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# Asbestos Bankruptcy Trusts and Tort Compensation

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## Summary

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Asbestos litigation in the United States began in the 1970s and grew rapidly in the subsequent decades. By 2002, an estimated 730,000 people had filed asbestos-related lawsuits, and \$49 billion had been paid in compensation. As past and expected future payments mounted, many of the primary asbestos defendants filed for reorganization under U.S. bankruptcy law. At that point, all lawsuits against them were halted. After negotiations with creditors, including asbestos claimants represented by their counsel, many companies established an independent asbestos personal injury trust to pay asbestos claims.

Over the past 30 years, 56 asbestos personal injury trusts have been set up on behalf of companies that have filed for reorganization. The largest 26 trusts paid \$10.9 billion on 2.4 million claims through 2008. Trust outlays have grown rapidly since 2005, reaching \$3.3 billion in 2008. Given these sizable assets, and the great reservoir of future asbestos personal injury claims, both plaintiffs and solvent defendants have a great deal at stake with regard to how trusts enter into the determination of tort awards. At issue is whether a lack of coordination between the trusts and the tort system allows plaintiffs to, in effect, recover once in the tort system and then again from the trusts. Similarly at issue is whether the payments by solvent defendants are being properly adjusted to account for the compensation available from the trusts. Higher trust payments to current plaintiffs mean fewer trust resources for future plaintiffs, so also of concern is whether a lack of coordination between trusts and the tort system advantages today's plaintiffs relative to future plaintiffs.

This study examines the interactions between the trusts and the tort system. Although we were not able to determine what actually occurs in practice—data on plaintiff compensation over time are simply not available—we were able to determine how trust payments are factored into tort awards in different states and how trust payments can potentially affect total plaintiff compensation (from the trusts and the tort system) and payments by solvent defendants.

## Approach

Our analysis considers this issue by examining all the steps in the process for obtaining compensation and then identifying where the trusts and court cases interact in this process. We identify four potential opportunities for interaction—or linkages:

- *The information linkage.* We examine whether the claim forms and supporting exposure evidence submitted to trusts are provided to tort defendants. Because claim disclosure requirements are of little import if no claims have been filed, we also investigate whether there are state requirements on when a trust claim must be filed during a tort case.
- *The setoff linkage.* In tort litigation, defendants often settle before trial, and, because those settlements are intended to compensate the plaintiff for the alleged harm, states often allow credit to be given to the defendants found liable for money the plaintiff has already received. We examine whether these “setoffs” are available for pre-verdict trust payments in asbestos cases.
- *The indirect claim linkage.* Indirect personal injury claims are claims for compensation filed with a trust by a party other than the original asbestos claimant (the direct claimant). For example, a tort defendant that pays the full judgment might gain the right to pursue an indirect claim. If successful, the indirect claimant would recover the same amount that the direct claimant would have been paid.
- *The trust payment limitation linkage.* Restrictions in the governing documents of some trusts condition trust payments on outcomes in the tort system. For example, some trusts will not pay a direct claim if another party has satisfied the trust’s liability in full. This and other conditions provide feedback between the trusts and the tort case, affecting both plaintiff compensation from trust and tort combined and payments by defendants that remain solvent.

We chose six states that vary a great deal in their statutory laws and court rules. We selected California, Illinois, New York, Pennsylvania, and Texas because they have a history of a large number of asbestos filings, and we included a sixth state, West Virginia, because of its innovative approach to dealing with the trusts. California, New York, and Texas have adopted some form of several liability, which means that a defendant’s liability in these states can be limited to the portion of the harm for which it is responsible, as determined in trial. Illinois, Pennsylvania, and West Virginia, on the other hand, have *joint-and-several liability*, which means that the plaintiff can recover the entire judgment from any one of the liable defendants.<sup>1</sup> The difference between

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<sup>1</sup> Liability for asbestos injuries has recently changed in Pennsylvania and is now several, subject to some exceptions. The change does not apply to cases in which the plaintiff knew or should have known prior to June 28, 2011, that he or she was injured. The analysis in this monograph applies to Pennsylvania cases subject to this *prior* liability regime.

these two liability regimes, it turns out, has a strong effect on the interactions between the trust and tort system and ultimately on compensation.

Because we did not have actual data for calculating compensation, we engaged in the following thought experiment. First, assume that all potential defendants in an asbestos personal injury case are solvent and that the jury returns a verdict in favor of the plaintiff, allocating liability to the defendants in accordance with the relevant state laws (the pre-reorganization scenario). Now consider the same plaintiff facing the same jury in the same state, but with some of the defendants reorganized and trusts up and running in their place (the post-reorganization scenario). Further assume that the jury verdict is the same in both scenarios and that the combined trust payments are less than the combined payments in the pre-reorganization scenario of defendants that will be reorganized. We use this hypothetical situation to explore the potential impact that the trusts could have on total plaintiff compensation and on payments by defendants that remain solvent. The effect of the trusts on total plaintiff compensation is the amount received in the post-reorganization scenario less the amount received in the pre-reorganization scenario. The trusts' effect on payments by defendants that remain solvent is defined similarly.<sup>2</sup>

We drew on experts for information about the ways in which the trusts and tort system relate to each other in different states. We conducted individual and group interviews with representatives of the plaintiff bar, defense bar, and the trusts, all on a confidential basis. For each of the six states, we sought and obtained cooperation of plaintiff and defense attorneys who practiced in the state. Overall, we interviewed 20 defense attorneys, 11 plaintiff attorneys, and six trust managers or counsel, some of them multiple times. We also reviewed relevant state statutes, court rules, and controlling appellate opinions.

## **Results: Linkages Between Trusts and Tort Cases**

We found a great deal of variation across states with regard to how trust compensation enters into the determination of tort awards. This variation is caused by differences in liability standards and practices that determine when trust claims must be filed during a tort case, whether setoffs are allowed, and whether fault can be assigned to bankrupt firms.

### **Information Sharing**

Courts in the six states typically require the disclosure of the claim forms for trust claims that have been filed. However, plaintiffs are seldom required to file trust claims

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<sup>2</sup> We do not consider the transition period between the time a firm files for reorganization and when a trust is paying claims in its place. We thus focus on the longer-run impact that the replacement of solvent defendants by trusts can have.

before trial. Courts in New York City and in Montgomery County, Pennsylvania, require all trust claims to be filed before trial, but there is no such requirement in the other jurisdictions we examined. When trust claims are not filed prior to trial, defendants will not receive setoffs for trust payments and might not have the information they need to assign fault to bankrupt firms or to pursue indirect trust claims postjudgment.

### **Setoffs**

Four of the states examined (Illinois, New York, Texas, and West Virginia) allow setoffs for all pre-verdict trust payments; Pennsylvania and California do not. Defendants in California do not receive setoffs for that portion of a trust payment the court attributes to noneconomic damages. However, the same is true for noneconomic damage settlements by solvent parties. In Pennsylvania, setoffs have typically been allowed only when the trust has been assigned fault, but, in contrast to solvent parties, trusts typically cannot be assigned fault in Pennsylvania. Pennsylvania law regarding setoffs for trust payments, however, might be changing.

### **Indirect Trust Claims**

In joint-and-several-liability states, the verdict defendant will typically be able to recover from a trust if it fully satisfies the judgment and meets the exposure and other requirements that apply to the direct claimant. However, the defendant often needs the plaintiff's cooperation to develop the information required to bring a trust claim, and such cooperation is uncertain. When liability is several, a verdict defendant does not cover the liability of other parties and thus will not be able to bring an indirect claim against a trust.

### **Limitation on Trust Payments**

Provisions at some trusts prohibit payments to direct claimants when the trust's liability has been satisfied by another party and require direct claimants to indemnify the trust for future indirect claims. Such provisions prevent trusts from paying more than once on the same injury and reduce the likelihood that a plaintiff will receive more than the full value of injury. Some trusts, however, do not have such provisions. In any case, our interviews suggest that most trusts are on the lookout for circumstances in which an injured party would receive trust compensation for damages that were covered by another source.

## **Results: Effects on Total Plaintiff Compensation and Payments by Solvent Defendants**

Our findings indicate that the potential effects of the replacement of once-solvent defendants by trusts are very different in states with joint-and-several liability than in states with several liability.

In states with joint-and-several liability, total plaintiff compensation should not change. That is because of setoffs for pre-verdict trust payments, the availability of indirect claims, and trust provisions that require the direct claimant to indemnify the trust for subsequent indirect payments. In contrast, payments by defendants that remain solvent will likely increase in these states. If all potential claims are brought against the trusts, payment by defendants that remain solvent will increase by the amount that the bankrupt firms would have paid in the pre-reorganization scenario, less the amount covered by the trusts. Such an outcome is consistent with the intent of joint-and-several liability: A plaintiff can recover from any one defendant, and the defendant is responsible for the shares of other defendants that cannot be collected. However, if information on exposure to the bankrupt firms' products and practices is not developed and neither direct nor indirect claims are brought against some trusts, then payments by solvent defendants could increase further. In the extreme, all trust money can be left on the table, and the defendants that remain solvent can be required to cover the entire amount that would have been paid by the bankrupt firms in the pre-reorganization scenario. In other words, the solvent defendants do not receive credit for the compensation available from the trusts.

In several-liability states, the replacement of once-solvent defendants by trusts can cause total plaintiff compensation to increase, decrease, or remain unchanged. Payments by defendants that remain solvent can increase or remain unchanged. Which outcomes occur depends on the extent to which the jury assigns fault to the bankrupt firms in the post-reorganization scenario. If the solvent defendants are successful in persuading the jury to assign the same fault to the bankrupt firms in the pre- and post-reorganization scenarios, then total plaintiff compensation will decrease, and payments by the defendants that remain solvent will remain unchanged. If, on the other hand, the bankrupt firms are assigned less fault than would have been the case in the pre-reorganization scenario, total plaintiff compensation and payments by the defendants that remain solvent can increase. In the extreme, the plaintiff can receive full compensation in the tort system and then receive additional compensation from the trusts. Such an outcome is not consistent with the doctrine in several-liability states that holds defendants responsible for only their share of the fault. Although the additional trust payments benefit current plaintiffs, they can disadvantage future plaintiffs in several-liability states. The additional trust payments deplete trust assets, reducing the amount available for future plaintiffs. If, for example, no solvent party is found liable in a future case, then the plaintiff's only source of compensation will be the trusts. Additional

trust payments to current plaintiffs could thus translate into lower total compensation for the future plaintiff.

Our findings underscore the importance of information on exposure to the products and practices of the bankrupt firms in determining the trusts' effects on plaintiff compensation and on payments by defendants that remain solvent. There is a great deal of dispute between plaintiff and defense attorneys over who is responsible for developing evidence on the products and practices of bankrupt firms. Plaintiffs' attorneys argue that defense attorneys can use discovery tools to uncover exposure information. Defense attorneys respond that plaintiffs' attorneys can influence the exposures plaintiffs recall during the court case and that, without plaintiff cooperation, they will not succeed in assembling the information needed to recover from the trusts. We have not examined the dynamics of the discovery process in this study. We note, however, that the stakes regarding the development of this information are greater for both plaintiffs and solvent defendants in states with several liability than they are in states with joint-and-several liability—a factor that could create different incentives to investigate (or to not investigate) exposure information.

Some states have addressed the disputes between plaintiffs and defendants regarding the investigation and filing of trust claims. Plaintiffs in New York City are required to file all trust claims at least 90 days before trial, and West Virginia plaintiffs are required to complete a good-faith investigation of all trust claims no later than 120 days before trial. These rules have the potential to significantly affect outcomes for plaintiffs and the defendants that remain solvent.

## Conclusion

In summary, our analysis identifies a range of potential outcomes for plaintiffs and defendants—outcomes that depend on liability regime, court procedures, and the behaviors of plaintiffs, defendants, and their attorneys. In some cases, the replacement of once-solvent defendants by trusts increases total plaintiff compensation. This increase in total compensation can come at the expense of future plaintiffs. In addition, we have shown that payments by solvent defendants can increase, sometimes by more than the amount of the bankrupt firms' pre-reorganization liability that is not covered by the trusts. We have also identified circumstances under which total plaintiff compensation decreases, as well as circumstances under which total plaintiff compensation and payments by solvent defendants remain unchanged.

Data on total plaintiff compensation over time are needed to determine which outcomes occur in practice. Analysis is also needed to evaluate the performance of the current system and to suggest reforms that will improve outcomes.