, 277 S.E.2d at 901 ("One of the beneficial purposes of a class action is to avoid multiplicity of claims in order to foster judicial economy."); Rezulin Litigation, 214 W. Va. at 69, 585 S.E.2d at 69 ("The class action vehicle appears to be a superior option to consolidation, as it gives the circuit court greater control over class representatives and class counsel.").

Especially telling in the present case is the lack of a sufficient stake for class members with no present compensable injury to pursue separate actions. *See* McFoy, 170 W. Va. at 534 ("[T]he class action is largely a procedure to enable suits to be brought that would otherwise die because the transactional costs would exceed individual judgments . . . ."); Burks, 172 W. Va., 307 S.E.2d at syl. pt. 9 (a factor in deciding whether a class action may be maintained is "whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.").

Appeals have taken measures to ensure that insurers make every effort to effect settlements with insureds or third-party claimants, as is the present case. See Buckhannon-Upshur County Airport Auth., 186 W. Va. at 589.

Even when the parties compromise on a doubtful question of law or fact, if the parties are competent to contract and the compromise is fairly made, then the settlement will be binding and cannot be affected by any subsequent investigation or result. *See* Devane, 205 W. Va. at 535. Settlements are presumptively made in good faith, and will only be held to lack good faith upon a showing of corrupt intent involving collusion, dishonesty, fraud or other tortious conduct by the settling plaintiff. Smith v. Monongahela Power Co., 189 W.Va. 237, 429 S.E.2d 643 (1993).

In the present case, the proposed settlement was achieved only after serious, informed, arms-length negotiations. Defendants have vigorously defended this action and absent settlement, would surely do so through trial. They maintain that the Plaintiff's claims are barred both substantively and procedurally. Because the Settlement Class members had not manifested any injury from asbestos exposure before A&I's dissolution, Defendants contend that no justiciable action was commenced prior to the Bar Date, and that Plaintiff therefore cannot establish coverage under A&I's insurance policies. Further, Defendants argue that Plaintiff's suit violates an established rule in West Virginia prohibiting third-party "direct actions" against insurers. While Plaintiff has successfully maintained this action against these defenses to date, the issues are complex and novel, and the outcome is uncertain.

Against this backdrop, after years of litigation the parties have worked diligently to come to a fair and reasonable resolution of their disputes. Arms-length negotiations began in earnest in early spring of 2004 and have included consultations with experts

and presentation of evaluations on both sides. The negotiations and resulting proposed settlement have taken into account many considerations including historical settlement values, projections of future claims in various disease categories, and the relative likelihood of success on untried theories.

Plaintiff and the Settlement Class have been ably represented both in litigation and in settlement discussions. Because Litigation Counsel, Goldberg, Persky & White, P.C. and Motley Rice, L.L.C., also represent injured asbestos claimants against A&I, Plaintiff retained as Settlement Counsel former Judge A. Andrew MacQueen, who has very extensive experience with mass asbestos litigation from his time on the bench, but who does not presently represent injured asbestos claimants outside the Settlement Class.

The proposed settlement will confer a real and substantial benefit on the Settlement Class, in the form of a trust funded by the Settling Insurers which will pay compensation to Settlement Class members who manifest an asbestos-related disease. Settlement Counsel MacQueen personally negotiated the proposed settlement, and agreed to its terms because he believes based upon his experience that it is in the best interest of the Settlement Class. As the proposed settlement was fairly made and is not in contravention of any law or policy of West Virginia, this Court should render its preliminary approval of the parties' agreement.

III. The Proposed Class Notice is Reasonably Calculated to Apprise Class Members of Their Rights.

W. Va. R. Civ. P. 23(d)(2) authorizes the Court to make an appropriate order "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action . . . ."[14] In addition, Rule 23(e) requires that "notice of [a] proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Plaintiffs submit that notice to the Settlement Class of the class certification is appropriate under Rule 23(d)(2), and that notice of the proposed Class settlement is mandated under Rule 23(e).

According to Cameron R. Azari, Esq., a consultant with extensive experience in formulating and implementing notice in class actions and in bankruptcies, the form of the proposed Settlement Class notice set forth in Exhibit B to Plaintiff's pending Motion is reasonably calculated to apprise Settlement Class members of their rights, and the method of that Class notice is the best practicable under the circumstances. *See* Declaration of Cameron R. Azari, Esq., attached to Plaintiff's Stipulation of Settlement as Exhibit G.

Conclusion

For the foregoing reasons, Plaintiff's Motion for Settlement Class Certification,

[14] For a class action maintained under Rule 23(b)(3) (which permits members to opt out), Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Because the present action is sought to be maintained under Rule 23(b)(2), the Rule 23(c)(2) standard does not apply to the proposed Class notice. Nevertheless, Plaintiff submits that in the present case individual Class members cannot be identified through reasonable effort, and the proposed Class notice is the best practicable under the circumstances. *Cf.* Rezulin Litigation, 214 W. Va., 585 S.E.2d at syl. pt.9 (equating practicability with convenience or absence of difficulty in the context of Rule 23(a)(1)).

Preliminary Approval of Proposed Class Settlement, and Approval of Class Notice should be granted.

Respectfully submitted,

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Settlement Counsel for Plaintiff