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ASBESTOS CLAIMS AND LITIGATION

PFIZER, INC. V. LAW OFFICES OF PETER G. ANGELOS CASE ANALYSIS: PARENT COMPANYASBESTOS LIABILITY

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I. Background

On June 24, 2013, the Supreme Court of the United States denied Pfizer, Inc.'s (hereinafter "Pfizer") Writ of Certiorari, effectively allowing state court proceedings against the pharmaceutical company to proceed unhindered by the federal bankruptcy bar.

The Pfizer litigation is premised on the company's acquisition of Quigley Company, Inc. (hereinafter "Quigley") in 1968. *See* In re Quigley Co., Inc., 449 B.R. 196, 198 (S.D.N.Y. 2011) reconsideration denied, 10 CIV. 1573 RJH, 2011 WL 2610564 (S.D.N.Y. June 24, 2011) and aff'd, 676 F.3d 45 (2d Cir. 2012) cert. denied, 12-300, 2013 WL 3155260 (U.S. June 24, 2013). Quigley, founded in 1916, manufactured various products including some which contained asbestos. These asbestos-containing products were distributed in commerce from the 1930s into the early 1970s. *See id.* After Pfizer acquired Quigley, the packaging and marketing materials for certain of Quigley's products, including Insulag insulation, began to incorporate the Pfizer name, logo and trademark. *See id.*[1]

By the time Quigley filed for bankruptcy in 2004, it was involved in more than 160,000 asbestos-related lawsuits, at least 100,000 of which also involved Pfizer. *See id.* Quigley's primary assets are in the form of insurance policies and an insurance trust under which it and Pfizer are joint beneficiaries. *See* In re Quigley Co., Inc., 676 F.3d 45, 47 (2d Cir. 2012) cert. denied, 12-300, 2013 WL 3155260 (U.S. June 24, 2013).

II. Preliminary Injunctions Under the Bankruptcy Code: "The Bankruptcy Bar"

Upon filing for bankruptcy in 2004, Quigley also moved for a preliminary injunction. *See id.* at 47-48. The motion sought to enjoin parties from taking further asbestos-related action, either pending or future, during the course of Quigley's bankruptcy proceeding to avoid depletion of the insurance trust assets. *See id.* at 48. The bankruptcy court granted Quigley's motion and enjoined all asbestos-related claims against both Quigley and Pfizer during the bankruptcy proceeding with the exception that parties asserting asbestos-related claims against Pfizer that had no relation to Quigley could seek relief from the injunction. *See id.*

The bankruptcy court later narrowed the scope of the injunction by adopting language set forth in the Bankruptcy Code. *See id.*, citing In re Quigley Co., Inc., 04-15739 (SMB), 2008 WL 2097016 (Bankr. S.D.N.Y. May 15, 2008) rev'd, 449 B.R. 196 (S.D.N.Y. 2011) aff'd, 676 F.3d 45 (2d Cir. 2012) cert. denied, 12-300, 2013 WL 3155260 (U.S. June 24, 2013). Section 524(g) of the Code authorizes courts to enter injunctions in asbestos-related bankruptcy cases in connection with reorganization plans and the creation of trusts. *See id. See also* 11 U.S.C. § 524(g). Provision 11 U.S.C. § 524(g)(4)(a)(ii) further provides that these types of injunctions apply to third parties identified by or associated with the injunction where such third parties are:

[1] Bags of Quigley's Insulag insulation and advertising materials related to the product contained the Pfizer name and/or logo. *See* In re Quigley Co., Inc., 449 B.R. at 198. Moreover, the Insulag packaging did not contain asbestos-related warnings, but rather marketed the product as "not injurious . . . to the body." *Id.* at 199.

> alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—
>
> > **(I)** the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;
> > **(II)** the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;
> > **(III)** the third party's provision of insurance to the debtor or a related party; or
> > **(IV)** the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—
> >
> > > **(aa)** involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
> > > **(bb)** acquiring or selling a financial interest in an entity as part of such a transaction.

11 U.S.C. § 524(g)(4)(a)(ii).

The Code seeks to facilitate the reorganization of the debtor while also preserving the ability of future asbestos claimants to seek recovery by staying pending and future asbestos claims for future routing to litigation with the trust. *See* In re Quigley Co., Inc., 676 F.3d at 61. By mirroring the statutory language, Quigley's amended injunction provided as follows:

> [D]uring the pendency of Quigley's chapter 11 case, all parties . . . are hereby stayed, restrained and enjoined from commencing or continuing any legal action against Pfizer alleging that Pfizer is directly or indirectly liable for the conduct of, claims against, or demands on Quigley to the extent such alleged liability of Pfizer arises by reason of—
>
> > (I) Pfizer's ownership of a financial interest in Quigley, a past or present affiliate of Quigley, or a predecessor in interest of Quigley;
> > (II) Pfizer's involvement in the management of Quigley or a predecessor in interest of Quigley; or service as an officer, director or employee of Quigley or a related party;
> > (III) Pfizer's provision of insurance to Quigley or a related party;
> > (IV) Pfizer's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of Quigley or a related party, including but not limited to—
> >
> > > (aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or
> > > (bb) acquiring or selling a financial interest in an entity as part of such a transaction.

Id. at 48.

III. The Pfizer Litigation

A. *Bankruptcy Court*

In 1999, the Law Offices of Peter G. Angelos (hereinafter "Angelos") began filing lawsuits premised on Quigley and Pfizer's asbestos-containing products in the State of Pennsylvania. *See* In re Quigley Co., Inc., 449 B.R. at 199-200. Angelos argued that Pfizer was an appropriate party to these lawsuits, notwithstanding the injunction, because it placed its logo on Quigley's Insulag packaging and advertising thus becoming an "apparent manufacturer" of the product pursuant to § 400 of the Second Restatement of Torts. *See id*. at 200.[2]

In 2008, the bankruptcy court held that the Pennsylvania lawsuits fell within the scope of the amended injunction. In doing so, the court reasoned that Pfizer's § 400 liability would arise out of Quigley's conduct, either directly or indirectly (as required by the amended injunction and 11 U.S.C. § 524(g)), that the claims would be paid out of the Quigley plan since the liability of an apparent manufacture equaled that of the original manufacturer under § 400 and that the primary inquiry was thus whether Pfizer's potential liability arose "by reason of its ownership or management of Quigley" as provided in the amended injunction and 11 U.S.C. § 524(g). *Id. See also* In re Quigley Co., Inc., 04-15739 (SMB), 2008 WL 2097016.

The bankruptcy court concluded that the "arises by reason of" phrase was ambiguous because Angelos sought to impose liability on Pfizer due to the placement of its logo on Quigley products rather than on account of its ownership or management of Quigley, but that the logo placement would not have occurred but for Pfizer's ownership and/or management of Quigley. *See* In re Quigley Co., Inc., 676 F.3d at 49. The court ultimately held that the amended injunction applied to the Angelos claims because the injunction covered claims premised on successor and alter ego liability as well as those based on respondeat superior liability, which was similar to the apparent manufacturer theory pursuant to § 400 of the Restatement. *See id. See also* In re Quigley Co., Inc., 04-15739 (SMB), 2008 WL 2097016.

B. *United States District Court*

Angelos appealed the ruling of the bankruptcy court to the United States District Court. The Southern District of New York reversed the bankruptcy court, effectively allowing the Angelos Pennsylvania cases to go forward. The district court began its analysis by clarifying that third-party actions are enjoinable under 11 U.S.C. § 524(g) (and therefore under Quigley's amended injunction), where (1) the action alleges that "Pfizer is 'directly or indirectly liable' for the conduct of Quigley; and (2) the action . . . 'arise[s] by reason of' Pfizer's ownership of Quigley." In re Quigley Co., Inc., 449 B.R. 196 at 203. The district court indicated that while the bankruptcy court's resolution of the direct or indirect liability issue was "reasonable," it misapprehended the nature of § 400 liability. *See id.* at 203-04. The district court therefore

[2] Section 400 of the Second Restatement of Torts provides as follows: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." In re Quigley Co., Inc., 449 B.R. at 202. According to the district court, § 400 of the Restatement "reads another entity into the distribution chain: the company that did not manufacture a product, but held itself out as a sponsor." *Id.* at 207. The State of Pennsylvania adopted § 400 as state law in Forry v. Gulf Oil Corp., 237 A.2d 593, 596-97, 599 (Pa. 1968).

reversed the ruling of the bankruptcy court, holding that the Angelos cases were not subject to third-party channeling injunctions because the cases did not arise by reason of Pfizer's ownership of Quigley. *See id.* at 204.

In support, the district court explained that the labeling at issue contained Pfizer's logo first, then Quigley's logo, followed by the words "Manufacturers of Refractories – Insulations – Paints." *Id.* at 204. The label did not, however, contain information of any kind relating to the parent-subsidiary relationship between the two entities. *See id.* As a result, a reasonable consumer, according to the court, could believe that the use of Pfizer's logo and trademark represented an assurance as to the quality of the product to the user (even more so since Pfizer's name was listed first). *See id.*

The Angelos § 400 claims as against Pfizer were therefore legally independent of the issues relating to Pfizer's affiliation with Quigley and/or the reasons behind why Pfizer's name appeared on Quigley products. *See id.*[3] As a "sponsor" of the product under § 400, Pfizer owed an independent duty to consumers to refrain from marketing and/or selling defective products. *See id.* at 207. The bankruptcy court's analysis of derivative and/or vicarious liability was thus off point because the Angelos claims did not "legally arise by reason of Pfizer's ownership of Quigley" and were outside of the scope of 11 U.S.C. § 524(g). *Id.*

C. *United States Court of Appeals, Second Circuit*

Pfizer appealed the district court ruling to the Second Circuit Court of Appeals, which affirmed. The circuit court first addressed jurisdictional issues, determining that the bankruptcy court had jurisdiction to issue the injunction in the first instance and that it likewise had jurisdiction to address the appeal. *See generally* In re Quigley Co., Inc., 676 F.3d at 51-58. Turning next to the "by reason of phrase" and ultimate issue of whether the amended injunction applied to bar the Angelos claims, the circuit court concluded that Angelos' interpretation of the phrase, e.g. that liability "must arise as a *legal* consequence of the one of the four" relationships enumerated in 11 U.S.C. § 524(g) for an injunction to be appropriate, was favorable to Pfizer's but-for, factual-causation-based reading of the phrase. *Id.* at 59-60.[4]

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[3] The district court offered a hypothetical to clarify its holding as to the independent nature of the Angelos claims, stating:

> Put another way, does Pfizer's liability under state law arise out of its ownership of Quigley, or does liability arise out of its independent obligations as a sponsor of Insulag?
>
> One way to answer this question is to propose the following hypothetical: Assuming that Pfizer had no corporate affiliation with Quigley could it be liable under § 400 if Insulag were marketed with Pfizer's logo on the packaging (say, as its distributor)? Since the answer is obviously yes, it would appear that Pfizer's liability arises out of its sponsorship of a defective product, not its corporate affiliation (or, in the hypothetical, its disbritutor (sic) agreement) with the manufacturer.

In re Quigley Co., Inc., 449 B.R. at 206.

[4] The court framed Pfizer's argument as follows:

The court noted that though 11 U.S.C. § 524(g) does not specify whether the "by reason of" language refers to legal or factual causation, or to some combination thereof, several factors support Angelos' construction. First, all four of the relationships identified in 11 U.S.C. § 524(g) represent affiliations that could have given rise to independent liability prior to enactment of the statute. *See id.* at 60. For example, the ownership subsection allows a bankruptcy court to bar actions against third parties based on piercing the corporate veil jurisprudence. *See id.* Likewise, the involvement-in-a-transaction subsection incorporates aiding and abetting theories, which have traditionally served as a basis for tort liability. *See id.* Though not conclusive evidence, the court considered the enumerated relationships a strong suggestion that the bar applies only to "situations in which the third party's relationship with the debtor is legally relevant to its purported liability." *Id.*

Further, the court reasoned that use of the phrase "by reason of" in other areas of the statute, namely in 11 U.S.C. § 524(g)(3)(A)(ii), supported the Angelos position. *See id.* at 61. Finally, the circuit court noted that the Angelos interpretation advances the purpose of § 524(g) as the statute was not meant to enjoin "claims bearing only an accidental nexus to an asbestos bankruptcy." *Id.* As such, the court concluded that because Pfizer's ownership of Quigley was "legally irrelevant" to the allegations concerning § 400 liability, the Angelos cases were not subject to injunctions pursuant to 11 U.S.C. § 524(g)(4)(A)(ii). *Id.* at 62.

IV. **Conclusion**

The long-term implications of the Pfizer litigation remain to be seen. The Pfizer courts did not address the types of conduct, other than the logo and branding practices directly at issue, that may fall outside of the channeling function of 11 U.S.C. § 524(g) due to either the "apparent manufacturer" theory of the Second Restatement of Torts or pursuant to other bodies of law. Despite the lack of clarity as to the scope of the decisions, it is likely that the Pfizer series will encourage additional litigation aimed at eliminating parent corporation protection as to asbestos liability.

Our mission at ALRA Group is to provide pro-active counseling to keep our clients from the hidden liability of asbestos litigation. Our members collectively have over a century of experience in all phases of the asbestos litigation. We are uniquely positioned to spot lurking liability in mergers, acquisitions, equity investments and other corporate deals. For example, we recently have seen asbestos liability potential inadvertently triggered in the foreclosure of commercial real estate. Since it is so much easier to avoid liability than it is to thwart it, our ability to steer our clients away from danger provides them with tremendous strategic advantage.

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> Pfizer argues that liability arises 'by reason of' any of the four enumerated relationships when that relationship is a 'but for,' factual cause of the liability in question. Here, because Quigley, as a factual matter, would not have applied the Pfizer name and logo to its asbestos-containing products absent Pfizer's ownership interest in Quigley, Pfizer contends that its liability arises 'by reason of' that ownership interest and that the Angelos suits were properly enjoined.

In re Quigley, Co., Inc., 676 F.3d at 59.