TEXAS PUBLIC POLICY FOUNDATION
BillAnalysis

March 2015
Center for Economic Freedom

Unmasking Asbestos Fraud

Senate Bill 491 and House Bill 1492

by Kathleen Hunker, *Policy Analyst*

Background

Taken at face value, Texas law does not permit plaintiffs to recover more than what the factfinder awards them in damages. A deeper look, however, reveals that certain trial lawyers have learned how to game the system in asbestos litigation so as to secure payouts not only in excess of the defendant's share of responsibility but also far beyond what their client's injury actually warranted.

Plaintiffs in an asbestos lawsuit have two possible tracks in which to pursue compensation. They can initiate a suit against a solvent company that is alleged to be a source of their asbestos exposure or they can file a claim with an asbestos trust. Approximately 100 companies have declared bankruptcy under the weight of asbestos-related liability; asbestos trusts are the privately administered funds set up by these companies to handle all future claims.

By and large, asbestos trusts operate in secrecy. The annual report that the trusts submit to the U.S. Bankruptcy Court often include only the total number of claims received and reimbursed. The reports purposefully omit the identity of who submitted a claim, their exposure history, and the amount paid to each claimant. Additionally, most trusts view this information as part of settlement negotiations, which makes it privileged and therefore not discoverable outside of a courtroom subpoena.

Not ones to let an opportunity slip by, a flock of enterprising attorneys has exploited this dearth of transparency to hide evidence and submit inconsistent claims about their clients' asbestos exposure. This means that even as attorneys would blame one company in court, they would file a competing claim with an asbestos trust that attributed their client's exposure to a second company's product, confident that neither the courts nor the defendants would have the wherewithal to dig deeper.

The bankruptcy proceedings surrounding Garlock Sealing Technologies offer an instructive example. There the court permitted limited discovery in 161 cases where Garlock paid recoveries of $250,000 or more, "almost half" of which involved some form of evidence manipulation. The court observed, "[i]t was a regular practice by many plaintiffs' firms to delay filing Trust claims for their clients so that remaining tort system defendants would not have that information." Although the exact breadth of the corruption remains unknown, the presiding judge called it "a startling pattern of misrepresentation," and acknowledged that "more extensive discovery would show more extensive abuse."

Left unaddressed, the rampant fraud will have mounting repercussions on Texas litigants. As provided in the Texas Civil Practices and Remedies Code, tortfeasors only acquire joint and several liability when they act with specific intent to do harm or when the factfinder attributes to them at least 50 percent of responsibility for the plaintiff's loss. Without access to a claimant's full exposure history, the judge or jury may wrongly assign defendants liability past this threshold, putting them on the hook for the entirety of the plaintiff's injury rather than just the role they played—a disservice that is all the more likely as the plaintiffs' bar descends the chain of causation in its ever more frenzied search for solvent marks.

Even more worrisome, the inconsistent claims and higher payouts could sap asbestos producing companies of the funds needed to indemnify future Texans suffering from a debilitating illness. Most asbestos trusts already lack the assets to pay existing claims in full, and many solvent companies subjected to asbestos litigation teeter on the edge of bankruptcy. Refusing them the chance to apportion blame accurately means that more resources go towards plaintiffs with multiple avenues of relief instead of being saved for victims with a long latency period between exposure and disease.

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Common Sense Reform

Trial attorneys can manipulate the compensation system only because current rules deny defendants a reasonable opportunity to examine the evidence surrounding a claimant's alleged asbestos exposure. Senate Bill 491 and House Bill 1492 therefore take the common sense approach of breaking the monopoly plaintiff attorneys have over exposure evidence.

Specifically, both SB 491 and HB 1492 require that plaintiffs file their claims with existing trusts prior to initiating a suit against a solvent company. They also oblige plaintiffs to notify each party about the trust claim, including any and all documentation that establishes an asbestos-related injury as well as the forms that the claimants submit to an asbestos trust to qualify for compensation. To enforce this rule, the courts may decline to remand an action to trial court or, if the claimant already received compensation, vacate the judgment and order a new trial. Notably, the court only has this discretion upon a motion from the defendant.

In addition, the bills presume that the materials submitted in support of a trust claim are not privileged and therefore are open to discovery. The parties have explicit permission to use the materials as evidence for any issue relevant to adjudication, including proof of an alternate source of asbestos exposure and a basis on how to allocate responsibility for an exposed person's injury. Put differently, the proposed legislation prevents resourceful attorneys from brandishing asbestos trusts like a shroud to hide inconvenient facts.

Finally, SB 491 and HB 1492 provide a post-trial remedy to defendants in the event they paid for injuries that were at least in part attributable to the products associated with an asbestos trust. Specifically, the bills grant Texas courts the authority to modify the judgment if notice of a trust claim was not provided to the defendants or if the claim was made after the judgment to a trust already in existence. Plaintiffs therefore retain the option of pursuing relief from both solvent companies and asbestos trusts, but they will not be permitted to collect more than what their injury merits or force a defendant to assume responsibility for damages outside of its liability share.

Conclusion

Asbestos compensation has evolved in such a way as to solicit fraudulent conduct. Plaintiff attorneys exert exclusive control over the evidence surrounding their clients' asbestos exposure and have shown every willingness to use that advantage to trick the courts into conferring duplicate awards and assigning defendants higher liability than their conduct deserved. Senate Bill 491 and House Bill 1492 introduce some much-needed transparency into asbestos litigation. They ensure that the outcome of the litigation matches its purpose: to make injured Texas whole, not secure a financial boon at a defendant or forthcoming claimant's expense. ✯

900 Congress Ave., Suite 400 | Austin, Texas 78701 | (512) 472-2700 phone | (512) 472-2728 fax | www.TexasPolicy.com