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NEW GENERATION OF ASBESTOS TRUSTS ENCOURAGES DOUBLE-DIPPING

FORUM COLUMN

By Jacob C. Cohn and Joseph A. Arnold

There's nothing new about asbestos plaintiffs' lawyers trying to manipulate the legal system, playing what one Los Angeles County judge recently dubbed the "grisly game of asbestos litigation." A new generation of asbestos trusts, established to pay claims on behalf of bankrupt manufacturers, now tempts plaintiffs' lawyers to seek double recoveries by concealing their clients' trust recoveries from tort defendants. Solvent defendants are thereby unfairly saddled with a larger share of the liability, while trust dollars are drained away from other deserving claimants. California's courts should level the playing field by requiring full disclosure by asbestos claimants of their claims to, and recoveries from, asbestos trusts.

Since 2000, most major defendants historically targeted in asbestos litigation have resolved their asbestos liabilities by establishing trusts under Section 524(g) of the Bankruptcy Code. With more than \$30 billion in assets, asbestos trusts represent a major funding source for asbestos claimants. With the most culpable defendants gone from the tort system, plaintiffs target companies with peripheral involvement with asbestos and use the prospect of joint and several liability to extract settlements.

These inequities have spurred reforms in key states. Mississippi completely eliminated joint and several liability in 2004. Defendants pay the percentage of liability assigned by a jury, and all responsible tortfeasors appear on the verdict sheet. Other states limit the imposition of joint and several liability based on a threshold percentage of liability. Ohio bars joint and several liability for economic losses for defendants found to be less than 50 percent liable — and entirely for non-economic losses. In 2003 Texas adopted a 50 percent joint and several threshold applying to economic and non-economic damages. Both states allow juries to allocate responsibility to non-parties, including bankrupt companies.

California's Proposition 51 has softened joint and several liability's effect on marginally liable defendants, making them liable for their proportionate share of non-economic damages. Juries allocate non-economic damages to the "universe of tortfeasors," including non-parties. Defendants are entitled to economic damages set-offs from joint tortfeasor settlements.

To make Prop. 51 work, defendants must have full discovery of a plaintiff's claims against and recoveries from asbestos trusts. Some plaintiffs have sought to stymie discovery by invoking

confidentiality provisions in the trust distribution procedures, failing to provide accurate information and even delaying their trust submissions until after the conclusion of their tort cases. The procedures' confidentiality provisions, not coincidentally, are drafted by counsel for the asbestos claimants during the trust formation process with a view toward obstructing discovery, and the trusts themselves consistently resist third-party discovery efforts.

The poster-child for abuses flowing from the opaque nature of the trust claiming process is *Kananian v. Lorillard Tobacco Company*, No. CV 442750 (Ohio Cuyahoga County Com. Pl. Jan. 18, 2007). *Kananian*, who claimed in the tort system that he developed mesothelioma solely from smoking Lorillard's asbestos-filtered cigarettes, simultaneously filed claims with numerous asbestos trusts alleging that their products caused the disease. Despite plaintiff's counsel's attempts to hide this information, Lorillard eventually learned that these lawyers had obtained hundreds of thousands of dollars by submitting contradictory — even bogus — trust claims, leading an Ohio judge to revoke counsel's pro hac vice privileges.

Kananian reflects a trend by courts to facilitate discovery of plaintiffs' asbestos trust claims. The leading decision comes from a California appellate court. In *Volkswagen of America Inc. v. Superior Court*, 139 Cal.App.4th 1481 (2006), the court held that bankruptcy trust submissions are discoverable by a tort defendant. The plaintiff, who sued Volkswagen and 66 other defendants for asbestos-related injuries, resisted production of trust submissions, contending that the information consisted of "confidential settlement information packets" and revealed efforts to negotiate a settlement. The court disagreed: "Volkswagen has good reason to ascertain what [plaintiff] has told others about these issues. ... Since each party who shares responsibility for any asbestos-related disease from which a claimant suffers is liable only for its proportionate share of non-economic damages, each will understandably be concerned to determine whether the claimant has overstated its share of responsibility."

A number of jurisdictions have established standing asbestos case management orders requiring plaintiffs to disclose trust-related claims information. In West Virginia, the order governing state-wide asbestos litigation requires plaintiffs to disclose the trusts to which they have submitted or will submit claims. Ohio's order requires plaintiffs to produce claim forms and supporting documentation presented to any bankruptcy trust and authorizes defendants to seek information from the trusts.

Facing this, claimants are known to wait until after trial to seek trust recoveries. This is another version of the "double dipping" exposed in *Kananian*. A trial court in Washington neutralized this tactic by allowing a setoff for amounts: "received to date," "agreed to and to be received," "that can be obtained by application to existing bankruptcy trusts" and "that can be obtained from bankruptcy trusts expected to soon become available." *Coulter v. AstenJohnson*, 2008 WL 4103199 (Wash. Super Ct., May 30, 2008).

The Los Angeles Superior Court has joined the salutary trend of promoting transparency. The court's May 27 Third Amended General Order No. 29 requires plaintiffs to file a case report disclosing basic product identification and exposure information, and to attach a "copy of each bankruptcy proof of claim relating to asbestos exposure which plaintiff(s) has submitted to any bankruptcy Trust."

While this is a good start, it is not enough to ensure essential transparency. Whether by statute, rule or standing order, asbestos plaintiffs should be required to make mandatory initial disclosures regarding 524(g) trusts, including: trusts against which the plaintiff has made or intends to assert a claim for compensation; sums the claimant received or anticipates receiving from each trust sent a claim; claims sent to a trust, and communications concerning payment, non-payment or status of those claims; pending bankruptcies in which the plaintiff has asserted or plans to assert a claim against debtors; other entities from which he has recovered or expects to recover money for his injuries and attorneys or law firms other than counsel of record that represents or has represented him in efforts to recover. Courts should require that these disclosures be supplemented until the date of trial, and provide post-trial relief to discourage plaintiffs from delaying trust claims.

Additionally, bankruptcy trusts should be required to respond to discovery the same as any other third-party pursuant to the applicable rules of procedure. Confidentiality concerns can be addressed by stipulation or order. Trusts should be reformed to encourage transparency and guard against improper claiming.

Non-bankruptcy courts are increasingly recognizing that fundamental fairness requires that tort system defendants be afforded access to claiming and payment information concerning the 524(g) trusts. To restore integrity to the claiming processes, 360-degree disclosure of trust claiming and payment information both to tort defendants and the trusts will provide much-needed illumination of the entire claiming process. Peripheral defendants will be able to better establish their correct liability and the unseemly claiming abuses against the trusts, epitomized by the *Kananian* case, will be discouraged.

***Jacob C. Cohn** is a member in the Philadelphia office of Cozen O'Connor's global insurance group and represents insurers in many asbestos-related bankruptcy proceedings as well as in major asbestos and other mass tort coverage cases. **Joseph A. Arnold** is an associate in the same office.*