

Association of Defense
Counsel of Northern
California and Nevada

ASDC

ASSOCIATION OF
SOUTHERN CALIFORNIA
DEFENSE COUNSEL

January 6, 2016

Presiding Justice Norman L. Epstein
Associate Justice Nora M. Manella
Associate Justice Audrey B. Collins
California Court of Appeal
Second Appellate District, Division Four
300 S. Spring Street, 2nd Floor, North Tower
Los Angeles, California 90013-1213

Re: *Hernandezcueva, et al. v. American Standard, Inc., et al.*
(*E.F. Brady Co., Inc.*)

Court of Appeal No. B251933

Request to Modify Opinion

Dear Honorable Justices:

We write on behalf of the Association of Southern California Defense Counsel, as well as the Association of Defense Counsel of Northern California and Nevada, to request that this Court delete or modify the first full paragraph on page 23 of the December 22, 2015 opinion, which relates to whether a bankruptcy trust is a collateral source.

We believe that this paragraph presents a serious risk of being misconstrued and misused on the issues of (a) whether a defendant is entitled to a settlement credit for payments made by a bankruptcy trust on behalf of a joint tortfeasor and (b) whether bankrupt entities may be assigned a share of responsibility on a verdict form, thereby reducing the liability of non-bankrupt defendants for noneconomic damages, which in asbestos cases particularly often dwarf the economic awards. Although neither was at issue in *Hernandezcueva*, and hence the paragraph on page 23 of the Opinion was not central to this Court's conclusion that a strict products liability claim could be asserted against the defendant, settlement payments obtained from a bankruptcy trust are commonly the subject of a credit under Code of Civil Procedure § 877 in many asbestos-litigation cases. As discussed below, bankrupt entities that have contributed to cause a plaintiff's injuries are joint tortfeasors and settlement payments made to resolve claims for their tortious conduct are not a collateral source. Thus, under settled law, defendants are entitled to a credit for these settlements under Code of Civil Procedure § 877 and may allocate fault to these joint tortfeasors under Civil Code § 1431.2.

Respectfully, the Associations therefore request that the first full paragraph on page 23 be deleted or modified to ensure that the Opinion is not misused in other cases to deprive defendants of their statutory right to a settlement credit. The entire paragraph could be deleted without impacting the Court's holding, or its analysis of the issues and arguments raised by the parties. Alternatively, a slight modification would also be appropriate, to simply state that the contention of the Coalition for Litigation Justice, Inc. is irrelevant to the primary issue involved in this appeal, which is whether a strict products liability claim could be asserted against defendant E.F. Brady based on the evidence and authorities discussed in the opinion.¹

Interest of the Associations.

The Associations are among the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions. They are comprised of more than 1,800 leading civil litigation defense attorneys in Southern California and Northern California. The Associations are active in assisting courts on issues of interest to its members, having appeared numerous times as amicus curiae in the California Supreme Court as well as the Courts of Appeal. They also provide its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multi-faceted support, including a forum for the exchange of information and ideas.

The Associations' members regularly defend civil cases involving alleged asbestos exposures (as in *Hernandezcueva*), in which settlement monies are received by plaintiffs from bankruptcy trusts, to settle claims against joint tortfeasors. Thus, they have a significant interest to ensure that any confusion is avoided and that plaintiffs do not seize upon language in this Court's opinion to make arguments in other cases to impact a defendant's rights to a settlement credit and to allocate fault to bankrupt entities, which were not issues that were raised or briefed by the parties in *Hernandezcueva*. The concerns directly impact and can also extend beyond the hundreds of asbestos cases that are filed each year.

¹ For instance, the end of the paragraph could be modified to read as follows: "However, the contention is irrelevant to the primary issue involved in this appeal, which is whether a strict products liability claim could be asserted against E.F. Brady based on the evidence and authorities discussed in this opinion. The record is also devoid of evidence that the Hernandezcuevas may receive compensation from any bankruptcy trust related to E. F. Brady. Accordingly, we reject the contention. In sum, the trial court erred in granting nonsuit on the Hernandezcuevas' claim for strict products liability."

Settlement Payments Made By Asbestos Bankruptcy Trusts To Resolve Claims Against Joint Tortfeasors Are Not A Collateral Source.

The collateral source rule is not implicated and “[c]ollateral recovery is not allowed where a joint tortfeasor is involved because the source of recovery is not wholly independent” of the tortfeasor. (*Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479, 485.) The California Supreme Court has long held that defendants are entitled to a settlement credit, which reduces a plaintiff’s damages, for payments made by or on behalf of a joint tortfeasor. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1330, 1333-1334; *Helfend v. Southern California Rapid Transit Dist.* (1989) 2 Cal.3d 1, 7-8 fn. 7.) Settlement credit reductions are made “before the entry of judgment” and, in some cases, “when a plaintiff’s prior settlement is more than the award received at trial, the plaintiff ultimately recovers nothing.” (*Goodman*, 47 Cal.4th at 1334-1335.) In *Helfend*, the Court explained the reasons why payments obtained to resolve a claim against a joint tortfeasor are not deemed a “collateral source,” stating:

“In *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, 813, 155 P.2d 633, 637, this court held that ‘payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing *pro tanto* the amount of the damages he may be entitled to recover.’ Hence, the [collateral source] rule applies only to payments that come from a source entirely independent of the tortfeasor and does not apply to payments by joint tortfeasors or to benefits the plaintiff receives from a tortfeasor’s insurance coverage.” (*Helfend*, 2 Cal. 3d at 8 fn. 7, citing *De Cruz v. Reid* (1968) 69 Cal. 2d 217, 225; *Witt v. Jackson* (1961) 57 Cal.2d 57, 71-72; *Turner v. Mannon* (1965) 236 Cal.App.2d 134, 138-139; and *Dodds v. Bucknum* (1963) 214 Cal.App.2d 206, 212-213.)

“A joint tortfeasor” includes any person or entity whose acts or omissions allegedly contributed to “produce the sum total of the injuries to the plaintiff.” (*Topa Ins. Co. v. Fireman’s Fund Ins. Cos.* (1995) 39 Cal.App.4th 1331, 1341.) “It is not necessary that they act in concert or in pursuance of a common design, nor is it necessary that they

be joined as defendants.” (*Gackstetter v. Frawley* (2003) 135 Cal.App.4th 1257, 1272-1273.)

As *Helpend* instructs, it “makes no difference whether the payment comes directly from the tortfeasor” or from some other entity who makes a payment on behalf of the tortfeasor, including “the tortfeasor’s insurance carrier.” (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673.) “[I]n either circumstance, a credit must be given.” (*Id.*)

Bankruptcy Trust Settlements Are Paid On Behalf Of Joint Tortfeasors, And Thus Defendants Have A Statutory Right To A Settlement Credit.

Plaintiffs file claims against bankruptcy trusts because they assert that their injuries were caused or contributed to by the entities that set up the trusts to resolve claims. Asbestos bankruptcy trusts are successors to, and stand in the shoes of, such joint tortfeasors. The trusts “assume the liabilities of a debtor [manufacturer, supplier, etc.] which... has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.” (11 U.S.C. § 524(g)(2)(B)(i)(I).)

Asbestos bankruptcy trusts are established pursuant to court-confirmed reorganization plans, and only where it is determined that “the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events,” and “the actual amounts, numbers, and timing of such future demands cannot be determined.” (11 U.S.C. § 524(g)(2)(B)(ii)(I)-(II).) The plan is confirmed (and a trust created) where there is “reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.” (11 U.S.C. § 524(g)(2)(B)(ii)(V).) The trust is required to “be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments” in order to “pay claims and demands” that injured parties may make for injuries caused by the bankrupt entity (i.e. debtor). (11 U.S.C. § 524(g)(2)(B)(ii) and (iv).) This usually involves hundreds of millions of dollars paid by the debtor and its insurers to set up the trust.² After this settlement fund is in

² Recently, a court concluded that a \$125 million trust was required to pay for the asbestos liabilities of Garlock Sealing Technologies. (*In re Garlock Sealing Techs., LLC* (Bankr. W.D.N.C. 2014) 504 B.R. 71, 73.) In reaching its decision, the court discussed even greater amounts that were required to fund bankruptcy trusts to pay for the asbestos liabilities of other entities who were often sued for causing a plaintiff’s injuries. This

place, the trusts are commonly accompanied by a “channeling injunction,” whereby all claims arising from the asbestos activities of the debtor company and related entities are directed to the trust and to the court that entered the injunction. (11 U.S.C. § 524(g)(1)(B).) There is simply no parallel between this successor-of-asbestos-defendant status of trusts and the typical “collateral source”—insurance, charity, and the like.

Thus, payments made by bankruptcy trusts on behalf of joint tortfeasors fall within a defendant’s statutory right to a settlement credit pursuant to Code of Civil Procedure § 877, for payments made by “one or more of a number of tortfeasors claimed to be liable for the same tort,” which “shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater.” (Code Civ. Proc., § 877 (a).)

Because bankruptcy trusts are created by entities who caused or contributed to a plaintiff’s injuries, the settlement payments are made to resolve claims on behalf of entities who are unquestionably joint tortfeasors. As joint tortfeasors, bankrupt entities may therefore be placed on a verdict form and allocated a share of fault for causing a plaintiff’s injuries. (See Civ. Code § 1431.2; *Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063, 1069 [A defendant’s liability for noneconomic damages “cannot exceed his or her proportionate share of fault as compared with all fault responsible for the plaintiff’s injuries, not merely that of ‘defendant[s]’ present in the lawsuit.”]; *Collins v. Plant Insulation Co.* (2010) 185 Cal.App.4th 260, 270 [Immune entities may be allocated fault].) For instance, one well-known bankrupt entity that has created a trust to settle asbestos claims is Johns-Manville, which was one of the “largest supplier of raw asbestos and manufacturer of asbestos-containing products in the United States.” (*Travelers Indem. Co. v. Bailey* (2009) 557 U.S. 137, 140, 129 S.Ct. 2195, 2198.) It is precisely because Johns-Manville and others bankrupt entities are joint tortfeasors that juries have allocated fault to them. (See, e.g., *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 958, 961-962 [96.3% of fault allocated to entities who were not defendants in the case, and “Johns-Manville, Unarco and Aamatex” were identified by plaintiff as “additional asbestos manufacturers to whose products he believed he had been exposed.”].)

included Eagle-Pircher Industries, Owens-Corning, Federal Mogul and Specialty Products, with each having an estimated liability of more than a billion dollars for asbestos claims. (*Id.* at 88, 90-92.) *In Re Garlock* has received significant attention for revealing unfortunate practices by plaintiffs’ counsel in California and other states of concealing bankruptcy trust claims while pursuing civil lawsuits against other parties they alleged caused their injuries. (*Id.* at 84-87.)

And, because bankruptcy trust settlements are paid on behalf of joint tortfeasors to resolve claims asserted against them for causing a plaintiff's injuries, they are not a collateral source that is "wholly independent" of the tortfeasor. (*Helpend*, 2 Cal.3d at 7-8 and fn. 7; *Kardly*, 207 Cal.App.3d at 485; *Krusi*, 144 Cal.App.3d at 673.)

Consistent with *Helpend's* holding that defendants are entitled to a credit for monies paid by or on behalf of joint tortfeasors—which are therefore not a collateral source—courts have expressly considered bankruptcy trust payments to be settlements. (See, e.g. *Volkswagen of America, Inc. v. Superior Court (Rusk)* (2006) 139 Cal.App.4th 1481, 1494 ["The trial court has ordered Rusk to disclose the amounts, if any, he has received in settlement from each of the trusts."]; *Scapa Dryer Fabrics, Inc. v. Saville* (Md. 2011) 418 Md. 496, 533, 16 A.3d 159, 181 ["In the instant case, the substance of the settlement agreements between Mr. Saville and any and all §524(g) Trusts will determine the amount of the reduction of the judgment."]; *Barabin v. AstenJohnson, Inc.*, 2010 WL 3699979 at *1, 3-4, 10 (W.D.Wash. 2010) [Plaintiff's settlements with asbestos bankruptcy trusts supported a settlement credit to offset a verdict.]

When discussing the relevance and discoverability of bankruptcy trust claims, the Court of Appeal in *Volkswagen* confirmed that bankrupt entities who created the trusts are joint tortfeasors:

"...Rusk has provided the bankruptcy trusts with factual information concerning both his work history and his medical condition. Both unquestionably are directly pertinent to the claim Rusk is asserting against Volkswagen. And Volkswagen has good reason to ascertain what Rusk has told others about these issues. Since each party who shares responsibility for any asbestos-related disease from which a claimant suffers is liable only for its proportionate share of noneconomic damages (see *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 528, 66 Cal.Rptr.2d 438, 941 P.2d 71 [applying Civ.Code, § 1431.2 to limit defendant's liability for noneconomic damages caused by asbestos exposure to defendant's proportional share of the fault]; *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 97 Cal.Rptr.2d 240), each will understandably be concerned to determine whether the claimant has overstated its share of responsibility. The number of days and the conditions under which a claimant was exposed to the asbestos-containing materials of one responsible party bears directly upon the extent

of the liability of the others. Each therefore will have very good reason to compare what a claimant has said in this regard in supporting a claim against another responsible party.” (139 Cal.App.4th at 1495.)

Two decisions since *Volkswagen* have addressed a related issue—whether amounts that “plaintiffs would be entitled to recover, but had not yet sought, from various asbestos bankruptcy trusts” should be included within a defendant’s right to a settlement credit under Code of Civil Procedure § 877. Both decisions said no – but not because payments from trusts were from a “collateral source:” instead on the rationale that Code of Civil Procedure § 877 applies to prejudgment settlements only. (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1367; *Hellam v. Crane Co.* (2015) 239 Cal.App.4th 851, 873.)

Paulus and *Hellam* do not (nor could not) disturb the California Supreme Court’s holding in *Helfend*, which instructs that settlement payments made on behalf of a joint tortfeasor do not fall within the collateral source and are “admissible for the purpose of reducing *pro tanto* the amount of the damages [a plaintiff] may be entitled to recover.” (*Helfend*, 2 Cal.3d at 8 fn.7.)

Pursuant to Code of Civil Procedure § 877, defendants have a statutory right to a credit for any settlement payments made by or on behalf of joint tortfeasors (*Helfend*, 2 Cal.3d at 7-8 and fn.7; *Goodman*, 47 Cal.4th at 1330, 1333-1335; *Krusi*, 144 Cal.App.3d at 673)—which includes bankruptcy trust settlement payments that are made to resolve claims that a plaintiff has asserted against a bankrupt joint tortfeasor.

Settlement credits are necessary and proper to ensure that “a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one joint tortfeasor and all of his claim from another.” (*Reed v. Wilson* (1999) 73 Cal.App.4th 439, 444.) This is particularly fair in the context of bankruptcy trust settlements because the only reason a trust rather than a company is paying the settlement is because the company’s asbestos liabilities were so enormous that it was forced into bankruptcy. Otherwise, that company would be a defendant in the case and would have to pay for all the economic and non-economic damages that it caused.

Conclusion: The misidentification of asbestos bankruptcy trusts as “collateral sources” is inconsistent with the above authorities. Even though it is *dicta*, unnecessary to the result in *Hernandezcueva*, this could have unfortunate and improper ripple effects that will threaten defendants’ legitimate rights to (1) a settlement credit under Code of Civil Procedure § 877 for settlements paid by bankruptcy trusts on behalf of joint tortfeasors

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who contributed to cause a plaintiff's injuries; and (2) naming bankrupt entities on verdict forms so that fault can be allocated to them. Thus, on behalf of the Associations and the many companies who will be adversely impacted, this Court is respectfully requested to delete or modify the first full paragraph on page 23 of its Opinion in the *Hernandezcueva* case.

Respectfully submitted,

ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL

By:  _____

David K. Schultz of Polsinelli LLP
2049 Century Park East, Suite 2900
Los Angeles, California 90067
(310) 203-5325
dschultz@polsinelli.com

ASSOCIATION OF DEFENSE COUNSEL
OF NORTHERN CALIFORNIA AND NEVADA

By:  _____

Don Willenburg of Gordon & Rees Scully
Mansukhani
1111 Broadway Street, Suite 1700
Oakland, California 94607
(510) 463-8688
dwillenburg@gordonrees.com

PROOF OF SERVICE


I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and not a party to the within action; my business address is 2049 Century Park East, Suite 2300, Los Angeles, CA 90067.

On January 6, 2016, I served the following document(s) described **LETTER REQUEST TO MODIFY OPINION** on the interested parties in this action as follows:

See Attached Service List

BY FIRST CLASS MAIL: I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 6, 2016, at Los Angeles, California.


Eartha M. Guzman

SERVICE LIST

Hernandezcueva v. American Standard, Inc., Case No. B251933

ADDRESSEE	
<p>Simona A Farrise, Esq. Farrise Law Firm, P.C. 225 South Olive St., Suite 102 Los Angeles, CA 90012</p> <p>Sharon J. Arkin, Esq. The Arkin Law Firm 225 South Olive Street, Suite 102 Los Angeles, CA 90012</p>	<p>Attorneys for Plaintiffs and Appellants JOVANA HERNANDEZCUEVA</p>
<p>Jerry C. Popovich, Esq. Selman Breitman LLP 6 Hutton Centre Drive, Suite 1100 Santa Ana, CA 92707</p>	<p>Attorneys for Defendant and Respondent E.F. BRADY COMPANY, INC.</p>
<p>E Scott Holbrook, Esq. Crawford & Bangs LLP 1290 E. Center Court Drive Covina, CA 91724</p>	<p>Attorneys for Amicus Curiae for Respondent AMERICAN SUBCONTRACTORS ASSOCIATION</p>
<p>Kevin C. Mayer, Esq. Crowell & Moring LLP 515 So. Flower St., 40th Floor Los Angeles, CA 90071</p>	<p>Attorneys for Amicus Curiae for Respondent COALITION FOR LITIGATION JUSTICE, INC.</p>
<p>Curt Cutting, Esq. Horvitz & Levy LLP 15760 Ventura Blvd., 18th Floor. Encino, CA 91436</p>	<p>Attorneys for Amici Curiae HONEYWELL INTERNATIONAL INC., KAISER GYPSUM COMPANY, INC., RESOLUTE MANAGEMENT SERVICES LTD., SHERWIN WILLIAMS COMPANY, and TRUCK INSURANCE EXCHANGE</p>
<p>Don Willenburg, Esq. Gordon & Rees Scully Mansukhani 1111 Broadway, Suite 1700 Oakland, CA 94607</p>	<p>Attorneys for Amicus Curiae ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA</p>
<p>David K. Schultz, Esq. POL SINELLI LLP 2049 Century Park East, Suite 2900 Los Angeles, CA 90067</p>	<p>Attorneys for Amicus Curiae ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL</p>

Eartha Guzman

From: nobody@jud.ca.gov
Sent: Wednesday, January 06, 2016 11:38 AM
To: Eartha Guzman
Subject: E-File Case B251933, Hernandezcueva v. American, Submitted 01-06-2016 11:38 AM
Attachments: B251933_MOT_ASCDC&ADCNCN.pdf

The following Appellate Document has been submitted.

Case Type: Civil

Division: 4

Case Number: B251933

Case Name: Hernandezcueva v. American Standard Inc. (E.F. Brady Co., Inc.)

Name of Party: Amicus Curiae Assoc. of So. CA Defense Counsel & Assoc. of Defense Counsel No. CA & NV

Type of Document: Motions (MOT)

Name of Attorney or Self-Represented Party Who Prepared Document: David K. Schultz

Bar Number of Attorney: 150120