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MASS & TOXIC TORT ALERT**Ohio Supreme Court Finds Retroactivity of Statute Constitutional**
*Results in Dismissals of Numerous Pending Asbestos-Related Claims***OVERVIEW**

On October 15, 2008, the Ohio Supreme Court, in *Ackison v. Anchor Packing Co.*, Slip Opinion No. 2008-Ohio-5243, issued an opinion that already has led to a significant reduction in the number of asbestos-related lawsuits pending in Ohio state courts. House Bill 292, passed by the General Assembly in 2004, placed new evidentiary requirements on plaintiffs seeking to recover in asbestos-related lawsuits, and was expressly written to apply retroactively to any cases pending in Ohio's state courts at the time the bill was effective. The law required courts to dismiss cases that did not meet its evidentiary requirements of medical evidence of physical impairment, supported by the written opinion of a competent medical authority that the plaintiff's exposure to asbestos was "a substantial contributing factor to his medical condition." The Ohio Supreme Court held that retroactively applying the law to cases that were pending on September 2, 2004, does not violate the Ohio Constitution. As a result, more than 30,000 asbestos-related lawsuits that lacked the required medical evidentiary support were dismissed in Cuyahoga County.

THE 2004 LAW

House Bill 292, which included the enactment of Ohio Revised Code Sections 2307.91, 2307.92 and 2307.93, was designed to address the "unfair and inefficient" asbestos litigation system that was operating in Ohio. (Am.Sub.H.B. No. 292, Section 3(A).) In the years preceding the bill, many cases were filed on behalf of plaintiffs who had abnormal x-ray results, but who had no clinical symptoms or impairment. Significant resources were spent on asbestos litigation, and 65 percent of the compensation that had been awarded up to that time had gone to plaintiffs who were not sick. *Id.* In *Ackison*, the Ohio Supreme Court noted that Ohio was one of the top five judicial venues for asbestos filings.

In response, Ohio's General Assembly acted to reduce the number of such filings with House Bill 292. The bill included language that prevented asbestos claims from being initiated or maintained unless a plaintiff filed an affidavit meeting the statutory requirements. Further, the bill required that cases in which such evidence was not filed were to be dismissed without prejudice until such time that the evidentiary requirements could be satisfied. The *Ackison* holding particularly focused upon the legislature's designation that these requirements applied not only to newly filed cases, but also to all asbestos cases that were pending in Ohio state courts on the bill's effective date of September 2, 2004.



CASE DETAILS

The *Ackison* suit was filed in May 2004, prior to the enactment of House Bill 292. The trial court ruled that the new law applied retroactively to the suit and dismissed the claim based upon the lack of the required evidentiary filings. Ms. Ackison appealed, and the appellate court reversed, holding that applying the law retroactively to Ms. Ackison's claim would violate Section 28, Article I of the Ohio Constitution, which states "the general assembly shall have no power to pass retroactive laws..."

The Ohio Supreme Court reversed, and, in upholding the legislation, distinguished between statutes that violate the Ohio Constitution if applied retroactively because they affect substantive rights and remedial statutes that may be applied retroactively without violating the Ohio Constitution because they are procedural in nature. The Court held that each of the statutory sections challenged by the plaintiff was remedial and did not impair the plaintiff's substantive rights. Thus, Ohio Revised Code Sections 2307.91, 2307.92 and 2307.93 could be applied retroactively to cases that were pending on September 2, 2004, without violating the Ohio Constitution. *Ackison v. Anchor Packing Co.*, Slip Opinion No. 2008-Ohio-5243.

STATISTICS

This decision already has had a significant effect on the number of asbestos cases pending in Ohio's busiest state courts. At the time House Bill 292 was written, there were more than 39,000 asbestos cases pending in the Cuyahoga County Court of Common Pleas, with approximately 200 new cases filed each month. (Am.Sub.H.B. No. 292, Section 3(A).) Because of House Bill 292 and its new medical evidentiary support requirements, the number of new filings has decreased dramatically. According to the annual report for the Cuyahoga County Common Pleas Court, there were only 443 and 266 new cases filed or transferred into the court in 2006 and 2007, respectively. However, there were still more than 37,000 asbestos cases pending in Cuyahoga County at the end of the 2007 calendar year. Thus, while the number of new cases had decreased significantly, the number of pending cases had not. Based upon the *Ackison* ruling, a three-judge panel in the Cuyahoga County Court of Common Pleas dismissed 30,000 asbestos claims on October 21, 2008. Asbestos Docket (Oct. 20, 2008), Cuyahoga County Ct. C. P. Master Case No. 073958, unreported (administrative order dismissing cases without prejudice). These cases may not be refiled if the evidentiary materials cannot be supplied. It is reasonable to expect that similar action will be taken by courts across Ohio in response to the *Ackison* decision.



FOR MORE INFORMATION

Please contact **Elizabeth B. Wright**, **Timothy J. Coughlin** or **John R. Mitchell**, or any member of our **Product Liability Litigation** practice group for more information.

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