State of New York
Court of Appeals

To be argued Thursday, January 10, 2019

No. 8 Matter of New York City Asbestos Litigation (South v Chevron Corporation)

After he was diagnosed with mesothelioma in 2014, Mason South and his wife Anne brought this action against Texaco and other defendants under the federal Jones Act, alleging that the disease resulted from his exposure to asbestos while he served as a seaman in the Merchant Marine from 1945 to 1982. South died of his mesothelioma in 2015 and his wife was substituted as plaintiff.

Texaco moved to dismiss the complaint against it based on a release South signed in 1997 in settling a Jones Act lawsuit that he and other plaintiffs filed in federal court against Texaco and 115 other defendants, seeking damages for injuries he suffered as a result of his exposure to asbestos and second-hand smoke on merchant ships. South was paid $1,750 to settle his claims against Texaco, and in return he agreed to "forever discharge and release Texaco ... from any and all actions or causes of actions, suits [or] claims ... which [he] has now, has ever had, or which may accrue in the future." The release included any illness or injury "allegedly caused as a result of the exposure to asbestos, silica, asbestos fibers, and asbestos dusts, and/or silica or asbestos-containing products, smoke and carcinogenic chemicals (not including benzene...). Further, [South] understands that the long term effects of exposure to asbestos ... may result in obtaining a new and different diagnosis from the diagnosis as of the date of this Release. Nevertheless, [he] understands that ... he is giving up the right to bring an action against [Texaco] ... in the future for any new or different diagnosis that may be made about [his] condition as a result of exposure" to asbestos or other products.

Supreme Court denied Texaco's motion. It ruled the release could not be used to bar South's suit under section 5 of the Federal Employers' Liability Act (FELA), which prohibits agreements that exempt common carriers from liability, and the Third Circuit's decision in Wicker v Consolidated Rail Corp. (142 F3d 690 [1998]), which held that "a release does not violate [FELA] provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed." Supreme Court, noting the "meager" amount of South's settlement and the fact that the release "does not even mention cancer [or] mesothelioma," said Texaco "offered no proof ... that Mason South intended to release a future claim for mesothelioma."

The Appellate Division, First Department affirmed on a 3-1 vote, saying, "The 1997 complaint ... is exceedingly vague as to whether [South] had actually contracted an asbestos-related disease.... Indeed, the 'meager' consideration he received for resolving the claim suggests that he had not been diagnosed with an asbestos-related disease.... [T]he lack of an actual diagnosis reveals the language in the release as mere boilerplate, and not the result of an agreement the parameters of which had been specifically negotiated and understood by South. Even under the stricter standard of Wicker, 'the release[] do[es] not demonstrate [South] knew of the actual risks to which [he was] exposed and from which [Texaco] was being released' (142 F3d at 701)."

The dissenter said, "[T]he parties executed a release that should be enforced and that constitutes a complete bar to this action.... The release was properly limited to those risks known to the parties at the time of its execution (see Wicker...), including the known risk that the decedent could contract mesothelioma in the future.... [T]he release's language establishes that the decedent understood that his exposure to asbestos could result in future injuries and diagnoses..., but that despite those risks he agreed to give up his right to bring any actions against Texaco for 'any new or different diagnosis' as a result of his exposure to asbestos."

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No. 9 People v Emmanuel Diaz
No. 10 People v Ali Cisse

The common issue in these appeals is whether a pretrial detainee's implied consent to the recording of calls he makes on jail telephones also implies consent to jail authorities giving the recordings to prosecutors for use against him at trial. Defendants argue in both cases that such recordings were improperly admitted at their trials because, while they had been given notice that their calls from Rikers Island would be monitored and recorded, they had not been told the recordings could be released to prosecutors. This Court left the issue open in People v Johnson (27 NY3d 199 [2016]).

Emmanuel Diaz was arrested in July 2012 for breaking into a Brooklyn home and robbing the elderly owners. Unable to make bail, he was held at Rikers for more than a year awaiting trial. Supreme Court admitted into evidence excerpts of recorded calls in which Diaz made incriminating statements. Convicted of first-degree robbery and burglary, he was sentenced to 15 years in prison. The Appellate Division, Second Department affirmed on a 3-1 vote.

Ali Cisse was walking in upper Manhattan in December 2012 when he was stopped by officers who said he was acting nervously. They seized an illegal handgun and MetroCards, which provided user history that placed him near the scene of a gun-point robbery outside of a midtown nightclub four days earlier. He was held at Rikers for more than 500 days awaiting trial. Supreme Court permitted the prosecutor to play for the jury three recorded jailhouse calls in which Cisse made incriminating statements. He was convicted of first-degree robbery, weapon possession and related crimes, and was sentenced to 12 years in prison. The Appellate Division, First Department unanimously affirmed, rejecting his claim that the Rikers calls were inadmissible. It also rejected his claim that the pistol and MetroCards should have been suppressed as the fruit of an illegal stop.

In Diaz, the Second Department majority said, "[T]he defendant impliedly consented to the monitoring and recording of his telephone conversations by using the prison telephones despite being notified that such calls were being monitored.... The record reflects that the defendant was on notice from several sources of the prison's policy of" recording the calls, "including the inmate handbook, signs posted next to the telephones, and a recorded message which plays prior to each telephone call. In light of these notifications, 'it was no longer reasonable for [the defendant] to presume an expectation of privacy as to the content of those telephone conversations'...." It said "the better practice" may be for Rikers to expressly notify detainees that their calls may be turned over to prosecutors, but "the absence of such a warning does not render the calls inadmissible...."

The dissenter argued the calls were inadmissible. Because Diaz "was never informed that the recordings of his telephone calls would be provided to the prosecutor handling his case," he "never expressly or impliedly consented to the recordings of those calls being disseminated to the prosecutor for potential use at his criminal trial. While the defendant admittedly 'had no reason to expect privacy in his calls, that does not equate to any consent that the agents and prosecutors working on this case would gain access' to the calls'.... In this context, the defendant's consent can be no broader than the notice provided to him." She said the access prosecutors are given to Rikers recordings "simply adds to the well-documented disparities between defendants who can afford to make bail and are at liberty, and those who cannot afford to make bail...."

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