New York's Article 16 and Multiple Defendant Product Liability Litigation: A Time to Rethink the Impact of Bankrupt Shares on Judgment Molding

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INTRODUCTION

The precise cost of resolving asbestos-related personal injury claims,¹ a nationwide phenomenon unprecedented in scope,² is unknown, although it clearly must be staggering.³ Asbestos

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¹ Given its excellent fire-retardant capability, asbestos was prevalent in the construction trade from the 1940s through the early 1970s. For nearly half a century, hundreds of thousands of people have used asbestos in various settings ranging from refineries, shipyards, and powerhouses to office building and residential construction. This has lead to unparalleled mass tort litigation with a devastating financial impact. See Brian M. DiMasi, The Threshold Level of Proof of Asbestos Causation: The "Frequency, Regularity and Proximity Test" and a Modified Summers v. Tice Theory of Burden-Shifting, 24 CAP. U. L. REV. 735, 737-39 (1995).

² The enormity of this litigation and its financial consequences were anticipated a decade ago:

No litigation in American history has involved as many individual claimants, been predicated upon the severity of injury, consumed as many judicial resources, resulted in as much compensation to claimants, compelled the number of defendants' bankruptcies, or been as lucrative to lawyers as asbestos litigation. Asbestos litigation has been referred to as an 'impending disaster'....


³ See Christopher Oster, Some Insurers Face Shortfall in Reserves for Costly Claims Related to Asbestos, WALL ST. J., May 7, 2001, at A4 (citing an A.M. Best study, which reports that domestic insurers have expended approximately $21 billion, through 2000, on asbestos personal injury litigation, and which estimates their final cost at $65 billion). The study warns that there is a shortfall, in excess of $30 billion, in reserves set aside to resolve asbestos-related claims. Id. In addition to the sums expended by the insurers, there are additional costs paid directly by the

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litigation has dramatically reduced the equity and debt values of affected companies and forced an enormous number of bankruptcies during the past twenty years. The trend seems to be accelerating, and at least one think tank estimates that the entire asbestos industry may be headed for bankruptcy in the near future. Indeed, from February 2000 to February 2002, more than a dozen companies with asbestos-related liabilities filed for bankruptcy.

Although one effect of the dwindling number of traditional defendants is the search for secondary and tertiary defendants, a less visible but perhaps more significant effect arises in the context of judgment molding under Article 16 of the New York Civil Practice Law and Rules. Under New York law, all entities with a potential share of blame in causing plaintiffs' injuries are included on the verdict sheet, regardless of whether the entity defendants, which add considerably to the estimated $65 billion total cost to insurers.

4 One need only review the decline in value of the equity of affected companies to realize the loss of value to investors. For example, Crown Cork and Seal ("Crown") shares were trading at $20 in 2000 but traded for less than $6 in March 2002. See Crown, Cork & Seal, Stock Quotes and Charts, at http://www.crowncork.com/investors/index_i.html (last visited Aug. 20, 2002). Crown has suffered this loss in value, notwithstanding that it has so far avoided bankruptcy; shares of companies actually in bankruptcy trade at fractions of their pre-filing values. For example, Owens Corning stock traded at $19 per share at the beginning of January 2000 but traded for $0.75 on October 6, 2001, the day after filing for bankruptcy, see Owens Corning, Historical Price Lookup, at http://www.owenscorning.com (last visited Aug. 22, 2002), and Federal Mogul stock traded for nearly $19 at the beginning of January 2000 but sank to $0.74 on October 2, 2001, the day after filing for bankruptcy, see Federal Mogul, Historic Stock Quotes, at http://www.federalmogul.com/investors/index.html (last visited Aug. 22, 2002).


7 See id. at 51 (listing the following examples: Babcock & Wilcox (Feb. 2000); Pittsburgh Corning (Apr. 2000); Owens Corning (Oct. 2000); Armstrong World Industries (Dec. 2000); G-1 Holdings (Jan. 2001); W.R. Grace (Apr. 2001); U.S. Gypsum (June 2001); United States Mineral Products (July 2001)).


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has already settled out of the matter, has been dissolved, or has received a judgment in bankruptcy. The "[a]llocation among all potential fault sharers is necessary to determine the proper equitable share." Under Article 16, entities over whom plaintiffs could not obtain jurisdiction with due diligence are excludable from the judgment, thereby enlarging the share the remaining defendants may ultimately have to pay. In asbestos litigation, New York courts have concluded that bankrupt parties fall within the category of "beyond jurisdiction"; thus, since plaintiffs cannot, with due diligence, obtain jurisdiction over them, the portion of liability allocated to bankrupt parties has been deemed excludable when apportioning a final judgment. Depending on the allocation of fault to bankrupt entities, this can have a dramatic effect on the judgment entered against the non-settling defendants.

The implication of Article 16 for viable defendants (and for the economy as a whole, to the extent that it is impacted by the overall financial health of the remaining defendants) is dramatic. In the initial period of asbestos-related litigation, lawsuits focused primarily on "traditional" defendants: miners.

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10 See Kelly v. Long Island Lighting Co., 286 N.E.2d 241, 243 (N.Y. 1972) (stating that liability should be distributed in proportion to the tortfeasor's fault); Gannon Pers. Agency v. City of New York, 394 N.Y.S.2d 5, 16 (1st Dep't 1977) (finding that excluding a judgment-proof defendant's percentage of fault from an apportionment of fault among multiple defendants was error); see also Killeen v. Reinhardt, 419 N.Y.S.2d 175, 178 (2d Dep't 1979) (holding that the reduction of the defendant's liability by the share of fault allocable to a tortfeasor no longer being sued was correct).


14 See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 798 F. Supp. at 956–59 (finding that although the remaining defendant was actually liable for only 10% of the harm, the bankrupts and others over whom the court lacked jurisdiction were liable for 58.5% of the harm, requiring that the sole defendant's 10% share be increased to 24.1%).
manufacturers, and distributors of asbestos. Currently, however, an increasing number of defendants fall outside the scope of these “traditional” defendants. Plaintiffs are now filing claims against a host of contractors, automotive parts manufacturers, retailers, insurers, premises owners, and other “non-traditional” defendants. Many of these new defendants find themselves in cases where the significant fault sharers are in bankruptcy. As such, they may be asked to pick up a substantially greater share of liability than their actual proportional allocation of fault. The resulting financial burden on these companies may become severe enough to cause many of the “new” defendants to file for bankruptcy.

In addition, the increase in bankruptcy filings, coupled with the perception among plaintiffs’ counsel that non-settling defendants must absorb, in some manner, the bankrupt defendants’ share of liability, has resulted in impeding settlements. There are two principle reasons. First, when a defendant files for bankruptcy, the settlement funds that the plaintiff ordinarily anticipates from this defendant are no longer available. Second, viable defendants are under pressure from plaintiffs’ demands, which are based on the assumption that a non-settling defendant will absorb in some manner the bankrupts’ shares.

As the pace of bankruptcy filings increases, the significance of the issue of whether bankrupt shares are reallocated will surely grow as well.

15 See DiMasi, supra note 1, at 735-44.
16 See Warren, supra note 8, at B1.
17 See id.
18 See Christopher F. Edley & Paul C. Weiler, Asbestos: A Multi-Billion Dollar Crisis, 30 HArV. J. ON LEGIS., 383, 384 (1993) (explaining that as asbestos litigation causes major companies to go bankrupt, plaintiffs begin to seek new defendants to make up for those funds no longer available for settlements); Robert K. O'Reilly, Targeting the Wrong Deep Pocket: Professional Liability Claims in Insurance Company Insolvencies, 1996 WIs. L. Rev. 123, 123-24 (1996) (stating that as insurance companies have become insolvent, plaintiffs have instead targeted other “deep pocket” professionals in their lawsuits).
19 See Deborah R. Hensler & Mark A. Peterson, Understanding Mass Litigation, 59 BROOK. L. REV. 961, 1005 (1993) (explaining that many defendants were pressured to the point of bankruptcy by increasing numbers of claims and by having to absorb Johns-Manville Company's portion of liability after it declared bankruptcy); O'Reilly, supra note 18, at 124 (noting that in the area of insurance company insolvencies, the remaining defendants—so-called “deep pocket” professionals—are under pressure to settle).
20 While this Article focuses on the impact of bankruptcy on asbestos litigation, the analysis is equally relevant to any other litigation involving liability shares.
I. OVERVIEW OF ARTICLE 16

Article 16 was an integral part of New York tort reform legislation passed in 1986. The legislative aim of Article 16 was to limit the application of traditional joint and several liability to non-economic damages in personal injury cases, thereby protecting potential defendants such as municipalities and other similar "deep pockets" from being held liable for the full amount of a judgment when their actual percentage of fault was small.

Article 16 forces plaintiffs to sue all alleged tortfeasors or run the risk of obtaining only a partial recovery. The statute modifies liability to the extent that a tortfeasor apportioned fifty percent or less of the fault will only be liable for that apportioned share.

Article 16 provides that where a defendant is held to be no more than fifty percent liable, that defendant's liability for non-economic damages cannot exceed its equitable share of liability. The statute reads, in pertinent part:

[When a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable...]

...and the

attributable to bankrupt entities. If asbestos litigation can be used as a guide, various defendants in future multi-defendant mass tort cases may very well file for bankruptcy. Given the growing trend of mass products liability law suits, the likelihood of this occurring is substantial. See Helen E. Freedman, Product Liability Issues In Mass Torts—View From The Bench, 15 TOURO L. REV. 685, 685-86 (1998) (discussing the sharp rise in mass tort litigation).

21 See Rangolan v. County of Nassau, 749 N.E.2d 178, 182 (N.Y. 2001) (noting Article 16's legislative goal of benefiting low-fault deep pocket defendants); see also Paul F. Kirgis, Apportioning Tort Damages in New York: A Method to the Madness, 75 ST. JOHN'S L. REV. 427, 433-34 (2001). Of course benefiting low-fault deep pocket defendants was not the sole legislative goal. See In re Joint E. & S. Dist. Asbestos Litig., Nos. 88 Civ. 1286 (PNL) & 88 Civ. 1922 (PNL), 1990 U.S. Dist. LEXIS 10891, at *9 (S.D.N.Y. Aug. 20, 1990) ("The bill...represents a negotiated compromise between plaintiffs' and defendants' interests. Some provisions do indeed favor defendants; others do not. I therefore find no basis for accepting the defendants' argument that Article 16 was passed to help defendants and must be interpreted in whatever manner will benefit defendants.") (footnote omitted).

22 See Rangolan, 749 N.E.2d at 182; Kirgis, supra note 21, at 433-34.

23 See Zakshevesky v. City of New York, 562 N.Y.S.2d 371, 373 (Sup. Ct. Kings County 1990) (holding that the plaintiff must establish an inability to obtain personal jurisdiction before a non-defendant's share of fault will be imposed on the defendants).


25 Id.
liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant’s equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss . . . .\textsuperscript{26}

Article 16, however, remains inapplicable, and thus the traditional rule of joint and several liability remains in effect for economic loss, for parties allocated more than fifty percent of the liability and for defendants who satisfy one or more of the various exceptions to Article 16.\textsuperscript{27}

II. ENTITIES BEYOND JURISDICTION

In computing a defendant’s equitable share of damages, courts are directed to the portion of Article 16 which expressly excludes shares of liability attributed to persons beyond the jurisdiction of the court. In particular, the statute states that “the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action.”\textsuperscript{28}

Although a defendant’s equitable share of fault under Article 16 is determined only by reference to the liability of parties over whom the court could indeed exercise jurisdiction, the express language of Article 16 squarely places the burden of demonstrating that such entities were not amenable to suit upon the plaintiff.\textsuperscript{29}

\textsuperscript{26} Id. There are exceptions that restore joint and several liability, for example, acting with “reckless disregard for the safety of others.” See N.Y. C.P.L.R. 1602(7) (McKinney 2001). Thus, although a defendant may be held less than fifty percent liable, should an exception apply, Article 16 will not govern the molding of the judgment.

\textsuperscript{27} See N.Y. C.P.L.R. 1601 (McKinney 2001).

\textsuperscript{28} Id.

\textsuperscript{29} See Zakshevsky v. City of New York, 562 N.Y.S.2d 371, 373 (Sup. Ct. Kings County 1990) (“Unless plaintiff meets the additional burden placed upon it by the statute, by showing that personal jurisdiction could not have been obtained over a party, plaintiff runs the risk of obtaining a partial recovery.”).
Typically, in asbestos personal injury cases, there are numerous entities for which a jury will be asked to apportion liability. The number of entities on a verdict sheet can be daunting and may include many entities which have previously filed for bankruptcy.\textsuperscript{30} Article 16 requires the plaintiff to attempt "with due diligence" to "obtain" jurisdiction over a fault sharer.\textsuperscript{31} Under New York law, personal jurisdiction is obtained by serving a summons and complaint on a party.\textsuperscript{32} According to plaintiffs in these actions, service of process cannot be made upon bankrupt defendants because of the automatic stay provision of the United States Bankruptcy Code.\textsuperscript{33} Courts have agreed with this position:

As a technical matter entities which have filed petitions for bankruptcy are subject to suit, but the automatic stay precludes processing a claim against them. No amount of diligence could result in the plaintiff bringing bankrupt parties into this litigation; hence it does not appear that their share should be considered pursuant to Article 16.\textsuperscript{34}

Non-settling defendants desire to allocate liability among as many defendants as possible to reduce their own liability shares. Defendants will thus emphasize the exposure to the settled defendants' products to build up the settled parties' shares, thereby reducing their own share.\textsuperscript{35} Plaintiffs, on the other hand, have an incentive to ensure that the jury allocates the bulk of liability between the unsettled defendants and the parties that plaintiffs could not obtain jurisdiction over, in an attempt to have the unsettled defendants found liable for as

\textsuperscript{30} See supra, notes 6 and 8.
\textsuperscript{31} N.Y. C.P.L.R. 1601(1) (McKinney 2001).
\textsuperscript{32} See N.Y. C.P.L.R. 304, 305, 311 (McKinney 2001).
\textsuperscript{33} See 11 U.S.C. § 362(a)(1) (2000) ("[A] petition filed under [the Bankruptcy Code] ... operates as a stay, applicable to all entities, of—(1) the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor ... ").
\textsuperscript{34} In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 846 (2d Cir. 1992) (citation omitted).
\textsuperscript{35} See In re New York City Asbestos Litig., 624 N.E.2d 979, 983–94 (N.Y. 1993) (holding that under N.Y. General Obligations Law section 15-108(a), a non-settling tortfeasor is entitled to have its liability reduced "either by the total of the dollar amounts to be paid by the settling defendants or the total dollar amounts of their corresponding shares of the verdict, allocated in accordance with their apportioned liability, whichever is greater").
large of a share as possible. Accordingly, plaintiffs attempt to skew the product identification evidence toward the remaining defendants as well as the bankrupt entities.\textsuperscript{36}

Although a claimant may testify as to a variety of products he or she claims to have been exposed to, the number of entities considered for purposes of blame allocation is not limited merely to the testimony of the plaintiff. A share of blame can be indirectly and circumstantially proven through invoices and co-worker testimony.\textsuperscript{37} Thus, at major worksites, such as powerhouses and shipyards, there are an array of entities against which a jury may be asked to apportion liability. Such apportionment will be based upon both product exposure and the magnitude of fault.\textsuperscript{38}

\textsuperscript{36} See G-I Holdings, Inc. v. Baron & Budd, 179 F. Supp. 2d 233, 240–41 (S.D.N.Y. 2001). There may be ethical considerations that arise. A plaintiff's trial strategy might very well be geared toward the goal of forcing a defendant to pay more than their several share by manipulating the product identification evidence (presenting to the jury only the evidence of those whose shares they believe will be picked up by the defendant). Since the parties in summation are allowed to argue percentages to the jury, plaintiffs can appear quite reasonable by stating that the remaining defendants should be apportioned ten percent of the blame and the other (bankrupt) defendants fifty percent, knowing that defendants may pay more if the bankrupts are allocated higher shares. Since the jury is unaware that apportioning to the bankrupts might enlarge the unsettled defendant's share of liability, the plaintiff has a free hand in appearing reasonable while a defendant in summation may look unreasonable in arguing for apportionment. Id.

\textsuperscript{37} See In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d at 837 (holding that New York law does not require the plaintiff to identify the exact manufacturers whose product injured each plaintiff); Kreppein v. Celotex Corp., 969 F.2d 1424, 1426 (2d Cir. 1992) (concluding that the plaintiff was exposed to defendant's asbestos products based partly on witness testimony and plaintiff's job duties); O'Brien v. Nat'l Gypsum Co., 944 F.2d 69, 72–73 (2d Cir. 1991) (holding that circumstantial evidence alone may suffice as proof); Johnson v. Celotex Corp., 899 F.2d 1281, 1286–87 (2d Cir. 1990) (holding that a reasonable jury could infer that defendant's product was a factor in plaintiff's injury where plaintiff presented "unusually detailed circumstantial" evidence).

\textsuperscript{38} See Kreppein, 969 F.2d at 1426–27 ("[L]iability should be apportioned according to relative degrees of fault for the injury, which may include not only the strength of the causal link but also the magnitude of the fault." (citing Garrett v. Holiday Inns, Inc., 447 N.E.2d 717, 719 (N.Y. 1983))). Often, apportionment of blame may be based, at least in part, on the magnitude of fault. There is substantial fault evidence against many of the entities which filed for bankruptcy in the early years of asbestos litigation (juries found that the conduct of these entities was reckless and awarded punitive damages, thereby contributing to their bankruptcy), and plaintiffs' counsel is able to present such evidence when making their case, thereby arguing that these companies deserve to be apportioned a substantial allocation of fault based upon their conduct. Ironically, then, a viable defendant may pay more than its share of liability due to the conduct of the bankrupts rather than
The preferred, but by no means uniform, trial format is the reverse bifurcated method. Under reverse bifurcation, the damages phase of the trial is conducted before the liability phase, and the latter phase occurs only if the jury returns a damages verdict in the plaintiff's favor. If the plaintiff obtains a finding of liability, the court needs to enter a judgment. It is at this stage where the interplay of bankrupt defendants and Article 16 occurs. Nevertheless, each party can still move post-trial prior to the entry of judgment to set aside the apportionment and other findings of the jury.

IV. REALLOCATION OF THE SHARES ATTRIBUTED TO ENTITIES BEYOND THE JURISDICTION OF THE COURT

Once a court determines which entities, if any, are indeed beyond its jurisdiction, the question remains—what happens to the shares attributable to those entities? Essentially, there are their own.


41 See N.Y. C.P.L.R. 4404(a) (McKinney 2001) ("After a trial... upon the motion of a party..., a court may set aside a verdict... where the verdict is contrary to the weight of the evidence... "). The New York Court of Appeals has held that "the standard for making [the] determination [that the jury's verdict was against the weight of the evidence], and reviewing it on appeal, was whether 'the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence.'" Lolik v. Big V Supermarkets, 655 N.E.2d 163, 164 (N.Y. 1995) (alterations in original). Where jury verdicts on apportionment issues are "against the weight of the evidence," courts are empowered to order new trials pursuant to C.P.L.R. 4404(a). See Glassman v. City of New York, 640 N.Y.S.2d 139, 140 (2d Dep't 1996) (holding that a jury's award of ninety percent liability against the city in a case involving two other individual defendants was against the weight of the evidence, and that the jury's apportionment of fault was not based on a fair interpretation of the evidence); Salles v. Manhattan and Bronx Surface Transit Operating Auth., 577 N.Y.S.2d 7, 8 (1st Dep't 1991) (affirming the granting of defendant's motion to set aside liability verdict and ordering a new trial on apportionment of liability). Furthermore, where courts have found a jury's verdict to be "contrary to the weight of the evidence," courts have readjusted liability percentages to make verdicts accord more with reality. See Lemma v. Forest City Pierrepont Assoc., 625 N.Y.S.2d 553, 554-55 (1st Dep't 1995) (ruling that jury's apportionment of liability was against the weight of the evidence and ordering a new trial on the issue of apportionment); Fortune v. Newmark & Co. Real Estate, Inc., 607 N.Y.S.2d 947, 947-48 (1st Dep't 1994) (ordering new trial solely on issue of apportionment of liability unless parties agreed to apportionment in the amount of 42.5% and noting that such a reapportionment of liability "more reasonably reflects the reality of the situation").
two possible approaches when Article 16 applies and a third approach when Article 16 is inapplicable.

Under the first approach when Article 16 is applicable, a defendant would pay no more than the share awarded by the jury in the event that the court found that plaintiffs failed to meet their burden of proving that any entities were indeed beyond the court's jurisdiction.\textsuperscript{42} New York State Supreme Court Justice Schackman employed this method in \textit{In re New York City Asbestos Litigation (Maltese)},\textsuperscript{43} an asbestos case tried in New York County.

Pursuant to the second approach when Article 16 is applicable, each non-settling tortfeasor is responsible only for its \textit{proportionate} share of the damages attributed to parties outside the court's jurisdiction, a method employed in \textit{In re Joint Eastern & Southern District Asbestos Litigation (McPadden)}.\textsuperscript{44}

Alternatively, where Article 16 \textit{does not apply}, the share of the damages apportioned to unavailable tortfeasors is redistributed only among non-settling tortfeasors.\textsuperscript{45} This is the result because without Article 16's statutorily created liability cap, the court's only recourse is to utilize New York's traditional rule of joint and several liability.\textsuperscript{46}

\section{V. VARIOUS COURTS' APPROACHES TO ARTICLE 16}

\subsection{A. Justice Shackman's Judgment in Maltese}

In \textit{Maltese}, Justice Shackman entered a judgment equal to the amount of liability assigned by the jury without reallocating the shares of insolvent entities that were purportedly beyond the court's jurisdiction. The jury apportioned liability among several entities, as follows: 20\% to Westinghouse Electric Corporation;

\begin{footnotesize}
\textsuperscript{42} See Zakshevsky v. City of New York, 562 N.Y.S.2d 371, 373 (Sup. Ct. Kings County 1990) ("Unless plaintiff . . . [shows] that personal jurisdiction could not have been obtained over a party, plaintiff runs the risk of obtaining a partial recovery.").
\textsuperscript{43} 640 N.Y.S.2d 488 (1st Dep't 1996), aff'd, 678 N.E.2d 467 (N.Y. 1997).
\textsuperscript{45} See Austin v. Raymark Indus., Inc., 841 F.2d 1184, 1195–96 (1st Cir. 1988) ("There is . . . [authority] supporting the redistribution of the liability of an insolvent or immune tortfeasor among the remaining tortfeasors . . . ." (citing Larsen v. Wis. Power & Light Co., 355 N.W.2d 557, 563–64 (Wis. Ct. App. 1984))).
\textsuperscript{46} See Rangolan v. County of Nassau, 749 N.E.2d 178, 181–82 (N.Y. 2001) ("Prior to Article 16's enactment, a joint tortfeasor could be held liable for the entire judgment, regardless of its share of culpability." (citing Sommer v. Fed. Signal Corp., 593 N.E.2d 1365 (N.Y. 1992))).
\end{footnotesize}
10% to The Babcock & Wilcox Company; 10% to General Electric Company; 10% to Worthington Corporation; 5% to Armstrong World Industries; 5% to Owens Corning Fiberglas Corporation; 30% to Keene Corporation; 5% to Johns Manville; and 5% to Philip Carey (Celotex). Keene Corporation, Johns Manville, and Celotex were insolvent at the time of trial. Westinghouse was the only non-settling defendant. Although the jury found that Westinghouse had acted recklessly and in concert with others—both circumstances making article 16 inapplicable—the trial court set aside both findings pursuant to a post-trial motion. Thus, since the judgment did not fit within an exception to Article 16, the article applied. Accordingly, Westinghouse, as the non-settling defendant, was not held jointly and severally liable and instead was required to pay only its equitable share.

The order of judgment indicates that the jury assessed damages of $1,600,000 in favor of the Estate of Mario Maltese, and judgment was entered against Westinghouse in the amount of $301,280 with interest, an amount corresponding roughly to the percentage of liability given to Westinghouse by the jury (20%). Significantly, no portion of the damages representing the shares of the bankrupt defendants (40% or $640,000) was reallocated to Westinghouse. The award remained undisturbed on appeal. Evidently, plaintiffs never requested the court to reallocate the bankrupt shares to Westinghouse, and the issue was not argued on appeal.

B. Judge Sifton's Approach in McPadden

In McPadden, Judge Sifton expressly applied Article 16 to limit plaintiff's recovery for non-economic damages. There, John Crane-Houdaille ("Crane"), the only defendant to go to a

49 See In re New York City Asbestos Litig., 678 N.E.2d at 468.
50 See id.
52 See In re New York City Asbestos Litig., 678 N.E.2d at 468.
final verdict, was assigned ten percent of the overall liability by
the jury. In calculating Crane's equitable share under Article
16, Judge Sifton first separated out the percentage of liability
attributed by the jury to non-diverse and bankrupt entities.

The parties agreed that "both bankrupts... and defendants
whose New York state residence prevents the Court from
exercising diversity jurisdiction over them... are not subject to
the Court's jurisdiction for Article 16 purposes."

Crane's equitable share of 24.1% of the damages was
established by dividing its apportioned share of liability (10%) by
the total amount of liability attributed by the jury to Article 16
fault sharers (41.5%). The decision reveals that most of the
Article 16 fault sharers had settled with the plaintiff prior to
verdict. Nonetheless, Crane was held liable for non-economic
losses. Crane was thus required to absorb a proportional share
of the damages attributed to bankrupt and non-diverse
defendants, not the entire share.

C. The Approach When Article 16 Is Inapplicable

A major cause of the confusion surrounding the treatment of
unavailable shares is that reported decisions addressing issues
of reallocation often involve cases not subject to Article 16. In

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54 See id. at 945.
55 See id. at 958.
56 Id. at 956. Of course, the fact that a remaining defendant agreed that
bankrupt defendants were beyond jurisdiction reduces the significance of the ruling
because it was not the product of vigorous litigation but rather stipulation of the
parties.
57 Id. at 956-59.
58 Id. at 951.
59 See id. at 960.
60 On appeal, the Second Circuit did not review Judge Sifton's application of
1993) (reversing the district court and ordering a new trial based on admission of
evidence prejudicial to Crane).
61 See In re New York Asbestos Litig. (Consorti), 847 F. Supp. 1086, 1109
(S.D.N.Y. 1994) (holding that Article 16 was not applicable because the evidence
substantiated the jury's findings of reckless conduct and concerted action, both of
which are statutorily created exceptions to Article 16), aff'd in part and rev'd in
part, 72 F.3d 1003 (2d Cir. 1995); In re E. & S. Dist. Asbestos Litig., 772 F. Supp.
1380, 1401 (E.D.N.Y. & S.D.N.Y. 1991) (observing that time-barred actions revived
under tort reform legislation "were explicitly exempted from the strictures of Article
16 limiting the liability of persons jointly responsible for causing injury"), aff'd, In re
Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831 (2d Cir. 1992); In re New York
City Asbestos Litig., 572 N.Y.S.2d 1006 (Sup. Ct. N.Y. County 1991) (involving
1986, as part of general tort reform, the legislature changed the statute of limitation for products-related personal injury actions. Under the new rule, plaintiffs have three years from the date they discover their injury to file actions in order to recover damages allegedly caused "by the latent effects of exposure to any substance." Under the prior practice, such causes of action accrued at the date of exposure. Actions time-barred under the old rule, however, were revived, provided they were re-filed within one year from the effective date of the act (July 30, 1987). Although Article 16 was inapplicable to the revived cases at issue in In re New York City Asbestos Litigation (Anciewicz), the trial court held that under General Obligations Law (GOL) section 15-108, "shares attributed to the bankrupt defendants are distributed among various other defendants found liable by the jury in proportion to their respective shares of liability." The appellate division, however, in rejecting the lower court's proportional redistribution method, observed that "nothing in [GOL] § 15-108 suggests that it was intended to compromise the principle of joint and several liability in tort." Thereafter, without reference to Article 16, the First Department held that "[t]he share of damages attributable to bankrupt defendants should be allocated...among non-settling defendants.

Although plaintiffs would argue that Anciewicz, which was affirmed by the New York Court of Appeals without comment, buttresses their argument that unavailable shares are allocated solely amongst non-settling defendants, the First Department merely corrected the lower court's error in applying tort reform principles in a case where Article 16 was clearly inapplicable. Thus, the decision stands only for the proposition that in cases not subject to Article 16, non-settling defendants will be

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63 See 1986 N.Y. Laws 682 § 4 at 1567; see also In re E. & S. Dist. Asbestos Litig., 772 F. Supp. at 1401 (noting that all of the cases were subject to the revival statute).
64 In re New York City Asbestos Litig., 572 N.Y.S.2d at 1009.
65 In re New York County Asbestos Litig. (Anciewicz), 593 N.Y.S.2d at 49.
66 Id. at 50.
responsible for any shortfall between the GOL section 15-108 offset and the total verdict. Insofar as Article 16 governs the molding of the judgment in these three cases, the holding of Ancewicz is inapplicable.

In sum, if Article 16 applies, a defendant’s liability is capped at its equitable share. Alternatively, if Article 16 does not apply, non-settling defendants will be jointly and severally liable for the shortfall between the GOL section 15-108 offset and the amount of damages awarded by the jury.

VI. WHY THE MCPADDEN APPROACH SHOULD NOT BE FOLLOWED

Of the bankrupt entities that may be deemed beyond the jurisdiction of a court, two distinct categories can be discerned: (1) bankrupt entities that have not established settlement trusts and (2) those that have established settlement trusts. There are various ways to analyze these two categories of entities.

A. A Trust May Be Amenable to Suit

If a trust exists, the document which governs the claims procedures must be reviewed. It is possible that the trust allows suits against it as long as certain conditions are satisfied, such as filing a claim and opting for arbitration prior to filing suit. Should a trust allow itself to be sued, it would be unfair to consider the bankrupt beyond jurisdiction. A non-settling defendant should not be prejudiced by a plaintiff’s strategic decision not to pursue the trust in the tort system.

B. Trusts That Pay Claims

Regardless of whether a trust contains a provision allowing lawsuits, if a trust pays claims, it should not be considered beyond jurisdiction. Although trusts typically pay a fraction of the amount the pre-bankrupt defendant would have settled for, that factor should not lead to a “beyond jurisdiction” finding because the financial ability of an entity does not impact on the issue.

C. Bankrupt Entities Without a Trust

A more difficult issue arises when a bankrupt entity has no trust. As discussed above, there are significant legal arguments militating in favor of not treating such defendants as “beyond
jurisdiction.” In addition, there are policy reasons for this conclusion.

D. A Trust May Be Amenable to Suit

Notwithstanding the federal courts’ opinion that a bankrupt entity is not amenable to suit, and thus beyond the effective jurisdiction of the plaintiffs, a review of various bankrupt entities indicates that various trusts provide for a claimant’s ability to file a lawsuit against the trust.67

1. Johns Manville

In 1994, the Johns Manville Corporation reorganization plan was amended.68 The Johns Manville Personal Injury Trust (“Manville Trust”) was created to bear all asbestos liability for Manville for injuries arising out of exposure to Manville products. To process such claims, the Manville Trust established a Trust Distribution Process ("Manville TDP") which governs the filing of claims for injuries arising out of exposure to Manville products. Pursuant to the Manville TDP, plaintiffs retain the right to sue the Manville Trust. To do so, a plaintiff must initially file a claim with the Trust. If a plaintiff rejects the offer and non-binding arbitration is rejected, plaintiff has the absolute right to file a lawsuit. The Manville TDP provides that “[o]nly claimants who, following individual evaluation, elect non-binding arbitration and then reject their arbitral awards retain the right to trial against the Trust of the liquidated value, if any, of their claims.”69

Thus, since claimants enjoy the right to pursue tort claims against the Manville Trust, it can hardly be considered “beyond jurisdiction.” A plaintiff’s decision not to pursue those claims should not prejudice a defendant so that the Manville share is considered “beyond jurisdiction.”

2. Celotex

The Celotex Trust is the entity which receives asbestos

69 Id. at 587 (emphasis added).
personal injury claims on behalf of Celotex Corporation.\textsuperscript{70} The Celotex Trust’s Personal Injury Claims Resolution Procedures (“Celotex Trust Procedures”) states:

Only claimants who opt for non-binding arbitration and then reject their arbitration awards retain the right to a jury trial to determine the liquidated value of their Asbestos Personal Injury Claims against the Trust . . . . A holder of an Asbestos Personal Injury Claim desiring to file suit against the Trust may do so only after the rejection of a non-binding arbitration award.\textsuperscript{71}

There are similar provisions in other settlement trusts as well. In one significant ruling, a state court found that a hearing was necessary on the issue of whether the bankrupt trusts should be considered beyond the jurisdiction of the courts.\textsuperscript{72} While federal court rulings have treated a bankrupt entity as automatically beyond jurisdiction, the opinion in \textit{In re New York City Asbestos Litigation}\textsuperscript{73} analyzed the issue of whether trusts are beyond jurisdiction as one which was conceded by plaintiffs’ counsel to be one of first impression in New York State courts.\textsuperscript{74}

The court acknowledged that in the federal Brooklyn Navy Yard case (“BNY”) rulings, the Manville trust was beyond the jurisdiction of the court. However, Justice Lehner analyzed a subsequent statement made by Judge Weinstein, the author of the federal BNY ruling, noting:

\begin{quote}
[I]n a later decision . . . [J. Weinstein] wrote . . . that “the greatest experts in asbestos litigation who drew up the trust distribution process (“TDP”) disagree as to whether the provision of this TDP will render the Trust a party over whom plaintiffs are unable to obtain jurisdiction within the meaning of N.Y. CPLR 1601.”\textsuperscript{75}
\end{quote}

\textsuperscript{70} See \textit{In re Celotex Corp.}, 204 B.R. 586, 602 (Bankr. M.D. Fla. 1996).
\textsuperscript{71} THE \textbf{CELOTEX CORPORATION, SECOND AMENDED AND RESTATED ASBESTOS PERSONAL INJURY CLAIMS RESOLUTION PROCEDURES § VII.10 (June 17, 1999), available at http://www.celotextrust.com.}
\textsuperscript{72} See \textit{New York City Asbestos Litig.}, 670 N.Y.S.2d at 739.
\textsuperscript{73} \textit{Id.} at 738 (“[P]laintiffs will now be given the opportunity to submit proof on this issue . . . [whether] plaintiffs could have applied to join any corporation (or trust created by it) as a party defendant.”) (emphasis added).
\textsuperscript{74} See \textit{id.} at 737 (“[P]laintiffs acknowledge that the ‘issue of whether, for the purposes of Article 16, bankrupt entities should be deemed beyond the court’s jurisdiction has never, to plaintiffs’ knowledge been directly addressed in any reported decision by a New York state court.’”).
\textsuperscript{75} \textit{Id.} at 738–39.
The Court noted that the defendant “cited to several cases in which the Manville trust was sued... and also assert[ed] that the trust created by Fibreboard Corporation was amenable to suit.” The court found that a hearing was needed to determine precisely which entities were subject to the automatic stay. The court noted:

Plaintiffs have provided the court with no proof in opposition to these assertions by [defendant] and the record is totally barren on the issue of whether at the time of trial the bankruptcy statutory stay was in effect with respect to these entities or the trusts created by them, or to any other corporation to whom the jury ascribed fault.

Rather than automatically find that a bankrupt entity is beyond jurisdiction, a court should examine the settlement trust agreement.

3. A Trust That Pays Claims

Numerous settlement trusts have been established to process claims and pay settlements on behalf of bankrupt defendants. Although the trusts do not pay “full value” and often settle claims for a relatively nominal amount, they are undisputedly paying claims for the injuries caused by the asbestos manufacturer on whose behalf the trusts were established. These trusts, insofar as they are available to make settlement offers to plaintiffs, surely cannot be considered bankrupt entities.

Plaintiffs may argue that since the trusts pay substantially less than “market” settlements, they ought to be considered “beyond jurisdiction.” An entity’s financial status, however, has

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76 Id. at 739. The Fibreboard Corporation previously had its own Trust Distribution Process (“Fibreboard TDP”). The Fibreboard TDP permitted a claimant to pursue a recovery through the courts after exhausting alternative trust procedures. See Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 519 (E.D. Tex. 1995) (“If an acceptable resolution still cannot be reached, the claimant may then try the claim in the tort system...”) (emphasis added). Although the Fibreboard TDP is no longer processing claims due to the bankruptcy of Owens Corning Fiberglas (the latter purchased Fibreboard and subsequently filed for bankruptcy), this is an example of how some entities considered beyond jurisdiction ought not to be. Rather, an examination of the Trust rules is required to ascertain whether a given trust can be sued.

77 New York City Asbestos Litig., 670 N.Y.S.2d at 739 (emphasis added).

no bearing upon the applicability of Article 16. In *Washington v. City of New York*, the court refused to require a defendant to pay more than its twenty percent share of a $750,000 verdict, notwithstanding the fact that the other defendant, which was found to be eighty percent liable, was required by law to fund no more than $10,000 of the underlying award. The plaintiff argued that Article 16 should be held inapplicable to the "20% defendant" in light of the legal limitations of recovery on the claim against the "80% defendant," but the court rejected plaintiff's argument. Accordingly, pursuant to Article 16, the court refused to require the "20% defendant" to pay more than 20% of the underlying verdict. Although observing that "[p]laintiff's contention distills to one of equity and fairness," the court noted additionally that "[i]t could also be argued, however, that it is inequitable to require [the "20% defendant"] to pay for what is in the main someone else's wrong."

In its final analysis, the *Washington* court stated:

But, more fundamentally, equitable considerations simply have no standing in the interpretation of Article 16. Sometimes a statute has inequitable consequences, but if they do not rise to constitutional dimension, and in the Court's view they do not, redress may be sought only from the Legislature.... It is important to keep in mind that we are dealing here with the interpretation of a statute, not with common law. Section 1601 provides that the liability of a joint tortfeasor found to be 50% or less at fault is limited to that defendant's proportionate share of fault. If equitable considerations were to play a part, the statute's effect could unravel into uncertainty.

Just as the *Washington* court refused to require a solvent defendant to absorb the share of a financially compromised defendant, it can be argued that in light of the New York State cases interpreting Article 16 as pertaining solely to personal jurisdiction and the language of C.P.L.R. 1601, which contains no "insolvency" exception, a defendant ought not to be burdened with another entity's share of blame simply because plaintiffs cannot obtain more than a certain amount.

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80 *Id.* at 612 (stating the uninsured "80% defendant" was represented by the Motor Vehicle Accident Indemnification Corporation [MVAIC]).
81 *Id.* at 611 (emphasis added).
82 *Id.* at 611-12.
An argument can be made that it is simply inequitable to allow plaintiffs to collect settlements from distribution trusts yet not allow defendants to use the liability shares attributed to such entities as a means of reducing their liability. Although the federal courts have implicitly held that a defendant's share should not be reduced by the culpability attributed to entities as to whom there was truly no means of recovery whatsoever (e.g., where a plaintiff is unable to lift or modify a bankruptcy stay and cannot consequently recover any compensation from a bankrupt tortfeasor), the drafters of Article 16 simply could not have anticipated that the jurisdictional restriction of Article 16 would be applicable to entities such as the various trusts. Such an interpretation simply constitutes a windfall to plaintiffs as well as defeats the legislative aim of Article 16.

4. Bankrupt Entities Without a Settlement Trust

Although the plain language of Article 16 is silent regarding whether a bankrupt entity is to be considered beyond the jurisdiction of the court, the plaintiff—the party seeking to avoid the application of Article 16—bears the burden of proving that it could not, through the exercise of due diligence, have obtained jurisdiction over the bankrupt defendants.\(^8\) The question of whether such an entity is beyond jurisdiction is more difficult when there is no trust, as discussed below. Nonetheless, there are significant reasons for holding that such an entity is not beyond jurisdiction.

VII. NON-ASBESTOS CASES REQUIRE A SHOWING THAT PLAINTIFFS WERE UNABLE TO OBTAIN IN PERSONAM JURISDICTION OVER AN ENTITY

New York case law requires the inclusion of all culpable persons on the verdict sheet, regardless of whether or not they are parties.\(^8\)\(^4\) Included within this panoply of persons will likely be defendants not subject to the jurisdiction of the court. Unfortunately, the plain language of Article 16 is silent as to what qualifies an entity as being beyond jurisdiction. There is

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simply no mention in the statute whatsoever regarding the type of jurisdiction—be it subject matter jurisdiction or personal jurisdiction—which must be lacking in order for an entity to be outside the court’s jurisdiction.\textsuperscript{85}

Notwithstanding the statute’s silence, in non-asbestos cases, New York courts have interpreted Article 16 as requiring the showing of a lack of in personam jurisdiction. For example, in Duffy v. County of Chautauqua,\textsuperscript{86} the Fourth Department held that Article 16’s limitation on liability was only inapplicable in instances where the plaintiff could demonstrate the requisite inability to obtain personal jurisdiction over an entity.\textsuperscript{87} Although the Duffy court observed that New York’s Workers’ Compensation Law precluded co-workers from suing one another, the court further noted that a co-worker’s fault “would ordinarily be considered for apportionment purposes under CPLR 1601.”\textsuperscript{88} Recognizing that “[t]he term ‘jurisdiction’ in CPLR 1601(1), therefore, refers to personal rather than to subject matter jurisdiction,” the court observed that “the statutory bar of the Workers’ Compensation Law does not constitute the inability to obtain jurisdiction as intended by section 1601.”\textsuperscript{89} Thus, since the plaintiff failed to demonstrate the requisite inability to achieve personal jurisdiction over the decedent/co-worker (the plaintiff could have served a representative of the decedent’s estate), the decedent’s culpability would have been a factor in apportioning liability, even though New York’s Workers’ Compensation Law precluded co-workers from suing each other. Such a substantive limitation merely implicated the court’s subject matter jurisdiction and was not within the intended meaning of Article 16’s jurisdictional restriction.

Additionally, in Rezucha v. Garlock Mechanical Packing Co.,\textsuperscript{90} the court held that the jurisdictional restriction upon limited liability under Article 16 was grounded in notions of

\textsuperscript{85} Legal scholars have noted that Article 16 is poorly drafted. See, e.g., Vincent C. Alexander, Practice Commentaries, MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK ANNOTATED § 1602, 615 (2001).
\textsuperscript{86} 649 N.Y.S.2d 297 (4th Dep’t 1996).
\textsuperscript{87} See id. at 301.
\textsuperscript{88} Id. at 300.
\textsuperscript{89} Id. at 300–01.
\textsuperscript{90} 606 N.Y.S.2d 969 (Sup. Ct. Broome County 1993).
personal jurisdiction, not subject matter jurisdiction.91 The issue in Rezucha was whether the liability share attributed to the State of New York, which was immune from suit in Supreme Court, could be taken into account under Article 16 in reducing the shares of other defendants. In particular, the decedent, on behalf of whom the plaintiff sued, died from injuries sustained during the course of his employment with the State University of New York. Pursuant to C.P.L.R. 1601, plaintiff sought to preclude the introduction by the defendant of evidence of culpable conduct by the State of New York. Because the State of New York was immune from suit in Supreme Court, the plaintiff alleged that the state was an entity over which plaintiff could not obtain jurisdiction. Consequently, plaintiff argued that "any determination of culpable conduct on [the state's] part would not reduce any defendant's liability under the statute."92 The Rezucha court, while acknowledging the state's immunity to suit, stated:

[The feature which precludes consideration of a non-party's culpability under section 1601 is the lack of personal, rather than subject matter, jurisdiction. Here the State's immunity from suit is better viewed as a limitation on the subject matter jurisdiction of the Supreme Court rather than as a restriction on plaintiff's ability to make service and obtain personal jurisdiction under CPLR 301. Since the statute has been read to include a non-party's culpability unless the claimant cannot obtain personal jurisdiction, a lack of subject matter jurisdiction does not necessarily implicate the jurisdictional restriction.93

Adopting the foregoing interpretation of Article 16, the Rezucha court held that "proof of the State's culpable conduct will be permitted and its proportional share will be included in the consideration of whether CPLR 1601 reduces any defendant's liability for non-economic loss to that defendant's actual share."94 Courts interpreting Article 16 have consistently held that plaintiffs must demonstrate an inability to obtain personal jurisdiction over such entities, not the type of subject matter jurisdictional impediments posed by automatic stays.95

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91 See id. at 972.
92 Id. at 970.
93 Id. at 972 (citations omitted) (emphasis added).
94 Id. at 973.
95 With respect to interpretations of state statutes, New York courts should be
One legal commentator has observed that the correct result was reached in *Rezucha* and that an “inability to obtain jurisdiction” generally conjures up the image of an out-of-state tortfeasor over whom no basis of long-arm jurisdiction exists.\(^6\)

Federal courts have embraced an opposite policy. In the consolidated federal BNY trial decision,\(^7\) the court affirmed the trial court's ruling that bankrupt entities subject to automatic stays are parties over whom jurisdiction cannot be obtained pursuant to Article 16.\(^8\) However, the basis of the decision is really that the plaintiffs cannot obtain “effective” jurisdiction over the defendants. Without the “effective” requirement, ostensibly even according to the federal courts, there would be jurisdiction. The automatic stay does not deprive a court of jurisdiction.\(^9\) Courts have interpreted Article 16 as requiring effective jurisdiction, but such a reading is questionable.

As discussed above, courts have uniformly held that the language of Article 16's jurisdictional restriction contemplates an inability to obtain personal jurisdiction over an entity. Insofar as 28 U.S.C. § 1334(a) vests the federal courts with exclusive jurisdiction over bankruptcy proceedings, the New York Supreme Court lacks subject matter jurisdiction over such

guided by decisions of New York appellate courts, rather than federal courts, notwithstanding the fact that the sole appellate authority is from a different judicial department than the one in which the case is heard. See *Mountain View Coach Lines, Inc. v. Storms, 476 N.Y.S.2d 918, 919–20 (2d Dep't 1984)* According to the court:

The Appellate Division is a single statewide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule. *Id.* (citation omitted). Thus, the Fourth Department's decision in *Duffy*, and other New York state cases, are the best source of precedent on the issue of jurisdiction for purposes of Article 16.

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\(^7\) *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992).

\(^8\) See *id.* at 845–56.

matters. Clearly, the bankruptcy court's exclusive jurisdiction over matters involving insolvent entities implicates a court's lack of subject matter jurisdiction. The insolvent status of a tortfeasor, however, says nothing with respect to whether such an entity is likewise beyond the personal jurisdiction of New York courts. Just as the Rezucha court permitted the defendants to reduce their equitable share by the share attributed to the state, an entity over which the Rezucha court clearly lacked subject matter jurisdiction, courts should not automatically consider bankrupt entities beyond jurisdiction. The federal courts' view that insolvent entities are beyond the jurisdiction of the court for purposes of Article 16 is inconsistent with state court rulings.

In his commentaries to Article 16, Professor Alexander states the following:

It seems clear, however, that the proviso was intended to exclude a nonparty's share of fault only in situations in which the nonparty is someone over whom no basis of personal jurisdiction exists. The fact that a nonparty may have some special defense under the substantive law which, as a practical matter, would make joinder futile, does not seem to be a proper basis for excluding the nonparty's share of fault.

The commentaries refer to the federal BNY opinion and note that according to the federal ruling, bankrupts were considered excludable because of the absence of "effective" jurisdiction. Professor Alexander asks "whether the Legislature intended to equate practical limits on the ability of a court to exercise jurisdiction with an inability to obtain jurisdiction."

Professor Alexander also cites with approval the ruling in Rezucha v. Garlock Mechanical Packing Co. He states that the correct result was reached in Rezucha. "In further support of the

100 See Morrison v. Budget Rent a Car Sys., Inc., 657 N.Y.S.2d 721, 724 (2d Dep't 1997) (recognizing that personal jurisdiction pertains to a court's power to exercise control over the parties, and that subject matter jurisdiction constitutes an absolute restriction on a court "in terms of its statutory or constitutional capacity to adjudicate particular types of suits") (emphasis added).


102 Id. at 607 (finding that dissolution of corporate tortfeasor does not preclude the obtaining of jurisdiction (citing Dominguez v. Fixrammer Corp., 656 N.Y.S.2d 111 (Sup. Ct. Bronx County 1997))).
court’s conclusion, it can be argued that a plaintiff’s inability to sue the State in Supreme Court is not an inability to obtain jurisdiction, but rather is the result of a rule of substantive law based on the doctrine of sovereign immunity.”

No court has addressed the issue of whether any attempts were made to lift or modify the automatic stay applicable to these insolvent entities. Without even attempting to lift or modify the stay, it can be said that plaintiffs have not put forth the requisite due diligence regarding their attempts to exercise jurisdiction over the bankrupt entities. Of course, requiring plaintiffs to attempt to modify or lift the stay in every asbestos case would be difficult. Nonetheless, without even attempting, it cannot be demonstrated that plaintiffs could not, with due diligence, obtain jurisdiction over bankrupt defendants.

CONCLUSION

In New York, the effect of bankrupt defendants on judgment molding can be far reaching and can obscure the relative responsibility of a defendant. Presuming that a defendant does not come within an exception to Article 16, the idea that an unsettled defendant would have to absorb the asbestos liability of another defendant defies a significant legislative intent of

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103 Id. at 608.
104 One court, however, ordered a hearing to determine whether stays were in effect that prevented suit and that plaintiffs have the burden of demonstrating that a stay prevented them from obtaining jurisdiction over the parties, ruling as follows: [Defendant] argues that in light of such state of the record, plaintiffs have failed to meet the due diligence burden placed on them by § 1601, and further that they have failed to plead the existence of any exemption from the limitation on liability provided therein. While plaintiffs never submitted any proof as to which entities the bankruptcy statutory stay applied, it was always clear that there was a legal issue open with respect to the apportionment of the shares of fault of the corporations who had filed for bankruptcy protection. Therefore, plaintiffs will now be given the opportunity to submit proof on this issue, and a decision on the molding of the judgments is held in abeyance pending a hearing before a special referee to hear and report as to which corporations, to which the jury ascribed fault, were subject to a bankruptcy statutory stay at any time subsequent to September 1, 1995. Said date, which was 5 months prior to the trial of the damages portion of these actions, is selected as I find that plaintiffs could have applied to join any corporation (or trust created by it) as a party defendant if any applicable stay had expired prior to that time and a viable claim existed.

In re New York City Asbestos Litig., 670 N.Y.S.2d 735, 739 (Sup. Ct. N.Y. County 1998).
Article 16, impedes settlement, and raises potential ethical concerns.

It would seem that a defendant deemed to be responsible for five percent of the harm suffered by a plaintiff should be required to pay no more than five percent of the damages. By introducing evidence as to bankrupt entities, however, and focusing the jury’s attention on their culpability, an unsettled defendant may be asked to pay a portion of the bankrupts’ share. Thus, the legislative goal of preventing deep pockets from being targeted is thwarted.

Moreover, given the financial losses associated with the asbestos litigation and the potential impact on non-settling defendants, Article 16 issues pose unique challenges to remaining defendants. As more defendants enter bankruptcy, a considerable sum of money is no longer “on the table.” This places additional pressure on the remaining defendants to “make up” that difference. The dramatic increase in settlement demands contributes to an environment in which prior settlement values do not resolve cases.

Finally, there are ethical concerns relating to the presentation of evidence to the jury. Counsel has an incentive to manipulate the evidence before the jury and can appear quite reasonable to a jury by blaming the bankrupt defendants, all the while building up the share of liability of the viable unsettled defendant.

A different approach is clearly needed. The ruling in In re New York City Asbestos Litigation was a significant step forward in moving away from an automatic finding that bankrupts were beyond jurisdiction. By acknowledging that there were issues with respect to whether trusts could be sued and whether they could pay claims, the court appreciated that the simple reaction of placing bankrupts in the “beyond jurisdiction” category was not correct.