

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS : Consolidated Under
LIABILITY LITIGATION (No. VI) : MDL DOCKET NO. 875
: :
CERTAIN PLAINTIFFS : :
: :
v. : :
: : Transferor District Court
KIMBERLY CLARK CORP., et al., : Eastern District of Texas
: :
Defendants. : :
: :

O R D E R

AND NOW, this **24th** day of **June, 2010**, it is hereby
ORDERED that Defendant Kimberly Clark Corp.'s motion to certify
the Court's order of remand for appeal (doc. no. 30) in the cases
listed in Exhibit "A", attached, is **DENIED**.¹

¹ On April 23rd, 2010, the Court held a hearing on Plaintiffs' motion to remand in the 73 cases listed in Exhibit "A". At the hearing, the Court ordered remand of these cases. The reason for the ruling, stated on the record, was that the removal of the cases was not timely under 28 U.S.C. § 1446(b). The Court found that the deposition of Defendant Kimberly Clark's ("Defendant" or "Kimberly Clark") former president of U.S. Newsprint and Forest Products Division, Mr. Sanford Pinkerton, constituted an "other paper" from which Kimberly Clark should have been able to ascertain that the case was removable.

Kimberly Clark's instant motion asks the Court to certify the remand order for appeal to the Third Circuit. In order to show it is allowed to appeal, Kimberly Clark must first show that appeal is permitted under 28 U.S.C. § 1447(d). If an appeal is not barred by § 1447(d), Kimberly Clark must then seek a writ of mandamus under 28 U.S.C. § 1651. See PAS v. Travelers Ins. Co., 7 F.3d 349, 352-53 (3d Cir. 1993) (holding that, in the Third Circuit, the proper method of review of a federal court order remanding a claim to a state court is by petition for a writ of mandamus).

Section 1447(d) governs a removing party's ability to appeal an order remanding a case. In general, "[a]n order

remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . .” 28 U.S.C. § 1447(d). This prohibition has been limited to apply strictly to remands based on the grounds specific in 28 U.S.C. § 1447(c). Cook v. Wikler, 320 F.3d 431, 434 (3d Cir. 2003) (citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711-712 (1996)). Section 1447(c) discusses the remand of cases “on the basis of any defect other than lack of subject matter jurisdiction.” 28 U.S.C. § 1447(c). Therefore, when the basis for the remand order is based on a procedural defect in the removal of the case, § 1447(d) “prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or extraordinary writ.” Thermtron Prods., Inc., 423 U.S. at 336; see also Cook, 320 F.3d at 434-35.

Nevertheless, Kimberly Clark urges this Court to certify the remand order for appeal, arguing that the provisions of § 1447(d) do not apply. (Def.’s Memo. of Law in Supp. Mot. Cert. for Appeal, at 6.) Defendant’s first argument is that this Court exceeded its authority to remand the cases under § 1447(c), and therefore, this case is not subject to the § 1447(d) bar. (Id. at 8.) Simply stated, Kimberly Clark argues that a prior order allowing their motion for leave to file a second amended notice of removal in one of the cases subject to remand bound this Court to find that the deposition of Mr. Pinkerton did not trigger the 30 day period for removal in § 1446(b), and therefore the grounds for the Court’s remand order were improper and beyond the scope of the Court’s authority.

The ruling that Kimberly Clark points to was made by Judge Crone in the Eastern District of Texas. The order was issued after removal of the case, but prior to transfer to MDL-875. Judge Crone’s order simply states “[d]efendant Kimberly-Clark Corporation’s Motion for Leave to File Second Amended Notice of Removal (#35) is granted.” (Def.’s Memo. of Law in Supp. Mot. Cert. for Appeal, at Exh. L.) Kimberly Clark argues that in order to arrive at this ruling, Judge Crone must have implicitly determined that the original removal was proper, and further, implicitly ruled that Mr. Pinkerton’s deposition was not an “other paper” within the meaning of § 1446(b). Therefore, Defendant contends, this Court, in ruling on Plaintiffs’ motions to remand, was acting beyond its authority by ruling contrary to Defendant’s reading of the implicit ruling made by Judge Crone previously. (Id. at 7-8.)

In support of its argument, Kimberly Clark cites to the premise that “nothing in the text of 28 U.S.C. § 1407, the Multidistrict litigation transfer statute . . . authorizes a

transferee judge to vacate or modify an Order of the transferor judge.” (Id. at 7) (citing In re Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432, 440 (3d Cir. 2009)). The holding of Pharmacy Benefit Managers is not applicable to the instant facts. In that case, the transferee district judge expressly vacated an order compelling arbitration that was made by the transferor district judge prior to transfer under 28 U.S.C. § 1407. See In re Pharmacy Benefit Managers Antitrust Litig., 582 F.3d at 437.

In this case, the Court remanded these cases even considering the grounds for removal stated in the second amended notice of removal. There was nothing in Judge Crone’s order that could be construed as an affirmative holding that the original removal was proper or further, that Mr. Pinkerton’s deposition was not an “other paper” under § 1446(b). In fact, at no time during the proceedings in this Court did Kimberly Clark request that the Court be bound by an earlier order by the transferor court. Simply put, the Pharmacy Benefit Managers holding does not require a court to extrapolate unarticulated holdings from orders entered prior to a § 1407 transfer.

Kimberly Clark has offered no other valid reason why the § 1447(d) prohibition on appeal of an order to remand would not apply to the instant cases. As to Kimberly Clark’s objections to the specific findings that the Court made on the record at the April 23 hearing, the § 1447(d) bar to appealability applies even when a district court’s remand order is erroneous. See Cook, 320 F.3d at 435. Therefore, because the Court finds that § 1447(d) bars review of the Court’s order remanding these cases, Kimberly Clark’s motion to certify the cases for appeal is denied.

Even if § 1447(d) did not bar Third Circuit review in these matters, the procedurally correct remedy for Defendant is to seek a writ of mandamus, rather than a certificate of appealability under 28 U.S.C. § 1291. Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 222 (3d Cir. 1995). Because an order to remand a removed action is not a final judgment, a defendant must ask the court of appeals for a writ of mandamus which would compel the district court to exercise jurisdiction over the matter. Id. (quoting Thermtron Prods. Inc. v. Hermansdorfer, 423 U.S. 336, 352-53 (1976)). Defendant has not petitioned the Third Circuit for a writ of mandamus in these cases. Therefore, Defendant’s appeal is procedurally improper. An appeal may be dismissed for failing to petition for a writ of mandamus when that is the proper remedy. PAS v. Travelers Ins. Co., 7 F.3d 349, 357 (3d Cir. 1993) (“[w]e conclude that the proper method of

review in this case is by petition for writ of mandamus. Accordingly, we will dismiss the appeal.”) On the other hand, the Third Circuit may treat the notice of appeal as a petition for writ of mandamus, avoiding the dismissal of the appeal on a procedural defect. See Hudson United Bank v. LiTenda Mortg. Corp., 142 F.3d 151, 155 (3d. Cir. 1998) (“although we would be able to review the remand order only through a petition for mandamus, we may treat [appellant’s] notice of appeal as a mandamus petition.”)

Although Kimberly Clark has not properly petitioned the Third Circuit for a writ of mandamus, the Court will treat the notice of appeal as a petition for mandamus, and will evaluate the merits of Kimberly-Clark’s motion under a mandamus standard. A writ of mandamus is an extraordinary remedy, and will generally only issue if “the district court did not have the power to enter the order, and then ‘only if the party seeking the writ meets its burden to demonstrate that its right to the writ is clear and indisputable.’” In re Federal-Mogul Global, Inc., 300 F.3d 368, 379 (3d. Cir. 2002). The Supreme Court has identified “three conditions” that the petitioner must meet before a writ of mandamus will issue. A petitioner must first demonstrate that there are “no other adequate means” to attain the relief sought, second, that a right to the writ that is “clear and indisputable;” and, third, that even if these first two conditions are met, the reviewing court in its discretion must conclude that the writ “is appropriate under the circumstances.” Cheney v. U.S. Dist. Court for Dist. Of Columbia, 542 U.S. 367, 380-81 (2004).

In the instant case, at a minimum, Kimberly Clark fails to show right to the writ that is “clear and indisputable.” A writ may issue “only if the district court committed a ‘clear error of law’ at least approaching the magnitude of an unauthorized exercise of judicial power, or a failure to use that power when there is a duty to do so.” In re Federal-Mogul Global, Inc., 300 F.3d at 384. Kimberly Clark has not demonstrated any clear error of law which would approach the magnitude of an abuse of judicial power. In fact, the Court’s finding that the deposition transcript of Mr. Pinkerton was an “other paper” within the meaning of § 1446(b) comports with the majority position on the issue. See S.W.S. Erectors v. Infax, 72 F.3d 489, 494 (5th Cir. 1996); Peters v. Lincoln Elec. Co., 285 F.3d 456, 456-66 (6th Cir. 2002); Huffman v. Sul Holdings, Ltd. P’ship, 194 F.3d 1072, 1078 (10th Cir. 1999); Efford v. Milam, 859 F. Supp. 176, 180 (E.D. Pa. 1994) (decisions by the Fifth, Sixth and Tenth circuits and the E.D. Pa. which hold that

It is further **ORDERED** that Defendant's motion to recall remand of these cases and stay further remand pending appeal is **DENIED as moot.**

It is further **ORDERED** that these cases will be remanded to the 60th Judicial District Court of Jefferson County, Texas in accordance with the Court's order of May 6th, 2010 (doc. no. 25.)

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

deposition testimony and transcripts qualify as "other papers.") Therefore, the Court's decision remanding the cases to Texas state court is based on sound reasoning and does not represent a clear error of law amounting to an excess of judicial power. Therefore, Kimberly Clark can not demonstrate that it satisfies the requirements for the issuance of a writ of mandamus.