

Memorandum in Support

Torts, Insurance and Compensation Law Section

TICL #2-A

May 16, 2018

A. 6032

S. 2511

By: M. of A. Simotas

By: Senator Bonacic

Assembly Committee: Judiciary

Senate Committee: Finance

Effective Date: 30th day after it shall have become
a law

AN ACT to amend the civil practice law and rules, in relation to truth and fairness in asbestos litigation.

LAW AND SECTION REFERRED TO: Article 99 of the civil practice law and rules.

THE TORT, INSURANCE AND COMPENSATION LAW SECTION (“TICL”) SUPPORTS THIS LEGISLATION

Legislation creating CPLR Article 99, Truth in Asbestos Trust Claims, follows existing law in 12 other states. The legislation is intended to prevent “double dipping” by plaintiffs claiming asbestos-related personal injury in state court actions. Essentially, the legislation requires that within 45 days after commencing a personal injury state court action, a plaintiff file a claim for asbestos injury with one of the dozens of asbestos trusts created through the bankruptcy courts or, alternatively, justify to the state court why such a claim cannot be filed. Article 99 would also require a plaintiff to disclose within 30 days of the commencement of discovery any existing asbestos trust claims. The legislation is designed to prevent a plaintiff from recovering a court settlement or jury verdict against one set of defendants and then filing or pursuing a claim for the same damages with a bankruptcy-created asbestos trust outside of the tort system. As described by the court in *In re Garlock Sealing Technologies LLC*, 504 B.R. 71, 83-84 (W.D.N.C. 2014), in state court personal injury actions plaintiffs withhold evidence of exposure to asbestos products manufactured by bankrupt companies, and then delay filing a claim against bankrupt defendants’ asbestos trusts until after obtaining a recovery against viable defendants in the personal injury action.

Since *Garlock*, Congress has moved to require more disclosure of trust asbestos claims through the introduction in 2015 of legislation in the House, given the acronym of the “FAST” Act, or an act “Furthering Asbestos Claims Transparency.” Nevertheless, the house bill, whose passage is uncertain, does not prevent the delayed filings of bankruptcy trust claims.

The proposed Article 99 does not give defendants an unfair advantage in civil litigation. Rather, it furthers the CPLR goal of full disclosure and prevents a double recovery for damages. The apportionment of liability under CPLR Article 16 does not remedy the practice to be addressed by Article 99, because CPLR Article 16 presumes that all potential defendants are known to all parties at the time of the state court action.

The legislation contains an unusual provision requiring a settling plaintiff, upon request from a defendant, to disclose, for up to five years after the settlement, supplement trust claim material. It also gives the court the power to reopen and adjust a judgment based upon trust payments received by the plaintiff after the entry of the judgment. Overall, the legislation is intended to promote the coordinated resolution of a party’s asbestos-related personal injury claims, regardless of the forum in which there are brought.

For the foregoing reasons, the Tort Insurance & Compensation Law Section of the NYSBA **SUPPORTS** this legislation.