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Commentary

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Although 2022 may seem like a 2020 redux with the rise of the Omicron variant, it brings with it several changes related to asbestos personal injury and wrongful death lawsuits, including new statutes and emerging trends, which will have long-lasting effects on the litigation. The most prominent developments are the following: (1) the Supreme Court of the United States denied a Petition for Writ of Certiorari challenging California Code of Civil Procedure Section 2025.295, which imposes a hard cap of 14 hours for defendants (collectively) to depose a mesothelioma (or silicosis) plaintiff regardless of any pertinent circumstances, such as the number of defendants; (2) California Code of Civil Procedure section 377.34, effective January 1, 2022, preserves pain, suffering, and disfigurement damages in certain wrongful death actions; and (3) there has been a rise in the number of petitions to preserve testimony brought on behalf of former personal injury plaintiffs in anticipation of future wrongful death actions. Each of these changes, as well as its ramifications, is discussed below.

California Code of Civil Procedure Section 2025.295, Which Infringes on Defendants' Due Process Rights, Is Unlikely to Be Stricken Down

Effective January 1, 2020, California Code of Civil Procedure Section 2025.295 ("Section 2025.295") broke from the tradition codified in the California Civil Discovery Act ("Discovery Act") of balanced and flexible discovery procedures that could be modified pursuant to the courts' discretion. For the first time, the California Legislature ("Legislature") imposed a one-sided time limit on depositions, applicable only to defendants, and removed all discretion from the trial courts to increase the time allotted for cross-examination of mesothelioma (or silicosis) plaintiffs beyond 14 hours.

Pursuant to Section 2025.295, if a physician attests in a declaration that a plaintiff has been diagnosed with mesothelioma or silicosis and there is substantial medical doubt of his survival beyond six months, a presumptive seven-hour time limit is imposed on the defendants' cumulative time to examine the plaintiff. The court may increase this presumptive limit if it finds that the plaintiff's health would not be endangered, but only by three hours if 10 or more defendants appear for the deposition, and up to a maximum of 14 hours if more than 20 defendants appear. In other words, **no matter how many additional defendants are named above 20, the court has no discretion to increase the defendants' cumulative deposition time beyond 14 hours**. Thus, even when over 100 defendants appear at a plaintiff's deposition and the plaintiff has already withstood hours of direct examination by his own counsel, the court has no discretion to increase the 14-hour cap. (*See, e.g., Edward Richards and Linda Richards v. 3M Company, et al.*, Superior Court of the State of California for the County of Alameda, Case No. RG21088294 (filed on January 29, 2021) ("Richards").)

Even when deposition time limits were first imposed in California in 2012 through the addition of Section 2025.290, the Legislature expressly permitted the trial courts to adjust the time limit as circumstances warranted: "The statute gives no guidance as to how a court should exercise its discretion when considering a request to lengthen a deposition time . . . . It does, however, identify two circumstances under which the court must extend the deposition's length: 'if needed to fairly examine the deponent" or if anyone or anything "impedes or delays the examination.'" (Hogan and Weber, California Civil Discovery, Second. Ed. (LexisNexis 2020) § 2.7 [emphasis added].) Prior to Section 2025.295, the California courts exercised their discretion regarding deposition time limits by issuing case management orders and, as necessary on a case-by-case basis, through informal discovery conferences and law and motion practice. Accordingly, before the enactment of Section 2025.295, California's rules regarding deposition time limits aligned with other jurisdictions' provisions.

Now, however, trial courts have no discretion to increase the time beyond 14 hours for defendants to cross-examine a plaintiff that falls within the purview of Section 2025.295 regardless of the following: (1) the number of defendants or their disparate interests; (2) the length of the direct (and re-direct) examination of plaintiff by his own counsel; (3) a trial court's finding that a plaintiff's health would **not** be endangered by additional deposition time; (4) the witness's need for an interpreter; (5) claims that involve events occurring over a long period of time; and (6) speaking objections or other behavior by the plaintiff or his attorney that impedes or delays the examination. While other discovery tools may be available to both sides equally, constraining just one side in our adversarial system with inflexible time limits in the context of depositions, only, is fundamentally unjust given that depositions are uniquely valuable. (*See, e.g.*, Hogan and Weber, California Civil Discovery, Second. Ed. (LexisNexis 2020) § 1.4 ("Depositions have been hailed as 'the most effective discovery tool.'").) Unlike the other discovery tools available under the Discovery Act, depositions allow immediate, face-to-face interrogation and follow-up questioning. The testimony is often admissible at trial and can be considered by the trier of fact for the credibility of the deponent.

The indecency of Section 2025.295 was demonstrated by *Edward Richards and Linda Richards v. 3M Company, et al.*, Superior Court of the State of California for the County of Alameda, Case No. RG21088294 (filed on January 29, 2021). In *Richards*, the trial court agreed that Mr. Richards's health would not be harmed by having to sit for extended hours of deposition by defendants. Indeed, Mr. Richards's own counsel deposed him for nine hours. Over 80 defendants appeared at a deposition involving over 30 years of detailed work history. By the account given on direct examination, Mr. Richards's exposures to asbestos began over 55 years ago and encompassed more than three decades. During that time, he believes he encountered hundreds of asbestos-containing products and equipment in hundreds of settings. At his deposition, Mr. Richards's attorney chose to examine him about those aspects of his work history that would selectively highlight and implicate the named defendants. Defendants agreed to have two attorneys ask questions common to all, such as medical background, and then the remaining hours were divided among the 80-90 appearing defendants, which meant that each ultimately had **seven to eight minutes** to ask about its products or worksite, no matter how many were at issue.

Several defendants in *Richards* challenged Section 2025.295, and, eventually, their challenge was heard by Division Five of the California Appellate Court. Following accelerated briefing and oral argument, Division Five ruled that Section 2025.295, read literally and in light of its legislative history, meant to and did place a "hard cap" on the time defendants have to depose a mesothelioma plaintiff; that trial courts have no discretion to increase the time regardless of any circumstances that may arise before or during the deposition; and that fundamental fairness and due process were not offended, even though one side had a total of nine hours to elicit testimony from Mr. Richards, whereas each defendant had on average just seven or eight minutes. Ultimately, defendants filed a Petition for Writ of Certiorari with the Supreme Court of the United States ("SCOTUS"), and, on December 13, 2021, SCOTUS summarily denied the Petition.

In light of SCOTUS's ruling, any future challenges to Section 2025.295 are unlikely to succeed. Defendants' best chance to resurrect the challenge against this statute would be in a case where the diagnosis of mesothelioma (or silicosis) is disputed. However, to effectively dispute a diagnosis, fact (and expert) dis-

covery is required, which often does not occur until well after the conclusion of a plaintiff's deposition.

Thus, Section 2025.295 is likely here to stay and defendants must find ways to work within its limitations. Practical suggestions to mitigate the effects of this blow to defendants' due process rights include the following: (1) take all reasonable steps prior to the deposition to decrease the likelihood of delays during the deposition, such as by exchanging deposition exhibits amongst the parties prior to the start of the deposition and making sure all counsel are familiar with any technology that will be used to conduct the deposition; (2) be scrupulous about going off the record when appropriate, such as when a witness is reviewing a document but not testifying, or when there is any interruption in the proceedings (such as a technical glitch or phone call); (3) conduct a defense-only meeting prior to the deposition to plan out an efficient defense examination regarding common areas of interest; and (4) elect a defense timekeeper to make sure each defendant sticks to its allotted cross-examination time.

California Now Allows Pain and Suffering Damages in Certain Wrongful Death Actions

In addition to Section 2025.295, another critical change in California's statutory framework for personal injury cases is Section 377.34, effective January 1, 2022, which preserves pain, suffering, and disfigurement damages in certain wrongful death actions. Prior to 2022, California was one of the few jurisdictions that barred pain and suffering damages in wrongful death cases following the passing of a personal injury plaintiff. Now, however, such damages are preserved in the following circumstances: (1) "if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022"; or (2) "was filed on or after January 1, 2022, and before January 1, 2026." (Cal. Code Civ. Proc. § 377.34(b).)

In 2021, in anticipation of Section 377.34 going into effect in 2022, there was a flurry of motions for preference in trial setting pursuant to Section 36, most of which were granted. As a result, the California courts are now facing a backlog of trials not only due to COVID-19 (and the Delta and Omicron variants of COVID-19), but also the multiple asbestos personal injury cases that have been preferentially set for trial. Accordingly, non-preferential asbestos trials are unlikely to go forward anytime soon.

Petitions to Perpetuate Testimony in Advance of Potential Wrongful Death Actions

Lastly, an emerging trend in asbestos litigation is the influx of petitions to perpetuate testimony in advance of a potential wrongful death action. Over the past year, the prospective heirs of former personal injury plaintiffs have started attempting to revive these former plaintiffs' claims by way of such petitions, creating the possibility for future wrongful death suits and a second bite at the apple. Such petitions are routinely granted, and, assuming that wrongful death lawsuits are filed based on these "trial preservation" depositions, it appears that asbestos litigation is not going away anytime soon.

Endnotes

1. Although not discussed here, there have also been changes to the statutes and rules governing remote appearances in California civil cases. (See Cal. Code Civ. Proc. § 367.75 (adopted effective Jan. 1, 2022); Cal. Rules of Court 3.670 (amended effective Jan. 1, 2022); Cal. Rules of Court 3.672 (adopted effective Jan. 1, 2022).)

2. *See, e.g.*, Federal Rules of Civil Procedure, Rule 30 (the seven-hour time limit on depositions can be altered by agreement of the parties or by court order upon a showing of good cause); Arizona Rules of Civil Procedure, Rule 30(d) (four-hour time limit on depositions "[u]nless the parties agree or the court orders otherwise"); Texas Rules of Civil Procedure, Rule 190.2(b)(2) (20-hour time limit for all depositions but "the court may modify the deposition hours so that no party is given an unfair advantage"). ■

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