

NEW YORK COURT RULING IMPACTS “PERIPHERAL” ASBESTOS DEFENDANTS

by
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In a decision that is likely to substantially reduce asbestos defendants' potential liability in over 30,000 asbestos personal injury cases pending in the New York City area, New York State trial court Justice Helen E. Freedman recently ruled in four cases, *Tancredi, et al. v. AC&S, Inc., et al.*, 2002 N.Y. Misc.LEXIS 1459 (N.Y. Sup., N.Y. Co.), that, with respect to awards of noneconomic damages, asbestos defendants who are found by the jury to be 50% or less at fault (as usually occurs in these cases) are not liable for the entire award on a joint and several basis, but instead are liable only for their percentage share of fault. Most important, Judge Freedman, who is assigned to preside over all asbestos personal injury actions in the New York County court system, issued a declaratory ruling that the jury, when calculating the defendants' percentage share of fault for the plaintiff's noneconomic injuries, should also assess the degree of contributing fault of bankrupt nonparty tortfeasors. Thus, under this ruling, most solvent defendants in the New York City asbestos litigation are not likely to be required to absorb or bear responsibility for any portion of the bankrupt tortfeasors' fault for the plaintiff's noneconomic damages.

The court expressly acknowledged the significance of its decision, noting that because over sixty companies historically sued in asbestos cases have now filed for bankruptcy, "the bankrupt tortfeasors' shares of fault can comprise much or most of a large verdict." Those bankrupt entities were the "traditional" asbestos defendants, and the primary targets in the litigation, as they had either mined asbestos or manufactured or installed asbestos-containing products. In comparison, the solvent defendants, who have increasingly been brought into asbestos litigation in recent years, consist for the most part of either "downstream" users and distributors of asbestos-containing products or manufacturers of products in which the asbestos was encapsulated in some form. These "downstream" and peripheral defendants are likely to be the major beneficiaries of the Court's ruling in *Tancredi*, which recognizes that "low-fault, 'deep pocket'" defendants have been paying "a disproportionate share of damage awards."

The New York statute discussed in *Tancredi*, Section 1601(1) of the New York Civil Practice Law and Rules, provides that unless a plaintiff can show that he was not able with due diligence to obtain jurisdiction over a tortfeasor and join it as a defendant, the non-party tortfeasor's share of fault will be considered by the jury when calculating party-defendants' relative percentages of fault for the injury. The precise issue framed by the Court in *Tancredi* was whether under Section 1601(1) the plaintiffs were "unable to obtain jurisdiction" over several tortfeasors simply because the tortfeasors had filed for bankruptcy, triggering the automatic stay of any prosecution of claims against them, as set forth in Section 362 of the United States Bankruptcy Code. The plaintiffs argued that the automatic stay deprived the New York courts of any "effective jurisdiction" over the bankrupt entities and, therefore, that the bankrupt entities' percentage of fault should not be assessed or taken into account by the jury. The defendants argued that a bankruptcy filing by a tortfeasor does not "divest a plaintiff of jurisdiction that it might otherwise obtain over the bankrupt." The court noted that if the plaintiff's argument prevailed, and the bankrupt entities' percentage of fault were disregarded, in many of these cases a solvent defendant's percentage of fault would rise above fifty percent, causing that defendant, albeit peripheral,

to have to pay the entirety of what is usually a multi-million dollar damages award.

The court found that defendants had the better of the argument on this issue, expressly holding that the term "jurisdiction" as used in Section 1601(1) means "personal jurisdiction," rather than subject matter jurisdiction. Specifically, the court determined that "[p]ersonal jurisdiction is unaffected by a party's bankruptcy filing and the attendant automatic stay: a bankruptcy stay merely suspends other court proceedings outside the bankruptcy proceeding, and does not divest those courts of jurisdiction over the bankrupt." In reaching this conclusion, the court was mindful that its ruling would have an "immediate and powerful effect on the plaintiffs and defendants as they weigh the risks and benefits of litigating these four cases, as well as the entire docket of asbestos personal-injury lawsuits statewide." Given the thousands of asbestos personal injury claims still pending nationwide, and the continuing trend of bankruptcy filings by traditional and primary target defendants, the *Tancredi* decision is a hopeful sign that the remaining solvent defendants may not be required to bear more than their proportionately small and fair share of any noneconomic damages assessed in asbestos cases.

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