

# Products Liability & Mass Torts Alert

An informational newsletter from Goodwin Procter's Products Liability & Mass Torts Group

## West Virginia Supreme Court Rules That the State's Statute Barring Claims of Nonresidents Against West Virginia Defendants Is Unconstitutional

A common feature of mass tort litigation in the last few decades has been the rise of the magnet jurisdictions. Because they are perceived as being plaintiff-friendly, large numbers of nonresidents file suit in these jurisdictions even though these plaintiffs and the facts of their cases may have no significant relationship with the chosen jurisdiction.

In recent years, the courts and legislatures of several, but not all, of these magnet jurisdictions have taken steps to curb the filing of suits by nonresidents that would otherwise swamp their courts. Mississippi has undertaken a series of legislative and judicial reforms to limit the number of out-of-state asbestos claims.<sup>1</sup> In recent years, Texas has expanded the power of courts to dismiss actions on *forum non conveniens* grounds<sup>2</sup> and required each plaintiff to establish proper venue independently.<sup>3</sup> Moreover, the trial court in Madison County, Illinois, has recently proved to be more receptive than in the past to motions to dismiss out-of-state lawsuits on the ground of *forum non conveniens*.<sup>4</sup> On the other hand, a Delaware trial court has recently declined to dismiss a substantial number of asbestos cases brought by nonresidents.<sup>5</sup>

<sup>1</sup> Early in 2004, the Mississippi Supreme Court limited the ability of plaintiffs to bring mass tort claims in plaintiff-friendly counties by tightening joinder rules. *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004). The Mississippi Tort Reform Act of 2004 further tightened venue provisions and joinder rules and expanded the ability of courts to transfer or dismiss claims under the doctrine of *forum non conveniens*. Miss. Code Ann. § 11-11-3. As a result of the reforms, Mississippi courts have dismissed thousands of out-of-state asbestos claims and made clear that the "courts of Mississippi will not become the default forum for plaintiffs seeking to consolidate mass-tort actions." *3M Co. v. Johnson*, 926 So. 2d 860, ¶¶ 18-19 (Miss. 2006).

<sup>2</sup> See Tex. Civ. Prac. & Rem. Code Ann. § 71.051.

<sup>3</sup> See Tex. Civ. Prac. & Rem. Code Ann. § 15.003(a).

<sup>4</sup> E.g., *Quackenbos v. A.W. Chesterton, Inc.*, No. 04-L-168 (Madison Cty., Ill. Circuit Ct., Oct. 6, 2004).

<sup>5</sup> *In re: Asbestos Litigation*, No. 05C-05-246-JRS (ASB), (Del. Super. Ct. Mar. 8, 2006). This result was reached even though the Delaware Supreme Court has acknowledged that a nonresident plaintiff's choice of forum "is not as strong" as a resident's. See *Inson v. E.I. de Point de Nemours & Co.*, 729 A.2d 832, 835 (Del. 1999).

One of the magnet jurisdictions that did adopt such reforms is West Virginia. That state had become extremely attractive to plaintiffs, particularly in asbestos cases, because its trial courts had employed mass consolidations of thousands of individual asbestos claims that both put enormous pressure on defendants to settle and limited the ability of courts and defendants to focus on the merits of individual claims.<sup>6</sup> Substantial percentages of these claims were brought by nonresidents of West Virginia.

In 2003, the West Virginia legislature attempted to curb this abuse by amending the State's venue statute to bar suits by nonresident plaintiffs unless (i) a "substantial part" of the acts or omissions giving rise to the claim occurred in the State or (ii) the plaintiff could not obtain jurisdiction against a defendant where the claim arose.<sup>7</sup> Moreover, under this statute, each plaintiff in an action must independently establish that venue is proper for him or herself.

On June 29, 2006, the West Virginia Supreme Court of Appeals rendered a decision (with one judge dissenting) that threatens to greatly limit the effectiveness of this reform. *Morris v. Crown Equipment Corporation*, No. 32751 (W. Va. June 29, 2006). In *Crown Equipment*, the plaintiff had been injured in *Virginia* while operating a forklift. He sued (i) the designer and manufacturer of the forklift, an *Ohio* defendant, and (ii) the *West Virginia* company that had distributed and serviced the forklift. The trial court dismissed the case on the ground that a substantial part of the acts at issue did not occur in West Virginia. The Supreme Court of Appeals reversed. The court ruled that the Privileges and Immunities Clause of the U.S. Constitution<sup>8</sup> forbids West Virginia from barring the suit by the nonresident against the West Virginia defendant, even though the operative events occurred outside West Virginia, when a West Virginia resident would be allowed to bring suit in the State under the same facts. The court also ruled that, once venue was proper as to the nonresident plaintiff's claims against the West Virginia defendant, it was also proper for the Ohio manufacturer, who in all likelihood was the target defendant in the case.

Following *Crown Equipment*, nonresident plaintiffs will be allowed to avoid the restrictions of the West Virginia venue statute and bring product liability and other mass litigation suits in West Virginia courts, without any showing of acts or omissions in the State, so long as each plaintiff can allege a colorable claim against one West Virginia defendant. This result is likely to significantly limit the effectiveness of the West Virginia legislature's venue reform, for plaintiffs in many cases will have little difficulty in naming some West Virginia resident as a defendant. In particular, the decision raises the possibility that West Virginia courts will again be overrun with asbestos cases attracted by West Virginia's traditionally liberal rules on consolidations, and seeking to avoid rules in nearby Pennsylvania and Ohio requiring asbestos plaintiffs to demonstrate physical impairment in order to recover. Moreover, because the West Virginia Supreme Court rested its decision on the U.S. Constitution, acceptance of its result imperils similar reforms in other states.

---

<sup>6</sup> See, e.g., *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W.Va. 2002).

<sup>7</sup> W. Va. Code § 56-1-1(c) (2003).

<sup>8</sup> U.S. Const., Art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.")

Because it rests on federal grounds, the decision of the West Virginia Supreme Court is not the last word on this question, for it can be reviewed in this case or some other case by the U.S. Supreme Court. Proponents of the West Virginia venue statute contend that the West Virginia legislature should be able to free the State's courts from having to adjudicate tens of thousands of mass tort claims that have no significant connection to the State, except the choice by plaintiffs of that State as their preferred forum. While the U.S. Supreme Court has not addressed in recent years the extent to which the Privileges and Immunities Clause limits the right of a state to restrict the access of nonresidents to its courts, it has in the distant past upheld state laws that treat nonresidents differently in certain respects from residents in providing access to courts. It has, for instance, upheld a statute of limitations that bars a suit by a nonresident when the suit is time-barred in the jurisdiction where the tort occurred, but would not bar a suit under the same facts if brought by a resident.<sup>9</sup> It has also upheld a state statute that allowed only claims for the wrongful death of a citizen to be brought in the courts of that state.<sup>10</sup> More recently, the U.S. Supreme Court has made clear in ruling on motions to dismiss for *forum non conveniens* that courts can give less deference to the choice of forum by a plaintiff who is a nonresident of the forum than to the choice of a plaintiff who sues in his or her home jurisdiction.<sup>11</sup> As a matter of theory, there seems little to distinguish this preference for the forum choice of home-state plaintiffs to the preference given by the West Virginia legislature to suits by residents. We therefore expect the constitutional analysis of the West Virginia court to be the subject of additional litigation.

If you have any questions on the information contained in the alert, please contact:

<b>Frederick C. Schafrick</b>	fschafrick@goodwinprocter.com	202.346.4194
<b>Joanne M. Gray</b>	jgray@goodwinprocter.com	212.459.7440
<b>Richard A. Oetheimer</b>	roetheimer@goodwinprocter.com	617.570.1259

**Anne M. Smetak** contributed to the preparation of this alert.

Full access to all articles on products liability prepared by Goodwin Procter is available at:  
<http://www.goodwinprocter.com/Publications/Full%20Publication%20Index.aspx>

Full access to all articles prepared by Goodwin Procter is available at:  
<http://www.goodwinprocter.com/PublicationSearchResults.aspx?search=all>

This publication, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP or its attorneys. Additionally, the foregoing discussion does not constitute tax advice. Any discussion of tax matters contained in this publication is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code or promoting, marketing or recommending to another party any transaction or matter. © 2006 Goodwin Procter LLP. All rights reserved.

<sup>9</sup> *Canadian N. Ry. v. Eggen*, 252 U.S. 553 (1920).

<sup>10</sup> *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907).

<sup>11</sup> See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).