Application of the Bankruptcy Transparency Act in *Barbara Watkins v. Honeywell International Inc.* : A Case Study

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Asbestos claims have been characterized as "an elephant mass" of cases by the United States Supreme Court. Before Ohio tort reform in 2004, Ohio was a safe haven for 39,000 asbestos claims, and was one of the top five state court venues for asbestos filings. Since the advent of tort reform, the asbestos docket in Cuyahoga County has been reduced to approximately 5,000 active cases.

Ohio House Bill 380 (the Bankruptcy Transparency Act), codified as R.C. 2307.951, et seq., took effect on March 27, 2013. R.C. 2307.952 provides in relevant part:

> Within thirty days after the commencement of discovery in an asbestos tort action … or within thirty days of the effective date of this section with respect to an asbestos tort action that is pending on that effective date and in which discovery has commenced, a claimant ***shall*** provide to all of the parties in the action a sworn statement by the claimant, under penalty of perjury, identifying all existing asbestos trust claims made by or on behalf of the claimant and all trust claims materials pertaining to each identified asbestos trust claim. The sworn statement ***shall*** disclose the date on which each asbestos trust claim against the relevant asbestos trust was made and whether any request for a deferral, delay, suspension, or tolling of the asbestos trust claims process has been submitted.

R.C. 2307.952(A)(1)(a) (emphasis added). Failure to provide this ***required*** sworn statement in a timely manner constitutes grounds for the court to decline to assign an initial trial date or to extend the date set for trial. R.C. 2307.952(B).

According to House Bill 380, asbestos trust claims forms are presumed to be authentic, relevant to, and discoverable in an asbestos tort action. Notwithstanding any agreement or confidentiality provision, trust claims materials are presumed to not be privileged. The parties in the asbestos tort action may introduce at trial any trust claims material to prove alternative causation for the exposed person's claimed injury or death, to prove a basis to allocate responsibility for the claimant's injury or death, and to prove issues relevant to an adjudication of the asbestos claims. R.C. 2307.954(B).

The importance of obtaining bankruptcy trust filings by Plaintiffs in Ohio cannot be understated. Since April 9, 2003, Ohio has been a several liability jurisdiction. In an asbestos tort action where two or more persons proximately caused the same injury and the trier of fact determines that more than 50% of the tortious conduct is attributable to one defendant, liability is joint and several. However, if the trier of fact determines that less than 50% of the tortious conduct is attributable to one defendant, liability is several (and the defendant is only responsible for its proportionate share of the compensatory damages). So, for example, if a jury awards a plaintiff $1,000,000.00 and determines that the bankrupt entities are 75% liable for causing decedent's mesothelioma at trial, settled defendants are 20% liable, and the lone trial defendant is 5% liable, the trial defendant is only liable for 5% of the total verdict amount, or $50,000.00. The issue of the admissibility of bankruptcy trust claim material and jury instructions regarding the claim forms were addressed in the recent case of Barbara Watkins v. Honeywell International Inc. (Cuyahoga County Common Pleas Case No. 12-780871).

Barbara Watkins v. Honeywell International, Inc.

Decedent Glenn Watkins was employed at Babcock & Wilcox in Barberton, Ohio from 1957 until 1958. He testified that he was exposed to asbestos-containing rolls of insulation and pipe covering. Mr. Watkins' exposures to asbestos-containing products at B&W were confirmed through bankruptcy trust submissions filed with the AC&S,

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Armstrong World Industries, Babcock & Wilcox, GI Holdings, Johns Manville, Kaiser Aluminum, and Owens Corning/ Fibreboard trusts. Between 1985 and 2001, Mr. Watkins was employed as a store manager at Auto Shack and Auto Zone stores. Mr. Watkins claimed that during his time at Auto Shack and AutoZone, he was exposed to asbestos from Bendix, Valuecraft, Morse, Albany, and Duralast brakes, and FelPro, Dana and McCord gaskets. Mr. Watkins also testified that he did automotive repair work on various Chevrolet, Ford, Subaru and Toyota vehicles. He allegedly removed and installed asbestos-containing original equipment manufactured products and aftermarket brakes that he purchased from Auto Zone. Mr. Watkins also alleged that he performed engine rebuilds and repairs using asbestos-containing original equipment manufactured parts and FelPro gaskets. In addition, Mr. Watkins alleged that he performed home remodeling work using asbestos-containing Georgia-Pacific products.

The *Watkins* case was tried to a plaintiff verdict on December 15, 2014. The following entities were present on the verdict form: (1) Honeywell/Bendix; (2) AC&S; (3) All Acquisition Corporation; (4) Armstrong World Industries; (5) Auto Zone Stores, Inc.; (6) Babcock & Wilcox; (7) Dana Corporation (Victor); (8) Federal Mogul Asbestos Personal Injury Trust (Felpro); (9) Georgia Pacific Corporation; (10) G-I Holdings, Inc.; (11) Johns Manville; (12) Kaiser Aluminum; (13) McCord Corporation; (14) National Gypsum Corporation (Gold Bond); and (15) Owens Corning Fiberglas. Trial defendant Honeywell/Bendix was adjudicated 40% liable of a total compensatory award of $815,000, or $326,000. The jury awarded Glenn Watkins $200,000, Barbara Watkins $300,000, and $315,000 for medical expenses.[1]

On January 26, 2014, Defendant-Appellant Honeywell appealed the jury verdict to the Eighth District Court of Appeals.[2] Honeywell argued that the trial court's instructions to the jury misstated Ohio law and substantive facts surrounding plaintiffs' filing of bankruptcy claims. Honeywell asserted that the Ohio Revised Code explicitly states that asbestos trust claims are admissible at trial, and that the claims made in the case are presumed to be authentic and relevant to an asbestos action. Honeywell maintained that the trial court's instruction was prejudicial and misleading, and resulted in an erroneous verdict. More specifically, Honeywell argued that the jury instructions were improper on two grounds: (1) the trial court instructed the jury that the bankruptcy trust claims only resulted in partial compensation and implied that the plaintiff would not be made whole by the compensation she received from the bankruptcy trusts; and (2) the trial court instructed the jury that the bankruptcy trusts claims require a lower standard of proof.

Honeywell contended that the trial court's suggestion that plaintiff may only receive partial compensation was entirely misleading because there was no evidence in the record demonstrating what manner of compensation plaintiff had received from the bankruptcy trust claims she had filed. Moreover, Honeywell averred that the suggestion was unfairly prejudicial to Honeywell as it clearly undermined Honeywell's statutory affirmative defense of apportionment of liability against the bankruptcy trusts. Some of the bankruptcy trust claim forms specifically stated in the affirmative that: "the injured party altered, repaired, or otherwise worked with an asbestos-containing product such that the injured party was exposed on a regular basis to asbestos fibers." Despite clear evidence of exposure, the jury did not assign any percentage of liability to some of the bankruptcy trusts. Honeywell claimed that it was undeniable that the trial court's improper instruction in the case misled the jury, which resulted in the bankruptcy trusts not being assigned any liability.

Honeywell also contended that the trial court abused its discretion when it instructed the jury that "in order to facilitate the adjudication of the bankruptcy trust claims the usual rules of evidence and proof of causation have been eased. Some trusts only require the identification of a work history by the claimant which coincides with the presence of the product." Honeywell asserted that this instruction mischaracterized the admissibility or use of bankruptcy trust claims at trial. R.C. 2307.23 only requires that a defendant raise the "empty chair" as an affirmative defense, present evidence regarding contributory fault, and submit proposed jury instructions or interrogatories to the trial court regarding the liability of others. Honeywell maintained that the trial court instruction to the jury that the bankruptcy trust claims lacked the same burden of proof as required to establish liability in a court proceeding misled the jury into thinking that these claim forms are insufficient alone to compel the jury to hold the trusts liable.

The instruction was in direct conflict with R.C. 2307.954(B), which clearly states that the bankruptcy claim forms can be utilized to prove alternative causation or to prove a basis to allocate responsibility for the claimant's claimed injury or death. **Pursuant to R.C. 2307.954(B), a jury could in fact apportion liability to a bankruptcy trust based on**

the claim form alone, without any additional evidence presented in the case to support the apportionment of liability against such entity. Honeywell concluded that the trial court's instruction that the plaintiff's bankruptcy trust claims may lack the evidentiary ability to demonstrate proof of causation in a court proceeding is a misstatement of law which requires a new trial.

On June 26, 2015, Plaintiff-Appellee Barbara Watkins filed her Answer Brief. Watkins argued that the statute does not elevate a trust claim to become evidence in and of itself sufficient to prove legal cause. To the contrary, Watkins submitted that the statute permits the introduction of the asbestos claims to prove an element of defendant's alternative tortfeasor claim; however, the admission of the asbestos trust claims does not compel the jury to find for the defendant on exposure. R.C. 2307.954(B). Watkins contended that Honeywell was still charged with the burden to present evidence sufficient to prove all elements of the tort required under R.C. 2307.23(C). Watkins insisted that the jury was deliberate in its apportionment of liability, because the jury apportioned liability to some bankrupt companies, but not others. Watkins emphasized that the cautionary instruction given by the Court was not prejudicial or likely to confuse the jury, particularly when the trial judge instructed the jury on substantial factor causation and alternative causes before the jury began deliberation.

The Eighth District Court of Appeals heard oral argument in *Barbara Watkins v. Honeywell International Inc.* on October 6, 2015. The Court has not issued a ruling as of the publication date of this article.

Endnotes

[1] On December 16, 2014, the punitive damages phase of the case proceeded, and the jury denied plaintiff's claim for punitive damages.

[2] Honeywell asserted four assignments of error, but only one assignment dealt with bankruptcy trust claims, and is the sole issue that will be addressed in this article.

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