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From Inside TSCA

Republican AGs Say ‘Major Questions’ Doctrine Should Sink Asbestos Rule

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A coalition of 12 Republican attorneys general (AGs) says the landmark Supreme Court decision narrowing EPA’s climate authority under the “major questions” doctrine also undercuts the agency’s proposed TSCA rule that would ban chrysotile asbestos, though environmental and industry attorneys alike appear skeptical judges will embrace that argument.

In **joint July 13 comments**, the AGs argue that EPA’s Toxic Substances Control Act (TSCA) proposal “fails to account for whether EPA has statutory authority to impose a flat ban on Chrysotile Asbestos,” given the “major economic significance” of that decision.

While it acknowledges that the reformed TSCA passed in 2016 “permits the agency to limit or prohibit the distribution of dangerous substances under certain circumstances,” the letter says EPA’s ability to apply that authority to asbestos specifically has been weakened by Congress’ repeated failure to pass stand-alone asbestos ban bills in recent years.

“[T]he Rule also acknowledges that Congress has passed several other statutes that more specifically address the regulation of asbestos. As Congress has decided to take a measured approach to the regulation of Chrysotile Asbestos notwithstanding its known health risks, it is hard to see how EPA can use the general language of the TSCA to impose a flat ban on all commercial uses of the substance,” reads the letter, which is led by Texas AG Ken Paxton and signed by the AGs of Arkansas, Florida, Idaho, Indiana, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, and Utah.

It cites the **June 30 Supreme Court ruling** in *West Virginia v. EPA*, where a 6-3 majority of the court for the first time explicitly embraced a legal doctrine that novel agency rules with “vast economic and political significance” are only valid if authorized by a statute that “speaks clearly” on the subject at hand, even if conventional approaches to interpretation would otherwise support its policy.

But the ruling by Chief Justice John Roberts did not clearly define criteria for what makes something a major question. This has spurred predictions that *West Virginia* will embolden critics of EPA and other agencies to argue that a long list of rules have the “vast” consequences needed to trigger the doctrine, in hopes of convincing courts to strike them down under the new precedent.

The AGs’ arguments appear to be one such case, as they claim EPA’s proposed ban represents “a question of major economic significance.”

And while they say they “do not dispute” EPA’s conclusion that concern over asbestos’ human health risks have led to steep declines in the substance’s use, “the industries where it remains used -- particularly in the chlor-alkali and petrochemical industries -- remain of enormous economic significance and political salience. After all, the petrochemical industry contributes nearly $600 billion and 3 million jobs to the U.S. economy across 33 states.”

Further, they write that Congress’ refusal to pass several proposed **asbestos bills** means it has not spoken clearly in favor of a ban on the substance “in

the production of either chlorine or petrochemicals despite knowing the downsides."

Rather, the AGs continue, "as the proposed Rule implicitly recognizes, Congress has declined to ban the use of Chrysotile Asbestos outright. Instead, Congress has taken a more measured approach in requiring the removal of asbestos from areas where its health risks outweigh the benefits of its heat-resistance properties."

Skeptical Response

But environmental and industry attorneys alike -- including former Obama- and Trump-era EPA officials -- appeared skeptical of the AGs' arguments in comments to *Inside TSCA*, as they raised doubts over how decisive the history of asbestos bills would be in court, as well as the idea that Congress did not "speak clearly" on the subject of a potential ban.

"The legislative history is very clear that Congress wanted to remove statutory impediments that the decision relied on to overturn EPA's regulation of asbestos and could block regulation of other chemicals. The Congressional goal was to facilitate regulation of asbestos and chemicals like it," Bob Sussman, a former EPA official now counsel to the Asbestos Disease Awareness Organization (ADAO) and the group's president and co-founder, Linda Reinstein, told *Inside TSCA* in a joint statement.

The two argue EPA's proposed rule does not meet the any of Supreme Court's conditions for a "major question" -- that the agency is claiming "broad and previously unrecognized authority in statutory language," seeks to use it to address vast economic or social issues, and lacks any "explicit" authorization for that reading of the law, or "clear grant of authority from which it can be inferred."

They say TSCA includes "an explicit grant of authority for EPA to ban or restrict 'chemical substances' presenting an unreasonable risk of injury" -- a category that clearly includes asbestos -- and gave the agency discretion to apply that power.

And while the ADAO officials acknowledge that Congress has considered bills to ban asbestos -- which the group supports -- they argue that neither the sponsors nor stakeholders "asserted or implied that TSCA regulatory authorities did not apply to asbestos. Indeed, some groups questioned the need for legislation on the ground that TSCA already provided sufficient authority over asbestos."

Moreover, they say the economic impact of a chrysotile asbestos ban "is not remotely comparable to the sweeping national changes in the U.S. power supply system that were at issue in *West Virginia*."

Industry attorneys did not take as strong a stance against the AGs' claims but also expressed skepticism of the argument. Lynn Bergeson, managing partner of the chemicals-focused law firm Bergeson & Campbell, agrees that "Unquestionably, everyone wishing to challenge agency authority will raise the [major questions doctrine (MQD)] to oppose all but the most trivial of administrative rulemakings."

EPA's efforts to implement the 2016 TSCA reform law, known as the Frank R. Lautenberg Chemical Safety for the 21st Century Act, "will be no exception," she said. Specifically, she added, such suits could target the Biden administration's "**whole chemical**" TSCA risk findings, environmental justice protections under the toxics law, and the scope of "reasonably foreseen" uses for new chemicals.

'Well Settled' Authority

But she tells *Inside TSCA* that it "is less clear [] whether Lautenberg's relative recent passage and TSCA's celebrated and litigious history, especially with respect to authority to ban, will blunt the success of those efforts. Many of the issues EPA is seeking to address in implementing Lautenberg are not new and EPA's authority under TSCA to address risks deemed unreasonable is well settled, including EPA's authority to restrict or ban uses of a chemical substance EPA has determined to pose unreasonable risks."

She says "[r]egardless of the ultimate success of an MQD challenge to a Lautenberg rule, there is clear cause for concern with the destabilizing implications of *West Virginia*. At a time of sustained Congressional inaction, West Virginia imposes an additional burden agencies are ill-suited to shoulder as they struggle to address ever more daunting challenges."

Similarly, David Fischer, a former Trump EPA toxics official now counsel with the law firm Keller & Heckman, says "TSCA section 6 is a different provision than [Clean Air Act] section 111," and says the "confines of the *West Virginia* case remain to be established by lower courts."

While Fischer says that the AGs "raise an interesting application of the Major Questions Doctrine," he also argues "banning a substance should not be EPA's default option, given the concomitant societal and economic impacts that stem from a ban," but "should only be an option after careful analysis by EPA in full compliance with TSCA section 6."

He says that analysis "was not done in EPA's most recent asbestos risk management proposal," but does not dispute EPA's authority to consider such rules if it follows a strict enough procedure to craft them. -- *Maria Hegstad* (**mhegstad@iwpnews.com**)

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