

CIVIL JUSTICE RESPONSE AND TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

Several states have enacted legislation aimed at bringing transparency regarding bankruptcy trust claim filings to asbestos litigation. This article discusses a recent constitutional challenge to one such law, and a federal court's confirmation that the requirement that plaintiffs disclose claims made with bankruptcy trusts is constitutional.

A Matter of Trust: North Dakota's Asbestos Bankruptcy Trust Transparency Act's Disclosure Requirements Survive Constitutional Challenge

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Introduction

In 2017, North Dakota joined a growing list of states that have enacted asbestos litigation reform legislation aimed at bringing transparency to exposures attributable to bankrupt entities. Now, in North Dakota, the tort system can properly account for those exposures. Among its key provisions, North Dakota's Asbestos Bankruptcy Trust Transparency Act ("Trust Transparency Act"),¹ requires asbestos personal injury or wrongful death plaintiffs to pursue and disclose claims made with bankruptcy trusts.² Plaintiffs recently challenged the disclosure provision as unconstitutional. North Dakota state and federal courts have squarely rejected these challenges.

I. North Dakota's Asbestos Bankruptcy Trust Transparency Act

The Trust Transparency Act requires plaintiffs in asbestos actions, within 30 days of filing their cases, to provide the court and all parties with a sworn statement indicating that an investigation of all potential bankruptcy trust claims has been conducted and that all trust claims that could be made have been filed.³ Plaintiffs must also produce all trust claim materials, including claim forms, documents submitted in support of the claim, documents reflecting

the status of the claim, and documents relating to any settlement of the claim.⁴ Plaintiffs have an ongoing duty to supplement these disclosures, within 30 days of supplementing an existing trust claim, receiving additional materials related to a trust claim, or filing an additional trust claim.⁵

Plaintiffs who fail to comply with these disclosure provisions risk potential dismissal of their lawsuits.⁶ Plaintiffs also risk delays in their trials for failure to comply with the disclosure provisions; trials in asbestos cases may not proceed until at least 180 days after the plaintiffs have made the required disclosures.⁷ If a plaintiff does not fully comply with the file and disclose requirement, defendants may move to compel the plaintiff to file additional trust claims by presenting evidence establishing that there is a sufficient basis for a plaintiff to do so.⁸

Beyond its disclosure requirements, the Trust Transparency Act also establishes how trust materials may be used in evidence. Trust claims materials "are presumed to be relevant and authentic and are admissible in evidence."⁹ Furthermore, trust claim materials that are sufficient to entitle the claim to be considered for payment "may be sufficient to support a jury finding that the plaintiff may have been exposed to products

¹ N.D.C.C. §§ 32-46.1-01 to -.06.

² N.D.C.C. § 32-46.1-02.

³ N.D.C.C. § 32-46.1-02(1)(a).

⁴ N.D.C.C. § 32-46.1-02(b); N.D.C.C. § 32-46.1-01(5).

⁵ N.D.C.C. § 32-46.1-02(2).

⁶ N.D.C.C. § 32-46.1-02(3).

⁷ N.D.C.C. § 32-46.1-02(4).

⁸ N.D.C.C. § 32-46.1-03.

⁹ N.D.C.C. § 32-46.1-04(1).

for which the trust was established. . . and that such exposure may be a substantial contributing factor in causing the plaintiff's injury."¹⁰

Materials submitted by claimants to asbestos bankruptcy trusts typically contain admissions and other information about the injured party's alleged exposures to asbestos that may not otherwise be made available to defendants through discovery. Introduction of this evidence at trial helps juries reach fully informed decisions as to how to apportion fault by allowing jurors to consider not only evidence as to the liability of the defendants remaining before them at trial, but also evidence as to the liability of the historically most responsible entities that have filed for bankruptcy protection. By having the complete picture of all of the injured party's exposures to asbestos, the jury is better able to allocate fault among all at-fault entities.¹¹ This is especially important to the defense of asbestos cases in North Dakota, where a defendant's liability is several, and shares of fault allocated to bankrupt entities cannot be reallocated to the remaining defendants, except in very limited circumstances.¹² As such, defendants have a strong incentive to introduce as much evidence as possible of the injured party's exposures to bankrupt entities' asbestos-containing products. But without evidence available, proving that such exposures contributed to cause the

alleged disease becomes difficult, if not impossible.

The Trust Transparency Act's disclosure requirements provide a means, not previously available to defendants in North Dakota asbestos litigation, to obtain information and admissions about the injured party's exposures to bankrupt entities' products. For years, defendants requested, through written discovery, plaintiffs' disclosure of claims made with bankrupt trusts, the identification of the factual basis for the claims (including all witnesses or documents evidencing exposure to the bankrupt entity's asbestos-containing products), and production of claims forms and all evidence submitted in support of the claim. Plaintiffs routinely refused to respond to such discovery, contending that the requested information was inadmissible settlement evidence. Defendants also typically made independent inquiries with trusts to determine if plaintiffs had made any claims. If such claims had been made, defendants issued subpoenas to the trusts, requesting production of claims forms and documents containing the evidence supporting the claim. Plaintiffs moved to quash those subpoenas, also contending that they sought inadmissible evidence regarding settlement negotiations. With the enactment of the Trust Transparency Act, defendants now have a means to obtain evidence regarding

¹⁰ N.D.C.C. § 32-46.1-04(3).

¹¹ N.D.C.C. § 32-03.2-02 ("When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint,

and each party is liable only for the amount of damages attributable to the percentage of fault of that party[.]").

¹² See *id.*

plaintiffs' exposures to asbestos products made or sold by bankrupt entities.

II. ***Kotalik and Selfors: Plaintiffs' Constitutional Challenge to Trust Transparency Act's Disclosure Provisions***

In 2018, the first three asbestos-related wrongful death and survival actions subject to the Trust Transparency Act were filed in North Dakota's Cass County District Court in Fargo. Certain defendants removed two of those cases, *Kotalik v. A.H. Bennett Co.* and *Selfors v. A.H. Bennett Co.*, to federal court, asserting federal officer jurisdiction under 28 U.S.C. § 1442(1). In both cases, Plaintiffs failed to comply with the Trust Transparency Act's disclosure requirements within 30 days of filing their lawsuit.

After several written requests to plaintiffs for production of this information, defendants jointly filed motions in both cases, requesting orders directing plaintiffs' compliance with the Transparency Act's disclosure provisions, and requesting dismissal if plaintiffs failed to do so. The defendants provided the U.S. District Court for the District of North Dakota with a comprehensive overview of the background of trust transparency legislation throughout the country, including a detailed description of the landmark opinion by the North Carolina federal bankruptcy court in *In re Garlock Sealing Technologies, LLC*,¹³ in which

the court cited evidence that asbestos litigants have delayed filing trust claims in attempt to withhold evidence of alternative sources of asbestos exposure. The defendants also detailed the legislative history of North Dakota's Trust Transparency Act, and a Cass County District Court decision in which the trial court had recently granted a similar motion by defendants to enforce the Act's disclosure provisions.¹⁴

Both plaintiffs challenged the constitutionality of the Trust Transparency Act in response to defendants' motions. The plaintiffs argued that the Trust Transparency Act, in its entirety, violates North Dakota's constitutional provisions regarding separation of powers because it "represents statutory procedural rule-making" and "infringes upon the exclusive authority of the North Dakota District Courts to manage civil actions." The plaintiffs also argued that the Trust Transparency Act conflicts with North Dakota's several liability statute. Finally, the plaintiffs requested certification of the question of the Trust Transparency Act's constitutionality to the North Dakota Supreme Court.

The court first addressed the plaintiffs' motion to certify. The court noted that plaintiffs had not asserted that the Trust Transparency Act conflicts with any of the federal rule applicable to the case, or explained why certification as to the entirety of the Trust Transparency Act, as opposed to

¹³ 504 B.R. 71 (Bankr. W.D.N.C. 2014).

¹⁴ *Wallock v. A.H. Bennett Co.*, No. 09-2018-CV-02167 (Cass Cnty. June 19, 2019).

specific sections, was appropriate.¹⁵ The court further agreed with defendants' position that even if it certified the question as requested, the North Dakota Supreme Court would likely decline to address the issue because any opinion as to provisions of the Trust Transparency Act not currently before the court would be purely advisory.¹⁶ The court denied the motion for certification, ruling that plaintiffs failed to raise a "close" question of state law warranting certification.¹⁷

The court next considered whether the Trust Transparency Act's provisions are substantive or procedural. Applying the "outcome-determination test," the court noted that if it were to disregard the disclosure provisions, which are clearly applicable in asbestos cases venued in state court, the results of the case could be significantly impacted, leading to forum-shopping and inequitable administration of the law.¹⁸ Therefore, the court concluded that the disclosure requirements are substantive, applicable in the federal forum.¹⁹

Finally, the court addressed plaintiffs' argument that the Trust Transparency Act is unconstitutional. The court noted that plaintiffs failed to demonstrate that any portion of the Trust Transparency Act conflicts with any federal procedural rule

applicable to the case or with several liability.²⁰ Furthermore, the court noted that a state district court, addressing the same arguments, had ordered a plaintiff's compliance with the Trust Transparency Act's disclosure requirements.²¹ After this careful consideration, the court concluded that the Trust Transparency Act "clearly and plainly" requires plaintiffs to make the requisite trust claim disclosures.²² The court granted the defendants' motion, and ordered plaintiffs to produce the required disclosures within 30 days of the court's order, or be subject to a sanction, up to and including, dismissal of their actions.²³

III. The Trust Transparency Act: Moving Forward

In the relatively short time since its enactment, the Trust Transparency Act has accomplished its stated goals in North Dakota. State and federal courts addressing the issue have uniformly ruled that the Act's disclosure provisions are constitutional, and required the plaintiffs to produce the disclosure information, or risk dismissal of their cases. In each case, the plaintiff has complied with the courts' orders and provided defendants with evidence of the trust claims made on behalf of the injured party. Although no asbestos case has proceeded to trial in North Dakota since the Trust Transparency Act was enacted,

¹⁵ *Kotalik v. A.W. Chesterton Co.*, No. 3-18-cv-246, 2020 WL 4381606, at *8 (D.N.D. July 8, 2020).

¹⁶ *Id.*

¹⁷ *Id.* at *7-9.

¹⁸ *Id.* at *7-8.

¹⁹ *Id.* at *8.

²⁰ *Id.* at *7.

²¹ *Id.*

²² *Id.*

²³ *Id.*



defendants anticipate that the exposure information made available through the disclosures provisions will help ensure that solvent defendants pay their fair share under North Dakota's several liability system.

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