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September 22, 2008

VIA HAND DELIVERY

Honorable Allan L. Tereshko
Supervising Judge, Complex Litigation Center
622 City Hall
Philadelphia, PA 19107
Attn: Donna Candelora, Esquire

CONTROL # 095224

Re: IN RE: ASBESTOS LITIGATION, PCCP NO. 001, OCTOBER TERM 1986

RESPONSE OF PLAINTIFFS REPRESENTED BY BROOKMAN ROSENBERG BROWN AND SANDLER TO GLOBAL MOTION FOR SUMMARY JUDGMENT OF CROWN CORK & SEAL CO., INC.

Defendant's Counsel: Mathieu J. Shapiro, Esquire

Dear Judge Tereshko:

Defendant Crown Cork & Seal Company, Inc. ("Crown") has filed a Global Motion for Summary Judgment in the above-captioned case, claiming that it is entitled to dismissal under 15 Pa.S.C.A. §1929.1 ("the Statute"). Previously, Crown had filed in this court a Global Motion for Summary Judgment, seeking dismissal from all asbestos cases filed against it after December 17, 2003, based on the Statute.

Plaintiffs represented by Brookman, Rosenberg, Brown and Sandler opposed that Global Motion. By Order dated July 28, 2005, this court granted Crown's Motion. Appeals from that Order are currently pending in the Pennsylvania Superior Court.

Plaintiffs represented by Brookman, Rosenberg, Brown and Sandler oppose the instant Motion. The basis of plaintiffs' opposition is that the Statute is unconstitutional for all of the reasons set forth in plaintiffs' opposition to the first Global Motion, which is expressly incorporated herein. A copy of that opposition is appended hereto as an exhibit. In addition, subsequent to the filing of that response, the Pennsylvania Supreme Court held unconstitutional an act of the legislature that applied to a single public employer. *Pennsylvania Turnpike Commission v. Commonwealth of Pennsylvania*, 889 A.2d 1025 (Pa. 2006). The basis of the court's decision to strike down the law was the prohibition of special legislation contained in Article III, Section 32 of the

JUDGE TERESHKO
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Pennsylvania Constitution. This authority, which was unavailable at the time of this court's July 28, 2005, order, demonstrates that the Statute must be found unconstitutional as special legislation.

For the foregoing reasons, plaintiffs respectfully request that the Court deny Crown Cork & Seal Co., Inc.'s Global Motion for Summary Judgment in the form of the attached proposed Order.

Respectfully,

Brookman, Rosenberg, Brown and Sandler

By: 
Steven J. Cooperstein, Esquire

SJC/ch
Enclosures

cc: Mathieu J. Shapiro, Esquire

**IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA**

**CROWN CORK & SEAL CO. INC.'S
GLOBAL MOTION
FOR SUMMARY**

**: CIVIL ACTION - LAW
:
: OCTOBER TERM 1986
: NO. 0001**

**RESPONSE OF PLAINTIFFS REPRESENTED BY
BROOKMAN ROSENBERG BROWN AND SANDLER
TO GLOBAL MOTION BY DEFENDANT CROWN
CORK & SEAL COMPANY, INC. FOR SUMMARY JUDGMENT**

Defendant Crown Cork & Seal Company, Inc. (hereinafter referred to as "Crown") has filed a global motion for summary judgment based on 15 Pa.C.S.A. §1929.1. This is the response on behalf of all of the cases subject to the motion in which the plaintiffs are represented by Brookman, Rosenberg, Brown and Sandler. Plaintiffs oppose the Crown motion for all of the reasons set forth below.

BACKGROUND

Plaintiffs filed various Complaints to initiate the instant actions, seeking damages for their injuries caused by occupational exposure to asbestos. Each plaintiff named as a party defendant Crown, as well as other entities. All of these actions were brought after the Pennsylvania General Assembly enacted 15 Pa.C.S.A. §1929.1 (hereinafter "the Statute"), which set a ceiling on the amount a corporation meeting certain criteria would be required to pay in order to meet its asbestos-related liabilities.

The Statute was signed into law on December 17, 2001, and, insofar as is relevant here, was to take effect immediately. In specific, the Statute applies only to corporations incorporated in

Pennsylvania prior to May 1, 2001. As to those corporations, the Statute abrogates established principles of successor liability, and provides that once an eligible corporation has paid damages arising out of asbestos-caused injuries for which it was responsible as a successor in an amount equal to the fair market value of the assets of the business entity that brought with it asbestos-related liabilities (adjusted according to a set formula for the passage of time), that corporation has no further obligation to pay its successor asbestos-related liabilities. The Statute was expressly to apply to existing asbestos claims. 15 Pa.C.S.A. §1929.1(d)(2). As two State Senators who spoke in the Senate in support of the Bill stated, the Statute was designed to help Crown. 2001 Legislative Journal - Senate at pp. 1230-1232 (December 11, 2001).

On February 7, 2002, Crown filed a global summary judgment motion in the Court of Common Pleas of Philadelphia County, requesting its dismissal as a defendant in all cases then pending against it in Philadelphia County in which the plaintiff sought damages for asbestos-caused personal injury. The motion was assigned to the Honorable Allan L. Tereshko, who was then supervising matters heard in the Complex Litigation Center. In briefing and oral argument, plaintiffs raised several grounds upon which they asserted that the Statute was unconstitutional. On June 11, 2002, Judge Tereshko granted Crown's Motion, and issued an opinion in support of his order. *Crown, Cork & Seal, In re: Asbestos Litigation*, 2002 WL 1305991, 59 D.&C. 4th 62 (Phila. Common Pleas 2002).

One of the affected plaintiffs timely appealed to the Superior Court. Crown then filed an Application for Extraordinary Relief, in response to which the Supreme Court issued a *per curiam* order granting the Application and setting the case for oral argument. On February 20, 2004, the Supreme Court reversed, finding that the Statute was unconstitutional as applied to causes of action

that arose before the Statute was enacted. The court did not reach any of the other claims of unconstitutionality. *Ieropoli v. AC&S Corp.*, 577 Pa. 138, 842 A.2d 919 (2004). Crown now has brought a new global summary judgment motion, seeking dismissal from each pending case in which the plaintiff's cause of action arose after December 17, 2001.

LEGAL ARGUMENT

As an initial matter, Crown appears to attempt to have its motion heard by Judge Tereshko, rather than by assignment in the Complex Litigation Center. As its motion concerns cases in the Complex Litigation Center only, the motion should be heard in the Complex Litigation Center. Of course, then, the court must consider whether to apply the coordinate jurisdiction rule. The general prohibition against revisiting the legal holding of a judge of coordinate jurisdiction must give way here for several reasons. First, the Supreme Court's *Ieropoli* decision has substantially impacted the law applicable to this case. Second, other cases decided since Judge Tereshko's opinion are highly germane to some of the issues raised instantly. Third, Judge Tereshko's finding of constitutionality was clearly erroneous, and to follow Judge Tereshko's opinion would create the manifest injustice of dismissing Crown from dozens of cases in which real injury has occurred. *See Zane v. Friends Hospital*, 575 Pa. 236, 836 A.2d 25, 29 (2003) ("exceptional circumstances" exist, justifying departure from the coordinate jurisdiction rule, when there has been a change in controlling law or when the prior ruling is clearly erroneous and its perpetuation would cause manifest injustice).

I. THE STATUTE IS UNCONSTITUTIONAL UNDER THE FEDERAL COMMERCE CLAUSE

Crown's summary judgment motion must be denied because the Statute under which it seeks dismissal is unconstitutional on its face as it is in violation of the Commerce Clause of the United

States Constitution, U.S. Const. Art. I, §8, cl. 3. In initially ruling on Crown's motion, Judge Tereshko found that plaintiffs have no standing to raise the argument. As the Statute is sought to be applied to dismiss plaintiffs' claims against Crown, there is no question but that plaintiffs have standing to challenge the constitutionality of the Statute. The Supreme Court's *Ieropoli* Opinion, in finding the Statute unconstitutional as applied, obviously requires a conclusion that plaintiffs have standing to challenge application of the Statute to them.

Indeed, no other conclusion appropriately could be reached. As the Pennsylvania Supreme Court has observed in its seminal case on standing, "the core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 280 (1975). Crown has sought dismissal in these cases through application of the Statute. Thus, application of the Statute has unquestionably adversely affected these plaintiffs. Therefore, plaintiffs have standing.

The court's analysis in the *Wm. Penn Parking* case was that standing can be determined by an inquiry into whether the plaintiff's interest is "substantial," "direct," and "immediate." Crown's argument before Judge Tereshko appeared to focus only on the immediacy of plaintiff's interests. *Wm. Penn Parking* describes that prong of the standing test as being concerned "... with the nature of the causal connection between the action complained of and the injury to the person challenging it." 464 Pa. at 197, 346 A.2d at 283. It is difficult to conceive of a more immediate causal connection than dismissal of plaintiffs' existing causes of action against Crown.¹ Nevertheless,

¹ Judge Tereshko found as an initial matter that plaintiffs' interests were neither substantial, direct nor immediate because they had sued many other tortfeasors. The court apparently believed that reduction of the number of potentially liable parties by one does not

Crown argued before Judge Tereshko that plaintiffs failed to show standing to mount a Commerce Clause challenge because they could not show that their injury from dismissal of Crown falls within the zone of interests protected by the Commerce Clause. This assertion is unsupported. The cases relied upon by Crown, *Ken R. v. Arthur Z.*, 546 Pa. 49, 682 A.2d 1267 (1996), and *Upper Bucks County Vocational-Technical School Education Association v. Upper Bucks County Vocational-Technical School Joint Committee*, 504 Pa. 418, 474 A.2d 1120 (1984), say only that a plaintiff can satisfy the immediacy test by showing he is within the “zone of interests.” They do not impose a requirement of such proof. Of course, neither case involves an attempt simply to limit the grounds of attack on a statute by a plaintiff who has standing, as is the case here. Because these plaintiffs are aggrieved by the proposed application of the Statute to them, they have standing to raise any and all challenges to the constitutionality of the Statute.²

It is well established that the federal Commerce Clause denies states the power to burden the interstate flow of articles of commerce. *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514

really adversely affect plaintiffs. This reasoning was squarely rejected by the Supreme Court in *Ieropoli*. That opinion makes clear that a plaintiff has individual causes of action against each tortfeasor, and that dismissal of a tortfeasor deprives a plaintiff of the ability to recover full compensation for his injuries. 842 A.2d at 930. It is impossible to imagine how such an adverse effect could fail to constitute a substantial, direct and immediate impact.

² Moreover, even if plaintiffs were required to show some additional interest related to Commerce Clause concerns, they surely have such an interest as consumers. The dormant Commerce Clause protects against out-of-state businesses being placed at a competitive disadvantage. If the Statute results in out-of-state businesses shouldering more of the load of asbestos liabilities, they will need to raise prices on their goods and services, impacting all consumers. Therefore, these plaintiffs are within the Commerce Clause’s zone of interests. See *Oxford Associates v. Waste System Authority of Eastern Montgomery County*, 271 F.3d 140, 146 (3d Cir. 2001) (“... every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any ...,” quoting *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L. Ed. 865 (1949)).

U.S. 175, 115 S.Ct. 1331 (1995); *Annenberg v. Commonwealth*, 562 Pa. 570, 575, 757 A.2d 333, 335 (1998), *cert. denied*, 531 U.S. 959, 121 S.Ct. 385 (2000). This constitutes a prohibition against treating a domestic corporation differently from a foreign corporation. As the Supreme Court has stated, “This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 1807 (1988). Further, “... where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535 (1978).

There can be no question that the Statute constitutes precisely the type of economic protectionism which is virtually *per se* invalid under the federal Commerce Clause. The Statute limits “... the cumulative successor asbestos-related liabilities of a domestic business corporation that was incorporated in this Commonwealth prior to May 1, 2001 ...” 15 Pa.C.S.A. §1929.1(a)(1). A domestic corporation is one incorporated under the laws of Pennsylvania. 15 Pa.C.S.A. §102. There is no statutory limit on the successor asbestos-related liabilities of a corporation that was not incorporated in Pennsylvania. Thus, the Statute is blatant economic protectionism; it grants a clear competitive advantage to a Pennsylvania corporation by putting a cap on its liabilities.³ This has the inevitable effect of increasing the liabilities of out-of-state corporations, thus burdening their interests in a way prohibited by the Commerce Clause.

³ Indeed, as Judge Tereshko observed, one of the sponsors of the bill that became the Statute, Senator Stack, told the Senate that the goal of the bill was “... to achieve some measure of fairness for Pennsylvania companies like Crown Cork & Seal.” 2002 WL 1305991 at pp. 3-4. quoting 2001 Legislative Journal - Senate at p. 1231 (December 11, 2001).

There is a wealth of cases that plainly demonstrate the constitutional infirmity of the instant Statute. Perhaps most pertinent is *Annenberg v. Commonwealth, supra*. There, the Pennsylvania Supreme Court had before it a taxation statute in which Pennsylvania citizens had to pay personal property tax on the value of certain stock. The statute was drafted in such a way that the tax was due only on the stock of corporations that were neither incorporated in nor did business in Pennsylvania. The Court held that:

The discrimination against foreign corporations, and the preferential treatment afforded corporations which were either incorporated in Pennsylvania or do business in Pennsylvania, is plain to see. It is beyond peradventure that the §4821 facially discriminates against interstate commerce.

562 Pa. At 579, 757 A.2d at 337. Because of the facially discriminatory nature of the statute, the Court noted that the burden was on the Commonwealth to establish that the law “advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives.” *Id.*, quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 278, 108 S.Ct. at 1810.

Similarly, in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599 (1977), the United States Supreme Court reviewed a New York statute that imposed a transfer tax on certain securities transactions. The scheme of the legislation called for a heavier tax on transactions involving an out-of-state sale than on transactions involving an in-state sale. The Court held that: “The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges.” 429 U.S. at 331, 97 S.Ct. at 607-608. Ultimately, the Court invalidated the law, stating that: “Because it imposes a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax, ... falls short of the substantially

evenhanded treatment demanded by the Commerce Clause.” 429 U.S. at 332, 97 S.Ct. at 608.

Crown has previously argued that *Annenberg* is irrelevant because it involved a challenge to a taxing statute. It has cited *Complete Auto Transit, Inc., v. Brady*, 430 U.S. 274, 97 S.Ct. 1076 (1977), as authority for the proposition that a case involving taxes is inapposite to any other situation. Even a cursory review of the case makes clear that it does not aid the present inquiry. In *Brady*, a Michigan corporation that transported assembled motor vehicles into Mississippi challenged on Commerce Clause grounds Mississippi’s imposition of a sales tax on the income the corporation derived from transporting the vehicles into the state. The Supreme Court started and ended its discussion by noting that the taxpayer did not challenge the tax as discriminating against interstate commerce. 430 U.S. at 277-278, 287, 97 S.Ct. at 1078, 1083. The Court observed that prior law had held invalid under the Commerce Clause state statutes that imposed a tax on the privilege of doing business that was interstate. However, more recent law had held that a state could properly impose a nondiscriminatory, properly apportioned tax on a corporation doing interstate business when the tax was related to the corporation’s local activities and was reasonable in light of the benefits and protections the state provided. *Id.* Accordingly, the Court held that a state law would not be invalidated simply because it imposed a tax on interstate business. 430 U.S. at 289, 97 S.Ct. at 1084.

Thus, under *Brady*, the way in which a tax case is “different” is that a taxing statute may be more likely to withstand constitutional challenge than other laws - a nondiscriminatory state tax can impact interstate commerce and yet not violate the Commerce Clause. That principle hardly renders irrelevant a case invalidating a tax that discriminates against foreign corporations. The constitutionality of instant Statute, which discriminates against out-of-state corporations, is clearly

controlled by *Annenberg*, which invalidated a tax that discriminated against out-of-state corporations.⁴

Moreover, other cases make clear that the reach of the Commerce Clause is not limited to instances of discrimination in taxation. In *City of Philadelphia v. New Jersey, supra*, the Supreme Court struck down a New Jersey law that prohibited the importation into New Jersey of waste materials that originated outside of the state. The Third Circuit, in *Juzwin v. Asbestos Corporation, Ltd.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 896, 111 S.Ct. 246 (1990), reviewed a New Jersey statute of limitations tolling provision. The relevant limitations period for an action to recover damages for asbestos-caused personal injuries was two years. However, the tolling provision excepted from the statutory period any time in which a defendant that was not incorporated in New Jersey had no corporate office there, was not registered to do business there, and had no appointed agent for service in the state. In *Juzwin*, the plaintiff sued Carey Canada, Inc., more than two years after the plaintiff was diagnosed with asbestosis. Carey Canada's circumstances fit precisely the criteria of the tolling statute. In the trial court, Carey Canada moved for summary judgment on statute of limitations grounds. Its motion was denied. On appeal, the Third Circuit reversed, holding that the tolling statute was facially discriminatory under the Commerce Clause because it applied to out-of-state corporations but not to New Jersey corporations. 900 F.2d at 689. In reviewing whether there existed a legitimate state purpose that could not be served by nondiscriminatory means, the court noted that the test must be applied "with considerable rigor," and is "virtually a *per se* rule of

⁴ The other case upon which Crown has relied for the principle that tax cases are "different," *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987), does no more than cite to *Brady* in a footnote in which the court says that it will not discuss the observations in *Brady* about the considerations that may save a nondiscriminatory taxing statute. 822 F.2d at 399 n. 16.

invalidity.” *Id.* The court found that the state could not justify the statute under that standard of heightened review.

In its previous motion, Crown sought to avoid the persuasive effect of *Juzwin* by pretending that the instant Statute merely regulates domestic corporations.⁵ Crown asserted that the harm in the statute considered in *Juzwin* was that it placed a burden on out-of-state corporations, while the instant Statute is silent as to foreign corporations. By limiting the liability of domestic corporations, however, the instant Statute unmistakably discriminates against out-of-state corporations. Just as the statute in *Juzwin* made it likely that foreign corporations would shoulder more of the burden of asbestos liabilities by exposing them to a longer statute of limitations than the statute of limitations to which domestic corporations were subject, the Statute here makes it more likely that foreign corporations will be responsible for a greater portion of asbestos liabilities by its exempting Crown from further liability.

Judge Tereshko found that the Statute may, in fact, burden non-exempt corporations with a greater share of the asbestos liability burden. *Crown Cork & Seal, In re Asbestos Litigation*, 2002 WL 1305991 at p. 7. Nevertheless, the court found no Commerce Clause violation because this increased burden “... would be shared by both Pennsylvania companies and foreign companies whose

⁵ Crown relied on *CTS Corporation v. Dynamics Corporation*, 481 U.S. 69, 107 S.Ct. 1637 (1987). There, the Indiana statute challenged under the Commerce Clause truly regulated domestic corporations, as it provided for the length of time a corporation’s shareholders would need to hold stock in an Indiana corporation before acquiring voting rights. The instant Statute plainly does not regulate corporate conduct. Indeed, nothing in the Statute prevented Crown from settling the instant case. The Statute, in exempting certain Pennsylvania corporations from liability to asbestos victims, will inevitably increase the liability burden on foreign corporations. The Supreme Court upheld the Indiana statute because, unlike the instant Statute, it imposed no greater burden on any foreign entity than it imposed on any domestic entity. 481 U.S. at 88, 107 S.Ct. At 1649.

liability arise from direct manufacturing, distributing or other non-successor acquired liability. This fact again fails on its face to erect any local protectionist barriers.” *Id.* As the Supreme Court has found, however, the Statute does not merely “alter the allocation among multiple defendants.” *Ieropoli v. AC&S, Inc.*, 742 A.2d at 931. Rather, the Statute shields Crown from liability, *id.*, only because Crown is a Pennsylvania corporation. This is direct protection of a Pennsylvania corporation. Thus, *Ieropoli* requires a different result from that reached by Judge Tereshko. Further, Supreme Court Commerce Clause jurisprudence shows that Judge Tereshko’s conclusion is clearly erroneous.

In *C&S Carbone, Inc., v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S.Ct. 1677 (1994), the Supreme Court rejected an argument identical to Judge Tereshko’s reasoning herein. There, the town enacted an ordinance requiring solid waste recyclers to bring its non-recyclable residue to one particular transfer station, whose operator had to be paid a set fee. The ordinance prohibited recyclers from shipping its non-recyclable residue anywhere else. The town argued that there was no Commerce Clause violation because the ordinance increased the burdens on both domestic and foreign solid waste processors. The Supreme Court rejected this argument, stating that: “The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.” 511 U.S. at 391, 114 S.Ct. At 1682. *See also Cloverland-Green Spring Dairies, Inc., v. Pennsylvania Milk Marketing Board*, 298 F.3d 201, 214 (3d Cir. 2002); *Harvey & Harvey, Inc., v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *cert. denied sub nom. Tri-Counties Industries, Inc. v. Mercer County*, 516 U.S. 1173, 116 S.Ct. 1265 (1996). So too here, that the Statute burdens some domestic corporations along with all foreign corporations does not clear it from discrimination prohibited by the Commerce Clause.

Judge Tereshko also suggested that there is no improper discrimination worked by the Statute because "... only a small subset of the universe of Asbestos defendants is affected ..." 2002 WL 1305991 at p.7. Like the argument that the Statute is nondiscriminatory because it burdens some domestic corporations, this fact does not save the Statute from violation of the Commerce Clause. To the contrary, in *C&A Carbone, Inc., v. Town of Clarkson, New York, supra*, the Court noted that if the ordinance favored only a single domestic business, that fact "... just makes the protectionist effect of the ordinance more acute." 511 U.S. at 392, 114 S.Ct. at 1683. Thus, there is no escaping the discriminatory nature of the Statute.

It is certain that the Commonwealth cannot justify the discriminatory treatment afforded to out-of-state corporations, as the reason for the Statute is to benefit a single Pennsylvania corporation, Crown Cork & Seal. If the Commonwealth's legitimate purpose were to limit the law of successor liability, it surely could have done so without discriminating against foreign corporations. The Statute clearly, palpably, and plainly violates the Commerce Clause of the United States Constitution. Judge Tereshko's opinion to the contrary is clearly erroneous, and therefore need not be followed. As a result, Crown's summary judgment motion must be denied.

II. THE STATUTE CONSTITUTES A DENIAL OF EQUAL PROTECTION

Further, the Statute's discrimination against out-of-state corporations, as well as running afoul of the Commerce Clause, must be found to be a denial of equal protection. In *WHYY, Inc., v. Borough of Glassboro*, 383 U.S. 117, 89 S.Ct. 286 (1968), the United States Supreme Court reviewed a New Jersey law that exempted certain nonprofit corporations from paying real estate taxes. Among the criteria for exemption was that the corporation had been incorporated in New Jersey. The Court found the statute unconstitutional, holding that the disparate treatment of domestic

and foreign corporations was violative of the out-of-state corporation's right to equal protection. The same flaw clearly infects the Statute upon which Crown seeks dismissal. In addition, the removal from an injured plaintiff of the right to recover from only Pennsylvania corporations whose liability is based on the rules of successor liability deprives the plaintiff of equal protection. *See Moyer v. Phillips, M.D.*, 462 Pa. 395, 341 A.2d 441 (1975) (statute's exception of defamation claims from actions that survive the death of the injured party is a violation of the constitutional right to equal protection).

III. THE LAW IS AN UNCONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER

A. The Statute Sets An Unconstitutional Limit On Personal Injury Damages

The Statute also violates several state constitutional provisions that limit the power of the legislature. First, the Pennsylvania Constitution permits the legislature to pass laws limiting the compensation to be paid by employers to injured employees, but goes on to state that "... in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, ..." Pennsylvania Constitution, Article 3, §18. Here, the legislature has purported to limit the damages that may be recovered in third-party actions by asbestos victims. Although the Statute sets a limit from the standpoint of the amount of money a particular defendant can be required to pay, rather than from the perspective of the plaintiff, nothing in the constitutional provision would except this law from the prohibition on limiting recovery amounts. The legislature has done just what the Constitution forbids in Article 3, §18, and, therefore, the Statute must be found unconstitutional on that basis also.

B. The Statute Is An Unconstitutional "Special Law"

Second, the Statute constitutes a "special law" which is prohibited by Article 3, §32 of the

Pennsylvania Constitution. The Supreme Court has held that the test for determining whether a statute is violative of the constitution prohibition of special laws is as follows:

Legislation for a class distinguished from a general subject is not special, but general; and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones, used for the purpose of evading the Constitutional prohibition. If the distinctions are genuine, the Courts cannot declare the classification void, though they may not consider it to be a sound basis. The test is not wisdom, but good faith in the classification.

Dufour v. Maize, 358 Pa. 309, 313, 56 A.2d 675, 677 (1948), quoting *Seabolt v. Commissioners*, 187 Pa. 318, 41 A.2d 22, 23 (1898). Therefore, the court's inquiry is whether the classifications made in the Statute are real distinctions. See *Freezer Storage, Inc., v. Armstrong Cork Company*, 476 Pa. 270, 275, 382 A.2d 715, 718 (1978). Here, it is obvious that, taken as a whole, the classifications in the Statute are to benefit Crown alone, and are not the result of genuine distinctions.

The first classification in the Statute is between corporations and all other business entities. The second is between corporations incorporated in Pennsylvania and those incorporated anywhere else. Third, the Statute classifies Pennsylvania corporations incorporated before and after May 1, 2001. Next, the Statute separates domestic corporations incorporated before May 1, 2001, on the basis of whether they have liability for asbestos-caused personal injuries. Finally, it divides those domestic corporations incorporated May 1, 2001, who have liability for asbestos-caused personal injuries, into those whose liability is as a successor and those whose liability is based on another legal theory. These classifications are plainly intended solely to benefit Crown, as no other business entity fits within all five of the classifications made in the Statute. While each of the five distinctions may in theory be of general application, when the five are considered together, no

conclusion is possible other than that the legislature has attempted to evade the constitutional proscription against special laws.

This conclusion is buttressed by the legislative history. Senator Waugh, speaking in support of the bill, stated that the legislation "... has obviously been here for quite some time in the General Assembly and been identified, as the two speakers before me so eloquently pointed out, as the Crown Cork & Seal legislation." 2001 Legislative Journal - Senate at p.1232 (December 11, 2001). One of the two speakers referred to by Senator Waugh was Senator Tomlinson, who termed the bill one that "... will help the company Crown Cork & Seal ..." 2001 Legislative Journal - Senate at p. 1230 (December 11, 2001). The Statute plainly constitutes special legislation, and therefore, must be found unconstitutional as violative of Article 3, §32 of the Pennsylvania Constitution. See *Harrisburg School Dist. v. Hickok*, 563 Pa. 391, 398, 761 A.2d 1132, 1136 (2000) ("...this court has held that a classification is per se unconstitutional when the class consists of one member and it is impossible or highly unlikely that another can join the class."); *Allegheny County v. Monzo*, 509 Pa. 26, 44-46, 500 A.2d 1096, 1105-1106 (1985).

C. The Statute Was Constitutionally Flawed In The Manner Of Its Enactment

Finally, the law was passed in violation of Article 3, §1 and Article 3, §3 of the Pennsylvania Constitution. The former section provides that: "No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose." The latter provision states that: "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof." Here, the purpose of the Statute was altered substantially after the relevant bill was first introduced in the Pennsylvania Senate, and the final bill contained more

than one subject.

The Statute was passed as Senate Bill No. 216. In its original form (Printer's No. 223), the bill's title stated that it would be an act "Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, further providing for limitations of actions." Its only substance was a proposed amendment of 42 Pa.C.S.A. §5524 to set the statute of limitations for asbestos-caused injuries and deaths at two years from the date a plaintiff was informed by his doctor of his injury.⁶ The original bill was passed unanimously by the Senate on March 14, 2001.

In the House of Representatives, the bill was amended and reprinted under Printer's No. 1576. That amendment changed the language of the statute of limitations section, but also added an extensive section detailing costs to be charged by the judicial system for certain cases. The new title of the bill read: "Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, further providing for COSTS, FOR COMMONWEALTH PORTION OF FINES AND FOR limitations of actions." This amended version of the bill, as yet containing no mention of the limitation on successor asbestos-related liabilities, passed the House of Representatives, with one vote against, on December 5, 2001.

When the bill was returned to the Senate for concurrence in the House amendments, the bill was again amended, and given Printer's No. 1617. For the first time, one of the houses added the language upon which Crown seeks dismissal from these lawsuits. In addition, the Senate deleted all of the House amendment dealing with judicial costs, made further changes to the statute of

⁶ The court can take judicial notice of the different versions of Senate Bill 216 in its passage through the legislature. *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 112 (Pa. Cmwlth. 1998), *affirmed*, 562 Pa. 632, 757 A.2d 367 (2000); *Pennsylvania AFL-CIO v. Commonwealth*, 691 A.2d 1023, 1026 (Pa. Cmwlth. 1997), *affirmed*, 563 Pa. 108, 757 A.2d 917 (2000).

limitations provision, and added a section that amended 42 Pa. C.S.A. §8128, dealing with transfers of claims against Commonwealth residents. The new title provided:

AMENDING TITLES 15 (CORPORATIONS AND UNINCORPORATED ASSOCIATIONS) AND 42 (JUDICIARY AND JUDICIAL PROCEDURE) OF THE PENNSYLVANIA CONSOLIDATED STATUTES, PROVIDING FOR LIMITATIONS ON ASBESTOS-RELATED LIABILITIES RELATING TO CERTAIN MERGERS OR CONSOLIDATIONS; AND FURTHER PROVIDING FOR CERTAIN STATUTES OF LIMITATIONS AND FOR CERTAIN TRANSFERS.

The Senate concurred in the House amendments, as further amended, on December 11, 2001, and the House concurred in the new Senate amendments the next day. Upon the bill being passed in both houses, it was sent to the Governor, who signed it on December 17, 2001.

Thus, this law clearly was altered, so as to change its original purpose, as it journeyed through the legislature. It began as a bill that related solely to the statute of limitations, passed the Senate, and then was substantially altered to provide for certain judicial costs. After the amended bill passed the House, for the first time there appeared language to change substantively the law of successor liability. Therefore, the purpose of the bill was altered twice, each time in a manner that changed its original purpose. In addition, the final bill contained two distinct subjects - the statute of limitations amendment and the substantive change in the law of successor liability. As a result, it is clear that the law was passed in violation of Article 3, §§1 and 3 of the Pennsylvania Constitution. *See Common Cause of Pennsylvania v. Commonwealth*, 668 A.2d 190 (Pa. Cmwlth. 1995), *affirmed*, 544 Pa. 512, 677 A.2d 1206 (1996).

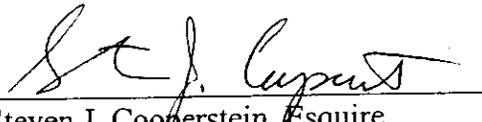
Judge Tereshko's conclusion that these constitutional provisions were not violated was reached prior to the date of decision of two appellate cases that are persuasive on the Article 3, §3

issue. A legislative enactment was found unconstitutional for combining unrelated subjects in *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 838 A.2d 566 (2003). Similarly, the Commonwealth Court has found that a bill with two distinct subjects may be constitutionally infirm. *DeWeese v. Weaver*, 824 A.2d 364 (Pa. Cmwlth. 2003). When these precedents are considered, it is clear that the Statute violates Article 3, §3. Crown's motion for summary judgment must be denied on the additional basis that the enactment of the law on which its motion is based was constitutionally flawed.

CONCLUSION

For the foregoing reasons, plaintiffs represented by Brookman, Rosenberg, Brown and Sandler hereby respectfully request that the Global Motion of Crown, Cork & Seal Company, Inc., for Summary Judgment be denied.

Respectfully submitted,



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IN RE: ASBESTOS LITIGATION IN
PHILADELPHIA COURT OF COMMON
PLEAS

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
CIVIL TRIAL DIVISION

OCTOBER TERM 1986

No. 001

ORDER

AND NOW, this 19th day of September, 2008, upon consideration of the Global Motion by Defendant Crown, Cork & Seal Company, Inc. for Summary Judgment and responses thereto, it is hereby ORDERED that said Motion is DENIED.

BY THE COURT:

J.