OHIO SENATE INSURANCE COMMITTEE
MARCH 15, 2023

LAURA KINGSLEY HONG
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SENATE BILL 63 PROPONENT TESTIMONY

Chairman Hackett, Vice Chair Lang, Ranking Member Craig, and members of the Senate Insurance Committee, thank you for the opportunity to provide proponent testimony on Senate Bill 63 (SB 63). My name is Laura Kingsley Hong and I am Chair of the Mass Tort Product Liability Group at Cleveland-based law firm Tucker Ellis. I have been defending asbestos personal injury suits for more than 35 years. I have tried several asbestos personal injury cases to jury verdict and serve as Ohio counsel for many companies, as well as National counsel for many other companies. I also serve as special projects counsel, medical counsel and trial counsel – all in the defense of asbestos cases filed in Ohio and throughout the United States. I am one of the original authors of the Cuyahoga County Asbestos Case Management Order which has served as a model for jurisdictions throughout the nation and helped guide the Ohio legislature, as well as others, ensuring fairness and addressing issues so that resources are preserved and deserving individuals are compensated by the responsible party. I testified in favor of Ohio's Medical Criteria bill and assisted the Cuyahoga County Court in requiring bankruptcy trust disclosures which paved the way for that legislative reform. I am proud Ohio has been a leader in asbestos fairness jurisprudence and that my home court in Cuyahoga County has been innovative and a leader as well.

It is now time for the Ohio legislature to act once again to address a phenomenon that has found its way into asbestos lawsuits -- a phenomenon that is extremely costly and unfair. My testimony raises two issues – one of which I touch on briefly in the article I co-authored which is attached to my written statement and another issue that I do not believe has been brought to your attention.

I will start with the latter first. This issue relates to the harm done to Ohio companies outside of Ohio courtrooms. Ohio companies are sometimes named in the asbestos litigation to prevent removal to federal court. As you know, most asbestos lawsuits are filed in state court. In some cases, if an Ohio company is named, all defendants are prohibited from pursuing their right to remove the case to federal court based on diversity. If the Ohio company is erroneously named, this inability to exercise a legal right, is reason alone to enact S.B. 63. That said, we also need to consider the harm done to the mistakenly (or wrongly) named Ohio company. Because of my reputation, I am often (but not always) able to confer with the Plaintiff's attorney and obtain dismissal by successfully explain why the naming is without basis Even if I am successful in obtaining dismissal, (which does not always occur) that Ohio Company is now named in an asbestos Complaint that is electronically filed and available to everyone in the nation, including the national plaintiff law firms. And even if that Ohio company is lucky to obtain a dismissal in Ohio, it now finds itself listed in complaints in

New York, California, Pennsylvania, Illinois – or other states, where dismissals are much harder to come by and the costs of litigating are exponentially greater. This is one reason why the Ohio legislature should enact S.B. 63 which mandates a threshold investigation and evidence implicating the named defendant.

The second relates to company investments and acquisitions. Because of my experience and knowledge I am often engaged to conduct due diligence for investors or companies looking to invest in, or buy, a company. This includes Ohio investors and Ohio companies. First, simply hiring me means the investor or purchaser is concerned about the fact that the company is named in asbestos lawsuits. Of course, we all know that when sued in the asbestos litigation – defending the cases alone, can financial ruin for that company. Or even if it does not result in bankruptcy, we can all agree that it is extremely costly to defend asbestos cases that often go on for years -- costly in terms of defense costs as well as company resources. But what about the company that is sued for no legitimate reason and is now looking for investors for capital improvements or looking for a buyer? As counsel for the investors or buyers, I not only have to assess the legitimacy of any claims, but also assess the likelihood of the company becoming embroiled in the litigation for years to come regardless of the legitimacy of the claims. Buyers and investors are turned away. The simple naming of a company in an asbestos personal injury lawsuit has widespread repercussions that are extremely costly and unfair, but less than obvious.

Considering these examples, as well as the many that have been cited by others, I ask the Committee to not only look at numbers of lawsuits, but also appreciate the exceptional impact that even one asbestos lawsuit can have on an Ohio company or investor when the company is erroneously sued.

S.B. 63 is fair legislation aimed at addressing lawsuit system abuse to cut down on wasteful litigation. Your support to the legislation would simply require asbestos plaintiffs to disclose the evidentiary basis for each claim against each defendant and produce supporting documentation. This legislation will focus judicial resources on claims with evidentiary support and facilitate settlements of viable claims while protecting businesses and consumers.

Thank you for the opportunity to provide proponent testimony today. I welcome any questions from the committee.

Attached: "*Over-naming in Ohio Asbestos Litigation: A Legislative Solution is Needed*", by Laura Kingsley Hong & Mary Margaret Gay, IADC Newsl., Dec. 2020

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Over-naming of defendants in asbestos cases continues to be a problem for companies in Ohio. Legislation is a solution to help protect companies from enduring years of litigation.

Over-naming in Ohio Asbestos Litigation: A Legislative Solution is Needed

ABOUT THE AUTHORS

Laura Kingsley Hong chairs the Tucker Ellis LLP Mass Tort & Product Liability Group. Based in the firm's Cleveland office, Laura has nearly thirty-five years of experience defending class action, mass and toxic tort, product and commercial litigation. She serves as national, trial, and local counsel for many companies. In her role as national and trial counsel, Laura manages and assists local counsel, insurers, and corporations in the defense of mass and toxic tort and product liability claims. Laura is a former Case Western Reserve University School of Law professor and speaks frequently on topics relating to toxic tort and product liability litigation. She can be reached at laura.hong@tuckerellis.com.

Mary Margaret Gay is a founding partner of Gay Jones & Kuhn PLLC, a women-owned and operated law firm in Jackson, Mississippi. Mrs. Gay's practice is primarily focused on mass tort defense, and she has represented dozens of clients nationally and regionally. As counsel of record for more than 40 defendants in MDL 875, Mary Margaret served as coordinating counsel for the defense liaison committee and helped coordinate the attack on screening-related fraud, which led to dismissals in more than 100,000 cases. She is currently working on unified joint defense efforts arising in the aftermath of Judge Hodges' landmark estimation opinion issued in the Garlock bankruptcy proceedings and has been retained by a number of clients to serve as National Trust Transparency Counsel. Mary Margaret has written multiple articles on asbestos litigation reform issues and is frequently called upon to present seminars and provide testimony in state legislatures on the topic. She can be reached at mmgay@gayjoneslaw.com.

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The **Civil Justice Response Committee** works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection, and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect the outcome of the debate or controversy. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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More than 99% of all asbestos-related personal injury or death cases in Ohio are filed or litigated in Cuyahoga County, which covers the Cleveland metropolitan area. The Cuyahoga County court system is one of the birthplaces of asbestos litigation—both property damage cases filed by schools which flourished in the 1980's and individual personal injury cases which became widespread after Johns Manville filed bankruptcy in 1982. Cuyahoga County is also where one of the preeminent asbestos plaintiff lawyers, labor union attorney and former U.S. Congressman Robert E. Sweeney (1924-2007) maintained his offices. And of course, Ohio is home to Eagle-Picher Industries, Owens Corning Fiberglas and Owens-Illinois, three staple companies that weathered hundreds of thousands of asbestos claims before being forced to seek protection under bankruptcy statutes.

Cuyahoga County became one of the epicenters for asbestos personal injury litigation and a hot bed for case filings that have lasted decades and reached nearly 40,000 active pending cases at one time. With this experience, Cuyahoga County became—and is—a leader in court-driven case management orders. Cuyahoga County's asbestos standing order is the bedrock of Lone Pine orders. In addition, the county was one of the first to establish medical criteria for prioritization and trial groupings and to require bankruptcy trust disclosures. The latter orders gave rise to Ohio's 2004 asbestos medical criteria legislation[1] and 2012 asbestos bankruptcy transparency legislation,[2] both of which became models for other states seeking to curb asbestos litigation abuses.

Against the national landscape, Cuyahoga County has often been viewed as a beacon of fairness and sound policy in its handling of asbestos cases. Cases get tried, summary judgments are granted, and defense verdicts are possible.

That said, the naming of asbestos defendants that have no connection to a plaintiff's injuries is a problem in Ohio, as in other states.[3] And the large number of defendants that are typically named in Cuyahoga County asbestos cases is reflective of this problem.

As of December 1, 2020, almost twenty percent of the twenty-one asbestos lawsuits filed in Cuyahoga County in 2020 name twenty or more defendants; one suit names more than eighty defendants. In 2019, over forty percent of the thirty-one asbestos lawsuits filed in Cuyahoga County named twenty or more defendants, eight suits named more than fifty defendants, and one suit named nearly 100 defendants. In 2018, over forty percent of the County's forty-three asbestos lawsuits named more than twenty company defendants, thirteen suits

[1] *See* Ohio Rev. Code Ann. §§ 2307.91–.96.
[2] *See* Ohio Rev. Code Ann. §§ 2307.951–.954.
[3] *See* James Lowery, *The Scourge of Over-naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice*, 32-24 Mealey's Litig. Rep.: Asbestos 22 (Jan. 24, 2018).

named more than thirty defendants, seven suits named more than fifty defendants, and one suit named nearly ninety defendant companies. In the forty-two lawsuits filed in 2017, nearly forty percent named twenty or more company defendants, and nine named more than thirty defendants.

The court system eventually weeds out most erroneously sued asbestos defendants, but the process is time-consuming and expensive for those companies, taking at least two years for many of them to obtain dismissal.

In cases filed in 2017, the dockets reflect that an estimated 15-20% of the named companies were voluntarily dismissed after enduring at least two years of expensive litigation. For example, in one 2017 case, which named more than thirty-five defendant companies, at least seven of these companies were voluntarily dismissed without payment in 2019, and all remaining defendants in that case were voluntarily dismissed thereafter. In another 2017 case involving thirty-five defendants, at least five of the defendants were dismissed on summary judgment by early 2019, meaning each of the companies was required to fully litigate (attend depositions, prepare briefs and present oral argument) to obtain dismissal. In another 2017 case that involved over forty defendants, at least eight companies were voluntarily dismissed without payment in 2019, and ultimately, the entire case was voluntarily dismissed. A similar pattern followed in two other 2017 cases naming more than twenty company defendants. In one of those cases, all the companies except bankrupt entities were dismissed by 2019, including at least four that were dismissed without payment. In the other case, summary judgment was granted to at least three of the companies, at least eight companies were dismissed without payment, and by January 2020, all companies except bankrupt entities were dismissed. For the cases filed in 2018 and 2019, large numbers of defendants remain pending as each participates in costly discovery, bears hidden costs of being sued, and waits its turn for an opportunity to obtain dismissal.

Some of these over-naming practices may flow from difficulties in identifying potentially responsible parties in asbestos cases and proving causation. These challenges for plaintiffs do not, and cannot, translate to an obfuscation of the Ohio Civil Rules which mandate a good faith filing. Ohio Civil Rule 11 provides that all filings constitute a certificate by the attorney that to the best of the attorney's knowledge, information, and belief there is a good ground to support the claims against the named defendants. The routine dismissal of asbestos defendants without payment and grant of unopposed summary judgment motions show that Rule 11 principles are not consistently being followed or enforced.

The over-naming of companies in asbestos litigation is costly and has long-lasting negative effects on businesses that should not have been named in the first instance. A wrongly sued defendant in a Cuyahoga

County asbestos case may incur legal costs ranging from a few thousand dollars to as much as $25,000 prior to dismissal. Of course, that cost grows significantly when it is multiplied by the number of lawsuits.

These costs are just the obvious—other significant costs relate to corporate acquisitions, and disclosures, as well as reserves. Imagine trying to sell a company and explaining that, while past experience indicates that the current docket will eventually be dismissed without payment, more filings are expected. Imagine convincing the would-be buyers and due diligence team that there really is nothing under the hood, even though this corporate defendant has no documents or witnesses relating to events that occurred more than fifty years ago. And sometimes there are documents, and corporate witnesses have verified that asbestos was never used and the use of asbestos in legacy product lines simply does not make functional sense. But still, the company continues to be sued and expend significant dollars defending those suits in order to obtain dismissal. The cautious buyer simply looks elsewhere.

Or consider reserves—having to adequately reserve for potential liability for a verdict gone wrong or tie up working capital because of pending lawsuits. Independent auditors and best practices dictate adequate reserves for pending lawsuits even when there is no legal basis for liability. Being wrongly named in asbestos cases limits innovation, restricts creativity and mobility, depletes insurance, and wastes resources.

Sue first and discover the facts later should not be the norm for asbestos cases in Ohio. And the current remedy—pursuing a Rule 11 violation—is inadequate. Courts disfavor Rule 11 motions, and asbestos defendants face retaliation from plaintiffs' counsel for any such efforts. No lawyer whose client is routinely sued in asbestos cases and dismissed would advise that client to seek sanctions under Rule 11 when the stakes may be the punitive filing of many more lawsuits against the company along with manufactured discovery disputes and potential sanctions in a volatile jurisdiction outside of Ohio.

Ohio needs a legislative solution to protect businesses from being wrongfully named in asbestos litigation. Pioneering legislation enacted in Iowa in 2020 serves as a model.[4] Iowa's new law requires asbestos plaintiffs to file a sworn information form with the complaint specifying the evidence that provides the basis for each claim against each defendant. The sworn information form must include detailed information as to the plaintiff's exposures and their connection to each defendant. The court must dismiss the action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.

[4] *See* Iowa S.F. 2337 (2020), *available at* https://www.legis.iowa.gov/docs/publications/LGE/88/SF2337.pdf. *See generally* Peter Kelso et al., *Asbestos Litigation Amid the COVID-19 Pandemic: New Developments in 2020*, 35-17 Mealey's Litig. Rep.: Asbestos 25 (Oct. 14, 2020).

Conclusion

The erroneous, over-naming of asbestos defendants is a problem in Ohio. Companies with no liability are routinely named as defendants in asbestos-related personal injury lawsuits and forced to pay the costs of defense for at least two years only to find themselves dismissed. Ohio should enact legislation modeled after a pioneering Iowa law enacted in 2020 that requires asbestos plaintiffs to provide the factual basis for each claim against each defendant. This commonsense reform would save companies from incurring unnecessary costs and streamline the litigation to allow legitimate claims against culpable entities to proceed more efficiently.

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