



U.S. CHAMBER

Institute for Legal Reform

A Docket on the Brink

Asbestos Litigation in Cook County

.....
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U.S. CHAMBER
Institute for Legal Reform

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Table of Contents

Introduction.....	1
Evolution of the Docket.....	2
The Present: A Vicious Cycle.....	10
The Need for Change.....	12
Conclusion.....	15

Introduction

Over the last three decades, plaintiffs have filed large numbers of asbestos claims in the Circuit Court of Cook County, Illinois, located in Chicago. Because of the circuit court's and local plaintiffs' tendency to push a large number of cases through the system via settlement, Cook County has largely remained below the radar compared to other hotbeds of asbestos litigation (e.g., Madison County, Illinois; New York, New York; Beaumont, Texas; Baltimore, Maryland; and Philadelphia, Pennsylvania). However, the climate in Cook County appears to be steadily worsening.

Absent improvement with respect to filings, trial settings, and exorbitant settlement demands, Cook County threatens to join those notorious asbestos jurisdictions, where plaintiff-friendly courts have overridden defendants' due process rights, compromised their ability to defend cases on the merits, and fueled bankruptcies of multiple waves of companies entangled in asbestos litigation. To complicate matters, this potentially dire situation confronts a judge who has just been assigned to manage the asbestos docket.

This paper describes the development of the asbestos docket in Cook County and the evolution of current issues that threaten the administration of justice in asbestos cases. The paper also describes some options for defendants confronting these issues. However, absent reform in the administration of the docket, Cook County appears destined to continue on a path toward notoriety.

Evolution of the Docket

Chicago enjoyed a proud history of commerce and industry from the late nineteenth century through the last quarter of the twentieth century. Steel mills, power plants, railroads, scrap yards, material service plants, coke plants, tool and die makers, refineries, meat packing plants, and other industrial sectors helped the city earn its nickname as the “City of the Big Shoulders[.]” its workforce “bareheaded, shoveling, wrecking, planning, building, breaking, rebuilding.”¹

A by-product of its industrial power was the occupational exposure of some workers to potentially harmful substances, including asbestos. Scientific knowledge and worker protection laws were less advanced than they are today. Certain workers exposed to asbestos in that time period developed asbestos-related diseases, including asbestosis and mesothelioma.

Asbestos litigation as we know it did not exist prior to the mid-1970s. Although some personal injury claims had been filed previously, the U.S. Court of Appeals for the Fifth Circuit’s decision in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1974), prompted a fundamental shift in the litigation. *Borel* expanded asbestos litigation from worker compensation claims, where only employers could be sued, to original manufacturers of asbestos products and installers of asbestos building materials. *Borel* started a flood of asbestos

claims in the United States, including Cook County, which grew to, in the words of the U.S. Supreme Court, an unmanageable “elephantine mass.”² Asbestos litigation since has been described by courts and scholars as an “avalanche,”³ a “crisis,”⁴ a “disaster,”⁵ and a “monster.”⁶ As of today, asbestos litigation has caused the bankruptcy of 104 companies.⁷

1980s: Early Cases and the *Lipke* Rule

Plaintiffs began filing asbestos claims in Chicago in the mid to late 1970s. The Cooney & Conway firm reportedly began representing plaintiffs more than 35 years ago, when a group of Johns-Manville employees from Waukegan, Illinois sought the firm’s help obtaining medical records. Cooney & Conway later filed personal injury suits on behalf of plant workers against Johns-Manville.⁸ Several other plaintiffs’ firms

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and attorneys were also active in the 1980s, including Burke & Burke and Terrence M. Johnson.⁹ Mr. Johnson filed his first lawsuit around 1983 in the United States District Court for the Northern District of Illinois.¹⁰

Since at least the mid-1990s, Cooney & Conway has dominated the plaintiffs’ side of the litigation.¹¹ Cooney & Conway now claims to represent plaintiffs in 90 percent of the asbestos cases filed in Northern Illinois. The firm has enjoyed a long relationship with a number of important unions, including the Local 17, Chicago Asbestos Workers, and the local pipefitters’ unions.

In 1984, The Honorable Dean M. Trafelet assumed control of the asbestos docket, over which he presided until 1998.¹² Judge Trafelet took a number of important steps to manage the docket. For example, in the mid-1980s, when approximately 90 claims were already pending¹³ and a number of individual case management orders had been entered, the court “anticipated that the number of pending asbestos cases will increase in the future as new cases are filed.”¹⁴ The court entered a consolidated management order (CMO No. 1) to address the organization of the parties, motion practice, and discovery for cases filed after September 30, 1985. CMO No. 1 called for cases to be tried individually, typically at a time more than three years after the case was filed.¹⁵

In February 1985, Burke & Burke prevailed in the first asbestos case tried to verdict in Cook County in *Lipke v. Celotex*, No. 80-L-11840 (Cook County Cir. Ct.). In *Lipke*, filed in 1980, plaintiff allegedly suffered from asbestosis.¹⁶ He ultimately settled with all but one defendant (48 Insulations, Inc.) prior to trial.¹⁷ The jury awarded plaintiff \$629,000 in compensatory damages and \$175,000 in punitive damages. After the verdict, the defendant declared bankruptcy.¹⁸ It also appealed the judgment, inadvertently leading to the so-called “*Lipke* rule,” a rule of evidence that prohibited defendants from introducing evidence that plaintiff was exposed to other asbestos-containing products. This exclusionary rule set Illinois apart from every other jurisdiction in the nation for roughly twenty years.

The defendant in *Lipke* had argued that the trial court wrongfully excluded evidence that the plaintiff was exposed to other asbestos-containing products.¹⁹ In a one-paragraph discussion, the Illinois Appellate Court for the First District rejected that argument, noting that Illinois cases had long recognized that

“there can be more than one proximate cause of an injury. In such a situation, one guilty of negligence cannot avoid responsibility merely because another

person is guilty of negligence contributing to the same injury... Thus, the fact that plaintiff used a variety of asbestos products does not relieve defendant of liability for his injuries. Evidence of such exposure is not relevant.”²⁰

Subsequently, other courts expanded *Lipke*'s holding to situations in which a defendant contested liability and sought to introduce evidence of a plaintiff's exposure to other asbestos products to establish that the other exposures were the sole proximate cause of plaintiff's injury.²¹ These decisions made it extremely difficult for defendants to try asbestos cases. The exclusion of evidence that plaintiff was exposed to other asbestos products leaves a jury with the impression that plaintiff was exposed only to the defendant's product. Because the jury also hears that asbestos is the only cause of most asbestos-related diseases, a jury inevitably concludes that the only explanation for plaintiff's asbestos-related disease is that he or she was exposed to asbestos from the defendant's product. Put plainly, excluding the evidence of other exposures prevents defendants from effectively answering the question, “[I]f not you, then who?”²²

This line of reasoning stood until 2009, when the Illinois Supreme Court overturned a judgment in a central Illinois case based on the exclusion of other exposure evidence. *Nolan v. Weil-McLain*, 233 Ill. 2d 416 (2009) affirmed that there are no special rules for asbestos litigation with respect to causation. Accordingly, a trial court commits reversible error by preventing a defendant who denies liability from presenting

evidence of decedent's other asbestos exposures in support of its sole proximate cause defense.²³

From a trial perspective, the years immediately after *Lipke* were quiet. Not until 1989, four years after *Lipke*, did another asbestos case reach a verdict, when Burke & Burke won the second asbestos case tried to verdict in Cook County, *Estate of Skonberg v. Owens-Corning Fiberglass Corp.*, No. 80L20427 (Cook County Cir. Ct.). The decedent was a career insulator who claimed exposure to defendant's block and pipe covering. The jury awarded plaintiff \$283,000.

1990s: Progress and Dysfunction

The 1990s was a decade of both progress and dysfunction in the management of asbestos litigation. Filings in Cook County increased as the litigation continued to metastasize across the nation. In 1991, the Joint Panel on Multidistrict Litigation established MDL-875, the Federal Asbestos MDL. MDL-875 was intended to provide an efficient means to coordinate the thousands of asbestos cases pending in the federal district courts. However, MDL-875 did not keep pace with the claims. Thus, plaintiffs began to file almost exclusively in state court because they regarded the MDL as the judicial equivalent to a black hole. This trend resulted in far more cases being filed in Cook County. The court grasped for methods to deal with its ballooning docket.

Some of the circuit court's decisions were progressive and shrewd. For example, in 1991, it followed a handful of courts in other jurisdictions by creating a pleural registry to deal with the claims of those who had been exposed to asbestos but were not yet sick. The registry is a

"court-supervised repository wherein certain asbestos-related personal injury claims filed in Cook County must be placed and kept on a deferred or inactive docket until such time, if ever, that the claimant develops a prescribed degree of impairment or disability arising from their contact with asbestos."²⁴

The registry enabled plaintiffs to avoid statute of limitations problems, while conserving the resources of the court and the parties for claims involving truly ill plaintiffs. When the court created the registry, almost half of the nearly 1,000 claims pending in Cook County were subject to placement on the registry.²⁵ Claims transitioned to inactive status, and new claims meeting specified criteria were placed on the registry.

Additionally, in 1993 Judge Trafelet entered CMO No. 7²⁶, which provided that counterclaims for contribution among defendants would be deemed filed. This approach, utilized by other courts as well, eliminated the need for essentially pro forma filings which, given the many defendants in each case, would further swamp the court with paper.

Despite this progress, a string of three consecutive plaintiff verdicts in 1993-1994, each resulting in an award of more than

\$3 million, established Cook County as a favorable place for plaintiffs to try cases. In July 1993, in *Estate of John Hermansen v. Owens-Corning Fiberglas*, No. 92-L-4398 (Cook County Cir. Ct.), Cooney & Conway won a \$3.54 million award on behalf of the estate of an individual who died from mesothelioma at age 53. In March 1994, Cooney & Conway secured a \$12.32 million award on behalf of the estate of a 59-year-old insulation worker in *Estate of James K. Barry v. Owens-Corning Fiberglas Corp.*, No. 92-L-13582 (Cook County Cir. Ct.). According to the Cook County Jury Verdict Reporter, *Barry* was the largest compensatory damage award in an asbestos case in Illinois history. *Barry* appears to be the last reported case Cooney & Conway has taken to verdict over the past nineteen years. In June 1994, a Cook County jury awarded \$3.42 million (including \$1 million in punitive damages) to a former Local 17 asbestos worker in *John Healy v. Owens-Corning Fiberglas Corp.*, No. 83-L-21031 (Cook County Cir. Ct.).

By 1996, the trial docket had utterly failed to keep pace with filings. Judge Trafelet noted in July that more than 200 pre-1994 cases remained pending on the asbestos docket and congesting the circuit court.²⁷ In clear contravention of Illinois Appellate Court precedent²⁸ and defendants' due process rights, he consolidated those cases for trial.²⁹ This ruling created a virtually impossible scenario for defendants, who could not reasonably prepare to try dozens of cases for a consolidated trial involving different exposures and diseases, and who were not willing to risk the gigantic verdicts they feared might inevitably result.

The consolidation can fairly be seen as judicial coercion to force mass resolution. As a result, Cooney & Conway settled 177 claims for \$200 million, a personal injury settlement that Cooney & Conway claims was the highest in Illinois history.³⁰ According to the Cook County Jury Verdict Reporter, the settlement was paid by Owens-Corning Fiberglas, Armstrong World Industries, GAF, Pittsburg-Corning, Owens-Illinois, W.R. Grace, and U.S. Gypsum. With the exception of Owens-Illinois, each of those companies subsequently filed for bankruptcy.

The consolidation experiment did not last. In 1997, toward the end of his tenure, Judge Trafelet entered CMO No. 18, which vacated and superseded CMO No. 1.³¹ CMO No. 18 established a system, which remained in place for many years, in which asbestos cases were assigned out generally in chronological order of filing for trial in clusters of six every six weeks. Since that time, the court has almost invariably required that the cases be tried individually in *seriatim* fashion before the assigned trial judge.³²

2000-2012: New Judge, New Cases, New Defendants

There have been a number of important developments in the Cook County asbestos docket in the new millennium, many of which have contributed to the current, negative situation.

JUDGE MADDUX

Judge Trafelet ceased managing the asbestos docket in 1998. While other judges covered the docket for brief periods,³³ The Honorable William D. Maddux managed it for more than a decade.

Judge Maddux enjoyed a long career as a highly regarded trial lawyer for both plaintiffs and defendants in a wide variety of cases. He took the bench in 1991 at age 55. In 2001, he was offered the position of Presiding Judge of the Law Division for the Cook County Circuit Court. He quickly instituted a “Black Line” system designed to move cases to trial within two years from filing. The Black Line system is consistent with Judge Maddux’s stated view that, too often, the civil litigation system has permitted excess discovery, which unnecessarily slows the process of resolving claims.

Judge Maddux believed that “justice delayed is justice denied.”³⁴ His administration of the asbestos docket reflected that view. His stated goal was to move cases through the system within approximately one year, and he seldom granted motions to continue trials.³⁵ He held parties’ feet to the litigation fire but rarely prevented either side from prosecuting or defending its case in front of a jury. He rarely granted summary judgment, which resulted in an unnecessarily bloated trial docket. He also tended to allow unduly broad discovery, for which the Illinois Appellate Court reversed him on at least one occasion.³⁶ On the other hand, Judge Maddux granted motions to dismiss based on *forum non conveniens*, and he resisted granting death penalty discovery sanctions or permitting far-fetched conspiracy claims. This placed him in stark contrast to judges in certain other Illinois circuit courts, such as Madison County³⁷ and McLean County.³⁸

FILING INCREASES AND LIBERAL NAMING OF DEFENDANTS

As noted above, Cooney & Conway dominates the plaintiffs' bar in Cook County asbestos cases, filing approximately 90 percent of all cases on the docket each year.

John Cooney serves on the advisory committees of 15 asbestos bankruptcy trusts that boast combined equity of more than \$12 billion.³⁹ There are more than 40 such trusts, which represent the assets set aside by insulation makers, cement manufacturers, and mining companies.⁴⁰ As a group, the trusts set up by the bankrupt firms had paid \$17.5 billion in claims at the end of 2010, and possessed roughly \$18 billion more to pay claims at the end of 2011.⁴¹ In most trusts, a handful of plaintiffs' attorneys, like John Cooney, sit on advisory committees and are selected because they represent numerous clients suing the bankrupt company.⁴² According to the *Wall Street Journal*, plaintiffs' attorneys hold considerable sway, in part because they help design general payment policies and, in some cases, sign off on auditing procedures.⁴³ This is important because unlike court, where plaintiffs can be cross-examined and evidence can be scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records and work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding, and the process is less expensive for attorneys.⁴⁴ Cooney & Conway claims to have recovered *billions* for its clients from the bankruptcy trusts of Halliburton, Owens-Corning Fiberglass, United States Gypsum, Armstrong, and others.⁴⁵

In 2001, Cooney & Conway filed a total of 52 asbestos cases in Cook County. In 2002, that number soared to 105; by 2004, it had reached 219, reflecting a 320 percent increase in the span of four years. In recent years, Cooney & Conway has filed increasing numbers of mesothelioma claims. Mesothelioma cases involve the most serious injuries, the most complex trials, and the largest plaintiff awards. In 2005 through 2008, Cooney & Conway filed an average of 96 mesothelioma claims per year. From 2009 through 2012, the firm filed an average of 119 mesothelioma claims each year—a nearly 25 percent increase.

It is unlikely that this sharp increase in mesothelioma filings is a statistical anomaly. Claims filed on behalf of career Local 17 insulators and other heavily exposed worker populations in Chicago should be on the decline given the period in which asbestos insulation was prevalent, established latency periods, and the efficiency with which the cases were historically harvested and filed. Consistent with these facts, the increased filings appear to correlate with an influx of Cooney & Conway filings on behalf of plaintiffs lacking genuine connections to Illinois. Most frequently, such plaintiffs have lived, worked, and claimed exposure to asbestos in Indiana, Michigan, and Wisconsin. Some, however, have hailed from the far reaches of the nation, such as Arizona, Arkansas, California, Colorado, Delaware, Florida, New Jersey, New York, Pennsylvania, and South Dakota.⁴⁶ In light of well-settled *forum non conveniens* jurisprudence, which the Illinois Supreme Court affirmed in a 2012 asbestos suit,⁴⁷ such cases do not belong in Cook County,

“ *As Cooney & Conway ramped up its filings in the mid-2000s, it also appears to have adopted a ‘name first, ask questions later’ approach to potential defendants. For example, the firm named a core group of 15 separate defendants in 99 percent of the 496 mesothelioma-related complaints it filed in 2009-2012.* **”**

where they consume precious judicial resources. Nonetheless, Cooney & Conway appears to be importing them so it can funnel cases through its “home court.” Today, a significant percentage of their current mesothelioma cases should not be filed in Illinois.

In addition to filing more cases, plaintiffs’ counsel now name a far greater number of defendants in almost every case, and the roster of defendants has expanded considerably. For example, in *Lipke*, the plaintiff named a total of 27 defendants,⁴⁸ including Johns-Manville, Unarco Industries, Inc., Fibreboard Corp., H.K. Porter, Owens-Corning Fiberglass Corp., and Keasbey-Mattison.⁴⁹ Complaints filed in 2012, on the other hand, name 40 or 50 defendants but often as many as 80 or 90. Virtually none of the 2012 defendants were named in complaints in the earlier era. The most logical inference to draw from this trend is that as the traditional defendants surrender to asbestos-related bankruptcy, plaintiffs’ counsel have added new, second-tier defendants to fuel the litigation. The fact that these defendants generally were not

named historically reflects the reality that their nexus to occupational exposure to asbestos is far more remote than the “first wave” defendants.

As Cooney & Conway ramped up its filings in the mid-2000s, it also appears to have adopted a “name first, ask questions later” approach to potential defendants. For example, the firm named a core group of 15 separate defendants in 99 percent of the 496 mesothelioma-related complaints it filed in 2009-2012.⁵⁰ Illinois Supreme Court Rule 137(a) provides that the “signature of an attorney ... constitutes a certificate by him that he has read the pleading ... that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law ... and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”⁵¹ It strains credibility to believe that nearly 496 consecutive Cooney & Conway mesothelioma plaintiffs over a four-year period could have such identical work and exposure histories as to implicate



a group of the same exact 15 defendants, particularly given that the group includes entities that manufactured a wide variety of products and served different industries at different times.⁵²

SWOLLEN TRIAL DOCKETS

The increase in mesothelioma filings directly affected the trial calendar. To deal with the growing backlog of cases that resulted from the increased number of complaints, Judge Maddux in 2009 entered CMO No. 19, which dictates that cases generally will be set for trial in chronological order of filing, in groups of 13, on the first Tuesday of each month.⁵³ Where Judge Trafelet's order could theoretically result in approximately 52 trials per year, Judge Maddux's could result in three times that amount—156 trials per year. Even that number fails to keep pace with the 192 combined average mesothelioma and non-mesothelioma claims filed by Cooney & Conway alone. The predictable result of this discrepancy, which ran headlong into Judge Maddux's desire to move cases through the system in approximately one year, was the erosion of the 13-case trial group. That putative limit still exists in CMO No. 19. However, the court has constantly disregarded it. Trial groups swelled to more than 20 cases each month, resulting in defendants being forced to prepare for 200-plus trials per year, and left largely in the dark as to which cases would be tried first because CMO No. 19 does not require plaintiffs to disclose to defendants the intended order of trial of the cases in a particular group until 10 days prior to trial.⁵⁴

The Present: A Vicious Cycle

Judge McWilliams

On August 7, 2013, at age 78, Judge Maddux transferred the asbestos docket to The Honorable Clare E. McWilliams. Judge McWilliams reportedly tried more than 20 criminal and civil cases to jury verdict and more than 100 bench trials to verdict before she became a circuit judge in 2004. Commentators describe her as “a qualified judge with a good temperament ... [who] is considered even-tempered, diligent, prepared and attentive to arguments.”⁵⁵ Judge McWilliams has been appealed seven times. In those cases, the appellate court reversed her in whole or in part four times.

Though Judge McWilliams still presides over an occasional commercial or insurance case, tort suits have dominated her docket since at least 2008. She is no stranger to the asbestos docket. Judge Maddux routinely assigned asbestos cases to her for trial for several years. Only one of the cases was tried to verdict. In 2009, Judge McWilliams presided over *Estate of John Mulcahy v. Crane Co., et al.*, No. 08-L-6223. In that case, the decedent died at the age of 77 from mesothelioma. His estate alleged that Mr. Mulcahy was exposed to asbestos-containing products associated with valves manufactured by Crane Co. and turbines made by General Electric during his forty years of work as a mechanic at several Commonwealth Edison power plants. The jury returned a complete defense verdict.

Not all toxic tort defendants have fared well before Judge McWilliams. For example, in 2010, Judge McWilliams presided over the trial of *Solis v. BASF Corp.*, a case in which the plaintiff allegedly suffered lung injury from exposure to diacetyl, a food-flavoring chemical.⁵⁶ After Judge McWilliams directed verdict in favor of plaintiff on BASF Corp.’s statute of limitations defense, the jury awarded plaintiff \$32 million.⁵⁷ By a \$14 million margin, it was the largest award ever in a diacetyl trial. BASF Corp. argued on appeal that Judge McWilliams erred in directing verdict against it because evidence showed that Mr. Solis knew of his injury and its wrongful cause more than two years before he filed suit against BASF Corp.⁵⁸ The appellate court agreed and ordered a new trial.

Status of the Docket

Judge McWilliams sits in the unenviable position of presiding over a docket quietly teetering on the brink of collapse. The system has created a vicious circle for defendants. Increased filings have meant increased numbers of trial set cases. Increased trial settings make it harder to defend individual cases on the merits. The difficulty of defending cases on the merits pressures defendants to settle, often at inflated values. Settling large numbers of cases encourages Cooney & Conway to continue broadly naming defendants and enables the firm to attract more cases.

“ *The experience of Yarway Corp. in Cook County asbestos litigation offers a telling, cautionary example. In 2005, Cooney & Conway did not name Yarway Corp in a single mesothelioma case. ...From 2009 through 2012, however, Cooney & Conway named Yarway Corp. in every single mesothelioma complaint it filed—496 complaints in all. On April 22, 2013, Yarway Corp. filed for bankruptcy, citing asbestos liabilities and naming scores of Cooney & Conway plaintiffs among its creditors.* **”**

It also creates the impression that Cooney & Conway invariably settles, which may make the court more likely to set more trials each year than could rationally be tried.

The experience of Yarway Corp. in Cook County asbestos litigation offers a telling, cautionary example. In 2005, Cooney & Conway did not name Yarway Corp in a single mesothelioma case. In 2006, it named the company in two. By 2007, the number jumped to 45 (which translated to 36 percent of the firm’s mesothelioma filings that year). From 2009 through 2012, however, Cooney & Conway named Yarway Corp. in every single mesothelioma complaint it filed—496 complaints in all. On April 22, 2013, Yarway Corp. filed for bankruptcy, citing asbestos liabilities and naming scores of Cooney & Conway plaintiffs among its creditors.⁵⁹

These are not academic concerns. In any given month, a defendant must investigate a plaintiff’s factual allegations (including locating documents and witnesses in foreign states), retain and timely disclose experts (e.g., medicine, pathology,

pulmonology, epidemiology, industrial hygiene), respond to discovery (including defending their own corporate depositions and attending the depositions of other corporate representative depositions), file dispositive motions, and prepare for trial in dozens of cases at once. Moreover, although CMO No. 19 contemplates that cases generally will be set for trial in chronological order, in practice, plaintiffs’ counsel choose the order in which trials will proceed. Naturally, plaintiffs’ counsel seek to lead with their best case in hopes of creating an effective lever for resolving all the other cases in the group in which a defendant is named. Plaintiffs’ counsel rarely respond to summary judgment motions in a timely fashion. Typically, they wait until the time of trial and respond only to the motions of remaining defendants and even then, only in the lead case. Because defendants must timely file their summary judgment motions to preserve their arguments, this results in a seriously disproportionate burden on defendants and frustrates their ability to timely resolve weaker claims.

The Need for Change

Ultimately, whatever the reasons for crowded dockets, defendants' due process right to a fair trial cannot be overridden by a desire to process claims "efficiently."⁶⁰ Yet the cumulative effect of the practices and procedures described above prejudice defendants severely enough that the jurisdiction is heading toward a crisis.

The future of asbestos litigation in Cook County remains uncertain. The status quo appears to be unsustainable. The "go along to get along" approach has resulted in more cases, more trial settings, and more demands. Filings will continue for the foreseeable future and may increase as Cooney & Conway imports cases from other states. As target defendants continue to succumb to bankruptcy, pressure will increase on defendants who now consider themselves to be at the margins.

Several changes to the management of the Cook County asbestos docket are necessary to improve the administration of justice in Cook County and align it with the more balanced approaches taken in other jurisdictions with comparable dockets.

Forum Non Conveniens

The CMO should be amended to prevent a plaintiff who never lived, worked, or was exposed to asbestos in Illinois from receiving a trial date. In the absence of such a measure, consistent motion practice to prevent the cases from being litigated in Illinois would have a number of positive

influences. Keeping non-Illinois cases out of Cook County would eliminate a sizeable number of cases that are disproportionately labor intensive to investigate and defend because of the abundance of out-of-state witnesses and worksites. In addition, out-of-state cases occasionally end up being the lead case in a monthly trial group. Eliminating these cases could diminish plaintiffs' unfair settlement leverage with respect to other cases in the group.

Trial Settings

CMO No. 19's 13-case trial group standard should be lowered. The Court of Common Pleas of Philadelphia County, for example, limits trial setting to between 8-10 cases. At the very least, the court should enforce the 13-case standard, as the answer to increased filings is not to force increased numbers of cases to trial within a shorter period of time than the court historically allowed. Additionally, the court should require plaintiffs to disclose the sequence in which cases will be tried no later than 60 days before the trial date (compared with the 10-day window currently in place).

Summary Judgment

CMO No. 19 requires plaintiffs to respond to motions for summary judgment within 14 days. Cooney & Conway rarely, if ever, complies with this deadline. The court should *sua sponte* grant summary judgment motions when plaintiffs fail to timely respond to them. Doing so would radically thin the number of pending claims, ease the burden on the court, and help level the playing field.

Bankruptcy Trust Claims

As noted above, asbestos bankruptcy trusts offer plaintiffs considerable financial recovery outside the tort system for the same injuries that form the basis of tort actions. A problem with the bankruptcy trust claim process is that plaintiffs' counsel often game the system by waiting to file claims until their clients resolve their tort claims via trial or settlement. They do so for at least two reasons.

First, plaintiffs' counsel hope to avoid having to produce information about exposures to asbestos from companies that are not in the courtroom because that information would support a sole proximate cause defense. Many, if not most, of the bankruptcy-related claims involve products that contained potent amphibole asbestos, such as thermal insulation. Exposure to asbestos from these products, which *Nolan* held is relevant and admissible, explains to a jury why a plaintiff became ill. Hiding it deceives the jury and unfairly prejudices defendants' ability to mount a well-established defense.

Second, plaintiffs' counsel delay submitting trust claims in order to recover twice for the same injury and deprive defendants of an opportunity to obtain a set off⁶¹ for any monies received by the plaintiff from the bankruptcy trusts.⁶² Again, such a set off would often be very substantial because mesothelioma claimants can receive hundreds of thousands of dollars from the bankruptcy trusts.

Neither CMO No. 19 nor standard discovery requests expressly mention bankruptcy claims. However, several of the standard interrogatories and requests for production encompass them, such as discovery requests seeking statements related to alleged exposure, use of asbestos containing products, and information related to all claims for injury or physical condition.

The court should amend the pending case management order by requiring all plaintiffs to make sworn statements identifying all asbestos trust claims made by the plaintiff, and enabling any defendant to seek a stay of trial in any case in which it demonstrates by a preponderance of the evidence that a plaintiff has one or more claims against bankruptcy trusts which the plaintiff has not disclosed. This simple amendment, already enacted elsewhere, would fundamentally cure the trust claim abuses that currently afflict the docket.⁶³

By way of illustration, Cooney & Conway plaintiffs generally acknowledge in discovery that, at one or more jobsites, they worked with or around, or were otherwise exposed to, the asbestos-containing products and equipment of specifically identified companies that are operating

under bankruptcy protection and are no longer amenable to civil suit. However, the firm stubbornly delays producing forms for any trust claim asserted and almost certainly defers the filing of other claims until after it resolves claims in the circuit court.⁶⁴ Requiring such plaintiffs to attest that they have identified all asserted claims (and provided the associated materials) or risk losing a trial date would provide a strong incentive to come clean with information these claimants and their counsel obviously possess. It seems difficult to imagine a compelling argument against such a fair, even-handed means to address this problem.

Trials

The serial abuses that plague Cook County asbestos may force defendants to try Cooney & Conway cases. It sounds counterintuitive. However, trials could be a meaningful tool for change.

For starters, Cooney & Conway obviously likes the status quo—and for good reason. The firm files nearly 200 cases per year in Cook County, the majority of them mesothelioma claims. The fact that Cooney & Conway is not reported to have tried a case since 1994 implies that the firm recognizes that its model works best when it can force group settlements. If Cooney & Conway were forced try a significant number of cases, the court's docket would quickly clog, creating a problem for the circuit court and its trial judges and choking off the firm's revenue stream.

The principal reason defendants have not forced Cooney & Conway to trial is that Cook County has earned a reputation for

being perilous for defendants. The jury pool is regarded as hostile to corporate defendants and willing to award large sums to plaintiffs. *Barry*, after all, was the largest compensatory award in Illinois history in an asbestos case when the verdict was rendered. Outside of asbestos, in a five-year period between 2006 and 2011, Cook County juries awarded plaintiffs age 50 years or older (like virtually all asbestos plaintiffs) more than \$1 million in compensatory damages 32 times, with the largest award soaring to \$31 million. Nonetheless, the reality is that defendants have fared well trying cases against firms other than Cooney & Conway. In fact, defendants have won seven of the last eight cases tried to verdict since 1997. These results dispel the reflexive belief that defendants simply cannot win trials.

Is Cooney & Conway different than other plaintiffs' counsel? Cooney & Conway files far more cases than other plaintiffs' counsel. Its steady and deep portfolio of cases enables Cooney & Conway to credibly threaten retribution against a defendant who forces them to trial. Thus, defendants rationally fear that even if they win several consecutive trials against Cooney & Conway, the firm will cherry-pick cases to target that defendant until they obtain a large plaintiff award. Ultimately, though, risks exist for both sides. If Cooney & Conway continues to name defendants indiscriminately, import large numbers of out-of-state cases, force the cases through the system in excessively large groups, and make exorbitant settlement demands, defendants will likely have no choice but try substantially more cases.

Conclusion

The problems endemic to Cook County asbestos litigation developed over many years. They cannot be solved overnight. However, understanding the evolution of the problems is necessary to understand and solve them.

Absent change, Cook County's asbestos docket will spiral into the ranks of the infamous and attract unwanted attention to the Cook County Circuit Court. Some modifications to Cook County's pre-trial procedures to bring them in line with

established civil litigation practices would go a long way to mitigating these problems, and trials could help shine a much needed light on the problems of Cook County.

Endnotes

- 1 Sandburg, Carl. "Chicago." *Chicago Poems*. New York: Henry Holt and Company, 1916; Bartleby.com, 1999, www.bartleby.com/165/.
- 2 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).
- 3 *Jensen v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986).
- 4 *Amchem v. Windsor*, 521 U.S. 591, 597 (1997).
- 5 REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2 (Mar. 1991); *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283*, 106th Cong. at 14 (1999) (statement of Professor William N. Eskridge, Jr., Yale Law School).
- 6 Michael France and Stephanie Forest, *The Asbestos Monster: How Scary for Halliburton?* Bus. Wk., Dec. 24, 2001.
- 7 See Mark D. Plevin, Leslie A. Davis and Tacie H. Hoon, *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, Mealey's Bankruptcy Report, Vol. 11, No. 7 (February 2012), <http://www.crowell.com/files/2012-mealys-asbestos-bankruptcy-report.pdf> (identifying 95 such bankruptcies through 2011); <http://www.crowell.com/files/List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf> (incorporating nine additional bankruptcies from 2012-present).
- 8 See <http://www.cooneyconway.com/mesothelioma.html>.
- 9 See <http://terryjohnsonlaw.com/meso-asbestos.php>. Mr. Johnson also enjoyed a strong relationship with Local 17, and he participated in asbestos screenings for the union. *Id.* He was one of the moving attorneys who sought the establishment of a pleural registry to defer the claims of unimpaired plaintiffs. *Id.* In 1989, Mr. Johnson won the first plaintiff's verdict in federal district court in an Illinois asbestos case.
- 10 Before 1991, when the Joint Panel on Multi-District Litigation established MDL - 875 (the Federal Asbestos MDL), a significant number of the asbestos claims filed in the Chicago area were filed in federal district court. Seven of the eight verdicts in asbestos trials in the Chicago area prior to 1992 were rendered in federal district court. There have been no verdicts in federal district court since 1996. Of the nine cases tried to federal district court, defendants won five and plaintiffs won four.
- 11 Other firms are active today. For example, Connelly & Vogelzang file a handful of cases each year. Some national firms that are active in other jurisdictions have tried unsuccessfully to establish a presence in Cook County, including Waters & Kraus and Baron & Budd.
- 12 *In re Motors Liquidation Co., et al., f/k/a General Motors Corp., et al.*, Case No. 09-50026 (REG) (S.D.N.Y.) (Declaration of Dean M. Trafelet in Support of Motion Pursuant to Sections 105 and 1109 of the Bankruptcy Code for an Order Appointing Dean M. Trafelet as Legal Representative for Future Asbestos Personal Injury Claimants, dated Feb. 23, 2010).
- 13 Carol McHugh, "Asbestos Attorneys Argue Effect of First Punitive Damage Award," *Chicago Daily Law Bulletin*, p. 1, col. 3 (February 28, 1985) (noting that as of the publication date, there were "more than 90 asbestos-related cases pending in the Circuit Court.").
- 14 *In re Asbestos Litigation*, Master File No. 1, Consolidated Case Management Order No. 1, par. 1 (Cook County Cir. Ct.).
- 15 *Id.* at pp. 5-7.
- 16 See *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 501 (1st Dist. 1987).
- 17 *Id.*
- 18 *Id.*

- 19 *Id.* at 509.
- 20 *Id.* (citations and quotations omitted).
- 21 *See, e.g., Kochan v. Owens–Corning Fiberglass Corp.*, 242 Ill. App. 3d 781 (5th Cir. 1993), and *Spain v. Owens-Corning Fiberglass Corp.*, 304 Ill. App. 3d 356 (4th Dist. 1999).
- 22 *See Warner/Elektra/Atlantic v. County of DuPage*, No. 83–C–8230 (N.D. Ill. March 6, 1991).
- 23 *Id.* at 444-45.
- 24 *In re: Asbestos Cases*, 224 Ill. App. 3d 292 (1st Dist. 1991).
- 25 *Id.*
- 26 *In re Asbestos Litigation*, Law No. 91 L 1695 (Cook County Cir. Ct., Apr. 15, 1993). This order has been amended from time to time but remains fundamentally in place today.
- 27 *In re Asbestos Litigation*, Law No. 95 L 0000, Case Management Order No. 12 (Cook County Cir. Ct., July 17, 1996).
- 28 *See, e.g., Lowe v. Norfolk & Western Ry. Co.*, 124 Ill. App. 3d 80 (5th Dist. 1984) (circuit court erred in consolidating 47 suits for trial where, despite the fact that the suits all arose from the same chemical spill, individual exposures varied, the jury was instructed on four different legal theories, and the manner of presentation of the evidence almost inevitably led to confusion).
- 29 *In re Asbestos Litigation*, Law No. 95 L 0000, Case Management Order No. 12 (Cook County Cir. Ct., July 17, 1996).
- 30 *See* <http://cooneyconway.com/tocverdictsandcases.html>.
- 31 *In re Asbestos Litigation*, Law No. 95 L 0000, Case Management Order No. 18 (Cook County Cir. Ct., March 19, 1997).
- 32 Circuit court judges twice denied motions by Cooney & Conway to consolidate large numbers of cases for trial.
- 33 For example, The Honorable Mary Mulhern and The Honorable Daniel Locallo each handled the docket at one time.
- 34 Ameet Sachdev, *County’s courts win some breathing room*, CHI. TRIB. March 26, 2007, at http://articles.chicagotribune.com/20070326/business/0703260078_1_asbestos-litigation-courtroom-defense-lawyer.
- 35 *Id.*
- 36 *In re All Asbestos Litigation*, 385 Ill. App.3d 386 (1st Dist. 2008).
- 37 The Circuit Court of Madison County imposed extreme sanctions in a number of asbestos cases, including striking witnesses and defenses. These rulings helped produce large plaintiffs’ verdicts. *See, e.g., Illinois Jury Awards Former Roofer \$34M, Believed To Be Largest Single Plaintiffs’ Verdict*, Mealey’s Litig. Rep.: Asbestos, June 2, 2000, at 3.
- 38 *See Rodarmel v. Pneumo Abex, L.L.C.*, 2011 IL App (4th) 100463, 957 N.E.2d 107 (reversing trial court’s denial of defendants’ motion for judgment n.o.v. based on the conspiracy theory).
- 39 *See A Matter of Trust*, WALL ST. J., March 11, 2013, <http://online.wsj.com/article/SB10001424127887323864304578318611662911912.html>.
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 *Id.*
- 44 *Id.*
- 45 *See* <http://cooneyconway.com/tocfirmoverview.html>.
- 46 Cooney & Conway promotes its services in 28 separate markets, including 16 different states. *See* <http://www.cooneyconway.com/>.
- 47 *See Fennell v. Illinois Cent. R. Co.*, 2012 IL 113812 (2012).
- 48 *Lipke v. Celotex Corp.*, 153 Ill. App. 3d at 498.
- 49 *Lipke v. Celotex Corp.*, No. 80-L-1184, Compl. at Law (May 22, 1980).

- 50 The group consists of A.W. Chesterton, Certainteed Corp., Crane Co., Foster Wheeler Energy, General Electric Co., Georgia-Pacific Corp., Henry Pratt, Ingersoll Rand, Mueller Co., Rapid American Corp., Riley Power, Inc., Union Carbide Corp., Uniroyal, Inc., Viacom, and Yarway Corp.
- 51 Ill. S. Ct. Rule 137(a).
- 52 This is particularly the case given the fact the Illinois Supreme Court rejected the market share liability. *See Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222 (1990).
- 53 *In re Asbestos Litigation*, Law No. 09 L 0000, Case Management Order No. 19, par. 8 (Cook County Cir. Ct., May 4, 2009).
- 54 *Id.* at par. 9(u).
- 55 *See* Judicial Performance Commission of Cook County, Report on the Judges Seeking Retention on the November 2, 2010 Ballot in Cook County, http://www.voteforjudges.org/JPC_report_for_2010_final.pdf.
- 56 *Solis v. BASF Corp.*, No. 2006 L 12105 (Cook County Circuit Court).
- 57 *Solis v. BASF Corp.*, 365 Ill. Dec. 815, 824 (Ill. App. 1 Dist., 2012).
- 58 BASF Corp. also argued that there was insufficient evidence of causation because Mr. Solis failed to show that diacetyl supplied by BASF Corp. was a substantial factor in causing his injury, and because Mr. Solis admitted that he did not read BASF's MSDSs at Flavorchem. In addition, BASF Corp. argued that the jury was improperly instructed that BASF Corp. had a duty to warn the flavoring industry—and not just the users of its diacetyl—about the hazards of diacetyl. The company also contended that Mr. Solis failed to make the necessary showing that diacetyl was unreasonably dangerous in order to support his strict liability claims. It also made numerous claims of evidentiary and instructional error, which it argued entitled it to a new trial. Because the appellate court reversed Judge McWilliams' ruling on BASF Corp.'s statute of limitations defense and ordered a new trial, it did not reach these additional arguments.
- 59 Six weeks earlier, Rapid American Corp., another defendant in virtually all Cooney & Conway mesothelioma cases, also filed for bankruptcy.
- 60 *Nye v. Parkway Bank & Trust Co.*, 114 Ill. App. 3d 272, 276, (1st Dist. 1983) (court's procedures to move cases quickly violated defendant's due process rights); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("The benefits of efficiency can never be purchased at the cost of fairness ... The systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—case not be lost in the shadow of a towering mass litigation").
- 61 *See* 740 ILCS 100/2 (c).
- 62 *See How Fraud and Abuse in the Asbestos Compensation System Affects Victims, Jobs, the Economy, and the Legal System: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 101-04 (2011) (statement of James L. Stengel, Esq. detailing examples of such gamesmanship).
- 63 *See, e.g.*, OHIO REV. CODE ANN. §§ 2307.951-2307.954.
- 64 Other plaintiffs firms, such as Connelly & Vogelzang, appear to wait until after tort claims are resolved to file any trust claims.



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