What's New in the Latest NYCAL Case Management Order?

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On June 20, 2017, Justice Peter Moulton, Administrative Judge and Coordinating Justice of the New York City Asbestos Litigation ("NYCAL"), issued a new Case Management Order and an accompanying Decision and Order. The new NYCAL CMO – whose first iteration was implemented by Justice Helen E. Freedman in 1988 – will govern litigation in one of the country's largest asbestos dockets and site of some of the highest plaintiff verdicts rendered in recent history. This CMO had been in the works for two years. During that time, Justice Moulton presided over town halls with all counsel, attended separate meetings with plaintiff and defense bars, and along with Special Master Shelley Rossoff Olsen, oversaw numerous meetings between plaintiff and defense counsel representatives, often featuring fiercely-opposed points of view.

This article compares the significant and notable changes made from the previous version of the CMO ("prior CMO") to the one just issued by Justice Moulton ("2017 CMO"), beginning with the four major issues discussed in the accompanying Decision and Order: 1) consolidation of cases for trial; 2) punitive damages; 3) introduction of Article 16 evidence; and 4) bankruptcy trust claims. See *In re New York City Asbestos Litigation*, Sup Ct, NY County, Jun. 20, 2017, Moulton, J. ("Decision").

CONSOLIDATION OF CASES FOR TRIAL

Following the assignment of a cluster of cases to a trial judge, a plaintiff's firm may move to consolidate cases into trial groups. No previous CMO had addressed the joinder of cases for trial and thus rules for consolidation were governed under CPLR § 602 and applicable case law. The size of the trial groups could theoretically be unlimited, so long as they satisfied factors enunciated in *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993): 1) common worksite; 2) similar occupation; 3) times of exposure; 4) disease type; 5) living or deceased; 6) status of discovery; 7) whether plaintiffs are represented by the same counsel; and 8) type of cancer. In his Decision, Justice Moulton drew upon his experience presiding over NYCAL trials and found merit in defendants' arguments that multi-plaintiff joinders inevitably resulted in lengthy, unfair trials with great possibility for juror confusion. Decision, *20.

Consequently, the 2017 CMO states that a trial judge may join two cases for trial in accordance with *Malcolm*. A trial judge may join three cases for trial where it is shown upon good cause that (i) joinder is warranted under three or more of the factors described in *Malcolm* and its progeny; and (ii) where all three plaintiffs share the same disease, i.e., pleural mesothelioma, non-pleural mesothelioma, lung cancer or other cancers. (Section XXV.B.) However, where a plaintiff has asserted punitive damages against one or more defendants, that case may not be joined with other cases absent the parties' stipulation. (Section XXV.C.) That plaintiff may also drop its punitive damages claim in order for it be consolidated with other

cases. There are no limitations to joinder in a bench trial. (Section XXV.D.)

PUNITIVE DAMAGES

The 1996 version of the CMO stated that "[c]ounts for punitive damages are deferred until such time as the Court deems otherwise, upon notice and hearing." In a 2012 law review article, Justice Freedman cited the following in support of this provision: (i) charging companies with punitive damages for wrongs committed 20-30 years ago did not serve a "corrective purpose"; (ii) as infrequent as punitive damages are, they only serve to deplete resources better used to compensate injured parties; (iii) disparate treatment among plaintiffs would result, as there were some states and districts that did not permit punitive damages; and (iv) no defendant should be punished repeatedly for the same wrong.

In 2013, plaintiffs' attorneys moved to lift the deferral of punitive damages claims, and on April 8, 2014, Justice Sherry Klein Heitler granted plaintiffs' motion and modified the CMO so that "applications for permission to charge the jury on the issue of punitive damages shall be made on a case by case basis to the Judge presiding over the trial(s) of the action(s) at issue . . . [s]uch applications shall be made at the conclusion of the evidentiary phase of the trial upon notice to the affected defendant(s), to which such defendant(s) shall have an opportunity to respond."

On July 9, 2015, the Appellate Division, First Department, held that Justice Heitler had the authority to modify the CMO and that her decision did not constitute an advisory opinion. However, the Appellate Division stated that the applications for permission to charge the jury on punitive damages at the conclusion of the evidentiary phase of trial deprived defendants of their rights to due process "by leaving them guessing" as to whether punitives would be sought. The Appellate Division concluded:

> *We . . . remand the matter to the Coordinating Justice for a determination of procedural protocols by which plaintiffs may apply for permission to charge the jury on the issue of punitive damages. We note, however, that this decision does not preclude the Coordinating Justice, after consultation with the parties, from reconsidering other aspects of the April order, including the determination whether to permit claims for punitive damages under the CMO, in the exercise of the court's discretion, either upon application or at its own instance.*

Justice Moulton cited the above excerpt in his Decision, agreeing with the rationale of Justice Heitler's April 2014 decision allowing punitive damages. Decision, *8, 21.

Therefore, the 2017 CMO states in Section VII.C. that "punitive damages are no longer deferred." They are not available in cases "where the Trial Judge has put the case on a trial calendar" as of the CMO's effective date, July 20, 2017. (Section XXIV.A.) Plaintiff may amend an existing complaint in an Accelerated or Active Cluster to include a prayer for damages. (Section VII.C.) When the 2017 CMO becomes effective, "plaintiff shall consider whether it intends to seek punitive damages against a named defendant or defendants." Plaintiff and defendants must then confer and where plaintiff determines that it has "no good faith basis" for proceeding with a punitive damages claim, plaintiff will sign a no-opposition summary judgment order. (Section VII.C.) Should the parties not come to an agreement regarding the dismissal of punitive damages, the parties must answer additional interrogatories and document requests relating to punitive damages in accordance with the CPLR. (Section IX.M.)

In quantifying an award of punitive damages, a jury may consider the ability of a defendant to pay exemplary damages. Thus "immediately prior" to jury selection in a trial where plaintiff asserts punitive damages, defendant must provide plaintiff with reliable financial disclosures, such as SEC disclosures, an audited profit and loss statement or a corporate representative affidavit attesting to the defendant's net worth with supporting documentation. (Section XXIV.B.)

If the trial judge finds that the issue of punitive damages should go to a jury, it will be included in the jury instructions and verdict sheet. Should the jury find that the plaintiff is entitled to punitive damages, the same jury, unless stipulated otherwise, will determine the quantification of damages in a separate, bifurcated trial phase, called Phase II. (Section XXIV.C.) Following the conclusion of Phase II, the jury will render a special verdict regarding the amount of punitive damages. (Section XXIV.C.)

In his Decision, Justice Moulton states that these punitive damages protocols give due process protection to defendants when coupled with his requirement that any plaintiff asserting punitive damages must be tried as a single case. Decision, *21-22.

ARTICLE 16 EVIDENCE

During CMO discussions, the defendants' bar placed substantial emphasis on developing a consistent methodology for the application of Article 16 of the CPLR. Article 16 partially abrogates the New York common law rule under which any joint tortfeasor may be held jointly and severally liable for an entire judgment, regardless of its share of fault. Under Article 16, a joint tortfeasor found to be 50% or less at fault is only liable for its proportional share of liability for a plaintiff's non-economic losses. Article 16 apportionment is uniquely relevant in the context of asbestos litigation, where potential tortfeasors are

numerous and many defendants will agree to pre-trial settlements.

However, as Justice Moulton notes in the Decision, trial defendants have historically experienced difficulty establishing that a negligent nonparty should be included on the verdict sheet for Article 16 purposes. Decision, *22. Identifying, locating and compelling nonparty corporate representatives at trial – especially when the events at issue occurred several decades ago – is exceedingly difficult. Without the testimony of a nonparty representative with personal knowledge of the entity's asbestos-containing products or any warnings placed on these products, the ability to establish the nonparty's liability is unpredictable. Therefore, defendants argued for a relaxing of hearsay rules to admit certain types of information normally barred by New York State's rules of evidence. Justice Moulton agreed in his Decision that limited Article 16 relief was warranted given the age of asbestos litigation. Decision, *23.

Consequently, the 2017 CMO permits the limited use of responses to standard interrogatories of nonparties, which includes settled parties. These responses may be used at trial to prove: (i) that a product or products of the nonparty contained asbestos, or that asbestos was used in conjunction with the nonparties' product or products, and/or (ii) any failure to warn by the nonparty concerning an asbestos-containing product and/or the use of asbestos in association with a product. (Section XIII.) In his Decision, Justice Moulton found that interrogatory answers responsive to these issues are reliable because they are clearly statements against interest, overcoming any hearsay obstacles. Decision, *23.

Notably, Justice Moulton specifically declined to uniformly permit the use of nonparty depositions for Article 16 purposes. Following strong debate and in the absence of consent, he ultimately ruled that he could not engraft Federal Rules of Evidence admitting an unavailable declarant's former testimony (FRE 804(a), 804(b)(1) and 807). Decision, *24-25. The 2017 CMO simply states that "[n]onparty depositions may be used where allowed by the CPLR," and the Decision references CPLR 3117(a)(2) and states "that section applies only to settled defendants, and contains other requirements." Decision, *23. There are sure to be further disputes over the interpretation of CPLR 3117(a)(2) and the admissibility of prior corporate representative testimony.

BANKRUPTCY TRUSTS

Following the bankruptcies of numerous traditional asbestos defendants beginning in the 1980s, bankruptcy trusts were established to provide compensation, albeit limited, to plaintiffs exposed to the asbestos-containing products of those bankrupt entities. Generally, in order to secure compensation from a bankruptcy trust, a plaintiff submits a proof of claim form establishing a likelihood of exposure.

As pointed out in Justice Moulton's Decision, defendants have a strong interest in knowing the bankruptcy trusts to which a plaintiff has filed a claim because: (i) any recovery from a bankruptcy trust may be used as a set-off against damages awarded at trial, and (ii) a bankrupt defendant may be placed on the verdict sheet for Article 16 apportionment. Conversely, plaintiffs have little incentive to submit bankruptcy trust claims until the eve of trial, as settlement values are likely to become diluted when defendants learn of additional shares of liability.

Justice Moulton noted that during CMO discussions, the issue of bankruptcy trusts was not at the forefront of defendants' concerns, but some defendants sought greater transparency in the submission of proofs of claim. Decision, *29. Therefore, the 2017 CMO retains the prior CMO's requirements that a plaintiff who intends to file a proof of claim form with any bankrupt entity or trust is required to do so no later than ten days after the case is designated in a FIFO Trial Cluster, and no later than 90 days before trial in *In Extremis* cases. Significantly, the 2017 CMO states that if these deadlines have passed and plaintiff seeks to submit a proof of claim, plaintiff's counsel must notify the Coordinating Judge and remaining defendants of the eligibility for this claim and explain why it was not filed. Plaintiff may not submit any delinquent claim before conferring with the Court and parties, and the "Coordinating Judge shall confer with the parties and take such action as he or she deems appropriate." (Section XXVI.)

Beyond the four major issues addressed by Justice Moulton in his Decision, a further review of the 2017 CMO also reveals other changes, significant and seemingly trivial, at virtually every stage of litigation in NYCAL cases:

THE SPECIAL MASTER

The role of the Special Master as the arbiter of discovery disputes and overseer of settlement conferences has not changed. Much as in years past, discovery disputes must be brought to the Special Master immediately and no motion to compel shall be filed before seeking the assistance of the Special Master. The mechanisms and deadlines for objections to the Special Master's rulings remain the same. (Section III.C.) Whereas the prior CMO stated that the NYCAL Coordinating Judge had the discretion to adopt the Special Master's ruling, the 2017 CMO states that in the absence of an appeal, the Special Master's ruling will be the law of the case. (Section III.C.)

The 2017 CMO further provides that an ongoing dispute does not change the existing discovery timeline unless allowed by the Special Master. When a party objects to discovery based on privilege, it must identify the privilege claimed and the general content of the information or document to which it is

attached. Failure to do so will waive the privilege. (Section IX.Q)

VENUE

The prior CMO provided that all asbestos personal injury and wrongful death cases arising in New York, Kings, Queens, Bronx or Richmond Counties would be filed and tried in New York County (Manhattan). During the CMO discussions, it was proposed that trials be sent out to Bronx County, which was met with resistance from the defense bar. In the end, the 2017 CMO states that "[c]ases shall be tried in New York County, except that upon the appropriate Administrative Order, NYCAL cases ready for trial may also be assigned to one or more trial parts in another county." (Section IV.)

PLEADINGS

Plaintiffs must plead with heightened specificity to have their cases placed on the "Accelerated Docket" (commonly referred to as the *In Extremis* clusters), reserved for cases where plaintiffs have a diagnosis of mesothelioma or are terminally ill with a life expectancy of less than one year. (Section XIV.B.) There will continue to be two *In Extremis* clusters per year, in April and October. (Section XV.A.)

The 2017 CMO states that plaintiffs seeking placement in an *In Extremis* cluster must allege facts and include documentation demonstrating their terminal illness of mesothelioma. These requirements go beyond what is required for placement on the Active Docket (commonly referred to as FIFO clusters) of 60 cases that are published eight times per year. (Section XVI.A.) For placement in an Active Docket, a plaintiff need only have a functional impairment that meets certain minimum criteria, such as pleural thickening or a diagnosis of cancer caused by asbestos. (Section XIV.C.5.)

Additionally, plaintiffs are now required to apply for Social Security records before filing the complaint. The complaint must either include the date of this application or identify the impediment preventing the application. The failure to comply with these requirements may expose plaintiff's counsel to sanctions. (Section VII.A.)

PRE-DEPOSITION DISCLOSURES

Consistent with the pleading requirements, the plaintiffs' discovery obligations have been adjusted to encourage plaintiffs to provide **authorizations** before depositions. The 2017 CMO requires plaintiffs to provide authorizations for medical, employment, social security, disability, workers compensation, union,

military and tax records "[a]t the time of the filing of the complaint, or as soon as practicable thereafter . . . ." (Section IX.A.)

The prior CMO permitted plaintiffs to submit standard **product identification interrogatories** to individual defendants with respect to particular worksites, giving defendants seven days to object. The 2017 CMO does away with the seven-day term and states that defendants shall respond "per the CPLR." (Section IX.D.) CPLR § 3133 provides that a party has 20 days following service to respond or object to any interrogatory, and under the 2017 CMO, that period may be extended by the Special Master "for good cause shown." (Section IX.D.)

Plaintiffs must provide detailed verified answers to defendants' **standard set of interrogatories** pursuant to the CPLR. The 2017 CMO repeats the prior CMO's mandate that an answer to a request seeking worksite information "must provide detailed information and not merely state 'various jobsites in New York City.'" (Section IX.B.) Whereas the prior CMO "expected that plaintiff will provide full and substantially complete answers" to interrogatory answers, the 2017 CMO provides that "[a]ll interrogatories should be fully and substantially answered," with "well-taken objections" to be raised with the Special Master. (Section IX.E.) A party's failure to timely and substantially respond to standard interrogatories shall result in postponement of the deposition upon application to the Special Master. (Section IX.E.)

The prior CMO required that a defendant responding to NYCAL standard interrogatories for the first time respond to plaintiff's interrogatories within 30 days. The 2017 CMO extends such time to respond to 60 days. Like the prior CMO, plaintiffs may serve supplemental interrogatories, but the 2017 CMO adds a provision that requires defendants' responses to be made per the CPLR. (Section IX.C.) The general provisions for discovery sanctions have been simplified, such that any failure to comply with a discovery order deadline (unless excused by the Special Master) shall be deemed a "willful failure to disclose" and will expose the offending party to sanctions, including but not limited to removal from a cluster, preclusion of witness, and the striking of pleadings. (Section XIX.)

The prior CMO permitted parties to amend their answers to interrogatories up to 30 days prior to commencement of jury selection. The 2017 CMO expressly revokes that provision. Any party seeking to amend their interrogatories and add additional fact witnesses must make a motion before the Special Master, supported by showings of good cause and no prejudice to opposing parties. (Section XIX.)

The prior CMO provided defendants the opportunity to obtain an **independent medical examination**

of the plaintiff. The 2017 CMO adds the possibility of penalties for plaintiffs who are not made available for an examination at least two weeks prior to the trial cluster deadline. A plaintiff not made available on reasonable notice will be removed from a trial cluster. (Section X.)

DEPOSITIONS

The 2017 CMO provides that all depositions are to be taken in accordance with CPLR § 3107 (requiring 20 days' notice). (Section XI.A.) Any video-recorded *De Bene Esse* deposition must give at least ten days' notice prior to the scheduled date. (Section XII.B.)

The prior CMO required depositions to be held in the New York City area unless ordered by the Court or agreed to by Liaison Counsel. The 2017 CMO states that when a plaintiff provides a medical certification demonstrating that he or she is unable to travel, the presumption is that the deposition can go forward at or near the witness's home. (Section XI.B.) A diagnosis of mesothelioma is presumptive evidence that a plaintiff cannot travel, but it still must be supported by a doctor's letter or other medical documentation. (Section XI.B.) The 2017 CMO also adds a requirement, previously assumed but now explicit, that counsel must conduct themselves professionally and in compliance with New York State's Uniform Rules for the Conduct of Depositions, 22 NYCRR § 221. (Section XI.A.)

The 2017 CMO continues the policy of discouraging any redundant depositions of a defendant's corporate representative and states that the parties must make "every effort" to use such depositions obtained in other cases outside of NYCAL. (Section XI.E.) Should a corporate representative deposition be sought, plaintiff's counsel must demonstrate to the Special Master that the proposed lines of questioning will not be repetitive. (Section XI.E.) The 2017 CMO further states that corporate representative depositions shall be "noticed at a time and place convenient to the witness, taking into account the expense to the defendants' witness." (Section XI.B.)

SUMMARY JUDGMENT MOTIONS

The prior CMO did not substantially address summary judgment motions aside from describing the process by which no opposition motions ("NOSJMs") were to be issued and filed. It "anticipated that the number of formal motions to the court [would] be few." The 2017 CMO formalizes the guidelines for filing formal, substantive summary judgment motions.

Now the Coordinating Judge decides all motions for summary judgment. A defendant may not file a

summary judgment motion until discovery is complete on the subject issues, and is required first to request a NOSJM. A defendant must move for summary judgment at least 30 days prior to a trial date, except where the trial judge has set a trial date less than 30 days into the future, in which case the parties shall cooperate and consult with the Coordinating Judge regarding the motion's scheduling. (Section XXI.)

Despite the lengthy, comprehensive and reasoned approach leading to its creation, the full impact of the 2017 CMO – assuming that it becomes effective on July 20 and remains intact – is a mystery. Justice Moulton himself recently stated in correspondence to CMO representatives: "We don't know yet how the new provisions of a CMO will play out in practice . . . ." A case management order is only as effective as the Special Master and NYCAL judges who enforce its provisions consistently. In the meantime, defendants in NYCAL must continue to navigate a refashioned landscape of enormous risks but also opportunity. **Contact Hawkins Parnell Thackston & Young, the nation's innovative leader in asbestos litigation, to evaluate your defense strategy and litigate your cases in NYCAL.**

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