

STATE COURT ENDORSES USE OF EQUITABLE POWERS TO REDUCE ASBESTOS SUIT DOUBLE-DIPPING

by
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Recently, the Pennsylvania Superior Court issued what is believed to be the first appellate-level decision to approve the use of a trial court's equitable powers to deduct bankruptcy trust recoveries from an asbestos plaintiff's tort system recovery for claims involving the same alleged injury. *See Marlene Reed v. Honeywell Int'l, Inc.*, 2011 WL 6645694 (Pa. Super. Ct. Dec. 6, 2011) (unpublished). The ruling is a significant step toward reducing the double dipping which threatens the financial viability of solvent defendants and unnecessarily depletes resources available to future claimants. The ruling is also significant for its impact on asbestos cases in Philadelphia, which has been named America's top Judicial Hellhole® for two consecutive years by the American Tort Reform Foundation.

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. *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.), available at http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf. According to one study, "For the first time ever, trust recoveries may fully compensate asbestos victims." Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 MEALEY'S ASBESTOS BANKR. REP. 1 (Nov. 2006).

In the absence of an interface between the trust and tort systems, asbestos claimants may "double dip" — obtaining trust recoveries and tort damages for the same injury — while the thousands of asbestos personal injury lawsuits filed each year threaten the existence of many companies that had little, if anything, to do with manufacturing or supplying asbestos-containing materials. 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.

As asbestos litigation continues to force otherwise viable corporations into bankruptcy, employers left to defend asbestos lawsuits in the tort system have struggled to convince state court judges to consider bankruptcy trust recoveries in asbestos personal injury lawsuits. Existing statutes and judicial precedents do not account for the unique phenomenon of tens of billions of dollars of

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tortfeasors' money flowing to tort claimants outside 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, but the statutory and common law have not evolved to reduce the disproportionate compensation burden imposed upon those who remain in the tort system.

The Pennsylvania Superior Court's *Reed* decision demonstrates that trial courts have an opportunity to address this double dipping through the imposition of basic, sound, equitable remedies.

The facts of the case are straightforward. 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). 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."

The plaintiffs challenged the deduction of amounts received from three of the five bankruptcy trusts based on distinctions in the releases. The plaintiffs also argued that since these trusts did not appear on the verdict form (by operation of Pennsylvania law), the liability of the trusts as joint tortfeasors was not established. The trial court found this argument "without merit on its face," given that the plaintiff applied for and accepted bankruptcy trust money on the basis that the companies were liable for the decedent's development of mesothelioma. The plaintiff "cannot now come before this court and argue that there was no evidence of exposure to asbestos from said manufacturer's products presented at trial in order to effect a double recovery."

The appellate court agreed. A three-judge panel unanimously found the trial court had equitable powers to reduce a verdict to reflect the difference between a jury's verdict and the excess funds already paid to a plaintiff. Under Pennsylvania's Uniform Contribution Among Tortfeasors Act (UCATA), 42 Pa. Consol. Stat. § 8321 et seq., the court recognized that the settlement of a claim for the same injury by a joint tortfeasor reduces the claim against the other tortfeasors in the amount of the release. The court ruled that "a combined reading of the claims forms, affidavits and trust distribution process for the subject bankrupt entities provides a sufficiently reliable basis" for the trial court to have found that the companies were joint tortfeasors and that the UCATA "clearly allows the joint tortfeasors' settlement monies received by *Reed* to reduce the verdict against Honeywell."

The coordinating judge of Pennsylvania's Complex Litigation Center, Judge Moss, has issued an order applying to all asbestos cases that requires plaintiffs to disclose the amounts received from asbestos trusts. Under the appellate court's ruling, trial courts should use this discoverable and verified information to set off jury verdicts by funds that the plaintiff received from settling bankruptcy trusts.

Reed is both logically and legally correct. The decision recognizes that simply ignoring the real-world impact of tens of billions of dollars flowing to tort system plaintiffs from insolvent tortfeasors is not an appropriate means of computing an award. Given the availability of recovery from bankruptcy trust funds, *Reed* provides persuasive precedent for other courts to exercise their equitable powers to preclude double dipping in asbestos personal injury cases.