

Midwest Update

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Providing updates on litigation in [Illinois](#), [Michigan](#), [Missouri](#), and [Wisconsin](#)

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Illinois Legislative Update

CATHERINE E. GOLDHABER & ELSA D. BUSS (CHICAGO, IL)

Illinois House Speaker Michael Madigan

After 50 years in the state legislature, Michael Madigan resigned as a state representative in February 2021. His resignation is believed to be linked to the ongoing federal investigation of allegations that Madigan accepted over \$1.3 million in bribes from Commonwealth Edison. A month prior, he was ousted as speaker of the Illinois House of Representatives, a position he held for 36 years. Emanuel Chris Welch replaced Madigan as Illinois' House speaker.

Legislation on Prejudgment Interest

With its first attempt to pass prejudgment interest at 9% vetoed by Governor Pritzker, the Illinois Legislature has now passed a [SB 72](#), which if not vetoed will allow victims in personal injury and wrongful death cases to collect 6% in pre-judgment interest on all damages, except punitive, sanctions, and some fees and costs. The interest will accrue on the date that the action is filed. If the judgment exceeds the highest written settlement offer made by the defendant, then the interest will run on the amount between the offer and the judgment. The law would not apply to suits against governmental entities. The Bill was sent to Governor Pritzker April 1. He has 60 days to sign it or return it with his veto. If neither signed nor vetoed, then it will automatically become the law. If signed by the Governor, the bill would take effect on July 1, 2021, and not be retroactive.

Proposed Legislation

- [SB 74](#): Amendment to the Illinois Code of Civil Procedure which provides limits on non-expert and expert testimony and opinions, sets out rules for expert disclosures, and seeks to have Illinois apply the *Daubert* standard of expert admissibility, rather than the current *Frye* standard.
- [SB 78](#): Creates the "Full and Fair Noneconomic Damages Act" which distinguishes the factors a jury may consider when awarding noneconomic damages for pain and suffering versus punitive damages. It provides a procedure for a bifurcated trial as to noneconomic and punitive damages.

Appellate Updates

DAISY DENIZARD (CHICAGO, IL)

In-person proceedings, including oral arguments, are suspended indefinitely in all five Appellate District Courts in Illinois. All proceedings are currently being held via videoconference. On March 24, 2020, the Illinois Supreme Court issued an order extending filing deadlines in the Appellate Courts. On August 28, 2020, that order was vacated, and all original appellate deadlines resumed. While the courts are closed to the public, they are continuing operations, with a handful of court staff on site and complying with all COVID-19 related protocols imposed by the state. It is rumored that the courts will not open to the public and resume in-person proceedings until September 2021, at the earliest.

CATHERINE E. GOLDBERGER (CHICAGO, IL)

The Third District addressed issues of damages and sole proximate cause in its opinion issued January 29, 2021 in *Gretencord-Szobar v. Kokoszka, et al.*, 2021 IL App (3d) 200015 (verdict for defendants in a medical malpractice case appealed on grounds trial court abused discretion in jury instructions, affirmed). Regarding the proximate cause instruction, the court found that the trial court did not abuse its discretion in denying plaintiff's request to use short form IPI Civil (2011) No. 12.05 and instead use IPI Civil (2011) No. 15.01 as modified to read:

When I use the expression 'proximate cause,' I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.

On damages, the trial court provided a modified IPI Civil (2000) No. 31.13 instruction with the approximate life expectancy of 1 to 3 years. On appeal, Plaintiff argued that per the general life tables, the life expectancy was 10 years, as proposed. The trial court, however, based its instruction on the only evidence as to life expectancy – which was provided by Plaintiff's expert's testimony. The trial court followed *Morus v. Kapusta*, 339 Ill.App.3d 483 (2003). The appellate court concurred and affirmed the defense verdict.

Central Illinois

JENNI L. YOUNG (CHICAGO, IL)

As many of the courts in Illinois have struggled with how to resume proceedings in light of the COVID-19 pandemic, the McLean County courthouse has found ways to resume in-person jury trials and has been doing so since June 1, 2020. While criminal proceedings have been given preference to avoid a backlog of cases, McLean County has also begun in-person jury trials in civil matters. While many proceedings, such as court calls, can be conducted remotely by telephone conference or Zoom conference, in-person hearings have also begun while participants adhere to social distancing and mask requirements. To allow in-person jury trials to proceed, McLean County has moved the trials to different areas in the courthouse to make room for social distancing. For example, as seen in the photo below, proceedings have been held in large conference rooms where jurors are seated 6 feet apart with distance between make-shift witness stands, the judge's bench, and the court reporter. Jury selection has been conducted remotely.

Some of these changes may be here to stay. Chief Judge Mark Fellheimer has indicated that the use of virtual proceedings will continue even after the pandemic is over and normal operations have resumed. Hawkins Parnell

represents defendants before Judge Rebecca Foley, who presides over the asbestos docket in McLean County. She has continued to conduct motion calls and hearings by telephone and Zoom conference, depending on whether the matter is contested, uncontested, or requires the use of exhibits. Judge Foley has indicated that jury trials in asbestos matters may resume in July or September 2021, but due to the length and the number of parties involved, they may not qualify for preference due to the limited number of available courtrooms and juries.

Cook County

MEGHAN P. MURRAY (CHICAGO, IL)

Cook County Chief Judge Evans has indicated that the first Cook County jury trial is expected to proceed on March 22, 2021 in criminal matters. On March 2, 2021, Judge McWilliams, the supervising judge of the Cook County Asbestos Litigation Calendar, advised that she does not anticipate that any civil trials will start until May 2021 at the earliest. Judge McWilliams reported that once criminal jury trials begin in March 2021, criminal matters in all districts will be given priority, and civil jury trials will be last priority.

Although civil jury trials are delayed with Covid-19 emergency measures in effect, Cook County Motion and Trial Calls have continued as scheduled via Zoom. Plaintiffs' attorneys have attempted to shortcut trial settings and case management deadlines due to the uncertainty surrounding firm trial dates with Covid-19 restrictions. Now more than ever, defensive file handling is crucial to ensure Plaintiffs are compliant with case management orders and deadlines. For instance, Cook County's 2021 Standing Case Management Order states that no trial setting will be given prior to submission of necessary trial forms. Hawkins Parnell diligently investigates whether Plaintiffs are compliant with such requirements, objects to depositions and trial settings where there is noncompliance, and requests the court enforce standing case management orders. Hawkins Parnell has appeared at all Cook County Motion and Trial calls to present motions for hearing, request the court timely set and enforce briefing schedules, and obtain dismissals for Hawkins Parnell clients to ensure all matters move toward an expedient resolution.

Madison County

MATTHEW S. DOWLING (CHICAGO, IL)

In February of 2021, Judge Stobbs indicated that jury trials would resume sometime in March 2021, with criminal cases receiving the highest priority and allocation of jurors. Judge Stobbs has most recently mentioned that July 2021 would be the earliest that he expects an asbestos jury trial to proceed. There are some issues with resuming civil trials, especially in the asbestos realm. These trials require a much larger jury pool than criminal jury trials. This presents issues with space in the courthouse for social distancing requirements. To date, we have not received word of a jury trial, whether criminal or civil, moving forward.

The Court entered an order on February 11, 2021, allowing the Madison County Court to resume some in-person court operations on March 1, 2021. To resume court operations, some in-person proceedings will be allowed that pertain to non-essential matters under the guidelines established by judges in their particular docket. Judge Stobbs has yet to resume in-person trial dockets and motion dockets in the asbestos realm. The Court's order places capacity limits on each courtroom and requires that all individuals adhere to various COVID-19 related safety protocols, including that lawyers and parties appear promptly and leave promptly after the hearing, with no congregating inside or outside courtrooms. Case management and status hearings shall still be conducted remotely. We are unsure whether non-asbestos matters have begun to follow these guidelines and start more routine procedures in-person, but the asbestos docket has continued to meet virtually for both trial and motion

dockets. This is likely due to the large number of attorneys that regularly attend the asbestos docket and the lack of space for social distancing.

This order also addresses jury trials, but without specificity, simply stating “Jury trials in Madison County will proceed only after the trial judge confers with the Chief Judge and the Chief Judge determines that proper distancing requirements and facilities limitations do not prevent the trial from proceeding safely.”

As the COVID-19 numbers continue to decrease in the coming months and more people receive the vaccine in Illinois, we do expect some jury trials to resume. However, there is no set start date as of now, and when trials do resume, we expect the first jury trials to be criminal, with asbestos jury trials not taking place until resolving any backlog on the criminal side.

St. Clair County

SHAHARYAR ANSARI (CHICAGO, IL)

Jury trials continue to be postponed in St. Clair County due to the ongoing COVID-19 pandemic. As such, current asbestos litigation largely involves responding to initial pleadings, conducting written discovery and investigation, and the taking of depositions.

At this time, the Chief Judge has said that he will continue to make month-to-month decisions as to whether jury trials should begin. The Chief Judge indicated that he is hopeful that the court will open by May 1, 2021, but that is not a set date. St. Clair County currently has a bi-weekly motion call through Zoom to ensure cases are still progressing and to provide an up-to-date indication of when the court will open.

Michigan

RICK BRAUN (DETROIT, MI)

Adjustment to Damage Caps in Michigan

In the 1990s, the Michigan Legislature enacted caps on noneconomic damages in product liability cases. Those original caps (\$280,000 or \$500,000 if the product defect causes death or permanent loss of a vital bodily function) are adjusted yearly based on the annual percentage change in the Detroit consumer price index. Effective January 1, 2021, the caps have been increased to **\$476,600** or, if the product defect causes death or permanent loss of a vital bodily function, **\$851,000**. The cap that applies to a case is the one in place the year the case is filed, not the date of resolution.

Status of Jury Trials in Wayne County

Michigan’s largest asbestos docket and busiest trial court is Wayne County Circuit. Restrictions on in-person proceedings due to the COVID-19 pandemic have caused significant backlogs of cases. The asbestos docket is presided over by one judge – Hon. Patricia P. Fresard. In addition to having administrative duties as Chief Judge of the Civil Division, she also has a general liability docket. On March 15, 2021, Wayne County Circuit began the process of opening the courthouse for in-person proceedings. The plan for the 17 judges in the civil division is to

set some smaller trials first (for example, two-party auto negligence cases which take only a day or two) and work through those. Since asbestos cases do not fit within those parameters, all trial dates have moved into the fall. In fact, unresolved asbestos cases from the July 2020 Wayne County Trial Group have been given new trial dates in September 2021.

Recently, the neighboring counties of Oakland and Macomb have again stopped in-person proceedings due to rising COVID cases in metro Detroit. It is probable that Wayne County may be forced to do the same.

Ruling on Statute of Repose Motion filed by Crane Defendant

Judge Fresard recently ruled on a Motion for Summary Disposition based on the Michigan statute of repose filed by a crane defendant. It was granted as to any allegations on the initial installation of the crane but denied on repair and maintenance and on supply of replacement parts. Plaintiff's counsel presented old transcripts of clients who had testified in the past that they had seen replacement parts supplied by the crane manufacturer. They also testified that the manufacturer's employees came on-site and performed repairs. Judge Fresard commented: "The Court has to view this in the light most favorable to plaintiff...plaintiff has provided sufficient information to create a genuine issues" and "...at the MSD stage plaintiff does not have to show witness unavailability" to allow hearsay statements (i.e. old transcripts) to be used. She was also not concerned with whether those witnesses actually worked with the plaintiff, as she further noted, "Plaintiff provided testimony of *someone* who worked there at the same time as plaintiff."

Missouri Legislative Update

KATE JILKA BREE & J.R. SCHULTZ (ST. LOUIS, MO)

Missouri's New Discovery Rules

Missouri has enacted significant changes to the Missouri Rules of Civil Procedure, effective September 2, 2021, putting the Missouri Rules more in line with several provisions found in the Federal Rules of Civil Procedure. Specifically, Missouri is adopting the proportionality standard as a restriction on the scope of discovery. Missouri's current standard in Rule 56.01 that discovery must be "reasonably calculated to lead to the discovery of admissible evidence" has been removed. Rule 56.01(b)(1) will now limit the scope of discovery to information that is not only relevant but "proportional to the needs of the case." This language mirrors FRCP 26.

In addition, the Missouri Rules have been amended to impose limits on time and amounts of discovery. For instance, Rules 57.03 and 57.04 will now limit the number of depositions for each party to 10 and will limit the time of depositions to one day of seven hours. Rules 57.01(a) and 59.01 have also been amended to provide that each party may only serve another party with up to 25 interrogatories and 25 requests for admission.

Likewise, Rule 56.01 has been revised to adopt the federal standard with respect to discovery of Electronically Stored Information.

A more detailed explanation of the changes can be found [here](#).

Bills Requiring Disclosure of Asbestos Bankruptcy Trust Claim ([HB 363](#) and [SB 200](#))

Both the House of Representative and the Senate have introduced bills, which, if enacted, will impose disclosure requirements relating to bankruptcy trust claims in asbestos cases. Click on the links above to read the full text of these bills.

HB 363 was introduced by Representative David Gregory (R-96). It was first read on January 6, 2021. It was voted out of the Special Committee on Litigation Reform and referred to the Rules – Legislative Oversight Committee on March 3, 2021. On March 30, 2021, the Committee voted to report the bill to the House with the recommendation that it "do pass." The bill's provisions would apply to asbestos tort actions filed on or after August 28, 2021, and to pending asbestos tort actions where a trial has not commenced as of such date. SB 200 was introduced by Senator Bill Eigel (R-23). It was first read on January 6, 2021. It was second read and referred to the Senate General Laws Committee on January 28, 2021. There has been no movement on the bill since January 28, 2021.

Both bills require that plaintiffs in civil cases alleging asbestos exposure provide all parties with a sworn statement indicating that all trust claims available to them have been filed. The bills also:

- allow defendants to either stay (HB) or seek dismissal (SB) of the proceedings if trust claims were not filed,
- allow evidence of asbestos claim information and documents at trial,
- remove claims of privilege relating to the trust claim materials, and
- allow courts to reopen judgments for a period of time if defendants can demonstrate that additional trust claims are filed.

Most importantly, the bills also provide for dismissal of cases where plaintiffs fail to comply with the bankruptcy claim disclosure requirements. Specifically, HB 363 allows courts to "dismiss an action **without** prejudice for the claimant's failure to comply with these disclosure requirements", and SB 200 allows courts to "impose sanctions for any willful failure by a claimant or claimant's counsel to comply with the requirements of this act, including dismissal of the action **with** prejudice."

Bill Requiring Asbestos Case Disclosures ([SB 331](#))

This bill establishes disclosure procedures for a claimant in a civil action for damages due to asbestos exposure. It would apply to all asbestos cases filed on or after the effective date and to pending asbestos actions in which a trial has not commenced. If enacted, the act will require that, within 30 days of filing an asbestos case, the plaintiff must provide a sworn statement regarding the products, manufacturers, circumstances, and other supporting documentation specifying the evidence that provides the basis for each claim against each defendant. Furthermore, it provides that the court, on motion by a defendant, (1) shall dismiss a claimant's asbestos action without prejudice as to any defendant whose product or premises is not identified in the required disclosures, or (2) shall dismiss the entire action without prejudice as to all defendants if the claimant fails to comply with the disclosure requirements.

The bill was introduced by Senator Eric Burlison (R-20). It was first read on January 6, 2021. It was second read and referred to the Senate Judiciary and Civil and Criminal Jurisprudence Committee on February 4, 2021. The Senate Judiciary and Civil and Criminal Jurisprudence Committee conducted a hearing on the bill on March 8, 2021. On March 29, 2021, the Senate Committee on Judiciary and Civil and Criminal Jurisprudence voted to report the bill to the Senate with the recommendation that it "do pass."

COVID-19 Liability Protections Bill ([SB 51](#))

The Missouri Senate passed legislation shielding small businesses, health care professionals and first responders from lawsuits resulting from COVID-19 exposure. Senate Bill 51 also provides product liability protections to certain manufacturers who produced PPE and other products in response to the pandemic. The bill was referred to the Missouri House Rules Legislative Oversight Committee on March 25, 2021.

City of St. Louis

BRIAN CONNOLLY (ST. LOUIS, MO)

Status of Trials

On March 22, 2021, a jury was selected for the first criminal trial since the pandemic started. The court used the juror assembly room to conduct voir dire. Judge Stovall-Reid presided over the case (Case No. 1822-CR04166-01), which was successfully tried to verdict.

The Circuit Court is also currently moving toward holding its first jury trial in a criminal death penalty case set for April 12, 2021 (originally set for March 29, 2021), which is expected to last six (6) weeks. A pool of 3,500 potential jurors is expected to be summoned for this case alone, with questionnaires already being distributed to potential jurors, who will be subject to sequestration given the gravity of the case. Whether this first trial will move forward on April 12 will of course depend on many factors, including response rate to the juror summons and reported cases of COVID-19 among Court personnel and the associated impact on the Court's COVID-19 Operational Phase (<https://www.courts.mo.gov/pandemic/>).

Jury trials for civil cases remain suspended in the Circuit Court for the City of St. Louis, and no civil jury trials have taken place since March 2020. The Court has set forth no specific timeline for when jury trials may resume in this Circuit, and all motion dockets in civil cases continue to be conducted virtually over WebEx. At this point, we anticipate that civil jury trials are a few months away, possibly beginning in early to mid-Summer. Even then, we anticipate that civil cases will only be sent to trial divisions if there are no criminal cases that need the available jurors. For those reasons, we expect that the Fall might be a more realistic timeframe for starting civil jury trials in the City of St. Louis.

At present, cases with peremptory trial settings are being removed from those settings and re-assigned to the "rolling docket," which assigns cases a new date every six weeks on a rolling basis. From the rolling docket, Plaintiffs' firms generally have to obtain another peremptory setting via motion filed with the Court. Recognizing the Court currently maintains an extensive backlog of felony criminal matters awaiting trial, which will be given highest priority, it is anticipated it will yet be a number of months before civil litigants will be able to select a jury. However, Judges have warned litigants in both civil and criminal matters that, once jury trials resume in earnest, continuances generally will not be granted absent the most extraordinary of circumstances.

Individualized Docketing Implemented for Criminal Cases

The City of St. Louis has implemented an individualized docketing procedure for criminal cases, meaning the trial judge is assigned to a given criminal case from its inception. The trial judge in criminal matters handles all hearings and status conferences, hears all motions, and presides over trial. The individualized docketing system allows judges to develop familiarity with the facts and parties involved in the cases tried before them over a matter of months or years. Individualized docketing contrasts with the procedure used in civil cases in the City of St. Louis, known as central docketing, where all motions and other pre-trial matters are heard by one of three judges

specifically assigned to motion and equity divisions. The trial judge in the central docketing system is then assigned to the case by the presiding judge only a matter of weeks before the trial date. For the time being, central docketing will remain the procedure for all civil cases, and it is unclear when, or if, individualized docketing will be implemented for such litigation.

St. Louis County

MICHAEL J. HART (ST. LOUIS, MO)

It has been over one year since the last jury trial was conducted in St. Louis County. Judge Stanley Wallach in Division 12 presided over the trial before all jury trials were ultimately suspended due to the COVID-19 pandemic. During the pandemic, the St. Louis County Court faced numerous hurdles for reopening with positive cases among courthouse staff and the July death of a Sheriff's Deputy.

On May 4, 2020, the Missouri Supreme Court issued operational directives for all of the Missouri Circuit and Appellate Courts. The Operational Directives are divided into four phases: zero, one, two, three, and four. Phase Zero is the lowest phase with most in-person proceedings suspended and very limited access to the courthouse. At the other end, Phase Four is basically normal operations, subject to compliance with local social distancing protocols and individuals are required to wear masks in court proceedings and public areas of the courthouse. Further details may be found on the Missouri Supreme Court's website: <https://www.courts.mo.gov/pandemic/>.

On March 26, 2021, the Presiding Judge announced that St. Louis County Court will move to Phase Two. This is the first time the St. Louis County Court has been in Phase Two during the pandemic. According to operational directives, occupancy rates in courtrooms and other court areas must be twenty-five people or less, whenever possible, and the Court may resume additional proceedings. The Court's phase status will continue to be reviewed weekly on an ongoing basis.

The Court anticipates conducting jury trials for criminal cases three weeks after moving into Phase Two. This would appear to be sometime in mid or late April. However, it remains unclear when the Court expects to resume jury trials for civil cases. Given the number of criminal cases in need of jury trials, it will probably no earlier than the summer of 2021.

Wisconsin

JOHN J. KOHNKE (CHICAGO, IL)

On February 25, 2021, Wisconsin enacted a new law designed to reduce ambiguity regarding COVID-19-related liability. The statute (Wis. Stat. § 895.476), which became effective on February 27, 2021, gives certain entities broad immunity from civil liability related to COVID-19 unless they acted recklessly or engaged in wanton conduct or intentional misconduct. This immunity applies to lawsuits filed after February 27, 2021, asserting claims that accrued on or after March 1, 2020. The new protections are in addition to any other applicable immunities provided by law.

Entities covered by the statute include partnerships, corporations, associations, governmental entities, tribal governments, tribal entities, or other legal entities. Covered entities also include schools, institutions of higher

education, nonprofit organizations, and any employers covered by the state unemployment insurance laws. Employers, business owners, employees, agents, or independent contractors of the entities are also covered, regardless of whether the person is paid or is an unpaid volunteer. Importantly, the immunity applies not only to employers for workplace incidents of COVID-19, but also in many other contexts, including, for example, COVID-19-related lawsuits against long-term care providers (e.g., by their patients and/or patients' families), retail establishments (e.g., by their customers), and universities (e.g., by their students).

Under the statute, covered entities are immune from civil liability for the death of (or injury to) any individual (or other damages) caused by an act or omission related to novel coronavirus exposure (i.e., exposure to SARS-CoV-2 or COVID-19 in the course of, or through the performance or provision of, the entity's functions or services). The immunity does not apply, however, if the challenged act or omission by the entity involves reckless or wanton conduct or intentional misconduct.