LOS ANGELES
Daily Journal
www.dailyjournal.com
WEDNESDAY, FEBRUARY 8, 2012

Asbestos case lends to application of political question doctrine

By William O. Martin Jr., Jules Zeman and Lee Marshall

By now there have been more than a few articles written about the landmark state Supreme Court case of *O'Neil v. Crane Co.* (2012) 53 Cal. 4th 335. Most have provided a synopsis while a few have anticipated how the plaintiffs' bar will attempt to circumvent it.

However, the state Supreme Court has laid the foundation for a result that is potentially far wider reaching than the holding itself. Its opinion leads to the possible application of the political question doctrine.

The doctrine recognizes that the executive and legislative branches of government are responsible for conducting war. The Constitution provides Congress with the "Power ... to provide and maintain a Navy," and appoints the president as the "Commander in Chief of the Army and Navy of the United States." This doctrine recognizes that there is no subject matter jurisdiction for the judicial branch to review the choices made by those two branches of government for decisions affecting war. As Alexander Hamilton concluded, the judiciary has "no influence over ... the sword." The Federalist No. 46 at 402 (Gideon ed., 2001).

In *Baker v. Carr,* 369 U.S. 186 (1962), the U.S. Supreme Court provided the test for when the political question doctrine applies. A later Supreme Court decided *Gilligan v. Morgan*, 413 U.S. 1 (1973), which stated that there is no jurisdiction for courts to enter the domain of how the military is trained. Other significant decisions hold that the presence of a political question prevents the power of the judiciary from being invoked by complaining parties and that plaintiffs' claims inquiring into military strategy and policy decisions made in war are clearly beyond the competence of courts to review.

In the 1940s and 1950s, U.S. Navy warships were loaded with asbestos. Not only was it lightweight, asbestos did not burn or give off toxic fumes when a vessel was on fire — the greatest threat to a warship. With the use of asbestos, ships were safer and could therefore carry greater armaments and travel faster while using less fuel.

Considering the political question doctrine, the question in today's asbestos cases becomes whether the judicial branch, including a jury, can constitutionally substitute its decisions for those made by the Navy in the 1940s and 1950s as to how a warship should be designed and constructed? The doctrine is implicated because, in all asbestos cases involving service on Navy vessels, plaintiffs' claims are based upon convincing the judge or jury to accept their arguments that companies supplying the Navy with mechanical and other products should have designed them without asbestos or should have provided substantial warnings about the use of asbestos.

Inherent in this inquiry are the underlying political questions of whether or not the Navy itself should have designed and built each of their warships to contain literally hundreds of tons of raw asbestos, and required the supplying companies to use asbestos in their products. A finding in favor of plaintiffs' claims implicitly, but necessarily, requires a judge or jury to find that asbestos should not have been used on Navy warships. Since the decision of how to design and build warships to provide the maximum efficiency and safety is expressly reserved to the executive and legislative branches, and beyond the competence of judges and juries, a strong argument exists that the political question doctrine should prevent such determinations by judges and juries.

The political question doctrine has only infrequently been presented to trial courts in summary judgment motions. Trial judges have denied those motions without addressing the doctrine's merits. Given the state Supreme Court's statements in *O'Neil*, motions based upon the doctrine may now be seriously considered, perhaps best framed as motions to dismiss for lack of subject matter jurisdiction.

O'Neil provides plenty of ammunition to support the application of the political question doctrine. In laying out the decision, the state Supreme Court noted that "Navy specifications required use of asbestos containing insulation on all external surfaces of the steam propulsion elements." It also observed that "Asbestos installation was also used as an internal sealant within gaskets and other components of the propulsion system." The Court, in fact, determined that the Navy preferred to use asbestos over other materials because it was indeed "lightweight, strong and effective." Asbestos was considered so important that a federal regulation in 1942 required its conservation for the war effort. Likewise, the plaintiff in the case admitted there were no acceptable substitute for asbestos until the 1960s and that it was required to build warships. Product manufacturers were also required to use asbestos when Navy specifications mandated it. Included in these specifications, was the decision that asbestos was the only material that could withstand the high temperatures and pressures of a warship's steam propulsion system.

The state Supreme Court also noted that the Navy knew as early as 1922 that airborne asbestos could potentially cause lung diseases. Yet, the Navy did not warn sailors, advise them to wear respirators or take other precautions. The Court concluded that the Navy made knowing and fully informed decisions to use asbestos in its warships because of its unique advantages despite knowing that health risks for some might be realized decades later.

Today, however, the judicial branch, through the jury, is asked to substitute its decisions for those made by the Navy as to how to best construct a warship. This may be considered an infringement by the judicial branch into decisions that are constitutionally reserved for the executive and legislative branches. In other words, the courts should not have jurisdiction over these cases.

It makes no difference that the defendants here are manufacturers of asbestos containing products as opposed to the Navy itself. Courts have regularly held that the application of the political question doctrine applies to those contractors who furnish products in compliance with government specifications. See *Carmichael v. Kellogg Brown & Root Inc.*, 572 F. 3d 1271 (11th Cir. 2009), which applies the doctrine to affirm dismissal in favor of contractors responsible for a military supply convoy, upon findings that the adjudication of plaintiff army sergeant's injury claims required extensive reexamination and second-guessing of military judgment and that there would be no judicially manageable standards with which to resolve the claims. In *Carrie v. Caterpillar Inc.*, 503 F.3d 974 (9th Cir. 2007), the court could not adjudicate the liability of contractor for selling bulldozers to Israel to level homes without "implicitly" determining the propriety of the U.S. government's decision to sell the bulldozers to Israel in the first place. Meantime, *Zuckerbraum v. General Dynamico*, 755 F. Supp. 1134, 1142 (D. Conn. 1990) dismissed claims against manufacturers, designers, testers and marketers of an anti-missile system and *Mejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) dismissed claims against a military contractor under the doctrine because it called into question the Navy's decisions and actions in executing those decisions.

Application of the political question doctrine goes far beyond the borders of California. It is may ultimately need to be resolved by the U.S. Supreme Court. Imagine what life would be like in the legal asbestos world if thousands of cases against companies that merely supplied what the Navy decided was critical and essential to the security of America were suddenly to disappear?

William "Skip" O. Martin Jr. *is a partner in the Los Angeles office of Haight Brown & Bonesteel LLP. He is a member of the Products Liability and Tort Practice Group.*

Jules Zeman *is a partner in the Los Angeles office of Haight Brown & Bonesteel LLP. He is the practice group leader of the Appellate Practice Group.*

Lee Marshall *is a partner in the Los Angeles office of Haight Brown & Bonesteel LLP. He is the practice group leader of the Environmental Law and Toxic Tort Practice Group.*

This doctrine recognizes that there is no subject matter jurisdiction for the judicial branch to review the choices made by [the executive and legislative] branches of government for decisions affecting war.