

Asbestos

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Commentary

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[Editor's Note: Mark Behrens and Cary Silverman are attorneys in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. Kevin Underhill and Christine Edwards are attorneys in the firm's San Francisco office. Erin Sparkuhl is an attorney in the firm's Orange County office. Messrs. Behrens and Silverman submitted comments to the Philadelphia Court of Common Pleas' Complex Litigation Center on behalf of numerous national and state business associations urging the adoption of procedural changes discussed in this article. Copyright © 2012 by Mark Behrens, Kevin Underhill, Cary Silverman, Erin Sparkuhl and Christine Edwards. Responses are welcome.]

Introduction

Courts handling several of the nation's largest asbestos dockets have recently altered their procedures or replaced judicial leadership, and more changes are on the horizon. The Philadelphia Court of Common Pleas' Complex Litigation Center abandoned its controversial practice of involuntary reverse bifurcation, limited trial consolidations, continued the deferral of punitive damages claims, and placed restrictions on appearances by out-of-state attorneys. Madison County, Illinois, stopped its unique system of reserving trial slots for large numbers of asbestos cases. The San Francisco Superior Court may rescind most Asbestos General Orders. In Southern California, the asbestos litigation in Los Angeles, Orange, and San Diego Counties has been consolidated under

a single judge who may take similar action. New York City has a new special master. Liaison counsel for plaintiffs and defendants in Massachusetts have agreed to a protocol for bankruptcy trust claims discovery. Significant changes are also underway in the federal asbestos multidistrict litigation in Philadelphia, MDL No. 875.

Many of these reforms reflect a growing recognition that practices that developed in another era of the asbestos litigation may no longer fit the circumstances of today. Now entering its fourth decade, the litigation continues to evolve and courts' practices need to change too. Critical media coverage of jurisdictions that have been magnets for asbestos claims, along with shrinking state budgets, also may have served as catalysts for a reexamination of practices that was long overdue.

Philadelphia, Pennsylvania

In November 2011, Pennsylvania Supreme Court Chief Justice Ronald Castille appointed the Hon. John W. Herron as administrative judge of the Trial Division of the Court of Common Pleas of the First Judicial District.¹ The First Judicial District is the judicial body governing Philadelphia County. Chief Justice Castille noted that appointing Judge Herron would "give the Supreme Court more direct control and involvement in some of the issues facing the First Judicial District."² These issues included a poor image

by defendants regarding the fairness of certain procedures employed by the Court of Common Pleas in asbestos and other mass tort cases.

Soon thereafter, Judge Herron made improvements. On February 15, 2012, the Philadelphia Court of Common Pleas' Complex Litigation Center (CLC), which manages asbestos and other mass torts, issued General Court Regulation No. 2012-01.³ The new regulation significantly altered the protocol governing mass torts cases.

General Court Regulation No. 2012-01 ends involuntary reverse bifurcation of mass tort cases, significantly limits consolidation of mass tort cases at trial (absent agreement of the parties), and continues the court's practice of deferring punitive damage claims in asbestos cases. The regulation also tightly limits *pro hac vice* appearances by out-of-state attorneys. The regulation followed the court's issuance of a Notice to the Bar two months earlier, inviting brief comments from the legal community on these practices. The CLC's action will help restore balance to asbestos litigation in Philadelphia and should deter the filing of cases that have no connection to Pennsylvania if judges follow the spirit of the regulation.

In recent years, the CLC had come under intense scrutiny, largely as a result of a perception that its procedures for mass tort cases favored plaintiffs and were unbalanced. The court's leadership did not discourage that view. President Judge Pamela Pryor Dembe expressed a desire to make the CLC even more attractive to attorneys, "so we're taking away business from other courts."⁴ The *Legal Intelligencer* characterized President Judge Dembe's remarks, and the reappointment of Common Pleas Judge Sandra Mazer Moss as the center's coordinating judge in 2009, as part of a "public campaign to lay out the welcome mat for increased mass torts filings."⁵ Philadelphia Common Pleas Judge William J. Manfredi, supervising judge of the civil section of the trial division, observed with satisfaction that "[m]ass tort cases are being filed here because the parties are interested in coming to Philadelphia once again. It comes back to our case management system."⁶

Some questioned whether the goal of fairness was paramount in an environment that emphasized expediency and promoted the filing of claims. An empirical study

by Joshua D. Wright, a law and economics professor at George Mason University School of Law in Virginia, documented "systemic biases" in Philadelphia's civil courts.⁷ Jim Copland of the Manhattan Institute called the Philadelphia court system a "profit center" given the amount of filing fees pulled in from out-of-state cases.⁸ For two years running, the American Tort Reform Foundation listed Philadelphia as the nation's top Judicial Hellhole, largely due to "the attractiveness of the CLC to plaintiffs from across the country."⁹ Media reports echoed such views, drawing attention to the unfairness of CLC's practices.¹⁰

The preface to the new regulation acknowledges that the court changed its procedures "[i]n an effort to consider and address a number of concerns and criticisms of this Court's Mass Tort Program and the Asbestos Program in particular." In fact, the court's own examination of its docket validated those concerns. Judge Herron found that the court's inventory of asbestos cases had increased each year since 2006, and the court's disposition rate had not kept pace with filings, leading to a significant backlog. As a result of members of the court's leadership "invit[ing] the filing of asbestos cases from other jurisdictions," Judge Herron wrote, the percentage of out-of-state claims in the CLC jumped from about one-third of filings from 2001 to 2008, "soared to 41%" in 2009 and "reached an astonishing 47%" in 2011.

Due to the influx of claims, Judge Herron observed that it became even more difficult for the court to meet the American Bar Association's suggested standards for resolving cases within two years. "The Asbestos Program was by far the one Mass Tort Program most out of compliance with the standards," while certain types of pharmaceutical litigation also did not meet ABA goals. Given the surge of filings and backlog, Judge Herron concluded that the court's procedures with respect to asbestos claims "may not at the present time meet the needs of the citizens of the Commonwealth for the prompt and fair resolution of these claims, while at the same time addressing the claims of non-Pennsylvania residents."

The court's February 2012 order takes two significant steps that will help level the playing field – elimination of the consolidation of unlike claims at trial and the imposition of reverse bifurcation on defendants.

Deciding multiple cases with different exposures and injuries in a single trial places efficiency over fairness.¹¹ The CLC's order addresses this problem in a manner that is fair to plaintiffs and defendants. The order provides, "Consolidation of mass tort cases shall not occur absent an agreement of all parties" with certain exceptions. Going forward, cases will proceed in groups of eight to ten, but no more than three of these eight to ten cases may be consolidated for trial. This is significant. The other five to seven cases must either be resolved through settlement or returned to the Coordinating Judge for regrouping and relisting for trial.

Furthermore, cases proposed for consolidation must involve the law of the same state, same category of disease (i.e. mesotheliomas, lung cancers, other cancers, and non-malignancy cases), and same plaintiffs' law firm. Cases where Philadelphia-based plaintiffs' firms serve as local counsel for out-of-state attorneys are not to be grouped with other cases from the local firm. In addition, the court will not consolidate cases in which Pennsylvania's enactment of limits on joint liability, the Fair Share Act, would apply to some of the claims but not others. The court will separate cases involving pleural mesothelioma from mesotheliomas originating in other parts of the body. Non-pleural mesothelioma cases will be further classified for trial, so that occupational exposure cases are not tried on a consolidated basis with para-occupational (bystander) exposure cases.

The court's elimination of involuntary reverse bifurcation is another significant step forward. When courts use this procedure, the jury is asked to decide general causation (that the plaintiff's injury resulted from exposure to asbestos) and compensatory damages in the first phase of a trial. Decisions concerning liability and product identification are reserved for later. When phase one of the trial finishes, the judge encourages the parties to settle. If they fail to settle, then the same jury will decide liability.

Use of reverse bifurcation first emerged during the initial flood of asbestos-related litigation in the 1980s, as the CLC attempted "to eliminate a grossly flooded and overburdened docket of asbestos cases."¹² At that time, reverse bifurcation may have made sense; the primary defendants were typically major manufacturers of asbestos products whose liability was difficult

to dispute. The litigation environment has changed significantly since that era. Defendants today are often remote and causation can be hotly contested. Reverse bifurcation in this environment is abused as a club to force settlements by tainting the jury with sympathy occasioned by knowledge of the severity of the plaintiff's injuries before it considers whether the defendant is responsible for those harms.

In addition, the CLC wisely chose to continue its longstanding practice of deferring punitive damage claims for asbestos cases, and extended that practice to all mass tort claims. In 1986, Pennsylvania courts were among the first to recognize it is sound policy to preserve resources for future asbestos claimants. At that time, Judge Richard Klein observed that "[i]f punitive damages are allowed in the face [of] so many major defendants filing for bankruptcy, it is very possible that some plaintiffs will get a windfall of punitive damages while others find that the money is gone by the time their cases come to trial."¹³ The policy supporting deferral is even stronger today than when the practice was first adopted.¹⁴ Nearly 100 companies have been forced into bankruptcy under the weight of asbestos litigation, including many over the last decade.¹⁵ The financial viability of remaining solvent defendants continues to be threatened both by the litigation and the challenging economy. It would have been particularly ill-advised to reintroduce punitive damages to augment economic pressures on employers and raise the specter that future cancer victims could be left without timely or adequate recoveries.

With respect to forum shopping, the February 2012 regulation takes only a modest step, limiting *pro hac vice* admissions to two trials per year and generally requiring that all discovery take place in Philadelphia. In so doing, the order limits the work of non-Pennsylvania bar members, but not the filing of claims that arise outside of Pennsylvania. Thus, the order effectively preserves and potentially increases the business of local law firms.

The preamble to the Court's regulation, however, "cautions out-of-state plaintiffs to seek other venues to file their claims until and unless this Court's revisions have successfully resolved the backlog of outstanding claims and achieved compliance with the ABA suggested standards." This philosophy may be

reflected in a ruling issued by Judge Moss just days before the February 15 order. In that case, the claimants, a husband and wife, lived in Texas, their exposure to asbestos occurred in Texas, the employers at issue were located in Texas, and the co-workers and physicians who would serve as witnesses, as well as business and medical records, were located in Texas. Although some of the asbestos products were allegedly manufactured or assembled in Philadelphia, supporting jurisdiction and venue, the court found that the doctrine of *forum non conveniens* favored dismissal.¹⁶

Finally, Judge Herron's order provides new leadership for the CLC's asbestos docket. Effective May 1, Judge Arnold New will join Judge Moss as Co-Coordinating Judge of the CLC. Judge Moss will assume senior status at the end of the year, at which time Judge New will serve as the sole coordinating judge for the CLC and its Mass Torts Program.

Madison County, Illinois

Madison County is another jurisdiction that has been criticized for its civil litigation practices.¹⁷ Located in the Metro-East region of St. Louis, nearly one-quarter (23.5%) of all mesothelioma cases in the entire U.S. were filed in Madison County in 2011. Like Philadelphia, Madison County has recently altered its procedures to eliminate a systemic advantage provided to plaintiffs' lawyers and changed court leadership over the asbestos docket. The new procedures, however, at least in early application, do not appear to balance the playing field or discourage out-of-state plaintiffs and their attorneys from taking advantage of the loosely interpreted forum laws by the Madison County judiciary.

Over the last decade, Madison County's asbestos docket has ebbed and surged. In 2003, asbestos filings in the county peaked at 953. After public scrutiny of the magnet jurisdiction, at least one prominent Madison County plaintiffs' firm shifted some filings to Delaware. Delaware was viewed as attractive because so many companies are incorporated there. By 2006, asbestos filings in Madison County reached a low point of 325. The American Tort Reform Foundation moved Madison County off its Judicial Hellholes list to the "Watch List" in 2007.

More recently, however, the number of asbestos filings has steadily increased — 455 in 2007, 639 in

2008, 814 in 2009, and 840 in 2010.¹⁸ In 2011, asbestos filings returned to their 2003 level — 953.¹⁹ Only about one in ten of Madison County's asbestos cases are filed by people who actually live or work there, or have any other connection to the area.²⁰ According to one local defense lawyer, asbestos claims account for nearly sixty percent of Madison County suits seeking more than \$50,000, eclipsing the claims of local residents.²¹ In January 2012 report, Madison County reclaimed its dubious status as a Judicial Hellhole.

The Madison County Circuit Court received particular criticism from the defense bar because of the court's unique practice of reserving trial dates for large numbers of asbestos cases to be handled mostly by local plaintiffs' firms.²² The trial reservation originated to help resolve localized controversies. It has remained in place, however, and was no longer being utilized for its original purpose, turning Madison County into an open forum for asbestos lawsuits from around the nation. In fact, as of February 1, 2012, approximately sixty-five percent of all cases first set for trial on the 2012 calendar were filed after the trial dates were awarded.²³

The asbestos trial reservation system acted like a magnet because it created an oversupply of trial dates on a compressed pre-trial schedule.²⁴ The system allowed the local plaintiffs' law firms to market the empty trial dates to referring attorneys outside of Illinois with the promise of quick trial dates and resolution of cases.²⁵

Madison County Circuit Court Judge Barbara Crowder planned on continuing this trial allocation practice in 2013. In December 2011, she set about 500 slots for asbestos trials, allocating eight of every ten trial dates to three local law firms.²⁶ One firm alone, Simmons Browder, received nearly forty percent of the trial slots. Days later, the three law firms that received the most favorable treatment contributed \$30,000 towards Judge Crowder's November 2012 retention election campaign, according to Judge Crowder's campaign finance reports.²⁷

After a public outcry ensued, Chief Judge Ann Callis reassigned Judge Crowder from the asbestos docket and replaced her with Judge Clarence Harrison.²⁸ After hearing from both plaintiffs' and defense counsel,²⁹ Judge Harrison "dealt a swift blow" to the trial reservation system.³⁰ On March 29, 2012, he issued

an order finding “no continuing need for the pre-assignment of trial settings” and revoking the 2013 preliminary trial assignments.³¹

Going forward, Judge Harrison will set cases for trial on a case-by-case basis, giving priority to cases with elderly or dying claimants. It may take eighteen months to see whether the elimination of the trial reservation system will have an impact on the number of cases filed. At the next asbestos docket call following the March 2012 order, over 100 cases were set for trial on the 2013 trial calendar.

San Francisco, California

The San Francisco Superior Court has traditionally handled the largest asbestos caseload of any superior court in California.³² A decline in filings and severe budget shortfalls have prompted the court to consider changes to its longstanding system of Asbestos General Orders.

Change has been in the works for at least two years. The court attempted to streamline its system beginning in 2010, when Presiding Judge James McBride announced the creation of a new asbestos department that would be overseen by a single judge (with the aid of a commissioner). At the time, San Francisco still had the largest asbestos caseload in the state, with more than 1,600 active cases. (During the previous year, asbestos cases had accounted for an amazing forty-five percent of jurors summoned for civil trials in the county.) Judge Harold Kahn took over the new department, and within a year or so had managed to cut the caseload nearly in half, to 850, partly through a series of global case settlements. In 2011, however, continuing budget problems forced the court to announce that it would have to cut forty percent of its workforce and close twenty-five courtrooms. This move increased the pressure for reform across the board.

After serving as the “asbestos” judge for a year and a half, Judge Kahn was replaced by Judge Teri Jackson in October 2011. Although Judge Jackson had pledged to continue to handle the asbestos department much as Judge Kahn had, shortly thereafter the court’s new presiding judge, Katherine Feinstein, proposed an Order [Case No. 828684], which would rescind almost all of the existing General Orders.³³ The proposed order would do away with the practice

of grouping asbestos cases according to plaintiffs’ firm, personal injury or wrongful death, and disease.³⁴ The General Orders would also cease to play a significant role in managing fact or expert discovery. A few specific General Orders would be retained, but the order essentially proposes phasing out the existing system by the end of 2013. Opinions as to whether this sweeping approach is necessary, and which if any General Orders should continue, are widely varied and have triggered heated debates.

Not surprisingly, given how well the system has served them, plaintiffs’ attorneys almost unanimously oppose doing away with the General Orders. Gil Purcell, a partner in the firm that handles the majority of asbestos cases in San Francisco, has encouraged the Court to “step back and pump the brakes” because the Court is “off in an area where [it has] no data.”³⁵ He believes that it would be a “mistake” to dispose of the General Orders. Similarly, his partner Alan Brayton predicted that rescinding the General Orders would recreate the “dysfunction which existed before the general orders were put into place.”³⁶ Other plaintiffs’ attorneys also expressed concern, describing the court’s *sua sponte* order as an unexpected “shot . . . out of the blue.”³⁷

The comments from asbestos defense firms have been mixed. Berry & Berry, which has long served a coordinating role as “Designated Defense Counsel,” has urged caution, calling for a more “deliberative process” than the Court’s sweeping order.³⁸ Generally, however, defense firms looked forward to the dismantling of the system, noting the declining caseload and the “hoary and outmoded” nature of the Orders.³⁹

Initially, the court stated that the General Orders would be rescinded by the end of 2011, allowing limited time for submission of comments. Judge Jackson later decided this timeline was unrealistic and deferred action until July 2, 2012.⁴⁰ She did, however, order the plaintiff and defense bar to form a joint committee of twelve members (six from each side). This committee is required to meet with her and produce three reports, after which the court will make its final decision.

For now, therefore, the General Orders are in place and the committee has been wrangling over what changes to recommend. The committee’s first report

to Judge Jackson identified 53 General Orders as obsolete.⁴¹ Although such action makes it appear as if the committee is making progress, there are a few notable, more widely-used, General Orders missing from this list. For example, General Orders 129 and 140, governing discovery in non-preferential and preferential cases, are not included on the list. These lengthy and complex orders are burdensome for defendants, and it would appear that the committee has been unable to agree that they should be rescinded.

On March 29, 2012, the committee submitted a letter to Judge Jackson stating that the members had reached agreement on eight of the twenty remaining General Orders.⁴² Then, on April 16, 2012, the committee submitted a proposed Administrative Order which collapsed some of the eight General Orders into one Order.⁴³ The committee must submit a final report to Judge Jackson by May 14, 2012, identifying any asbestos orders and procedures that remain in dispute, as well as why the committee failed to reach agreement on these issues. A public comment hearing will be held on June 11, 2012, before the court issues its decision about the General Orders by July 2, 2012.

It remains unclear, therefore, what the scope of the General Orders, or the Asbestos Department itself, will be in San Francisco going forward. The court is likely to retain at least some of the existing system, though there have already been significant changes in the San Francisco asbestos docket. Given these changes and the continuing budget problems, it seems likely that many plaintiffs will consider other jurisdictions that may have smaller caseloads and/or more favorable rules.

In Alameda County, just across the Bay, asbestos trials are reportedly starting relatively close to their projected trial dates, suggesting less congestion exists there. On January 3, 2011, and again on January 3, 2012, the Presiding Judge issued general directives declaring all previous asbestos general orders "obsolete" and "rescinded" except for "General Order Nos. 8.00, 11.00, 14.00, and General Order re: Plaintiff's Standard Interrogatories to Defendant(s)."⁴⁴ A hearing was held on April 6, 2012, to discuss time limitation concerns of all parties for depositions in malignancy cases, but no ruling has been published as of the time of this article.

Southern California

The Los Angeles Superior Court (LASC) has been a favorite venue for asbestos plaintiffs since the 1970s,⁴⁵ but in recent years the asbestos docket has exploded. From 2006 to 2010, asbestos filings in LASC increased by eighty percent, from 105 new filings in 2006 to 188 filings in 2010.⁴⁶ A November 2010 "DataPoints" publication of the California Administrative Office of the Courts quoted observers who expected the court to remain a popular venue for asbestos filings.⁴⁷ Indeed, the number of plaintiffs' firms setting up shop in the area confirmed the trend of steering asbestos cases to LASC.⁴⁸

The increase in asbestos filings in recent years did not go unnoticed. In the Spring of 2011, LASC Supervising Judge Carolyn Kuhl held an open conference to discuss changes in the handling of asbestos cases. Judge Kuhl opened the April 25, 2011 conference by giving counsel a sense of the impact of asbestos litigation on LASC: with the eighty percent increase in filings and 293 then-pending cases, asbestos cases "bog down" the court's calendars, particularly at the pre-trial stage.⁴⁹ Judge Kuhl explained the problem was compounded by other developments in the same time period: budget cuts, a thirty-three percent increase in the number civil cases assigned to each judge per month, reductions in the number of long cause courtrooms (courts dedicated to trials over twenty days) and complex courtrooms, and the elimination of the eminent domain department, resulting in the reassignment of these cases to other existing courtrooms.⁵⁰

At the time of Judge Kuhl's conference, LASC assigned each asbestos case to 1 of 47 general civil judges in the downtown courthouse. These judges handled cases pursuant to their individual courtroom calendars and procedures, which could vary considerably. For example, some judges closely followed the LASC Asbestos General Orders and Local Rules, while others did not. Rulings on the same or similar issues (e.g., standard motions *in limine* brought by the same or similarly-situated defendants across multiple cases) could vary from one judge to the next. Even scheduling matters wildly diverged: some judges would not hear motions for summary judgment until the first day of trial, while others required that they be heard far earlier, even in cases subject to

statutory trial preference on 120-day pre-trial schedules. As expressed by Judge Kuhl at the conference, this uncertainty reduced the likelihood of case resolution, thereby contributing to rising case inventories throughout courtrooms in LASC.

LASC's solution to the problem was coordination of all asbestos cases pending in Los Angeles, Orange, and San Diego counties under one judge, pursuant to Code of Civil Procedure sections 404-404.9 and California Rules of Court 3.501-3.550. Coordination is California's equivalent of federal multi-district litigation treatment, meaning that all cases included in the scope of the coordination order (i.e., same subject matter/common question of law or fact) are assigned to a single judge for all purposes. A coordination judge has discretion to try cases in his or her own court or remand them back to their originating court for trial.⁵¹ The perceived benefit of coordination is generally that centralized management promotes the effective utilization of judicial resources and reduces or eliminates duplicative and inconsistent rulings.

LASC's coordination petition was filed on May 16, 2011.⁵² By way of background, the petition notes that from 1978 to 1996, LASC had a single department designed to manage pre-trial proceedings in asbestos cases. During this time, the court enacted a number of General Orders to manage the litigation. These General Orders were effective enough that in 1996, the asbestos department was shut down and asbestos cases were transferred to the independent calendar courts in the downtown courthouse. According to the petition, from 1996 to roughly 2005, asbestos cases moved through these courts with "relative efficiency." Although asbestos cases were designated as "complex," they were never transferred during that time to the Los Angeles Complex Litigation Program courthouse and remained assigned to the individual judges. But the petition cited a "sea change" in asbestos litigation starting in 2006 with: (1) a surge in filings in LASC, and (2) a shift in "litigation strategies" resulting in proceedings becoming more protracted, more contentious, and less efficient.⁵³

LASC's move to coordinate asbestos cases appears motivated, at least in part, by San Francisco's experience. The petition cited the "impressive" results of San Francisco's consolidation of all asbestos law and motion and discovery into one department, along

with the implementation of a settlement manager. This apparently netted a thirty-two percent decrease in cases awaiting trial, a sixty-five percent decrease in the number of days spent in trial, a fifty-eight percent decrease in the number of jurors sent to trial, and a 114% increase in settlements.⁵⁴

On August 30, 2011, the Judicial Council issued an order granting LASC's coordination petition. The next day, Judge Emilie Elias (the Supervising Judge of LASC's Complex Civil Litigation Panel) was assigned as the coordination judge. The practical effect of these orders is that Judge Elias now presides over the combined asbestos dockets of Los Angeles, Orange, and San Diego Counties. She will act as the judge for all purposes, including case management, law and motion, discovery disputes, and (at least theoretically) trial. Since her appointment as coordination judge, Judge Elias has not presided over an asbestos trial and has remanded trial-ready cases to their originating courts, although she is ruling on pre-trial motions *in limine* and has developed a standard juror background and hardship questionnaire.⁵⁵ Given the size of the coordinated proceedings docket (as of February 17, 2012, nearly 100 cases remained set for trial in 2012 and over a dozen of these had statutory trial preference),⁵⁶ it is anticipated that cases will continue to be remanded for trial.

The LASC's challenge in managing its caseload will only increase in the future. San Francisco is not the only court affected by the state's budget crisis. In April 2012, the LASC announced the "most significant reduction of services in its history," including the closure of fifty-six courtrooms, including twenty-four in the civil division.⁵⁷ After laying off 329 court staff and losing another 229 employees through attrition over the past two years, the court anticipates more than 100 additional non-courtroom staff reductions by June 30, 2012.

The long-term effects of coordination and the impact of the latest budget cuts on the court remain to be seen, but one thing is clear: Judge Elias has considerable power to reshape the landscape of asbestos litigation in Southern California. It is, for example, in her discretion to modify, replace, or eliminate the General Orders in effect, to order briefing on common issues in the coordinated proceeding, to develop uniform rulings on recurring issues, and to implement mandatory

alternative dispute resolution procedures. She has thus far been receptive to case management suggestions from both plaintiff and defense counsel, having received extensive written and oral briefing on a wide array of substantive and procedural issues that are beyond the scope of this article, and has set up committees of counsel to assist in the reform process. Judge Elias has already implemented some limited case management orders pertaining to records release authorizations, mandatory settlement conferences, and general motion calendar procedures. For now, the General Orders remain intact and litigants can plan on Judge Elias handling all pre-trial matters from pleadings challenges to discovery disputes and motions *in limine*, but returning to their originating courts for trial.

New York, New York

Two recent developments are worthy of mention for the New York City asbestos litigation (NYCAL). First, there is a new special master. Longtime special master Laraine Pacheco has been replaced by Claire Gutekunst. Ms. Pacheco, who was appointed in 1999, was forced out in March 2012 amid claims she overbilled asbestos lawyers by \$400,000 over a span of several years.⁵⁸ Hundreds of corporations were allegedly overbilled. "In response, Pacheco said she worked hard to bill thousands of clients, and often had trouble tracking down those who did not pay."⁵⁹ Ms. Gutekunst, who was initially recommended by plaintiffs' lawyer Perry Weitz, spent almost three decades as a litigator in Proskauer Rose firm in New York City. She has not litigated asbestos cases but is experienced in dispute resolution. She is also active in the New York State Bar Association and was elected as the Association's first female treasurer in 2011. The amount to be paid to the Special Master remains the same on an annual basis (\$368,000). The proportionate amount that defendants and plaintiffs will pay also will remain the same (60/40 split). What is new is that a financial management company will be retained to handle billings and collections. The Special Master will have no role regarding the billings and collections.

The second development involves a challenge by the Weitz & Luxenberg firm to the discovery obligations of plaintiffs with respect to the disclosure of bankruptcy trust submissions and related information pursuant to the longstanding NYCAL Case Management Order (CMO). Since September 1996, the NYCAL CMO order has required: "Any plaintiff who intends

to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial."⁶⁰ In December 2011, Special Master Pacheco issued a recommendation enforcing the trust disclosure provisions after defendants claimed the Weitz firm had not complied with its discovery obligations under the CMO.⁶¹ On April 18, 2012, Administrative Judge Sherry Klein Heitler heard oral argument on the discoverability of proof of claim forms in the NYCAL.

Massachusetts Consolidated Docket

On January 27, 2012, liaison counsel for plaintiffs and defendants in the Massachusetts Asbestos Cases Consolidated Docket submitted a joint motion to amend Pre-Trial Order No. 9 regarding service of pleadings and other documents; protocol for depositions of product identification witnesses; bankruptcy trust claims discovery; and provisions for all cases regarding requirements of Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) Extension Act and Medicare's right of recovery under the federal Secondary Payer Act.⁶² With respect to bankruptcy trust claims discovery, the joint motion provides as follows. First, plaintiffs will produce, no later than ninety days before trial, the product exposures section of bankruptcy claim forms that have been filed on the plaintiff's behalf, with a continuing duty to supplement the information through trial. The amount received will be redacted from the documents provided to defendants. Second, any payment made to a plaintiff by an asbestos bankruptcy trust acts as a dollar-for-dollar set-off of any damages awarded to a plaintiff in a tort trial in those cases in which Massachusetts law is applied. Third, upon payment of a verdict in favor of a plaintiff, the plaintiff will assign to defendant all bankruptcy trust claims to which a plaintiff is entitled. Plaintiffs agree to cooperate in good faith with defendants against whom a verdict is rendered in determining and filing any asbestos bankruptcy trust claim to which a plaintiff is entitled to compensation. Fourth, notwithstanding the foregoing, nothing in the Pre-Trial Order shall preclude any party from seeking the disclosure, after jury empanelment, of the amounts the plaintiff received in connection with the bankruptcy claims. Fifth, not later than thirty days before trial, the plaintiff will serve a certification

in court that all known bankruptcy trust claims have been filed.⁶³

Federal MDL No. 875

On November 23, 2011, Judge Eduardo Robreno of the United States District Court for the Eastern District of Pennsylvania, the judge who oversees MDL No. 875, reported that “the backlog of cases” in MDL No. 875 “has been largely eliminated” and that, with certain exceptions, all of the pending cases are under scheduling orders which call for their adjudication, settlement, or remand by December 31, 2012.⁶⁴ Judge Robreno also noted that only about 400 new cases are being filed in the federal district courts annually.⁶⁵

Accordingly, Judge Eduardo Robreno proposed to the MDL Panel that the practice of referring tag-along cases (*i.e.*, cases involving the same party or counsel as one already pending in the MDL) be discontinued, subject to exceptions for (1) a block of cases in the Eastern District of Virginia which turned on an issue of federal railroad preemption that was pending at the time (and subsequently decided) by the United States Supreme Court;⁶⁶ (2) a group of Seventh Circuit cases filed by a single law firm; (3) maritime docket (Mardoc) cases; (4) cases from certain jurisdictions which have fifty or more cases pending in the MDL and are on track toward settlements; and (5) cases from the Eastern District of Pennsylvania.⁶⁷

On December 13, 2011, the MDL Panel adopted Judge Robreno's recommendation in all respects but one: whereas he had proposed stopping new tag-along transfers after January 1, 2012, the Panel decided to stop them immediately.⁶⁸ The Panel also noted that parties in the new actions that will proceed in individual federal district courts “should be able to avail themselves of the discovery already obtained in the MDL,” and that “the judges presiding over those actions will almost certainly find useful guidance in the many substantive and thoughtful rulings that have been issued during the lengthy course of the multi-district proceedings.”⁶⁹ As a result of the MDL Panel's adoption of Judge Robreno's suggestion, the rate at which the federal MDL asbestos docket will shrink “will accelerate and, eventually, Judge Robreno's express goal of resolving MDL-875 will be achieved.”⁷⁰

Conclusion

Asbestos litigation has been characterized by its ebb and flow to jurisdictions viewed by plaintiffs' lawyers

as having more favorable procedures.⁷¹ Between 1970 to 1987, California, Illinois, and Pennsylvania accounted for more than half of the nation's asbestos claims.⁷² By the late 1990s, however, asbestos filings in these states accounted for only six percent of the total.⁷³ The cases moved to states such as Texas and Mississippi, but as these states undertook reform, the litigation appears to have come full circle, returning to some of its original epicenters. As RAND has recognized, “Sharp changes in filing patterns over time more likely reflect changes in parties' strategies in relationship to changes in the (perceived) attractiveness (or lack thereof) of state substantive legal doctrine or procedural rules, judicial case management practices, and attitudes of judges and juries toward asbestos plaintiffs and defendants, than changes in the epidemiology of asbestos disease.”⁷⁴

Many of these “magnet” state courts have recently changed their asbestos case handling procedures or replaced judicial leadership. Significant changes are underway in federal MDL No. 875 as well. The experience of these courts demonstrates that procedures that were once fair can become unbalanced if not periodically updated to reflect fundamental changes in the litigation environment. Courts should periodically review their procedures governing asbestos cases and make adjustments to better recognize the practical realities of the litigation today.

Endnotes

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2. Pennsylvanians for Modern Courts, *Administrative Judge Herron Appointed to Chair Administrative Governing Board*, Dec. 14, 2011.
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13. See Yancey v. Raymark Indus., Inc., No. 1186 (832), slip op. at 10 (Ct. Com. Pl., Phila. County, Pa. Nov. 12, 1986).
14. Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 RUTGERS J. OF L. & PUB. POL'Y 50 (2011).
15. See LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 47 (Rand Corp. 2010).
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 26. Korris, *Crowder Sets 2013 Asbestos Docket*, *supra*.
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 37. Letter from Steven M. Harowitz and Stephen M. Tigerman, Harowitz & Tigerman LLP, to Judges Teri Jackson, Harold Kahn, and Katherine Feinstein (Oct. 18, 2011).
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 50. *Id.*; see also Hon. Mary Ann Murphy, Judge of the Los Angeles Superior Court, *Mosk Unlimited Civil Courtroom Budget Cuts*, *supra*.
 51. *McGhan Med. Corp. v. Superior Ct.*, 11 Cal. App. 4th 804 (1992), which led to the creation of the first product liability coordinated proceeding in California (breast implant litigation), includes a summary of the coordination procedure and the rationale for its use in mass tort-product liability litigation. Since *McGhan*, coordinated proceedings have been set up in a variety of product liability-based litigation, including heart valves, diet drugs, PPA, latex gloves, and hip implants.
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 63. See *id.* at XIII.C.7(o)(2).
 64. See *In re Asbestos Prods. Liab. Litig.* (No. VI), Suggestion to the Panel on Multidistrict Litigation Concerning Future Tag-Along Transfers, at 1 (E.D. Pa. Nov. 23, 2011) (Robreno, J.). Over the past two years, Judge Robreno and affiliated magistrate judges have issued numerous summary judgment rulings on a variety of issues. A word-searchable spreadsheet identifying each of those issues can be found on the "Updates" page of the MDL 875 website at <http://www.paed.uscourts.gov/mdl875u.asp>. The court has resolved numerous product identification issues, applying the law of many different jurisdictions.
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- Concerning Future Tag-Along Transfers, at 1 (E.D. Pa. Nov. 23, 2011).
66. In *Kurns v. Railroad Friction Prods. Corp.*, 132 S. Ct. 1261 (2012), the U.S. Supreme Court held that state law tort claims against locomotive equipment manufacturers and distributors are preempted by the federal Locomotive Inspection Act.
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73. *Id.*
74. *Id.* at 63. ■

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