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NEW OHIO LAW EXPANDS TRANSPARENCY FOR ASBESTOS BANKRUPTCY TRUSTS

by
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My first exhaustive look into the asbestos abyss came four years ago, when I agreed to carry a reform bill in the Ohio House. Before then, I had heard about the bankruptcy trust situation only in passing. State legislators, after all, don't have much say in federal bankruptcy law except in the exemption area. What I found was nothing short of stunning, particularly to a suburban representative with a typical suburban law practice. The motivations, rewards, penalties and rules were contrary to good public policy. The entire industry seemed to chug along in a bizarre world unto itself, oblivious to social mores and impervious to legal attack.

At the top of the list of backwards policies is the near irresistible motive for plaintiffs' counsel to falsify their evidence. With upwards of 60 trusts from which to garner payment, and with very little collaboration, plaintiffs can collect from multiple trusts and viable defendants just by "adjusting" their evidence as to causation. The system rewards those who change the evidence to fit the defendant or trust. Rather than a rare occurrence, it seems the asbestos litigation industry has turned those two prohibitions into standard operating procedure. Unfortunately, as an Ohioan, I am particularly aware of this problem. As an important hub of manufacturing throughout the Twentieth Century, Ohio has been a hotbed of asbestos litigation. One of those cases resulted in our courts having to take well publicized action against a plaintiff's firm. In 2007, Cuyahoga County Common Pleas Judge Harry Hanna sanctioned a plaintiff's firm and one of its partners for various acts of misconduct in an asbestos case, including lying to the court regarding bankruptcy trust claims. *See Paul Davies, Plaintiffs' Team Takes Hit on Asbestos*, WALL ST. J., Jan. 20-21, 2007, at A4. In the end, everyone loses in instances like these. For the sake of fairness to defendants, and for the sake of public confidence in our judicial system, this process needs reform.

Another public policy concern is for the viable companies who are still being sued. In many cases the nexus with asbestos is tenuous, at best. In 2003, Ohio eliminated joint and several liability in favor of apportionment of liability. Where plaintiffs fail, or refuse, to provide information regarding the claims they've made against asbestos bankruptcy trusts, our attempt to make Ohio's litigation system more fair and predictable are thwarted. The remaining defendant companies have very little direct connection with asbestos and if all information was available to the court, many defendants would rightly avoid being found jointly and severally liable. These companies are providing valuable jobs and tax revenue for a

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number of states. Why would we want to have a judicial framework which drives these companies out of business?

Finally, most of the companies which manufactured asbestos, or which used significant quantities of it in their processes, have been bankrupted and their assets were used to fund the asbestos trusts. These trusts are designed to provide for all current and future claimants. Given the long latency period for most asbestos-related diseases, asbestos claims are likely to continue for years to come. An open and transparent compensation process benefits all claimants because it helps ensure that the trusts and the defendants are only compensating deserving claimants.

Due to these concerns, I introduced Ohio House Bill 380 in the 129th session of the Ohio General Assembly on November 15, 2011. . The legislation was intended to ensure that claimants provide a full accounting of all potential or filed trust claims as well as the evidence presented in those claims. Over the course of the next year, we conducted a dozen committee hearings in both chambers and held many meetings with interested parties to ensure that both sides of the debate were able to provide feedback on the legislation. The end result is a bill that respects plaintiffs' rights to compensation while providing a much needed dose of sunlight to the role of asbestos bankruptcy trusts. Among some of the key reforms:

- House Bill 380 is designed to ensure that the court and all involved parties are aware of the trust claims as early in the process as possible by requiring plaintiffs to disclose all claims within 30 days of the start of the discovery process.
- If plaintiffs make timely disclosures as required under the new law, then the usual procedure of these trials carries on with no delay.
- In some instances, defendants have a reasonable basis for believing that the plaintiff has not filed with possible responsible asbestos bankruptcy trusts. Defendants may ask the court for a motion to stay the case while the plaintiff files with the appropriate trusts. Should the court decide that such filings are warranted, the case is stayed until the plaintiff can show that the filing was made. This never becomes an issue if plaintiffs promptly file and honestly disclose all appropriate asbestos bankruptcy trust claims.
- Should a defendant discover that the plaintiff filed a claim(s) with a bankruptcy trust(s) that was in existence at the time a judgment was entered, the defendant may ask the court to reopen the judgment and adjust the award or provide other relief as necessary for up to one year after the entry of the judgment. This provision is in addition to the power of the court to reopen judgments under the Ohio Rules of Civil Procedure.

The provisions of Ohio House Bill 380 are very limited in scope – they are specifically designed to ensure transparency and openness between the asbestos bankruptcy trust claims and tort litigation processes. The legislation accomplishes two primary goals: (1) it requires claimants to disclose all existing bankruptcy trust claims; and (2) requires claimants to pursue all legitimate trust claims. Ohio House Bill 380 preserves the rights of claimants seeking compensation for asbestos-related injuries. It does not place a cap on the amount of compensation that can be sought nor does it limit the number of asbestos bankruptcy trusts with which a claimant may file.

More transparency and disclosure will go a long way to protect ongoing businesses, but such disclosure will not prevent plaintiffs from recovering 100% of their damages, nor should it. Legislation providing for trust transparency is fair and will preserve jobs and tax revenue for those states which choose to enact it.