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Toxic Tort

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In this edition of the *IDC Quarterly*, Toxic Tort Committee member Justin Zimmerman reviews important developments in toxic tort litigation in 2020. As Justin discusses, COVID-19 significantly impacted this litigation, as it did so many areas of law. Then, Toxic Tort Committee member Kelly Libbra examines the Illinois appellate court opinion, *Levy v. Gold Medal Products Co.*, 2020 IL App (1st) 192264, in which the First District Appellate Court addressed whether specific jurisdiction existed over a defendant in a toxic tort case. The court's decision in *Levy* represents another Illinois court opinion, much like the Illinois Supreme Court's holding in *Russell v. SNFA*, holding that a non-resident defendant was subject to specific jurisdiction based upon the business commercial activities of a third-party.

2020 in Review: An Overview of Toxic Tort Litigation

2020 was a truly unprecedented year in the court system nationwide due to the COVID-19 pandemic. A review of filing rate statistics, important court opinions, significant trials, and related developments provides an overview of 2020 Illinois toxic tort and asbestos litigation and show the litigation, as with most other aspects of professional and personal life, was impacted by COVID-19.

Unsurprisingly, asbestos filings declined nationwide in 2020. The most recently available numbers indicate a 12 percent decline nationally as asbestos related filings between January and October decreased from 3,245 in 2019 to 2,853 in 2020. Megan Shockley, *Asbestos Filings in 2020: A Tale of Two Jurisdictions*, KCIC (Nov. 30, 2020), https://www.kcic.com/trending/feed/asbestos-filings-in-2020-a-tale-of-two-jurisdictions/. Consistent with this general trend, Madison County, Illinois filings recorded a six percent decline in asbestos filings through the first half of 2020. Megan Shockley, *2020 Mid-Year Asbestos Litigation Update*, KCIC (Aug. 12, 2020), https://www.kcic.com/trending/feed/ 2020-mid-year-asbestos-litigation-update/.

The top plaintiffs' firms filing asbestos lawsuits remained consistent, although the Gori Law Firm, Simmons Hanly Conroy, and Cooney and Conway saw significant decreases in their filing rates. *Id.* With respect to venue, most jurisdictions saw a decrease in 2020 filings compared to 2019. *Id.* St. Clair County, Illinois saw a similar decrease in filings (8%) while Cook County, Illinois (27%) and St. Louis, Missouri (32%) experienced more substantial decreases. *Id.*

Despite the decrease in new filings, there were several important appellate court opinions issued in pending cases related to asbestos and tox tort litigation in 2020, including *Krumwiede v. Tremco, Inc.*, 2020 IL App (4th) 180434; *Linder v. A.W.*

Chesterton Co., 2020 IL App (5th) 200101; *Rios v. Bayer Corp*., 2020 IL 125020; *John Crane Inc. v. Allianz Underwriters Ins. Co*., 2020 IL App (1st) 180223; *Stamper v. Turtle Wax, Inc*., 2020 IL App (5th) 180514-U; and *Apex Oil Co. v. Arrowood Indem. Co*., 2020 IL App (5th) 180396-U. Analyzing one such decision in further detail, in *Krumwiede v. Tremco, Inc.,* 2020 IL App (4th) 180434, the Fourth District Court of Appeals determined that the plaintiffs failed to establish at trial that the decedent's work with the defendant's products was a substantial factor in the cause of the decedent's illness. The case involved the estate of a decedent that alleged the decedent was exposed to asbestos through his work with Tremco caulk and tape and that he developed mesothelioma as a result of said exposure. *Krumwiede v. Tremco, Inc.,* 2020 IL App (4th) 180434, ¶¶ 1, 4. The decedent allegedly used Tremco caulk and glaze while working as a window glazier from the mid-1950's to the early 1990's. *Id.* ¶¶ 5-6. Following a verdict for the plaintiffs at trial, Tremco appealed. *Id.* ¶¶ 44-46. On appeal, the Fourth District concluded that the plaintiffs failed to establish that the decedent's work with Tremco products was a substantial factor in the cause of his mesothelioma. Under Illinois law, the plaintiffs were required to prove that the decedent was exposed to asbestos from Tremco's products with such frequency, regularity, and proximity that the asbestos from those products could be viewed as a substantial factor in causing the decedent's mesothelioma. *Id.* ¶ 53. According to the court, simply proving that the decedent worked in proximity to Tremco products did not satisfy this standard because it did not establish that the decedent had frequent, regular, and proximate contact with respirable asbestos fibers from the products. *Id.* ¶¶ 68-69. The court believed that there was an absence of evidence explaining under what circumstances Tremco's products released respirable asbestos fibers that were inhaled by the decedent. *Id.* ¶ 71.

The court also determined that the plaintiff failed to present evidence showing that Tremco's products released more than a *de minimis*, casual, or minimum amount of asbestos fibers when the decedent encountered the products. *Id.* ¶ 72. Illinois law does not require a plaintiff to quantify the number of asbestos fibers to which a decedent was exposed, but a plaintiff must show more than a *de minimis* exposure to the defendant's asbestos. *Id.* Finally, the court found that while Dr. Frank's "cumulative exposure" testimony was admissible under Illinois law, the court concluded that his testimony did nothing to aid the plaintiffs in satisfying the substantial factor test under Illinois law because he did not opine that exposure from Tremco products was a substantial factor in bringing about the decedent's illness. *Id.* ¶ 81.

As with nearly all areas of litigation, COVID-19 significantly impacted asbestos jury trials in 2020. However, in February 2020, the Cooney & Conway firm took the *Doolittle* case to verdict against Ford Motor Company in Cook County. *Charles C. Doolittle, Jr. v. A.W. Chesterson Company, et al*.; 2017 L 009996. The case involved a living plaintiff who worked at Ford dealerships as a mechanic starting in the 1990s. During that time, he worked with Ford brakes. Ford's arguments at trial included that they provided multiple warnings in regard to the brakes and also that each mechanic at the dealership was thoroughly trained on the proper way to handle the brake material. Ford also called a manager from the dealership who testified regarding the warnings and training programs. Plaintiff claimed nearly $1,300,000 in medical bills and, during closing arguments, requested a significant amount of overall damages from the jury. At the close of trial, the jury returned a defense verdict in favor of Ford.

Additionally, an important ruling was recently issued in Cook County with regard to the science behind potential genetic causes for mesothelioma. In a December 30, 2020 opinion, Judge Clare E. McWilliams denied a motion by defense counsel seeking full genetic testing of Plaintiff Cynthia Cowger. *Cynthia B. Cowger v. Qualitex Co*., No. 2018-L-012099, Ill. Cir., Cook Co. Defendant Qualitex Co. previously moved pursuant to Illinois Supreme Court Rules 201(b) and 215(a) to compel a blood examination for the purpose of genetic testing to determine whether a genetic mutation caused plaintiff's mesothelioma. In response to the written motion, Judge McWilliams ordered an evidentiary hearing pursuant to the rule set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) in August 2020 on the issue of whether genetic mutation can cause mesothelioma in the absence of any asbestos exposure is accepted within the scientific community. During the hearing, Qualitex argued that because the evidence will show that there was no possible exposure from its product (laundry press

pads). Plaintiff's genetics will be at issue in the case and a focus of the defense. Defendant called witness Dr. Leonel van Zyl, Ph.D., who testified that it was generally accepted in scientific literature that a BAP-1 mutation alone can lead to mesothelioma, that multiple genetic mutations are related to mesothelioma, and that the techniques for determining the existence of genetic mutations include obtaining blood samples for genetic testing. Plaintiff responded by calling Dr. Joseph Testa, Ph.D., FACMG, a mesothelioma and BAP-1 gene expert to refute the defense's claims.

Following the hearing and briefings, Judge McWilliams denied the motion to compel full genetic testing. She found it was undisputed that the Online Mendelian Inheritance in Man (OMIM) is an authoritative source on various genetic syndromes. In spite of Dr. van Zyl's claims, the OMIM itself recognizes BAP-1 as the only inherited cancer syndrome that is generally accepted to be related to mesothelioma. Judge McWilliams also determined that Dr. van Zyl failed to produce a peer reviewed study to support some of his key claims regarding BAP-1 mutations. Additionally, one of the peer review studies cited was published before the BAP-1 gene was discovered. Ultimately, the court determined that the theory underlying the defendant's motion for a blood sample to conduct a full genetic sequencing of the plaintiff's genome has not gained general acceptance.

While asbestos trials were largely on hold during 2020, developments with the judiciary occurred. Judge Stephen McGlynn, who previously presided over the St. Clair County asbestos docket, was appointed to the United States District Court for the Southern District of Illinois. Judge Andrew Gleeson was reassigned asbestos cases in St. Clair County. Additionally, Madison County Judge Stephen Stobbs was elected Circuit Judge during the November elections. Judge Stobbs continues to handle Madison County asbestos litigation following his election.

Overall, 2020 saw decreases in asbestos litigation filings and jury trials. 2021 will be an important year to determine whether COVID-19 results in a short-term impact or longer trend with respect to asbestos litigation. The IDC's Toxic Tort Law Committee will continue to vigilantly monitor developments in this litigation during 2021.

Stream of Commerce as the Basis for Specific Jurisdiction: Does it Need to be a Stream or a River?

The Illinois Appellate Court First District recently decided a case involving whether the Illinois Court could exercise specific personal jurisdiction over a non-resident defendant. *Levy v. Gold Medal Products Co.*, 2020 IL App (1st) 192264. Levy filed a complaint alleging strict liability and negligence against Gold Medal Products Co. and Ventura Foods, LLC, among other defendants, seeking recovery for lung injuries allegedly resulting from her exposure to diacetyl and acetyl propionyl—chemicals used for butter flavoring in popcorn. *Levy v. Gold Medal Products Co.*, 2020 IL App (1st) 192264, ¶¶ 1-2. Levy claimed that she worked with these chemicals sold and distributed by defendants while she was employed by Long Grove Popcorn Shoppe, Inc. in Illinois. *Id.*

Although Plaintiff dismissed Ventura, Gold Medal filed an amended third-party complaint for contribution against various parties, including Ventura. *Id.* ¶ 3. Ventura filed a motion to dismiss, arguing that the Illinois circuit court lacked specific jurisdiction over it with regard to Gold Medal's third-party complaint for contribution. *Id.* ¶¶ 4-5. The First District affirmed the circuit court's denial of Ventura's motion to dismiss, holding that Ventura was subject to specific personal jurisdiction in Illinois as to the contribution claims. *Id.* ¶ 24.

The First District analyzed whether the court could exercise jurisdiction over non-resident defendant, Ventura, pursuant to subsection (c) of the Illinois long-arm statute, 735 ILCS 5/2-209 (West 2016). *Id.* ¶ 27. Subsection (c) of the Illinois long-arm statute provides that, "[a] court may exercise jurisdiction on any other basis now or hereafter permitted by the Illinois

Constitution and the Constitution of the United States." 735 ILCS 5/2-209(c). As the third-party plaintiff, Gold Medal had the burden to establish a prima facie case of personal jurisdiction over Ventura, as set forth by the Supreme Court of Illinois in *Russell v. SNFA*, 2013 IL 113909. *Levy,* 2020 IL App (1st) 192264, ¶ 26.

Gold Medal did not argue that there was general jurisdiction over Ventura, so the appellate court only addressed whether the circuit court had specific jurisdiction over Ventura. *Id*. ¶ 29. To establish specific jurisdiction over a nonresident defendant, a court is required to find that the nonresident defendant has "purposefully directed its activities at the forum state and the cause of action arose out of or relates to the defendant's contacts with the forum state." *Levy*, 2020 IL App (1st) 192264, ¶ 29 (quoting *Russell v. SNFA*, 2013 IL 113909, ¶ 40 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

The United States Supreme Court first adopted a "stream of commerce" basis for specific jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). *Levy,* 2020 IL App (1st) 192264, ¶ 30. In *World-Wide Volkswagen*, the Supreme Court held that a nonresident defendant may be subject to jurisdiction in a state where the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *Id*. ¶ 30 (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98). The Supreme Court explained that an isolated transaction is insufficient to subject a non-resident defendant to jurisdiction in another state. Instead, jurisdiction over a nonresident defendant must arise from the nonresident defendants' efforts to serve the forum state. *Levy*, 2020 IL App (1st) 192264, ¶ 30 (citing *World-Wide Volkswagen Corp*., 44 U.S. at 297).

The First District compared the *Levy* facts to *Russell*, holding that the Illinois circuit court could exercise specific personal jurisdiction over Ventura with respect to Gold Medal's claims for contribution under the Joint Tortfeasor Contribution Act. *Levy*, 2020 IL App (1st) 192264, ¶ 50. The Court reasoned that the circuit court in Illinois "can assert personal jurisdiction over Ventura as long as it is involved in 'the regular and anticipated flow of products from manufacture to distribution to retail sale' and is 'aware that the final product is being marketed in" Illinois. *Id*. (citing *Asahi Metal Indus. Co, Ltd.. v. Superior Ct. of California, Solano Cty.*, 480 U.S. 102, 117 (1987). In *Levy*, the First District court found that Ventura regularly manufactured products for Gold Medal that were subsequently distributed and sold in Illinois. 2020 IL App (1st) 192264, ¶ 50. Further, the Levy court held that Ventura was aware that Gold Medal products containing Ventura's chemical products were being marketed in Illinois. *Id.*

The First District distinguished Ventura from a manufacturer whose injury-causing product is taken to another state by a customer's unilateral actions. *Id.* ¶ 51. The First District was not convinced by Ventura's claim that it was unaware that Gold Medal sold popcorn to Illinois and construed the conflict in facts in favor of Gold Medal. *Id*. ¶ 52-53. Gold Medal's representatives contradicted this claim, and Gold Medal's web site and product catalogs listed two branches in Illinois. *Id.* ¶¶ 11, 52. Ventura sold 200,000 to 400,000 pounds of popcorn per year to Gold Medal for at least 25 years with the knowledge that those products would be sold nationwide. *Id*. ¶ 54.

In holding that this specific set of facts rendered Ventura amenable to Gold Medal's claims against it in the circuit court, the First District stated that "Ventura has thus done more than simply place its popcorn products into the nationwide stream of commerce; it has also engaged in conduct purposefully directed at Illinois regarding those products, which is all that is required under the narrow stream of commerce theory to allow the circuit court to assert specific personal jurisdiction" over Ventura as to Gold Medal's action for contribution. *Id.* ¶ 55. The First District further concluded that Gold Medal's third-party claims against Ventura "arose out of or was related to Ventura's contacts with Illinois." *Levy*, 2020 IL App (1st) 192264, ¶ 23. In addition to Ventura's 25-year or more history of selling popcorn products to Gold Medal for nationwide distribution, Levy was injured after Gold Medal resold products to Levy's employer in Illinois. *Id.*

Finally, the First District determined that it would be reasonable to require Ventura to litigate Gold Medal's third-party complaint for contribution in Illinois after considering the following four factors set forth in *Russell*:

1) the burden imposed on Ventura by requiring it to litigate in Illinois; 2) Illinois's interest in resolving the dispute; 3) Gold Medal's interest in obtaining relief; and 4) the interests of the other affected forums in the efficient juridical resolution of the dispute and advancement of substantive social policies.

Id. ¶¶ 57-62 (citing *Russell*, 2013 IL 113909, ¶ 87). As to the first factor, the court found that the burden imposed on Ventura was low in light of its regular business, its registered agent, and manufacturing facility, all in Illinois, as well as its prior involvement in litigation in Illinois. *Id.* ¶ 58. The First District held that the second factor was met because Illinois had an interest in resolving a dispute involving the sale of products that were resold and caused harm in Illinois. *Id.* ¶ 59. Next, Gold Medal's interest in obtaining contribution from Ventura for any damages it paid Levy met the third factor. *Id.* ¶ 60. Finally, the First District reasoned that the fourth factor was established, at least in part, by Ventura's failure to identify any forum with a greater interest in resolving this dispute than Illinois. *Id.* ¶ 61.

As evidenced by *Levy*, at a minimum, for a defendant to be subject to specific jurisdiction in Illinois pursuant to the stream of commerce theory, the defendant must have a long history of sales or distribution of products that the defendant is aware are coming into Illinois. Further, those products must be the source of a plaintiff's alleged injury.

About the Authors

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