

Bankruptcy Trusts Complicate the Outcomes of Asbestos Lawsuits

Key findings:

- Exposure to asbestos in any product of a bankrupt firm is less likely to be identified in the interrogatories and depositions of a tort case after the firm declares bankruptcy.
- The more time that passes between a firm’s bankruptcy and the date a lawsuit is filed, the less likely it is that any product of the bankrupt firm will be identified.
- The decline in product identification in interrogatory responses is not offset by a rise during deposition.
- Plaintiffs and defendants disagree about whether these findings are a cause for concern.

More than 100 companies have gone bankrupt at least in part because of asbestos lawsuits, and the number keeps rising. As a result of these bankruptcies, contemporary asbestos litigation now involves both lawsuits against solvent defendants and claims for compensation filed with specially created asbestos bankruptcy trusts. RAND researchers examined the interaction between these two compensation systems. Their study offers evidence that exposure to asbestos in any product of a bankrupt firm is less likely to be identified in a tort case after the firm declares bankruptcy. This fact complicates the business of establishing liability and compensation in the tort system.

The outcome of an asbestos lawsuit depends on whether evidence of exposure to any product of a bankrupt party is introduced in the case. If it is not, the remaining solvent defendants at trial could end up paying more than they otherwise would have had such evidence been developed. Plaintiffs might also receive more in compensation from the courts and trusts combined if fault is not allocated to the bankrupt parties in the tort case.

This study examined how often the products of 43 firms that went bankrupt between 1998 and 2010 were mentioned in mesothelioma cases brought by two sets of plaintiffs with similar exposure histories: 47 plaintiffs who worked at the U.S. Navy Yard in Brooklyn, New York, between 1940 and 1949 and 39 plaintiffs who joined the Navy between 1950

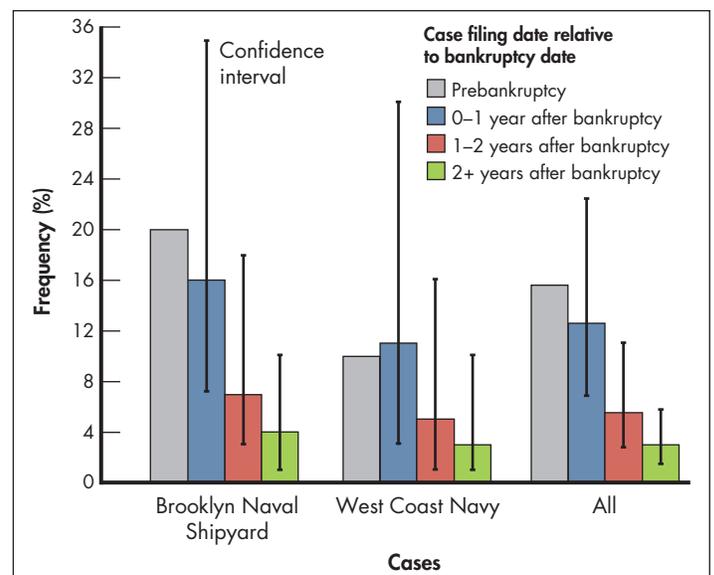
and 1954 and were stationed at West Coast bases or on ships that were serviced on the West Coast.

Researchers compared the rate at which a firm’s products were identified before and after bankruptcy, either in interrogatories or in depositions. Answers to the interrogatories were completed by plaintiffs’ lawyers and paraprofessionals and typically were submitted early in the cases. Depositions typically occur later in the process, with questions asked by the defense and answered by the plaintiff, family members, or coworkers.

Product Identification in Interrogatories

Results from the review of interrogatories alone (shown in Figure 1) indicate that the more time that passes between a firm’s bankruptcy and the date a tort case is filed, the less likely the bankrupt firm’s products are to be identified in the tort case. For Brooklyn Naval Shipyard cases, a pre-bankruptcy identification rate of 20 percent falls to very low levels—4 percent—for cases filed two years or more after the firms filed for bankruptcy, a statistically significant decline. The prebankruptcy identification rate is lower for the West Coast Navy cases, and the rate also appears to decline as

Figure 1. Frequency of Product Identification in Interrogatories After Bankruptcy



more time passes after bankruptcy. However, because of the modest sample size, these latter trends are not statistically significant.

In Figure 1, the set of bars on the right shows the average effect for all cases combined. The smaller confidence intervals (that is, greater accuracy) are a consequence of the larger sample size.

Product Identification in Depositions

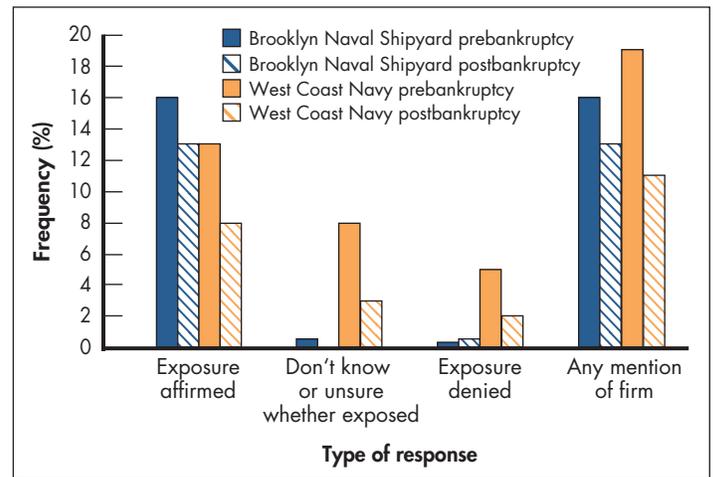
If the number of products plaintiffs identify in interrogatories declines after bankruptcy, one might expect additional products to be identified during depositions. Examining cases for which both interrogatories and depositions were available, researchers tallied whether products from any of the 43 products included in the study were identified in the deposition, and, if they were, whether the exposure was affirmed or denied or whether plaintiffs were unsure about whether they were exposed.

As Figure 2 shows, fewer firms were identified in depositions after bankruptcy than before, and there is no indication of a rise in the frequency with which plaintiffs either denied or were unsure about exposure. This suggests that defendants do not attempt to counter the decline in product identification in interrogatories with more-aggressive questioning in depositions.

Views Are Sharply Divided About Whether These Findings Are a Cause for Concern

Are these findings a cause for concern? Not surprisingly, plaintiffs and defendants give different answers to this question. Plaintiffs' attorneys argue that the system is working. Some believe that it is appropriate for them to focus on the solvent defendants because doing so furthers their clients' interests by maximizing the compensation they could receive for the harms they suffered. Plaintiffs' attorneys interviewed for the study remarked that, because solvent defendants are the only ones available to be sued, pursuing liability claims against those firms is both logical and appropriate. Some plaintiffs' attorneys further noted that defendants have many options when it comes to investigating and introducing potential exposures to bankrupt defendants' products: They can explore exposures to products of bankrupt firms during depositions, or they can introduce ship logs and other information on work history to establish exposure. The information about insolvent defendants' products, plaintiffs contend, is widely known and available for introduction—by the defense—as part of the defense's litigation

Figure 2. Product Identification in Depositions Before and After Bankruptcy for Cases with Both Interrogatories and Depositions



strategy if it so chooses. Plaintiffs' attorneys point out that, even if product-identification rates in interrogatories and depositions decline postbankruptcy, all exposures could end up being identified if the case proceeds to verdict. If a case settles before verdict, those settlements are voluntary on the defense's part.

Defendants and defense attorneys, on the other hand, claim that a falling rate of product identification after bankruptcy is of major concern. Although defense attorneys can hire experts to prove that a plaintiff was exposed to the product of a bankrupt party, doing so is much more expensive and less persuasive than a plaintiff's acknowledgment of exposure to such products. Defendants and defense attorneys contend that case-management orders require plaintiffs to identify, during pretrial discovery, *all* exposures to asbestos-containing products, not just the products of the solvent companies they are pursuing in litigation. Consequently, they argue for modifying case-management orders to clarify that plaintiffs must disclose, in interrogatory responses, all exposures to asbestos-containing products, regardless of whether a product was produced by a currently bankrupt firm. They also support expanding and better enforcing requirements that trust claims be filed before trial.

The researchers do not take a position in this debate but offer empirical evidence that should help elected officials, judges, and lawyers decide whether the situation merits a policy response.

This brief describes work conducted within the RAND Institute for Civil Justice and documented in *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases*, by Lloyd Dixon and Geoffrey McGovern, RR-907-ICJ, 2015 (available at www.rand.org/t/RR907). To view this brief online, visit www.rand.org/t/RB9830. The RAND Corporation is a research organization that develops solutions to public policy challenges to help make communities throughout the world safer and more secure, healthier and more prosperous. RAND is nonprofit, nonpartisan, and committed to the public interest. RAND's publications do not necessarily reflect the opinions of its research clients and sponsors. RAND® is a registered trademark. © RAND 2015

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