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BY CRAIG BLAU AND SANDRA STEINMAN

A Relief in Tort Law for 'Deep-Pocket' Defendants

Corporations with "deep pockets" should take note of one of the most recent and significant decisions affecting tort law in New York, *In re New York City Asbestos Litigation*, 6 A.D.3d 352, 775 N.Y.S.2d 520 (1st Dep't 2004), aff'g *In re New York City Asbestos Litigation*, 194 Misc.2d 214, 750 N.Y.S.2d 469 (Sup.Ct. N.Y. Co. 2002).

Before *In re New York City Asbestos Litigation*, solvent, and often deep-pocket, defendants had been forced to pay more than their share of damages by absorbing bankrupt tortfeasors' share of liability. However, in *In re New York City Asbestos Litigation*, the Appellate Court, First Department, affirmed Justice Helen Freedman's decision, which held that, in any personal-injury or wrongful death lawsuit, under Article 16 of New York's Civil Practice Code and Rules, apportionment of liability among defendants for non-economic damages will include companies that have filed for bankruptcy protection.

CPLR §1601

Under CPLR §1601 (1) if a joint tortfeasor is found to be 50 percent or less at fault, the joint tortfeasor's liability for non-economic damages is its proportionate share of fault. For example, if joint tortfeasor A's fault percentage is 10 percent, joint tortfeasor B's fault percentage is 30 percent, and joint tortfeasor C's fault percentage is 60 percent, joint tortfeasor A would only be liable for 10 percent of plaintiff's non-economic losses and B is liable for 30 percent of plaintiff's non-economic losses. C would be liable for 100 percent of plaintiff's non-economic losses because he is more than 50 percent at fault.

CPLR §1601 (1) further states that if a plaintiff can show that she is unable to obtain jurisdiction over a joint tortfeasor, then the fault percentage of that joint tortfeasor will not be considered.

Taking the above example, if the plaintiff cannot obtain jurisdiction over C, C's fault percentage of 60 percent would not be considered when apportioning percentage of liability to A and B. Thus, 60 percent would be deducted from 100 percent leaving 40 percent, which is used to determine the limit of A and B's exposure.

Consequently, A's share is adjusted from 10/100 to 10/40, making A's adjusted fault percentage 25 percent. Because 25 percent is less than 50 percent, A would only be liable for 25 percent of plaintiff's non-economic losses. B's share is adjusted from 30/100 to 30/40, making B's adjusted fault percentage 75 percent. Since B's adjusted fault percentage is more than 50 percent, B is liable for 100 percent of plaintiff's non-economic losses.

Craig Blau *Sandra Steinman*

'In re New York City Asbestos Litigation' departs from the past application ofCPLR §1601(1) in cases where one or more of the joint tortfeasors is a bankrupt entity.

Past application of CPLR §1601 (1) in tort cases reasoned that plaintiffs could not obtain jurisdiction over bankrupt entities within the meaning of the rule.

Second Circuit Ruling

The U.S. Court of Appeals for the Second Circuit held that "jurisdiction" within the meaning of CPLR §1601 (1) meant that plaintiffs needed to obtain "effective jurisdiction." See *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (1992).

The circuit further held that plaintiffs could not obtain "effective jurisdiction" over bankrupt tortfeasors because these bankrupt entities obtain automatic stays of litigation.

As a result, prior application of CPLR §1601 (1) in tort cases meant that the solvent defendants were apportioned more than their fair share of liability. In addition, juries were often not told that if they apportioned any share of the liability to a bankrupt tortfeasor, the solvent defendants would have to pay for the bankrupt tortfeasors' share of liability as well as for their own share of liability.

In re New York City Asbestos Litigation departs from the past application of CPLR §1601(1) in cases where one or more of the joint tortfeasors is a bankrupt entity.

The First Department held that "[a] New York State court does not lack jurisdiction over a tortfeasor in bankruptcy" and that "[n]otwithstanding the automatic stay resulting from bankruptcy, the tortfeasor is not exempt from consideration of damages under CPLR article 16."

The First Department apparently agreed with Justice Freedman's reasoning behind *In re New York City Asbestos Litigation* that "[t]he Court of Appeals has stated that the general legislative intent of Article 16 [a modification of the common law rule of joint and several liability] is 'to remedy inequities created by joint and several liability on low-fault, 'deep pocket' defendants.' " [quoting *Rangolan v. Co. of Nassau*, 96 N.Y.2d 42, 46 (2001)].

The impact of *In re New York City Asbestos Litigation* will be apparent in all areas of tort law, but its immediate impact will provide some much needed relief to hundreds of companies involved in the asbestos litigation.

The onslaught of suits against traditional asbestos defendants has driven many of the largest companies into bankruptcy. In the past three years, close to 30 traditional asbestos defendants have filed for bankruptcy. Over 70 traditional asbestos defendants have filed since 1982. As more and more traditional asbestos defendants succumbed to bankruptcy, the remaining solvent defendants were made to pay for more and more of these bankrupt tortfeasors' shares of liability.

In turn, as the remaining solvent defendants were forced to take on the added burden of bankrupt tortfeasors' shares, the closer they came to bankruptcy themselves.

The result was completely contrary to the legislative intent of Article 16. *In re New York City Asbestos Litigation* helps avoid such an inequitable result by taking into account the various degrees of culpability of all tortfeasors — bankrupt or not — thereby protecting the rights of low-fault, deep-pocket defendants.

Craig Blau *is a partner at Anderson Kill & Olick and co-chair of its product liability group.* **Sandra Steinman** *is an associate in the product liability and commercial litigation groups.*