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# Bankruptcy Trusts, Asbestos Compensation, and the Courts

Over the past ten years, payments by asbestos bankruptcy trusts have played an increasing role in compensation for asbestos injuries. Fifty-six such trusts have been set up on behalf of asbestos defendants that have declared bankruptcy, and payments from these trusts have risen rapidly. As of 2008, the largest 26 trusts had paid \$10.9 billion on 2.4 million claims.

Because payments coming from trusts and from tort defendants are not explicitly coordinated, it is not clear how the replacement of once-solvent defendants by trusts is affecting plaintiff compensation and payments by defendants that remain solvent. In some cases, plaintiffs appear to be able to recover payments once in the tort system and then again for the same injuries from the trusts. Some also argue that payments by remaining defendants are not being properly adjusted to account for the compensation available from the trusts.

A recent RAND study examines these issues. The researchers describe how trust payments are factored into tort awards in different states. Although the researchers were not able to determine what actually occurs in practice—data on tort awards over time are simply not available—they describe the potential effects trusts can have on plaintiff compensation from trusts and tort combined and on payments by solvent defendants.

The study focuses on six states—California, Illinois, New York, Pennsylvania, Texas, and West Virginia—which vary in their statutory laws and court rules. California, New York, and Texas have adopted some form of several liability. In these states, a defendant’s liability can be limited to the portion of the harm for which it is responsible. Asbestos liability in Illinois, Pennsylvania, and West Virginia, on the other hand, is joint and several.<sup>1</sup> In these states, the plaintiff can recover the entire judgment from any one of the liable defendants.

<sup>1</sup> Since this study, Pennsylvania has changed to a several-liability regime.

## Abstract

People with asbestos injuries are increasingly receiving compensation from trusts set up by bankrupt asbestos defendants. A recent report documents how courts handling asbestos cases consider payments by the trusts when determining compensation. Focusing on six states, the researchers find great variation in the coordination between the trusts and the courts, which influences both compensation and payments made by solvent defendants. These differences are largely due to the different liability regimes across states.

## Interactions Between Systems

The differences between the two liability regimes, it turns out, have a strong effect on the interactions between the trusts and tort system and, ultimately, on compensation. The researchers highlight four ways in which trusts and tort cases can be linked and compare how these linkages work under different liability regimes.

**Information Sharing.** Courts in the six states typically require the disclosure of any trust claims on file. However, plaintiffs are seldom required to file trust claims *before* trial. Plaintiffs are required to file claims before trial in New York City and in Montgomery County, Pennsylvania, but not in the other jurisdictions examined. When such claims are not filed before trial, defendants will not receive setoffs for trust payments and might not have the information they need to assign fault to bankrupt firms.

**Setoffs.** Four of the states examined (Illinois, New York, Texas, and West Virginia) allow setoffs for all trust payments that occur during the tort case; in some circumstances, Pennsylvania and California do not.

**Indirect Trust Claims.** In joint-and-several liability states, a defendant that pays a full tort

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judgment will typically be able to recover from a trust, following the tort case, if it can develop the information required to bring a trust claim. When liability is several, a verdict defendant does not cover the liability of other parties and thus will typically not be able to bring an indirect claim against a trust.

**Limitation on Trust Payments.** To prevent trusts from paying more than once on the same injury, some trusts prohibit payments to direct claimants when another party has satisfied the trust's liability, and they require the direct claimant to indemnify the trust for future indirect claims.

### **Differences in Total Compensation to Plaintiffs**

It is not surprising that the different ways of handling trust claims in lawsuits should lead to different outcomes for plaintiffs and the remaining defendants. In states with joint-and-several liability, total plaintiff compensation should not be affected. In several-liability states, however, plaintiff compensation could increase, decrease, or remain unchanged from what it would have been before the trusts were established. If the solvent defendants have enough evidence to persuade the jury to assign the same fault to the bankrupt firms as the jury would have done before they were reorganized, then total plaintiff compensation will decrease. But if defendants do not have access to that information, then total plaintiff compensation can increase. Such increases can jeopardize future plaintiffs if trust assets become depleted by the time their claims are filed.

### **Differences in Payments by Solvent Defendants**

When trusts replace once-solvent defendants in joint-and-several-liability states, payments by solvent defendants will likely increase. Such increases are consistent with principles of joint-and-several liability, which require the remaining defendants to pay the difference between what the bankrupt defendants would have paid prebankruptcy and the amount paid by their trusts. However, if information on the plaintiff's exposure to the bankrupt firm's products and practices is not developed during the tort case 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 cover the entire amount that would have been paid by the bankrupt firms before entering bankruptcy.

In several-liability states, payments by solvent defendants can increase or remain unchanged, depending on the extent to which the jury assigns fault to the bankrupt firms. Increases in payment from the defendants that remain solvent are not consistent with the doctrine in several-liability states that holds defendants responsible for only their share of the fault.

The study findings underscore the importance of developing information on exposure to the products and practices of 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 such information. Plaintiffs' attorneys argue that defense attorneys can use discovery tools to uncover this evidence. Defense attorneys respond that plaintiffs' attorneys can influence what plaintiffs recall during the court case and that, without plaintiff cooperation, defense attorneys will not be able to uncover the information needed to obtain payment from the trusts or assign fault to bankrupt firms. As the researchers point out, the stakes 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 evidence of exposure.

### **Conclusion**

The authors demonstrate how liability regime, court procedures, and the behaviors of plaintiffs, defendants, and their attorneys affect total plaintiff compensation and payments of solvent defendants. In some cases, the replacement of once-solvent defendants by trusts increases total compensation for current plaintiffs, an outcome that could limit resources available to future plaintiffs. In other cases, 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. The authors also point to cases in which total plaintiff compensation could decrease or payments by solvent defendants remain unchanged.

The authors emphasize that data are needed on total plaintiff compensation over time to determine which outcomes actually occur in practice. Further analysis is also needed to evaluate the performance of the current system and to suggest reforms that will improve outcomes. ■

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