

(Cite as: **101 F.3d 368**)

United States Court of Appeals,
Fifth Circuit.

In re ASBESTOS LITIGATION.

James FLANAGAN; David H. Middleton; Edee Cochran;
Esteban Yanez Ortiz; John
R. Allgood; Henry William Evers; Lester Eugene Taylor;
Safety National
Casualty Corporation, Appellants

v.

Gerald AHEARN; James McAdams Dennis; Charles W.
Jeep; James Drake; Juanita
Drake; James Ellison; Roland Dearborn; Judith Dearborn;
Kerwin Butcher,
Dir., Workers Comp., Director, Office of Workers'
Compensation Programs, U.S.
Dept. of Labor; Paul Cochran; Ida Beck; Marion Behee;
Longshore
Intervenor; William James Mitchell; Fibreboard
Corporation; Bethlehem Steel
Corporation; Continental Casualty Company; Pacific
Indemnity; Francis
McGovern; Owens-Illinois Inc.; Penn Mutual Life
Insurance Company; Columbia
Casualty Company; CNA Casualty Company of California;
Celotex Corp.; Daniel
Herman Rudd, Jr., on behalf of themselves and others
similarly situated;
Beverly White, on behalf of themselves and others similarly
situated; John
Hansel, on behalf of themselves and others similarly
situated, Appellees.

Nos. 95-40635, 95-40694.

Nov. 26, 1996.

Rehearing Denied Dec. 3, 1996.

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Chartered, Washington, DC, [Joseph B. Cox, Jr.](#), Cox &
Cox, Sullivan's Island, SC, [Harry Fred Wartnick](#), Wartnick,
Chuber, Harowitz, Smith & Tigerman, San Francisco, CA,
for Ahearn, Dennis, Jeep, Ellison, and Mitchell.

Eric D. Green, Boston, MA, for Dennis and Jeep.

[Bruce L. Ahnfeldt](#), Napa, CA, for Drake.

[Clinton A. Krislov](#), Krislov & Associates, Chicago, IL,

[Ronald W. Lupton](#), Stinson, Lupton and Weiss, Bath, ME,
for Roland and Judith Dearborn, Butcher, and Longshore.

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Penn Mutual Life Insurance Company.

*369 [Herbert Maurice Wachtell](#), [Meyer G. Koplou](#), [Stuart
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[Roy L. Stacy](#), [Dennis D. Conder](#), Dallas, TX, Andrew K.
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Brent M. Rosenthal, Steve Dan Baughman, Baron & Budd, Dallas, TX, Frederick M. Baron, Dallas, TX, Sidney Katherine Powell, Powell & Associates, Dallas, TX, S. Ann Saucer, Dallas, TX, for Edee Cochran, appellant.

Appeal from the United States District Court for the Eastern District of Texas; Robert M. Parker, Circuit Judge.

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion July 26, 1996, 5 Cir., 90 F.3d 963)

Before REAVLEY, DAVIS and SMITH, Circuit Judges.
[FN*]

FN* Judges King, Higginbotham, Barksdale, Benavides, and Parker are recused and did not participate in the consideration of the suggestions for rehearing en banc. Judge Dennis also did not participate.

PER CURIAM:

The court having been polled at the request of one of its members and a majority of the judges who are in regular active service not having voted in favor (FRAP 35 and Local Rule 35), the suggestions for rehearing en banc are DENIED.

JERRY E. SMITH, Circuit Judge, with whom GARWOOD, JOLLY, JONES, EMILIO M. GARZA and DeMOSS, Circuit Judges, join, dissenting:

I respectfully dissent from the failure of the court to grant rehearing en banc. The result of this litigation, as implemented by the district court and affirmed by the panel majority, is the first no-opt-out, mass-tort, settlement- only, futures-only class action ever attempted or approved. The issues presented are worthy of consideration beyond the level of circuit panel review.

Five of the active judges are disqualified from participating in this matter, and a sixth judge has elected not to participate in the consideration of the suggestion for rehearing en banc. Accordingly, it is not possible to determine whether, if all active judges were voting, a majority would decide to rehear this case en banc.

The applicable statute and rules require the affirmative vote of a majority of the active judges--here, nine of the seventeen active judges--for en banc consideration, as recused and non-participating judges are counted as members of the court for purposes of the calculation. [FN1] The effect in this *370 case is to require not a simple majority, but a supermajority of 82%-- nine of the eleven

participating judges--to favor reconsideration.

FN1. "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." 5TH CIR.R. 35.6. Under 28 U.S.C. § 46(c), rehearing en banc is "ordered by a majority of the circuit judges of the circuit who are in regular active service." See Fed.R.App.P. 35(a); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 4-5, 83 S.Ct. 1667, 1670, 10 L.Ed.2d 709 (1963); *Western P.R.R. v. Western P.R.R.*, 345 U.S. 247, 250, 73 S.Ct. 656, 657- 58, 97 L.Ed. 986 (1953); *Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295 (5th Cir.1993), *suggestion for rehearing en banc denied*, 13 F.3d 833, 834 (5th Cir.1994) (Smith, J., dissenting), *rev'd sub nom. NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995).

That onerous requirement has not been met. Accordingly, the appellants' only recourse, in order to obtain review of the difficult and novel issues presented, is to petition the Supreme Court for writ of certiorari.

101 F.3d 368

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