

Asbestos

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**A commentary article
reprinted from the
September 7, 2011 issue of
Mealey's Litigation Report:
Asbestos**



Commentary

Pennsylvania Moves Forward With Considering Asbestos Trust Recoveries When Calculating Tort System Awards

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Over sixty trusts have been established or proposed to collectively form a \$30-plus billion privately funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system.¹ “Trust outlays have grown rapidly since 2005.”² According to one study, “For the first time ever, trust recoveries may fully compensate asbestos victims.”³

In the absence of an interface between the trust and tort systems, asbestos claimants can potentially “double dip” — obtain trust recoveries and tort damages for the same injury — while the thousands of asbestos personal injury lawsuits filed each year threaten the existence of “companies far removed from the scene of any putative wrongdoing.”⁴ Most of today’s asbestos defendants were formerly second or third tier “peripheral” defendants — entities that had little, if anything, to do with manufacturing or supplying asbestos-containing

materials.⁵ One former plaintiffs’ attorney described the litigation as an “endless search for a solvent bystander.”⁶ Meanwhile, through bankruptcy court proceedings, entities that played a significant role in causing claimants’ asbestos-related injuries have channeled their asbestos liabilities into trusts, insulating themselves from tort claims in perpetuity.⁷

As the asbestos litigation continues to force otherwise viable corporations into bankruptcy,⁸ employers left to defend asbestos lawsuits in the tort system have struggled to convince state legislators⁹ and bankruptcy courts¹⁰ to provide assistance in considering asbestos trust recoveries when calculating tort system awards. This is not surprising, however, since the complexity and nuance of the bankruptcy trust system and the strong efforts of the trial bar have made legislative reform a challenge,¹¹ and federal bankruptcy courts must reconcile multiple competing interests (e.g., the debtor, past and future asbestos claimants, the debtor’s liability insurers, and other creditors), which are, in those judges’ view, paramount to the interests of tort system defendants. Accordingly, the most immediate path to reform appears to run through the trial courts, because of their familiarity with the issues and ability to address bankruptcy trust recoveries within the unique framework of the laws of a particular jurisdiction.¹²

To a large extent, the task of convincing trial judges to account for bankruptcy trust recoveries in asbestos personal injury lawsuits has been an uphill battle. Existing statutes and judicial precedents do not account for the

unique phenomenon of tens of billions of dollars of tortfeasors' money flowing to tort claimants outside of the civil justice system. Indeed, there is no comparable situation in which, under the dictates of federal law, a group of tortfeasors can compensate all future claimants outside of the tort system, while the same claimants can seek complete recoveries for the same injuries in the courts. Tort system defendants face a continuing diminution of solvent co-defendants, with a concomitant increase in the asbestos trust compensation pool,¹³ but the statutory and common law have not evolved to reduce the disproportionate compensation burden imposed upon those who remain in the tort system.

Until recently, state court judges have relied upon the absence of statutory or case law addressing trust recoveries directly as a basis for holding that the bankruptcy trust recoveries should continue to exist independently of the tort system.¹⁴ This conclusion, however, is unjustified by logic, and ignores the role of equity to provide relief where the existing law is inadequate.¹⁵ Pennsylvania courts now have an opportunity to address this unfairness through the simple imposition of straightforward and sound equitable remedies.

On August 23, 2011, the Pennsylvania Superior Court held oral argument in an appeal, *Marlene Reed v. Honeywell International, Inc.*, Nos. 3022 EDA 2010 and 3023 EDA 2010, in which the mid-level appellate court will decide whether a trial court properly concluded that equity enables a court to deduct bankruptcy trust recoveries from an asbestos plaintiff's tort system recovery when the claims arise from the same alleged injury. The facts of *Reed* are straightforward, and, on their face, compel the affirmance of the trial court's order.

In *Reed*, plaintiffs' decedent, Frederick Lewis was a career brake mechanic who died as a result of mesothelioma, a cancer of the lining of the lungs that is often associated with asbestos exposure. In a reverse bifurcated trial, the jury awarded plaintiffs \$492,007 in damages against Honeywell International, Inc. (formerly known as Allied Signal, Inc., as successor in interest to the Bendix Corporation).¹⁶ The trial court found that plaintiffs had already collected \$149,093 for the same injuries from five asbestos bankruptcy trusts (i.e., Manville, Celotex, Armstrong, U.S. Gypsum, and National Gypsum). The court deducted the prior recoveries from the jury award and entered judgment

in favor of plaintiffs for the net amount of their damages, plus interest and "delay damages."

Plaintiffs did not dispute that the Manville (\$26,250) and Celotex (\$18,583) settlements could be deducted from the judgment but disputed any deduction for the roughly \$105,000 in payments plaintiffs received from the Armstrong, U.S. Gypsum, and National Gypsum trusts. Plaintiffs' post-trial argument focused on provisions in the three bankruptcy trust settlement releases that permit actions for contribution when there has been a verdict or settlement by other defendants.¹⁷ Plaintiffs also apparently noted Pennsylvania precedents interpreting the existing version of the Pennsylvania Uniform Contribution Among Joint Tortfeasors Act ("UCATA")¹⁸ as prohibiting trial courts from allocating verdict "shares" to bankrupt entities, and which purport to limit a tort system defendant's recourse to contribution claims against the bankruptcy trusts.¹⁹ Accordingly, without any regard for the fact that plaintiffs had already recovered almost one-third of their damages from the five trusts, plaintiffs urged the trial court to ignore those recoveries and force the lone solvent trial defendant to pay virtually all of their damages.

The trial court found that Plaintiffs failed to show that there was a significant distinction between the Johns Manville and Celotex trust settlement releases and the releases of the other trusts. All of the trust settlements could be interpreted to provide for a pro tanto release. Furthermore, in balancing the various competing concerns, the trial judge concluded that "a number of developments in bankruptcy and asbestos litigation. . .obviate against contribution as the best remedy for implementing the goals of the UCATA."²⁰ First, "the Pennsylvania Supreme Court has stated that the UCATA allows a verdict reduction based on the Trust Distribution Process as the most equitable distribution of bankruptcy trust assets."²¹ Second, where plaintiffs have already received trust settlements, "[i]t would simply be a waste of time and resources to require [the trial defendant] to seek contribution from the trusts. . .[and] could further delay compensation for the Plaintiffs."²² Thus, in the absence of an adequate remedy at law — by way of an allocation of responsibility to the trusts on the verdict form or a contribution claim against the trusts — the trial judge recognized the need for an equitable solution. The court interpreted Pennsylvania Rule of Civil Procedure 227.1 (Post-Trial Relief) as authorizing it to invoke equitable remedies in this instance.²³

The trial court's ruling is both logically and legally correct. Decisions prohibiting trial courts from allocating verdict "shares" to bankrupt entities — which date back to trials that took place when significantly fewer bankruptcy trusts paid significantly fewer dollars to injured plaintiffs — do not preclude the imposition of common sense equitable remedies, and do not require courts to abandon Pennsylvania's prohibition upon double recoveries for the same injury.²⁴ Pennsylvania law unquestionably permits courts to fashion equitable remedies to address situations that the statutory and case law fail to address adequately. Moreover, the imposition of practical solutions should not be forestalled by the absence of case law explicitly instructing the trial court to apply common sense. Indeed, when faced with plaintiffs' argument that a set-off for the trust recoveries was inappropriate because evidence was not presented at trial as to the decedent's exposure to the bankrupt entities' asbestos-containing products, the court pointed out that plaintiffs had accepted trust money, precluding them from "argu[ing] that there was no evidence of exposure to said manufacturers' products presented at trial in order to effect a double recovery."²⁵ Thus, the trial court recognized that simply ignoring the real-world impact of tens of billions of dollars flowing to tort system plaintiffs from insolvent tortfeasors was not an appropriate means of computing an award.

The trial court's holding represents a positive step in the right direction. Additional equitable remedies also may be available to account for bankruptcy trust recoveries. For example, equitable remedies can extend to allocating specific portions of plaintiffs' damages to the trusts from which they are eligible to recover. Nevertheless, since the equitable remedy that is appropriate to address any particular situation will depend upon the facts of the specific case and the remedies available in a particular jurisdiction, the Superior Court need not define the limits of a trial court's equitable powers when dealing with bankruptcy trusts. The court could take a significant step forward simply by recognizing that equitable remedies are appropriate for addressing trust recoveries.

Endnotes

1. See Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (2010 Rand Corp.). As

of year-end 2008, active asbestos bankruptcy trusts held assets worth \$18.2 billion, and eight of nine proposed trusts held additional initial assets of \$14.5 billion. See *id.* at xiii.

2. Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* xi (2011 Rand Corp.).
3. Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006), available at <http://www.bateswhite.com/medias/287.pdf>. For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average \$1.2 million from active and emerging asbestos bankruptcy trusts, see Charles E. Bates et al., *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1 (Sept. 2, 2009), available at <http://www.bateswhite.com/medias/229.pdf>, and could receive as much as \$1.6 million. See Charles E. Bates et al., *The Claiming Game*, 25:1 Mealey's Litig. Rep.: Asbestos 27 (Feb. 3, 2010), available at <http://www.bateswhite.com/medias/2.pdf>.
4. Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, abstract available at 2001 WLNR 1993314.
5. The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. See Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks — Insights*, Apr. 2010, at 1, available at http://www.com/1492/Dislosures/Insights_4-15-10.pdf.
6. 'Medical Monitoring and Asbestos Litigation' — A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig Rep: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).
7. See William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 Norton J. Bankr. L. & Prac. 257 (2008).
8. See Dixon et al., *supra*, at 25 ("Parties that follow asbestos litigation closely have identified 96 companies that have filed for bankruptcy in which liability for asbestos tort cases was addressed.").
9. For instance, a 2011 Texas bill that sought to impose requirements on asbestos personal injury claimants to

- make claims with available trusts and to disclose all such claims, payments, and the information in the submissions underlying them was left pending in committee. *See generally* Texas Civil Justice League, *H.B. 2034 Halts Abuses in Asbestos Lawsuits*, Mar. 3, 2011, available at <http://www.tcjl.com//in-lawsuits>.
10. In two pending bankruptcy proceedings, EnPro Industries subsidiary Garlock Sealing Technologies (*see In re Garlock Sealing Technologies LLC*, No. 10-31607, *pet. filed* (Bankr. W.D.N.C. June 5, 2010) and RPM International subsidiaries Specialty Products Holding Corp. and Bondex International (*see In re Specialty Prods. Holdings Corp.*, No. 10-11780, *pet. filed* (Bankr. D. Del. May 31, 2010)), "have taken a hard stance against trusts by demanding greater transparency" because the debtors believe that if claims submission information were available they would have the opportunity to argue for reduced financial exposure for liabilities. Carolyn Okomo, *Metastasizing Petitions*, Daily Deal, Dec. 15, 2010, available at 2010 WLNR 25747226. Recently, U.S. Bankruptcy Judge Judith Fitzgerald "denied Bondex's request for details on payments that some asbestos-victims' trusts may have made to people who also claimed to have been injured by Bondex's home-repair products." Steven Church, *Bondex, Rust-Oleum Maker Unit in Bankruptcy, is Denied Asbestos Claim Data*, July 25, 2011, available at <http://www.bloomberg.com//07-25/in-.html>.
 11. Over time, there have been various comprehensive asbestos litigation reform efforts at the federal level, but those broad efforts have often encountered difficulty in the political process. *See, e.g.*, Patrick M. Hanlon, *An Elegy for the FAIR Act*, 12 Conn. Ins. L.J. 517 (2006).
 12. *See* David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol'y 589, 647-648 (2008).
 13. *See In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) ("The resources available to persons injured by asbestos are steadily being depleted."), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001).
 14. *See, e.g., Coulter v. Group, Inc.*, 230 P.3d 169 (Wash. Ct. App. Div. 1) (refusing defendant offsets for plaintiffs' future trust recoveries under Washington statutory law), *review denied*, 238 P.3d 503 (Wash. 2010); *Norris v. Crane Co.*, No. B196031, 2008 WL 638361, at *19 (Cal. Ct. App. 2 Dist. Mar. 11, 2008) (unpublished) (refusing defendant offsets for plaintiffs' future trust recoveries under California statutory law); *Scapa Dryer Fabrics, Inc. v. Saville*, 16 A.3d 159, 180-81 (Md. 2011) (holding that *only* the payments of those asbestos bankruptcy trusts whose organizing documents contemplate treatment of the trust as a "joint tortfeasor" for purposes of a state law contribution claim can offset Maryland tort judgments).
 15. *See, e.g.*, 30A C.J.S. *Equity* § 3 ("The office of equity is to supply defects in the law."); *Hill v. Nationwide Ins. Co.*, 570 A.2d 574, 576 (Pa. Super.) (recognizing that the role of equity is to afford relief where the law provides either no remedy or one that is less than "full, perfect and complete"), *appeal denied*, 581 A.2d 573 (Pa. 1990).
 16. *See Marlene Reed v. Allied Signal, Inc.*, Nos. 3022 EDA 2010 and 3023 EDA 2010 (Philadelphia, Pa. Ct. Com. Pl. Dec. 22, 2010), available at <http://www.bbs-law.com//.pdf>.
 17. *Reed, supra*, slip op. at 8.
 18. *See* 42 Pa. C.S. §§ 8321-8327. A series of prospective, recent amendments to Pennsylvania law, specifically 42 Pa. C.S. § 7102, *et seq.*, generally provide for several liability in multi-defendant tort actions and will likely affect the working, and relevance, of the Pennsylvania UCATA in future cases.
 19. *See Ball v. Johns-Manville Corp.*, 625 A.2d 650 (Pa. Super. 1993), *abrogated on other grounds, Baker v. ACandS*, 755 A.2d 664 (Pa. 2000); *Ottavio v. Fibreboard Corp.*, 617 A.2d 1296 (Pa. Super. 1992).
 20. *See Reed, supra*, slip op. at 11.
 21. *Id.* (citing *Baker*, 755 A.2d at 674).
 22. *Id.* at 13.
 23. *Id.* at 8.
 24. *See Brown v. City of Pittsburgh*, 186 A.2d 399, 402 (Pa. 1962) ("It has long been the law that for the same injury, an injured party may have but one satisfaction. . .").
 25. *See Reed, supra*, slip op. at 13-14. ■

MEALEY'S LITIGATION REPORT: ASBESTOS
edited by Bryan Redding

The Report is produced twice monthly by



1600 John F. Kennedy Blvd., Suite 1655 Philadelphia, PA 19103
1-215-564-1788

Email: mealeyinfo@lexisnexis.com Web site: <http://www.mealeys.com>
ISSN 0742-4647