

## The Role of the Bankruptcy Trusts in Civil Asbestos

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I would like to thank the conference chairs John Cooney and Tim Krippner for an interesting and useful conference. In particular, the opening commentary by Perry Weitz and Robert Riley was a stimulating discussion of the most significant and controversial asbestos litigation issue. Recently 524(g) asbestos trusts with billions of dollars in assets have been established. The current asbestos tort defendants see these billions as assets that should pay most of the current tort liability. Plaintiff law firms assert that the solvent tort defendants should pay the entire tort liability and that plaintiffs should also collect from the trusts.

The amount of money at issue is large: tens of billions of dollars! Bates White's initial examination of the issue was published by Mealey's in late 2006 in our article titled "Having Your Tort and Eating It Too." There we reported that the trust will have more than \$30 billion in assets, perhaps much more. We also found that the tort liability of all future and pending asbestos personal injury claims is about \$30 billion. Defendants assert that plaintiffs will fully collect twice for the same liability if they are allowed to first collect the tort liability from tort defendants and then collect again from trust.

The basis of the defendants' position is that the solvent defendants are currently paying the bankrupt defendants' share of the tort liability. With claims against the bankrupt defendants stayed while those companies were reorganized, the solvent defendants were forced to pay the

full amount of the tort liability or face trials without the bankrupt co-defendants. Current defendants argue that the purpose of the 524(g) trusts is to pay the tort liability of the bankrupt co-defendants. Therefore, the plaintiffs should not be able to collect the full amount of the same liability twice, once from the solvent defendants and then again from the trusts.

The plaintiffs' position is that these are separate liabilities. They assert that the increases in solvent defendants' payments are due to higher total settlements. The basis for their position is their assertion that the average mesothelioma claim value is now about \$6 million across the country, not the \$1.1 million average we used in our analysis of total tort liability reported in our Mealey's paper in late 2006.

This is important because if the tort liability is \$1.1 million per mesothelioma claim, the trusts will have sufficient assets to pay most if not all of the tort liability of the 30,000 pending and future mesothelioma and other asbestos claims.

At \$6 million per mesothelioma claimants, not even close. At this higher level of tort liability, the trusts' assets will cover only a small fraction of the tort liability.

- At a million dollars per mesothelioma claimant, the increase in solvent defendants' payments is primarily due to the transfer of liability share from bankrupt defendants.
- At \$6 million per mesothelioma claimant, the increase in payments by solvent defendants is primarily due to increases in the total tort liability, not a transfer of liability share.

If the current payment levels by solvent defendants are the result of a liability share transfer, their payments are duplicative of 524(g) trust payments. After all, the purpose of the trust assets is to pay the bankrupt defendants' liability share that left the tort system when the now bankrupt defendants' tort claims were stayed by order of the bankruptcy court.

If current payment levels are primarily due to an increase in total liability, bankruptcy trust payments and tort payments are largely not duplicative.

What is true?

No one has the data to directly calculate the national average mesothelioma tort recovery. Messrs Cooney & Weitz told me, and the other participants of the Mealey's asbestos conference last June, the data they have confirms a \$6 million total mesothelioma recovery per claimant, but they were not going to let me see their data.

At Bates White we set out to see what we could learn with the data we have available. Our results are presented in our paper published by Mealey's in December 2007 titled "Show Me The Money." We find that total mesothelioma tort recoveries average just over \$1 million. That is, if you add up all the tort settlements a mesothelioma claimant will receive from all defendants, and then average the amount across all claimants in the country, the amount is just over \$1 million per plaintiff.

We know this for several reasons.

First, at \$6 million per mesothelioma claimant, defendants would be paying about \$20 billion per year in settlements and defense costs. That much money leaves a very clear trail in defendants' 10-K and 10-Q SEC financial disclosures and plaintiff law firm revenues. Neither shows anything like that amount of asbestos-related expenditures.

Second, naming patterns of plaintiffs and settlement patterns of defendants reveal a much lower number. Plaintiffs typically collect from 15 to 25 defendants, an average of about \$50,000 from each defendant. There is usually a target defendant that pays much more than this, but most defendants settle for a lot less to each plaintiff.

Third, changes in the litigation environment have favored defendants over the last few years. This is not uniformly true for all defendants and all venues, but it is true for most defendants. There are fewer trials, a higher percentage of dismissals without payments, and a greater number of defense verdicts. There are also a smaller number of plaintiff verdicts, albeit with higher average awards. All of these facts are consistent with a more defense-friendly litigation environment. Only the plaintiffs best cases now receive an award at trial. These are the cases that receive the most money if the plaintiff wins.

In conclusion, our analysis shows that much of the money now paid by solvent defendants to settle asbestos tort claims is the result of a transfer of liability from defendants bankrupt between 2000 and 2003. As a policy matter, their payments should be reduced to the extent that the trusts set up to cover that liability have the assets to pay it. Not all of the increase is due to a liability transfer, as some defendants had actual increases in liability from new liability theories by plaintiffs that have proved successful, or new facts have been developed to show that a current defendant has a greater share of the total liability.

What will happen? That's up to you lawyers to fight it out.

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