

Mass Tort Litigation Update

EPA Proposes New Asbestos Reporting Rule

By Laura E. Fein

On May 5th, as a result of a settlement between the U. S. Environmental Protection Agency (EPA) and the Asbestos Disease Awareness Organization (ADAO), the EPA announced a proposed rule to impose significant new reporting requirements on *all* asbestos manufacturers and processors. The American Public Health Association (APHA), Center for Environmental Health (CEH), Defend Our Health (formerly Environmental Health Strategies Center), Environmental Working Group (EWG), Safer Chemicals, Healthy Families (SCHF), and eleven state Attorneys General joined in the legal action.

Public comments are being accepted by the agency on the proposed rule. Under the settlement agreement, the EPA must finalize the reporting rule by November 18, 2022. Following the settlement, the ADAO announced its intent to press for increasing the requirements through its comments to the agency, including recommending that the EPA:

- Conduct outreach to sectors and stakeholders that may have reportable information.
- Promptly post reports submitted publicly on the Agency's website so that the public is fully informed of information about asbestos use and exposure.
- Verify compliance with reporting requirements by looking for asbestos-containing products on the internet, in stores, and in import records.

If approved, the rule will impose an onerous and actionable set of additional reporting requirements on manufacturers of asbestos and asbestos-containing products. Specifically, it requires comprehensive reporting on asbestos imports, use and disposal, including information related to asbestos-containing articles that fall under Section 8(a) of the Toxic Substances Control Act (TSCA). The rule also mandates a one-time report going back four years, identifying all products that include asbestos, including as part of a mixture or as an impurity. The EPA will require reporting on quantities of asbestos and asbestos-containing products that were manufactured, imported, or processed, as well as employee data and information on the specific type of asbestos used. As proposed, manufacturers and processors will have up to nine months following the effective date of the final rule to collect and submit all required information to the EPA.

The information collected under the rule could further be used in future actions. The EPA indicated that potential future risk management activities, including the ongoing risk evaluation for legacy uses of asbestos, could be based on the information obtained under the rule. According to the EPA Assistant Administrator for the Office of Chemical Safety and Pollution Prevention, Michal Freedhoff, "Getting a more comprehensive and complete set of data on how and where this chemical is used is part of EPA's broader effort to evaluate the health risks from asbestos and, when needed, put protections in place." The agency called the rule "one component of a comprehensive suite of actions to address the risks to public health from asbestos," including another proposed EPA rule to prohibit ongoing uses of chrysotile asbestos.

The proposed rule came out of a settlement with the ADAO, which in 2019 sued the EPA to require the reporting rule. In granting summary judgment, U.S. District Judge Edward Chen of the Northern District of California found that the EPA “had not articulated a satisfactory explanation for its decision not to use its significant enforcement powers to collect information from companies concerning asbestos-related health risks,” thus the decision not to collect was “arbitrary and capricious” under the Administrative Procedure Act. Asbestos Disease Awareness Org. v. Wheeler, 508 F. Supp. 3d 707 (N.D.Cal, 2020, amended 2021). The court ruled that the EPA is obligated to collect and assess “reasonably available information” to “inform its regulatory obligations under the Toxic Substances Control Act” and when considering risk evaluations on conditions of use.” To this end, “it is the policy of the United States that adequate information should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such information should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.” Id.

Upon publication in the Federal Register, the EPA will accept comments on the proposed rule for 60 days. The EPA will publish the final risk evaluation by December 1, 2024.