



January 15, 2021


### The Defendant Over-Naming Trouble: West Virginia Asbestos Litigation

Mary Margaret Gay – Gay Jones & Kuhn PLLC

[mmgay@gayjoneslaw.com](mailto:mmgay@gayjoneslaw.com)

Asbestos litigation continues to create problems for businesses and West Virginia is the epicenter. Over-naming of defendants in asbestos litigation, who have little or no known liability for asbestos-related products, is a serious issue and it is trending upward for companies. Over the past three decades more than 100 companies have filed for asbestos-related bankruptcy protection leaving plaintiffs’ attorneys scrambling to find and name new viable companies in lawsuits. This search for the ever-solvent defendant has led to the habitual over-naming of asbestos defendants that do not belong in the case and end up being dismissed after costly litigation with no liability. This litigation tactic is unnecessarily driving up litigation costs, bankrupting companies, creating further West Virginia court backlogs, and leaving unsuspecting victims with delayed recoveries.

Cases set on trial dockets in West Virginia show this increasing trend where plaintiffs’ counsel “*sue first and discover facts later.*” In the 38 cases set on the July 2020 trial dockets in West Virginia, more than 4,489 defendants were named on Complaints. These defendant lists include as many as 436 companies. **The average Complaint named over 118 defendant companies.**

 July 2020 WV Trial Docket	Cases	Defendants Named on Complaints
Lung Cancer	19	2,190
Exigent Cases	19	2,299

The percentage of times those companies are named and then dismissed with no liability is contemptible. In the Lung Cancer trial group, on average, 35% of all the defendants named on a Complaint were dismissed with no finding of liability. That average dismissal percentage jumped to 39% for the Exigent trial docket cases. The Exigent docket is comprised of mesothelioma and lung cancer cases.

The number of defendants named on a typical asbestos complaint in West Virginia is increasing yearly. Cases in the lung cancer trial group named an average 115 companies on a single Complaint. The number increased to an average 120 defendants named on a Complaint for exigent cases set on the 2020 trial docket in the state.

One complaint named over 210 companies and 26 others named more than 100 companies as defendants. These Complaints list pages and pages of defendants with no specific connection or exposure to a company or a product related to the company.

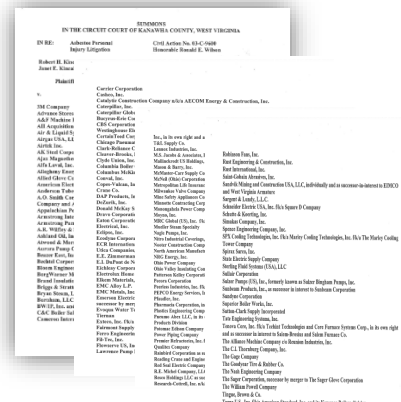
#### Robert Kincaid vs. 3M, et al. (Kanawha County) Cause No. 03-C-9600

The *Kincaid* case, filed in July 2019 by the Antion McGee and Maune Raichle law firms, included a list of defendants five pages long naming more than **210** companies.

The *Kincaid* case was set on the 2020 trial docket and **26%** (about 55 defendants) have been dismissed without any liability.

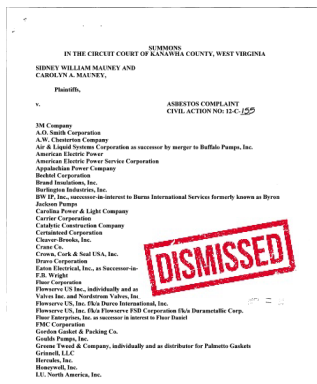
#### James McLain vs. AO Smith, et al. (Kanawha County) Cause No. 15-C-1208

The *McLain* case, filed by the Prim and Savinis, D’Amico & Kane law firms, named **165** defendant companies. **35%** of the defendants named on that Complaint were dismissed without liability when the case was set on the 2018 trial docket.



Despite the bankruptcies of traditional asbestos defendants, the number of defendants named continues to grow. The companies that are being named as defendants on these Complaints do not include the more than 100 “big dusty” companies who have filed for asbestos-related bankruptcy protection and are no longer named in cases. Some of the companies named in recent years on Complaints in West Virginia had never been historically sued in asbestos litigation.

The high dismissal rates for companies named on asbestos Complaints validates the over-naming problem. Long lists of defendants named in a case only to be dismissed with no liability.



**Sidney Mauney v. 3M Company, et al. (Kanawha County) Cause No. 12-C-155**

The *Mauney* case named 75 defendants on the Complaint. By the time the case was set on the 2020 trial docket **70% of the defendants named on the Complaint had been dismissed** without any payment for liability. These companies were named in cases and paid ongoing costs of litigation only to be dismissed without pay prior to trial.

This dismissal rate is a trend and not a one-off occurrence. The *John Kerns* case named 116 defendants and 64 have already been dismissed without liability. The *David Harbert*, *Stephen Templeton* and *Christopher Logelin* cases have all dismissed more than 50% of the defendants named on the Complaints.

A review of all the defendants named in the trial group Complaints reveals a substantial number of dismissals- **400 defendants were dismissed from every case** that they were named on the Complaint. For a company in West Virginia litigation this means litigation costs are baselessly incurred for a large portion of the cases in which the company is originally named.

2020 West Virginia Lung Cancer Trial Group			Defendant Status			
Case Name	Law Firm	Named Defendants	Dismissed	% Dismissed	Settled	Pending
<i>Canterbury, Joe</i>	Goldberg Persky & White	117	38	32%	12	67
<i>Clark, Roger</i>	Lee Davis	82	0	0%	0	82
<i>Dugan, Dena</i>	Antion McGee/Tenoglia	104	25	24%	5	74
<i>Fields, Bobby</i>	Motley Rice/Humphrey	75	34	45%	3	38
<i>Hendricks, James</i>	Savinis Kane Gallucci	153	58	38%	18	77
<i>Johnson, James</i>	Goldberg Persky & White	81	0	0%	0	81
<i>Kavesky, Walter</i>	Antion McGee/Tenoglia	163	29	18%	17	117
<i>Keller, David</i>	Motley Rice/Humphrey	124	59	48%	4	61
<i>Layner, Frederick</i>	Motley Rice/Maroney	103	35	34%	10	58
<i>Martin, George</i>	Goldberg Persky & White	185	58	31%	14	113
<i>McLain, James</i>	Savinis D'Amico Kane/Prim	165	57	35%	11	97
<i>Michalo, Larry</i>	Goldberg Persky & White	118	32	27%	14	72
<i>Nunley, Deloris</i>	Antion McGee/Sutter	77	22	29%	5	50
<i>Osborne, Dean</i>	Antion McGee/Valles	170	60	35%	9	101
<i>Powell, Chris</i>	Motley Rice/Humphrey	78	31	40%	11	36
<i>Templeton, Stephen</i>	Antion McGee/Barber	119	61	51%	8	50
<i>Wells, Robert W.</i>	Hartley	102	45	44%	13	44
<i>Wells, Ronald A.</i>	Antion McGee/CBC	122	32	26%	11	79
<i>Wright, Robert Jean</i>	Hartley	52	18	35%	4	30

2020 West Virginia Exigent Trial Group			Defendant Status			
Case Name	Law Firm	Named Defendants	Dismissed	% Dismissed	Settled	Pending
Carfagna, Kim	Goldberg Persky & White/Segal	160	29	18%	13	118
Davis, Kimberly	Antion McGee/Sutter	148	58	39%	10	80
Epperson, John	Savinis Kane Gallucci/Prim	124	50	40%	11	63
Godfrey, Dana	Maune Raichle/Humphrey	96	46	48%	5	45
Harbert, David	Antion McGee	138	72	52%	8	58
Kerns, John	Antion McGee/Caroselli	116	64	55%	4	48
Kincaid, Robert	Antion McGee	210	55	26%	21	124
Kuhlmann, William	Antion McGee/Weykamp	126	50	40%	6	70
Lawhorn, Oren	Savinis Kane Gallucci/Prim	68	16	24%	5	47
Logelin, Christopher	Antion McGee/Weykamp	123	64	52%	8	51
Mauney, Sidney	Maune Raichle	75	52	70%	1	22
Powell, Earl D.	Maune Raichle/Humphrey	70	23	33%	9	38
Powell, Earl F.	Goldberg Persky & White	72	7	10%	3	62
Smith, Thomas E.	Antion McGee/Valles	172	82	48%	10	80
Stout, Robert E.	Goldberg Persky & White/Segal	135	24	18%	15	96
Wamsley, John	Antion McGee/Tenoglia	114	37	32%	9	68
Whiteman, Delmas	Antion McGee/Caroselli	88	44	50%	3	41
Whitt, Fred	Savinis Kane Gallucci/Prim	145	59	41%	9	77
Wurts, John	Antion McGee	119	55	46%	3	61

## Methodology

The data in this report was compiled and analyzed by Gay Jones & Kuhn PLLC using publicly filed documents, information and case dockets made available in West Virginia asbestos cases. The data cited is based on case information posted and available as of September 30, 2020. These numbers will continue to change as remaining defendants resolve and/or are dismissed without pay from these cases. A defendant's status in a case as cited in the report based on the docket reflection of the type of final Orders of dismissal entered for each defendant.

A defendant is considered dismissed with no liability and no settlement if the docket reflects an Order for Dismissal Without Prejudice; a defendant is marked settled/paid if the docket notes a verdict (*none are reported in the data set reviewed*) or a Dismissal with Prejudice on the docket; and a defendant is considered pending if the docket does not reflect a final status Order. It is unlikely that any defendant remains pending in the cases on the trial dockets, as those trial dates have now passed. However, without clear docket notation there is no information to report related to their dismissal or settlement status. It is likely that the number of dismissals for defendants with no liability is higher than reported on the docket.

\*\*\*\*\*

Mary Margaret Gay is a founding member of Gay Jones & Kuhn in Jackson, Mississippi. Mary Margaret represents clients locally, regionally, and nationally in product liability and environmental litigation. She served as counsel of record for more than 40 defendants in the Federal Asbestos MDL and assisted the Court in the management and closure of the MDL resulting in the dismissal of thousands of cases. In 2015, she and her partners pioneered technology used to assist asbestos defendants and their counsel nationwide to develop alternative exposures and estimate asbestos bankruptcy trust claims values. Mary Margaret is known for being at the forefront of issues affecting asbestos litigation and for her ability to maximize available data to track and report trends in asbestos litigation. Clients call on Mary Margaret for her creative problem-solving and ability to collaborate with others involved in the litigation to identify innovative solutions to problems old and new. She has undertaken numerous studies, published articles, and routinely speaks on issues affecting the ever-changing asbestos litigation landscape.