

District Court Decision on EPA Reporting Could Affect Asbestos Litigation

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Environmental non-governmental organizations (NGOs) are pursuing litigation against EPA to force companies that have never intentionally used asbestos in a product to file reports linking their products to asbestos. Manufacturing and chemical companies should keep an eye on *Asbestos Disease Awareness Organization v. Wheeler* – currently pending in California federal court – where the NGOs seek to dramatically increase companies' obligations to disclose that their products contain asbestos – even where it is just present as an impurity.

Current Regulation of Asbestos

Although the term “asbestos” refers to a group of naturally occurring minerals, the primary federal statute that regulates asbestos is the Toxic Substances Control Act (TSCA), administered by EPA. TSCA governs asbestos because minerals are chemicals. Current TSCA reporting obligations related to asbestos are relatively limited, because few companies intentionally import or use asbestos in their chemicals or products. Since 2016, the EPA has been conducting a risk evaluation of existing use of asbestos, using information collected under its TSCA Chemical Data Reporting (CDR) rule, 40 C.F.R. part 711, and from other sources. This risk evaluation is scheduled to be completed by December 2019.

Environmental and public health NGOs, including the Asbestos Awareness Disease Organization (ADAO) petitioned EPA to compel companies to disclose asbestos not intentionally added to products under EPA's TSCA CDR rule, 40 C.F.R. part 711. After EPA denied the petition, ADAO and other organizations filed suit.

Ongoing TSCA Litigation

A federal district court in California recently weighed in on when companies must report that a product contains asbestos. In *ADAO v. Wheeler*, the court ruled against the EPA and allowed a court case to proceed seeking to broaden disclosure obligations related to asbestos. TSCA already requires companies to report asbestos intentionally used in products. In EPA's view, the changes that the NGOs had requested “would not lead to the reporting of new information that would contribute to EPA's ongoing asbestos risk evaluation.”

Under the revised regulations that ADAO and its fellow plaintiffs seek, more companies could be obligated to report their products as asbestos-linked. That increases the risk that those companies could be sued in asbestos personal injury litigation.

The Recent Decision

TSCA Section 21 allows any person to petition the EPA to initiate a rulemaking proceeding for the issuance, amendment, or repeal of a rule under certain parts of TSCA. After the petition is filed, the EPA can grant the petition and begin a rulemaking proceeding or publish its reasons for denying the petition in the Federal Register. Parties can challenge any denial in federal district court within sixty days after the EPA's decision.

ADAO and similar public health and environmental NGOs filed a petition under TSCA Section 21 seeking to require EPA to make specific amendments to EPA's CDR. These amendments would include both designating asbestos specifically as a reportable substance under the CDR and eliminating exemptions from reporting for impurities like asbestos in products.

After the EPA denied the petition, the groups challenged the denial of the petition in federal district court under both TSCA and the federal Administrative Procedure Act (APA). The groups likely included TSCA claims because TSCA could potentially require the court to review the EPA's decision using a *de novo* standard – a more lenient standard of review than the agency-favoring standard provided by the APA – under limited circumstances, i.e. if the petition sought *new* regulation. The EPA argued that the petition sought *amendment* of a rule and that, in such a circumstance, the appropriate standard of review was the “abuse of discretion” standard available under the federal APA.

In finding for the EPA, the court was guided by the language of the NGOs' petition itself, which contained the following heading “Closing the CDR Loophole: How the Rule Should Be Amended.” Relying on the language in this heading and the language following, the court determined that the “[p]etition expressly requests to modify the CDR rule for stricter asbestos-reporting” and therefore is not a petition to “initiate a proceeding to issue a rule” entitled to a *de novo* standard.

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