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Asbestos Litigation 2022 Year in Review

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What's Inside

Volume of Cases and Overall Filing Trends

San Francisco Superior Court

In San Francisco, we saw the number of filings decrease in 2022 compared with 2021. The total number of case filings went from 90 in 2021 to 80 in 2022. Although overall filings decreased due to a decrease in disputed asbestosis and lung cancer cases (29 disputed asbestosis cases filed in 2022 compared with 42 in 2021, and 16 lung cancer cases filed in 2022 versus 25 in 2021), mesothelioma filings doubled in 2022, with 17 cases total. “Other cancer” filings remained relatively flat at 18 filings in 2022 versus 15 filings in 2021. Brayton Purcell topped the list of plaintiff firms in San Francisco, filing the majority of the cases. The Gold Law Firm, Maune Raichle, and Waters Kraus & Paul filed the remaining cases.

Alameda County Superior Court

Alameda County saw approximately the same number of new filings as San Francisco – a total of 74 cases filed in 2022, which was an increase over the 64 filings in 2021. Of the new cases filed, 67 were mesothelioma, 3 disputed asbestosis, and 4 lung cancer. Maune Raichle topped the list of Alameda filings in 2022 with 31 new cases. The next closest firm was Kazan at 19 cases. Other firms that filed matters in Alameda were Simmons Hanly (5), Brayton Purcell (4), Weitz & Luxenberg (4), Pearce Lewis (3), Keller Fishback (2), Paul Law Firm (2), DeBlase Brown (1), Frost Law Firm (1), and Connor Nideffer (1).

Los Angeles Superior Court

After a dip in filings in 2021, we saw an increase in filings in Los Angeles in 2022. Los Angeles had a total of 121 new filings in 2022, compared with approximately 82 in 2021. Most of the filings concerned mesothelioma, with 107 new cases (compared with approximately 80 alleged mesothelioma cases in 2021). Lung cancer and disputed asbestosis cases accounted for 7 new cases total. Waters Kraus topped the list of filers in 2022 with 23 new cases, followed by Simmons Hanly with 21 cases. Similar to last year, there were a substantial number of firms filing in Los Angeles, including Simon Greenstone (11), Weitz & Luxenberg (10), Maune Raichle (9), DeBlase Brown (8), Pearce Lewis (7), Frost Law Firm (8), Kazan (5), Gold Law Firm (4), Brayton Purcell (4), Dean Omar (3), The Gori Law Firm (2), Jones & Bendon (1), Vinson Law (1), Karst von Oiste (1), Keller Fishback (1), Connor Nideffer (1), and Robert Green (1).

Other Jurisdictions

Filings in other jurisdictions remained low. Solano and Contra Costa counties each had a single lung cancer matter filed by The Gori Law Firm. Other jurisdictions, including the federal United States District Court for the Southern District as well as state courts in Santa Barbara and Ventura counties, each had mesothelioma filings in 2022.

Trends Associated with Los Angeles Superior Court

This year saw three different judges fill the presiding judge role for the LAOSD coordinated asbestos litigation in Los Angeles. The year began with Judge Stuart Rice continuing in the role to which he had been appointed in the fall of 2021. Judge Rice continued to be very thoughtful in his rulings, notably by issuing detailed tentative rulings granting a number of defense motions for summary adjudication on fraud/intentional tort and punitive damages causes of action. In April, at an LAOSD Bench & Bar meeting, Judge Rice announced the formation of three attorney-led committees comprised of defense and plaintiff attorneys with the mandate to assist the Court in making changes and updates to the handling of LAOSD asbestos matters – the Case Settlement Protocol Committee, the Discovery Issue Committee, and the Pretrial/Trial Committee.

At the same Bench & Bar meeting, Judge Rice announced that he was taking over Complex Department 1 and that Judge Lawrence Riff would be taking over the role of presiding judge for asbestos matters. Judge Riff officially assumed the presiding judge position in May and quickly made it clear to everyone that he would be focusing on what he felt were long-overdue changes to the standard Case Management Order for LAOSD asbestos cases. To that end, in early June, Judge Riff provided a draft of the Court's proposed new Case Management Order and invited comment from the defense and plaintiff bars. The new Case Management Order was aimed at updating many of the general orders that were decades old and in many ways not reflective of the current state of asbestos litigation, including imposing updated rules for discovery, page and line designations, and timing for submission of various trial documents. During this period, Judge Riff also worked closely with the three attorney committees that had been formed to provide input on settlement, discovery, and pretrial/trial issues.

Shortly after providing the draft of the Court's proposed new Case Management Order, Judge Riff unexpectedly announced that he was moving to a different trial department and that Judge Laura A. Seigle would be taking over as the presiding judge for asbestos matters effective July 11. As one of his last acts overseeing the asbestos docket, Judge Riff pushed through the issuance of the Court's new General Asbestos Litigation Case Management Order, which took effect on July 8.

Judge Seigle came to the Court with an impressive pedigree. She obtained her undergraduate degree at Harvard and is a graduate of Yale Law School. Before being appointed to the bench in 2015, Judge Seigle had a predominantly private practice background, with a focus on intellectual property work. Prior to assuming her new position in the asbestos department, Judge Seigle had extensive experience in the family law courts, with a more limited background in the civil department.

From the outset, Judge Seigle has shown that she intends to strictly manage the asbestos docket and calendar, spending significant time with all the parties at each Group Status Conference to ensure that for every case on the docket, all parties have been served and have appeared, and that dismissals have been filed for all defendants who have resolved. In addition, Judge Seigle has been very reluctant to grant any trial continuances – even in situations where both plaintiffs and defendants have agreed on a continuance. Judge Seigle has also continued Judge Riff's work with the three attorney committees formed to provide input on settlement, discovery, and pretrial/trial issues, and in late August, she issued an amendment to the recently enacted General Asbestos Litigation Case Management Order.

We expect to continue to see changes instituted in the coming year, including alterations to the standard interrogatories propounded on both sides, scope and timing of discovery, updated trial setting orders, and a determination of whether or not there can be any further streamlining of matters.

Trends Associated with San Francisco Superior Court

Though San Francisco's 2022 calendar remained relatively quiet for most of the year, we ended the year with yet another judicial reassignment. Judge Samuel Feng, who previously served as the presiding judge, took over the Asbestos Department from Judge Ming-Mei Lee. We are still learning more about Judge Feng given his recent appointment, including what his plans are for oversight of asbestos matters. At this point, we anticipate that settlement coordinator Pang Ly will continue to oversee settlement conferences. While orders continue to require in-person carrier appearances at those conferences, party requests to allow carriers to be available by telephone were frequently granted by Judge Lee – it remains to be seen if Judge Feng will be equally flexible.

Likely due to the continued drop in filings in San Francisco, very few matters were assigned to a trial judge in 2022, and none proceeded to verdict. We anticipate that we will continue to see few cases tried in San Francisco as the filings remain low.

Trends Associated with Alameda County Superior Court

Judge Jo-Lynne Lee, who has presided over the Alameda County asbestos docket since January 2020, informed the asbestos bar over the course of a number of appearances in the fall that she would be stepping down from her position and taking a sabbatical. In November, the Court announced that Judge Lee would be replaced by Judge Richard Seabolt effective December 5.

Judge Seabolt obtained his undergraduate degree from the University of Michigan and is a graduate of the University of California Hastings College of Law. Prior to his appointment to the bench in 2018, Judge Seabolt spent his entire career in private practice at Hancock, Rothert & Bunshoft (including through its merger with Duane Morris LLP in 2006). During his time at Hancock, he worked as a litigator with an emphasis on complex commercial and contract disputes, including litigation involving technology, construction, and insurance coverage.

While at Hancock, he was a lawyer-member of the CACI Advisory Committee (the Judicial Council Committee on Civil Jury Instructions) from 2003 to 2018. He also served as an officer of the State Bar's Litigation Section (including serving as Chair from 2005 to 2006) and as an officer of the Association of Business Trial Lawyers (including serving as President in 2013).

Due to a pre-planned vacation and his involvement in an ongoing civil trial, Judge Seabolt was not able to fully assume the reins of the asbestos docket until January 2023, and the asbestos bar is only just now getting a chance to see how he will manage the docket. He has stressed his intention to maintain many of the schedules and practices of his predecessor as he settles into his new role and acquaints himself with asbestos litigation.

Judge Jo-Lynne Lee made numerous key rulings in 2022, which will continue to leave their mark on ongoing litigation:

Privacy Issues Relating to Pathology Testing

Alameda has been a hot spot for motion practice relating to limitations that may be imposed on defendants and their experts relating to testing, reporting on, and publishing about plaintiffs' pathology. Multiple plaintiffs' firms sought stipulations and protective orders to foreclose defense experts from using and publishing about plaintiffs' medical information, even if the injured parties were deceased or their names were redacted from articles. **(Cont. on page 4)**

Trends Associated with Alameda County Superior Court

(Cont. from page 3) After several motions and hearings, including testimony from the Court's own expert, Judge Jo-Lynne Lee issued seven orders regarding the issue in four different cases: *Bevan, Hernandez, Davis, and Rathburn*.

In all four cases, plaintiffs asserted that the injured parties suffered from mesothelioma that was caused by asbestos exposure. When defendants sought to obtain and test the parties' pathology material, however, plaintiffs tried to limit defense experts' access to, use of, and publication regarding plaintiffs' pathology material to only the individual lawsuits.

Plaintiffs argued that testing should be limited to confirmation of diagnosis only (and not include testing for genetic predisposition to developing cancer) and that the results of the testing should not be used by or published about by defense experts for any purpose outside the immediate lawsuits. In all four cases, the Court ruled that plaintiffs do indeed have a substantial privacy interest in testing results, even when that data is later de-identified by defense experts in publication. Those privacy interests are not waived by filing a lawsuit in which medical status is at issue. In the wrongful death actions of *Bevan and Hernandez*, the Court expanded this privacy interest to wrongful death cases, finding that as decedents' biological descendants who share genetic information, heirs have a legally recognizable privacy interest in decedents' genetic information.

In sum, the Court ruled that written consent from plaintiffs is required when an expert or retained consultant wants to use a plaintiff's genetic materials and test results outside the lawsuit in which it is obtained. If a plaintiff or his/her heirs refuse to provide written consent, the expert or consultant must notify the plaintiff of their intent to seek approval from the Institutional Review Board ("IRB") and submit to the IRB a request to obtain access to the plaintiff's medical information. Even after consent from the plaintiff or approval from the IRB is obtained, the expert or consultant must then notify plaintiffs' and defense counsel of their intent to use those materials and results.

It has yet to be seen how, if at all, this issue will be addressed in other jurisdictions – as Judge Lee's rulings are not controlling precedent on other courts, but other courts might choose to copy them given how much time and consideration of expert opinion that Judge Lee put into them. We will also see in 2023 how, if at all, these rulings will impact experts' willingness to participate in litigation given the limitations imposed.

Plaintiffs Not Required to Provide Verifications to Settled/Dismissed Defendants' Written Discovery

Plaintiffs' failure to provide verifications to discovery, or choice to serve verifications privately only on the propounding party and not on all parties, is a common tactic defendants encounter in asbestos litigation. Missing verifications can cause problems come the time of trial, when defendants wish to use plaintiffs' written discovery responses to support defendants' alternate exposure claims against co-defendants who have settled out of the case – without a verification, those responses are inadmissible. In July 2022, Judge Jo-Lynne Lee denied a request by a defendant to compel plaintiffs to verify responses they had previously served to co-defendants' written discovery, ruling that the court has no authority to compel plaintiffs to provide verifications to discovery propounded by defendants who had been dismissed or resolved the case. In denying the motion, Judge Lee cited the delay of the defendant in seeking the verifications, ruled that the court cannot compel verifications to discovery that have been superseded by amended/supplemental responses, and found that defendants do not have a right to move to compel verifications to another party's discovery. Judge Lee noted that "at best, any party may seek sanctions from the court for the discovery abuse that has injured that party." Since this ruling by Judge Lee, defendants have been far more diligent in obtaining verifications – and in pressing co-defendants to seek verifications to their discovery as well.

Noteworthy Rulings

In addition to the venue-specific rulings noted above, 2022 saw multiple important rulings that will apply to lawsuits across California. The most relevant of those decisions are discussed below:

Expansion of General Contractor Liabilities

For decades, the *Privette* Doctrine has governed the extent of liability that general contractors and property owners have for work site injuries suffered by a subcontractor's employees. In *Privette v. Superior Court* (1993) 5 Cal.4th 689, the California Supreme Court held that "generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." Numerous exceptions to this Doctrine apply, and an appellate ruling issued in 2022 expanded those exceptions.

In October 2022, the California Second District Court of Appeal held that a general contractor may be liable for damages caused by a third party's allegedly defective equipment if the general contractor fails to fully delegate the duty to inspect and maintain that equipment to the third party. In *Brown v. Beach House Design & Development*, the court reversed an order granting summary judgment to a general contractor.

Plaintiff Kyle Brown was severely injured from falling from a scaffolding installed by A&D Plastering Co. ("A&D"). Brown was employed by O'Rourke Construction ("O'Rourke"). Defendant Beach House Design and Development ("Beach House") hired A&D to erect the scaffolding and O'Rourke to perform carpentry work. After Plaintiff's fall, Beach House's and A&D's principals found that the scaffold was improperly installed and was not safe to use. Brown brought a negligence action against Beach House and A&D for failing to maintain the scaffolding properly. Beach House moved for summary judgment, arguing that because it did not install the scaffolding, it did not supply, control, or perform any other affirmative act that contributed to Brown's injury. The trial court granted Beach House's summary judgment motion, and Brown timely appealed.

The appellate court reversed, holding that a triable issue of fact exists as to whether Beach House negligently exercised retained control over the scaffolding supplied and erected by A&D. The court explained that when a general contractor hires a third party to supply, control, or assemble equipment, liability turns on whether or not the general contractor "fully delegated" to the third party the duty to maintain the equipment in a safe condition. If the general contractor did not fully delegate the responsibility for the equipment's condition, then liability might be found.

The appellate court found that Brown had in fact alleged sufficient facts to defeat Beach House's motion for summary judgment. First, the court explained that a triable issue of fact existed as to whether Beach House rented the scaffolding for O'Rourke's employees to use. O'Rourke employees believed that Beach House rented the scaffolding from A&D for all subcontractors to use. Even after the incident, Beach House permitted other O'Rourke employees to use the repaired scaffolding. Further, Beach House's site manager was aware that O'Rourke employees used the scaffolding before the incident. Second, the court found that there was also a triable issue of fact as to whether or not Beach House fully delegated to A&D the responsibility to provide and maintain the scaffolding. The contract between A&D and Beach House provided that A&D would use the scaffold for its plasterwork for 90 days. However, the scaffold remained in place and was used by other subcontractors for more than one year – long past the contract time. The contract was also unclear about who was responsible for maintaining and inspecting the scaffolding's condition. Third, there was still an issue of whether Beach House exercised retained control that affirmatively contributed to the injury. In reversing the summary judgment, the court concluded that the jury may find that Beach House failed to maintain the scaffolding, assumed a duty to provide the scaffolding to O'Rourke employees, or failed to fully delegate the duty to A&D. **(Cont. on page 6)**

Noteworthy Rulings

(Cont. from page 5) The court's ruling sends a clear message that a general contractor's failure to fully delegate the duty to inspect and maintain equipment's condition can in fact lead to a finding of liability beyond the *Privette* limitations.

Expansion of Manufacturer Liabilities

In addition to expanding the liabilities of general contractors, appellate courts in 2022 expanded the liabilities of product manufacturers. In October, California's Fourth District Court of Appeal held that a manufacturer of a non-defective unassembled product can be held liable for defective assembly performed by an authorized dealer. In *Defries v. Yamaha Motor Corporation*, the appellate court reversed a jury finding of no liability against Yamaha for a product that had been improperly assembled by another party.

Plaintiff Chad Defries suffered injuries while riding a Yamaha dirt bike when a handlebar component slipped. Defries sued Yamaha for negligence and breach of implied warranty. During the trial, Yamaha argued that its duty to Defries ended when the non-defective product left its control, and the authorized dealer's assembly was the source of the product's defect. Defries argued that even when the product left Yamaha's control, it still had a nondelegable duty to ensure the proper assembly of the product. However, the trial court refused to issue a jury instruction regarding nondelegable duty. The jury found for Yamaha, and Defries timely appealed.

The appellate court held that the trial court was in error and *should* have issued a nondelegable duty jury instruction. The Court explained that plaintiff could validly prove Yamaha's negligence by simply establishing the negligent assembly of the authorized dealer. In finding an agency relationship between Yamaha and its authorized dealer, the Appellate Court explained Yamaha's authorizing the dealer to assemble its product imposes liability on Yamaha – a manufacturer has a duty to ensure its product is properly assembled when it enters the market. By allowing a product manufacturer to hold liability for an authorized dealer's failure to properly assemble the product, the *Defries* ruling eases plaintiff's burden of establishing exactly which entity in the supply chain caused the defect.

Expansion of Recoverable Damages in Wrongful Death Cases

In late 2021, California became the 46th state to do away with the so-called death discount, the purported "discount" that defendants receive when plaintiffs die mid-litigation. Historically in California, when a plaintiff filed a personal injury action relating to his/her own injuries and then died mid-litigation and the case was converted to a wrongful death action, pain and suffering damages were deemed non-recoverable. That changed on January 1, 2022, when an amended Code of Civil Procedure section 377.34 became effective. With that amendment, the code now permits successors-in-interest to recover for a decedent's pain, suffering, or disfigurement when the decedent's personal injury action or proceeding either was granted preference before January 1, 2022, or was filed after January 1, 2022, and before January 1, 2026.

In terms of asbestos matters, we have not seen a significant change in terms of settlement value as a result of the amendment to Section 377.34. We believe that this is in large part due to the rise in overall value of matters due to recent verdicts in California and the smaller number of parties to whom exposure can be attributed. While there has been some uptick in the number of matters where plaintiffs have moved for trial preference because of the impacted availability of trial courtrooms – be it because of COVID, lack of jurors, or unavailability of trial judges – and the increased number of mesothelioma matters, it is hard to say what impact Section 377.34 has had on plaintiffs seeking a preferential trial date in asbestos cases.

Noteworthy Rulings

Potential Change in Settlement Confidentiality in 2023

In early 2022, California Senate Bill 1149 (SB 1149), also known as the Public Right to Know Act of 2022, was introduced and sought to require disclosure of agreements settling actions that involved public health and safety. After several amendments, the bill failed to move forward and died as unfinished business on November 30, 2022; however, the bill's reconsideration is deemed pending. If entered into law after further consideration in 2023 or beyond, the bill would prohibit certain confidentiality provisions in settlement agreements between parties in actions for "civil damages regarding a defective product or environmental hazard" that posed a danger to public health or safety as void as a matter of law, against public policy, and unenforceable. The bill would provide that disclosure of discoverable factual information related to those actions must not be restricted, except for categories like medical information, personal identifying information, the amount of the settlement, etc.

Although the bill was not specifically enacted to address settlements in asbestos cases, given the likelihood that asbestos would be considered a defective product, one could see the attempt to apply it to these actions. With respect to asbestos matters, SB 1149's requirement to disclose settlements could certainly have a chilling effect on resolution of matters, making it harder for parties to resolve prior to trial. For many reasons, a party may dispute liability but find that resolution is a better option. Requiring disclosure of all settlements may force those parties who would typically choose the cost-efficient route to rethink their decision for fear of encouraging other parties to sue the defendant, driving up defense costs.

Second District Court of Appeal Rules on Offers to Compromise (C.C.P. § 998)

Offers made pursuant to Code of Civil Procedure section 998 are often the only way a party can recoup some of the costs associated with litigating a matter. The Second District Court of Appeal made two rulings this year that impact the viability and usefulness of those offers. In *Council for Education and Research on Toxics v. Starbucks Corporation* (2022) 84 Cal. App.5th 879, the Court found that Starbucks' offers to compromise were invalid because the offers were overly broad general releases. Here, the Court ruled that it was insufficient and overly broad to include in the offer a release for "all claims known or unknown" arising under Proposition 65 or for an alleged failure to provide warnings. The Court concluded that releases that extend beyond the scope of litigation invalidate the compromise offers, citing *Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81. The ruling offered a good reminder to parties to ensure that all offers to compromise are tailored to the claims made in the underlying case – in asbestos litigation, it will be important for defendants to remember that an offer to compromise served in a personal injury action cannot and should not include an offer to resolve potential future litigation like a wrongful death action.

In Trujillo v. City of Los Angeles (2022) 84 Cal.App.5th 908, the Second District held that pending offers to compromise are deemed inoperative at the moment when a trial court issues an oral ruling granting summary judgment, because that oral ruling creates a certainty of outcome of litigation. In Trujillo, the Court determined that plaintiff had attempted to accept a pending offer to compromise only after the trial court had orally granted the city's motion for summary judgment. An offer must be extended while there is a dispute to be resolved, and similarly that offer can only be accepted while there is a dispute to be resolved – but once summary judgment is granted, there is no further dispute. Therefore, plaintiff's attempt to accept after the oral ruling on the motion was ineffective as there was no longer any operative 998 offer to accept. *Trujillo* reminds all parties that it is important to consider whether or not to accept any pending 998 offer prior to a hearing on a dispositive motion.

Noteworthy Rulings

Key Rulings on Discovery Issues

2022 saw the courts rule on numerous key discovery issues, including discovery of mental health records, issues with remote deposition proceedings, and the impact of evasive discovery responses on dispositive motions.

Recent Developments in Discovery of Mental Health Records

In the past, plaintiffs successfully have shielded their mental health records from discovery by calling their claims "garden variety emotional distress." Although they claim emotional distress related to their bodily injury claims, plaintiffs assert that this "regular" emotional distress is "typically" associated with the circumstance of a physical injury, and therefore have thwarted defendants' efforts to obtain mental health records or treating doctor testimony over plaintiffs' considerable privacy rights objections. Recent rulings in state and federal courts tend to show that there may be a shift underway.

Key to plaintiffs' arguments for protecting their mental health records from discovery in California is Article I, Section 1 of the California Constitution, which confirms the "inalienable right of privacy." (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 855-856.) A plaintiff's medical and psychiatric records are further protected by the physician-patient privilege and the psychotherapist-patient privilege. (Evid. Code sections 990 et seq., 1012 et seq.) And while these Evidence Code sections provide exceptions, the courts have broadly construed the privileges and narrowly construed the exceptions. (*Britt, supra*, 20 Cal.3d at p. 863; *People v. Castro* (1994) 30 Cal.App.4th 390.)

Defendants have historically had a very difficult time obtaining plaintiffs' mental health records even when there is a claim of emotional distress. In the recent case *Vanessa Bryant v. County of Los Angeles*, however, U.S. Magistrate Judge Charles F. Eick confronted the issue of whether Bryant had waived the psychotherapist-patient privilege in her suit against Los Angeles County by alleging severe and continuing emotional distress caused by county employees who allegedly took and disseminated graphic photographs of the site of her husband's and daughter's helicopter crash. The county sought Bryant's mental health records to show that it was the effect of the crash itself, and not the subsequent acts of county employees, that caused her emotional distress.

Judge Eick found that a waiver of the psychotherapist-patient privilege had occurred, thus enabling the County to obtain discovery of Vanessa Bryant's mental health records. In resolving the issue, Judge Eick considered three possible approaches to the issue: the broad approach, which finds waiver anytime the privilege holder claims emotional distress in her complaint; a middle-ground approach, which finds waiver only when the privilege holder alleges more than "garden variety" emotional distress; and the narrow approach, which finds waiver only where the privilege holder affirmatively relies on the privileged psychotherapist-patient documents in support of her own claim.

Judge Eick concluded that under either the broad approach or the middle-ground approach, Vanessa Bryant had waived the psychotherapist-patient privilege. Judge Eick reasoned that though the term "'garden variety' emotional distress" has not been uniformly defined by the courts that have applied the approach, in this case, there was no need to consider any particular definition of garden-variety emotional distress because no reasonable definition of that term could properly encompass the type of extraordinary emotional distress alleged by Vanessa Bryant.

State courts have also acknowledged defendants' right to obtain mental health care discovery where emotional distress damages are being sought, particularly in matters involving claims of insurance bad faith or employment torts where the claim of emotional distress is a more discrete damage and less intertwined with a bodily injury. **(Cont. on page 9)**

Noteworthy Rulings

(Cont. from page 8) Although some of these state court rulings are unpublished and not binding precedent, these rulings are instructive to guide discovery where emotional distress forms a basis for plaintiffs' claims.

Impact of Videoconferencing on Motions to Compel

Since the onset of the pandemic, countless depositions have been conducted via videoconference rather than in person. Many believe this to have been a positive change, leading to increased efficiencies and reducing countless hours of travel time. As with all changes, however, this one has led to new issues. One issue addressed by the Southern District of California in 2022 was the validity of subpoenas where a deposition is noticed to take place simply via videoconferencing rather than at a physical location. In an order in the matter *Federal Insurance Company v. Tungsten Heavy Powder & Parts, Inc., et al*. (USDC, Southern District of California 21cv1197), Magistrate Judge Mitchell D. Dembin denied a motion to compel compliance with a deposition notice that required a nonparty to produce a person most qualified to testify at deposition where the place for the deposition was "Via Zoom Video Conferencing: Link to be provided at a later date." Although parties can certainly stipulate to videoconference depositions, Magistrate Judge Dembin held that a federal court cannot compel appearance at a videoconference deposition if the witness objects, because Federal Rule of Civil Procedure, Rule 45(c)(1) requires a subpoena to command the person to which it is directed to attend and testify at "a specific… place," and Zoom is not a physical place that can be measured according to mileage. Given this order and others, it will continue to be important for parties noticing depositions in federal cases to ensure that they include a proper physical location for the deposition to take place, even if they intend to reach agreement for the deposition to proceed via videoconference.

Evasive Discovery Responses Can Foreclose Arguments in Opposition to Summary Judgment

The California Court of Appeal for the Second Appellate District emphasized the importance of providing complete and non-evasive discovery responses when it upheld a Los Angeles Superior Court's order granting summary judgment in the published matter *Field v. U.S. Bank National Assn.* (2022) 79 Cal.App.5th 703.

In *Field*, the Court reiterated that the civil discovery process aims to unearth the truth of a case and facilitate settlement based on a mutually expected value. Evasive discovery responses frustrate that goal by concealing the truth. In answer to a key contention interrogatory, the plaintiff in *Field* had stated that she was "unsure" whether the defendant's notice of foreclosure was proper, but when she opposed the defendant's summary judgment motion she contradicted her "unsure" discovery statement and instead asserted that notice was improper. The Court did not take kindly to the sudden reversal and noted instead that Field should have answered a simple contention interrogatory "unambiguously, forthrightly, and truthfully" and that it was unjust and improper for Field to swear in discovery she was unsure and contradict that position when faced with a summary judgment motion. The Court further held that a party opposing summary judgment may not move the target *after* the proponent has launched its arrow. In its scathing opinion, the Court of Appeal further held that trial courts encountering abuses like that in Field are free to disregard a later declaration that hopes to supplant early tactical or slothful ambiguity with tardy specificity. The Court of Appeal noted that publication of the decision was aimed at emphasizing to attorneys that they can harm their clients' interests when crafting evasive discovery responses and possibly harm the chance of obtaining fee awards where a court finds counsel was unprofessional.

In asbestos litigation, it is common for parties on both sides of the aisle to draft discovery responses that are at worst evasive and at best incomplete. Defense counsel often point to allegedly nonresponsive and evasive responses to written discovery and testimony to support dispositive motions, and the *Field* decision will provide ammunition for attacking contradictory declarations that plaintiffs may file in an attempt to defeat summary judgment. **(Cont. on page 10)**

Noteworthy Rulings

(Cont. from page 9) *Field* should also serve as an equally important reminder to defendants that they themselves need to be as forthright and complete in responding to discovery as possible in order to avoid issues further down the road.

Inadmissibility of Former Testimony

The California Supreme Court has issued an opinion that lays out a road map for determining the admissibility of former testimony under California Evidence Code Section 1291. Courts have frequently discussed aspects of the former testimony exception to the hearsay rule, but in *Berroteran v. Superior Court (Ford)*, the Court issued a lengthy order laying out a multi-step process for determining whether, under the exception to the hearsay rule, a party seeking to exclude prior deposition testimony had the "right and opportunity to cross-examine the declarant with an interest and motive similar to that which the same party will have at the present trial":

> (1) Determine whether the parties intended, at the outset, that the deposition serve as trial testimony. If such intent is established, then it may be inferred that all counsel had, at that deposition, a right and opportunity to examine the declarant with an interest and motive similar to that which the party would have at trial in a future case. The burden would then shift to the party opposing admission to demonstrate circumstances rebutting that conclusion.
>
> (2) Determine whether the parties subsequently reached agreement concerning use of the deposition at trial in that or other cases.
>
> (3) Analyzing key "practical considerations," including (a) the timing of the deposition within the context of the litigation, and special circumstances creating an incentive for cross-examination; (b) the relationship of the deponent and the opposing party; (c) the anticipated availability of the deponent at trial in the proceeding in which the deposition was taken, and the statutory context; (d) conduct at, and surrounding, the deposition, and the degree of any examination conducted by the opposing party; (e) the content of the particular designated testimony, to the extent to which it demonstrates an interest and motive of cross-examination; and (f) similarity of position. Although none of these practical considerations is dispositive, taken together they may be instructive for the court.

Recent California Asbestos Litigation Jury Verdicts

There were eight verdicts reached in California asbestos cases from January through December 2022, including six plaintiff verdicts and two defense verdicts. The following is a summary of those verdicts:

Kevin Brooks, et al. v. DAP Products, Inc., et al. (02/16/2022)

Judge Michael Levanas presided over the Los Angeles-based trial for *Brooks v. DAP Products, Inc.* A Santa Monica jury returned a plaintiff verdict of $5,000,000 in favor of Kevin Brooks. Frost Law Firm represented Brooks, 72, who argued that his mesothelioma resulted from exposure to various asbestos-containing products. Two defendants remained at verdict: Mission Stucco and Kaiser Gypsum. Although the jury concluded that Mission Stucco exposed plaintiff to asbestos, it determined that the exposure was not a substantial factor in plaintiff's disease. The jury assigned 10% of the fault to Kaiser Gypsum. The jury award primarily consisted of pain and suffering damages. The jury also did not award punitive damages against the two defendants.

Recent California Asbestos Litigation Jury Verdicts

Charles Lavooi and Shuchun Lavooi v. Air and Liquid System Corp., et al. (02/24/2022)

In February 2022, an Alameda jury returned a verdict in favor of plaintiffs Charles and Shuchun Lavooi. The remote trial was tried before Judge Patrick McKinney. Lavooi, 71, represented by Weitz & Luxenberg, argued he developed mesothelioma from exposure to asbestos-containing friction products and at various sites. Hennessy was the last remaining defendant at the trial, and the jury attributed 21% fault against it. The jury awarded the plaintiffs $2,825,000 total – stipulated economic damages of $1,475,000, and a noneconomic damages award of $1,350,000. The jury did not award punitive damages against the defendants.

Deanne Warren and Craig Warren v. Algoma Hardwoods, Inc., et al. (05/20/2022)

A Long Beach jury presided over by Judge Michelle Fleurer found in favor of plaintiffs Deanne and Craig Warren in May 2022. The jury returned a verdict totaling $43,799,850, including $42,299,850 in noneconomic damages (including $23,542,500 for future noneconomic damages). The jury did not find evidence in favor of punitive damages. Deanne Warren, 64, alleged she developed mesothelioma from various sources, including household items and from her husband's work. Deanne, represented by Weitz & Luxenberg, alleged she was exposed to asbestos from fire core doors, construction chalk, joint and patching compounds, caulk roofing products, and large electrical and HVAC equipment.

Richard Shaffer v. 3M Company, et al. (05/23/2022)

Judge Edward Moreton in Beverly Hills presided over this trial, where Trey Jones and Chris Madeksho represented plaintiff. Shaffer, 79, alleged he developed colon cancer due to exposure to friction products, sealing materials, and insulation. The jury returned a defense verdict, finding no causal link between Shaffer's disease and asbestos exposure during the first phase (causal link between asbestos and colon cancer) of a trifurcated trial – exposure and punitive phases were not reached.

Dale Spurlin v. Air & Liquid Systems Corporation, et al. (08/26/2022)

In August 2021, a San Diego jury empaneled by the United States District Court for the Southern District of California returned a defense verdict for Foster Wheeler. Spurlin, age 76, alleged he developed mesothelioma from exposure to asbestos when he served as a U.S. Navy boiler tender between 1963 and 1966. Frost Law Firm represented Spurlin, and Judge Anthony Battaglia presided over the trial. The jury determined that Foster Wheeler was not negligent when it supplied boilers that were later insulated with asbestos when installed aboard ship. Notably, the jury found that Foster Wheeler had no duty to warn sailors of the dangers of asbestos, because it did not know that the integrated product was likely to be dangerous for its intended use.

Steven Watts v. 84 Lumber Company, et al. (09/12/2022)

In September, Judge Frank Roesch presided over a fully remote trial in Alameda. The jury returned a verdict of $10,684,653.40 in favor of plaintiff Steven Watts. Maune Raichle represented Watts, 62, who argued that he was diagnosed with mesothelioma resulting from exposure to asbestos-containing brakes. The jury assigned fault as follows: 60% to brake manufacturer Abex, 25% to other brake manufacturers, and 15% to Watts. Watts requested a $40 million verdict during closing arguments. The jury awarded $319,970.40 in stipulated past medical expenses, $250,000 in future medical expenses, $2,091,228 in future lost income, and $273,455 in household services. **(Cont. on page 12)**

Recent California Asbestos Litigation Jury Verdicts

(Cont. from page 11) The jury also awarded $3,750,000 in past noneconomic damages and $3,000,000 in future noneconomic damages for Steven Watts, and $1,000,000 to Cindy Watts for noneconomic damages.

Linda Phipps v. Copeland Corporation LLC, et al. (10/26/2022)

A Los Angeles jury found in favor of three heir plaintiffs in the Phipps matter, awarding a total of $428,587.80. In this wrongful death case brought by the Paul Law Firm and tried against Copeland Corporation, Phipps alleged that asbestos exposure from pumps caused the development of mesothelioma and eventual death of decedent. Copeland previously went to verdict in an underlying personal injury case filed by decedent, and in that prior case, Copeland was found by the jury to be 60% at fault for decedent's injuries. That determination of liability was controlling in the instant matter. As a result, the jury in this wrongful death action was tasked solely with determining the amount of damages to award decedent's estate, widow, and heir children. Judge Peter Mirich presided over this wrongful death trial. The jury awarded $8,587.80 in economic damages and $420,000 in noneconomic damages ($140,000 to each heir plaintiff).

Rita-Ann Chapman v. Avon Products, Inc., et al. (12/16/2022)

In December 2022, a downtown Los Angeles jury returned a plaintiff verdict of $40,831,453 in favor of plaintiff Rita-Ann Chapman. Chapman, 76, represented by the Dean Omar Branham law firm, alleged that she developed mesothelioma from using personal talc and from bystander exposure to brake dust. The trial lasted over 46 days with numerous defendants and was presided over by Judge Lawrence Riff. By the time of verdict, defendants Avon Products, Inc., and Hyster-Yale Group, Inc., remained and were assigned 90% and 10% fault, respectively. The jury awarded $831,453 in economic damages and $32,000,000 in noneconomic damages. The noneconomic damages consisted of $7,000,000 past noneconomic damages, $25,000,000 future noneconomic damages, and $8,000,000 loss of consortium damages. After one day of deliberation, the jury also awarded punitive damages totaling $11,300,000, with $10,300,000 assigned to Avon Products and $1,000,000 to Hyster-Yale Group.

About Walsworth

Walsworth is proud to have established itself as a nationally recognized law firm with an experienced team of lawyers, paralegals and other support staff defending all types of clients. Over the course of many years, we have represented clients in excess of 30,000 asbestos cases.

Our team works for many national and international corporations in the defense of asbestos litigation claims and cost effectively manages large asbestos dockets from the inception of a claim through discovery, motions, and final resolution. We work closely with our clients to investigate and evaluate cases as early as possible and regularly obtain dismissals on their behalf. We have dedicated lawyers who specialize in settlement negotiations and have longstanding working relationships with plaintiffs' counsel to allow meet and confer efforts throughout the life of the case. As always, our skilled trial team is also prepared to defend our clients in those cases that proceed to trial. Our asbestos trial team has commenced trial in over 500 cases.

Our numerous long-term clients appreciate the personal and team-based litigation management system that we employ which helps to distinguish Walsworth. Our clients include distributors, manufacturers, contractors and premises owners in cases venued throughout the State of California and other jurisdictions. We also serve as regional and national counsel for a number of high-profile asbestos defendants. Representation of these varied clients requires our team to develop, implement and manage national as well as local defense strategies that most effectively serve each client.

The diversity of our clientele provides our team with a unique and broad perspective on the many key issues presented by asbestos litigation, including state-of-the-art knowledge, asbestos-related medicine, industrial hygiene, and specialized defenses available to each type of defendant we represent.

Of course, our asbestos litigation clients often differ in their approach to managing their litigation, and this uniqueness dictates how our efforts are directed. However, our dedication to our clients, regardless of overall strategy, remains consistent. The talent of our asbestos litigation team members is consistently recognized via invitations to co-chair and participate in prominent industry conferences throughout the country.

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