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Failing Cos. Should Consider Pension Plans as a Whole

By Elizabeth Bennett

Of the DLW

In a decision that could have far-reaching implications if more large American companies file for bankruptcy, the 3rd U.S. Circuit Court of Appeals ruled that multiple pension plans should be considered in the aggregate for purposes of reorganization under Chapter 11.

Circuit Judge Marjorie O. Rendell wrote the 41-page opinion for *In re Kaiser Aluminum Corp.* after arguments were heard in April by Rendell, D. Brooks Smith, circuit judge, and Ruggero J. Aldisert, senior judge. The opinion was entered July 26.

"The instant case raises a question of first impression among the courts of appeal: when a Chapter 11 debtor seeks to terminate multiple pension plans simultaneously under the reorganization test, should a court apply the test to each plan

independently, or to all of the plans in the aggregate?" Rendell wrote.

The opinion proceeded to consider the arguments of the appellant, Pension Benefit Guaranty Corp., a federal corporation set up in the 1970s to cover failed pension plans. The court concluded that, in the absence of instructions from the U.S. Congress on the matter, to consider the plans in aggregate is the most logical, equitable method.

"I think it's a pretty significant precedent," said Gregory M Gordon, a partner with Jones Day in Dallas and lead attorney for Kaiser. "There are industries that are in financial distress. One is the auto parts industry, as well as automakers and the like, that have multiple pension plans. This is the only case at the level of the circuit court that rules on the issue."

A spokesman for the PBGC said its lawyer declined to comment "because plan aggregation is an issue in other current PBGC cases."

In her opinion, Rendell said the court needed to examine the text of the Employee Retirement Income Security Act "for indicia of congressional intent on the issue."

Rendell noted that in every similar case identified, bankruptcy courts have applied an aggregate analysis, "apparently without protest from the PBGC."

The PBGC spokesman took care to point out that Kaiser was not the first case "in which the PBGC has asserted that pension termination should be judged plan-by-plan," adding that it had done so in a 2005 case in Hawaii bankruptcy case captioned *In re Aloha Airgroup, Inc.*, among others.

The Kaiser matter, in which the aluminum manufacturer sought to terminate six of its pension plans, was first considered by Delaware's Bankruptcy Court in early

Pensions continues on page 4

'Wave' of Asbestos Litigation in Del. May Be Just a Ripple

By Elizabeth Bennett

Of the DLW

When Myron T. Steele, chief justice of the Delaware Supreme Court, spoke at a recent conference on the state of the American judiciary, he was asked about a supposed wave of asbestos litigation that has hit Delaware Superior Court.

"I, of course, am not oblivious, but I have seen no evidence of any surge at the appellate level," Steele said. "I've seen the articles being passed around saying we are in it now. I would say that we have a highly developed system to handle such surges."

Steele was referring to special masters assigned to handle high volumes of cases, and judges who can step in to relieve a crowded docket.

According to the Superior Court Prothonotary's office, 80 asbestos cases have been filed since January. As for why

the cases are coming to Delaware, Steele said he couldn't say why, except for, "Why wouldn't everyone want to file their case in Delaware?"

Steele's audience perhaps had its own theories. He was speaking at a conference held by the U.S. Chamber of Commerce's Institute for Legal Reform on July 18.

According to Lisa A. Rickard, president of the ILR, since May 2005, Delaware has been "flooded" with asbestos cases, many brought by Illinois law firm Simmons Cooper and Texas law firm Baron & Budd.

"Delaware does have a fairly liberal venue law. ... I think they are bringing

Asbestos continues on page 5

IN THIS ISSUE

Morris Nichols team writes on unclaimed property law 2

Pfizer appellate ruling has something for everyone. 3

Digests.....7

*****AUTO**SCH 3-DIGIT 197

1-1

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Asbestos

Continued from page 1

[the cases] based on the venue law. They can get in there with a lot of claimants that don't have a connection to Delaware," Rickard said.

This kind of attention from the ILR is new for Delaware, which has been rated the best court system in the country for tort litigation in an ILR-sponsored survey for five years straight.

"Can the Delaware courts hold up to their reputation?" Rickard asked. She said the problem is that judges are sometimes forced to put rules in place to expedite cases when there is a high volume, and that can impede fair consideration.

"If the court system handles this total wave in a fair and judicious manner consistent with Delaware's reputation, it can say the system took a nice shot and yet survived," Rickard said.

The ILR isn't the only one with its eye on Delaware. It may surprise some practitioners in the state to learn that the American Tort Reform Association put Delaware on the "watch list" of its *Judicial Hellhole 2005* report. The 2006 report is expected to come out in December.

"As the judge handling the asbestos docket in Madison County, Illinois, has stopped letting anyone, from anyplace, file suits in the county, and shown more even-handed application of the law, plaintiffs lawyers have sought other jurisdictions to continue their boondoggle. Delaware appears to be one of the new targets," the report said.

ATRA's report noted Delaware's good reputation. It also made reference to an Illinois newspaper article last year that said Delaware court clerks were working day and night trying to cope with the high volume of suits.

Dan White, commissioner for New Castle County, where all mass tort litigation is filed in the state, said he had heard about the article, and while he can't know what anyone may or may not have said, the characterization is simply not true.

"So far, the cases have been manageable," said White, who is the special master handling asbestos and benzene cases. "I've had weekly civil motions and they have not been overwhelming."

The Superior Court had nine cases scheduled to begin trial on Aug. 14, but all of them settled. White said seven of those cases were resolved on Aug. 10 and the other two earlier.

Simmons Cooper brought the cases processed this month, White said. Baron & Budd filed those on the docket for September.

According to court documents, Simmons Cooper has worked locally with Wilmington firm Bifferato Gentilotti Biden & Balick. Baron & Budd has worked with Jacobs & Crumplar, also of Wilmington.

While suits filed by out-of-state firms are not new to Delaware, they are somewhat novel in tort litigation.

It may surprise some practitioners to learn that the American Tort Reform Association put Delaware on the 'watch list' of its Judicial Hellhole 2005 report. The 2006 report is expected to come out in December.

"The original law firms that have been bringing the lawsuits for years and years are still bringing them," White said. "We've just had, in a year and half, two out of town law firms who have associated themselves with two Delaware law firms to bring in cases from out of state. In that

sense, the original cases are still being filed and we just have these cases from these two other groups."

Originally all these cases were assigned to Judge Joseph R. Slight. Other judges had volunteered to handle cases in the event the court had to preside over trials simultaneously, White said. Given that they all settled, however, this has not been necessary.

Slight also had his encounter with newspaper articles about the asbestos issue. In March the judge denied a forum non-conveniens motion in a case, *In re Asbestos Litigation*. One defendant's attorneys had attached newspapers articles to their motion brief that discussed contributions made by Simmons Cooper to Delaware politicians, intimating that the firm was trying to buy influence. Slight was not amused.

According to the transcript of a September 2005 hearing on a motion to strike these briefs from the record, Slight said the defendants "imply the most serious compromise to fairness and due process, a less than objective judiciary. And yet they appear to be quite comfortable to rest these allegations on hearsay reports that are at best inadmissible, if not themselves purely speculative and offensive. Truly remarkable."

Needless to say, he ruled to strike the briefs.

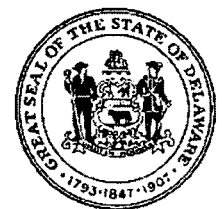
Michael J. Angelides, a partner with Simmons Cooper and head of its asbestos department, said his firm has made political contributions in Delaware, but that it

Asbestos continues on page 6

The Race for

Attorney General

Staff Correspondent Elizabeth Bennett takes an in-depth look at the two top Delawareans vying for the attorney general's job, Ferris Wharton and Joseph R. "Beau" Biden III. The election package appears in the Aug. 30 issue.



Asbestos

Continued from page 5

makes such contributions everywhere, to people who "believe in issues that we believe in."

His firm has filed about 50 cases in Delaware, Angelides said, but more in Illinois and Missouri. He added that the litigation has gotten attention because defendants "are up in arms because they don't want these cases filed anywhere."

Simmons Cooper did turn to Delaware because of venue issues, he said.

"One of the main things that we're

looking for is a fair way to get our clients into court so they can have their day in court. Anywhere you file asbestos claims the defendants say it's inconvenient or improper. ... We want to avoid the defendant claiming that venues are improper," he said.


According to Ian Connor Bifferato, a partner in Bifferato Gentilotti, his firm and Simmons Cooper started discussing the Illinois firm's desire to file cases in a jurisdiction that was known to be a fair.

"I just can't fathom that anyone would think Delaware could become a judicial hell hole," he said, adding that he does not perceive the volume of asbestos cases in

Delaware to be particularly high.

Nor does he agree with the ILR that there is an inherent advantage for plaintiffs in filing groups of cases.

"I think the Delaware courts, at least what I've seen, are extraordinarily cautious to make sure no advantage is given to the other side," Bifferato said. "Delaware has always been the home of dealing with corporate litigation, and in some regard this does fall in that same line. The only difference is their cause of action. Rather than dealing strictly with corporate issues, you are dealing with different issues related to corporations." •



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