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CIVIL JUSTICE RESPONSE AND TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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Over-naming of defendants in asbestos cases continues to be a problem for companies in Ohio. Legislation is a solution to help protect companies from enduring years of litigation.

Over-naming in Ohio Asbestos Litigation: A Legislative Solution is Needed

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The **Civil Justice Response Committee** works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection, and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect the outcome of the debate or controversy. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Member participation is the focus and objective of the **Toxic and Hazardous Substances Litigation Committee**, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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More than 99% of all asbestos-related personal injury or death cases in Ohio are filed or litigated in Cuyahoga County, which covers the Cleveland metropolitan area. The Cuyahoga County court system is one of the birthplaces of asbestos litigation—both property damage cases filed by schools which flourished in the 1980's and individual personal injury cases which became widespread after Johns Manville filed bankruptcy in 1982. Cuyahoga County is also where one of the preeminent asbestos plaintiff lawyers, labor union attorney and former U.S. Congressman Robert E. Sweeney (1924-2007) maintained his offices. And of course, Ohio is home to Eagle-Picher Industries, Owens Corning Fiberglas and Owens-Illinois, three staple companies that weathered hundreds of thousands of asbestos claims before being forced to seek protection under bankruptcy statutes.

Cuyahoga County became one of the epicenters for asbestos personal injury litigation and a hot bed for case filings that have lasted decades and reached nearly 40,000 active pending cases at one time. With this experience, Cuyahoga County became—and is—a leader in court-driven case management orders. Cuyahoga County's asbestos standing order is the bedrock of Lone Pine orders. In addition, the county was one of the first to establish medical criteria for prioritization and trial groupings and to require bankruptcy trust disclosures. The latter orders gave rise to Ohio's 2004 asbestos medical criteria legislation[1] and 2012 asbestos bankruptcy transparency legislation,[2] both of which became models for other states seeking to curb asbestos litigation abuses.

Against the national landscape, Cuyahoga County has often been viewed as a beacon of fairness and sound policy in its handling of asbestos cases. Cases get tried, summary judgments are granted, and defense verdicts are possible.

That said, the naming of asbestos defendants that have no connection to a plaintiff's injuries is a problem in Ohio, as in other states.[3] And the large number of defendants that are typically named in Cuyahoga County asbestos cases is reflective of this problem.

As of December 1, 2020, almost twenty percent of the twenty-one asbestos lawsuits filed in Cuyahoga County in 2020 name twenty or more defendants; one suit names more than eighty defendants. In 2019, over forty percent of the thirty-one asbestos lawsuits filed in Cuyahoga County named twenty or more defendants, eight suits named more than fifty defendants, and one suit named nearly 100 defendants. In 2018, over forty percent of the County's forty-three asbestos lawsuits named more than twenty company defendants, thirteen suits

[1] *See* Ohio Rev. Code Ann. §§ 2307.91–.96.
[2] *See* Ohio Rev. Code Ann. §§ 2307.951–.954.
[3] *See* James Lowery, *The Scourge of Over-naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice*, 32-24 Mealey's Litig. Rep.: Asbestos 22 (Jan. 24, 2018).

named more than thirty defendants, seven suits named more than fifty defendants, and one suit named nearly ninety defendant companies. In the forty-two lawsuits filed in 2017, nearly forty percent named twenty or more company defendants, and nine named more than thirty defendants.

The court system eventually weeds out most erroneously sued asbestos defendants, but the process is time-consuming and expensive for those companies, taking at least two years for many of them to obtain dismissal.

In cases filed in 2017, the dockets reflect that an estimated 15-20% of the named companies were voluntarily dismissed after enduring at least two years of expensive litigation. For example, in one 2017 case, which named more than thirty-five defendant companies, at least seven of these companies were voluntarily dismissed without payment in 2019, and all remaining defendants in that case were voluntarily dismissed thereafter. In another 2017 case involving thirty-five defendants, at least five of the defendants were dismissed on summary judgment by early 2019, meaning each of the companies was required to fully litigate (attend depositions, prepare briefs and present oral argument) to obtain dismissal. In another 2017 case that involved over forty defendants, at least eight companies were voluntarily dismissed without payment in 2019, and ultimately, the entire case was voluntarily dismissed. A similar pattern followed in two other 2017 cases naming more than twenty company defendants. In one of those cases, all the companies except bankrupt entities were dismissed by 2019, including at least four that were dismissed without payment. In the other case, summary judgment was granted to at least three of the companies, at least eight companies were dismissed without payment, and by January 2020, all companies except bankrupt entities were dismissed. For the cases filed in 2018 and 2019, large numbers of defendants remain pending as each participates in costly discovery, bears hidden costs of being sued, and waits its turn for an opportunity to obtain dismissal.

Some of these over-naming practices may flow from difficulties in identifying potentially responsible parties in asbestos cases and proving causation. These challenges for plaintiffs do not, and cannot, translate to an obfuscation of the Ohio Civil Rules which mandate a good faith filing. Ohio Civil Rule 11 provides that all filings constitute a certificate by the attorney that to the best of the attorney's knowledge, information, and belief there is a good ground to support the claims against the named defendants. The routine dismissal of asbestos defendants without payment and grant of unopposed summary judgment motions show that Rule 11 principles are not consistently being followed or enforced.

The over-naming of companies in asbestos litigation is costly and has long-lasting negative effects on businesses that should not have been named in the first instance. A wrongly sued defendant in a Cuyahoga

County asbestos case may incur legal costs ranging from a few thousand dollars to as much as $25,000 prior to dismissal. Of course, that cost grows significantly when it is multiplied by the number of lawsuits.

These costs are just the obvious—other significant costs relate to corporate acquisitions, and disclosures, as well as reserves. Imagine trying to sell a company and explaining that, while past experience indicates that the current docket will eventually be dismissed without payment, more filings are expected. Imagine convincing the would-be buyers and due diligence team that there really is nothing under the hood, even though this corporate defendant has no documents or witnesses relating to events that occurred more than fifty years ago. And sometimes there are documents, and corporate witnesses have verified that asbestos was never used and the use of asbestos in legacy product lines simply does not make functional sense. But still, the company continues to be sued and expend significant dollars defending those suits in order to obtain dismissal. The cautious buyer simply looks elsewhere.

Or consider reserves—having to adequately reserve for potential liability for a verdict gone wrong or tie up working capital because of pending lawsuits. Independent auditors and best practices dictate adequate reserves for pending lawsuits even when there is no legal basis for liability. Being wrongly named in asbestos cases limits innovation, restricts creativity and mobility, depletes insurance, and wastes resources.

Sue first and discover the facts later should not be the norm for asbestos cases in Ohio. And the current remedy—pursuing a Rule 11 violation—is inadequate. Courts disfavor Rule 11 motions, and asbestos defendants face retaliation from plaintiffs' counsel for any such efforts. No lawyer whose client is routinely sued in asbestos cases and dismissed would advise that client to seek sanctions under Rule 11 when the stakes may be the punitive filing of many more lawsuits against the company along with manufactured discovery disputes and potential sanctions in a volatile jurisdiction outside of Ohio.

Ohio needs a legislative solution to protect businesses from being wrongfully named in asbestos litigation. Pioneering legislation enacted in Iowa in 2020 serves as a model.[4] Iowa's new law requires asbestos plaintiffs to file a sworn information form with the complaint specifying the evidence that provides the basis for each claim against each defendant. The sworn information form must include detailed information as to the plaintiff's exposures and their connection to each defendant. The court must dismiss the action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.

[4] *See* Iowa S.F. 2337 (2020), *available at* https://www.legis.iowa.gov/docs/publications/LGE/88/SF2337.pdf. *See generally* Peter Kelso et al., *Asbestos Litigation Amid the COVID-19 Pandemic: New Developments in 2020*, 35-17 Mealey's Litig. Rep.: Asbestos 25 (Oct. 14, 2020).

Conclusion

The erroneous, over-naming of asbestos defendants is a problem in Ohio. Companies with no liability are routinely named as defendants in asbestos-related personal injury lawsuits and forced to pay the costs of defense for at least two years only to find themselves dismissed. Ohio should enact legislation modeled after a pioneering Iowa law enacted in 2020 that requires asbestos plaintiffs to provide the factual basis for each claim against each defendant. This commonsense reform would save companies from incurring unnecessary costs and streamline the litigation to allow legitimate claims against culpable entities to proceed more efficiently.

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