

Memorandum in Opposition

Trial Lawyers Section Legislation Committee

TLS #1

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.

TRIAL LAWYERS SECTION **LEGISLATION COMMITTEE OPPOSE THIS LEGISLATION**

The majority of our Legislation Committee does not support this legislation. We believe that the legislation is an attempt by the asbestos defendants to minimize the damages that are owed to victims of asbestos exposure. It appears that one of the other goals is to delay and/or deny compensation for asbestos related conditions.

Purely from a victim's perspective, the proposed legislation is a one-sided attempt to delay claims and to deprive victims who suffer from mesothelioma from receiving full compensation for their injuries and ultimate death.

Congress amended the Federal Bankruptcy Code in 1994 in order to provide special treatment for corporations that were historically involved in the manufacturing of asbestos products. Essentially the law provides that if an asbestos defendant established a trust under state law to pay present and future asbestos claims, it can shift liability to the trust for all present and future asbestos liabilities.

The trusts are privately funded without any governmental funds. The trusts are administered by hired entities according to an administrative process that was approved by the Bankruptcy Court. In order to preserve funds for all present and future asbestos victims, every trust sets up a "scheduled value" that have been historically paid by the defendant in the tort system.

A study by Rand Corporation, a not for profit institution, found that "most trusts do not have sufficient funds to pay every claim in full and, thus, set a payment percentage that is used to determine the actual payment a client will be offered."

In 2015-2016, 13 states proposed asbestos trust legislation. Only two states, Utah and Tennessee, enacted negotiated versions of the originally proposed legislation. The bills in the other states died in committee, were pulled from hearing by the sponsor, or died for other reasons.

If an injured victim has not identified and filed a claim with a particular trust, the asbestos defendant has the power to force the victim to file a claim with the trust. Potentially until a claim is filed, a victim's trial could be delayed.

The New York proposed addition of Article 99 to the CPLR would require an injured party to file an asbestos trust claim within 45 days after bringing a civil action. The legislation also would require an injured party to notify a defendant in a civil action of the filing of each asbestos trust claim 30 days after commencement of discovery.

The bill also would allow the defendant in a civil action to file a motion to stay the action 60 days before trial.

This bill would create major hurdles for injured parties to obtain justice. If passed, the legislation would make it more difficult for plaintiffs to complete their cases and the potential for repeated delays would undermine plaintiffs' cases and tilt the rules in favor of the asbestos defendants. It would give asbestos defendants new rights to benefit from hypothetical recoveries and stay all proceedings during the process.

If passed, this legislation would waste taxpayer money and judicial resources with motions made for stays. This unnecessary legislation would slow down court dockets and place asbestos victims in the slow lane. It would do nothing for victims who are waiting for justice.

This legislation is one-sided and sets in place hurdles that will delay victims' attempts to hold the asbestos industry accountable. The court in *In re Garlock Sealing Technologies LLC*, 504 B.R. 71, 83-84 (W.D.N.C. 2014) does not identify any New York law firm as having participated in any alleged abuse.

A member of our Section who does defend asbestos claims suggested the proposed legislation seeks to address problems that have occurred in New York City asbestos litigation.

It was also suggested the word "claimant" should be defined in an attempt to prevent the creation of illusory walls whereby two "separate" attorneys are retained (one for the litigation and another for the bankruptcy trusts) who claim to not know what the other is doing.

With respect to the look-back period, he questioned whether it was practical and whether defendants would pay for the post-settlement monitoring.

Our committee did not believe the proposed law was balanced. We concluded it gave an unfair advantage to defendants.

Injured victims are already required to disclose their complete work histories and exposure information. The asbestos corporations already have the tools they need to defend themselves.

Injured victims are required to prove that each asbestos corporation is responsible and ensures that each corporation only pays for its share of the harm it has caused. Injured victims are not double dipping when they seek recovery from multiple defendants.

Accordingly, the Committee submits that the legislation is flawed and that it would erect unnecessary legal hurdles for victims seeking justice.

Based on the foregoing, the Committee **OPPOSES** this legislation.