

The Value Of Bankruptcy Trust Claims In Asbestos Defense

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As even the most casual television viewer is no doubt aware, plaintiffs law firms are airing advertisements exhorting asbestos-exposed individuals to take advantage of the billions of dollars to be claimed in the scores of asbestos-driven bankruptcy trusts. It seems that securing those dollars has become just as important to plaintiffs law firms as prosecuting the common law tort claims in court. Indeed, a cottage industry is developing to secure payments from the trusts.

Jurisdictions with active asbestos dockets are focusing on plaintiffs' bankruptcy trust claims, from whether and when they have to be disclosed in discovery to whether they may be included on verdict forms. To ensure that complete and accurate trust submissions are produced, it may be advisable to request or subpoena the claimant's entire file from the bankruptcy trust administrator, as opposed to relying solely on a plaintiff's production. Because some trust administrators will require Health Insurance Portability and Accountability Act releases from plaintiffs before producing unredacted claim forms containing protected information, it is a good idea to secure authorizations from plaintiffs to append with discovery requests and subpoenas. Even if a jurisdiction does not mandate disclosure of bankruptcy trust claims by a plaintiff or precludes them from being listed on a verdict form, the trust submissions with supporting affidavits can enhance the defense effort on several key fronts.

The dates of alleged exposure on the trust forms can help to build a timeline for a plaintiff's exposure history. For example, plaintiffs tend to indicate on a bankruptcy trust claim form that they worked at a specific jobsite at which they were exposed to amphibole asbestos for a specific period of time. This documentation can often be helpful at deposition and trial to cross-examine the plaintiff who suddenly downplays the exposure or length of employment at the specific jobsite. They, or another product identification witness, may testify to having worked or seen the plaintiff work on many jobsites in an unreasonably short period of time, often during the same time period that the plaintiff claimed to be at a jobsite cited in their bankruptcy trust claims. Even the most industrious plaintiff cannot be in two places at the same time. One may be able to refute a plaintiff's work history and exposure timeline in their case against solvent parties by producing contradictory exposure dates identified on the claim forms or supporting affidavits. In lung cancer cases, bankruptcy trust claim forms can also be useful to prove a plaintiff's smoking history.

The information in the claim forms may direct the defense to alternative exposure investigations. In addition to claiming exposure to other, specific asbestos-containing products (often containing amphiboles or crocidolite), an affidavit in support of the trust claim may provide more detail as to the



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types of products used, how they were used, with what frequency, and for what duration. This information can be used on cross-examination of the plaintiff or the product identification witness, at deposition or trial, to elicit other exposures or products which, in turn, dilute the contribution of the defendant's product.

The trust forms may also lead to the impeachment of the witness or plaintiff by what they do not contain. If the plaintiff or product identification witness describes exposures beyond those initially identified in the bankruptcy trust affidavit, then there may be value in cross-examining the plaintiff's expanding trial story with the trust affidavit. For clients whose product was also manufactured by now-bankrupt entities, a plaintiff's claim against one or more of those bankrupt entities weakens any identification of the solvent client's product. Even if a plaintiff testifies that they were unaware of the contents of a submission form or that attorneys submitted it on their behalf, some judges will instruct a jury that the statements made in claim forms and related documents should be considered admissions by the plaintiff.

Some bankruptcy trusts also require identification by the claimant of the exposure site or sites from an "approved jobsite list." For defendants, this identification may lead to jobsites that have not yet been disclosed in discovery, and exploring these jobsites may lead to new witnesses to testify about alternative exposures and additional asbestos-containing products at those jobsites, or to refute evidence of exposures to one's client's products. Affidavits executed in support of bankruptcy trust claims may identify the claimant's employer at the jobsites where the exposure is alleged. Defendants can pursue further investigation into these disclosed employers' personnel files, invoices, supply lists, job lists and customer lists, as well as jobsite asbestos abatement records, EPA or OSHA citations, or permits. Defendants can then compare this information with the dates and sites listed on the trust affidavit to once again pursue for credibility and to develop evidence of additional exposures.

Finally, if a claimant passes away before their deposition can be taken, then information in a previously filed bankruptcy trust claim may be the only firsthand (and, in claims with an accompanying affidavit, sworn) account of the plaintiff's alleged exposure. This information, if favorable to defendants over the testimony of co-workers or other product identification witnesses, may carry more weight with jurors because it comes directly from the decedent, and possibly before his or her lawsuit was filed.

The potential utility of bankruptcy trust claim submissions extends well beyond identification of alternative amphibole exposures. It can be an essential tool in preparing a case for trial, even if defendants are prevented from using the trust claims on verdict sheets.

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