

RECORD NO. 02-2032

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**NORFOLK SOUTHERN RAILWAY COMPANY;
CSX TRANSPORTATION, INCORPORATED;
CONSOLIDATED RAIL CORPORATION;
AMERICAN PREMIER UNDERWRITERS INCORPORATED,
f/k/a Penn Central Corporation,**

Plaintiffs-Appellants,

v.

**CHIEF JUSTICE WARREN R. McGRAW;
JUSTICE ELLIOT E. MAYNARD; JUSTICE LARRY V. STARCHER;
JUSTICE JOSEPH P. ALBRIGHT; JUSTICE ROBIN JEAN DAVIS;
JUDGE MARTIN J. GAUGHAN, First Judicial District;
JUDGE A. ANDREW MacQUEEN, Thirteenth Judicial Circuit,**

Defendants – Appellees.

VARIOUS FELA CLIENTS OF JAMES F. HUMPHREYS AND ASSOCIATES, L.C.

Movant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
at CHARLESTON**

BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

On November 29, 2001, Appellants Norfolk Southern Railway Company, CSX Transportation, Inc., Consolidated Rail Corporation and American Premier Underwriters Inc., f/k/a Penn Central Corporation, (hereinafter “appellants” or “railroads”) filed this action in the United States District Court for the Southern District of West Virginia under 42 U.S.C. § 1983 and attempted to invoke the district court’s jurisdiction under the Constitution of the United States and 28 U.S.C. § 1331. JA at 13. Appellees, the individual Justices of the Supreme Court of Appeals of West Virginia and Judges MacQueen and Gaughan (hereinafter “Appellees” or “the Court”)¹, filed a Motion to Dismiss the railroads claims. JA at 29. On August 12, 2002, the district court granted Appellees' Motion to Dismiss and entered a final judgment order. JA at 63. Appellants timely filed their Notice of Appeal on September 6, 2002. JA at 65. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

¹ Subsequent to the filing of the Railroads’ complaint, Justice Robin Jean Davis replaced Justice Warren R. McGraw as Chief Justice of the Supreme Court of Appeals of West Virginia. Additionally, Senior Judge A. Andrew MacQueen retired and Judge Martin J. Gaughan was recused from presiding over the underlying asbestos litigation. Judges Arthur M. Recht and Booker T. Stephens were appointed in their stead. See, JA at 31.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it abstained from exercising its jurisdiction pursuant to the doctrine articulated in Younger v. Harris, 401 U.S. 37 (1971) and Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), where the dispute involved more than 5000 pending civil actions in the state courts of West Virginia in which the State of West Virginia maintained a significant interest, and where appellants clearly possessed an adequate opportunity to obtain relief on their federal constitutional claims in state court.

STATEMENT OF THE CASE

It has been widely recognized for decades that asbestos-related litigation represents a crisis for trial courts across the nation. While dockets swell with increasing numbers of asbestos-related filings, Congress continues to ignore the problem. As a direct result of this congressional inaction, courts have been effectively forced to adopt “innovative and often non-traditional judicial management techniques to reduce the burden of asbestos litigation.” State ex rel. Allman v. MacQueen, 551 S.E.2d 369, 373 (W.Va. 2001), quoting State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300, 304 (W.Va. 1996); see also, Ortiz v. Fibreboard Corp. 527 U.S. 815 (1999).

The West Virginia Constitution guarantees litigants prompt access to the State's judicial system. W. VA. CONST. Art. III, § 17; State ex rel. Bagley v. Blankenship, 246 S. E.2d 99, 102 (W. Va. 1978). The West Virginia Constitution also empowers the Supreme Court of Appeals of West Virginia to enact rules governing all West Virginia courts. W. VA. CONST. Art. III, § 3; Bagley at 104-5. Through the enactment of Trial Court Rule 26.01 (hereinafter "TCR 26.01") the Supreme Court of Appeals of West Virginia has sought to honor litigants' constitutional right to prompt access to the West Virginia court system in these, and other, mass tort cases.

The railroads like neither the rule, nor the West Virginia judicial system. See, footnote 3, intra. Eschewing the proper approach for challenging the constitutionality of TCR 26.01; that is, raising these constitutional objections with the state trial court, the Supreme Court of Appeals of West Virginia, and, if necessary, the Supreme Court of the United States, the railroads filed this case in the United States District Court for the Southern District of West Virginia, alleging that TCR 26.01 violates their due process rights under the Fourteenth Amendment of the United States Constitution.

On January 17, 2002, appellees filed a Motion to Dismiss the railroads' complaint on the abstention grounds articulated in the cases of

Younger v. Harris, 401 U.S. 37 (1971) and Burford v. Sun Oil Co., 319 U.S. 315 (1943) and Rule 12(b)(1)² of the Federal Rules of Civil Procedure. JA at 29. On August 12, 2002, the district court entered its Order dismissing the railroads' complaint pursuant to the *Younger* abstention doctrine. JA at 31-64. The railroads now appeal the district court's decision to abstain.

STATEMENT OF FACTS

I. INTRODUCTION

In a transparent attempt to justify the remarkable nature of the lawsuit they have filed, the railroads have filled their opening brief with invective and vituperative attacks against the West Virginia judicial system generally and the individual justices of the highest court in the State of West Virginia specifically.³ Further, the railroads have taken this opportunity to reassert the allegations set forth in their complaint and to reargue their position as to the alleged unconstitutionality of TCR 26.01. While the slanderous attacks on West Virginia's highest judicial officers are beneath the dignity of the Court to address, the railroads' arguments regarding the constitutionality of TCR 26.01 miss the point. The sole issue before this Court is whether the

² Appellant's incorrectly state that the district court dismissed their complaint for failure to state a cause of action upon which relief can be granted. Fed. R. Civ. Proc. 12(b)(6).

³ For example, appellants accuse the Court of intentionally violating defendants' due process rights through the creation and implementation of TCR 26.01's mass trial system (App. Br. at 4) and infer that the Court will shirk its constitutional duty with regard to any constitutional challenge asserted by a defendant involved in mass litigation (App. Br. at 26).

district court erred in its application of the *Younger* abstention doctrine. A brief review of the history of mass litigation in the State of West Virginia, the creation of TCR 26.01 and its application to mass tort litigation currently pending in the state courts of West Virginia highlights the reasons why abstention was absolutely proper in this case.

II. MASS TORT LITIGATION IN WEST VIRGINIA

Mass litigation,⁴ as that term has come to be defined, is a relatively recent phenomenon in the jurisprudence of the State of West Virginia. Due to its nearly ubiquitous use in industrial settings throughout the state, personal injury lawsuits arising from alleged exposures to asbestos fibers and asbestos-containing-products are the most notorious and well-

⁴ TCR 26.01 defines “mass litigation” as:

. . . two (2) or more civil actions pending in one or more circuit courts (a) involving common issues of law or fact in mass accidents or single catastrophic events in which a large number of people are injured; or (b) involving common questions of law or fact in “personal injury mass torts” allegedly incurred upon numerous claimants in connection with widely available or mass marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common questions of law or fact in “property damage mass torts” allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in “economic loss” cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury.

W. Va. TCR 26.01(c).

documented facet of the mass litigation problem. As various commentators have noted over the last twenty years, by their sheer volume asbestos cases threaten to “cripple the common law system of adjudication.” State ex rel. Appalachian Power Co. v. MacQueen, 479 S. E.2d 300, 303 (W. Va. 1996); citing, James A. Henderson & Aaron D. Tuerski, *Stargazing: The Future of American Products Liability Law*, 66 NYU Law Rev. 1332, 1336 (1991). Indeed, while no one was precisely sure how many asbestos-related cases were on the dockets of the various circuit courts in West Virginia, in 2001 the parties to those cases estimated that the number exceeded 8,000 cases. See, State ex rel. Allman v. MacQueen, 551 S. E.2d 369, 371 (W. Va. 2001).

Prior to the adoption of TCR 26.01, the West Virginia judiciary attempted to implement various innovative trial management methodologies to effectively litigate the massive number of asbestos-related cases. In all, six “mass trials” were conducted and an estimated 20,000 asbestos-related cases were resolved. Id. at 371. Contrary to conventional wisdom at the time, these herculean efforts led not to a reduction and elimination of asbestos cases, but instead to the continued filing of new claims.

There is no doubt that the “elephantine mess of asbestos cases” remains the most high profile problem for the judicial administration of West Virginia’s courts. However, it is by no means the only one. In recent

years the West Virginia judiciary has been confronted with a massive number of new filings involving a multitude of subjects. Mass litigation has recently been initiated in areas involving tobacco, the effects of diet drugs, and the massive property destruction caused by recent flooding in the mountainous terrain of southern West Virginia. It is against this backdrop of a new era of massive case filings and the administrative nightmare created by the sheer volume of those filings that TCR 26.01 was enacted.

III. THE ENACTMENT OF TCR 26.01

The West Virginia Constitution gives the Supreme Court of Appeals of West Virginia the power to enact rules governing all West Virginia courts. W. VA. CONST. art. VIII, § 3; State ex rel. Bagley v. Blankenship, 246 S. E.2d 99, 102 (W. Va. 1978). In an effort to create a more formalized mechanism to address the demands of the asbestos litigation juggernaut and other mass tort litigation, the Supreme Court of Appeals of West Virginia adopted Trial Court Rule 26.01. JA at 72-74. TCR 26.01 creates a “Mass Litigation Panel” (“MLP”) and charges the MLP “to develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation.” TCR 26.01(b)(1); JA at 72. The MLP consists of six active or senior status circuit judges, appointed by the Chief Justice with the approval of the full Supreme Court. “Mass

litigation” is defined by the rule as “two (2) or more civil actions . . . involving common questions of law or fact” in “personal injury mass torts,” “property damage mass torts,” or “economic loss cases,” each of which is defined by TCR 26.01. TCR 26.01(c), see also, ft.nt. 4, supra.

In addition to this mandate to develop and implement creative mass litigation strategies, MLP members are required to preside over and provide assistance in cases referred to the MLP; to recommend the transfer of actions and judicial assignments to facilitate case management and resolution; to recommend additional rules to the Supreme Court; and to take such “action as is reasonably necessary and incidental to the powers and responsibilities expressly conferred by the rule or by the specific directive of the Chief Justice. TCR 26.01(b)(6). Cases which qualify as “mass litigation” may be consolidated upon a motion for referral to the MLP made by “any party, judge or administrative director of the Courts.” TCR 26.01(e); JA at 73.

IV. THE APPLICATION OF TCR 26.01

Reacting to the growing volume of asbestos-related personal injury cases in West Virginia’s circuit courts, on June 27, 2000, Circuit Judges MacQueen and Recht filed a motion with then Chief Justice Elliot E. Maynard seeking the transfer of all currently pending asbestos litigation in West Virginia to the MLP. JA at 75. After receiving various submissions

from interested parties, Chief Justice Maynard sought a recommendation from the MLP and appointed Circuit Judge John A. Hutchinson, a member of the MLP, to hear evidence and file a report and recommendation. JA at 80. Judge Hutchinson held two hearings regarding the Referral Motion. The hearings revealed that not only could the parties not reach a consensus, but also the defendants could not agree amongst themselves as to a preferred procedure. While some asbestos defendants favored state-wide treatment of the asbestos litigation, some defendants, including the railroads, opposed transfer to the MLP. JA at 83-237.

On November 14, 2000, Judge Hutchinson recommended that all pending asbestos litigation be transferred to the MLP. JA at 239-42. Chief Justice Maynard accepted Judge Hutchinson's recommendation and, on November 17, 2000, issued an Order implementing Judge Hutchinson's conclusions. JA at 244-48. All pending asbestos cases were then transferred to the Circuit Court of Kanawha County, West Virginia and consolidated under TCR 26.01. JA at 250.

Following the transfer, the parties submitted various trial plans and proposed case management methodologies. Most plaintiffs advocated a single, bifurcated mass trial, while the majority of defendants sought "all issue" trials of single plaintiffs or small groups of plaintiffs. Ultimately,

Judge MacQueen decided to hold several “all issue” trials consisting of groups of 25 plaintiffs rather than holding a single, bifurcated mass trial. JA at 538-558.

Shortly thereafter, certain asbestos plaintiffs (*Allman, et al.*) petitioned the Supreme Court of Appeals of West Virginia for a writ of prohibition to prevent Judge MacQueen from holding anything other than “common issues” mass trials. JA at 254. On May 7, 2001, defendant Mobil Oil Corporation (“Mobil”) filed its own petition for a writ of prohibition to prevent Judge MacQueen from holding anything other than single plaintiff “all issue” trials. JA at 381. Mobil challenged TCR 26.01 as violating established West Virginia procedural rules, as unconstitutionally vague and as a violation of its due process rights. The two petitions were consolidated and considered by the Court together. See, State ex rel. Allman v. MacQueen, 551 S. E.2d 369 (W. Va. 2001). While the majority of defendants filed or joined briefs opposing the plaintiffs’ petition, the railroads did not. Rather, the railroads opted to file an *amicus* brief supporting Mobil’s petition. JA at 517.

On May 24, 2001, Judge MacQueen entered his First Master Case Management Order (“CMO”) setting forth his plan for conducting the initial “all issue” trials. JA at 538. The CMO contemplated a series of “all issue”

trials with 20-25 plaintiffs, beginning in September 2001, and continuing as necessary. The following day, Judge MacQueen also filed his response to the plaintiffs' petition for writ of prohibition. JA at 560.

On July 6, 2001, the Supreme Court of Appeals of West Virginia addressed both the Allman petition and the Mobil petition. The Court rejected the contention that TCR 26.01 was unconstitutionally vague and declined to address Mobil's due process arguments as premature. State ex rel. Allman, 551 S.E.2d 369, 371, n. 3, 373. Further, in response to defendants' procedural arguments, the Court noted that TCR 26.01 was not subject to decisions interpreting the rules of civil procedure inasmuch as TCR 26.01 stood on its own. Id. at 374.

As to the original CMO created by Judge MacQueen, the Court found that it did not go far enough in implementing the Court's Referral Order. To expedite the process, the Court ordered a "supervising judge" appointed. State ex rel. Allman at 551 S. E.2d at 376. The Court further ordered that all cases filed subsequent to the Referral Order be transferred to the MLP and that all future-filed asbestos cases be transferred to the MLP "upon motion of a party, or upon motion of a member of the Mass Litigation Panel, or upon motion of the supervising judge or the judge assigned to hear any case or trial group." Id. at 377-78. The Court required the "supervising

judge” to report to the Chief Justice as to his trial plans and requirements and to establish procedures “with a view towards commencing all trials no later than July 1, 2002, to provide for the expeditious disposal of the litigation.” Id. at 377.

On July 9, 2001, Chief Justice McGraw appointed circuit judge Martin J. Gaughan as supervising judge and confirmed the orders governing all recently and to-be-filed asbestos cases. JA at 599. Noting the Court’s mandate and his obligation to commence trials promptly while guaranteeing both parties’ right to a trial and due process interests, Judge Gaughan issued his initial report to the Chief Justice on September 6, 2001, along with orders governing mediation of the railroad FELA cases and the remaining asbestos cases. JA at 603-610.

After reviewing Judge MacQueen’s initial CMO and conferring with counsel, Judge Gaughan determined that the CMO was unworkable as its trial schedule would have consumed the West Virginia judiciary for decades. JA at 604. Judge Gaughan recognized that no authority guarantees that each individual plaintiff receive his or her own jury trial or requires that a single jury preside over the entirety of each case. Id. Judge Gaughan also found that “small mass trials” grouping common factors together was also unworkable, as so many claims and defendants overlapped all complaints.

Id. However, Judge Gaughan did find that the asbestos-related FELA claims could be effectively separated for trials and did so. Id. Judge Gaughan also ordered the parties to participate in mediation and canceled the mini-trials originally scheduled by Judge MacQueen so that the parties could focus on mediation. Id. Originally, Judge Gaughan set a trial date for the railroads FELA cases for October 29, 2002, over a year from the entry of his order. JA at 607.

Along with his report, Judge Gaughan filed an order requiring all railroads to participate in mediation. JA at 611-622. The mediation program was to start in September 2001 and to advance in three stages. Id. Judge Gaughan assigned mediators for the railroad cases on November 9, 2001. JA at 632. Cases which were not resolved by mediation were then to be transferred to a trial docket, at which point full discovery could commence.

The railroads filed their complaint in federal district court on November 29, 2001. One month later, Mobil Oil Corporation petitioned the Supreme Court of Appeals of West Virginia for a writ of prohibition preventing Judge Gaughan from implementing his trial management plan. JA at 635. A few of the asbestos defendants joined Mobil's petition. JA at 916. The railroads did not.

On April 25, 2002, the Court denied Mobil Oil's petition for a writ of prohibition. State ex rel. Mobil Corp. v. Gaughan, 563 S. E.2d 419, 425-427 (W. Va. 2002), cert. denied, 123 S. Ct. 346 (2002). Mobil subsequently petitioned the Supreme Court of the United States for a writ of certiorari and a stay of the state court proceedings. Mobil Corp. v. Adkins, U.S. July 24, 2002, No. 02-132. Mobil's request for a stay of the state court proceedings was denied, as was its petition for a writ of certiorari. Adkins at 123 S. Ct. 346 (2002).⁵

Following the Supreme Court's denial of Mobil's petition, and contrary to the railroads' assertion, two defendants, Union Carbide and AmChem, proceeded to trial. At the close of plaintiffs' case in chief, defendant AmChem successfully moved for a directed verdict. Union Carbide went on to present a defense to the jury and was found liable on some, but not all, claims that were presented to the jury. So, the process that the railroads describe as "designed to confuse juries and focus on the most injured plaintiffs while uninjured plaintiffs obtain windfall recoveries," resulted in one defense verdict and one partial plaintiffs' verdict. See, App. Br. at 20. To date, no individual plaintiff has received any recovery based

⁵ In an incredible example of judicial divination, the railroads' maintain that Mobil's petition for certiorari was denied due to the asbestos defendants' mad rush to settle cases on the eve of trial, thereby eviscerating Mobil's claims regarding the prejudicial joinder of numerous defendants. Of course, there is nothing in the record to substantiate this claim.

on the jury verdict, as individual damage trials are scheduled to be held in 2003. At those trials, Union Carbide will be afforded the opportunity to contest the damages claimed by each individual plaintiff.

On October 3, 2002, Judge Arthur M. Recht, now the supervising judge of the asbestos mass litigation, held a hearing regarding the disposition of the asbestos-related FELA cases. See, Transcript of October 3, 2002 Hearing, attached as Exhibit 1. As a result of that hearing, the court entered an order scheduling the first FELA trials. See, November 27, 2002 Order, attached as Exhibit 2. Judge Recht held that a consolidated trial of six FELA cases, with plaintiffs suffering from lung cancer allegedly linked to asbestos exposure, would commence on July 28, 2003 against a single railroad defendant. Plaintiffs' counsel were ordered to identify the single railroad defendant and the six plaintiffs and to provide the defendants with each work location, craft and all medical information by November 18, 2002. Id. Accordingly, as of the time of this writing, the railroads still have a full seven months in which to raise with the West Virginia state trial court the exact same federal constitutional claims that they attempted to assert in the district court.

SUMMARY OF ARGUMENT

The railroads' complaint seeks equitable relief in the form of "a declaratory judgment that TCR 26.01 operates in an unconstitutional manner because it deprives defendants of due process of law . . ." and a "declaratory judgment that the application of TCR 26.01 to join thousands of asbestos claims pending in West Virginia and automatically to refer all newly filed asbestos cases to the Mass Litigation Panel, violates due process; that joinder of multiple asbestos plaintiffs for trial violates defendants' due process rights to present a defense as it virtually guarantees jury confusion and a verdict in favor of the plaintiffs . . ." JA at 26-27. Accordingly, the district court was clearly correct in dismissing the complaint based on the principles of equity, federalism, and the "more vital" principle of comity⁶, embodied by the abstention doctrine set forth in Younger v. Harris, 401 U.S. 37 (1972), and its progeny.

The district court did not abuse its discretion when it abstained from exercising its jurisdiction pursuant to the *Younger* doctrine. *Younger* analysis is governed by a three-part test, which requires: (1) an ongoing state judicial proceeding that (2) implicates important state interests and (3) an

⁶ "Comity" is described by the United States Supreme Court as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger, 401 U.S. at 44.

adequate opportunity to present the federal claims in the state proceeding. Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Employers Res. Mgt. Co. v. Shannon, 65 F.3d 1126, 1134 (4th Cir. 1995). If the three conditions are met, as they clearly are in the instant case, the federal court must abstain and dismiss the claims that are subject to consideration in state court proceedings. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

The district court carefully examined all three elements of the *Younger* test and addressed each in a carefully crafted Memorandum Opinion. First, the district court easily found that there were ongoing state judicial proceedings. In doing so, the court did not need to venture far out onto the proverbial limb. There are more than 5,000 asbestos-related FELA cases currently pending in the state courts of West Virginia in which the railroads are defendants. Those pending actions clearly constitute ongoing state judicial proceedings “relating to” the challenged rule.

Second, the district court found that important state interests were implicated. The United States Supreme Court has “repeatedly recognized that the States have important interests in administering certain aspects of their judicial systems.” The district court found that West Virginia’s interest in “developing and implementing an innovative system, based upon Rule

26.01 to effectively manage issues unique to mass litigation and to control the overwhelming management issues presented by asbestos litigation, including the more than 5,000 state court actions pending against the railroads, plainly constitutes that type of significant state interest described in Younger and its progeny.” JA at 54.

Third, the district court found that the railroads had an adequate opportunity to raise the very same federal constitutional claims in the ongoing state judicial proceedings that they attempted to raise here. State courts are fully capable of considering federal constitutional issues. Indeed, the railroads did not, and cannot, show that the Supreme Court of Appeals of West Virginia is incapable of fairly considering a constitutional challenge to TCR 26.01. Instead, the railroads put forth a completely unsupported argument that the West Virginia judiciary will not be faithful to their constitutional responsibilities. This is the very type of argument that the United States Supreme Court has refused to consider. Huffman v. Purdue, Ltd., 420 U.S. 592, 611 (1975). The railroads have not raised their challenge in state court. They had, and they still have, the opportunity to do so!

ARGUMENT

I. Standard of Review

Appellants misstate the standard of review. The decision of a district court to abstain under the *Younger* doctrine is reviewed for abuse of discretion. Martin Marietta Corp. v. Maryland Comm'n on Human Relations, 38 F.3d 1392, 1396 (4th Cir. 1994).⁷ Although some circuits have ruled that *de novo* review is appropriate when a district court determines that remand is necessary, this Court has clearly stated that such a determination will be reviewed for an abuse of discretion. Id.; See also, New Beckley Mining Corp. v. International Union, United Mine Workers of Am., 946 F. 2d 1072, 1074 (4th Cir. 1991) (“We review the district court’s decision to surrender jurisdiction for abuse of discretion.”); Richmond, Fredricksburg & Potomac R.R., 4 F.3d 244, 250 (4th Cir. 1989) (“We review the district court’s decision to abstain for abuse of discretion.”).

⁷ Although Myles Lumber Co. v. CNA Fin. Corp., 233 F.3d 821, 823 (4th Cir. 2000) did apply a *de novo* standard of review to “whether a case satisfies the basic requirements of abstention,” it clearly states that such requirements are based on the determination of whether the relief being sought is equitable, in which case the court has discretion to consider abstention or a stay of proceedings, or damages, in which case remand is not an option. Myles at 823. Once the determination is made concerning the nature of the remedy sought, surviving claims are to be reviewed for an abuse of discretion. Id.

II. Discussion of the Issue

A. The railroads complaint seeks equitable relief, therefore, abstention was properly considered by the district court.

It is well established that a federal court has the authority to decline to exercise its jurisdiction when it “is asked to employ its historic powers as a court of equity.” Fair Assessment in Real Estate Assn., Inc. v. McNary, 454 U.S. 100, 120 (1981). When a suit involves equitable or discretionary relief, a district court may either stay the suit in favor of state court action, or “decline to exercise jurisdiction altogether by . . . dismissing the suit or remanding it to state court.” Quackenbush v. Allstate Ins. Co., 517 U. S. 706, 721 (1996). When an action is brought seeking damages, a district court may stay the action but, generally, may not dismiss it outright or remand it. Id. Therefore, whether the railroad is seeking equitable relief will determine whether the district court properly considered abstention.

The United States Supreme Court has recognized that the authority of federal courts to abstain from exercising their jurisdiction extends to all cases in which the court has discretion to grant or deny relief. Id. at 718. The doctrine is not limited to injunctive relief and includes certain classes of declaratory judgments. Id. For example, in Fair Assessment, the plaintiff sought to bring an action for damages as a result of an alleged

unconstitutional application of a state tax law. Fair Assessment at 115. The award of damages turned on a declaration that the state tax was in fact unconstitutional. Based on the fact that the recovery of damages would require a declaratory judgment concerning constitutionality, the Supreme Court approved the invocation of abstention principles. Id.; see also, Wilton v. Seven Falls Co., 515 U.S. 277, 282 (1995) (federal courts have “discretion in determining whether to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdiction prerequisites.”); Samuels v. Mackell, 401 U.S. 66, 69-70 (1971) (extending *Younger* abstention to declaratory judgment actions); Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293 (1943) (federal court must abstain from hearing declaratory judgment action challenging constitutionality of a state tax).

In their complaint, the railroads seek from the district court a “declaratory judgment that TCR 26.01 operates in an unconstitutional manner because it deprives defendants of due process of law . . .” and a “declaratory judgment that the application of TCR 26.01 to join thousands of asbestos claims pending in West Virginia and automatically to refer all newly-filed asbestos cases to the Mass Litigation Panel, violates due process; that joinder of multiple asbestos plaintiffs for trial violates

defendants’ due process rights to present a defense as it virtually guarantees jury confusion and a verdict in favor of the plaintiffs . . .”. JA at 26-27. The railroads’ complaint clearly seeks equitable relief. It asks the district court to guide and oversee the West Virginia Supreme Court in its interpretation and application of TCR 26.01. Accordingly, contrary to the railroads’ protestations, the district court properly considered abstention.

1. ***Younger* abstention is applicable to actions brought pursuant to 42 U.S.C. § 1983**

The railroads continue incorrectly to assert that abstention is particularly disfavored in actions brought pursuant to 42 U.S.C. § 1983. Further, the railroads now add that, by invoking the abstention principles found in *Younger*, the district court has somehow created a “categorical rule that invokes *Younger* abstention in any case challenging a state rule of civil procedure.” App. Br. at 29-30. This argument was unpersuasive at the district court level and is equally unpersuasive here.

In support of their argument, the railroads cite Mitchum v. Fosler, 407 U.S. 225, 242 (1972). Their reliance on Mitchum is misplaced. As appellees set forth below, in Mitchum itself, the Supreme Court took pains to note that by rendering its decision:

“ . . . we do not question or qualify in any way the principles of equity, comity and federalism that

must restrain a federal court when asked to enjoin a state court proceeding.”

Mitchum at 243.

Section 1983 is the most common vehicle by which state court defendants seek to make a federal case out of their objection to state court procedure. Indeed, the Younger case itself arose from the context of a §1983 case. Section 1983 cases are the largest category of cases in which the Younger abstention doctrine is applied. See, Huffman v. Purdue, Ltd., 420 U.S. 592 (1975); Pennzoil Co. v. Texaco, 481 U.S. 1 (1987). The railroads’ arguments have been made by dissenting opinions and, obviously, rejected. Huffman at 616 (Brennan, J., dissenting); Juidice v. Vail, 430 U.S. 327, 342-43 (1977) (Brennan, J., dissenting). The district court properly rejected the railroads’ attempt to create a “new” abstention rule for §1983 cases and moved to the traditional *Younger* analysis.

2. The railroads’ argument that *Younger* is inapplicable to “operational” or “facial” challenges is a fiction and is without merit

The railroads’ attempt yet again to wriggle free from the clutches of the *Younger* analysis by defining their lawsuit as an “operational challenge” and asserting a fictional abstention doctrine; that *Younger* is categorically inapplicable to “operational” challenges. Inasmuch as the railroads have

created this “new rule” from whole cloth and have no support for it, it is without merit and should be summarily rejected by this court.

As defined by the appellants, an “operational” challenge “does not contest that the bare language of Rule 26.01 is unconstitutional, nor is it a specific challenge to a particular decision to consolidate ongoing cases for a mass trial under the Rule. Rather the railroads’ operational claim attacks the way that Rule 26.01 operates in actual practice.” App. Br. at 30. In support of their argument that this type of challenge to TCR 26.01 is immune from abstention analysis, the railroads again rely on cases in which the holdings are inapposite to the issue. In each and every case cited by the railroads in support of this argument, the federal court found that the first prong of the *Younger* three-part test was not met. That is, in each case, the court found that there were no ongoing state judicial proceedings.

In the railroads’ leading authority, New Orleans Pub. Ser., Inc. v. Council of New Orleans (“NOPSI”), the term “operational” is never even used. That case involved a preemption challenge to state utility commission rate-setting. NOPSI, 491 U.S. 350 (1989). An electric utility sought injunctive and declaratory relief from an order of the city council. Id. Rather than supporting the railroads position, however, the Court in NOPSI rejected two proposed categorical rules similar to the railroads’ argument.

Id. at 364. The Court rejected two proposed categorical rules that assertion of a substantial claim that the challenged state action is completely preempted by federal law displaces *Younger* and that assertion of a substantial constitutional challenge categorically displaces *Younger*. Id. at 364, 365. Unlike the present case, *Younger* absence was held inappropriate in NOPSI for one simple reason: there was no ongoing state judicial proceeding. Id. at 357. Here there are more than 5,000 actions pending in state court, six of which have now been set for trial in July 2003.

The railroads' reliance on Wooley v. Maynard, 430 U.S. 705, 710-11 (1977), and Planned Parenthood League v. Bellotti, 868 F.2d 459, 467 (1st Cir. 1989) is equally unpersuasive. In both cases the federal court found that no ongoing state judicial proceeding existed. Obviously, those cases are distinguishable from this case.

The true thrust of appellants' argument appears to be that the district court erred by finding that the more than 5,000 pending asbestos-related FELA cases in which the railroads are defendants were "on-going state judicial proceedings relating to the challenged rule." JA at 49. The railroads argue that because the promulgation of TCR 26.01 was, in essence, an administrative or legislative act, the first part of the *Younger* test is not met.

The district court rejected the railroads’ attempt to put their complaint in a vacuum and shield it from the effects of the *Younger* analysis. It is undisputed that the railroads are parties to more than 5000 state actions. It is undisputed that TCR 26.01 is being applied in those state actions. The railroads were free, and remain free today, to assert an “operational” challenge to TCR 26.01 in any of these 5000 or more cases in the West Virginia trial courts, the Supreme Court of Appeals of West Virginia and, if necessary, the United States Supreme Court. As the district court correctly held, “whether the rule itself was promulgated pursuant to a legislative, administrative or judicial power is not determinative” of the issue of whether there are “ongoing state judicial proceedings.” See, Middlesex County Ethic Comm. V. GardenState Bar Assoc., 457 U.S. 423, 433-34 (1982) (holding that abstention under *Younger* was appropriate where plaintiff challenged the constitutionality of certain attorney disciplinary rules promulgated by the New Jersey Supreme Court under which the plaintiff’s attorney had been charged).

The railroads’ proposal that *Younger* analysis is inapplicable to “operational” challenges is without merit and the cases cited by the railroads in support of their argument are inapposite. The district court did not err by

rejecting the railroads argument and addressing the well-settled three-part *Younger* analysis.

3. **The railroads now seek an advisory opinion**

In their most extreme attempt to further insulate their complaint from *Younger* abstention analysis, the railroads now argue that they are in fact seeking nothing more than a mere declaration from the federal court that TCR 26.01 is unconstitutional. App. Br. at 39-41. According to the railroads, their federal lawsuit cannot affect ongoing state judicial proceedings because they are not asking for an injunction or other “coercive” relief and a declaratory judgment would not be binding on the state courts. *Id.* Rather, the railroads assert that they are requesting the federal court to review the state statute and issue a declaration that it is unconstitutional, but to take no further action.

In effect, the railroads are now arguing that their complaint should not have been subject to *Younger* abstention analysis because they were merely seeking an advisory opinion from the federal court! Such an argument only strengthens the reason to abstain. As the United States Supreme Court reiterated in *Pennzoil Co. v. Texaco, Inc.*:

Another important reason for abstention is to avoid unwarranted determination of federal constitutional questions. Where federal courts interpret state statutes in a way that raises federal

constitutional questions, a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time, thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless.

Pennzoil at 11; citing, Moore V. Sims, 442 U.S. 415, 428 (1979); and see, Trainor v. Hernandez, 431 US. 434, 445 (1977). Indeed, the Court further stated that “in some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised.” Id. at 12, n. 9.⁸

The Supreme Court’s admonition is particularly appropriate to this case if, as the railroads now allege, they truly seek nothing more than a declaration from the federal courts. What do the railroads intend to do with that declaration? Nothing? If true, then the railroads seek nothing more than an advisory opinion. Abstention in a case such as this is not only appropriate, but required regardless of whether there are pending state judicial proceedings. Id.

⁸ The Court was referring to the *Pullman* abstention doctrine, however, it noted that “considerations similar to those that mandate *Pullman* abstention are relevant to a court’s decision whether to abstain under *Younger*. The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.” Id.

B. The district court did not abuse its discretion when it found that all three of the *Younger* abstention factors were fulfilled and dismissed the case.

Consideration of abstention issues “begins with the basic proposition that abstention from the exercise of federal jurisdiction is the exception, not the rule.” Colorado River Water Conservation Dist. V. United States, 424 U.S. 800, 813 (1976). However, based on the principles of equity, federalism and comity, “there are some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is the normal thing to do.” New Orleans Pub. Ser. Inc. v. Council of City of New Orleans, 491 U.S. 350, 359 (1989) (quoting Younger, 401 U.S. at 44-45).

Younger analysis is governed by a three-part test. There must be (1) “an ongoing state judicial proceeding” that (2) “implicates important state interests” and (3) an “adequate opportunity to present the federal claims in the state proceeding.” Employers Res. Mgmt. Co. v. Shannon, 65 F.3d 1126, 1134 (4th Cir. 1995). This test has remained unchanged for thirty years.

1. There are ongoing state judicial proceedings.

According to the railroads' own pleadings, they are defendants in over 5,000 pending state court proceedings in which TCR 26.01 is being applied. In this case, regardless of how the railroads characterize their constitutional challenge, there is simply no avoiding the fact that the state procedural rule to which the railroads object is being applied to them in multiple pending state court proceedings. The sole purpose and the inevitable effect of the railroads' federal suit is to interfere with these state judicial proceedings. State courts should be permitted to try state cases free from the interference of federal courts. Younger, 401 U.S. at 43. The whole point of the railroads federal lawsuit is to stop TCR 26.01 from establishing the procedures by which those state court actions will be governed. "So long as those [federal] challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions in state-court litigation mandates that the federal court stay its hand." Pennzoil at 14. (*emphasis added*) The district court correctly found that these were ongoing state proceedings related to the railroads' federal challenges. Accordingly, the court did not err in finding the first element of the *Younger* analysis was fulfilled.

2. Important state interests are implicated.

The United States Supreme Court “repeatedly has recognized that the States have important interests in administering certain aspects of their judicial system.” Pennzoil, 481 U.S. at 12-13; see also Middlesex, 457 U.S. at 432 (1982); Trainor v. Hernandez, 431 U.S. 434, 441 (1977); Juidice v. Vail, 430 U.S. 327, 334 (1977); Richmond, Fredericksburg & Potomac R.R. Co. v. Forst, 4 F.3d 244, 251 (4th Cir. 1993). Operation of a judicial system is one of the fundamental attributes of sovereignty, and state proceedings involve an important state interest when they “concern the central sovereign functions of state government.” Phillip Morris Inc. v. Blumental, 123 F.3d 103, 106 (2nd Cir. 1999). Abstention on the basis of a state’s important interest in administering its own courts is therefore common.

As the Court below noted, the West Virginia Constitution, through the Judicial Reorganizational Amendment, “placed heavy responsibilities on the Court for administration of the state’s entire court system . . .” See, State ex rel Allman, 551 S. E.2d at 374 (2001). In accord with this responsibility, the Court adopted TCR 26.01 to deal with its crushing asbestos docket and other mass litigation.

The State of West Virginia has such an important interest in developing and implementing this innovative system to effectively manage

the issue unique to mass litigation. The district court did not err by finding that interest as constituting the type of significant state interest contemplated by *Younger* and its progeny. Accordingly, the district court properly found the second factor in the *Younger* analysis to be fulfilled.

3. The railroads have adequate opportunities to raise their federal constitutional claims in state court.

The railroads have never tried to obtain a hearing for the federal claims they have asked the federal court to decide. The railroads admit they are parties to over 5,000 pending actions in state court. Six cases have now been set for trial in July, 2003. See, Exhibit 2. When asked the dispositive question, “Did you have an opportunity to raise these claims in the state court proceedings?”, any answer other than “of course!” stretches the bounds of credibility. Not only did the railroads have such an opportunity, they still do! Contrary to the railroads doomsday, “the sky is falling” argument, six (6) cases have been set for trial on all issues.

There is absolutely nothing, other than their own dislike of the West Virginia judicial system and the West Virginia judiciary, to prevent the railroads from raising their “operational” challenge to TCR 26.01 in the state trial court. If they do not receive the relief to which they believe they are entitled, there is nothing preventing the railroads from seeking redress at the

Supreme Court of Appeals of West Virginia. Again, if the railroads remain frustrated, absolutely no impediment exists that would prevent the railroads from seeking a writ of certiorari from the U.S. Supreme Court.

The railroads repeat their meritless argument that the West Virginia Judges and Justices are disqualified from adjudicating challenges to their own procedural rules. The argument rests on the assumption that West Virginia's judges and justices will shirk their constitutional oaths and will not value a meritorious due process claim higher than their own rulemaking. As noted below and supra, such an argument, without support, is contrary to fact and law and requires an impermissible assumption under *Younger*.

The railroads also complain of the "settlement pressure" the mass litigation process creates. According to the railroads, the rule makes obtaining a windfall verdict for the plaintiffs as easy as falling off a log. The most recent mass trial, in which two defendants went to trial and one obtained a directed verdict, would seem to give the lie to the railroads argument. Further, it is readily apparent that in the fourteen months their federal action has been pending, the railroads could have asserted the same claims in any one of the 5,000 state court actions to which they are parties. It is obvious the railroads simply prefer to litigate in federal court. The

railroads' settlement argument is frivolous and should be rejected by this court out of hand.

CONCLUSION

In the present case there are 5000 state court judicial proceedings currently pending that are related to the challenged rule. The State of West Virginia maintains a significant state interest in managing the crushing asbestos docket and the railroads had, and continue to have, an opportunity to raise the exact same constitutional issues in the state court proceedings. Accordingly, the district court did not abuse its discretion when it abstained from exercising its jurisdiction pursuant to the principles set forth in Younger v. Harris and Pennzoil Co. v. Texaco Inc.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request that this appeal be set for oral argument.

Respectfully Submitted,

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