

Commentary

What Ohio's Retroactive Application Of Its Asbestos Legislation Means For The Litigation, Both Statewide And Nationwide

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Ohio is famous as an election bellwether. It is also gaining a reputation as a bellwether for state level asbestos litigation reform. In 2004, Ohio was the first state to pass a law directing judges to administratively dismiss asbestos personal injury suits that did not meet threshold medical evidence requirements. (See H.B. 292, Ohio Rev. Code §§ 2307.91-.93). In 2008, the Ohio Supreme Court was the first state high court to uphold retroactive application of an asbestos medical evidence law against a constitutional challenge. (See *Ackison v. Anchor Packing Co.*, ___ Ohio St.3d ___ (2008)).

H.B. 292 drew inspiration from the longstanding order in the federal asbestos MDL. (See, e.g. *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574 (E.D. Pa. Jan. 16, 2002)). Like the federal guidelines, H.B. 292 takes aim at mass-filed asbestos personal injury suits that are not supported by reliable evidence of asbestos caused injury. H.B. 292, how-

ever, is more detailed and more aggressive in fighting mass filing based on mass diagnosis. The statute required all cases alleging asbestos related injuries to undergo an early evaluation by the trial court. This prima facie proof proceeding was designed to sift out those cases where the plaintiff did not have asbestos related impairments.

Ohio's medical criteria statute specifically stated that it applied retroactively to claims filed before its effective date, September 4, 2004. Over 40,000 cases in Ohio were pending on the effective date. This set off a four-year appellate firestorm that the Ohio Supreme Court finally resolved in October, 2008. In a 6-1 decision, the Ohio Supreme Court held that the medical criteria may be applied retroactively to claims pending on the statute's September 2, 2004, effective date. *Ackison* was the culmination of more than a dozen predicate appeals, including a previous decision in the Ohio Supreme Court holding that decisions rendered by trial courts regarding the prima facie proceedings, including challenges to the statute's constitutionality, were appealable orders (*In re Special Docket No. 73958*, 115 Ohio St.3d 425 (2007)).

Ackison confronted a single question: whether retroactive application of the medical criteria to personal injury claimants suffering asbestosis violated the Retroactivity Clause of the Ohio Constitution. (See Article II, Section 28). After concluding that Ohio's General Assembly intended that the statute apply

retroactively, the Court focused on the long-standing test in Ohio that permits retroactive application of procedural laws, but bans retroactive application of substantive laws.

In *Ackison*, the Court drew upon an earlier case wherein the Court had concluded that H.B. 292's medical criteria were constitutional as mere procedures related to the "machinery for carrying on a suit." The earlier case involved a federal preemption challenge to the medical criteria for suits involving FELA and the LBIA. (*See Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455 (2007)). Although the Court characterized *Ackison* as "reiterating" the holding in *Bogle*, *Ackison* contains extensive constitutional analysis of the Ohio Constitution's Retroactivity Clause, an issue not addressed in *Bogle*. *Ackison* is also noteworthy because it offers insight into the Ohio Supreme Court's judicial philosophy.

The plaintiff's primary Retroactivity Clause challenge in *Ackison* was an argument that the medical criteria eliminated a common law cause of action for asymptomatic asbestosis (i.e., clinical evidence of exposure without physical impairment). This argument drew on two intermediate Ohio appellate opinions commenting that asymptomatic asbestosis was actionable because it involved an "alteration to the lining of the lungs." The Supreme Court rejected this reasoning as a "misreading" of the Second Restatement of Torts by the lower courts. Refusing to give any precedential authority to these cases, the Ohio Supreme Court held that asymptomatic asbestosis claimants had no vested right to a cause of action. Because those plaintiffs had no vested right, retroactive application of the medical criteria did not create a substantive change in the law. The medical criteria were thus procedural and constitutional.

Plaintiff also challenged specific parts of the medical criteria on retroactivity grounds. One requirement of H.B. 292 is that asbestos personal injury claimants submit medical evidence of injury in the form of reports from "competent medical authority." (*See* Ohio Rev. Code §§ 2307.91(Z); 2307.92(B)). Generally, competent medical authority is a doctor with a relevant specialty, who treated the plaintiff, and who spends less than 25% of her professional time as a litigation expert. The Court reasoned that "competent medical authority" was not previously defined in Ohio

law and, therefore, there was no substantive right in the previously undefined term. The Court further reasoned that limits on competent medical authority are "akin to a rule of evidence," and therefore do not alter substantive law.

Plaintiff also challenged part of the statute requiring evidence that asbestos was a "substantial contributing factor" to the injury. The statute defines "substantial contributing factor" as both the "predominate" and "but for" cause of the injury. Applying traditional guides of statutory interpretation, the Court recognized that a retroactive requirement that asbestos be the predominant cause of an injury would alter well established common law and, if applied retroactively, would violate the Ohio Constitution. Employing the interpretative canon that shuns unconstitutional constructions of ambiguous statutes, the Court interpreted the substantial contributing factor requirement as no more than a restatement of the well known tort elements of proximate cause and cause-in-fact.

Finally, plaintiff challenged the medical evidence requirement that claimants show "substantial occupational exposure" to asbestos. Although this part of the statute did not technically apply to the plaintiff's case (because it involved asbestosis, not lung cancer), the Court examined — and rejected — the constitutional challenge. Plaintiff's primary argument was that the definition of substantial occupational exposure conflicted with the Ohio Supreme Court's earlier definition of the phrase in the 1995 case, *Horton v. Harwick Chem. Co.*, 73 Ohio St.3d 679. The Court distinguished *Horton* because that case involved the standard for determining which defendants in a multi-defendant asbestos case could be held legally responsible for a claimant's asbestos injury, including a requirement that the plaintiff prove that each defendant's product caused the injury (specific causation). H.B. 292, on the other hand, involves only the preliminary requirement that a claimant show an injury that was caused by asbestos, rather than something else, such as smoking (general causation).

A lone dissenter rejected each of the majority's conclusions. Rather than view the medical evidence requirements for asbestosis claimants as establishing threshold injury, the dissent believed that the requirements eliminated an injury recognized at common law. The dissent took issue with the "competent

medical authority” standards because he believed they “redefined” the cause of action for asbestosis. The dissent also took issue with the majority’s analysis of “predominate” cause, chiding the majority for turning a blind eye to the legislature’s apparent intent to retroactively redefine causation for asbestos personal injury cases. Last, the dissent found fault with the majority’s analysis of the substantial occupational exposure requirement. The dissent criticized the majority both for deciding an issue the dissent believed was “irrelevant” to the case before the Court and for its analysis of the requirement. According to the dissent, the definition of “substantial occupational exposure” is substantive because it added a threshold not required of asbestos personal injury claimants before H.B. 292 took effect.

Ackison resulted in one trial court immediately dismissing 31,656 unimpaired cases pending in Ohio. This is just the first step in Ohio’s effort to focus on plaintiffs with actual impairment caused by asbestos exposure. Many more dismissals are likely to follow.

Ackison also provides insight into the future of asbestos litigation in Ohio and across the country. *Ackison* signals judicial receptiveness to legislative solutions to the crisis of volume in asbestos personal injury litigation. That receptiveness will likely next be tested in subsequent appeals in Ohio or Florida. In Ohio, other parts of H.B. 292 are now working their way through the lower appellate courts. For example, pending appeals will construe those parts of the statute dealing with premises liability and the requirements distinguishing between lung cancer claims of smokers and nonsmokers. Other appellate issues that may emanate from H.B. 292 include parts of the statute regarding piercing the corporate veil and conflicts in the submitted medical evidence.

The relevance of *Ackison* to other states varies. Most immediately, it may bear on the Florida Supreme Court’s analysis when it considers constitutional challenges to a very similar reform law in that state. (See *Am. Optical Corp. v. Spiewak*). Less immediately, *Ackison* may influence interpretations of similar reform measures in Texas, Georgia, South Carolina, and Kansas. (The Georgia Supreme Court has, however, already decided a similar question to that posed in *Ackison*, with the opposite result. See *DaimlerChrysler Corp. v. Ferrante*, 637 S.E.2d 659 (2006)). Even

further in the future, *Ackison* may influence reform efforts in states that are increasingly popular venues for asbestos litigation, such as California and Delaware.

Beyond asbestos litigation, *Ackison* presents an interesting perspective on the Ohio Supreme Court’s judicial philosophy. In interpreting the Retroactivity Clause the Court confronted three broad questions that could affect cases far afield from asbestos litigation. Ohio’s Retroactivity Clause, like similar clauses in other state constitutions, speaks in broad terms: the legislature “shall have no power to pass retroactive laws.” But the Court has never taken an absolutist view of the clause. *Ackison* considers the clause in three contexts, and in each maintains a narrow interpretation.

First, the Court had to consider how much of the common law the Retroactivity Clause protects. The answer is that it protects some common law doctrines, but certainly not all. Common law doctrines announced by the Ohio Supreme Court are protected. This is evidenced in the Court’s holding regarding the “predominate” cause requirement and its statement that the Retroactivity Clause prohibits any statute retroactively redefining the common law as announced by the Ohio Supreme Court. In this instance, the Court interpreted the statute to avoid a conflict with the Court’s own, earlier enunciation of the standard for tort causation.

The answer for all other common law doctrines is less certain. The majority does intimate that “settled” intermediate appellate interpretations of the common law may be guarded by the Retroactivity Clause. If they were not, the Court had no reason to engage in an analysis of the lower courts’ misreading of the Restatement that asymptomatic asbestos was a compensable injury. This discussion is also noteworthy because it reminds us that the common law is always subject to retroactive revision by the Ohio Supreme Court. Without saying so directly, the Court held that its own common law decisions are retroactive. (Subsequent to *Ackison*, the Court decided *DiCenzo v. A-Best Prods. Co., Inc.*, ___ Ohio St.3d ___ (2008), which limited an earlier decision to prospective application, but observed the general rule that the Court’s decisions are retroactive).

A second fundamental question the *Ackison* Court confronted was the scope of legislative authority to

retroactively modify procedures for pending suits. By holding that rules “akin to rules of evidence” are outside the protection of the clause, the *Ackison* majority adopted a narrow reading of this language. The implicit lesson is that the legislature is free to fix problems with pending litigation, even if the changes alter the likelihood of success of some litigants, so long as the changes are confined to the “machinery” of litigation. The legislative deference implicit in this narrow interpretation is consistent with a recent shift in the Court’s philosophy away from a prior history of less deferential “interbranch tension.” (See, generally, *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468 (2007); *Groch v. General Motors*, 117 Ohio St.3d 192 (2008); *Norfolk v. Bogle*).

A third question of judicial philosophy implicated by the *Ackison* holding is the scope of the constitutional avoidance doctrine. The *Ackison* majority adopts a

strong version of the doctrine. In interpreting the substantial contributing factor language, the Court came close to eliminating part of the statute. In interpreting the substantial occupational exposure language, the Court ascribes a specific motive to the General Assembly in order to preserve a provision that the Court acknowledges would otherwise be unconstitutional. The majority’s strong version of the constitutional avoidance doctrine is another manifestation of the Court’s narrow interpretation of the Retroactivity Clause and a further signal of its reluctance to invite constitutional tension with the legislature.

Ackison offers lessons about asbestos reform and how state constitutions may shape those reforms. *Ackison* signals judicial receptiveness to medical criteria reform and judicial unwillingness to invalidate reform with expansive interpretations of the state constitution. ■