

Practical Advice

Product & Environmental Liabilities

Key Issues in the U.S. Asbestos (and Talc) Tort System in 2023

The national asbestos litigation machine is running at full speed even though the system is more than five decades old. The machine is national in scope, but it only operates in relatively few state and county jurisdictions. Although the individual courts where asbestos claims flourish generally remain the same, the one salient and persistent feature of this vast litigation enterprise is that it is both readily adaptable and constantly evolving. In recent years, claims of injury allegedly caused by asbestos-like structures in talc have increased both in volume and value. What follows is a short summary of some key issues in the U.S. asbestos tort system for 2023.

New Defendants

As traditional asbestos defendants exit the litigation primarily through bankruptcy proceedings, the search to identify and implicate new defendants and new industries remains a top priority for the plaintiffs' bar in many jurisdictions. Fifty years ago, the primary asbestos defendants were mining operations, raw asbestos suppliers and thermal insulation manufacturers. After several years, those defendants went bankrupt, and the litigation migrated to other manufacturers or suppliers providing products and fittings incorporated into heating systems in homes, businesses, industry and ships. After another round of high-profile bankruptcies removed a number of heating product manufacturers in the early 2000s, the litigation expanded to capture additional defendants in a variety of industries supplying retail, commercial or industrial products, some part or piece of which may have contained any quantity of asbestos. That trend continues today.

Until several years ago, most traditional asbestos defendants were large companies with long manufacturing histories. With most of the major manufacturers already bankrupted or mired in the litigation, there appears to be an increasing trend for adding medium and small manufacturing companies to the list of regular asbestos defendants. Smaller manufacturing or supply companies are simply showing up more frequently in case captions.

More recently, product manufacturers incorporating industrial or cosmetic talc in their products have been added to the roster. Today, product manufacturers or suppliers that incorporated asbestos or talc into their products are often joined in the same cases. It is now much more common to find cosmetic talc manufacturers and traditional asbestos product defendants sitting together at the defense table at trial.

New Names for Old Defendants

As the search for new defendants continues, old companies that have not been in existence for decades are reappearing in asbestos litigation. Over many years, old companies have been acquired by bigger companies – many of which have nothing to do with asbestos. However, buyer companies now find themselves sued for legacy asbestos liabilities for obsolete products that they never manufactured or for operations that were closed and divested long before the acquisition. It is now very common to see captions like: “New Company, Inc. formerly known as or successor in interest to Old Corporation” under circumstances where “Old Corporation” and its products have not existed for decades.



These new defendants often present complicated factual and legal questions on the subject of successor liability to plaintiffs' counsel, defense lawyers and the courts. In most cases, the apparent simplicity of the party's name in the caption belies the often complex analysis to trace legacy liabilities through a tangled (and sometimes incomplete) corporate transactional record.

New Names for Old Legacy Liabilities

An emerging trend is developing on the defense side in which longtime asbestos defendants are restructuring and divesting legacy asbestos liabilities by consolidating and transferring legacy liability, available insurance coverage and cash to a separate entity, which then undertakes the ongoing defense and administration of the asbestos tort system. Under these structures, the consolidation and transfer company has a new and different name from the contributing entity. As a result, new names for old defendants are popping up.

It will be interesting to see whether these transactional devices for addressing legacy liabilities will become more popular and whether the new claims management entities will alter the way plaintiffs and defense counsel approach individual cases.

Corporate Knowledge of Historical Events

Asbestos counsel on both sides recognize the increasing difficulty of identifying fact witnesses with knowledge of relevant events from more than 50 years ago. Plaintiffs are often able to sidestep this challenge by noticing a corporate representative to testify in discovery with respect to historical topics. Plaintiffs can use the discovery process to obtain a record of corporate knowledge about historical facts, many of which are beyond the ken of living witnesses.

Plaintiffs' counsel has a distinct advantage in some courts by being able to selectively use certain lines of the corporate deposition transcript at trial, while, at the same time, objecting to defendants' use of other lines of the same deposition transcript for completeness, context or rebuttal. Some courts are inclined to allow plaintiffs' select lines of corporate deposition hearsay testimony on an admission against interest exception, while upholding the hearsay objection if the corporate representative lacks personal knowledge of the events.

On the other hand, historical facts are sometimes necessary to establish proof of plaintiffs' case, but if those facts are unavailable to the company after a reasonable investigation, plaintiffs may be unable to assemble the proofs necessary to support some or all of its case, particularly in the trending line of cases where plaintiffs are naming new companies for the legacy liabilities of old, outdated, and long-gone brands and entities.

Mixed Cosmetics and Industrial Products

Large verdicts against manufacturers using talc in their cosmetics and personal hygiene products have been reported over the past few years, although in fairness, there have been a few key defense verdicts. Interestingly, the talc litigation process seems to be tracking the early days of asbestos litigation because some of the main suppliers of talc (and the recipients of some big plaintiffs' verdicts) have opted for bankruptcy or restructuring relief from the tort system. As such, and following form, plaintiffs are widening the scope of defendant targets on the talc side of the litigation, while still targeting the major talc mining and supplier defendants that do not have bankruptcy stay relief.

Another interesting development is that while many past cases seemed to follow a “cosmetic talc track” or a “industrial asbestos track,” more cases are proceeding on a mixed theory of exposures to both. These days it is not uncommon for a cosmetic talc product manufacturer to share the defense table at trial with a traditional asbestos product defendant. As such, the asbestos litigation and talc litigation are merging into one blended asbestos tort system with some defendants holding legacy liabilities for asbestos, some for talc, and some for both.

These cases present strategic and tactical headaches for both sides, particularly in keeping the focus of a jury. It remains to be seen which side can take better advantage of this wide-ranging case structure.

Conclusion

The asbestos (and talc) tort system has always been a challenge and with new and emerging issues, it will remain so in 2023.

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