

KEY ISSUES IN THE U.S. ASBESTOS TORT SYSTEM IN 2022

After more than 50 years, the national asbestos litigation machine is running as smoothly as ever in 2022. Although the massive wealth transfer engendered by this ongoing enterprise has remained constant, the litigation process has and continues to evolve, particularly as new defendants are joined and new, creative theories of liability are asserted. What follows is a short summary of some key issues in U.S. asbestos litigation today.

What's Old Is New: The Primacy of Historical Corporate Transactions

For at least the past 40 years, many U.S. industries have undergone significant acquisition and consolidation activity domestically and globally. Industries with dozens of individual competing companies in the 1970s and 1980s may have now consolidated into a few dominant players as the result of acquisitions in which smaller companies were incorporated into larger survivors. As a result, many asbestos defendants today may have asbestos liability arising not from their own activities, but liabilities they inherited from prior acquisitions whose products have not been manufactured or sold for decades and were usually not in the old company's inventory or even known by the buyer at the time of the purchase. It is no surprise, therefore, that most asbestos complaints these days feature more and more companies named as a "successor" to one or more old, now defunct entities. Asbestos litigants now spend considerable time tracking down and assessing responsibility for yesteryear's products, giving the party with a keener understanding of the factual and legal consequences of past transactions a distinct advantage.

What's New Is Old: Finding New Witnesses to Reveal Old History

It has been decades since most products incorporating asbestos were discontinued. As a result, each passing year takes asbestos litigants further from the historical events giving rise to the design, manufacture and sale of obsolete products. The march of time presents a challenge for litigants attempting to discover reliable information about these old products. Stated another way, it is becoming more difficult to find knowledgeable witnesses, particularly in the context of inherited legacy liabilities, and in situations when a current defendant has no information about the employees or the historical activities of a long-ago acquired company. This challenge is especially true when it comes to preparing corporate witnesses, who are expected to testify on behalf of a company about events occurring in many instances before they were born. As time passes, litigants must become more creative. Plaintiffs have more difficulty obtaining necessary information about old products while defendants strive to meet discovery obligations.

A New Role for Legal Experts in Asbestos Cases

As noted above, the circumstances and legal consequences of multiple historical transactions on the question of legacy asbestos-related liabilities held by current defendants necessarily require the review and interpretation of complicated transaction documents. Because these are generally not fact questions, this type of case creates an emerging role for legal experts to gather and sort the voluminous, sometimes confusing documentation, to identify and interpret relevant provisions, and to opine with respect to the proper disposition of legal liability for plaintiffs' claims based mostly on



contract law and the governing corporate statutory and case law. The expert's role also includes identifying the proper party, if any, with legacy liabilities.

Two-Sided Discovery on Historical Practices?

Traditionally, plaintiffs and defendants in asbestos litigation have engaged in segregated discovery. Plaintiffs divulged family background, medical and financial information surrounding the claimant while defendants revealed all manner of historical corporate conduct and product-related information. However, the plaintiffs' bar has been active in asbestos litigation for decades and in many cases plaintiffs' firms have come to possess more relevant historical and background information than many targeted defendant companies. This is especially true of defunct entities and obsolete products. Many courts are now more amenable to considering whether plaintiffs must now disclose such historical information in their possession, custody or control.

Insurers Continued Dominance Over the U.S. Asbestos Tort System

As they should, insurers have always been keenly involved in asbestos litigation, but they continue to consolidate their control over the litigation risk that their policyholders face both individually and collectively in the U.S. asbestos tort system. Over the years, original insurers have transferred and aggregated their coverage obligations to many individual defendant-policyholders to claims managing entities, which, in turn, control the litigation partly by assigning defense counsel and making key strategic and tactical litigation decisions about the course and consequence of asbestos lawsuits. In many cases, one insurance claims management provider and its single hired law firm make decisions on behalf of multiple defendants, all of which are parties in many of the asbestos cases filed in the U.S. While the insurers consolidate control and decision-making into centralized claims management functions, the input and influence of the policyholder on important decisions may wane. Litigants now recognize that the asbestos litigation system is increasingly managed by claims organizations which control the litigation conduct of large percentages of all defendants in individual cases.

Post-COVID Jury Verdict Risk on the Rise

For over two years, courthouse closures caused by the COVID-19 pandemic have prevented plaintiffs' lawyers from securing jury trial dates for high value asbestos cases. As restrictions ease, courts are beginning to tackle the backlog. Some jurisdictions are more aggressive than others in addressing the civil case jury logjam. As a result, defendants will face jury verdict risks that have been largely absent during in the past two years. Moreover, as Americans emerge from the frustrations and anxiousness wrought by the pandemic, it is widely recognized that companies may face a generally unsettled and even angry jury pool looking simply to strike back and make someone pay.

Conclusion

The asbestos tort system has always been a challenge and with new and emerging issues, it will remain so in 2022.

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