



TOWARD A FAIRER CASE MANAGEMENT ORDER: FOUR KEYS FOR NEW YORK CITY'S ASBESTOS DOCKET

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For nearly three decades, parties involved in New York City Asbestos Litigation (NYCAL)—one of the busiest dockets of its kind in the United States—have followed agreed-upon procedures that are embodied in a Case Management Order (CMO) that has existed in one form or another since 1988. Rather than simply restating the procedural dictates of the New York Code—Civil Practice Law and Rules (CPLR), which control most civil lawsuits—the NYCAL CMO embodies a series of compromises, outside the letter of the CPLR, that better enable the court and the parties to navigate the unique procedural aspects of a repetitive tort docket.

The balancing of interests embodied in the NYCAL CMO was upset in April 2013, when plaintiffs unilaterally sought to remove the longstanding punitive-damages deferral from it. The New York judiciary subsequently appointed Justice Peter Moulton to oversee the NYCAL proceedings. Soon after his appointment, he ordered a renegotiation of the CMO. This LEGAL BACKGROUNDER highlights four issues that will be paramount in these negotiations. The analysis discusses how CMOs from other jurisdictions address these contentious areas, and urges the NYCAL court to consider those alternatives.

Background to Current Negotiations

The current NYCAL CMO was adopted on March 25, 1988. It has been amended several times since then to reflect changes in asbestos litigation.¹ Among the consented-to terms of the CMO was one that deferred punitive damages in NYCAL cases, subject to plaintiffs being able to seek leave to pursue such damages in appropriate individual cases.² In April 2013, however, some NYCAL plaintiffs' attorneys asked the NYCAL trial courts to consider permitting punitive damages in *all* NYCAL cases.³ The trial court ultimately granted plaintiffs' motion, and the defendants appealed. The Supreme Court of New York, Appellate Division, First Department, overturned the trial court's attempt to modify the CMO, holding that the manner in which the trial court amended the CMO "deprive[d] defendants of their rights to due process by leaving them guessing, until the close of evidence at trial, whether or not punitive damages will be sought."⁴ The Appellate Division remanded back to the NYCAL trial court the question of whether to maintain the ongoing deferral of punitive damages in NYCAL cases "after consultation with the parties."⁵

¹ *In re New York City Asbestos Litig.*, 37 Misc.3d 1232(A) (N.Y. Sup. Ct. 2012).

² See *In re New York City Asbestos Litig. (All NYCAL Cases)*, 130 A.D.3d 489, 489 (N.Y. App. Div. 2015). This provision, which was added to the CMO in 1996 as section XVII, stated, "Counts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing." *Id.*

³ It is worth noting that, as opposed to seeking redress for past misconduct, plaintiffs' counsel attempted to justify the blanket imposition of punitive damages in all NYCAL cases by the court's need to address "recalcitrant defendants" who resist "coming to [counsel's] office" to settle cases. See Transcript of Proceedings, *In re New York City Asbestos Litig. (Chidester, Milazzo, Moritz, Roman, Sadowski, and Smith)*, Index Nos. 190293/2011, 190311/2011, 190294/2011, 190262/2011, 190215/2011, 190299/2011 at 40 (N.Y. Sup. Ct. Dec. 16, 2013).

⁴ *All NYCAL Cases*, *supra* note 2 at 490.

⁵ *Ibid.*

Shortly before the First Department ruled on the issue, Justice Peter Moulton was named as NYCAL's new presiding judge. On August 28, 2015, Justice Moulton ordered a renegotiation of the NYCAL CMO, and indicated that the court would "participate with the parties in a thoroughgoing reevaluation of the Case Management Order" with a view toward "craft[ing] a new Case Management Order that is wholly consented to by both sides."⁶

While the negotiation of a new CMO will touch upon many areas of procedural and substantive law, the following four issues promise to inspire the most contentious debate.

Punitive Damages

Plaintiffs argue that because punitive damages are generally available in other tort actions in New York, and because such damages are not precluded by the statewide rules of practice, punitive damages should be widely available in NYCAL matters.⁷ As the First Department held, however, simply because such damages are not precluded as a matter of law, it does not follow that punitive damages are to be imposed uniformly, as a matter of course, in all NYCAL cases.

In opposing the reintroduction of punitive damages to NYCAL litigation, defendants' arguments have echoed what Justice Helen Freedman, formerly NYCAL's presiding judge, wrote in a 2008 law review article:

First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states do not permit punitive damages, and the federal MDL court precludes them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong.⁸

Consolidation of Claims

Beyond punitive damages, another point of contention is the extent to which asbestos actions on the NYCAL docket may be "consolidated" or joined and tried together.⁹ It is "common practice" for NYCAL trial judges to join together for trial cases brought by different plaintiffs,¹⁰ and over the past several years a number of NYCAL actions have been tried alongside other, completely unrelated, actions in consolidated trials.¹¹

Recently, NYCAL judges have denied some plaintiffs' consolidation requests, and have cited evidence that displays the inherent prejudice involved in consolidated multi-plaintiff trial settings.¹² For instance, in denying a recent consolidation request, one NYCAL trial judge discussed statistics related to the past 19 NYCAL trials that went to verdict. Those statistics showed that in the nine trials that involved only *one* plaintiff, there were six

⁶ See *In re New York City Asbestos Litig. (All Asbestos Cases)*, Index No. 40000/1988, Sequence No. 017 at 1-2 (N.Y. Sup. Ct. Aug. 28, 2015) (hereinafter "Stay Opinion"), available at: <http://www.nycal.net/PDFs/cmo/Judge%20Moulton%20Decision%20regarding%20Stay%20in%20NYC%20Asbestos%20Litigation.pdf>.

⁷ *Id.* at 5-6.

⁸ Helen S. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U.L. Rev. 511, 527 (2008).

⁹ See Stay Opinion, *supra* note 6 at 6.

¹⁰ *Ibid.*

¹¹ See, e.g., *In re New York City Asbestos Litig. (Peraica)*, No. 190339/2011, 2013 WL 6003218, at *1 (N.Y. Sup. Ct. Nov. 6, 2013) (noting that, when the trial of the action at issue began, it was one of *eight cases* being tried simultaneously by numerous plaintiffs against numerous defendants).

¹² See *In re New York City Asbestos Litig. (Andreadis)*, No. 190411/2013, 2015 WL 4501189 (N.Y. Sup. Ct. July 24, 2015); see also *In re New York City Asbestos Litig. (Santos)*, No. 190043/2014, 2015 WL 4620756 (N.Y. Sup. Ct. July 27, 2015) (applying *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350-51 (2d Cir. 1993), rejecting plaintiffs' proposed consolidation of claims, and ordering the five claims before the court to be tried in two consolidated two-claim groups, and one claim separately).

defense verdicts, and no plaintiff's verdict in excess of \$7 million. In the ten trials that involved *multiple* plaintiffs, however, there was only one defense verdict, and an *average* plaintiff's verdict of \$9 million.¹³ Defendants maintain that, in light of such evidence, consolidation is entirely inappropriate because it obviously makes a substantive difference in trial outcomes.

NYCAL would not be the first court to resolve a trade-off between the availability of punitive damages and consolidation in asbestos cases. Indeed, the Court of Common Pleas of Philadelphia County, Pennsylvania, resolved precisely the same dispute several years ago by implementing General Court Regulation No. 2013-01,¹⁴ which, among other things, defers punitive damages in all mass-tort claims in Philadelphia County but permits limited consolidation of asbestos actions for trial, subject to a number of detailed rules to minimize the prejudice that consolidation can cause. For example, a maximum of three cases can be consolidated for trial in Philadelphia, and the cases may proceed to trial only if they involve the same disease process, the same governing law, and the same plaintiffs' counsel, among other similarities. Although the approach to punitive damages and consolidation of cases taken in Philadelphia does not provide either defendants or plaintiffs with exactly what they may want, it at least attempts to acknowledge the prejudice often caused by consolidation and strikes a better balance between competing interests than the consolidation rule in NYCAL.

Joint-and-Several Liability Arising from a "Recklessness" Finding

Another significant issue that CMO negotiators face is the court's application of New York's "Article 16" and that application's potential for imposing draconian joint-and-several liability upon *de minimis* share defendants.¹⁵ Article 16 provides for several liability for awards of non-economic damages, thereby holding each defendant legally responsible only for the share of fault allocated to it by a jury. New York's legislature adopted this provision "to remedy the inequities created by joint-and-several liability, on low-fault, 'deep pocket' defendants."¹⁶

NY CPLR § 1602 sets forth several "exceptions" to Article 16's general rule of several liability. One of these exceptions provides that several liability will not apply "to any person held liable for causing claimant's injury by having acted with reckless disregard for the safety of others."¹⁷ In an effort to bypass Article 16's prohibition of joint-and-several liability, NYCAL plaintiffs often seek jury instructions that enable jurors to hold a trial defendant "reckless" based on conduct that is the effective equivalent of simple negligence. When this occurs, the "recklessness" exception to Article 16 "swallows the rule" of several liability for noneconomic damages in NYCAL cases, and essentially erases Article 16 from New York law in asbestos cases.

This unduly expansive version of the term "recklessness" undermines Article 16, and provides NYCAL plaintiffs with unwarranted leverage in settlement discussions. Indeed, in recent years, NYCAL juries have repeatedly found that defendants acted "with reckless disregard," even when it was undisputed at trial that the defendants before the court did not manufacture or supply any of the asbestos-containing materials to which the plaintiff was exposed.¹⁸

Plaintiffs will strongly oppose any change related to the submission of "recklessness" questions to the jury. Defendants, however, may be able to leverage some of the changes that plaintiffs are seeking to the CMO to achieve the "recklessness" change through compromise. For example, plaintiffs seek certain standardized

¹³ See *Andreadis*, *supra*, 2015 WL 4501189, at *3.

¹⁴ This regulation, which was created following an extensive review of the prevailing practices in asbestos actions in Philadelphia County, is available at: <http://www.courts.phila.gov/pdf/regs/2013/cpajgr2013-01.pdf>.

¹⁵ NY CPLR § 1600, *et seq.*; see Stay Opinion, *supra* note 6 at 9.

¹⁶ *Rangolan v. County of Nassau*, 96 N.Y.2d 42, 46, (2001); see also *Frank v. Meadowlakes Dev. Corp.*, 6 N.Y.3d 687, 692 (2006) ("The purpose of Article 16 was to place the risk of a principally-at-fault but impecunious defendant on those seeking recovery and not on a low-fault, deep pocket defendant.").

¹⁷ NY CPLR § 1602(7).

¹⁸ See, e.g., *In re New York City Asbestos Litig. (Dummitt)*, 121 A.D.3d 230 (1st Dep't 2014); *Peraica*, *supra* note 11.

pleading and discovery practices, streamlined and/or accelerated summary judgment practice, preferential expedited trial settings, and the convenience of consolidating all New York City asbestos cases before one single court, under one general docket number. Each of these proposed changes would bypass various aspects of New York Code.¹⁹

Treatment of Asbestos Bankruptcy Trusts

A new CMO must include a thorough treatment of issues arising from NYCAL plaintiffs' claims against so-called "asbestos bankruptcy trusts." Federal law created the trusts to provide compensation outside of civil litigation for asbestos-related injuries relating to products of entities that have proceeded through bankruptcy. The NYCAL court was one of the first in the nation to address situations in which asbestos plaintiffs either concealed evidence of exposure to products for which asbestos trusts are liable, or delayed making claims with trusts until after the resolution of a tort action, in order to deprive defendants of the ability to argue for a fault allocation to the trusts or a verdict setoff.²⁰ Under the current NYCAL procedures, plaintiffs are required to (1) file asbestos trust claims within certain set periods of time (while the tort action is pending) and (2) disclose to defendants all materials filed in support of the trust claims.²¹

However, some defendants contend that plaintiffs have not always followed these rules and, therefore, additional protections are needed in the new CMO.²² The CMO arguably should also include provisions that clarify the extent to which trust filings are admissible in evidence for various purposes. One possible means of addressing this question can be found in the CMO for asbestos actions filed in West Virginia. That order provides that materials submitted in support of trust claims are presumed to be authentic and admissible to prove alternative causation, and for any other purpose consistent with the laws of West Virginia.²³ A similar provision in the new NYCAL CMO would relieve trial judges from having to deal with repetitive, time-consuming objections to the admissibility of trust filings.

Conclusion

In light of the trial court's stated goal to "participate with the parties in a thoroughgoing reevaluation of the Case Management Order" with a view toward "craft[ing] a new Case Management Order that is wholly consented to by both sides,"²⁴ the parties in NYCAL cases should work toward a negotiated CMO that takes into account both the recent guidance of the First Department Appellate Division on the matter of punitive damages and the manner in which other jurisdictions with active asbestos dockets have resolved questions similar to the ones facing the NYCAL parties now.

¹⁹ Another school of thought is that the NYCAL parties should abandon the CMO in its entirety, and revert back to the strict requirements of the CPLR. While the authors here do not necessarily advocate for such an outcome, it is an alternative to be considered should the parties be unable to reach (or adhere to) a compromised CMO.

²⁰ See *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014) (detailing these practices at length); see also *Garlock Sealing Technologies, LLC v. Simon Greenstone Panatier Bartlett*, No. 3:14-cv-116, 2015 WL 5148732 (W.D.N.C. Sept. 2, 2015) (refusing to dismiss fraud, conspiracy, and federal racketeering claims asserted against plaintiffs' firms in asbestos litigation who routinely recovered from solvent defendants and then recovered, again, from asbestos trusts).

²¹ See *In re New York City Asbestos Litig.*, 37 Misc.3d 1232(A) (N.Y. Sup. Ct. 2012).

²² See Stay Opinion, *supra* note 6 at 7-8.

²³ See 2012 Asbestos Case Management Order with Attached Exhibits, in the Circuit Court of Kanawha County, West Virginia, Civil Action No. 03-C-9600 at 28-30, available at: <http://www.courtswv.gov/lower-courts/mlp/mlp-orders/asbestos-2012-CMO.pdf>. See also Case Management Order Requiring Disclosure of Bankruptcy Trust Claims, Claims-Related Materials, and Asbestos Exposures Facts, LAOSD Asbestos Cases, No. JCCP 4674 (Superior Court of the State of California for the County of Los Angeles, Apr. 7, 2015); Standard Order No. 1, *In re Asbestos Litig.*, C.A. No. 77C-ASB-2 (Superior Court of the State of Delaware in and for New Castle County).

²⁴ See Stay Opinion, *supra* note 6 at 1-2.