

# **CASE MANAGEMENT MANUAL FOR ASBESTOS CASES**

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Prepared by:

Ann G. McCormick, J.S.C.

Agatha N. Dzikiewicz, Special Master

Michelle V. Perone, Esq., Chief Civil Court Programs, AOC

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## **I. Background**

The term asbestos describes several naturally occurring mineral fibers, of which chrysotile, amosite, anthophyllite and crocidolite are commercially important. The fiber, which was used for centuries, is a unique thermal insulator, capable of withstanding very high temperatures without burning. In addition, some grades of asbestos fiber were woven into cloth.

The possible health problems from exposure to asbestos were not widely recognized sooner because of the slow progress of the disease and the inability to recognize it in its early stages. Asbestosis and mesothelioma are seldom manifested less than twenty years following exposure. The incubation period for these diseases is twenty to forty or more years.

Asbestos litigation is complex for several reasons. The cases involve numerous defendants of various types, who may be brought into the case on different theories of liability as discovery progresses; discovery is difficult, costly and time-consuming; and expert witnesses are used in the cases.

## **II. Nature of Individual Claims**

Asbestos cases are not ordinary tort suits. They involve allegations of serious and diverse injuries, some of which are particularly associated with asbestos exposure (for example, mesothelioma), others of which have multiple possible causes (for example, lung cancer), and all of which require expert testimony to prove. Asbestos-related diseases are progressive, and the prognosis in individual cases may be highly uncertain. The latency of asbestos disease makes causation difficult to prove in individual cases. Because the typical claimant was exposed to multiple asbestos products, it may also be difficult to demonstrate the nexus between a defendant and the source of exposure. Taken together, these characteristics of the claims suggest that asbestos lawsuits would be unusually difficult to resolve, even if there were fewer of them.

Of course, over time, attorneys with specialized asbestos practices have acquired the requisite substantive expertise and developed routines for managing their cases that mitigate these difficulties. But the initial need for special expertise and extraordinary case development contributed significantly to the concentration of cases in relatively few law firms, which now complicates resolution of the cases.

### Numerous Defendants

There may be 5 to 200 defendants in an asbestos case. A plaintiff may name all possible parties in the complaint, but often, the plaintiff or defendants will bring in additional parties through amended complaints or third party practice as discovery progresses. Third party practice may extend to fourth and fifth party actions. The General Order for Asbestos Litigation in Middlesex County requires a factual basis for the addition of new parties. If the case has an old docket number or is scheduled for trial, the court may require the party who joined the new party to bring the party current as a condition for allowing the joinder of a new party.

## Discovery

A plaintiff may allege that the asbestos exposure occurred more than 40 years ago for several months, or for a period of 20 to 30 years at various locations during employment in various occupations. A plaintiff may rely on its own recollection; co-workers' testimony; testimony of others with knowledge of asbestos fiber or products used where plaintiff worked; testimony of representatives of plaintiff's employer or a defendant corporation; and documents such as the plaintiff's employee records, documents showing supply of asbestos to plaintiff's work site, formula books used in the manufacture of asbestos products, contracts for the insulation, maintenance, inspection or repair of plants or plant equipment involving asbestos; and specifications showing certain asbestos products were required.

## Types of Defendants

A defendant may be the miner of asbestos; the manufacturer of a finished asbestos product; the seller, supplier or distributor of asbestos fiber or product; the owner of a work site where a plaintiff was exposed to asbestos while employed by an outside contractor doing work at the site; an insurance company who inspected plaintiff's place of employment in the course of determining the condition of the plant for the purpose of writing a liability policy for the insured; co-conspirators; or an employer.

## Multiple Defendants

The practice of suing for example, twenty or more defendants had resulted in excessive cross claims and duplication of effort in the pleadings stage and the discovery process. Sorting through this maze of parties in order to eliminate those without liability, and working with a number of attorneys, had proved to be difficult and time-consuming for the parties and judges.

Asbestos cases have presented a variety of difficult factual questions. Initially, neither the medical profession, the courts, nor the bar understood the basic medical issues involved. What is the causal relationship between exposure to asbestos and the development of mesothelioma and other forms of lung disease? What other factors of life style contribute to the onset and course of the disease? What techniques are available to diagnose the disease and establish the causal links? Over a period of years, these matters have been explored fully. Doctors, lawyers, and judges working in the area are now fully familiar with the basic causal relationships. While their application to particular cases remains disputable, the basic medical principles to be applied are well established and need not be litigated anew in every trial.

More difficult to establish is the allocation of responsibility among defendants. For example, what company supplied the particular asbestos to which an injured person was exposed? Records of purchases forty years or more in the past often no longer exist. When they can be reconstructed, *e.g.*, when it can be demonstrated that asbestos was sold by a particular manufacturer to a particular ship builder for use on one or more vessels, it is often impossible to prove that one manufacturer's product was in fact used in the reconstruction of the section of a

ship on which an injured employee worked. An associated issue is the attribution of the development of a plaintiff's affliction to one or more particular exposures, or the prediction of the onslaught of disease in a currently healthy, but exposed, person.

The great majority of asbestos cases have been filed in Middlesex County with the next highest caseload being in Camden County. It appears that cases have been concentrated in these counties because of the highly industrial nature of the areas. As a result, the pretrial handling of pending asbestos litigation was previously centralized in the Middlesex vicinage. Directive #6-83, dated January 3, 1984, was issued at the Supreme Court's request, and provided that the Hon. John E. Keefe (now retired) was to review all asbestos cases otherwise ready for trial in order to ensure uniformity and consistency in the decision to try individual cases. As a result, Judge Keefe handled all such matters statewide with the assistance of a full-time special master. During this time, many procedures and techniques were developed which streamlined the handling of these matters and eliminated unnecessary duplication. Many of these techniques continue to be used today.

By Supreme Court Order dated April 8, 1987, Directive #6-83 was rescinded and replaced by Directive #4-86, copies of which appear in the appendix. As a result, centralized judicial management and control of asbestos litigation on a statewide basis was terminated. Each Assignment Judge of those vicinages in which asbestos litigation constituted a "significant number" of pending cases was asked to designate one or more judges to be responsible for the management of such cases within the vicinage.

The Order of April 8, 1987 further provides:

- that the designated asbestos litigation judges must issue a model or standard case management order for asbestos litigation to ensure the uniform management of such cases within each vicinage;
- that the designated asbestos litigation judges should develop general management guidelines suggesting calendaring priorities, in Order to prevent or resolve scheduling conflicts; and
- that the designated asbestos litigation judges shall confer among themselves to facilitate coordinated and consistent management of asbestos cases.

### Experts

Various medical experts may be used to prove or disprove plaintiff's injury and the cause of plaintiff's injury. Plaintiff and defendants will use a pulmonary expert if plaintiff alleges pulmonary or pleural asbestosis. If an asbestos-related cancer is involved, pathologists will be used. If plaintiff alleges an emotional injury, such as fear of cancer or cancerphobia, a psychologist or psychiatrist may be used.

An epidemiologist may be used by plaintiff to prove causation of injury.

Liability experts may be used by plaintiff and defendant to prove or disprove that a product emits friable asbestos fiber. (Generally this issue comes up with gasket or packing products.) An expert may be used by defendant to show that conditions at plaintiff's place of employment exceeded acceptable standards and caused plaintiff's injury.

An economist may be used where future economic loss is an issue.

### Impact of Bankruptcies

Complicating the courts' ability to move asbestos cases is the fact that a significant number of defendants have sought Chapter 11 protection. Cases against the bankrupt defendants must be stayed during reorganization proceedings.

Over time, some defendants have been able to coordinate litigation activities and to agree on formulae for sharing damage payments. As defendants drop out of the mainstream litigation, however, these arrangements are disrupted. Moreover, as corporations emerge from bankruptcy, the trusts created to handle payments to claimants found themselves the targets of third-party claims from the non-bankrupt defendants.

## **III. Duties of the Special Master**

Because the overwhelming bulk of asbestos cases continue to be venued in the Middlesex vicinage, the vicinage has been allocated a full-time special master. In general, the special master assists the court and counsel in the prompt and efficient disposition of asbestos cases.

Specifically, the special master conducts case management conferences; assists the judge with the day-to-day problems that arise; schedules cases for trial; and conducts settlement conferences prior to the trial date. A copy of the Uniform Case Management Order used by the Middlesex special master appears in the appendix.

## **IV. Judicial Management of Asbestos Cases**

As a result of the considerable experience gleaned over the past numerous years in the Middlesex vicinage, a comprehensive General Order has been developed. The Order, a copy of which appears in the appendix, is intended to guide the litigation from beginning to end, organize and streamline it to achieve maximum efficiencies and avoidance of unnecessary cost and replication. The Order contains several provisions relating to:

- the filing and service of complaints and use of master complaints;

- the General Order provides that all pleadings, including complaints, must include “Civil Action – Asbestos Litigation” in the caption. This is intended to allow the court to readily identify these cases. Every complaint must be brought on behalf of only one plaintiff, except one plaintiff may include multiple parties to the extent that the claims are derivative (*e.g.*, John Doe, Executrix for the Estate of John Doe, and individual heirs of John Doe). The purpose of this is to provide ease in tracking each claimant;
- the requirements for filing of initial fact sheets (copies of which are attached in the appendix);
- The “Plaintiff’s Initial Fact Sheet” is required to ensure that the court, early on, has operative information needed to separate claimants into groups based upon commonalities;
- consolidation for discovery purposes of cases involving common issues and/or circumstances;
- if the claims of multiple individual plaintiffs arise out of similar circumstances (such as members of the same workgroup or employees at the same worksite) such cases may be consolidated by the court for discovery purposes either upon the initial filing or thereafter. If consolidated upon initial filing, the master asbestos complaint approved by the court must be utilized;
- all consolidated matters shall utilize an abbreviated caption and be referred to as “In re \_\_\_\_\_” (the name of the plaintiff in the earliest filed case), and shall use the docket number of earliest filed case. Although all pleadings upon and after the consolidation shall be captioned in the abbreviated caption, they shall further state, directly underneath or next to the abbreviated caption, the individual case(s) to which the pleading relates by setting forth the individual case name and the docket number of that case;
- the filing and service of standard answers and crossclaims;
- the General Order requires that all defendants are required to file a “Standard Answer and Cross Claim” or a “Standard Consolidated Answer and Cross Claim” to asbestos complaints. The filing of a “Standard Answer and Cross Claim” or a “Standard Consolidated Answer and Cross Claim” is not deemed to constitute acceptance of service of process in any matter;
- the General Order further provides that upon filing of a “Standard Answer and Cross Claim” or a “Standard Consolidated Answer and Cross Claim,” a defendant shall file a “Notice of Adoption of Standard Answer and Cross Claim” or a “Notice of Adoption of Standard Consolidated Answer and Cross Claim” in lieu of filing a full answer and cross claim;
- amendment and supplementation of pleadings;
- the Order notes that any party may seek leave to amend and/or supplement its pleadings or add or join parties or file a third party pleading in a case that is not over 3 years old upon the submission of a proposed form of Order to the court along with a certification that all answering parties have been served with the proposed form of Order. The Order will be signed by the court unless an objection is received within 10 days of service of the proposed form of Order. If

an objection is received, the court will schedule a telephone conference or a motion, as is appropriate. However, leave to file an amended or supplemental pleading or to add or join parties or to file a third party pleading in a case over 3 years old may only be sought by way of motion, filed in accordance with *R. 1:6-2*, showing good cause. Finally, answers filed before the filing of the amended and supplemental pleading in response to the initial pleading shall be deemed to be answers filed in response to the amended or supplemental pleading;

- the filing of third party actions;
- the Order provides that all third party complaints must include a statement containing the factual basis for joining the third party defendant. It also requires that they have appended a list of the names and addresses of attorneys who have filed pleadings in the action and the names of the parties each attorney represents; a copy of the complaint; and a copy of the General Order only in connection with service on a third party defendant who has not previously appeared in asbestos litigation in Middlesex County;
- third party plaintiffs must, within 20 days of receipt of third party defendant's responsive pleading, supply the third party defendant with:
  - copies of all interrogatories and interrogatory answers served or received by the third party plaintiff;
  - copies of all requests for production of documents and responses to requests for production of documents served or received by the third party plaintiff;
  - a list of all witnesses deposed in the action and scheduled to be deposed, the date of said deposition(s) and the name and address of the court reporter; and
  - copies of all expert witness reports prepared on behalf of the third party plaintiff or received from another party to the action.
- discovery and document production, including the use of uniform interrogatories (copies of which also appear in the appendix) and the conduct of depositions, the provision of expert reports and other modes of discovery;
- in Middlesex, all discovery deadlines are set by the special master at the initial case management conference. Standardized interrogatories have been developed and must be used in the form approved and kept on file by the court. Copies appear in the appendix. Limited supplemental interrogatories are permitted;
- motion practice, including uniform motion forms (copies appear in the appendix) and proceedings conducted by the special master;
- court conferences; and
- trial.

# **APPENDICIES**

**ASBESTOS LITIGATION – DIRECTIVE #4-86**

**ASBESTOS LITIGATION – GENERAL ORDER**

**ATTACHMENT A – PLAINTIFF’S INITIAL FACT SHEET**

**ATTACHMENT B – PLAINTIFF’S FORM A I INTERROGATORIES (1-35)**

**ATTACHMENT C – PLAINTIFF’S FORM A I INTERROGATORIES (36-56)**

**ATTACHMENT D – PLAINTIFF’S FORM A II INTERROGATORIES**

**ATTACHMENT E – FORM B (DEFENDANT INTERROGATORIES)**

**ATTACHMENT F – MOTION FOR SUMMARY JUDGMENT BY  
DEFENDANT**

**ATTACHMENT G – ORDER FOR SUMMARY JUDGMENT FOR  
DEFENDANT**

**ATTACHMENT H – PRO HAC VICE MOTIONS (REVISED) *R.1:21-2***

**ATTACHMENT I – NOTICE OF APPEARANCE OF DEFENSE MEDICAL  
COUNSEL**

**ATTACHMENT J – MEDICAL HIPPA AUTHORIZATION**

**ATTACHMENT K – COURT ORDER FOR RELEASE OF RADIOGRAPHIC  
DATA, PATHOLOGY MATERIALS AND SPECIMENS  
FROM A MEDICAL FACILITY**

**ATTACHMENT L – UNIFORM CASE MANAGEMENT ORDER FORM**