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 IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA
 

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IN RE ASBESTOS LITIGATION  
*Consolidated Cases*

CAUSE NO AC 17-0694

DEFENDANT MARYLAND CASUALTY  
 COMPANY'S RESPONSE TO  
 MCGARVEY PLAINTIFFS' MOTION FOR  
 ADDITIONAL PARAMETERS RE:  
 COURT'S MANDATORY SETTLEMENT  
 CONFERENCE

*Applicable to All Cases*

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Comes now, Defendant Maryland Casualty Company ("MCC"), and hereby submits its Response to the McGarvey Plaintiffs' Motion for Additional Parameters Re: Court's Mandatory Settlement Conference, and states as follows:

## **RELEVANT BACKGROUND**

On November 28, 2017, the Montana Supreme Court established the ACC, appointed Judge Amy Eddy as ACC Judge, and consolidated asbestos-related cases pending before Montana trial courts for pretrial purposes. *See* Montana Supreme Court, Order Establishing the Asbestos Claims Court and Consolidating Cases, November 28, 2017.

The ACC entered its Deferred Docket Order on September 13, 2018 which, in part, directed the ACC plaintiffs whose exposure took place over 30 years ago to attend a mandatory settlement conference within one year of the date of the ACC's Deferred Docket Order. *See* Deferred Docket Order, September 13, 2018. The ACC modified its directions regarding the mandatory settlement conference via two subsequently issued orders. On December 4, 2018, the ACC imposed the following requirements on all future settlement conferences under the jurisdiction of the ACC:

- (1) Lead counsel for each party must personally attend;
- (2) Each Plaintiff must personally attend;
- (3) A representative of each Defendant, who has ultimate settlement authority, must personally attend;
- (4) A representative of each Defendant's insurer, who has ultimate settlement authority, must personally attend.

*See* Order Re: Settlement Conferences, December 4, 2018.

Later, on June 18, 2019, the ACC granted plaintiffs leave to attend the settlement conference through counsel. *See* Order Granting Plaintiffs' Motion for Leave to Attend Settlement Conference Through Counsel, June 18, 2019. The ACC subsequently held a status conference on July 24, 2019, wherein the ACC suspended the then-effective September 13, 2019 deadline for the mandatory settlement conference contemplated by the Deferred Docket Order, based on the writs of supervisory control petitioned for by defendants MCC and BNSF.

The Montana Supreme Court issued its Opinion in *BNSF Railway Company v. Asbestos Claims Court*, 399 Mont. 180, on March 11, 2020, and its Opinion in *Maryland Casualty Company v. Asbestos Claims Court*, 2020 MT 70, on March 25, 2020.

Since the Montana Supreme Court's issuance of its Opinions, the parties have filed several motions relevant to the ACC's Deferred Docket Order, including motions seeking to enforce various provisions of the Deferred Docket Order and motions for relief from various provisions of the Deferred Docket Order. Absent from the McGarvey Plaintiffs' Motion is reference to the necessity of a ruling on those motions, and the McGarvey Plaintiffs' failure to comply with the directives of this Court for individuals on the deferred docket.

In addition, the ACC has undergone a fundamental transition. In particular, Judge Amy Eddy initially presided over the ACC as the sole ACC judge. In 2018, after the ACC issued the Deferred Docket Order, the Montana Supreme Court appointed six additional ACC judges, "to more equitably and efficiently meet the demands of this litigation." *See Order Appointing Additional Asbestos Claims Court Judges*, December 11, 2018. In June 2020, the ACC announced the creation of a "Twenty-Third Judicial District," to assist in the ACC's transition. *See Order Re: Case Reassignment*, June 17, 2020. In August 2020, the ACC completed its transition to eight total ACC judges. *See Case Management Order*, August 10, 2020.

The parties have submitted various motions in the ACC before the various ACC judges, including motions that are case-specific and motions that are generally applicable to all ACC cases. To MCC's knowledge, the motions regarding the Deferred Docket Order that were filed before the ACC completed its transition from one to eight ACC judges have not yet been ruled upon.

## **MCC'S RESPONSE**

As an initial matter, MCC conceptually is not opposed to engaging in a global settlement conference. Nor is MCC opposed in concept to the general “bifurcated” structure proposed by McGarvey Plaintiffs in light of the ongoing COVID-19 Global Health Pandemic, whereby the settlement conference occurs first virtually, followed by an in-person conference when possible and/or practicable. However, MCC is opposed to the random selection of a mediator without its input and agreement.

Nevertheless, Plaintiffs’ Motion is theoretically unnecessary as the global settlement conference can appropriately occur by agreement of the parties and without the additional, unworkable, court-imposed parameters that Plaintiffs suggest. Specifically, MCC objects to Plaintiffs’ proposed requirement that a Defendant’s representative and insurer(s) have ultimate settlement authority “to offer any amount up to McGarvey Plaintiffs’ last global demand to that Defendant.” Such a requirement is arbitrary, illogical, and gives unfettered discretion to the Plaintiffs to set an unrealistic benchmark value for their claims. In fact, the Court has already provided the parties with workable parameters which address and facilitate the need for good faith global discussions.

Plaintiffs provide no good basis, nor reasonable explanation for requiring certain defendants to appear at the settlement conference with settlement authority matching the Plaintiffs’ unilateral demand. A settlement demand does not reflect an appropriate value of the claims; rather, it is simply an amount that Plaintiffs have asked for.

Therefore, MCC objects to this new request as a precondition to discussing a global settlement. Such a requirement tacitly blesses Plaintiffs’ perceived value of their claims, even if that amount is completely untethered from the actual value of Plaintiffs’ claims. The parties obviously hold conflicting views of the strength and value of Plaintiffs’ individual claims.

Plaintiffs' unchecked and unrealistic assessment of their own claims is not an appropriate measure of the claims' relative or aggregate value. The McGarvey Plaintiffs suggest that "it defeats the intent [of a settlement conference] to send representatives with unilaterally capped authority"; however, it conversely "defeats the intent" to require defendants to participate with an amount of authority unilaterally determined by Plaintiffs. Plaintiffs are not entitled to unilateral control over the value of their claims, and such a position similarly renders any settlement conference futile.

Also, not discussed by Plaintiffs' Motion is the necessity of updated data and information of the over 1,000 deferred docket claims. Ostensibly, each of those claims has little or no value. Plaintiffs must provide a good faith basis for evaluating and responding to demands for these cases. A second, equally important requirement is for Plaintiffs to provide the mechanism by which the claims will be satisfied and releases obtained from the many claimants to assure defendants that the individual Plaintiffs will authorize acceptance of any settlement. There is no mechanism in place or even suggested for this very important consideration, particularly since Plaintiffs are excused from individual personal attendance.

The ACC's previous Order, which directs the parties to attend a conference via a representative "with ultimate settlement authority," is a sufficient and appropriate parameter to govern any future settlement conference. *See* Order Re: Settlement Conferences, December 4, 2018. The ACC's previous direction and the parties' obligations of good faith are sufficient to ensure that such a global settlement conference will be productive.

Finally, MCC objects to Plaintiffs' request that a mediator be appointed by the ACC without MCC's and the defendants' input. There should be a discussion by all of the parties about the selection and appointment of an appropriate mediator. MCC expects to participate in this discussion.

The additional parameters suggested by Plaintiffs are unnecessary, unreasonable, and arbitrary. The parties can successfully plan for and participate in a global settlement conference without further parameters imposed by the ACC. It would be useful for the parties if the Deferred Docket Related Motions pending before the ACC were decided.

### CONCLUSION

For these reasons, the ACC should deny Plaintiffs' Motion as unnecessary, and specifically reject Plaintiffs' request for parties to appear with any additional conditions other than previously ordered. It is further requested that the Court order the additional parameters to settlement participation proposed by MCC.

DATED this 20th day of October, 2020.

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