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COMMENTARY: Asbestos Litigation Amid The Covid-19 Pandemic: New Developments In 2020

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The Covid-19 pandemic has disrupted nearly every facet of the U.S. economy and operations across both the private and public sectors. The U.S. judicial system has been no exception, as courts across the country try to function in the "new normal" of virtual docket management and the remote adjudication of cases. The impact can be clearly observed in asbestos dockets that have experienced a decrease in filing and resolution rates nationwide as compared to prior years. However, despite the slowdown during the initial months of the pandemic, many courts handling asbestos cases have adapted to advance active dockets, and despite the substantial obstacles, several noteworthy developments have occurred thus far in 2020 in a number of key jurisdictions.

This article discusses the impact of the Covid-19 pandemic on the filing and resolution of asbestos cases in 2020; provides an update on asbestos defendants that have filed for bankruptcy protection this year; and provides insight into some important legal and legislative developments in several select jurisdictions.[1]

Impact Of The Covid-19 Pandemic

In March 2020, many of the state and federal courthouses closed or enacted remote procedures to file and resolve asbestos personal injury cases in response to state shut-down orders due to the U.S. outbreak of Covid-19. In response, legal professionals were forced to alter their law practices by working remotely and adhering to new court procedures for advancing and defending asbestos cases virtually.

Thus far, there have been a few bumps in the road in terms of due process as the courts and litigants continue to acclimate to the new remote environment. Several cases have involved issues with poor electronic connections, logistics concerning virtual depositions, document production limitations, and other complications with the new remote legal system. For instance, a defendant in a case in California recently filed a motion for a mistrial claiming that during a sidebar by the attorneys with the judge there was an alleged improper interaction between the plaintiff and several jurors in the virtual courtroom.[2] In West Virginia, the judge presiding over a consolidated docket of 38 mesothelioma and lung cancer cases involving hundreds of defendants, urged parties to settle rather than proceed with a "dreadful experience" of trying the cases under social distancing safety measures in the 4,000 square-foot Highlands Events Center. In another jurisdiction, a sports arena was to be used to conduct *voir dire*, but few responded to the juror summons they were sent.[3]

In terms of new filings, the pandemic appears to have impacted the rate of plaintiff law firms to bring new asbestos cases, resulting in a drop in overall case filings during the first half of 2020. As reported by KCIC in its 2020 Mid-Year Asbestos Litigation Update, the overall asbestos filings during

the first six-months of 2020 were down nearly 17% percent as compared to 2019 filing rates.[4] The decrease in overall filings included a 12% drop in mesothelioma filings, an 11% drop in lung cancer cases, and a 54.1% decrease in non-malignant claim filings. The decrease in non-malignant claims is mostly attributable to reduced non-malignant filings in the Baltimore, MD and Wayne County, MI dockets.[5]

The filings in many of the prominent asbestos jurisdictions showed significant case reductions including decreases in St. Louis, MO (-32%), Cook County, IL (-27%), Los Angeles, CA (-28%) and Kanawha, WV (-30%). The reduction of new filings in these jurisdictions was offset by increased filings over the first half of 2020 in jurisdictions such as New York, NY (7%), Philadelphia (12%), New Castle, DE (18%), Alameda, CA (22%), and San Francisco, CA (14%). The jurisdiction with the most annual asbestos filings, Madison County, IL, saw a 6% decrease in new asbestos cases during the first half of 2020.

The Next Bankruptcy Wave?

While the pandemic may have reduced the filing rate of underlying asbestos personal-injury claims, it doesn't appear to have slowed down the number of asbestos defendants seeking Chapter 11 bankruptcy protection as a means to globally resolve their asbestos liabilities. In the first six months of 2020, 4 companies filed for bankruptcy due to asbestos claims seeking to confirm plans under Section 524(g) of the U.S. Bankruptcy Code. While just a small sample, the last time asbestos litigation experienced this high of a volume of defendants exit the tort system and file bankruptcy in such a short time was during the 2000-2003 "bankruptcy wave" when 35 companies reorganized at an average of nearly 9 bankruptcies per year.[6] Chart 1 shows the number of asbestos related bankruptcy filings by year since 2010.

The defendants that have filed for bankruptcy in 2020 include ON Marine Services Company, LLC, Paddock Enterprises LLC, DPMB LLC, and Aldrich Pump/Murray Boiler. In bankruptcy filings, the debtors cite the previous bankruptcy wave of 2000-2003 as an inflection point in the litigation which created a dramatic increase in claims and costs to the remaining solvent tort defendants; costs which many of the 2020 debtors claim that over time led them to their own bankruptcy filings. In light of the 2020 filings, and other external risk factors tied to the potential impact of the pandemic on the economic health of defendant companies, it is this renewed insolvency risk that has many current asbestos defendants wondering if another bankrupt wave is occurring and how it may affect future filings, settlement values and trial risk. The following is a brief overview of the asbestos bankruptcy filings in 2020.

ON Marine Services Company

ON Marine Services Company ("ON Marine") filed for Chapter 11 bankruptcy protection on Jan. 2, 2020 in the Western District of Pennsylvania.[7] ON Marine's asbestos liability stems from the Ferro Division of Oglebay Norton Company, which manufactured asbestos containing refractory products for use in the steel making process from the 1950s to the 1970s. Since 1983, ON Marine has resolved over 182,000 asbestos cases with 95 percent of the cases resolved with no payment.

Prior to the filing of its petition, ON Marine faced approximately 6,000 asbestos personal-injury cases in 18 states. The pending stock of cases included 13% mesothelioma filings, 25% lung cancer cases, 9% other cancer filings, with the remainder of the claims either asbestosis or claims that did not signify a disease. In its filings, ON Marine reported that it has received $27,850,000 in insurance settlements to fund the proposed asbestos settlement trust to compensate current and future claimants. ON Marine currently has the exclusive right to file a plan of reorganization until Oct. 28, 2020.

Paddock Enterprises

Paddock Enterprises, LLC ("Paddock") filed for bankruptcy on January 6, 2020 in the bankruptcy court for the District of Delaware.[8] Paddock was created through a "corporate modernization transaction" that was consummated in December 2019 and which structurally transferred the legacy asbestos liabilities from Owens-Illinois Inc. ("Owens-Illinois) to Paddock. Owens-Illinois had been an asbestos defendant for decades due to its sales of the Kaylo brand of pipe covering and block insulation from 1948-1958 prior to selling the Kaylo business to Owens Corning Fiberglas Corporation. Prior to Paddock's filing, Owens-Illinois had historically resolved approximately 400,000

asbestos cases for nearly $5 billion.

In its bankruptcy filings, Paddock stated that financial and legal reasons led to its decision to file bankruptcy including (1) the uncertainty of the financial obligations related to administrative settlement agreements in a changing litigation environment, and (2) changes to Owens-Illinois financial reporting obligations under the Securities and Exchange Commission (SEC).[9] In regard to Owens-Illinois' financial reporting responsibilities, the company changed its accounting methodology to comply with the Financial Accounting Standards Board's Section 450 for contingent liabilities resulting in a total reserve of $722 million for its asbestos liabilities. Paddock is seeking to confirm a reorganization plan under Section 524g; a reorganization plan has yet to be filed in the case.

DPMB LLC

DPMB LLC ("DPMB") filed for bankruptcy on Jan. 23, 2020, in the Western District of North Carolina bankruptcy court.[10] The entity DPMB was created during a 2019 corporate restructuring of CertainTeed Corporation ("CertainTeed") in which CertainTeed's legacy asbestos liabilities were transferred to DPMB. CertainTeed's asbestos liabilities stem from its manufacture and sales of asbestos cement pipe, roofing products, joint compound and insulation products. DPMB stated in its bankruptcy filings that CertainTeed has historically spent over $2 billion in defense and indemnity payments to resolve asbestos cases prior to the filing.

According to bankruptcy filings, DPMB said its bankruptcy was ultimately precipitated by the dramatic rise of its asbestos liability following the bankruptcy wave in the early 2000s in which dozens of prominent asbestos defendants left the tort system and filed for bankruptcy protection.[11] In the 1980s and 1990s, CertainTeed participated in two asbestos case resolution defendant groups, the Asbestos Claims Facility ("ACF") and the Center for Claims Resolution ("CCR"), that shared defense and indemnity costs to resolve asbestos cases and allocated those costs to their members. DPMB stated that prior to the bankruptcy wave, CertainTeed defended on average 200 mesothelioma cases and it spent less than $10 million to settle cases in the 1990s.[12]

However, after the bankruptcy wave, CertainTeed's annual defense and indemnity costs skyrocketed, averaging between $80 million and $160 million from 2002 to 2019. That rise in defense expenditures was in response to a spike in mesothelioma claims filed against CertainTeed that went from an average of 200 cases prior to 2000 to more than 1,750 annual mesothelioma cases in 2002. To date, no reorganization plan has been filed in the DPMB bankruptcy proceedings.

Aldrich Pump/Murray Boiler

On June 18, 2020, Aldrich Pump LLC ("Aldrich") and Murray Boiler LLC ("Murray") filed for Chapter 11 bankruptcy protection in the Western District of North Carolina. Aldrich and Murray are two subsidiaries of Trane Technologies ("Trane"). Trane was created through a corporate transaction in March 2020 and is the new name of the original Ingersoll Rand Corp.

According to bankruptcy filings, Aldrich and Murray's asbestos liabilities stem from industrial heating and cooling equipment which often times included asbestos containing gaskets and other third-party component parts.[13] Historically, Aldrich and Murray paid less than $4 million to resolve asbestos claims in the 1990s prior to the 2000-2003 asbestos bankruptcy wave. However by 2019, the two units were spending close to $100 million annually to resolve asbestos claims and were named as defendants in approximately 70%.of all mesothelioma lawsuits. At the time of the bankruptcy filing, Murray and Aldrich had 8,200 pending mesothelioma claims and more than 90,000 other asbestos cases.

Key Developments in Select Jurisdictions

Although the pandemic may have slowed the rate of new asbestos tort filings and forced courts to adopt certain remote procedures, there were still several noteworthy changes in asbestos litigation in 2020 that are worth highlighting. This section will examine some of the legal and legislative developments that occurred this year in several key states.

California

The length in deposition time for plaintiffs in California asbestos cases has been a contested issue between plaintiff and defense counsel for years. To address the issue, California recently enacted legislation which imposes shortened time limits on depositions of plaintiffs in certain mesothelioma

cases.[14] The new truncated time limits attempt to find the balance between an appropriate length of time for plaintiffs while not threatening the due process rights of those companies who must defend themselves in cases with numerous defendants.

Under the new law that went into effect on January 1, 2020, depositions of plaintiffs in certain mesothelioma cases shall presumptively last no more than 7 hours. Depending on the number of defendants, the statute allows the court in its discretion to extend the length of such a deposition in individual cases up to 14 hours if defendants can make an adequate showing. To date, courts in California are still in the process of adopting case management procedures to implement the new legislation.

The desire to make depositions more efficient is not surprising and is supported by many defendants as well as plaintiffs. However, the California courts must recognize that it is improper to try to obtain such efficiency by sacrificing due process rights of defendants. Each defendant must have the ability to meaningfully examine the plaintiff about his or her alleged exposure to that defendant's particular product both to defend itself at trial and to establish the necessary foundation for summary judgment if warranted. Ferreting out this unique information for each defendant takes significant deposition time, and if there are multiple defendants against whom the plaintiff is alleging claims, then 7, and even 14, hours is often far from sufficient. Moreover, the common practice by asbestos plaintiffs' firms of naming dozens, if not hundreds, of defendants per lawsuit (*i.e.* over-naming) is problematic for the new 7-hour deposition time limit because many defendants against whom a plaintiff has no plausible claim must nevertheless spend deposition time establishing that fact.

From a defendants' perspective, it appears that the only way to make the new deposition time limitations work is to resolve as many key factual issues as possible in advance of the depositions so that they do not require the use of deposition time. Plaintiffs should be required to provide information regarding how many of the named defendants are actually at issue by the time the deposition begins. In addition to eliminating non-viable defendants prior to the deposition, plaintiffs should be required to provide basic information necessary to resolve plaintiff's claims, including identifying workplaces and other alleged exposure sites, timeframes, and alleged product exposure at the various sites. With this information at hand the deposition process could become much more efficient and the time limitation in many cases could be met under the new legislation.

Illinois

While the Covid-19 pandemic seems to have impacted the filing rates in Illinois, it will be interesting to see what, if any, changes in the interpretation of personal jurisdiction by Illinois courts will have on litigation in the state. On June 4, 2020, the Illinois Supreme Court in *Christy Rios et al., v. Bayer Corporation et al.,* recently considered whether *"Illinois may exercise specific personal jurisdiction over an out-of-state defendant as to the claims of out-of-state plaintiffs for personal injuries suffered outside of Illinois from a device manufactured outside of Illinois."*[15] In holding that it may not, the court further limited the exercise of personal jurisdiction over out-of-state defendants because a defendant's general activity in the state, unrelated to the claim, does not provide sufficient basis for exercising specific personal jurisdiction over that defendant.

The Illinois Supreme Court's ruling follows on a series of recent United States Supreme Court decisions addressing the scope of personal jurisdiction.[16] Despite this, several state courts across the country have faced arguments by plaintiffs in various states seeking to limit the application of the direction provided by the United States Supreme Court.

In *Bayer*, the defendant did not dispute that it directed certain activities toward Illinois. In its ruling, the Illinois Supreme Court focused on *"whether the nonresident plaintiffs' claims [arose] out of, or relate[d] to, those activities in any meaningful sense of the terms."* Specifically, the Court found no allegations that the product was manufactured in Illinois, that plaintiffs or their physicians received false information in Illinois, or that the nonresident plaintiffs' devices were implanted in Illinois. The Court further found that it would be unreasonable *"for the nonresidents' claims to proceed in Illinois"* because (1) the nonresident plaintiffs did not show how Illinois was convenient for the litigation, (2) Illinois had *"no particular interest in resolving claims that did not arise out of or relate to activities that occurred"* there, (3) plaintiffs' relief interest in Illinois did not justify finding personal jurisdiction as to nonresident plaintiffs, and (4) *"many nonresident plaintiffs initiated duplicate actions in California"* which showed that permitting their claims in Illinois did not further the interests of judicial

economy.

The practical effect of the ruling in Madison and St. Clair counties in Illinois — two of the nation's largest asbestos courts — where cases are overwhelmingly on behalf of non-resident plaintiffs, has yet to be seen. The United State Supreme Court is set to provide additional guidance in connection with two consolidated automotive product liability cases involving Ford Motor Company ("Ford"). In those cases, state supreme courts in Minnesota and Montana found personal jurisdiction proper over out-of-state defendant Ford even though (a) Ford did not design, manufacture, or sell the subject vehicles in the forum states; and (b) Ford's contacts with the forum states did not cause the accidents at issue.[17]

Iowa

In most jurisdictions around the country that handle a volume of asbestos cases, there is no current legal mechanism to ensure that there is a basis to file a lawsuit against a defendant based on credible evidence of exposure. As a result, plaintiff law firms typically name as many as 40-50 defendants (or more) on asbestos complaints even though the plaintiff will only claim exposure and identify the products and/or operations of a handful of the named defendants. This over-naming of defendants with no nexus to the plaintiff has become a prevalent practice in asbestos litigation. Absent a case management order or legislative measure to set general evidentiary standards at the beginning of an asbestos case, plaintiff law firms typically repeat this practice and name dozens of defendants in asbestos lawsuits even though history has shown that on average less than 10 defendants ultimately settle cases.[18] Often, the same boilerplate template appears repeatedly on asbestos complaints and the defendant listings are literally "copied and pasted" from case to case. On average, there was more than 65 defendants named in individual asbestos complaints in 2019.[19]

Recently, Iowa Governor Kim Reynolds addressed the issue of over-naming by signing first-of-its-kind legislation [Iowa Bill S.F. 2337] to curb this practice. The legislation requires asbestos plaintiffs (and silica plaintiffs) to provide a sworn information form with the initial complaint disclosing the evidence that provides the basis for each claim against each defendant. The sworn information form must include detailed information as to the plaintiff's exposures and their connection to each defendant. The court must dismiss the action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.

A recent study done by James Lowery of Gordon & Rees examined the over-naming issue in asbestos litigation and the costs to litigants and the civil justice system.[20] The study found that the practice has an adverse impact on the courts, defendants and plaintiffs. According to the study, the efficiency of the courts is inhibited by the inclusion of defense participants that don't belong in asbestos cases yet are forced to appear because they were named in the complaint. The defendants themselves incur defense costs related to deposition, discovery and dismissal motions that over time can add up to be quite substantial. The over-naming practice also burdens the asbestos plaintiffs during the deposition and discovery phase as they must answer questions about products or operations from dozens of defendants in which they have no exposure.

Modernizing the asbestos tort through legislation like the Iowa bill should reduce much of the unnecessary transaction costs related to over-naming that is curiously prevalent in a 40-year old mature litigation. It will be interesting to see whether other state courts and legislatures take steps to address the over-naming problem.

Maryland

For decades the Baltimore City asbestos docket has been enmeshed in debates over the best way to reduce a backlog that in recent years reached more than 30,000 cases, with the vast majority of those either nonmalignant claims or claims with little or no impairment. The Law Offices of Baltimore Orioles owner Peter Angelos filed about two-thirds of those cases and over the last eight years unsuccessfully petitioned the Baltimore Court, and more recently lobbied the Maryland legislature, to consolidate the thousands of cases for mass trials as was done in the 1990s.

After the legislature failed to consider a consolidation bill in its 2020 session, the Angelos firm changed course.[21] This is because the legislation was unnecessary. Indeed, during the prior two years, the Maryland judiciary had implemented a case management program that sharply reduced the number of pending asbestos cases, focusing on status conferences that pushed the plaintiff firms

to address the viability of numerous pending actions.

In March of this year, the Angelos firm started voluntarily dismissing 350 of its cases each month. In addition, The Law Offices of Peter Nicholl says its firm has been voluntarily dismissing about 150 of its cases each month. At a teleconference in July, lawyers from these two plaintiffs' firms told Judge W. Michel Pierson they would continue to dismiss those number of cases each month. In return the firms asked the Baltimore Court to suspend its very successful status conferences; a review of 500 court-selected cases a month to determine if the cases are viable and ready for trial or nonviable and should be dismissed.

Defendants strongly opposed any suspension of the status conferences saying they have been very effective in reducing the backlog of cases. A lawyer for the Wallace and Gale Settlement Trust, which is named in almost every case on the docket, told the Baltimore Court that as a result of the status conferences 3,400 cases or 75-percent of the cases reviewed so far, have been dismissed because they were not viable to stand trial. He said the percentage of cases being dismissed is expected to increase as the cases move through the review process.

The Baltimore Court did not abolish the status conference system but did put the program on hold through the end of 2020 as long as the plaintiff firms keep up their promised rate of dismissals. The Baltimore Court is also requiring the plaintiff law firms to start scheduling cases for trial in November. While this approach may be attractive to the Baltimore Court – the court keeps up the rate of dismissals without having to devote court resources to monthly status conferences – the current process effectively gives the plaintiff firms unfair control over the docket and provides them the ability to decide which cases get set for trial.

New York

A recent decision by the New York Appellate Division, First Department, could have a significant impact on causation standards in the New York City Asbestos Litigation (NYCAL). The recent case of *Nemeth v. Brenntag North America* concerns the plaintiff's claim that using the defendants' talcum powder products caused the plaintiff to contract mesothelioma.[22] The jury found that the defendants' talcum products contained asbestos and the plaintiff's exposure proximately caused the plaintiff to contract mesothelioma.

In its ruling on April 9, 2020, the New York appellate court considered whether the evidence of causation was sufficient under the well-established test set forth by the New York Court of Appeals in *Parker v. Mobil Oil Corp.*[23] In *Parker*, the Court required that any toxic tort plaintiff show: (1) the plaintiff's exposure to a toxin; (2) the toxin is capable of causing a particular illness; and (3) the plaintiff was exposed to sufficient levels of the toxin to cause the illness. After Parker, a New York court in the *Matter of NYC Asbestos Litigation* dismissed a plaintiff's claim based on expert testimony that the plaintiff's asbestos exposure was "regular" because merely being "regularly" exposed to products containing asbestos as an auto mechanic was not sufficient exposure to satisfy causation.

In *Nemeth*, the Appellate Division appeared to erode the causation requirements that the New York City court established for asbestos cases. The *Nemeth* court emphasized that *Parker* "*recognizes that mathematically precise quantification of exposure to a toxic substance, years after a plaintiff's exposure to such substance, may be impossible and, consequently, alternative means of proof should be available for an injured plaintiff to pursue what may otherwise be a valid claim*." Thus, the Court found that general proof about asbestos and mesothelioma was sufficient, as well as plaintiff's testimony about exposure to talcum dust.

If upheld, the *Nemeth* decision would undercut science-based arguments on the heavily-litigated issue of causation in asbestos litigation. Rather than requiring the plaintiff's expert to specify the level of exposure to asbestos fibers necessary to cause the disease at issue, the court accepted that exposure to asbestos in excess of ambient air levels could cause various forms of mesothelioma in general was a legally sufficient "quantification" of exposure to demonstrate specific causation. If followed, the decision would thus ease plaintiffs' burden of providing causation in New York asbestos litigation, creating a separate track for asbestos litigation with a different set of evidentiary standards as compared to other toxic tort litigation.

Pennsylvania

Thus far in 2020, two recent decisions by the Pennsylvania Supreme Court have resulted in less certainty in asbestos litigation.

First, in February, the Pennsylvania Supreme Court in *Roverano v. John Crane, Inc.*, et al, addressed a jury's apportionment of liability in strict liability asbestos cases.[24] The Court held that Pennsylvania's Fair Share Act ("FSA") requires liability to be apportioned equally among strictly liable joint tortfeasors (*i.e.*, on a per capita basis), and that the act permits the inclusion of bankrupt entities on the verdict sheet—assuming appropriate requests and proofs are made—if the bankrupt entity was either joined as a defendant or has entered into a release with the plaintiff.

The *Roverano* Court's per capita mandate for strict liability complicates asbestos litigation in the state considerably given the hybrid theories of liability typically at issue. Today's asbestos litigation involves a broad spectrum of defendant companies and rarely involves defendants sued solely based upon strict liability. As such, the per capita allocation for defendants sued for strict liability causes significant confusion where liability may be shared with defendants sued for negligence.

The *Roverano* ruling also creates practical issues with the structure of a verdict sheet for any matter with both strict liability and negligence defendants. Cases that face both theories of liability, a "hybrid case," will be wrought with myriad of complications that will be subject to the determinations of trial court judges that can lead to unpredictable outcomes. Lack of predictability as to how a particular defendant's liability may be assessed will make settlement difficult insomuch as it provides for no meaningful ability to predict how a case may be valued, and worse, inconsistent valuations that may lead to less cases being resolved prior to trial.

Further, when these hybrid cases reach juries, competing allocation schemes will not allow for a total valuation of responsibility by a jury. If a jury is required to consider some parties' liability by way of relative responsibility through a percentage fault allocation, *i.e.*, pro rata, while other defendants' responsibility must be assessed on an equal share basis, *i.e.*, per capita basis, confusion is bound to follow. In the absence of an assignment of a percentage as against less than all defendants, it may also lead to improper speculation by a factfinder.[25]

More recently on July 21, 2020, the Pennsylvania Supreme Court issued a ruling in a toxic tort case that could impact the use and admissibility of experts in asbestos and other mass tort litigation. In *Walsh v. BASF*, the majority ruled that a trial judge improperly barred two expert witnesses from a case concerning an alleged link between pesticides and cancer finding that the trial court had undertaken an "*overly expansive*" view into the testimony of two plaintiff experts.[26] The Court ruled that when evaluating whether methodologies used by proffered experts are generally accepted in their fields, the trial court had to limit its analysis solely to how an expert's analysis was conducted. Specifically, the high court said that *"The trial court may consider only whether the expert applied methodologies generally accepted in the relevant field, and may not go further to attempt to determine whether it agrees with the expert's application of those methodologies or whether the expert's conclusions have sufficient factual support."*

In a dissenting opinion, the Chief Justice warned that the limited analysis would allow jurors to be presented with unreliable expert testimony.[27] Indeed, the Court's opinion, by limiting the trial court's gatekeeper role, leaves juries to decide challenging scientific issues with little guidance from the court.

South Carolina

Although it has only recently become a more active asbestos jurisdiction, the South Carolina asbestos docket has attracted a great deal of attention over the past several months. Much of the recent attention is tied to a 2017 appointment by the South Carolina Supreme Court that allowed retired South Carolina Supreme Court Chief Justice Jean Toal to preside over the state's asbestos docket. Since the appointment, a number of Judge Toal's rulings have resulted in greater scrutiny as asbestos litigation in South Carolina has developed a reputation for what many consider plaintiff-friendly rulings which have included severe discovery sanctions on defendants in almost every case. For example, in one asbestos case, after a jury returned a defense verdict, Judge Toal declared herself the "13th juror," in effect hanging the jury resulting in a mistrial.[28] In at least two other trials, Judge Toal increased the amount of damages awarded by juries, in one case increasing the award to a plaintiff and his wife by more than $1.6 million.

Not surprisingly perhaps, there has been an increase recently in the number of defendant challenges to Judge Toal's rulings, including three separate writs to the South Carolina Supreme Court asking it to intervene in pending asbestos cases. As one example, Zurich America petitioned the Supreme Court to force Judge Toal to recuse herself from litigation involving the insurer saying "her impartiality can easily be questioned" after Judge Toal declared an asbestos defendant company to be the alter ego of Zurich and other carriers. The Supreme Court denied Zurich the writ on procedural grounds. Judge Toal also recently backed away from a ruling consolidating five asbestos cases involving 141 defendants into one trial after dozens of defendants filed numerous objections, including noting that Judge Toal made the initial ruling without hearing from defendants first. However, the status of those cases, and whether and to what extent they may be consolidated, still remain unresolved.

Recently an appeal to the South Carolina Supreme Court of another of Judge's Toal's rulings consolidating for trial two completely different talc cases against Johnson & Johnson over the company's Baby Powder product was dismissed. Unfortunately in this instance the state's high court will not get the opportunity to provide trial courts and litigants with guidance on how asbestos trials in South Carolina may proceed in the future.

West Virginia

In West Virginia, Judge Wilson, who is responsible for the state's asbestos docket, has expressed concern with a number of challenges presented by West Virginia's vast asbestos docket and the impact of those challenges on his goal of pushing cases to settlement.

Earlier this year, Judge Wilson appeared to raise concerns about over-naming. West Virginia asbestos cases typically have dozens of defendants and often name more than 100 individual defendant companies. Judge Wilson initially noted that his ability to resolve cases was undercut by "those who abuse the liberal civil procedure" by "suing questionable defendants." When questioned regarding the comment, Judge Wilson explained that he was simply asking plaintiff's attorney to be careful when they sue a particular defendant to make sure that they have enough information to prove that their client was exposed to asbestos from that defendant's product.

More recently Judge Wilson has expressed his concerns about trying cases during the Covid-19 pandemic. In connection with an upcoming consolidated trial, including 38 mesothelioma and lung cancer cases that have more than 100 defendants each, Judge Wilson noted it would be "a dreadful experience." In preparation for that massive trial, Judge Wilson ruled that:

> If you have filed motions for summary judgments or a continuance, you may assume they have been denied. I have had to pick and choose motions that I thought had to be ruled on prior to trial. There were too many motions for one judge to consider, and that is something we have to accept in mass litigation cases. And, after the trial, you always have your right to appeal to the Supreme Court of Appeals of West Virginia – or settle your case.

Judge Wilson made clear that the consolidated trial would not be continued, however. No doubt his inability to resolve all motions and warnings about the likely trial experience were impactful as all the cases settled. Nevertheless, in connection with a separate trial setting in an individual mesothelioma case, Judge Wilson continued the trial, noting that it would be an awful experience:

> I do believe that a jury trial that takes place next year in an atmosphere where people are not fearful of catching a virus that could take their life will be in everyone's best interest.
>
> I also have to consider that the trial could last for 2 weeks in the environment of a trial where everyone is wearing masks, and jurors, attorneys, clients, witnesses, and the judge, all separated by 6 feet, with the judge, the attorneys, and the witness trying to communicate. Not only is that an awful experience, but it also takes away the jurors' ability to make credibility judgments -wearing a facemask is not the same as making judgments about a person based upon their facial expressions and their reactions to questions. It does, in the court's opinion, affect the ability of good lawyers to be good lawyers. The ability to communicate is not the same when one has to address jurors 6 feet apart, and the ability to effectively cross-examine witnesses and make effective opening statements and closing arguments.

How West Virginia and, the rest of the country, address the issues of moving forward mass asbestos dockets in the face of Covid-19 will be interesting. The pandemic has been virtually the only interruption in the history of asbestos litigation as it has forged a path in United States courts over the course of more than 40 years. As resourceful as any in the legal community, state and federal courts that preside over asbestos dockets, as well as asbestos litigants, will continue to adapt to the present and ever-changing circumstances. Going forward, it will be imperative for the parties to work together to creatively implement new practices in light of the pandemic and continue to improve the efficacy of asbestos case resolution, now and when the pandemic is over.

Endnotes

1. This article is obviously not meant to be exhaustive as a number of courts continue to move their asbestos dockets forward. For example, a federal court recently reaffirmed the constitutionality of North Dakota's Trust Transparency Act. *Kotalik v. AW Chesterton*, No. 3:18-cv-246 (D.N.D. July 8, 2020).
2. *Wilgenbusch v. American Biltrite*, No. RG 19029791, Calif. Superior, Aug. 19, 2020
3. https://www.law.com/texaslawyer/2020/05/28/conference-center-courtrooms-harris-county-judges-searching-for-space-for-socially-distanced-voir-dire/
4. 2020 Mid-Year Asbestos Litigation Update, KCIC, Aug. 12, 2020
5. 2020 Mid-Year Asbestos Litigation Update, KCIC, Aug. 12, 2020
6. https://www.crowell.com/files/list-of-asbestos-bankruptcy-cases-chronological-order.pdf
7. *In Re: ON Marine Services Company LLC*, No. 20-20007, W.D. Pa. Bkcy.
8. *In re: Paddock Enterprises, LLC*, No. 20-10028-LSS, D.Del. Bkcy.
9. *In re: Paddock Enterprises, LLC*, No. 20-10028-LSS, D.Del. Bkcy., Declaration of David J. Gordon, President and Chief Restructuring Officer of the Debtor, in Support of Chapter11 Petition and First Day Pleading, Jan. 6, 2020.
10. *In re: DBMP LLC*, No. 20-30080, W.D. N.C., Bkcy.
11. *In re: DBMP LLC*, No. 20-30080, W.D. N.C., Bkcy.; Informational Brief of DBMP LLC, Jan. 23, 2020
12. CertainTeed's share of settling cases through the CCR was less than 3% of the collective CCR settlements.
13. *In re: Aldrich Pump LLC et al.*, No. 20-30608, W.D. N.C. Bkcy.
14. Code of Civil Procedure section 2025.295
15. https://courts.illinois.gov/Opinions/SupremeCourt/2020/125020.pdf
16. *BristolMyers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).
17. *Ford v. Montana Eighth Judicial District Court*, 443 P.3d 407; *Ford v. Bandemer*, 931 N.W.2d 744.
18. *In re Garlock Sealing Technologies, Inc.*, No. 10-31607 (Bankr. W.D. N.C.), "Report of Charles E. Bates, PhD," February 15, 2013, Trial Exhibit GST-0996.
19. Asbestos Litigation: 2019 Year in Review, KCIC
20. *See, e.g.* James Lowery, *The Scourge Of Over-Naming In Asbestos Litigation: The Costs To Litigants And The Impact On Justice* Mealeys: Asbestos (2018)
21. Vincent Palmiotto, *Maryland Asbestos Mediation Bill Deserved To Fail*, Law 360 (September 4, 2019).
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