Quarterly Review

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Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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Ohio Association of Civil Trial Attorneys
The Source for Defense Success

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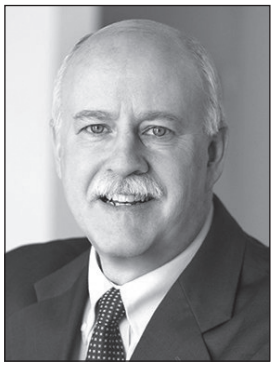

I am incredibly excited to let you know about OACTA's ambitious plans for 2019 and my hope that you will be inspired to take an active role in these plans, and encourage your colleagues to do so, as well. But first, it's my honor to recognize those who brought us to this point through their great leadership, imagination and accomplishments: my predecessor Jill Mercer, who will now move into the role of Immediate Past President, and Brian Kerns, our former Immediate Past President. Thank you both for your superb service (though Jill is not quite done yet).

In 2019, OACTA will continue to provide first-class CLE programs, starting with the Insurance Coverage seminar set for Friday, April 12, 2019 at Grange Insurance in Columbus. This is an incredibly informative program, and a wonderful opportunity for lawyers and claim professionals to learn and network. Another excellent CLE set for this coming June is our expanded "Litigation Skills Boot Camp" to sharpen critical tools for deposition, trial, mediation and oral argument. The Boot Camp recognizes the changing nature of our practice and the skills necessary to be successful. It's an ideal opportunity to provide top-notch training to younger lawyers at an exceptional value, but will be useful to veteran litigators, as well.

As part of our commitment to serving our community, we will once again hold the OACTA Foundation Golf Outing to benefit the National Foundation for Judicial Excellence which trains state court appellate judges, and also benefit OACTA's Inclusion and Equity Scholarship Program. There will be more good news coming about the scholarship program, so stay tuned. Speaking of which, it is also my hope that in 2019 we will expand the role of the OACTA Inclusion and Equity Committee beyond the scholarship to make an even greater impact. You'll also be hearing about additional OACTA initiatives as we seek to improve our services and the legal profession in Ohio.

In 2019, OACTA members will continue to serve as "scholars and experts," starting with this edition of the OACTA *Quarterly* by the Environmental Law and Toxic Tort Committee, Chaired by Karen Ross of Tucker Ellis, and Vice-Chair Dave Oberly of Blank Rome. They are going gangbusters, having revamped the committee's website, and now editing a terrific *Quarterly* that should appeal to attorneys in all aspects of defense work. Articles this month include an update on the legal standards regarding the statute of limitations in latent injury cases by Jim McCrystal of Sutter O'Connell; advice on how to strategically leverage personal jurisdiction motions by Dave Oberly of Blank Rome, as well as his analysis of the duty of care in "Take-Home"/Secondary asbestos exposure claims; a snapshot look at Cuyahoga County's Asbestos Docket by me; and an interview with esteemed Judge Harry Hanna who provides insights beneficial to us all.

And we look forward to ending the year with a fantastic Annual Meeting in Cleveland.

I want to thank the superb officers I have the honor of working with this year including Vice President Jamey Pregon, Treasurer Natalie Wais and Secretary, Ben Sassé. Each has tremendous drive, insight and imagination and we all look forward to working for you, our members. And please, if you have any questions, comments, suggestions (or racing tips), let me know. This is your organization and we want to do everything we can to make it better for all of us. Here's to a great 2019!

Introduction

Environmental Law/Toxic Tort Committee

Karen Ross, Esq., Committee Chair
Tucker Ellis LLP

The Environmental Law and Toxic Tort committee of the Ohio Association of Civil Trial Attorneys is pleased to provide you with the Winter Issue of the OACTA Quarterly Review. In this issue, we present: (1) updates on the legal standards regarding the statute of limitations in latent injury cases and a defendant's duty in take-home cases; (2) recommendations to strategically leverage personal jurisdiction motions; (3) a "snapshot" of the Cuyahoga County's Asbestos Docket; and (4) insight and lessons from Judge Harry A. Hanna of the Cuyahoga County Common Pleas Court. We encourage you to visit our new homepage (https://oacta.memberclicks.net/environmental-law); contact us to submit content for the website. Further, consider joining the ELTT Committee – we are always looking for more great lawyers. Finally, join me in thanking the authors of this Quarterly.

May the rest of Winter bring you warmth and prosperity in all aspects of your life!

Toxic Tort Issue Article - Latent Injuries - Nothing New in Ohio after Schmitz Decision

James L. McCrystal, Jr., Esq.
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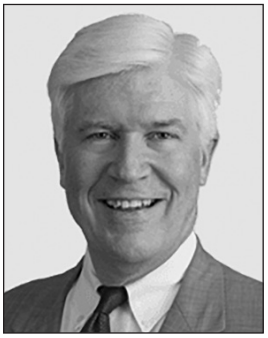

Since 1927 Ohio's statute of limitations for bodily injury claims has been simply expressed "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arises." The two year limitation period is clear, but when it begins to run has been frequently litigated. Most recently, the Ohio Supreme Court revisited the issue last October, when deciding *Schmitz v. Natl. Collegiate Athletic Assn.*, Slip Opinion No. 2018-Ohio-4391.

Steve Schmitz received a football scholarship to attend the University of Notre Dame and played football there from 1974 to 1978. In 2012 he was diagnosed with chronic traumatic encephalopathy (CTE), a degenerative brain disease and before he died in early 2015, he was additionally diagnosed to be suffering from severe memory loss, cognitive decline, Alzheimer's disease, and dementia. He sued Notre Dame and the NCAA in Cuyahoga County in 2014 alleging that repetitive head impacts sustained while playing football for Notre Dame were the cause or led to aggravating these diagnoses. The defendants were alleged to have failed to warn him of the harm which could result from concussions.

Rather than answering the complaint, the defendants quickly moved to dismiss the complaint, arguing the statute of limitations had expired long before the complaint was filed. The defendants argued that the complaint alleged he suffered repetitive concussive and sub-concussive injuries and that during practices and in games those injuries caused him to be substantially disoriented as to time and place. As a result of those admissions, they argued that it was clear that the claim was time barred because it was not filed within two years after suffering those injuries.

While the defendants were successful in the trial court which dismissed the case without an opinion, they lost in the 8th District Court of Appeals but successfully petitioned the Ohio Supreme Court to hear their appeal. In October, 2018 the Supreme Court affirmed the 8th District and the case is now pending once again in Cuyahoga County Common Pleas Court.

The 8th District opinion, *Schmitz v Natl. Collegiate Athletic Assn.*, 2016-Ohio-8041, took notice of out of state class actions involving professional wrestlers and hockey players. See *In Re. NHL Players' Concussion Injury Litigation*, D.Minn. No. 14-2551, (Mar.25,2015); *McCullough v. World Wrestling Entertainment, Inc.*, D.Conn. Nos. 3:15-CV-001074,3:15-CV00425, and 3:15-CV-01156, 172F.Supp3d. 528 (March 21, 2016). Both cases, like *Schmitz* involved claims that it was not clear that when those players suffered a concussion that they knew they were at risk of latent, permanent neurological conditions.

The 8th District decision noted that *Liddell v. SCS Services* (1994), 70 Ohio St 3rd 6, was analogous to those out of state cases, because as in those cases, *Liddell*, a police officer knew he was exposed to a toxic chlorine fumes when he responded to a fire, but he had no idea that he would be advised by a doctor seven years later his nasal cancer might be connected to his exposure at those fumes from that fire.

The Supreme Court in *Liddell* recognized "Statutes of limitations cause particular problems in cases like the one before us today in which a latent injury cannot be detected before the applicable limitations period expires, were the statute to begin to run at the time of the event that caused the injury. To avoid the potential harshness inherent in a rigid application of these statutes courts

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have devised exceptions where ignorance of an injury may toll the running of the statute of limitations. Under certain circumstances this discovery rule delays the running of the limitations period until the injury has been discovered." 70 Ohio St 3d 10.

In that decision the Court reviewed the history behind the judicially developed doctrine applying a discovery rule to toll the running of certain statues of limitations. That process began in 1972 with *Melnyk v. Cleveland Clinic* (1972), 32 Ohio St.2d 198, which permitted the filing of a medical malpractice claim against a surgeon who negligently left a foreign item in a patient when the patient discovered or in the exercise of reasonable diligence should have discovered the negligent act.

The *Melnyk* decision was followed by others: *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84 (discovery rule adopted for claims of bodily injury resulting from exposure to asbestos); *Oliver v. Kaiser Community Health Found*. (1983), 5 Ohio St.3d 111,(discovery rule expanded to cover claims for medical malpractice); *Skidmore & Hall v. Rottman* (1983), 5 Ohio St.3d 210 (discovery rule for medical malpractice adopted in Oliver also adopted for legal malpractice claims because the same statute of limitations, R.C. 2305.11[A], controlled both legal and medical malpractice actions); *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59 (discovery rule applied to DES-related claims); and *Browning v. Burt* (1993), 66 Ohio St.3d 544, (discovery rule applied to a claim of negligent credentialing of a physician by a hospital).

The *Liddell* decision also noted that had the police officer brought suit for the inhalation of the toxic chorine fumes, the defendant would have challenged the claim that he might develop cancer as a result of the exposure as being too speculative. As a result, the court found the negligence claim for the cancer claim was timely filed, if it was filed within two years of being informed by competent medical authority of the link between the cancer and the exposure to the toxic chlorine gas.

Using the *Liddell* decision the Court of Appeals noted that the record at that point did not permit the court to conclude as a matter of law that *Schmitz* discovered his legal injury in 1978 or that he should have discovered it more than two years before the suit was filed. As a result the case was remanded back to the trial court.

The school and NCAA jointly appealed the decision and the Supreme Court accepted the appeal in 2017. The proposition of law for the bodily injury claim was simply stated "A diagnosis for the long-term effects of an injury a plaintiff already knew about does not revive a time-barred claim" Proposition of Law No. 1.

In their Memorandum in Support of Jurisdiction, the defendants suggested that *Liddell* was distinguishable from this case, because in *Liddell* the cancer the officer developed was a latent disease, arising from the same incident, but distinct from the other injuries received in the accident. They argued that *Schmitz's* cognitive impairments were the result of the long-term worsening of the head injuries he experienced and was aware off in college, rather than district injuries.

In their merits brief, the defendants argued that the complaint clearly claimed the symptoms of a head injury was apparent immediately so the only question was whether alleged neurological and cognitive deficits for which the Complaint seeks relief are the long-term effects of the injuries that manifested in the 1970s.

The Supreme Court rejected that argument, noting that discovery of physical injury alone is insufficient to start the statute of limitations running if at that time there is no indication of tortious conduct giving rise to a legal claim. The Supreme Court had decided two earlier cases, one a negligent medical credentialing case, *Browning v. Burt* (1993), 66 Ohio St.3d 544 and one an employment intentional tort case, *Norgard v. Brush Wellman* (2002), 95 Ohio St. 3d 165, that addressed when the statute of limitations began to run.

The *Browning* case was a consolidated case where two women more than two years after concluding Dr. Burt had committed surgical malpractice on them, discovered that hospital where the surgery was performed negligently credentialed Dr. Burt. The hospital argued that their claim for negligent credentialing arose when they learned of the doctor's malpractice. The Supreme Court found that the statute of limitations for their claims of negligent credentialing didn't arise until they discovered, by watching a TV show about other patients of Dr. Burt that suggested his operations were unnecessary or experimental, and following that discovery their claims of negligent

credentialing against the hospital were timely filed. In other words, the statute began to run when they knew or should have known that their injuries were a result of negligent credentialing procedures or practices.

The *Norgard* case involved an employee of Brush Wellman who was diagnosed in 1992 with chronic beryllium disease (CBD), for which he was receiving workers compensation disability benefits. In 1995, he learned Brush Wellman had withheld information that their air sampling collections were faulty and inaccurate and that employees may have been exposed to unnecessarily high levels of beryllium. He then brought an intentional workplace tort claim against Brush Wellman. His employer argued the suit was time barred because his claim had accrued when his was diagnosed with CBD and the case was dismissed on summary judgment and affirmed on appeal. The Supreme Court reversed finding that the claim accrued when the employee discovered or in the exercise of reasonable diligence should have discovered the workplace injury and wrongful conduct of the employer.

In the *Schmitz* case, it appears that even if he was aware he suffered concussions while playing football at Notre Dame, his causes of action against the school and the NCAA did not arise until he discovered or in the exercise of reasonable diligence should have discovered that the wrongful conduct of the defendants in failing to warn him or protect him from harm was the cause of his injuries, both those at the time and those which developed later. This outcome is consistent with the Supreme Court's prior holdings.

This case will remain interesting because we don't yet know when the statute of limitations began to run on 5 claims. When should he have learned that the school had failed to warn or protect him? In April 2010 the NCAA changed their concussion-treatment protocols. If that was adequate notice, then the statute of limitations began to run then. If so, he would have had to file suit by April 2012, before he was diagnosed with CTE in December 2012. If that wasn't adequate notice, it appears likely that he was timely by filing within two years of his being diagnosed with CTE.

Decisions like this one, create major evidentiary issues for defendants because of the passage of time from the events and the accrual of the cause of action. In the *Schmitz* case, the events date back more than forty years to the 1970's. The defendants will be challenged to find documents and witnesses to build their defense to the claims. For businesses and their carriers, these are long tail liabilities and their exposure and their potential liability value are hard to predict.

At this point, lawyers should expect more claims involving conduct which occurred more than two years before suit was filed. Degenerative conditions which once were accepted as a part of life or a consequence of long ago events, for which there was no remedy, may well become the focus of new claims. Experts will improve their skills at identifying trauma's role in the development of degenerative conditions. Lawyers representing victims will focus on developing theories that conduct long ago, not considered at the time as lacking in due care, were in fact dangerous, by showing there is evidence establishing a link between the conduct and the development of conditions which take years to manifest.

James L. McCrystal, Jr., Esq., is a shareholder of Sutter O'Connell Co in Cleveland, a past president of OACTA and former member the DRI Board of Directors. He has successfully tried many product liability cases and has served as national counsel for a major Ohio corporation in mass tort cases. He is a graduate of the University of Notre Dame Law School and John Carroll University.

The Next Wave of Asbestos Litigation: Examining the Duty of Care In Take-Home/ Secondary Asbestos Exposure Claims

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The Rise of Take-Home or Secondary Exposure Asbestos Claims

Take-home asbestos claims are asserted by or on behalf of individuals who claim an asbestos-related injury arising from exposure to asbestos fibers through others. Most commonly, these claims allege that a worker family member was exposed to asbestos in an occupational setting, who thereafter "took home" the asbestos fibers and transferred them to the household setting, thereby exposing family members and others to the toxic fibers. Though they have never set foot onto a property owner defendant's premises, and have never been employed by a defendant employer, these claimants argue that the premises owner or employer should have known about the dangers posed by asbestos and exercised reasonable care for the claimant's safety accordingly by preventing asbestos fibers from being transferred to the home environment, or otherwise warned those individuals about the risks posed by take-home exposures.

Take-home cases have considerably expanded asbestos litigation to a new generation and class of individuals, and represent a new method of significantly prolonging asbestos litigation. Furthermore, take-home claims represent one of the fastest growing types of asbestos actions filed today, resulting in significantly enhanced potential exposure and liability for asbestos defendants of all shapes and sizes. To make matters worse, looking ahead the trend of increased take-home claim filings is only set to continue, if not accelerate, as we move forward in time, especially as the population of industrial workers who were exposed to asbestos continues to age and shrink.

In recent years, the issue of whether an employer or premises owner owes a duty of care to the take-home plaintiff has been a subject of fierce litigation across the country in both state and federal courts. During this time, significant uncertainty has developed across different jurisdictions on this issue, as courts have failed to reach a consensus as to whether a duty is owed to the take-home asbestos plaintiff. Importantly, at the present time a clear divergence of opinions exists across jurisdictions as to how tort law principles should be used to determine whether an employer or premises owner owes a duty to individuals who develop asbestos-related illnesses after being secondarily exposed to asbestos fibers. The differing views across jurisdictions is attributable to the different approaches that the courts have taken to determine the existence of a legal duty in the take-home exposure context. In this regard, courts have analyzed this dispute by focusing on four primary issues: (1) foreseeability; (2) the relationship between the parties; (3) public policy concerns; and (4) statutory considerations. While the majority of courts that have tackled the issue have found that no duty exists, others have held that employers and premises owners maintain a duty to safeguard non-employee claimants from the dangers and hazards of asbestos.

Foreseeability Approach

The first approach taken by the courts in analyzing whether a duty exists for take-home asbestos cases has been to focus on the issue of foreseeability of harm to the take-home plaintiff. The key question under the foreseeability approach turns on whether the defendant employer or

premises owner actually knew, or should have known, of the nature and potential hazard of asbestos exposures during the time period over which the take-home plaintiff was allegedly exposed to asbestos fibers on a secondary basis.

Courts that apply a foreseeability-oriented approach frequently focus on the period of time over which the take-home plaintiff's alleged exposure occurred, and whether the premises owner or employer knew or should have known of the dangers and hazards of take-home exposure based on the medical information known throughout the asbestos industry during that particular time period. In addition, courts also evaluate the federal laws or regulations that were in place at the time of the exposure to determine what the defendant should have known. In particular, many courts give great weight to the Occupational Safety and Health Administration's (OSHA) 1972 regulations for employers using asbestos, which recognized the potential risk from asbestos-exposed clothing, and required employers to take the appropriate measures—including providing showers and changing facilities for workers—to minimize exposure to employees and others. In this respect, many courts are willing to find that foreseeability does not exist for exposures that took place before 1972, as the connection between asbestos-related medical conditions and take-home exposures arising from clothing worn at the workplace was not generally recognized until OSHA's regulations addressing the issue of offsite contamination from workplace clothing were introduced that year.

As a general rule, courts are willing to find that a duty was owed to the take-home plaintiff if the evidence in a given case establishes that the defendant knew or should have known that secondary asbestos inhalation caused harm at the time of the alleged exposures. However, where a lack of evidence exists to establish that intermittent and non-occupational exposure to asbestos could put people at risk of contracting serious asbestos-related conditions was generally known, and thus foreseeable, at the time of the exposure(s) in question, defendants have been successful in defeating plaintiffs' attempts to establish a duty of care. In particular, defendants have found success in persuading courts to reject a duty where the defendant can show a lack of information available in the asbestos industry regarding secondary exposure risks at the time of the plaintiff's exposure, as under such circumstances courts ordinarily find that the defendant could not have reasonably foreseen the danger of exposure to asbestos dust on workers' attire at the time of exposure.

To date, the majority of courts using a foreseeability test as their primary consideration have concluded that a duty of care exists as it relates to take-home or secondary asbestos exposure plaintiffs. Conversely, courts that have found no duty exists based on foreseeability generally have arrived at this conclusion because the fact-specific evidence of those cases fell short of demonstrating that the defendant employers/property owners knew or should have known that their conduct created a risk of injury to the take-home plaintiffs during the period of exposure.

For example, in *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008), the Tennessee Supreme Court found that a defendant owed a duty to a take-home plaintiff based primarily on a foreseeability analysis. In that case, Doug Satterfield worked at an Alcoa facility from 1973 to 1975. Prior to Satterfield's employment, beginning in the 1930s Alcoa had been aware that asbestos is a highly dangerous substance, and as a result had closely monitored the research into the dangers posed by asbestos. In addition, Alcoa became aware in the 1960s that the dangers posed by asbestos fibers extended beyond its employees who were in constant direct contact with the materials containing asbestos or the asbestos fibers in the air. Finally, the court noted that in 1972 OSHA promulgated regulations prohibiting employees who had been exposed to asbestos from taking their work clothes home to be laundered. Under these facts, the court concluded that Alcoa knew the danger that asbestos posed, and that it should have foreseen the harm that an individual, such as Satterfield's daughter—who had filed suit against Alcoa alleging secondary exposure—could suffer. Therefore, the court concluded that Alcoa owed a duty of care to the take-home plaintiff.

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Conversely, in *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009), the Sixth Circuit Court of Appeals held that an employer did not owe a duty to a take-home plaintiff exposed to asbestos by a former employee. In that case, Dennis Martin's son filed a take-home asbestos exposure suit against, among other entities, Cincinnati Gas & Electric Company. Martin worked for CG&E for almost forty years, and had been "intermittently" exposed to asbestos for just over a decade. In its analysis, the Sixth Circuit noted that the most important factor for determining whether a duty existed was foreseeability, which was based on what the defendant knew at the time of the alleged negligence, and included matters of common knowledge at the time and in the community. Importantly, the court also highlighted the fact that the plaintiff's own expert established that the first studies regarding the impact of secondary bystander exposure did not originate until 1965. Martin's employment with CG&E, however, ended in 1963. As such, because the plaintiff was unable to point to any published studies or evidence of industry knowledge of bystander exposure, there was nothing that would justify charging the premises owner with such knowledge during the time the employee was working with asbestos. Consequently, the court held that no duty of care existed in connection with the take-home plaintiff.

Party Relationship Approach

The second primary approach taken by the courts is has been to focus on examining the relationship of the parties. Where no relationship between the take-home plaintiff and the defendant exists, no duty will be imposed.

Courts using the relationship test have generally found that no sufficiently close relationship exists between the premises owner or employer and the take-home plaintiff, and as such have rejected the existence of a duty owed to the take-home individual. In many cases, such as *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005), courts will analyze the issue by employing a basic relationship test and, in doing so, will find that because a take-home plaintiff was neither an employee of the defendant nor exposed to any danger on the defendant's premises, no duty was owed to the take-home plaintiff. Likewise, in *In re Asbestos Litigation*, C.A. No. 04C-07-099-ASB (Del. Super. 2007), a Delaware court found that the relationship factor weighed against finding a duty because the employer did not have a "legally significant relationship" to its employee's family.

Finally, plaintiffs have also attempted to assert relationship-oriented arguments which focus on an employer's purported negligence in failing to ensure a safe work environment for its employees, which thereafter caused the plaintiff's take-home asbestos exposure. This argument has also been uniformly rejected by the courts based on a refusal to stretch an employer's duty of care to maintain a safe work environment beyond employees and to third parties.

Public Policy Concern Approach

Third, many courts also consider public policy concerns in determining whether a duty exists in take-home cases. When doing so, these courts often combine an evaluation of public policy factors with additional considerations of foreseeability and/or the relationship between the parties.

Courts have used many different factors in analyzing the issue of public policy, including: (1) the foreseeable probability of harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct of the defendant; (5) the opportunity and ability to exercise care; (6) the foreseeability of alternative conduct that is safer; (7) the relative costs and burdens associated with that safer conduct; (8) the relative usefulness of the safer conduct; (9) the relative safety of alternative conduct; (10) the public interest in the proposed solution; and (11) the need to limit the consequences of wrongs to a controllable degree.

In general, courts find the public policy aspect of take-home claims troublesome. In this respect, while the hazardous nature of asbestos concerns the courts and provides motivation to allow recovery for take-home victims, courts are also cognizant of the potential adverse consequences that may result from stretching the liability of premises owners and employers too far, especially where asbestos litigation has already run hundreds of companies into

bankruptcy. Ultimately, however, courts that have focused on public policy considerations have generally held that no duty is owed to the take home-plaintiff, based on the reasoning that potentially "limitless liability" is too troublesome to find in favor of the existence of a duty.

For example, in *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 479 Mich. 498 (Mich. 2017), the Michigan Supreme Court examined public policy considerations and concluded that no duty existed to exercise reasonable care for the safety of a take-home plaintiff. In doing so, the court highlighted the development of a litigation crisis that had formed as a result of the state's existing asbestos docket, and from there concluded that expanding a duty of care to any individual who may come in contact with someone who has merely been on a premises owner's property would expand traditional tort principles beyond manageable bounds and create an "almost infinite universe" of potential claimants. As such, these policy considerations (along with a "highly tenuous" relationship between the defendant and the take-home plaintiff) compelled the court to decline to extend the scope of duty to the take-home context.

Statutory Considerations Approach

Finally, some state courts are bound in their duty determination by statutes or other regulations promulgated by state legislatures. For example, in Kansas, K.S.A. § 60-4985(a)—which provides that "[n]o premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure unless such individual's alleged exposure occurred while the individual was at or near the premises owner's property"—precludes take-home claims in that state. Likewise, in Ohio, Ohio Revised Code § 2307.941(A)(1)—which provides that "a premises owner is not liable in tort for claims arising from asbestos exposure originating from asbestos on the owner's property, unless the exposure occurred at the owner's property"—also bars take-home claims from being pursued in that state as well.

The Final Word

As traditional asbestos plaintiffs—those exposed to asbestos in an occupational setting—continue to dwindle, more and more plaintiffs' attorneys will inevitably turn to secondary exposure cases with more frequency. Fortunately, at this time the majority of courts that have considered the issue of duty in the take-home claim context have rejected plaintiffs' attempts to establish a duty in this particular context. With that said, a significant split still currently exists regarding the viability of negligence-based take-home exposure claims. As such, given the significant uptick and increasing importance of take-home claims in the context of asbestos litigation, asbestos defense practitioners are well-advised to become well-versed both in the specific law that applies in a particular jurisdiction, as well as with the various rationales used across the nation for evaluating and determining the issue of whether a duty exists on the part of employers and premises owners for take-home asbestos exposure claims.

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Strategically Leveraging the Personal Jurisdiction Requirement To Put the Brakes on Litigation Tourism & Forum Shopping

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I. Why It Matters

Until recently, personal jurisdiction over corporate defendants had been expanding significantly in scope through the reliance on tenuous corporate contacts or business conducted by a defendant in a particular forum. In January 2014, however, that all started to change when the United States Supreme Court issued its decision in *Daimler AG v. Bauman*, 564 U.S. 915 (2014), holding that corporations are subject to general jurisdiction in just two states – the company's state of incorporation, and state in which the company maintains its principal place of business. Three years later, the Supreme Court reaffirmed its ruling in *Daimler in BNSF Railway Co. v. Tyrrell*, 137 S.Ct. 1549 (2017), in which the Court erased any doubt regarding the contours of general jurisdiction by holding that absent any truly rare circumstances, general jurisdiction may be found only in a company's state of incorporation or where it has its principal place of business. Finally, also in 2017 the Supreme Court decided *Bristol-Myers Squibb v. Superior Court of California*, 137 S.Ct. 1773 (2017), in which the Court articulated a clear rule limiting specific jurisdiction to those cases where the injury at issue arises out of the defendant's specific conduct occurring within the borders of the chosen forum, thereby eliminating the ability to establish personal jurisdiction merely through a defendant's *general* connections with the forum. Combined, these three decisions are critical for corporate defendants who find themselves embroiled in toxic tort, asbestos, and product liability litigation, as these cases have significantly limited where plaintiffs can bring claims and, in turn, have substantially curtailed the practice of litigation tourism and forum shopping as a result of the limitations that have been placed on a forum state's exercise of personal jurisdiction.

II. Overview of the Law on Personal Jurisdiction

There are two types of personal jurisdiction. The first, known as specific jurisdiction, encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum. For specific jurisdiction to exist, a plaintiff's action must arise out of a defendant's forum-related activities. More specifically, specific jurisdiction is applicable if the in-state activities of a corporate defendant are not only continuous and systematic, but also gave rise to the liabilities sued on. Adjudicatory authority of this order, therefore, relates to instances where the suit arises out of or relates to the defendant's contacts with the forum. Thus, the question addressed by specific jurisdiction is whether a plaintiff's suit arises out of, and is adequately related to, the defendant's forum contacts, which must be extensive enough that the exercise of jurisdiction comports with fair play and substantial justice.

The second, general jurisdiction, is exercisable when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." General jurisdiction imposes an exacting standard because a finding of general jurisdiction permits a defendant to be hauled into court in the forum state to answer for any of its activities anywhere in the world. As such, a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the state in which suit is brought are so constant and persuasive "as to render [it] essentially at home in the forum State."

III. The Problem of Expanding Personal Jurisdiction & Forum Shopping

Until recently, personal jurisdiction over corporate defendants had been expanding significantly in scope through the reliance of courts and the plaintiffs' bar on tenuous corporate business conducted in a given forum. Importantly, for some time courts and litigants have operated under the general rule that a court may exercise general jurisdiction over a corporate defendant in any state where the company maintains "continuous and systematic" business contacts. As a result, businesses have been long subjected to being sued in any state across the country, regardless of strength of the business's connection to the forum. The expansive scope of personal jurisdiction that was seen until just recently resulted in significant, egregious litigation tourism and forum shopping by plaintiffs' attorneys in toxic tort, asbestos, and product liability actions, as plaintiffs took advantage of the significant leeway they had in filing large numbers of lawsuits in a select few extremely plaintiff-friendly courts, many of which are commonly known as some of the worst "judicial hellholes" for litigating these types of complex lawsuits.

IV. *Daimler AG v. Bauman*: Reining In the Scope of General Jurisdiction

In *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), the United States Supreme Court significantly curtailed plaintiffs' ability to forum shop in toxic tort, asbestos, and product liability lawsuits as a result of the Court's holding which significantly narrowed the applicable standard for general personal jurisdiction under the Fourteenth Amendment's Due Process Clause. Until *Daimler,* the general consensus was that a defendant is subject to general or all-purpose jurisdiction—which extends to suits wholly unrelated to any activity conducted by the defendant in the forum state—in every state where the corporate defendant had continuous and systemic general business contacts. The *Daimler* opinion is significant, then, as in that case the Court held that general jurisdiction may only be exercised if a defendant is regarded as "at home" in the forum state. Importantly, with respect to corporations, the concept "at home" is limited to only the business's place of incorporation and its principal place of business, as well as where other "exceptional" contacts exist. In doing so, the Court further held that a corporation is *not* deemed "at home" in a state merely by way of the fact that the company "engages in a substantial, continuous, and systematic course of business." Based on the Court's reasoning, general jurisdiction should rarely apply in a forum other than the state in which the defendant is incorporated, or has its principal place of business.

The *Daimler* decision was a significant win for toxic tort, asbestos, and product liability defendants, as the opinion significantly strengthened the requirements for exercising personal jurisdiction against corporate defendants. In doing so, the decision significantly narrowed the ability of state courts to exercise personal jurisdiction based merely on a corporation's general activity within the state. Importantly, because state courts ordinarily exercise jurisdiction to the limits of the federal due process standard, and because federal courts also do so as well, the *Daimler* decision is applicable from coast to coast and, more importantly, in every hotbed of toxic tort, asbestos, and product liability litigation. Significantly, many subsequent decisions rendered since *Daimler* have limited general jurisdiction to a defendant corporation's state of incorporation and principal place of business. In doing so, these courts have also held in unison that "continuous and systematic" business operations in the forum state no longer suffices to establish general jurisdiction.

V. *BNSF Railway Co. v. Tyrrell*: Reaffirming Narrow Scope of General Jurisdiction

In 2017, the Supreme Court reaffirmed its decision in *Daimler* in *BNSF Railway Co. v. Tyrrell*, 137 S.Ct.

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1549 (2017). *Tyrrell* pertained to consolidated Federal Employers' Liability Act lawsuits filed in Montana state court by non-residents against a railroad that operated in Montana, but was not incorporated and did not have its principal place of business in the state. Importantly, in its ruling the Court rejected the Montana Supreme Court's holding that general jurisdiction could be exercised because the company was "doing business" and "found within" the state as a result of the railroad's significant contacts with Montana. In doing so, the Court clearly provided that the company's in-state business did not suffice to permit the assertion of general jurisdiction over claims that were wholly unrelated to any activity that took place in the state. At the same time, the Court also rejected the Montana Supreme Court's attempt to distinguish *Daimler* as not pertaining to a FELA claim or a railroad defendant. Rather, the Court found that the Fourteenth Amendment's due process constraint described in *Daimler* applies to all state court assertions of general jurisdiction over defendants, and that the constraint does not vary with the type of claim asserted or business enterprise sued. Finally, the Court highlighted that although the railroad maintained over 2,000 miles of track and over 2,000 employees in the state, "[a] corporation that operates in many places can scarcely be deemed at home in all of them." As such, the Court emphasized that "in-state business" is not sufficient to allow the assertion of general jurisdiction over claims that are unrelated to any activity occurring in the forum. Significantly, with the *Tyrrell* decision, the Court removed any doubt that the *Daimler* general jurisdiction standard applies in both state and federal forums from coast to coast.

VI. *Bristol-Myers Squibb Co. v. Superior Court of California*: Defining the Contours of Specific Jurisdiction

Most recently, in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773 (2017), the Supreme Court provided additional, more focused rules for the exercise of specific jurisdiction which significantly benefits toxic tort, asbestos, and product liability defendants. That case arose out of multiple suits filed in California by over 600 plaintiffs, most of whom resided outside the confines of California, against Bristol-Myers Squibb (BMS), the manufacturer of a blood thinning drug that allegedly caused bodily injury to the plaintiffs. BMS was incorporated in Delaware, headquartered in New York, and conducted substantial business in New York and New Jersey. On appeal, the United States Supreme court reversed the California Supreme Court's decision that BMS's "wide-ranging" contacts with California were adequate to trigger specific jurisdiction over the claims asserted by the non-resident plaintiffs. In doing so, the Court noted that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." In this regard, the suit itself—and not just some other aspect of the litigation—"must arise out of or relate to the defendant's contacts with the forum." Thus, to exercise specific jurisdiction, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence which takes place in the forum State." When such a connection is lacking—the Court continued—specific jurisdiction cannot be utilized "regardless of the extent of the defendant's unrelated activities in the State." Accordingly, a defendant's general connections with the forum cannot suffice to establish specific jurisdiction.

VII. Plaintiffs' Responses to the *Daimler, Tyrrell*, and *Bristol-Myers Squibb* Rulings

In response to *Daimler, Tyrrell*, and *Bristol-Myers Squibb*, the plaintiffs' bar has attempted a range of techniques in order to get around the general jurisdiction limitations set forth by the Supreme Court in Daimler.

A. Consent Via Registration or Appointment of Agent for Service of Process

One of the most significant strategies employed by plaintiffs has been their attempt to create an exception to the *Daimler* general jurisdiction rule whereby corporate defendants consent to general jurisdiction by registering to do business in the state or by appointing an agent for purposes of service of process. Here, plaintiffs argue that a corporation's act of registering to do business in a state, or appointing a corporate agent for service purposes, constitutes consent on the part of the corporation to be sued in the forum. Unfortunately, *Daimler* did not directly address this issue of "consent" jurisdiction. More importantly, to date the courts are split on whether registration or agent appointment in a

given state justifies the exercise of general jurisdiction over a corporate defendant. Some courts have held that registration or the appointment of an agent for service subjects the company to general jurisdiction in that state because the company is deemed to have consented to general personal jurisdiction. Conversely, other state courts have found that registration or the designation of an agent is inadequate to establish general jurisdiction, and would violate the company's due process rights. As such, plaintiffs' counsel will almost certainly continue to raise this argument until another Supreme Court decision definitively resolves this issue.

B. Jurisdictional Discovery

Furthermore, plaintiffs' counsel also commonly seek to engage in lengthy and expensive jurisdictional discovery in response to a defendant's preliminary attack on jurisdiction, which plaintiffs' counsel ordinarily contends is needed before any rulings can be made on jurisdictional issues. Importantly, this particular form of discovery is sought in an attempt to discover rationales why a court should exercise jurisdiction, which can oftentimes constitute an extremely time-consuming and costly endeavor because plaintiffs will often continue their search through discovery until favorable evidence is obtained. Conversely, jurisdictional discovery does little to assist a defendant in supporting its position that jurisdiction is not appropriate. In some instances, courts have permitted jurisdictional discovery to allow plaintiffs to evaluate a company's overall business structure and operations to ascertain all of the locales where the company operates, not just whether the company is "at home" in the given forum.

C. Specific Jurisdiction

Finally, as a result of the significant tightening on the scope of general jurisdiction, plaintiffs have turned their attention to expanding the scope of specific jurisdiction in order to maintain suits against out-of-state corporate defendants. Specific jurisdiction is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." Here, the focus of inquiry is on the relationship between the defendant, the forum, and the litigation. For example, in some product liability actions, plaintiffs allegedly injured by exposure to a company's product outside the confines of the forum state have contended that specific jurisdiction exists because the defendant also sold the same product in the forum state and, as such, the claim "relates to" those sales because they both pertain to the same product. In some instances, courts have been receptive to stretching the bounds of specific jurisdiction in toxic tort, asbestos, and product liability suits. In doing so, courts have held that although there may be insufficient contacts to permit general jurisdiction under *Daimler,* a court may still possess specific jurisdiction over a claim against an out-of-state defendant for actions occurring entirely outside of the form state where such actions are deemed "sufficiently related" to conduct that takes place in the forum state.

VIII. Strategies for Defense Counsel

A. Overview

Daimler, Tyrrell, and *Bristol-Myers Squibb*, along with subsequent related decisions, have provided corporate defendants with robust tools to combat litigation tourism and forum shopping that has become all-too-common in plaintiff-oriented forums. Importantly, these decisions give companies significant ammunition to pursue successful jurisdictional dismissal motions when they find themselves faced with a lawsuit in a foreign state arising out of conduct that has no reasonable connection to the forum. In particular, *Daimler* provides sound guidance for defense counsel to make reasoned decisions as to whether a challenge founded on a lack of general jurisdiction may be successful, as the case makes clear that in the absence of a basis for specific jurisdiction, national corporations can only be sued where they are incorporated, have their principal place of business, or have "affiliations with the State that are 'so continuous and systematic' as to render them essentially at home in the forum State."

In analyzing the potential likelihood of success in mounting a jurisdictional attack, counsel must first determine whether specific jurisdiction is applicable to a given case, as a general jurisdiction attack would be fruitless if specific jurisdiction allowed a court to exercise jurisdiction in the case at hand. In the event counsel determines that specific jurisdiction is inapplicable, as an initial matter corporate counsel should identify where exactly the company is

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"at home" in terms of the entity's state of incorporation and place of principal business. For those forums where the company is not "at home," counsel should utilize jurisdictional motions to aggressively raise the argument that a lawsuit filed against counsel's corporate client in any jurisdiction other than where the defendant is "at home" is improper. In doing so, counsel should rely heavily on *Daimler's* "at home" test to formulate robust arguments aimed at persuading courts to refuse to accept jurisdiction in improper forums. In addition, counsel should also stringently emphasize that pursuant to *Daimler*, companies should not be forced to defend themselves in jurisdictions where they maintain only a small or passive presence, or even where they conduct significant operations, yet are not "at home." In most instances, in order to prevail on a *Daimler*-based argument, counsel will most likely have to present evidence to the court to establish where the company is "at home." In addition, additional evidence demonstrating that the company's activities maintained in the plaintiffs' chosen forum is but a small percentage of the business's global operations will also aid in supporting the defendant's position that jurisdiction is improper in a given forum.

B. Consent Arguments

In order to combat plaintiffs' "consent"-based arguments, defense counsel should educate the court that because almost every state mandates registration by corporate entities who wish to do business in the state, and since almost every state also requires a corporation to appoint an agent for purposes of service of process, any consent argument must be rejected because accepting such an argument would allow corporations to be sued in every state, thereby completely nullifying *Daimler's* general jurisdiction ruling. In addition, counsel should also highlight the fact that the *Daimler* Court held that it would be "unacceptably grasping" for a state to assert general jurisdiction over a corporation merely because that entity engages in a regular course of business in the state. As such, it would be equally "unacceptably grasping" for the court to find that a corporate defendant consented to general jurisdiction merely by registering to do business in the state, or by appointing an agent for service of process, which the company was required to do by state law. Furthermore, counsel can also point to the "unconstitutional conditions" doctrine, which provides that a state may not "require a corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution." Pursuant to this doctrine, it would be unconstitutional for a state to condition doing business in the state on relinquishing its due process right shielding the company from being subjected to general jurisdiction outside its principal place of business and state of incorporation. Finally, defendants should also stress that proceeding on a consent theory would be just as expansive—and as a result just as violative of due process—as the general and specific jurisdiction theories that were rejected by the Court in *Daimler* and *Bristol-Myers Squibb*.

C. Jurisdictional Discovery

To combat plaintiffs' attempts to conduct jurisdictional discovery, defense counsel should stress that jurisdictional discovery is unnecessary and inappropriate, as any such discovery would fail to reveal any evidence that would be sufficient to demonstrate that the exercise of personal jurisdiction is appropriate. In particular, counsel should demonstrate to the court that almost all jurisdictional discovery is completely needless, as no amount of discovery is needed to determine whether the company is "at home" in the selected forum. In reality, almost all jurisdictional discovery topics are going to be irrelevant, as they pertain to issues other than whether the company is "at home" in a given jurisdiction. Importantly, counsel should also highlight the fact that the Daimler Court directly addressed the impact of its ruling on the issue of jurisdictional discovery, noting that "it is hard to see why much in the way of discovery would be needed to determine whether a corporation is at home." Furthermore, to combat jurisdictional discovery centering on a company's extraterritorial activities, defendants may elect to voluntarily provide statistical information demonstrating that the entity's forum contacts constitute only a small part of the business's overall operations. This statistical evidence can be included in the defendant's initial jurisdictional motion, serving as a pre-emptive strike to guard against any potential arguments by the plaintiffs that jurisdictional discovery is necessary. Significantly, courts have rejected the exercise of general jurisdiction where the company's business in the forum, while not insubstantial, constitutes only a very small part of its portfolio.

D. Specific Jurisdiction Arguments

To combat specific jurisdiction arguments, defense counsel can rely heavily on both the *Daimler* ruling, as well the Supreme Court's subsequent ruling in *Bristol-Myers Squibb*. Importantly, while sometimes overlooked in light of the significant holding on general jurisdiction, the *Daimler* Court also provided key guidance as to the contours of specific jurisdiction. Specifically, the Court provided that for specific jurisdiction to be available, a defendant's activities in the forum ordinarily must be "continuous and systematic," *and* give rise to the cause of action.

Furthermore, defense counsel can utilize the *Bristol-Myers Squibb* decision—which limits the power of state courts to adjudicate claims by non-resident plaintiffs when the actions on which the claims are based take place outside the forum state—to combat many different attempts at establishing specific jurisdiction by plaintiffs. Specifically, *Bristol-Myers Squibb* can be leveraged to attack and eliminate any lawsuits that are not defendant-specific, not filed in the target defendant's state of incorporation or principal place of business, or filed by plaintiffs who reside in states other than the forum state where the litigation is instituted. In particular, defense counsel should emphasize that pursuant to *Bristol-Myers Squibb*, non-resident plaintiffs who do not allege any injuries arising from conduct occurring in a state cannot maintain a suit in that same state against a company who is neither headquartered nor incorporated in the forum state.

Taken together, defense counsel can utilize *Daimler, Bristol-Myers Squibb*, and subsequent decisions to establish that specific jurisdiction is inappropriate in any jurisdiction where the actual events giving rise to the plaintiff's injury did not occur in the forum state. In addition, defense counsel should also highlight the fact that any theory that a defendant is subject to specific jurisdiction for claims arising out of out-of-state sales activity by the mere fact that the company also made sales within the forum states is nothing more than a thinly-veiled effort to sidestep the Court's recent decisions curtailing the scope of general jurisdiction. At the same time, defense counsel should stress that allowing specific jurisdiction under such circumstances would render any substantial manufacturer amenable to suit, on any claim for relief, wherever it products are distributed – a sprawling view of jurisdiction that was specifically repudiated by the *Daimler* Court.

IX. The Final Word

Ultimately, given the generally favorable reception of Daimler, Tyrrell, and Bristol-Myers Squibb in subsequent decisions, toxic tort, asbestos, and product liability defense practitioners should make sure to keep jurisdictional challenges in their litigation toolbelts, and should seek to utilize this game-changing defense whenever possible. In particular, as a result of the Supreme Court's extremely defense-friendly decisions in Daimler, Tyrrell, and Bristol-Myers Squibb, defendants should thoroughly analyze the applicability of a jurisdictional defense during counsel's preliminary evaluation of a claim. Utilized properly, corporate defendants can effectively combat forum shopping and litigation tourism by successfully removing lawsuits from state courts that lack the proper jurisdiction. Finally, because this area of law is rapidly evolving and still developing, defense counsel and their corporate clients should ensure they stay abreast of all relevant developments on this key issue. In particular, counsel should remain on the lookout for new, innovative jurisdictional arguments being made by plaintiffs, and be able to successfully combat them should they be asserted in the course of a lawsuit.

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Cuyahoga County Asbestos Litigation
A "Snapshot" of The Mass Tort Docket[1]

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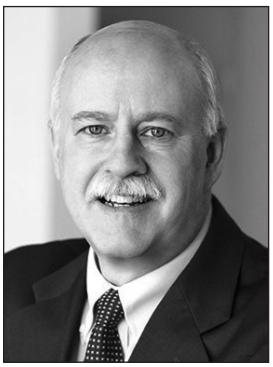

Counsel who do not practice in the toxic tort arena in Ohio, and particularly Cuyahoga County, and lay persons alike, often wonder about the long-lived, on-going asbestos litigation, and the special procedures for handling it. The reasons for this wonderment, and the need for a special docket are the result of many factors:

1) Virtually all of the active cases in Ohio involve malignancies;
2) The exposures often pertain to a host of worksites and products going back decades to the middle and even earliest part of the 20th Century;
3) There are now numerous governing statutes in Ohio;
4) There are typically a multiplicity of products in each case;
5) There are typically numerous defendants in each case;
6) There are typically a multiplicity of types of asbestos in each case, each with its own idiosyncratic issues;
7) Investigation of a tremendous number of non-parties' alternative asbestos exposures is essential;
8) There can be complex issues of diagnosis:
9) There are hosts of witnesses in each case, particularly experts; and
10) There is an overlap of the counsel handling these cases.

All of these unique features and demands combine to create a special sort of litigation that may never be encountered again.

The Background of Asbestos Litigation

Asbestos litigation has often been deemed the longest running and largest mass tort in history:

> "Through 2002, approximately 730,000 individuals who had been exposed to asbestos have brought claims against some 8,400 business entities, and almost as many more future claims are likely."
>
> *Asbestos Litigation*, Stephen J. Carroll, Deborah R. Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahamse, J. Scott Ashwood, RAND Corporation, 2005

These findings by RAND Corporation were recognized and commented upon by the Ohio State Legislature, which further noted that these business entities involved "many small- and medium-sized companies, *in industries that cover eighty-five per cent of the United States economy."* Findings & Intent, Uncodified Section, H.B. 380, R.C.§2307.951 et seq., Section 4 (italics supplied).

So What Is Asbestos Anyway?

Asbestos minerals are divided into two major groups: Serpentine asbestos and amphibole asbestos. Serpentine asbestos includes the mineral chrysotile, which has long, curly fibers that can be woven. Chrysotile asbestos is the form that has been used most widely in commercial applications. Amphibole asbestos includes the minerals actinolite, tremolite, anthophyllite, crocidolite, and amosite. Amphibole asbestos has straight, needle-like fibers that are more brittle than those of serpentine asbestos and are more limited in their ability to be fabricated.[2]

How Was Asbestos Used?

Asbestos has been mined and used commercially in North America since the late 1800s. Its use increased greatly during World War II. Since then, asbestos has been used in many industries. For example, the building and

construction industries have used it for strengthening cement and plastics as well as for insulation, roofing, fireproofing, and sound absorption. The shipbuilding industry has used asbestos to insulate boilers, steam pipes, and hot water pipes. The automotive industry uses asbestos in vehicle brake shoes and clutch pads. Asbestos has also been used in ceiling and floor tiles; paints, coatings, and adhesives, and plastics, to name a few.[3]

The Large Number of Products Translates Into a Large Pool of Potential Defendants

The list of products is almost countless, as there were numerous miners, manufacturers, suppliers/sellers, installers and servicing companies involved in the chain of production and distribution, installation and servicing for each product or type of product, and the asbestos that went in them or on them. This, in turn, has led to a plethora of defendants in asbestos cases. Adding to the complication is that for some products, asbestos is alleged as a contaminant rather than an intended ingredient. Moreover, as new purported sources of asbestos exposure have been alleged by plaintiffs (such as cosmetic talc) the complexity of the litigation has increased. As a result, asbestos cases usually involve large numbers of defendants.

The Malignant Diseases Associated With Asbestos Now Drive the Litigation

Because of the broad variety of products and the different types of asbestos, various alleged medical conditions have been associated with their use over the years.

These alleged conditions can include pleural plaques and diminished pulmonary function (often involving claims for asbestosis), various cancers, including most notably, lung cancer, and particularly, mesothelioma, but others as well.

The most serious of these asbestos-related illnesses are mesothelioma and lung cancer which can involve intensive treatment, running from draining lungs, extensive surgery and/or chemotherapy. Mesothelioma can have an accelerated progression and high mortality rate. A further complication in the litigation is that even the most serious of these cancers – mesothelioma – is divided into various types, usually described in general as either pleural or peritoneal, each with its own purported causes, diagnostic criteria, effects, treatments and prognoses.

These diseases, however, have a latency period before they manifest, often considered ten years or more.[4] Thus, a "Discovery Rule" applies to the triggering of the applicable statutes of limitations.[5] Both the applicable statute of limitations for development of a latent disease and for wrongful death are two years from discovery.[6]

While the development of the associated diseases is delayed, once manifested, progression can be fast. Because of the potentially accelerated progression of certain asbestos-related diseases and their often fatal outcome, cases are often filed on short notice with depositions being scheduled on an exigent basis with minimal investigation by plaintiffs' counsel. This potentially adds to the number of defendants named in each case, which can run up to 100 defendants or more.

In addition, Ohio is a "Two-disease" state, allowing separate claims for a non-malignancy, and later for any cancer that might develop.[7] This is in addition to any wrongful death claim that might arise, as well.[8] Thus, cases for a non-malignant condition can be concluded and then later be refiled based on the development of cancer. This has led to interesting situations where defendants who were omitted in the original suit are included in the second, often because the original defendants are no longer financially viable or bankrupt.

Complications During Discovery and At Trial

Further complicating these cases are the various changes in the law that have occurred over the years – such as adoption of the Ohio Product Liability Act, R.C. § 2307.71, *et seq.* – which may apply differently to different defendants in a single case based upon their status (e.g. manufactures versus suppliers), or even based upon the various dates of exposure involved.[9]

Each of these defendants may be subject to differing legal standards for liability. For example, some may be subject

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to claims for strict liability as a manufacturer, see e.g. R.C. § 2307.74, while others may only be subject to liability as a supplier either for their own negligence or based on strict liability if the manufacturer is not available under certain circumstances, such as insolvency.[10] And as a result, each may also have its own separate and distinct catalogue of available affirmative defenses.

An Essentially "All Malignancy" Docket Exacts a Toll

The intensity of the litigation also differs from other cases because of the need to address the pressures and demands of essentially an "All Malignancy" docket, dealing with plaintiffs who are likely to die soon and/or having to deal with their families. There should be no doubt that this docket can exact an emotional toll on counsel. Handling these cases puts a premium on empathy and consideration, particularly in depositions. Plaintiffs' counsel also utilize this aspect of the cases to seek unfair advantages in case management orders, trying when possible to limit defendants' discovery and preparation.

The stress of an All Malignancy Docket also includes the associated potential for overwhelming verdicts that can be part of any one of these claims. This litigation has led to some of the largest verdicts in Cuyahoga County.[11] Cases around the country addressing these claims have resulted in huge verdicts which have further added to the intensity and strain of the litigation. These verdicts have run into the tens and tens of millions of dollars, even up to *$4.6 billion dollars*, rendered July 13, 2018.[12] There should be no doubt that concern over an adverse verdict potentially resulting in the financial demise of a client adds even greater urgency to the handling of these cases.

These numerous, unique, features of asbestos litigation have led most jurisdictions to develop specialized dockets often administered by a single judge to assure the greatest economy to the parties and the court and the most uniform application of judicial and legal principles in the handling of the cases. Ohio, and particularly Cuyahoga County, have lead the way in this critical development.

The Need For a Dedicated Docket

The need for uniformity with respect to the analysis of these cases by the court is critical given the fact that many of the cases, if not all, often involve the same groups of defendants and similar groups of products, with consequential implications nationwide.

A judge handling asbestos litigation requires an intimate understanding of a large number of issues and elements including understanding: the types of exposures; the types of products; the type of testimony typically used to support particular claims; the science associated with these claims; the witnesses themselves; an appreciation and understanding of the many statutes and doctrines that control the litigation; and an ability to address the extensive motion practice and ultimately trials that result.

A Seismic Change: Apportionment Changes the Landscape

A major complicating factor in asbestos litigation has been the impact of Ohio's Apportionment Statutes, R.C. § 2307.22 and § 2307.23. The relevant statutes entitle defendants to apportion fault against any parties and non-parties who may be responsible for the harm to the plaintiff (which can include employers immune from suit or bankrupt companies and even "John Does"[13]).

As a result, the investigation of the varied sources of exposure and their potential contribution to the plaintiffs' illness multiplies exponentially as defendants need to – and are entitled to – investigate every aspect of each plaintiff's life, literally from cradle to grave, to identify any alternative sources of asbestos exposure, *including those attributable to family members who may have brought asbestos home on their clothes.* Thus, investigations not only encompass the plaintiff, but everyone in his or her immediate family, and all of *their* potential exposures. This leads to detailed and far-reaching investigations of these numerous other potential exposures. It can require the retention of experts with unique knowledge and skills to help investigate particular types of exposure. For example expert researchers hired to locate and analyze aging ships records for naval exposures, often going back to Viet Nam, Korea and even World War II.

Because of the potential multiple exposure sources, investigations often reach back to earlier cases involving common worksites or family members who may have had similar exposures and who may have provided information or testimony in their own cases or in the cases of others that may be relevant. For example, it is not uncommon for several family members to work together in a particular trade, such as insulators or plumbers, and thus had similar exposure histories, claims and prior testimony

Investigations can also involve earlier cases filed by the same claimant, for example, if a case was brought for asbestosis and the case was either administratively dismissed (see below for discussion) or resolved, and then later refiled when a malignancy developed ("The Two-Disease Rule" in action).

Because of the difficulty in investigating the apportionment defense, the statute expressly provides that it can be raised at any time up until trial.

More Seismic Changes: Asbestos Legislation - H.B. 292 Further Adds to the Complexity

Because of the broad range of potential harms associated with asbestos exposure, huge numbers of cases have been filed over the years – including in Cuyahoga County – involving claims associated with all of the purported types of asbestos-related harms (unimpaired, non-malignant and malignant).

The number of cases in Cuyahoga County alone reached over 40,000. This tremendous inventory of cases imposed an impossible burden on the courts. Because of the huge inventory of cases, Ohio adopted H.B. 292 (codified at R.C. §§ 2307.91 *et seq.*), Ohio's Asbestos Statute. Consisting of a series of statutes, it was adopted to impose standards on asbestos claims. R.C. § 2307.96(B) establishes the burden a plaintiff must meet, stating:

> A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:
>
> 1. The manner in which the plaintiff was exposed to the defendant's asbestos;
> 2. The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;
> 3. The frequency and length of the plaintiff's exposure to the defendant's asbestos;
> 4. Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

It additionally included threshold medical criteria as a means of prioritizing the cases, with the intent to get those plaintiffs who were suffering identifiable and acute illness to court ahead of those who were not. The legislation was designed to prevent the courts from being overwhelmed and the resources of the courts and defendants being depleted by responding to less serious claims, to assure that those who were sick, particularly those who were dying, would have their day in court.

H.B. 292 involves numerous tests and requirements, allowing defendants to challenge cases by motion. For example, these can include challenges to lung cancer claims where the claimant is deemed a "smoker" under the statute. Those cases that do not meet the designated statutory impairment criteria are subject to being "Administratively Dismissed." Administratively Dismissed cases are placed into inactive status. These cases can be activated by the filing of a motion when the individuals are deemed to be "impaired" based upon the statutory criteria. Most notably, this occurs if a malignancy develops.

Even More Seismic Changes: Ohio's Bankruptcy Trust Transparency Act, R.C. 2307.951 *et seq.* – The Litigation Landscape is Further Transformed

The difficulty of asbestos litigation and the associated investigation has now increased due to adoption of Ohio's Bankruptcy Trust Transparency Act, H.B. 380 ("The Bankruptcy Trust Act") R.C. § 2307.951, *et seq.*

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This Act is based on the fact that bankrupt companies have established a system of trusts to pay compensation to asbestos claimants who were exposed to their products without the claimants having to sue through the tort system. However, many plaintiffs would allege exposures to bankrupt companies' products to obtain such payments, but then fail to disclose these exposures in their tort suits. This strategy was intended to enhance the potential liability of the financially viable tort defendants by preventing jurors from hearing about other exposures that could be subject to apportionment.

The Bankruptcy Trust Act is intended to disclose these alternative sources of plaintiffs' asbestos exposure attributable to bankrupt companies to which claims may have been submitted, thereby identifying these exposures for which tort liability may then be apportioned per R.C. § 2307.22 *et seq*.

The Bankruptcy Trust Act was adopted in Ohio to be sure all claimed sources of asbestos exposure were identified to the parties and to juries. It imposes a series of obligations on plaintiffs to disclose bankruptcy trust claims; it addresses the manner in which those claims can be used as evidence; and it provides a means for defendants to require the filing of additional claims by plaintiffs with trusts to which they may have not yet filed. It then provides for the use of the claims information at trial to assure jurors are aware of all claimed exposures and to assure a fair apportionment of fault.

The investigation of bankruptcy trust claims is extremely complex as there are over 100 bankrupt companies with a majority having established trusts (or which intend to establish trusts) to which claims may have been submitted by plaintiffs. Each trust has its own means for providing trust claim records to requesting defendants and each follows its own timetable for compliance with requests for information. New bankruptcies are regularly being filed and new trusts being established adding to the difficulty of investigation. The lists of trusts to be investigated constantly needs to be updated. Some of these have recently come under scrutiny of the U.S. Department of Justice, concerned over the role plaintiffs' counsel play in the creation of the trusts and appointment of the administrators (i.e. are the foxes guarding the henhouses?). The concern is over lax compensation standards used to make large payouts to current claimants, potentially depleting the trusts' assets and their ability to pay future claimants.[14]

Numerous and sometimes every trust needs to be investigated in any given case. However, because of the demands on these trusts for information submitted by parties to asbestos cases nationwide, the ability of the trusts to respond to information requests can run several months from inquiry to response, and can be costly. Independent verification of claims by the trusts, however, is critical to assure that complete and accurate information is provided by plaintiffs to defendants, and ultimately the jury, as intended by H.B. 380.

Under the Ohio Bankruptcy Trust Act, defendants are also entitled to file motions to stay the action if they can identify trusts to which plaintiffs could submit claims in good faith, but have not. See R.C. § 2307.953. The statute provides for these motions to be filed no later than 75 days before trial.

Apportionment, combined with Ohio's Bankruptcy Trust Act, have completely transformed the landscape of asbestos litigation in the State of Ohio, by providing new, essential areas of investigation. This has added an entire overlay to the litigation which not only complicates it, but completely separates it – along with the other factors described above – from normal tort litigation involving personal injury. These developments have also brought the efficacy and fairness of the expedited, standard Case Management Order of 11 months (discussed below) into question.

Litigating an Asbestos Case –Pretrial Intensity

Asbestos litigation can be extremely complex and pretrial-dependent in terms of depositions, discovery and pretrial motions. For example, depositions of plaintiff are often on an exigent basis. They involve an initial discovery deposition. These can last several days in order to explore all of the potential sources of exposure (including for apportionment), especially for trades persons working at numerous, constantly changing, construction worksites.

They are then later followed by a trial video to preserve their testimony should they die before trial.

The parties rely upon lengthy, agreed form discovery ("Consolidated Discovery Requests" or "CDRs") that can be supplemented, depending on the parties and the products.

Discovery-related disputes often arise. These are often on a case-by-case basis and involve party-by-party disagreements. They typically require the Court to address a panoply of motions including: motions to strike; motions to compel; motions for protective orders (by parties and non-parties); motions for in-camera review, etc.

As a result, a typical case can easily exceed hundreds of filings, involving motions and voluminous supporting materials, all of which require judicial consideration, oral hearings and ultimately, written rulings. To help control the extent of filings, a Local Rule was adopted in Cuyahoga County to relieve defendants of filing Answers. Rather, defendants file Notices of Appearance in lieu of Answers. These Notices of Appearance preserve and assert all affirmative defenses and also relieve the defendants of the obligation to file cross-claims. See Cuy. Cty. L.R. 16; See also Case v. Clark Indus. Insulation, 2018-Ohio-4611, ¶ 1(8th Dist.).

Keep Movin': Motions for Summary Judgment and Motions to Dismiss Are Central

Because of the large number of defendants and the large number of affirmative defenses, there is an emphasis on dispositive motion practice. Typically a majority of defendants in a case file a dispositive motion (leading to dozens in any given case), each requiring extensive briefing, oral argument, and the review of numerous deposition transcripts and a tremendous body of evidence (e.g. discovery responses, medical records, etc.)

Dispositive motion practice is intense, including: Motions to Dismiss that can cover lack of personal jurisdiction and/or Motions to Administratively Dismiss per H.B. 292. Motions for Summary Judgment often address numerous defenses, including: lack of exposure, lack of substantial factor, the so-called "bare metal" defense/"replacement parts" defense, the "sophisticated purchaser" defense, the "supplier statute" defense, the statute of repose for improvements to real property, and the statute of limitations.

Special Processes for Special Problems: The Standing Case Managment Order and the Special Docket

While the Ohio Supreme Court allows up to a 36-month track for complex litigation from start to finish (and each asbestos case easily qualifies as complex litigation), counsel and the court agreed to a compromise pattern CMO, including a shorter, 11-month schedule (although the reasonableness of this CMO, adopted before the advent of apportionment and the Bankruptcy Trust Act is now subject to question).

Counsel and the court recognized the personal and financial stakes for both sides that are implicated by cases involving malignancies which can progress quickly. As a result, they agreed upon a highly detailed case management order but which includes an accompanying case management schedule on a more expedited basis than the 36 months otherwise allowed by the Supreme Court Rules in an effort to accommodate plaintiffs who were often in *extremis*. The intent was to get their cases to trial given their malignancies, but do so while still presumably allowing defendants to investigate and prepare a defense.

The Case Management Order, therefore, provides for certain initial disclosures by plaintiffs to defendants to assist the process, but in return, provides plaintiffs with a faster trial date. The legal and practical demands in each case, however (e.g., intervening deaths of plaintiffs, appointment of estate representatives, substitutions of parties, amendments of Complaints to add wrongful death claims or parties, and investigation of apportionment and bankruptcy trust issues), often require alteration of the Case Management Orders, or wholesale movement of cases on and off the docket.

These ongoing changes require flexibility by the Court, as well as an awareness and ability to control the entire docket to avoid conflicts, since a change in one case can potentially impact every other case on the docket

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(since they typically involve the same firms). Thus, having all the cases before a single judge on a single docket allows dates and schedules to be revised with far less complication than trying to do so with numerous judges overseeing their own independent dockets in isolation. The need for a special docket free of the demands of the criminal docket is especially acute, given the disruption that accommodating of other civil and criminal cases would have on the entire asbestos docket.

The need for flexibility is further heightened because many defendants have cases across the country, often involving the same counsel and witnesses. Thus, a change in one case in Cuyahoga County can impact not only other cases here, but dockets across the country. In turn, the cases here are impacted by the cases in the other jurisdictions, as well. At times it approaches the complexity of air traffic control with a goal of "keeping the planes flying and passengers moving."

Accommodation and flexibility in scheduling is also critical given that many of the cases involve exposures going back tens of years. This imposes difficulty on plaintiffs and defendants in investigating claims, locating and obtaining witnesses and evidence, both in support of and in opposition to claims. Many of these exposures go back to the 1960s, 1950s, and 1940s or before. Even if a plaintiff did not work at a particular site until the 1970s or 1980s, products and equipment installed decades earlier may still be deemed relevant to the exposure claims in the case and need to be investigated.

Thus, the ability to allow case schedules to change to meet these changing needs is a critical element of the current system with a single judge overseeing a single docket. Other courts facing large numbers of asbestos cases on their dockets have found that assignment of these specialized cases to the general pool of judges is generally unworkable.

Conclusion

What is clear is that the mass tort docket arose for no single reason, but rather due to a host of them. Moreover, even as the rates of case filings may have slowed, the stakes and complexity in each have not simply grown, but multiplied. Any case can result a business-ending verdict. This requires the very best that can be offered by counsel handling these cases. The stream of cases continues, spurred on by late night television ads from around the country.

Endnotes

1 The following article is not intended as the statement of any party or counsel and is not to be used, submitted or referred to in any manner in any case or claim or used for any other purpose.

2 National Cancer Institute Website, National Institutes of Health, https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos/asbestos-fact-sheet#q1

3 National Cancer Institute Website, National Institutes of Health, https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos/asbestos-fact-sheet#q1

4 "Asbestos-related diseases have a variable latency period, often extending from 10 to 40 years from initial exposure to onset of illness." Statement Of R. Davis Layne, Acting Assistant Secretary Of Labor For Occupational Safety And Health, Before The Committee On Heath, Education, Labor, And Pensions, United States Senate, July 31, 2001, https://www.osha.gov/news/testimonies/07312001

5 R.C. § 2305.10 (B)(5); See also R.C. §2125.02(D)(2)(g).

6 Id.

7 R.C. § 2307.94

8 R.C. § 2125.02.

9 "Decision of state Supreme Court in *Temple v. Wean United*, Inc., which imposed strict liability on nonmanufacturing sellers of defective products, applies prospectively only." *DiCenzo v. A-Best Prods. Co.*, 2008-Ohio-5327, 120 Ohio St. 3d 149, 897 N.E.2d 132

10 R.C. § 2307.78.

11 See for example, *Panza v. Kelsey-Hayes*, Cuyahoga County Common Pleas Court, Case No. CV-12-789009, Dec. 18, 2013, $27 million.

12 See *Ingham v. Johnson & Johnson, et al.*, Case No. 1522-CC 10417, 22nd Judicial Circuit of Missouri, July 12, 2018.

13 See e.g. *Danny J. Genet, et al. v. Georgia-Pacific, et al.*, Cuyahoga County Court of Common Pleas, Case No. CV-17-874508, File & Serve No. 6226312, 7/21/2018, and Proposed Jury Interrogatories of Defendant Union Carbide Corporation, File & Serve No. 62308488, 8/6/2018, Instruction No. 39.

14 See e.g. "DOJ Fights To Overturn Rep In Duro Dyne Asbestos Trust," https://www.law360.com/productliability/articles/1113338

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All Rise: An Afternoon With Judge Harry A. Hanna

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As lawyers, we hear jokes about our profession all the time. Most are funny because they are clever and often true. I read one recently that attempts to discredit lawyers, but actually outlines how a lawyer can go from good to great: "Good lawyers know the law. Great lawyers know the judge."[1] Knowing the judge does make a great lawyer. Not because the judge will grant favors or ignore the law, but because knowing the judge is necessary to appreciate the full picture, including the needs of the court and the best means to meet those needs when practicing law. A great lawyer not only knows the law and applies it to the facts of the case, but she also knows and understands her audience. In the courtroom, the audience starts with the judge.

If you are lucky enough to practice in Cuyahoga County, Ohio then you know Judge Harry Hanna. Judge Hanna always knew he wanted to be a lawyer. Next month he will celebrate 30 years on the bench, 22 spent overseeing Cuyahoga County's dedicated Asbestos Docket.[2] Judge Hanna considers himself blessed to have an occupation he enjoys, finds challenging, and never boring. During his career he has seen changes to asbestos litigation and gained a valuable perspective into the unique docket he maintains. I recently visited Judge Hanna to talk about his life, career, observations from the bench, and plans for the future. We are all fortunate to learn from my conversation with him.

The Changing Landscape

Over the years, Judge Hanna has observed a variety of changes to the litigation landscape. Specifically, he now sees a better "cross section of the community" serving as jurors. Long-gone are the days when lawyers and friends of lawyers/judges were barred or excused from jury duty. Judge Hanna applauds those changes.

Judge Hanna has also noticed that with the big asbestos targets[3] no longer viable, the products/equipment/devices in question are more specialized and intricate. This change requires the lawyers to educate Judge Hanna and the jury to ensure the claims and defenses are clear to a layperson. Along the same lines, with the change of defendants, punitive damages are "just about extinct" from an evidence standpoint.

Practice Tips

While Judge Hanna has much praise for the lawyers who appear before him, he identified some practice tips based on his observations and discussions with juries. While some seem obvious, the fact that jurors are noticing the issues makes them worthy of reviewing.

First, mind your manners. Remain professional at all times. The jury is watching and they expect and appreciate professional behavior from lawyers. Judge Hanna has noticed that, contrary to what some lawyers and television producers think, juries do not like overly aggressive lawyers and such behavior is not productive. Yelling at witnesses and being abusive will not help persuade the jury. Rather, Judge Hanna warns being a "blowhard" offends the jury. Judge Hanna finds that the softer approach is the better approach with a jury. With few exceptions, Judge Hanna observes that the lawyers he sees treat each other with respect and are collegial. He recognizes that the unique nature of the Cuyahoga County asbestos docket lends

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itself to better behaving lawyers as each knows they will be working opposite each other routinely and they will be appearing before Judge Hanna on any issue that arises. Judge Hanna's open door policy to answer questions or resolve issues for parties helps keep everyone on their best behavior. When the parties know the judge will answer the phone any time he is called in the middle of a deposition or if a discovery disputes arises, parties naturally tend to have less conflict. As Judge Hanna puts it, when you are repeatedly going to be working across the table from someone, "you might as well be a decent human being."

Second, remember the audience and take your time explaining the product/equipment/device at issue, utilizing experts as needed. Often lawyers forget that not everyone knows what they know and they skip steps — do not skip any steps! Alternatively, lawyers may not fully understand the product they are defending. If you do not understand the product specifications, it will show in your defense. So take the time to learn and then explain product specifications through demonstratives, graphics, or the product itself. The judge and jury, along with your client, are relying on you to explain why your client's product/equipment/device could not have caused the plaintiff harm. Do not lose this opportunity to educate them. Additionally, utilize experts to assist in your defense, including at the summary judgment stage. Judge Hanna recognizes the importance of experts in this litigation and worries that there is a limited pool, which will only continue to decrease. With that in mind, lawyers need to remember they can also wear an expert's hat to make sure the jury and judge understand each aspect of their defense.

Third, keep good company. As the asbestos litigation changes, non-local lawyers are becoming more common. They may be involved from the start, come in for motions, or appear at trial. Regardless of their involvement, if your case involves a non-local lawyer make sure they understand and follow the local procedure. Judge Hanna has thick skin, so absent outrageous behavior or flagrant and intentional disregard for the law, he will not fault a party. That said, it has become clear that some non-local lawyers do not follow applicable rules and procedure; not only does this disrupt the case flow, but it also reflects poorly on the local lawyer. Judge Hanna has also noticed that some non-local lawyers do not appreciate the local landscape. So make sure your non-local lawyers know which way the Lake[4] is, the different sides of town, and how to pronounce local streets and cities (aka "Hough" is not pronounced "how").

Fourth, time matters. With an increasing motion docket, Judge Hanna spends most of his time reading transcripts and briefs. He reads every transcript cited, even the never-ending expert transcripts. He recognizes that he needs to understand all the evidence in the case before he can rule; while he does not think a lawyer would deliberately mislead him he knows that each side will focus on the facts that are best for their argument and may "skim" over the bad facts. Judge Hanna respects his job as gatekeeper, so before he decides a claim as a matter of law, he wants to be sure he has read the evidence and understands it. Lawyers should remember this when deposing witnesses and writing briefs. In depositions, be judicious, but thorough. In motion practice, do not hide the ball and be prepared to address your bad facts as Judge Hanna will know them. In addition, Judge Hanna welcomes motion binders that contain all the documents cited in the motion; so for your next argument, make his life easier and take him a motion binder. Timing also matters to keep the jury's attention. Judge Hanna normally takes breaks during trial at the 50-55 minute mark (without disrupting the flow of the trial), so keep that in mind when planning your arguments and witness examinations. Additionally, while video-depositions are sometimes necessary due to scheduling issues or cost considerations, everyone knows that they are often boring to a jury.[5] To counter this problem and keep an attentive jury, Judge Hanna normally only plays 20-25 minutes at a time. Thus, when selecting which portions of a video-deposition to play, be sure to consider when breaks will be taken.

Fifth, follow the leader. Watch and learn from those who are sitting first chair. Judge Hanna praises the lawyers who appear in his courtroom for being professional and prepared. They are zealous advocates without being

overly aggressive. They recognize when the legal issues and case facts are complicated and they take the time to educate the decision-maker, be it Judge Hanna or the jury. They treat each other, the witnesses, Judge Hanna, and the jury with respect. As Judge Hanna recognizes, these simple behaviors make the practice of law satisfying and result in better representation.

The Future

With seven children and twenty-two grandchildren, one may think retirement would be calling. Judge Hanna, however, is "not going anywhere." He loves his work, even with the challenges. He appreciates the dedication and professionalism shown by the lawyers who enter his courtroom. He also recognizes the importance of building relationships as lawyers, not only because we all need to work together, but because it makes the work more enjoyable. Those of us who appear before Judge Hanna are happy he will continue to serve Cuyahoga County. We appreciate the relationships we have built with him, the experience he provides, and the lessons we can learn from him.

Endnotes

1. Anonymous.
2. See James Kline's article to learn about this docket.
3. Companies/manufacturers who were the original miners and manufacturers and suppliers of asbestos and asbestos-containing products.
4. Local lawyers know you just say "the Lake" when talking about "Lake Erie"- what other lake exists to a Clevelander?
5. Judge Hanna's view from the bench tells him that a jury appreciates a live body, as they like to size up the witness and enjoy the drama of a courtroom examination. Therefore, if the witness will help your case then move mountains to bring them live to trial.

Karen Ross is Counsel at Tucker Ellis LLP where she serves as local and national counsel in premises, asbestos, silica, coal mine dust, and other toxic exposure litigation in Ohio and across the United States. She also works with healthcare providers and companies in other industries to provide litigation-avoidance counseling and representation. Ms. Ross is also dedicated to community service. In addition to her work as a mock trial coach for John Hay High School students in the Cleveland Metropolitan School District, she serves on the boards of the May Dugan Center and the Lakewood YMCA.

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