

REPORT SHEDS LIGHT ON PARALLEL WORLD OF ASBESTOS BANKRUPTCY TRUSTS

by

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The RAND Institute for Civil Justice recently completed phase one of a larger research project to examine asbestos-related personal injury trusts established pursuant to Section 524(g) of the Bankruptcy Code. This comprehensive report, “Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts,”¹ provides a first-of-its-kind in-depth look at how these trusts are created, how they are organized, and how they operate. As the report explains, “Over time, companies with significant asbestos-related liabilities have filed for bankruptcy, and payments set up by bankruptcy courts have played an increasingly important role in the compensation of asbestos-related injuries. While the role of trusts in providing compensation to asbestos claimants has grown, information about the operating procedures and activities of these trusts is not readily available in a convenient form.” The report fills that critical information gap, peeling back the shadowy cover that has shrouded these trusts.

According to the report, “[p]arties that follow asbestos litigation closely have identified 96 companies that have filed for bankruptcy in which liability for asbestos tort cases was addressed.” It identified 63 trusts from this group that have been established or proposed, then closely examined 26 of the largest trusts to arrive at the following key findings:

- Approximately 575,000 claims were paid for a total value of \$3.3 billion in 2008. To put these numbers in perspective, a 2005 RAND report estimated that \$7.1 billion was paid by asbestos defendants in the tort system in 2002.
- 54 trusts were established as of June 2010 with a considerable acceleration in the total number of trusts in the second-half of the 2000s. Nine more trusts are in the pipeline, and there are undoubtedly more to come.
- The 26 selected trusts had assets totaling \$18.2 billion at the conclusion of 2008. This total does not include the assets of 4 recently formed trusts that had not filed financial statements as of 2009. The total also does not include the estimated assets of currently proposed trusts. Estimates of the initial assets of 8 of the 9 proposed trusts for which information is available total \$14.5 billion.
- While legislative and judicial reforms have made it increasingly difficult for claimants with nonmalignant injuries to recover in the tort system, so that cancer victims receive priority, the trust system remains a source of compensation for nonmalignant injury claims.
- A small group of plaintiffs’ firms serve as trustees for many of the trusts.

¹http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf

- There is typically no coordination between trusts to determine whether the evidence that a claimant submits to show that he or she was exposed to one manufacturer's products is consistent with evidence submitted to other trusts.
- It was "not possible . . . to determine the number of trusts providing payments to the same individual or the amount the trusts together pay to an individual claimant" due to the lack of publicly-available data. "This lack of information makes it difficult or perhaps impossible to evaluate the trusts' effect on the overall compensation provided to individual claimants and on the compensation paid by solvent defendants."

The study adds to a growing body of literature examining the trust compensation system. For example, a study by the Bates White consulting firm concluded, "For the first time ever, trust recoveries may fully compensate asbestos victims."²

The lack of transparency between the tort and bankruptcy systems may permit claimants to recover twice for the same injury—once from the trust fund system and again from the tort system. For example, another Bates White study estimates that mesothelioma plaintiffs in Alameda County (Oakland, California) will receive an average \$1.2 million from active and emerging asbestos bankruptcy trusts,³ and could receive as much as \$1.6 million.⁴ These sums are typically in addition to tort recoveries.

This lack of transparency may also encourage gamesmanship, leading some plaintiffs to tell one exposure history to a civil jury and a different exposure history to the trusts in order to maximize recoveries from each. Cleveland, Ohio Judge Harry Hanna exposed such conduct in 2007, when he found that a firm made allegations in open court that conflicted with documents submitted to bankruptcy trusts as to how a client developed cancer.⁵ *The Wall Street Journal* editorialized that Judge Hanna's ruling exposed "one of the darker corners of tort abuse" in asbestos litigation. "I never expected to see lawyers lie like this," Judge Hanna later said. "It was lies upon lies upon lies."⁶

To address these issues, the report supports calls for transparency between the trust and tort compensation systems to provide litigants, judges, and trust fund administrators with the full picture of an individual claimant's aggregate compensation from all sources. It may increase the willingness of judges to recognize civil defendants' legitimate interest in discovering information about plaintiffs' trust claims. In addition, the availability of substantial compensation from trust funds should alleviate pressure on courts to accept novel theories promoted by plaintiffs' lawyers to shift the liability of bankrupt companies onto peripheral defendants, thus perpetuating the decades-long asbestos litigation.

RAND's Institute for Civil Justice plans a second report that will examine how trust compensation or the potential for such compensation is addressed by state liability laws and considered during court proceedings and settlement negotiations. If courts do not adopt sound measures to discourage plaintiffs from pursuing double recoveries, then the now decades-long litigation will continue to grow increasingly unfair as plaintiffs pursue remote defendants and force even more companies into bankruptcy.

²Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 MEALEY'S ASBESTOS BANKR. REP. 1 (Nov. 2006); see also 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).

³See Charles E. Bates et al., *The Naming Game*, 24:15 MEALEY'S LITIG. REP.: ASBESTOS 1 (Sept. 2, 2009).

⁴See Charles E. Bates et al., *The Claiming Game*, 25:1 Mealey's LITIG. REP.: ASBESTOS 27 (Feb. 3, 2010).

⁵See *Kanianian v. Lorillard Tobacco Co.*, 2007 WL 4913164 (Ohio Ct. Com. Pl. Jan. 19, 2007).

⁶James F. McCarty, *Judge becomes National Legal Star, Bars Firm from Court over Deceit*, CLEV. PLAIN DEALER, Jan. 25, 2007, at B1.