YOUNG CONAWAY

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2020 Asbestos Litigation & Legislative Updates

Despite 2020 being an unprecedented year that brought many aspects of our lives to a standstill, the courts remained busy with asbestos litigation, setting some interesting new precedents while reaffirming others. Notably, the federal courts of appeals grappled with whether a confirmation plan that discharged latent asbestos claims without creating a litigation trust under Section 524(g) would still be able to afford future claimants due process, and whether an FCR appointed by the bankruptcy court in 1986 adequately represented future claimants with regards to their potential *in rem* and *in personam* actions against the settling insurers. Meanwhile, the state courts issued diverging decisions as to whether a defendant can be held liable for third party asbestos parts that are necessary to use products manufactured or sold by the defendant. Presumably focused on other topics in 2020, legislators passed few laws addressing asbestos litigation.

Litigation Updates:

Federal Cases

***In re Energy Future Holdings*, 949 F.3d 806 (3d Cir. 2020).**

The U.S. Court of Appeals for the Third Circuit affirmed a confirmation order permitting debtor Energy Future Holdings Corporation to discharge latent asbestos claims without creating a litigation trust under Section 524(g) of the Bankruptcy Code. The Court of Appeals approved the plan for two reasons: (1) it found sufficient the debtor's attempt pre-confirmation to notify unknown asbestos claimants of the bar date by which they needed to file their claims or those claims would be discharged, and (2) because the plan provided that unknown asbestos claimants who failed to file claims before the bar date had the opportunity post-confirmation to seek reinstatement of their claims through Federal Rule of Bankruptcy Procedure 3003(c)(3) motions. The Third Circuit concluded that these mechanisms afforded due process to latent asbestos claimants who claimed they were stripped of their due process rights.

Energy Future was a holding company with a portfolio of various energy properties. Four of its subsidiaries were defunct entities in existence solely because of their ongoing asbestos liability. Energy Future and those four subsidiaries filed a voluntary chapter 11 petition. Energy Future negotiated a merger with Sempra Energy, which was set to close after the bankruptcy court approved Energy Future's reorganization plan. Instead of creating a 524(g) trust to manage the asbestos liability, the proposed merger plan called for attempting to notify unknown asbestos claimants to file their claims by the bar date and provided future claimants who missed the bar date the ability to seek reinstatement of their claims available under Bankruptcy Rule 3003(c)(3).

Energy Future spent two million dollars on a notice plan, which included publishing notice in seven consumer magazines, 226 local newspapers, three national newspapers, forty-three

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Spanish-language newspapers, eleven union publications, and five internet outlets. As a result, 10,000 future claimants filed a proof of claim before the bar date, assuring them the right to pursue a claim at a future time. The plan also included permitting unknown asbestos claimants to come forward after the bar date to attempt to have their claims reinstated through Rule 3003(c)(3) motions. Under Rule 3003(c)(3), the bankruptcy court "shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed," allowing claimants to file after the bar date if they show "excusable neglect." At the confirmation hearing for debtor's plan of reorganization, the bankruptcy court ruled future claimants' due process rights were protected because the notice procedures for the bar date and the reinstatement process under Rule 3003(c)(3) were constitutionally sufficient.

One group of creditors was unhappy with the reorganization plan: the latent asbestos claimants claimed their due process rights were violated under Third Circuit precedent and that Energy Future should form a section 524(g) trust to receive a discharge of future claims. The bankruptcy court disagreed with the latent asbestos claimants and confirmed the debtor's plan, formally discharging all claims against the newly reorganized Energy Future that were not filed before the "bar date." The District Court dismissed the latent claimants' appeal.

The Third Circuit focused on whether Rule 3003(c)(3) motions afford due process to unknown future asbestos claimants. The Third Circuit determined the latent asbestos claimants asserted a cognizable property interest within the protection of the due process clause. However, the Court of Appeals found the plan was not unconstitutional because the combination of the expansive notice program and hearing available under Rule 3003(c)(3) provided adequate due process. The Court of Appeals was persuaded that latent claimants would be able to show that reinstatement of their claims would pose no danger of prejudice to the debtors because the post-confirmation procedure was incorporated into the merger, that any delay between the bar date and that while a Rule 3003(c)(3) motion could be substantial, those claims would have no impact on the debtor's bankruptcy proceedings because such motions were consistent with the confirmation order. The Court of Appeals indicated, however, that a section 524(g) reorganization is a preferable resolution because, although Energy Future's plan technically satisfied the Bankruptcy Code and the Constitution, it could result in costly and unnecessary back-end litigation for debtors (and claimants).

***Marsh USA, Inc. v. The Bogdan Law Firm (In re Johns-Manville Corp.)*, 802 Fed. Appx. 20 (2d Cir. 2020)**

The U.S. Court of Appeals for the Second Circuit reversed a July 2018 order of the U.S. District Court for the Southern District of New York (which in turn had reversed a January 2018 order of the U.S. Bankruptcy Court for the Southern District of New York) that had enjoined Salvador

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Parra, Jr.'s state-law claims against Marsh USA, Inc. and required any such claims against the Johns-Manville Corporation to be brought against the Manville Trust.

The Manville Trust was established pursuant to a 1986 bankruptcy settlement to compensate individuals harmed by asbestos products manufactured or sold by the Johns-Manville Corporation. The 1986 plan confirmation order funneled all Johns-Manville-related claims against insurers and insurance brokers, including Marsh, to the Manville Trust regardless of whether the claims were *in rem* or *in personam*. The bankruptcy court for the Southern District of New York found Parra was bound by that 1986 order because he was represented *in absentia* by the Future Claims Representative (FCR), whom the bankruptcy court had appointed to advocate for parties similar to Parra who may have been harmed by the asbestos products manufactured or sold by Johns-Manville but had not yet developed symptoms of any asbestos-related disease. The bankruptcy court found the FCR's representation encompassed future claimants' potential *in rem* and *in personam* actions against the settling insurers.

The district court reversed, concluding the FCR represented claimants in connection with their *in rem* claims only. The Second Circuit then reversed the district court and concluded the bankruptcy court did not clearly err in finding that the FCR's advocacy on behalf of future claimants extended to *in personam* claims as well. The Court of Appeals reasoned there was substantial evidence that the FCR advocated for future claimants in connection with their potential *in personam* claims. Specifically, the Court of Appeals found the FCR's urging of the bankruptcy court judge to cabin the language of the ultimate order, which appeared to enjoin both *in rem* and *in personam* claims, to encompass *in rem* claims only. Although making an unsuccessful argument that the bankruptcy court had no jurisdiction to issue such an order channeling *in personam* claims, the argument alone left a substantial impression on the Court that the FCR had advocated for future claimants in connection with their potential *in personam* claims. Accordingly, the Second Circuit held the bankruptcy court did not clearly err in concluding the FCR provided Parra with adequate representation in respect to his *in personam* claims and reinstated the January 2018 order of the bankruptcy court.

***Asbestos Disease Awareness Org. v. Wheeler*, Case No. 19-cv-00871, slip op. 2020 WL 7625445 (N.D. Cal. Dec. 22, 2020)**

The U.S. District Court for the Northern District of California addressed summary judgment motions filed against the Environmental Protection Agency for failing to adequately regulate the use of asbestos, finding that the EPA had "acted arbitrarily and capriciously" in its fact-gathering efforts and directing it to amend rules to improve that process. The court also denied the EPA's motion to dismiss, finding that review was proper under section 706 of the Administrative Procedure Act because the plaintiffs were seeking amendments to an existing rule as opposed to requesting a new rule.

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In December 2016, the EPA named asbestos as one of ten chemical substances to undergo risk evaluation. By May 2017, Occidental Chemical Corporation had not reported its asbestos imports, which amassed several hundred tons. Plaintiffs in these cases notified the EPA of Occidental's CDR reporting violation. The EPA wrote Occidental on July 28, 2017, exempting it from reporting because its imports fell under the "naturally occurring chemical substances" exception found in 40 C.F.R. § 711.6(a)(3). In response, the plaintiffs filed petitions under section 21 of the Toxic Substances Control Act for the EPA to initiate rulemaking under section 8(a)(1) to expand reporting requirements in four ways: (1) eliminate the asbestos importation and use exemption; (2) lower the reporting threshold for asbestos, eliminate the impurities and articles exemptions, and require processors to submit reports regarding asbestos; (3) require immediate reporting on asbestos for the 2016 reporting cycle; and (4) disallow confidential business information protection for submitted asbestos reports. Based on a conclusion that amending the CDR rule would not yield any more useful information than the EPA is already slated to receive under the current reporting requirements, the EPA denied these petitions on December 21, 2018. It also found the request for confidential business information was inappropriate for a section 21 petition and irrelevant to the risk evaluation or risk determination.

Ten states, plus the District of Columbia and several nonprofit public health and environmental organizations filed two separate actions against the EPA and its administrator, Andrew Wheeler, in 2019, in which they claimed the EPA failed to meet its duty to collect adequate information to assist its regulation of asbestos in the United States. After determining review under section 706 of the Administrative Procedure Act was proper since the parties sought to amend the existing reporting rule, the Court denied the EPA's motion to dismiss. The TSCA contemplates public disclosure of information for the plaintiffs' benefit, and the plaintiffs standing to bring the claims derived from the EPA's denial of the petitions as the states and the nonprofit organizations rely upon data from the EPA in performing their own risk evaluations and asbestos-legislation advocacy objectives, respectively.

The court was not persuaded by the EPA's argument that modifications to the CDR rule would garner duplicative rather than additional useful information. Several loopholes and unreliable data gaps, such as exemptions for asbestos-containing articles and impurities and non-classification of reportable processes, did not support the EPA's motion. Further convinced by the EPA's unwillingness to exercise its statutory enforcement authority to obtain reasonably available information, the court resolved that it was appropriate to remand the denials to the EPA with instructions to expand the requirements of its CDR rule to address its deficient process. In granting the plaintiffs' summary judgment motion, the court stated, "[b]y failing to consider all 'relevant factors' in its information-gathering efforts, the EPA has also acted arbitrarily and capriciously." The court directed the EPA to amend its chemical data reporting rule to fill gaps and close loopholes in its information-gathering process for risk evaluations of asbestos-

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containing substances as doing so equips the plaintiffs with data needed to carry out their objectives.

***Cyprus Historical Excess Insurers v. Imerys Talc Am., Inc. (In re Imerys Talc Am., Inc.)*, 2020 WL 6888278, (D. Del. Nov. 24, 2020)**

Excess insurers appealed three orders from the Delaware Bankruptcy Court in the Imerys bankruptcy case, challenging the appointment of James L. Patton, Jr., as the Legal Representative for Future Talc Personal Injury Claimants, his retention of Young Conaway Stargatt & Taylor, LLP as his Attorneys, and the court's denial of discovery sought by the excess insurers. On November 24, 2020, the U.S. District Court for the District of Delaware affirmed all three bankruptcy court orders.

The excess insurers argued that Mr. Patton had an "actual, concurrent conflict" because he was employed by Young Conaway, which represents some of the excess insurers as defendants in a state court matter. The district court found that there was no conflict, because the excess insurers had waived their conflict arguments by not raising them timely. However, even absent the waiver, the district court found that the bankruptcy court had not abused its discretion by appointing Patton as the legal representative, because the excess insurers did not show that Young Conaway currently represented any talc personal injury claimants. Furthermore, in reviewing the bankruptcy court's application of the *guardian ad litem* standard, the district court found that the bankruptcy court had "considered the entire record, supplemental declarations, and objections" and concluded that Patton was fit to serve as legal representative.

Finally, with respect to the discovery sought by the excess insurers, the district court found that the excess insurers offered no factual or legal support to challenge the order and instead simply submitted a conclusory statement that on its own was not enough to merit overturning the discovery order.

***Hipwell v. Air & Liquid Sys. Corp.*, No. 120CV00063JNPJCB, 2020 WL 6899492 (D. Utah Nov. 24, 2020).**

The U.S. District Court for the District of Utah held that § 78B-6-2004 of Utah's Asbestos Bankruptcy Trust Claims Transparency Act was preempted by the Federal Rules of Civil Procedure, but that § 78B-6-2007 applied to the case because it did not conflict with federal law.

The plaintiff and defendants filed a report with the court, detailing the Parties' plans and deadlines for discovery, expert reports, and other issues. The Parties agreed to everything except for the applicability of §§ 78B-6-2004 and 78B-6-2007 of the Transparency Act. The defendants

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argued both sections 2004 and 2007 should apply, but the plaintiff objected to the application of state law because federal procedural law applies to matters in federal court.

Section 2004 of the Transparency Act mandates certain disclosures that a plaintiff in an asbestos case must provide the defendant. However, discovery in federal court is generally procedural and controlled by the Federal Rules of Civil Procedure. Because Rule 26 governs a party's duties to disclose information, the timing of disclosure, the scope and content of discovery, and duties to supplement disclosures, and Rule 37 sets the applicable sanctions or penalties for a party's failure to comply, the court concluded that section 2004 conflicted with the Federal Rules.

Section 2007 sets forth a process for a defendant to compel a plaintiff to file asbestos trust claims prior to trial if the defendant identifies a claim that they reasonably believe the plaintiff can file. If the plaintiff does not file the claim per the defendant's request, the court can order the plaintiff to file the claim and stay the case if a sufficient basis exists to file the claim identified by the defendants. No federal procedural rule exists that either allows a party to move to compel the filing of trust claims or authorizes a court to grant such a motion. The court found that application of section 2007 would discourage forum-shopping because a plaintiff looking to defer potential bankruptcy trust submissions until after parallel civil litigation concludes would have ample reason to choose federal court if it offered a chance to avoid the compelled filing requirements of section 2007. Additionally, it found that disregarding section 2007 could bring about inequitable outcomes in the administration of the law by potentially allowing double recoveries in both civil and bankruptcy trust cases.

***Kotalik v. A.W. Chesterton Co.*, 471 F. Supp. 3d 934 (D. N.D. 2020)**

The U.S. District Court for the District of North Dakota denied plaintiff's motion for certification and granted defendants' motions to enforce plaintiffs' compliance with the North Dakota Trust Transparency Act's disclosure requirements.

Certain defendants moved to enforce the plaintiffs' compliance with disclosure requirements of North Dakota's Asbestos Bankruptcy Trust Transparency Act after the plaintiffs failed to provide the required disclosures at least twelve times. The plaintiffs challenged the Trust Transparency Act as unconstitutional and sought certification of a question to the North Dakota Supreme Court regarding its constitutionality. The defendants provided information about the legislative history of the Transparency Act and its intent to mitigate fraud in asbestos claims.

The district court concluded that the Trust Transparency Act's disclosure provisions were substantive state law requirements that applied to the proceedings before it. The court granted the defendants' motions because the disclosure provisions clearly and plainly required plaintiffs to provide the requested information to defendants. Additionally, the district court determined that

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plaintiffs did not raise a close question of state law that necessitated certification to the North Dakota Supreme Court and accordingly denied the motion for certification.

State Cases

***Coffman v. Armstrong Int'l, Inc.*, 615 S.W.3d 888 (Tenn. Jan. 4, 2021).**

The Tennessee Supreme Court held that a defendant cannot be held strictly liable for injury caused by exposure to the asbestos-containing replacement parts of third parties that were added after a product left the control of the defendant, even if the defendant anticipated that third party asbestos-containing parts would be used to repair and maintain the product.

Donald Coffman worked as an equipment mechanic at the Tennessee Eastman chemical plant for almost thirty years. His duties included repairing and replacing equipment, often using asbestos-containing pumps, valves, steam traps, gaskets, piping and insulation. After he developed mesothelioma, he and his wife sued nearly thirty defendants for negligence and strict liability claims. They alleged the defendants were liable for failing to warn of the foreseeable dangers based on their equipment being repaired and maintained with asbestos-containing materials.

The trial court granted summary judgment to the defendants, finding they had no duty to warn about the dangers of products they did not make, sell or distribute. The court of appeals reversed, finding that the defendants had a common law duty to warn of the dangers of the post-sale integration of third-party asbestos-containing parts. The Tennessee Supreme Court reversed and remanded, concluding that the defendants had no duty to warn based on the facts and law of Coffman's case.

The Supreme Court noted that the products at issue did not contain asbestos when they left the defendants' control, but that the end user had to use asbestos-containing materials with the products after purchasing them. Because the Tennessee Product Liability Act, as affirmed by case law, limited liability to instances when the product was unreasonably dangerous when it *left the defendant's control*, the defendants at issue were not liable for Coffman's injuries. The court rejected Coffman's argument that the defendants' anticipation that the products would be used with asbestos-containing parts should give rise to strict liability, instead finding that such a conclusion would make the defendants liable for the parts of third parties. The court distinguished the case from precedent in other jurisdictions based on the express provisions of the Tennessee Product Liability Act and noted that its decision did not address liability of the defendants for any asbestos-containing parts that were integrated with their products when they left the defendants' control (rather, the decision addressed the defendants' liability for replacement parts of third parties).

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One justice dissented, opining that the defendants should face liability because they anticipated their products would be repaired and maintained with asbestos-containing parts manufactured and distributed by third parties.

***Rossello v. Zurich Am. Ins. Co.*, 226 A.3d 444 (Md. 2020)**

The Maryland Court of Appeals held that (i) indemnity obligations for continuing asbestos bodily harm should be prorated based on an insurer's time on the risk; (ii) the joint and several allocation method is incompatible with a theory of continuous harm as a policy trigger; and (iii) an insured who elects not to carry liability insurance for a period of time will be liable for the prorated share that corresponds to periods of self-insurance or no coverage unless a gap in coverage is due to the insured's inability to obtain insurance.

Plaintiff Patrick Rossello was exposed to asbestos while working in Baltimore's Union Trust Bank Building, when it was renovated by Lloyd E. Mitchell, Inc. in 1974. Lloyd Mitchell sold, distributed, and installed products containing asbestos until it ceased operations in 1976. Forty years later, Rossello was diagnosed with mesothelioma and brought a strict liability and negligent-failure-to-warn action against Lloyd Mitchell. The jury awarded Rossello a multimillion dollar verdict.

To collect this judgment, Rossello initiated garnishment proceedings against defendant Zurich American Insurance Company, the successor to Maryland Casualty Company, which had insured Mitchell under a series of standard comprehensive general liability policies from 1974-1977. The policies required Maryland Casualty to pay on Lloyd Mitchell's behalf "all sums" which Lloyd Mitchell became legally obligated to pay "because of . . . bodily injury to which this insurance applies, caused by an occurrence." Lloyd Mitchell stopped purchasing the policies in 1977 and the policies became commercially unavailable after 1985. The policies defined "bodily injury" as "bodily injury, sickness, or disease sustained by any person which occurs during the policy period" and "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury . . . ."

The trial court assessed Zurich's damages on a pro rata, time-on-the-risk basis across all insured and insurable periods triggered by Rossello's injuries. The court determined that the relevant insured and insurable periods spanned from 1974, when Rossello was exposed to the asbestos, until 1985, the last year in which Lloyd Mitchell could obtain coverage under the policies. As a result, the trial court found Lloyd Mitchell was responsible for allocations to the insurable period from 1977 to 1985, despite its election not to secure coverage during this period.

The Maryland Court of Appeals affirmed these findings, applying a pro rata approach and finding that Zurich was liable only for the period it was "on the risk" rather than the entire time

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during which Rossello's bodily injury occurred. The court also agreed that the trial court properly relied on Maryland precedent that an "injury-in-fact" trigger should be applied to an extended exposure case like that of Rossello. Because the "injury-in-fact" trigger commences coverage when the actual injury occurs—regardless of when the injury is later discovered—the trial court properly found that continuous or progressive injury can constitute an occurrence within each policy period that asbestos is present, implicating multiple policy periods as well as periods of no insurance.

Finally, the Court of Appeals extolled the virtues of pro rata allocation because this approach: (i) best conformed to the realities of the injury-in-fact trigger, (ii) was consistent with the policies' language which provided coverage for "bodily injury . . . which occurs during the policy period," and (iii) was easily administrable and efficient. The Court affirmed the trial court's decision, which comported with well-established precedent, to impose liability on Zurich for the period in which it voluntarily elected to terminate coverage, from 1977-1985, but to foreclose liability after 1985 when coverage under the policies became unavailable.

***Whelan v. Armstrong Int'l Inc.*, 231 A.3d 640 (N.J. 2020)**

The Supreme Court of New Jersey held that manufacturers and distributors can be strictly liable for failure to warn of the dangers of a product that includes their asbestos-containing products and a third party's replacement components.

Plaintiff Arthur Whelan worked over forty years as a residential and commercial plumber and automobile mechanic, allegedly dealing with products that included asbestos-containing gaskets, insulation, packing, and brake drums that occasionally had to be removed and replaced. He sued multiple defendants that either manufactured or distributed products integrated with asbestos-containing components that also required asbestos-containing replacement components. The defendants argued they had no duty to warn the plaintiff about the dangers of the replacement parts manufactured or supplied by third parties that were incorporated into the defendants' products after the products left the defendants' control. The trial court granted summary judgment in favor of the defendants, agreeing with defendants that they could not be held liable for replacement parts of third parties. The appellate court reversed, concluding that the defendants had a duty to warn about the dangers of asbestos-containing replacement parts necessary for the products to function and that the defendants could be held strictly liable for a failure to warn.

The subsequent appeal included consideration of amici curiae briefs from the U.S. Chamber of Commerce, the Coalition for Litigation Justice, the Product Liability, Advisory Council, and the Washington Legal Foundation, the Asbestos Disease Awareness Organization, and the New Jersey Association for Justice. The court noted that other jurisdictions had agreed with the

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defendants' position, but was persuaded that New York, Maryland, and the U.S. Supreme Court (in the maritime context) were correct in concluding that strict liability could be imposed on manufacturers of products for failure to warn of the dangers of asbestos-containing replacement components.

The New Jersey Supreme Court affirmed, holding that the product at issue was the "aggregation of all its component parts," no distinction should be made between original and replacement components that were necessary for continued use of the products, and the manufacturer or distributor of the integrated product was best situated (as a matter of fairness in considering public policy) to warn a worker like Arthur Whelan so that he could take necessary precautions. The court held that the manufacturer or distributor could be found strictly liable for failure to warn where a plaintiff could prove (1) the manufacturers or distributors incorporated asbestos-containing parts into the original product; (2) those parts were integral and necessary for the product to function; (3) routine maintenance of the product required replacing those parts with similar asbestos-containing parts; and (4) exposure to the original or replacement parts containing asbestos was a substantial factor in causing or contributing to the plaintiff's injury.

Two justices dissented, arguing the majority's decision unfairly imposed liability on the defendants for products that they neither manufactured nor sold.

***Roverano v. John Crane, Inc.*, 226 A.3d 526 (Pa. 2020)**

The Pennsylvania Supreme Court concluded that its Fair Share Act required a factfinder to allocate liability on a per capita (rather than percentage) basis in strict liability asbestos actions. The court concluded that percentage apportionment is impossible to execute in asbestos cases, but per capita apportionment is consistent with, and not expressly preempted by, the Fair Share Act. Accordingly, the court reversed the order of the appeals court, which had vacated the trial court's decision. The Supreme Court further held that the factfinder must apportion liability to bankruptcy entities and that bankruptcy trusts that have entered into a release with a plaintiff or are joined as third-party defendants should be included on the verdict sheet for liability purposes only.

William Roverano worked as a carpenter with Peco Energy Company from 1971 to 1981, where was exposed to asbestos. He also smoked cigarettes for 30 years. After being diagnosed with bilateral lung cancer in 2013, Roverano and his wife sued 30 defendants for strict liability. One defendant, John Crane, Inc., filed a joinder complaint against the Manville Personal Injury Trust.

John Crane and other defendants filed a motion *in limine* for a ruling that Pennsylvania's Fair Share Act required the jury to allocate liability to defendant based upon the percentage each

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defendant's product caused harm to Roverano. Concluding the exposure was not quantifiable, the trial court denied the motion and held that liability would be apportioned on a per capita basis.

Another defendant filed a motion *in limine* seeking to list 14 asbestos bankruptcy trusts on the verdict sheet because the Roveranos had sought compensation from those trusts. The Roveranos countered with a motion to exclude the trusts with which he had not yet entered a release. The trial court sided with the Roveranos, finding the trusts could not be listed on the verdict sheet.

Trial proceeded against two defendants (including John Crane), all others having settled. The defendants argued Roverano's lung cancer was caused by smoking, while the Roveranos' expert argued there was no way to determine whether smoking or which asbestos product had caused his cancer.

The jury returned a verdict against the two unsettled defendants and six of eight other settled defendants that awarded more than $6 million to the Roveranos. The defendants contested how the damages award should be apportioned, arguing the Fair Share Act required a percentage apportionment, and also that the Manville Trust should have been on the verdict sheet as a defendant and the verdict should have included setoffs for compensation paid by the bankruptcy trusts.

The trial court apportioned the judgment per capita among the eight defendants the jury held liable. The appellate court affirmed in part, vacated the judgment, and remanded for a new trial to apportion the damages. It held the Fair Share Act applies to strict liability cases and requires that liability be apportioned to strictly liable defendants based on their percentage of liability. Further, the appellate court concluded the jury should have considered evidence of the Roveranos' settlements with the bankruptcy trusts.

The Supreme Court rejected the notion that apportionment should be allocated by percentage in strict liability cases because such liability determination does not contain an element of fault and each defendant is wholly liable for the harm, which means the liability should be equally apportioned among strictly liable joint tortfeasors. That result was also supported by the impossibility of allocating fault in asbestos cases because the individual contributions to a plaintiff's total exposure of asbestos is impossible to quantify. Accordingly, the court held that the Fair Share Act expressly requires equal apportionment among strictly liable joint tortfeasors.

Additionally, the Supreme Court held that the bankruptcy trusts that joined as third party defendants or that entered a release with the plaintiff can be included on the verdict sheet if "appropriate requests and proofs" have been submitted, but those items were excluded by the trial court. The trial court should have included the Manville Trust on the verdict sheet for liability purposes because John Crane had joined it as an additional defendant pursuant to the

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Manville TDP. Moreover, the Fair Share Act permits the factfinder to apportion liability to asbestos trusts that have entered releases with the Roveranos, even if they were not named as defendants. The trial court did not evaluate whether the proofs submitted by the defendants were sufficient to present the question of the trusts' liability to the jury. Accordingly, the Supreme Court remanded for a new trial on apportionment and a determination as to the appropriateness of submitting additional requests and proofs about those trusts.

One justice submitted a concurring option, and one justice submitted a concurring and dissenting opinion. The latter agreed that bankrupt entities should be included on the verdict sheet and that a new trial should be awarded for apportionment, but otherwise dissented.

***Joseph v. Huntington Ingalls Inc.*, 2020 WL 502306 (La. Jan. 29, 2020)**

The Louisiana Supreme Court held that a plaintiff was barred from bringing personal injury claims against his employer that arose after he had signed a settlement with the employer.

Joseph Gistarve worked for Avondale Industries, Inc. from 1969 to 1982, during which he was exposed to toxic fiber, asbestos, silica dust, and other dangerous materials and irritants. As a result, Gistarve contracted pneumoconiosis and sued Avondale in 1982. In 1985, Avondale and Gistarve entered into a written compromise agreement settling his claims. Through the agreement, Gistarve released Avondale, its executive officers, and their insurers from all liability that Gistarve had then or may thereafter acquire based on his employment at Avondale.

In June 2016, Gistarve sued Huntington Ingalls Inc., which formerly operated as Avondale Inc., for mesothelioma allegedly caused from occupational exposure during his employment at Avondale. After Gistarve died in July 2016, his adult children became the plaintiffs and asserted wrongful death and survival actions. Huntington Ingalls argued the 1985 written compromise agreement barred plaintiffs' survival action.

Louisiana law in effect in 1985 imposed res judicata where the defendant established that a second matter was determined by an earlier matter based on the same identity of the parties, the cause, and the thing demanded. The court concluded that the same parties were involved, because Gistarve's children had stepped into the shoes of their father and were the legal successors of Gistarve. Examining the four corners of the settlement document, the court found the intent of the parties to be clear, unambiguous, and unequivocal that the identity of the cause in the 1985 settlement and the 2016 suit was identical. Finally, the court found the demand was identical in that both matters sought damages for past and future claims for exposure to toxic materials during the course of his employment at Avondale. Accordingly, the Louisiana Supreme Court held the 1985 compromise agreement was entitled to preclusive effect and barred the 2016 lawsuit.

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***Maryland Cas. Co. v. Asbestos Claims Court*, 450 P.3d 882 (Montana Mar. 25, 2020)**

The Montana Asbestos Claims Court had previously held that an insurer owed a common law duty of care to warn third-party employees of its insured about known risks of asbestos exposure in the insured's facilities. On extraordinary review, the Montana Supreme Court, having assumed supervisory control over the lower court, affirmed and remanded for further action.

From 1963 to 1973, W.R. Grace and Company purchased from Maryland Casualty Company statutorily required workers' compensation insurance coverage for operations in Libby, Montana, that involved asbestos-containing substances. Under the policies, the insurer had certain inspection rights, which it exercised and used to consult with Grace about asbestos dust issues at its facilities. The documentary record evidenced that the insurer knew Grace's workplaces had asbestos dust hazards above safe levels and it admitted that Grace's safety program should have included warnings to the employees, but that the insurer did not recommend the employees be warned about the asbestos-dust hazards prior to 1972.

Ralph Hutt, a Grace employee from 1968-69 alleged that his workplace asbestos-dust exposure caused him to have an incurable respiratory disease. He sued Maryland Casualty for negligence and a common law insurance bad faith claim. On cross-motions for summary judgment, the Asbestos Claims Court granted summary judgment to the insurer on the bad faith claim because Hutt failed to bring a predicate workers' compensation claim. However, the court denied summary judgment on whether the negligence claim was time-barred and granted summary judgment in favor of Hutt that the insurer owed him a legal duty of care based on foreseeability of the risk of harm.

The Montana Supreme Court considered whether, consistent with the Restatement (Second) of Torts § 324A, the insurer had a duty of care to protect Hutt from foreseeable risks of harm caused by Grace based on the insurer's having affirmatively undertaken to render services necessary to protect the workers but failed to exercise reasonable care. The court adopted Section 324A as consistent with Montana common law tort principles. The court concluded that the record showed the insurer assumed some aspect of Grace's safety duty relevant to Hutt's harm, namely it had assumed employee-specific medical monitoring of Grace's workers regarding the airborne asbestos hazards. Although the record did not show that Hutt relied on the insurer to protect him, the record showed that Grace relied on the insurer to carry out that monitoring, giving the insurer a common law duty of care to Grace's workers. The record also showed that the insurer had no real authority to directly mitigate the airborne hazards of Grace's workplace and Grace did not relent to the insurer's recommendations. Accordingly, the court held that the scope of the insurer's duty to Hutt and other Grace workers was to use reasonable care to warn them of the known risks of exposure to airborne asbestos in Grace's workplaces. The court thus

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affirmed the appeals court, holding that Maryland Casualty owed a duty to Hutt based on its knowledge of the conditions of Grace's workplaces, independent of its contract duty to Grace.

One concurring opinion noted that the court's holding meant the insurer would face liability for Hutt's claims because the claims were based on an independent duty of the insurer under the Restatement. As such, the insurer would not be shielded from liability by Grace's reorganization under section 524(g).

***BNSF Railway Co. v. Asbestos Claims Court of Montana*, 459 P.3d 857 (Montana Mar. 11, 2020)**

The Supreme Court of Montana took over supervisory control of the Asbestos Claims Court of the State of Montana to decide whether summary judgment should be granted against BNSF Railway Company Asbestos Court in favor of Libby, Montana town residents on issues of preemption, strict liability, and non-party affirmative defenses. BNSF argued the claims were preempted by federal law and it was not engaged in an abnormally dangerous activity that would subject it to strict liability.

Libby residents sued BNSF and other defendants for injuries relating to exposure to asbestos-containing vermiculate ore that had been mined in Libby, Montana for decades until 1990. The ore was loaded into BNSF railcars for transport. The BNSF tracks ran through Libby and its railyard was located in downtown Libby. In 2002, in response to the EPA's investigations and concerns about asbestos exposure in Libby, the railyard was placed on the Superfund National Priorities List. Testing done on the railyard site and locations in and around Libby, where asbestos contaminated materials were hauled and shipped, revealed heightened levels of asbestos even after excavation and remediation and more than 10 years after mining operations ceased.

Libby residents alleged that BNSF industrial activities included transporting asbestos-containing vermiculite that spilled asbestos containing material along BNSF's tracks and in its railyard, and continual disruption caused by the built-up spilled asbestos by BNSF's trains and workers.

On cross motions for summary judgment based on the issues of preemption of plaintiff's claims, BNSF's strict liability, and the preclusion of BNSF's defense of non-party conduct, the Asbestos Court concluded that: (1) plaintiffs' claims were not preempted by federal law, (2) BNSF was strictly liable because its actions were abnormally dangerous, and (3) BNSF could not present evidence of non-party conduct to negate causation. BNSF then filed the petition for writ of supervisory control, which the Supreme Court of Montana granted.

The Supreme Court of Montana concluded BNSF had not met its burden to demonstrate the Federal Railroad Safety Act ("FRSA") and Hazardous Materials Transportation Act ("HMTA")

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preempt Plaintiffs' claims. The court found that the state law claims were not substantially subsumed by the federal laws.

The Supreme Court of Montana weighed various factors under the Restatement (Second) of Torts § 519 to conclude that the Asbestos Claims Court did not err in concluding BNSF was engaged in a dangerous activity giving rise to strict liability. Among other factors, the company had actual knowledge of the dangers of asbestos dust exposure, failed to eliminate that danger with reasonable care, and the dangerous operations were conducted in a residential neighborhood where community members were at risk of exposure. Accordingly, the Supreme Court found the Asbestos Court did not err by concluding that BNSF's handling of asbestos in Libby constituted an abnormally dangerous activity for which BNSF was strictly liable.

The Supreme Court, at BNSF's urging, decided to adopt Restatement (Second) of Torts § 521, which exempts a common carrier from strict liability, based on the reasoning provided in the Restatement, and the fact that the majority of other jurisdictions and Montana's district courts apply the common carrier exception. Under § 521, the common carrier exception applies if (1) the activity is carried on in pursuance of a public duty and (2) that public duty is imposed on the actor as a common carrier. Although the court found the BNSF satisfied the first prong because it was required by law to carry any goods that can be shipped, the court found that it did not satisfy the second prong based on plaintiff's evidence that BNSF undertook numerous other activities for its own purposes that may not fall under the common carrier exception. Those other activities were not before the court and could be addressed on remand.

As to another defense raised by BNSF, the court determined that BNSF could not raise W.R. Grace's conduct to refute causation because Grace had yet to settle with the plaintiffs over Grace's activities. The defense was thus not ripe for determination by the Supreme Court. Relatedly, the court held that BNSF could introduce evidence of Grace's conduct as a substantial factor in plaintiffs' injuries, but it could only do so to prove Grace's conduct was a superseding intervening cause of the damages. However, the court found that BNSF and Grace acted contemporaneously for many years, rendering Grace's actions not a superseding intervening cause.

Accordingly, the Montana Supreme Court held that the Libby residents' claims were not preempted by federal law and BNSF was subject to strict liability because it engaged in an abnormally dangerous activity. BNSF was protected from strict liability for actions taken pursuant to a statutory public duty but not for its own ordinary negligence, and BNSF could not refute causation by offering evidence of Grace's conduct as a substantial factor or superseding intervening cause of the Libby residents' injuries.

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***Jones v. Pneumo Abex LLC*, 2019 IL 123895 (Ill. Dec. 19, 2019)**

The Supreme Court of Illinois reversed and remanded a lower court decision, holding that prior precedent concluding that manufacturers could not be held liable as a matter of law for civil conspiracy were not distinguishable on the ground that the claims in the prior cases were resolved by motion for judgment notwithstanding the verdict.

A construction worker who allegedly contracted lung cancer as a result of exposure to asbestos-containing brakes and insulation during his career and when repairing his own vehicles brought civil conspiracy and negligence claims against, among others, a manufacturer of asbestos-containing brake linings and a manufacturer of asbestos-containing insulation. The trial court awarded summary judgment to the manufacturers and the construction worker appealed. The appellate court reversed and remanded.

In 2013, John Jones and his wife, Deborah, sued for damages they suffered when John contracted lung cancer. The Joneses alleged that John's lung cancer resulted from his exposure to asbestos, "including asbestos from one or more" of the numerous companies named as defendants in the case, while he was involved in the construction industry "from 1962 through the 1970's" and while he repaired the brakes on motor vehicles he owned during the same period. The plaintiffs alleged that Owens-Illinois, Inc. and Pneumo Abex LLC conspired with others to suppress information regarding the dangers of exposure to asbestos.

Pneumo moved for summary judgment with respect to the claims asserted against it for civil conspiracy, arguing that the claims were based on the same facts as those in the civil conspiracy claims advanced unsuccessfully by other plaintiffs in other cases resolved in Pneumo's favor at the trial court level. Two months later, Owens-Illinois filed its own motion for summary judgment, arguing that all of the evidence advanced by plaintiffs here had already been considered and found deficient in more than 60 other cases.

The trial court granted summary judgment for the defendants, finding the parties had admitted the facts were the same as in other cases the court had decided and adopting the findings and analysis of those cases to find no verdict could stand against the defendants based on conspiracy. The appeals court reversed and remanded, finding distinctions with the precedent the trial court had relied upon.

The Supreme Court reversed and remanded, concluding the trial court had properly decided the claims and the facts alleged had been "thoroughly explored and tested in the course of many lawsuits spanning more than two decades involving conduct that occurred long ago" and were confirmed by an exhaustive record with no claims that additional evidence had yet to be uncovered. Thus there was no practical consequence from the trial court granting summary

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judgment based on precedent that involved entry of judgment notwithstanding the verdict or a directed verdict.

Other Decisions Relevant to Asbestos Settlement Trusts

We include the following two decisions because they relate to topics relevant to settlement trusts, namely Medicare reporting obligations and the scope of privilege applicable to trust fiduciaries.

***Ruiz v. Rhode Island*, No. CV 16-507WES, 2020 WL 1989266 (D. R.I. Apr. 27, 2020)**

The U.S. District Court for the District of Rhode Island granted plaintiff's motion to enforce a settlement agreement and oblige defendants to pay settlement proceeds, while denying the plaintiff's motion to award attorneys' fees, punitive damages and interest. The court denied as moot the defendant's motion to compel plaintiff's to comply with a consented-to order requiring him to either provide his Social Security Number or an affidavit averring that he did not have one.

Plaintiff Genaro Ruiz developed a serious health condition and required a weeklong hospitalization following a wrongful arrest and incarceration. The parties entered into a settlement agreement for "all loss and damages" that Ruiz suffered. As part of the agreement and release, Ruiz acknowledged that it was his responsibility to resolve any outstanding Medicare claims. During the settlement negotiations, the parties did not discuss how the defendants, the State of Rhode Island and others, would obtain closure with respect to any possible Medicare liens – specifically, the defendants never advised Ruiz that they would require his SSN to comply with the Medicare statutory reporting requirements and Ruiz did not disclose that he would refuse to supply his SNN under any circumstances.

Pursuant to the Medicare, Medicaid and SCHIP Extension Act, ("MMSEA"), 42 U.S.C. §1395y(b)(8)(A-B), any self-insured entity paying a liability settlement must submit "information as [HHS] shall specify," § 1395y(b)(8)(B)(ii) ("specified information"), regarding the beneficiary of the settlement or judgment into a portal of the Centers for Medicare and Medicaid Services to determine the Medicare status of the injured party. Until 2013, the specified information required to make this query, as mandated by MMSEA, unambiguously included the injured party's full SSN.

Based on the state's extraordinary efforts to obtain the Ruiz's SNN and to comply with its MMSEA reporting obligations, the court found that the Rhode Island had both fully complied with the reporting requirement (by submitting queries based on every possible iteration of the five digit SSN using information plaintiff provided in discovery with plaintiff's knowledge and

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consent that it was to be used for MMSEA reporting) and had made far more than adequate "good faith efforts to identify a beneficiary."

The court then concluded that the defendants' prerequisite to "process[ing the] settlement check," and paying the plaintiff the settlement proceeds has been accomplished and settlement could be paid without producing any more information. Accordingly, the court entered orders enforcing the settlement.

***J.P. Morgan Trust Company of Delaware v. Fisher*, 2019 WL 6605863 (Del. Ch. Dec. 5, 2019)**

In an action by a trustee against the trust's beneficiaries "seeking a broad declaration that the trustee had acted properly in all respects," the beneficiaries moved to compel the production of relevant and responsive documents that the trustee withheld pursuant to the attorney-client privilege. The Delaware Court of Chancery granted the motion, finding that the beneficiaries had made the showing necessary to obtain production.

In February 2006, Richard Fisher entered into an option agreement with a Delaware limited liability company, RLF Assets, LLC, which granted the company the option to purchase Richard's ownership interest in a valuable real estate business, Fisher Brothers, upon his death. The company's members were Richard's three children: Winston, Hadley, and Alexandra. Winston was the managing member of the company with a full member interest that carried both voting and economic rights, as well as the authority to conduct the company's business and affairs. Richard created trusts for Hadley and Alexandra that each received a special member interest without voting rights or authority over the company's business and affairs.

If the company exercised the option, then the company would make distributions to the special members in certain pre-determined amounts over the next eleven years. Additionally, the option gave the company the right to acquire the special member interests after ten years for a set purchase price of $10 million for each special member interest.

After Richard died, Winston exercised the option and disputes arose among Richard's widow, his children, and the administrators of his estate. As part of their settlement in March 2010, the original trustees for Hadley's trust resigned, and J.P. Morgan Trust Company of Delaware became the successor trustee with all of the duties of a traditional common law trustee. Winston and J.P. Morgan, on behalf of Hadley's trust, engaged in discussions regarding the special member buyout, with Duane Morris LLP representing the trust.

Winston offered two alternatives to the contractual mechanism for the buyout: either a cash purchase of the trust's special member interest for $11.5 million, or a pool of securities Winston would select in exchange for the special member interest. Hadley, finding that both offers would

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generate a significant tax burden, asked J.P. Morgan to propose as a third alternative a tax-advantaged distribution of real estate held through a special purpose entity. J.P. Morgan declined to pursue the third alternative, describing it in an internal email as "not something that is acceptable to us." J.P. Morgan then accepted the cash proposal, despite Hadley's threat to sue J.P. Morgan if it accepted either of Winston's proposals.

J.P. Morgan sued Hadley, seeking an expansive declaratory judgment that it complied with its legal and equitable duties in all respects. Hadley contended that there were certain legal arguments J.P. Morgan should have raised regarding, among other things, Winston's alleged conflict of interest due to his being a partner in Fisher Brothers and the sole manager of the Company. Additionally, Hadley asserted that J.P. Morgan made its decision due to its own conflicts of interest relating to certain financial incentives associated with cooperating with Winston. During discovery, Hadley moved to compel 570 documents J.P. Morgan withheld pursuant to the attorney-client privilege regarding these allegations.

The Court of Chancery applied its analysis in *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976) in concluding that Hadley demonstrated his entitlement to the privileged documents. The court found that the documents sought involved advice J.P. Morgan obtained in order to carry out its duties to the trust and its beneficiaries, rather than for its own defense in any litigation against itself. J.P. Morgan contended that this analysis under *Riggs* was superseded by statute when the General Assembly added subsection (a) to 12 Del. C. § 3333, which codified the common law principle that a fiduciary can retain counsel and invoke the attorney-client privilege for the advice it obtains. However, the court rejected this argument, finding that the amendment merely clarified when certain fiduciary exception does not apply. Accordingly, the court granted Hadley's motion to compel, finding that Hadley made the necessary showing under *Riggs* to obtain production, and that *Riggs*, which remains good law and was not abrogated by statute.

Legislative Updates:

There was no significant legislative action regarding asbestos at the federal level in 2020. However, two states enacted new laws addressing asbestos claims.

Virginia Eliminates Indivisible Cause of Action Theory

In March 2020, the Governor of Virginia signed Senate Bill 661, which changed the limitations period for asserting a second disease. The bill expressly intended to reverse *Kiser v. A.W. Chesterton*, 736 S.E.2d 910 (Va. 2013), in which the Supreme Court of Virginia, deciding a question certified to it by the Third Circuit Court of Appeals, dismissed as time-barred an action for wrongful death. The action was untimely under the indivisible cause of action theory, pursuant to which the limitations period began to run when the decedent was diagnosed with

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asbestosis in 1988, even though he was not diagnosed with the fatal disease of mesothelioma until 2008. Under the new Virginia law, the diagnosis of a malignant asbestos-related disease is considered a separate injury from an earlier-diagnosed non-malignant asbestos-related disease, and the limitations period accrues when the subsequent malignant injury is diagnosed.

Iowa Adds to Evidentiary Requirements to File Asbestos/Silica Actions

In June 2020, the Governor of Iowa signed Senate File 2337, which revised the requirements for filing civil actions concerning asbestos and silica. Iowa had previously adopted a version of the transparency in asbestos claims act, which requires a plaintiff to file certain information about other asbestos claims when filing a civil action. The amended law now requires a plaintiff in a silica or asbestos action, including one alleging a non-malignant disease, to file with his initial pleading evidence of the basis for the claim against each defendant. The amendments make clear that the evidence must include information about current and past worksites; persons through whom the injured party was exposed; the products to which the injured person was exposed; details about the location, manner, and frequency of the exposure; and the identity of the manufacturer or seller of the product that caused exposure. Under the amended law, the court must dismiss the action without prejudice with respect to a defendant whose product or premises is not identified in the requisite evidence. The revised law took effect July 1, 2020.