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Expert Analysis

As Ohio Goes, So Goes the Nation? Ohio's Trust Fund Transparency Is A National Model

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In presidential politics, the state of Ohio occupies prominent space. Ohio has contributed eight presidents (no Republican has won without Ohio) and the state has not picked a loser since 1960, when it went with Richard Nixon. Ohio's electoral prominence can be distilled to big cities, big business, big farms, a rust belt and a Bible Belt. Because of these characteristics, general-election policies, priorities and resource allocation tend to reflect the issues that are important to Ohio. Such is the origin of the expression, "As Ohio goes, so goes the nation."

Basically, that means Ohio, in some important ways, is ahead of the curve, ahead of the rest of us. Recently, on the heels of a tight election, Ohio once again identified priorities and policies with national implications and took steps to protect its resources. The rest of us should pay attention.

And Ohio managed to do so in another nearly impossible environment: asbestos litigation. Specifically, the state addressed one of the most confounding developments in the history of asbestos litigation: the emergence of massive trust funds cloaked in secrecy that subjected Ohio's civil jury system to manipulation and fraud. Will other states follow Ohio's lead, endorse similar policies and priorities, and protect their scarce resources as well? That depends on the availability of judicial and political will, leadership and courage.

Ohio evolved into a plaintiff's venue of choice. Asbestos filings in Cleveland, a sleepy jurisdiction for asbestos litigation in the 1990s, escalated to in excess of 40,000 cases, many filed by law firms outside Ohio, and all overseen by Judge Harry Hanna. As RAND Corp. noted in 2005: "Sharp changes in filing patterns over time more likely reflect changes in parties' strategies in relationship to changes in the (perceived) attractiveness (or lack thereof) of state substantive legal doctrine or procedural rules, judicial case-management practices, and attitudes of judges and juries toward asbestos plaintiffs and defendants, than changes in the epidemiology of asbestos disease." Ohio, Mississippi, New York, West Virginia and Texas accounted

for 9 percent of asbestos filings prior to 1998. That percentage jumped to 66 percent within a few years.

After years of hard experience, Judge Hanna and Ohio's General Assembly adopted local and state-wide reforms to address the crisis. Ohio did away with joint and several liability in favor of apportionment in 2003 and adopted medical criteria for asbestos claims in 2004. Judge Hanna implemented case-management orders regarding trust-fund evidence that presaged legislative action, and in December 2012, Ohio Gov. John Kasich signed a law that sheds light and transparency upon the role of asbestos trust funds in compensating those with asbestos-related injuries.

Each of these events reflects the recognition by Ohio judicial and legislative leaders that affirmative steps are necessary to address the asbestos litigation crisis that had mugged the state, and regain some measure of control over their courtrooms and the adverse impacts that unbridled litigation has on Ohio, its citizens and employers. Asbestos plaintiffs' firms aggressively argued against the changes, and their criticism of the transparency law has been swift, consistent with the overt efforts at concealment set forth in trust-governing documents in the form of confidentiality, nondisclosure and sole-benefit provisions that are designed for the sole purpose of preventing transparency.

Ohio addressed one of the most confounding developments in the history of asbestos litigation: The emergence of massive trust funds cloaked in secrecy.

But Ohio was prompted to act after the state had endured years of abuse. During the initial onslaught, numerous manufacturing companies filed for bankruptcy protection from asbestos claims and funded trusts with huge sums of money. These trusts were formed with the approval and ongoing management of the lawyers that had filed the claims that drove the companies into bankruptcy. The trusts were layered with confidentiality clauses designed to prevent transparency and contained onerous provisions that prevented the trusts from disclosing innocuous information to trial courts.

Early trusts that did not initially incorporate anti-transparency provisions were simply amended to do so after viable defendants vainly sought basic information from the trusts about the exposure histories provided to the trusts by state court plaintiffs that had sued, blaming only viable companies for their injuries. Funding for the trusts has grown exponentially in recent years. The asbestos plaintiffs' bar, as a practical matter, now sits atop a $36 billion trust fund industry of its own making, though made with the money of others. Distribution of these resources is solicited relentlessly on television by wholesalers who then assign the referrals in exchange for substantial fees.

Ohio took action because it recognized that the lack of transparency between the jury system and the trust fund system was inappropriate because it adversely impacted the state's obligation to provide fair hearings to all litigants, undermined Ohio's relatively recent apportionment law, and adversely impacted the evaluation of relevant evidence by Ohio courts and juries. This lack of transparency was created deliberately and is an incentive for one set of asbestos exposures to be emphasized to jury fact finders, and another set of asbestos exposures emphasized to trust-fund-claim administrators. By doing so, compensation is artificially maximized because the occupational histories told to the jury don't have to match up with the occupational histories told to the trust funds.

At a minimum, the competing historical records of asbestos exposure are not subject to cross-scrutiny. To illustrate it simply: It is like being in a 10-car wreck, telling the jury about five nice cars that hit you and then approaching the five jalopies later on and telling them that you decided it is their fault, too. And no, you didn't tell the judge that, just like we agreed. So pay me.

For example, the Kaiser Aluminum & Chemical Corp. 3rd Amended Asbestos Distribution Procedures provide that "failure to identify Kaiser products in the claimant's underlying tort action or to other bankruptcy trusts does not preclude the claimant from recovering from the Asbestos PI Trust." And, as with other trusts, U.S. Gypsum Asbestos Personal Injury Settlement Trust Distribution Procedure Section 6.5 characterizes the trust claim as a "settlement discussion" and imposes a veil of secrecy on the transaction, preventing production of claim information to a state court. Ohio recognized the lack of a legitimate purpose to such stonewalling.

What has been the reaction to efforts to create trust fund transparency? Not encouraging. When confronted with discovery or a case management order about trust-claim admissions, the solution is for a plaintiff to delay submission of trust claims until after his civil case is resolved. That way, he avoids disclosing his trust-claim admissions to the trial court and can present his trust claims to the trust fund administrator later, comfortable in his knowledge that his fact scenario presented to the trial court will not be compared to the historical record he presented to the trust fund. Ohio put an end to that. Other jurisdictions ought to do so as well. No matter how hard they try, the plaintiffs' bar struggles to articulate a proper public purpose served by cloaking the trusts in secrecy and refusing to allow a trial court to evaluate the admissions made by their clients to trust funds in exchange for money.

The newly enacted law in Ohio is straightforward — it requires a plaintiff to disclose claims made to asbestos trust funds before trial. Why? Because disclosure discourages deception. There is $36 billion leading astray asbestos claimants and their attorneys and their advertisers, but in Ohio, at least, a jury has the right to hear all the facts. Turns out those jalopies have a lot of money, and there is more on the way as asbestos bankruptcies continue to be filed, all with the ambition of leaving the state court system in their wake.

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In addition to disclosing the trust fund claims made before trial, Ohio now requires a plaintiff to apply to all trusts against which the injured person has a legitimate claim (*i.e.*, if the person was exposed to asbestos-containing products made by a bankrupt company that formed a trust fund actively paying claims, the plaintiff in an Ohio lawsuit submits his claim to that trust fund before trial and produces the claim forms submitted in support of the claim). That way, the trial court has the best evidence available to it regarding the various causes of the plaintiff's injury. The trier of fact may then competently allocate a percentage of fault to that exposure with the benefit of a complete analysis.

Alternatively, the court may assess a trust claim and find that causation cannot be attributed to that product exposure under state law. In that circumstance, the plaintiff may still be paid by the trust.

In the event that a plaintiff refuses to comply with Ohio's requirement of transparency, the law allows a defendant to bring a motion to compel the exchange of claim information or filing of trust claims, or stay the trial until the claims have

been submitted. Resolution of trust claims is not required. Ohio's Evidence Code continues to provide the necessary protections against the consideration of inadmissible evidence, whether it be a weak trust claim or some other form of information.

I can comfortably predict that anyone who predicts the future of asbestos litigation will eventually be wrong. It can be said, though, that asbestos litigation is like electricity — it always finds the path of least resistance.

Ohio was a conduit for asbestos litigation and perceived by some, for a while, as an easy mark. But the state has taken the lead in addressing an imported litigation crisis, with a variety of local and state-wide solutions, and has again taken the lead in addressing the operations of trust funds as they relate to the state's judicial system and capacity to deliver justice. Other states may want to pay attention to Ohio on this issue, too.

In addition to the surge of cases between states, asbestos litigation also migrates within states (again, I suspect — and consistent with RAND's conclusion in 2005 — due to the perception of favorable or unprepared trial courts). In California, for example, the total number of filings in San Francisco and Alameda counties has declined by about half since 2008, with significant migration occurring in the last two years accounting for most of the decrease.

The cases went to Los Angeles to be presided over by Judge Emilie Elias, appointed in 2011 to be the coordinating judge for all asbestos cases filed in Los Angeles, Orange and San Diego counties. Asbestos filings in Los Angeles County Superior Court have increased dramatically and are on track to make it the most prolific asbestos-filing county in the state. It will be interesting to see if the leading jurists in Los Angeles address these issues with as much vigor and foresight as Judge Hanna did when it happened to him.

So, what will happen next and who will it happen to?

Will the plaintiffs' bar continue to adjust and abandon Ohio in order to avoid transparency? Will plaintiffs in California search out courtrooms within the state that have not learned from hard experience and lack effective case-management orders? Probably.

Asbestos firms from Texas, for example, have opened with enthusiasm in Los Angeles. Unless, of course, local and state leaders learn by proxy the hard lessons that Ohio learned by personal experience and implement reforms and procedures (including case management orders) that safeguard the judicial system, preserve scarce resources and remove the incentives to seek out "favorable" courtrooms, whether they be a state away or a county away.

Ohio's lead in demanding complete information about the cause of an injury through the best evidence available is a good place to start and is worthy of duplication. Complete information about the cause of an injury is routine in personal injury cases; there is no valid reason for asbestos personal injuries to have a lower standard.

Ohio may seem to some like an unlikely place to shape an election. And Ohio may seem to many more like an unlikely place to shape national litigation policy.

But Ohio may very well be doing both. The question for many lawyers and their clients with asbestos liabilities is whether other jurisdictions have taken enough punishment to be prompted to act or see the writing on the wall and have the judicial and legislative leadership necessary to implement common sense and require asbestos lawyers to disclose to the trial courts the best evidence of all causes of their client's injuries, just like the rest of us. Simple enough, right?

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