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Bill Analysis
Legislative Service Commission

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(As Reported by H. Civil & Commercial Law)

Rep. Oelslager

BILL SUMMARY

- Provides that "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person to which the person's exposure to asbestos is a substantial contributing factor.
- Provides the minimum requirements that are medical in nature for an asbestos claim based on a nonmalignant condition or based on lung cancer of an exposed person who is a smoker.
- In a tort action in which an asbestos claim is alleged, requires the filing of a written report and supporting test results constituting prima-facie evidence of an exposed person's physical impairment that meets the minimum requirements for the particular claim.
- Provides procedures for the defendant in the case to challenge the adequacy of the plaintiff's prima-facie evidence and for the court to resolve the issue of whether the plaintiff has made a prima-facie showing.
- Requires the court, upon a finding of failure to make a prima-facie showing, to administratively dismiss the plaintiff's claim without prejudice and to maintain its jurisdiction over the case, and permits a plaintiff whose case has been administratively dismissed to reinstate the case.
- Provides that a proceeding for a prima-facie showing is a provisional remedy that is subject to appeal under current law.

* *This analysis was prepared before the report of the House Civil and Commercial Law Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Provides that no prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.
- Specifies that the asbestos litigation provisions are not intended and are not to be interpreted to affect any wrongful death claims.
- Generally provides that a premises owner is not liable for any injury to any individual resulting from asbestos exposure, subject to certain exceptions and presumptions.
- Specifies that the asbestos litigation and premises liability provisions are not intended and are not to be interpreted to affect the rights of any party under bankruptcy proceedings or the ability to make a claim or demand against a trust established pursuant to a plan of reorganization under a Chapter 11 bankruptcy.
- Specifies that the asbestos litigation and premises liability provisions do not affect the scope or operation of any workers' compensation law or veterans' benefit program.
- In tort actions alleging injury or loss to person resulting from exposure to asbestos, requires the plaintiff to prove that a particular defendant's conduct, and that the exposure to asbestos, was a substantial factor in causing the injury or loss.
- Provides that it is the General Assembly's intent in enacting the provisions covered by the preceding dot point to establish the standard for granting summary judgment in tort actions involving exposure to asbestos that is consistent with the decision in *Lohrmann v. Pittsburgh Corning Cor.* (4th Cir. 1986), 782 F.2d 1156.
- Generally limits the successor asbestos-related liabilities of certain corporations to the fair market value of the acquired stock or assets of the transferor if the corporation is a successor in a stock or asset purchase, or to the fair market value of the transferor's total gross assets if the corporation is a successor in a merger or consolidation.
- Provides the methods by which a corporation may establish the fair market value of assets, stock, or total gross assets under the provisions covered by the preceding dot point and the formula for the annual increase of that fair market value.

- Requires courts in Ohio to apply, to the fullest extent permissible under the United States Constitution, Ohio's substantive law, including the bill's provisions, to the issue of successor asbestos-related liabilities.
- Provides that the bill's limitations on successor asbestos-related liabilities apply to all asbestos claims and all litigation involving asbestos claims, including claims and litigation pending on the bill's effective date, and that those limitations do not apply to workers' compensation benefits, claims against a successor that do not constitute claims for a successor asbestos-related liability, any obligation arising under the "National Labor Relations Act" or under any collective bargaining agreement, or any contractual rights to indemnification.
- Codifies the elements of the common law cause of action for piercing the corporate veil and specifies the elements that have to be proven with respect to the liability of a shareholder in an asbestos claim under the doctrine of piercing the corporate veil.
- Specifies that any such liability of the shareholder is exclusive and preempts any other obligation or liability imposed upon that shareholder for that obligation or liability under common law or otherwise.
- States that the intent of the bill's provisions regarding piercing the corporate veil are intended to codify the elements of the common law cause of action for piercing the corporate veil and to abrogate the common law cause of action and remedies relating to piercing the corporate veil in asbestos claims.
- Provides that the bill's provisions regarding piercing the corporate veil apply to all asbestos claims commenced on or after the provisions' effective date or commenced prior to and pending on that effective date.
- Provides the General Assembly's findings and intent.
- Specifically requests the Supreme Court to adopt certain rules related to asbestos claims.

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CONTENT AND OPERATION

Asbestos litigation--minimum requirements

Medical criteria for a claim based on a nonmalignant condition

The bill provides that for purposes of R.C. 2305.10 (see **COMMENT**) and R.C. 2307.92 to 2307.95 in the bill, "bodily injury caused by exposure to asbestos" means physical impairment¹ of the exposed person,² to which the person's

¹ "Physical impairment" means a nonmalignant condition that meets the minimum requirements of R.C. 2307.92(B) or lung cancer of an exposed person who is a smoker, that meets the minimum requirements of R.C. 2307.92(C). "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a

exposure to asbestos³ is a substantial contributing factor.⁴ A person is prohibited from bringing or maintaining a tort action⁵ alleging an asbestos claim⁶ based on a *nonmalignant condition* (a condition that is caused or may be caused by asbestos other than a diagnosed cancer (R.C. 2307.91(R)) in the absence of a prima-facie showing, in the manner described below in "*Asbestos litigation--required filings*," that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a

competent medical authority pursuant to R.C. 2307.92 and 2307.93, during the last 15 years. (R.C. 2307.91(T) and (BB).)

² *"Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under R.C. 2307.92 (R.C. 2307.91(L)).*

³ *"Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered (R.C. 2307.91(B)).*

⁴ *"Substantial contributing factor" means that exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim and a competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred (R.C. 2307.91(DD)).*

⁵ *"Tort action" means a civil action for damages for injury, death, or loss to person, including a product liability claim that is subject to R.C. 2307.71 to 2307.80 or an asbestos claim that is subject to R.C. 2307.91 to 2307.95. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons. (R.C. 2307.91(GG).)*

"Civil action" means all suits or claims of a civil nature in state or federal court, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include: (1) a civil action relating to any workers' compensation law, (2) a civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. 524(g), or (3) a civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code. (R.C. 2307.91(K).)

⁶ *"Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief, arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos. (R.C. 2307.91(C).)*

substantial contributing factor to the medical condition. (R.C. 2307.92(A) and (B).)

That prima-facie showing must include all of the following minimum requirements (R.C. 2307.92(B)):

(1) Evidence verifying that a competent medical authority⁷ has taken a detailed occupational and exposure history of the exposed person from the

⁷ "Competent medical authority" means (1) a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the medical criteria requirements described above and is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist, (2) is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person, (3) as the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following: (a) the reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted, (b) the reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process, or (c) the reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening, and (4) spends no more than 25% of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential civil actions, and whose medical group, professional corporation, clinic, or other affiliated group earns not more than 20% of their revenues from providing those services. (R.C. 2307.91(X).)

"Board-certified internist" means a medical doctor who is currently certified by the American Board of Internal Medicine (R.C. 2307.91(E)).

"Board-certified pathologist" means a medical doctor who is currently certified by the American Board of Pathology (R.C. 2307.91(H)).

"Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American Board of Internal Medicine in the subspecialty of pulmonary medicine (R.C. 2307.91(I)).

"Board-certified oncologist" means a medical doctor who is currently certified by the American Board of Internal Medicine in the subspecialty of medical oncology (R.C. 2307.91(G)).

exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the exposed person's principal places of employment and exposures to airborne contaminants and whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA Guides to the Evaluation of Permanent Impairment.⁸

(b) Either of the following:

(i) The exposed person has asbestosis⁹ or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis¹⁰ or

"Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American Board of Internal Medicine or the American Board of Preventive Medicine in the specialty of occupational medicine (R.C. 2307.91(F)).

⁸ *"AMA Guides to the Evaluation of Permanent Impairment" means the American Medical Association's Guides to the Evaluation of Permanent Impairment (Fifth Edition 2000) as may be modified by the American Medical Association (R.C. 2307.91(A)).*

⁹ *"Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers (R.C. 2307.91(D)).*

¹⁰ *"Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis (R.C. 2307.91(S)).*

radiological evidence of diffuse pleural thickening.¹¹ The asbestosis or diffuse pleural thickening, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has a forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal,¹² a total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal,¹³ or a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.¹⁴

"Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale (R.C. 2307.91(Y)).

¹¹ *"Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle (R.C. 2307.91(Z)).*

¹² *"Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA Guides to the Evaluation of Permanent Impairment (R.C. 2307.91(V)).*

"FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests. "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration. "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung. (R.C. 2307.91(M), (N), and (CC).)

¹³ *"Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration. "Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes. "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in the lung is then compared to the concentration of that type of gas in the spirometer. (R.C. 2307.91(U), (FF), and (HH).)*

¹⁴ *"ILO scale" means the system for the classification of chest x-rays set forth in the International Labour Office's Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses (1980) as amended. "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. § 37.51(b), as amended. (R.C. 2307.91(J) and (O).)*

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both a forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal and a total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

Medical criteria for a claim based upon lung cancer of a smoker

A person is prohibited from bringing or maintaining a tort action alleging an asbestos claim based upon *lung cancer*¹⁵ of an exposed person who is a smoker (see footnote 1), in the absence of a prima-facie showing that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing includes all of the following minimum requirements (R.C. 2307.92(C)(1)):

(1) A diagnosis by a board-certified internist, board-certified pathologist, board-certified pulmonary specialist, board-certified oncologist, or board-certified occupational medicine specialist that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. This ten-year latency period is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(3) Either of the following: (a) evidence of the exposed person's substantial occupational exposure to asbestos¹⁶ or (b) evidence of the exposed

¹⁵ "*Lung cancer*" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include mesothelioma (R.C. 2307.91(P)).

¹⁶ "*Substantial occupational exposure to asbestos*" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following: (1) handled raw asbestos fibers, (2) fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process, (3) altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers, or (4) worked in close

person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed person's occupational history and history of exposure to asbestos.

If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker and further alleges in the action that the plaintiff's exposure to asbestos was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements described above in paragraph (3) and that the plaintiff lived with the other person for the period of time specified in R.C. 2307.91(EE) (see footnote 16), the plaintiff is considered as having satisfied those requirements (R.C. 2307.92(C)(2)).

Other provisions

The bill provides that no prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma¹⁷ (R.C. 2307.92(D)).

Evidence relating to physical impairment, including pulmonary function testing and diffusing studies, must comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA Guides to the Evaluation of Permanent Impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretative standards set forth in the official statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values and Interpretative Strategies" as published in American Review of Respiratory Disease, 1991:144:1202-1218. (R.C. 2307.92(E).)

All of the following apply to the court's decision on the prima-facie showing that meets the requirements described above in **Medical criteria for a**

proximity to other workers engaged in any of the activities described in (1), (2), or (3), above, in a manner that exposed the person on a regular basis to asbestos fibers. "Regular basis" means on a frequent or recurring basis. (R.C. 2307.91(EE) and (AA).)

¹⁷ *"Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques (R.C. 2307.91(Q)).*

claim based upon a nonmalignant condition" and "Medical criteria for a claim based upon lung cancer of a smoker" (R.C. 2307.72(F)):

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's decision is not binding at trial.

Asbestos litigation--required filings

The plaintiff in any tort action who alleges an asbestos claim must file, within 30 days after the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements described above in "**Medical criteria for a claim based upon a nonmalignant condition"** and "**Medical criteria for a claim based upon lung cancer of a smoker,**" whichever is applicable. The defendant in the case must be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements. The defendant has 120 days from the date the prima-facie evidence of the exposed person's physical impairment is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements for a competent medical authority described in (1), (3), and (4) of footnote 7, above. (R.C. 2307.93(A)(1).)

With respect to any asbestos claim that is pending on the effective date of this provision, the plaintiff must file the written report and supporting test results within 120 days following the effective date of this provision. Upon motion and for good cause shown, the court may extend this 120-day period.

For any cause of action that arises before the effective date of these provisions, the provisions setting forth the minimum requirements as described above are to be applied unless the court that has jurisdiction over the case finds both of the following: (1) a substantive right of a party to the case has been altered and (2) that alteration is otherwise in violation of Section 28 of Article II, Ohio Constitution. If such a finding is made by the court that has jurisdiction over the case, then the court must determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under the law that is in effect prior to the effective date of these provisions. If the court

that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief, the court must administratively dismiss the plaintiff's claim without prejudice. The court must maintain its jurisdiction over any case that is so administratively dismissed. Any plaintiff whose case has been administratively dismissed under this provision may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose. (R.C. 2307.93(A)(2) and (3).)

If the defendant challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment, the court must determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements under the bill. The court must resolve the issue of whether the plaintiff has made the prima-facie showing by applying the standard for resolving a motion for summary judgment. The court is required to administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the required prima-facie showing. The court must maintain its jurisdiction over any case that is administratively dismissed. Any plaintiff whose case has been administratively dismissed as described in this paragraph may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements under the bill. (R.C. 2307.93(B) and (C).)

Asbestos litigation--appeal

Under the current law on appeals, an order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is any of specified types of orders, including an order that grants or denies a *provisional remedy* and to which both of the following apply: (1) the order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy and (2) the appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence. (R.C. 2505.02(A)(3) and (B)(4).)

The bill modifies the above definition of "provisional remedy" by including a proceeding for a prima-facie showing of the minimum requirements for an asbestos claim under the bill. In effect, an order that grants or denies such a provisional remedy is a final order for purposes of an appeal if the conditions described in (1) and (2) in the preceding paragraph are met. (R.C. 2505.02(A)(3) and (B)(4).)

Asbestos litigation--statute of repose

Notwithstanding any other provision of the Revised Code, with respect to any asbestos claim based upon a nonmalignant condition that is not barred as of the effective date of this provision, the period of limitations does not begin to run until the exposed person has a cause of action for bodily injury pursuant to R.C. 2305.10 (see **COMMENT**). An asbestos claim based upon a nonmalignant condition that is filed before that cause of action arises is preserved for purposes of the period of limitations. An asbestos claim that arises out of a nonmalignant condition is a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer. The court is prohibited from awarding damages for fear or risk of cancer in any tort action asserting only an asbestos claim for a nonmalignant condition. No settlement of an asbestos claim for a nonmalignant condition that is concluded after the effective date of this provision may require, as a condition of settlement, the release of any future claim for asbestos-related cancer. (R.C. 2307.94.)

Asbestos litigation--scope or operation

The bill provides that nothing in the above-described provisions regarding asbestos litigation and the provisions described in *Premises liability regarding asbestos claims*," below, is intended to affect, and nothing in any of those provisions is to be interpreted to affect, the rights of any party in bankruptcy proceedings or the ability of any person who is able to make a showing that the person satisfies the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code, to make a claim or demand against that trust. (R.C. 2307.95(A).)

The bill further provides that the above-described provisions regarding asbestos litigation and the provisions described in *Premises liability regarding asbestos claims*," below, do not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and may not authorize any lawsuit that is barred by any provision of any workers' compensation law. "Veterans' benefit program" means any program for benefits in connection with military service administered by the Veterans' Administration under title 38 of the United States Code. "Workers' compensation law" means R.C. Chapters 4121., 4123., 4127., and 4131. (R.C. 2307.95(B) and 2307.91(II) and (JJ).)

The bill provides that nothing in the above described provisions regarding asbestos litigation is intended to affect, and nothing in those provisions is to be interpreted to affect, any wrongful death claims (R.C. 2307.95(C)).

Premises liability regarding asbestos claims

Asbestos claims against premises owner

Under the bill, the following apply to all tort actions for asbestos claims brought against a "premises owner" (see "Definitions," below) to recover damages or other relief for exposure to asbestos on the premises owner's property (R.C. 2307.941(A)):

(1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

(2) If exposure to asbestos is alleged to have occurred before January 1, 1972, it is presumed that a premises owner knew that Ohio had adopted safe levels of exposure for asbestos and that products containing asbestos were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of asbestos in the immediate breathing zone of the plaintiff regularly exceeded the "threshold limit values" (see "Definitions," below) adopted by Ohio and that the premises owner allowed that condition to persist.

(3)(a) A premises owner is presumed to be not liable for any injury to any invitee who is engaged to work with, install, or remove asbestos products on the premises owner's property if the invitee's employer holds itself out as qualified to perform the work. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner has actual knowledge of the potential dangers of the asbestos products that is superior to the knowledge of both the invitee and the invitee's employer.

(b) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform cannot be liable for any injury to any individual resulting from asbestos exposure caused by any of the contractor's "employees" (see "Definitions," below) or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

(c) If exposure to asbestos is alleged to have occurred after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes the premises owner's intentional violation of an "established safety standard" (see "Definitions," below) that is in effect at

the time of the exposure and that the alleged violation was in the plaintiff's breathing zone and was the proximate cause of the plaintiff's medical condition.

Definitions

For purposes of the provisions regarding the liability of a premises owner for asbestos claims, the bill defines the following terms (R.C. 2307.91(W) and 2307.941(B)):

(1) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(2) "Threshold limit values" means that, for the years 1946 through 1971, the concentration of asbestos in a worker's breathing zone did not exceed the following maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration: (a) asbestos: five million particles per cubic foot, (b) cadmium: 0.10 milligrams per cubic meter, (c) chromic acid and chromates (calculated as chromic oxide): 0.10 milligrams per cubic meter, (d) lead: 0.15 milligrams per cubic meter, (e) manganese: 6.0 milligrams per cubic meter, (f) mercury: 0.10 milligrams per cubic meter, (g) zinc oxide: 15.0 milligrams per cubic meter, (h) chlorinated diphenyls: 1.0 milligram per cubic meter, (i) chlorinated naphthalenes (trichloronaphthalene): 5.0 milligrams per cubic meter, (j) chlorinated naphthalenes (pentachloronaphthalene): 0.50 milligrams per cubic meter.

(3) "Established safety standard" means that, for the years after 1971, the concentration of asbestos in the breathing zone of a worker does not exceed the maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration as promulgated by the Occupational Safety and Health Administration (OSHA) in effect at the time of the alleged exposure.

(4) "Employee" means an individual who performs labor or provides construction services pursuant to a construction contract as defined in R.C. 4123.79, or a remodeling or repair contract, whether written or oral, if at least ten of the following 20 criteria apply: (a) the individual is required to comply with instructions from the other contracting party regarding the manner or method of performing services, (b) the individual is required by the other contracting party to have particular training, (c) the individual's services are integrated into the regular functioning of the other contracting party, (d) the individual is required to perform the work personally, (e) the individual is hired, supervised, or paid by the other

contracting party, (f) a continuing relationship exists between the individual and the other contracting party that contemplates continuing or recurring work even if the work is not full time, (g) the individual's hours of work are established by the other contracting party, (h) the individual is required to devote full time to the business of the other contracting party, (i) the person is required to perform the work on the premises of the other contracting party, (j) the individual is required to follow the order of work set by the other contracting party, (k) the individual is required to make oral or written reports of progress to the other contracting party, (l) the individual is paid for services on a regular basis, including hourly, weekly, or monthly, (m) the individual's expenses are paid for by the other contracting party, (n) the individual's tools and materials are furnished by the other contracting party, (o) the individual is provided with the facilities used to perform services, (p) the individual does not realize a profit or suffer a loss as a result of the services provided, (q) the individual is not performing services for a number of employers at the same time, (r) the individual does not make the same services available to the general public, (s) the other contracting party has a right to discharge the individual, or (t) the individual has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Exposure to asbestos

Plaintiff's burden of proof

The bill provides that if a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos, the following apply (R.C. 2307.96(A) and (B)):

(1) If the injury or loss from that exposure is a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

(2) The plaintiff has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the exposure to asbestos was a substantial factor in causing the plaintiff's injury or loss to person. In determining whether exposure to asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action must consider, without limitation, all of the following: (a) the manner in which the plaintiff was exposed to asbestos, (b) the proximity of asbestos to the plaintiff when the exposure to asbestos occurred, (c) the frequency and length of the plaintiff's exposure to asbestos, and (d) any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

The bill specifies that the above provision applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are brought on or after the effective date of the provision (R.C. 2307.96(D)).

Legislative intent

The bill provides that it is the intent of the General Assembly that in enacting R.C. 2307.96 to establish the judicial standard for the granting of summary judgment in tort actions involving exposure to asbestos that is consistent with the decision in *Lohrmann v. Pittsburgh Corning Cor.* (4th Cir. 1986), 782 F.2d 1156, and is contrary to paragraph 2 of the syllabus of the Ohio Supreme Court in *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679. The General Assembly recognizes that the courts of Ohio, prior to the *Horton* decision, generally followed the rationale of the *Lohrmann* decision in determining when summary judgment was appropriate in tort actions involving exposure to asbestos. A majority of the states have adopted a summary judgment standard in those types of actions that is similar to the standard in the *Lohrmann* decision. The *Lohrmann* standard provides litigants and the courts of Ohio an objective and easily applied standard for determining when summary judgment is appropriate in tort actions involving asbestos. (Section 5.)

Successor asbestos-related liabilities

Definitions

The bill provides the following definitions for the purposes of the successor asbestos-related liabilities provisions (R.C. 2307.97(A)):

(1) "Asbestos" has the same meaning as in the above-described asbestos provisions.

(2) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes any of the following:

(a) A claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos;

(b) A claim for damage or loss to property that is caused by the installation, presence, or removal of asbestos.



(3) "Corporation" means a corporation for profit, including: (a) a domestic corporation that is organized under the laws of Ohio or (b) a foreign corporation that is organized under laws other than the laws of Ohio and that has had a certificate of authority to transact business in Ohio or has done business in Ohio.

(4) "Successor" means a corporation or a subsidiary of a corporation that assumes or incurs, or had assumed or incurred, successor asbestos-related liabilities or had successor asbestos-related liabilities imposed on it by court order.

(5)(a) "Successor asbestos-related liabilities" means any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, if the liabilities are related in any way to asbestos claims and either: (i) the liabilities are assumed or incurred by a successor as a result of or in connection with an asset purchase, stock purchase, merger, consolidation, or agreement providing for an asset purchase, stock purchase, merger, or consolidation, including a plan of merger or (ii) the liabilities were imposed by court order on a successor.

(b) "Successor asbestos-related liabilities" includes any liabilities described in the prior paragraph that, after the effective date of the asset purchase, stock purchase, merger, or consolidation, are paid, otherwise discharged, committed to be paid, or committed to be otherwise discharged by or on behalf of the successor, or by or on behalf of a transferor, in connection with any judgment, settlement, or other discharge of those liabilities in Ohio or another jurisdiction.

(6) "Transferor" means a corporation or its shareholders from which successor asbestos-related liabilities are or were assumed or incurred by a successor or were imposed by court order on a successor.

Applicability of limitations to a corporation

The bill provides that the limitations described below in "**Limitations on liability**" apply to a corporation that is either of the following (R.C. 2307.97(B)):

(1) A successor that became a successor prior to July 30, 1977, if either (a) in the case of a successor in a stock purchase or an asset purchase, the successor paid less than \$15 million for the stock or assets of the transferor or (b) in the case of a successor in a merger or consolidation, the fair market value of the total gross assets of the transferor, at the time of the merger or consolidation, excluding any insurance of the transferor, was less than \$50 million;

(2) Any successor to a prior successor if the prior successor met the requirements of (1)(a) or (b), above, whichever is applicable.

Limitations on liability

The bill provides that, except as described in the following paragraph, the cumulative successor asbestos-related liabilities of a successor are limited to either (1) in the case of a corporation that is a successor in a stock purchase or an asset purchase, the fair market value of the acquired stock or assets of the transferor, as determined on the effective date of the stock or asset purchase or (2) in the case of a corporation that is a successor in a merger or consolidation, the fair market value of the total gross assets of the transferor, as determined on the effective date of the merger or consolidation.

If a transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior purchase of assets or stock involving a prior transferor, the fair market value of the assets or stock purchased from the prior transferor, determined as of the effective date of the prior purchase of the assets or stock, is substituted for the limitation described in (1) in the prior paragraph for the purpose of determining the limitation of the liability of a corporation. If a transferor had assumed or incurred successor asbestos-related liabilities in connection with a merger or consolidation involving a prior transferor, the fair market value of the total gross assets of the prior transferor, determined as of the effective date of the prior merger or consolidation, is substituted for the limitation described in (2) in the prior paragraph for the purpose of determining the limitation of the liability of a corporation.

A corporation described in the two preceding paragraphs has no responsibility for any successor asbestos-related liabilities in excess of the limitation of those liabilities described in the applicable provision. (R.C. 2307.97(C).)

Establishment of fair market value of assets, stock, or total gross assets

Under the bill, a corporation may establish the fair market value of assets, stock, or total gross assets under the provisions described in "**Limitations on liability**," above, by means of any method that is reasonable under the circumstances, including by reference to their going-concern value, to the purchase price attributable to or paid for them in an arm's length transaction, or, in the absence of other readily available information from which fair market value can be determined, to their value recorded on a balance sheet. Assets and total gross assets include intangible assets. A showing by the successor of a reasonable determination of the fair market value of assets, stock, or total gross assets is prima-facie evidence of their fair market value.

For purposes of establishing the fair market value of total gross assets under the preceding paragraph, the total gross assets include the aggregate coverage

under any applicable liability insurance that was issued to the transferor the assets of which are being valued for purposes of the limitations on liability, if the insurance has been collected or is collectable to cover the successor asbestos-related liabilities involved. Those successor asbestos-related liabilities do not include any compensation for any liabilities arising from the exposure of workers to asbestos solely during the course of their employment by the transferor. Any settlement of a dispute concerning the insurance coverage described in this provision that is entered into by a transferor or successor with the insurer of the transferor before the provision's effective date is determinative of the aggregate coverage of the liability insurance that is included in the determination of the transferor's total gross assets.

After a successor has established a reasonable determination of the fair market value of assets, stock, or total gross assets, a claimant that disputes that determination of the fair market value has the burden of establishing a different fair market value. (R.C. 2307.97(D)(1), (2), and (3).)

Adjustment of fair market value

Under the bill, subject to the provisions described in the following paragraph, the fair market value of assets, stock, or total gross assets at the time of the asset purchase, stock purchase, merger, or consolidation increases annually, at a rate equal to the sum of the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the effective date of the asset purchase, stock purchase, merger, or consolidation, or, if the prime rate is not published in that edition of the Wall Street Journal, the prime rate as reasonably determined on the first business day of the year and 1%.

The rate that is so determined must not be compounded. The adjustment of the fair market value of assets, stock, or total gross assets continues in the manner described in the preceding paragraph until the adjusted fair market value is first exceeded by the cumulative amounts of successor asbestos-related liabilities that are paid or committed to be paid by or on behalf of a successor or prior transferor, or by or on behalf of a transferor, after the time of the asset purchase, stock purchase, merger, or consolidation for which the fair market value of assets, stock, or total gross assets is determined. No adjustment of the fair market value of total gross assets may be applied to any liability insurance that is otherwise included in total gross assets as described in "Establishment of fair market value . . .," above. (R.C. 2307.97(D)(4).)

Application of the limitations on liability

The bill provides that the above limitations on liability apply to: (1) all asbestos claims, including asbestos claims that are pending on the effective date of

this provision, and all litigation involving asbestos claims, including litigation that is pending on the effective date of this provision and (2) successors of a corporation to which the bill's provisions apply (R.C. 2307.97(E)(1)).

The limitations on liability do not apply to any of the following (R.C. 2307.97(E)(2)):

(1) Workers' compensation benefits that are paid by or on behalf of an employer to an employee pursuant to any provision of the Ohio workers' compensation law (R.C. Chapter 4121., 4123., 4127., or 4131.) or comparable workers' compensation law of another jurisdiction;

(2) Any claim against a successor that does not constitute a claim for a successor asbestos-related liability;

(3) Any obligation arising under the "National Labor Relations Act" or under any collective bargaining agreement;

(4) Any contractual rights to indemnification.

The bill requires the courts in Ohio to apply, to the fullest extent permissible under the Constitution of the United States, Ohio's substantive law, including the provisions of the bill, to the issue of successor asbestos-related liabilities (R.C. 2307.97(F)).

Disposition of assets

The bill provides that the terms and conditions of the following transactions are subject to the limitations on liability discussed in "**Limitations on liability**," above: a lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets, with or without the good will, of a corporation, if not made in the usual and regular course of its business that is authorized (1) by the directors, either before or after authorization by the shareholders or (2) at a meeting of the shareholders held for that purpose, by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on the proposal, or, if the articles so provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of the voting power, and by the affirmative vote of the holders of shares of any particular class that is required by the articles (R.C. 1701.76(F)).

Merger or consolidation

The bill provides that, with regards to when a merger or consolidation becomes effective, all obligations belonging to or due to each constituent entity, the liability of the surviving or new entity for all the obligations of each

constituent entity, and all the rights of creditors of each constituent entity that are preserved unimpaired are subject to the above-discussed limitations under the successor asbestos-related liability provisions of the bill (R.C. 1701.82(A)(3), (4), and (5)).

Piercing the corporate veil doctrine

Definitions

The bill provides the following definitions, unless the context otherwise requires, for purposes of its provisions dealing with shareholder liability in an asbestos claim under the doctrine of piercing the corporate veil (R.C. 2307.98(H)):

(1) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, is under common control with, or acts in concert with, a specified person (by reference to R.C. 1704.01(C)(1)).

(2) "Beneficial owner" of shares means a person who, with respect to particular shares, meets any of specified conditions (see **COMMENT**) (by reference to R.C. 1704.01(C)(4)) (a) the person directly or indirectly, alone or with others, including affiliates or associates of that person, beneficially owns the shares, (b) the person directly or indirectly, alone or with others, including affiliates or associates of that person, has the right, whether exercisable immediately or only after the passage of time, conditionally, unconditionally, or otherwise, to acquire the shares pursuant to a written or unwritten agreement, arrangement, or understanding or upon the exercise of conversion rights, exchange rights, warrants, calls, options, or otherwise, (c) the person directly or indirectly, alone or with others, including affiliates or associates of that person, has the right to vote or direct the voting of the shares pursuant to a written or unwritten agreement, arrangement, or understanding, or (d) the person has a written or unwritten agreement, arrangement, or understanding with another person who is directly or indirectly a beneficial owner, or whose affiliates or associates are direct or indirect beneficial owners, of the shares, if the agreement, arrangement, or understanding is for the purpose of the first person's or the other person's acquiring, holding, disposing of, voting, or directing the voting of the shares to or for the benefit of the first person. A bank, broker, nominee, trustee, or other person who acquires shares for the benefit of others in the ordinary course of business in good faith and not for the purpose of circumventing the provisions of R.C. Chapter 1704., however, is deemed to be the beneficial owner only of shares in respect of which that person, without further instruction from others, holds voting power. (By reference to R.C. 1704.01(C)(4).)

(3) "Covered entity" means a corporation, limited liability company, limited partnership, or any other entity organized under the laws of any

jurisdiction, domestic or foreign, in which the shareholders, owners, or members are generally not responsible for the debts and obligations of the entity. Nothing in the bill's provisions limits or otherwise affects the liabilities imposed on a general partner of a limited partnership.

(4) "Holder" means a person who is the holder, beneficial owner, or subscriber to shares or any other ownership interest of a covered entity, a member of a covered entity, or an affiliate of any person who is the holder, beneficial owner, or subscriber to shares or any other ownership interest of a covered entity.

(5) "Piercing the corporate veil" means any and all common law doctrines whereby a holder may be liable for an obligation or liability of a covered entity on the basis that the holder controlled the covered entity, the holder is or was the alter ego of the covered entity, or the covered entity has been used for the purpose of actual or constructive fraud or as a sham to perpetrate a fraud or any other common law doctrine by which the covered entity is disregarded for purposes of imposing liability on a holder for the debts or obligations of that covered entity.

(6) "Person" includes, without limitation, a natural person, a corporation, whether nonprofit or for profit, a partnership, a limited liability company, an unincorporated society or association, and two or more persons having a joint or common interest (by reference to R.C. 1701.01(G)).

Elements of doctrine

Under the bill, a holder has no obligation to, and has no liability to, the covered entity or to any person with respect to any obligation or liability of the covered entity in an asbestos claim under the doctrine of piercing the corporate veil unless the person seeking to pierce the corporate veil demonstrates all of the following (R.C. 2307.98(A)):

(1) The holder exerted such control over the covered entity that the covered entity had no separate mind, will, or existence of its own.

(2) The holder caused the covered entity to be used for the purpose of perpetrating, and the covered entity perpetrated, an actual fraud on the person seeking to pierce the corporate veil primarily for the direct pecuniary benefit of the holder.

(3) The person seeking to pierce the corporate veil sustained an injury or unjust loss as a direct result of the control described in (1), above, and the fraud described in (2), above.

The bill precludes a court from finding that the holder exerted such control over the covered entity that the covered entity did not have a separate mind, will,

or existence of its own or to have caused the covered entity to be used for the purpose of perpetrating a fraud *solely* as a result of any of the following actions, events, or relationships (R.C. 2307.98(B)):

(1) The holder is an affiliate of the covered entity and provides legal, accounting, treasury, cash management, human resources, administrative, or other similar services to the covered entity, leases assets to the covered entity, or makes its employees available to the covered entity.

(2) The holder loans funds to the covered entity or guarantees the obligations of the covered entity.

(3) The officers and directors of the holder are also officers and directors of the covered entity.

(4) The covered entity makes payments of dividends or other distributions to the holder or repays loans owed to the holder.

(5) In the case of a covered entity that is a limited liability company, the holder or its employees or agents serve as the manager of the covered entity.

Burden of proof; nature of liability; legislative intent

The bill provides that the person seeking to pierce the corporate veil has the burden of proof on each and every element of the person's claim and must prove each element by a preponderance of the evidence. Any liability of the holder described in "**Elements of the doctrine**," above, for an obligation or liability that is limited by that provision is exclusive and preempts any other obligation or liability imposed upon that holder for that obligation or liability under common law or otherwise.

The bill states that its provisions regarding the doctrine of piercing the corporate veil are intended to codify the elements of the common law cause of action for piercing the corporate veil and to abrogate the common law cause of action and remedies relating to piercing the corporate veil in asbestos claims. Nothing in those provisions are to be construed as creating a right or cause of action that did not exist under the common law as it existed on the effective date of the provisions. (R.C. 2307.98(C), (D), and (E).)

Applicability

The bill provides that the provisions regarding piercing the corporate veil apply to all asbestos claims commenced on or after the effective date of the provisions or commenced prior to and pending on their effective date.

The bill states that its provisions apply to all actions asserting the doctrine of piercing the corporate veil brought against a holder if any of the following apply: (1) the holder is an individual and resides in Ohio, (2) the holder is a corporation organized under the laws of Ohio, (3) the holder is a corporation with its principal place of business in Ohio, (4) the holder is a foreign corporation that is authorized to conduct or has conducted business in Ohio, (5) the holder is a foreign corporation whose parent corporation is authorized to conduct business in Ohio, or (6) the person seeking to pierce the corporate veil is a resident of Ohio. (R.C. 2307.98(F) and (G).)

Statement of findings and intent and other uncodified provisions

The General Assembly makes the following statement of findings and intent in the bill (Section 3(A)):

(1) Asbestos claims have created an increased amount of litigation in state and federal courts that the United States Supreme Court has characterized as "an elephant mass" of cases.

(2) The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of \$54 billion have already been spent on asbestos litigation and the costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names 60 to 70 defendants, compared with an average of 20 named defendants two decades ago. The RAND Report also suggests that at best, only ½ of all claimants have come forward and at worst, only 1/5 have filed claims to date. Estimates of the total cost of all claims range from \$200 billion to \$265 billion. Tragically, plaintiffs are receiving less than 43¢ on every dollar awarded, and 65% of the compensation paid, thus far, has gone to claimants who are not sick.

(3) The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts.

(a) Today, it is estimated that there are more than 200,000 active asbestos cases in courts nationwide. According to a recent RAND study, over 600,000 people have filed asbestos claims for asbestos-related personal injuries through the end of 2000.

(b) Before 1998, five states, Mississippi, New York, West Virginia, Texas, and Ohio, accounted for 9% of the cases filed. However, between 1998 and 2000, these same five states handled 66% of all filings. Today, Ohio has become a



haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings.

(c) According to testimony by Laura Hong, a partner at the law firm of Squire, Sanders & Dempsey who has been defending companies in asbestos personal injury litigation since 1985, there are at least 35,000 asbestos personal injury cases pending in Ohio state courts today.

(d) If the 233 Ohio state court general jurisdictional judges started trying these asbestos cases today, Ms. Hong noted, each would have to try over 150 cases before retiring the current docket. That figure conservatively computes to at least 150 trial weeks or more than three years per judge to retire the current docket.

(e) The current docket, however, continues to increase at an exponential rate. According to Judge Leo Spellacy, one of two Cuyahoga County Common Pleas Court judges appointed by the Ohio Supreme Court to manage the Cuyahoga County case management order for asbestos cases, in 1999, there were approximately 12,800 pending asbestos cases in Cuyahoga County. However, by the end of October 2003, there were over 39,000 pending asbestos cases. Approximately 200 new asbestos cases are filed in Cuyahoga County every month.

(4) Nationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than 70 companies, including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

(a) As stated by Linda Woggon, Vice President of Governmental Affairs of the Ohio Chamber of Commerce, a recent RAND study found that during the first ten months of 2002, 15 companies facing significant asbestos-related liabilities filed for bankruptcy and more than 60,000 jobs have been lost because of these bankruptcies. The RAND study estimates that the eventual cost of asbestos litigation could reach as high as 423,000 jobs.

(b) Joseph Stiglitz, Nobel award-winning economist, in "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," calculated that bankruptcies caused by asbestos have already resulted in the loss of up to 60,000 jobs and that each displaced worker in the bankrupt companies will lose, on average, an estimated \$25,000 to \$50,000 in wages over the worker's career, and at least a quarter of the accumulated pension benefits.

(c) At least five Ohio-based companies have been forced into bankruptcy because of an unending flood of asbestos cases brought by claimants who are not sick.

(d) Owens Corning, a Toledo company, has been sued 400,000 times by plaintiffs alleging asbestos-related injury and as a result was forced to file bankruptcy. The type of job and pension loss many Toledoans have faced because of the Owens Corning bankruptcy also can be seen in nearby Licking County where, in 2000, Owens Corning laid off 275 workers from its Granville plant. According to a study conducted by NERA Economic Consulting in 2000, the ripple effect of those losses is predicted to result in a total loss of 500 jobs and a \$15 million to \$20 million annual reduction in regional income.

(e) According to testimony presented by Robert Bunda, a partner at the firm of Bunda, Stutz & DeWitt in Toledo, Ohio who has been involved with the defense of asbestos cases on behalf of Owens-Illinois for 24 years, at least five Ohio-based companies have gone bankrupt because of the cost of paying people who are not sick. Wage losses, pension losses, and job losses have significantly affected workers for the bankrupt companies like Owens Corning, Babcox & Wilcox, North American Refractories, and A-Best Corp.

(5) The General Assembly recognizes that the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment. 89% of asbestos claims come from people who do not have cancer. 66% to 90% of these non-cancer claimants are not sick. According to a Tillinghast-Towers Perrin study, 94% of the 52,900 asbestos claims filed in 2000, concerned claimants who are not sick. As a result, the General Assembly recognizes that reasonable medical criteria are a necessary response to the asbestos litigation crisis in Ohio. Medical criteria will expedite the resolution of claims brought by those sick claimants and will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future. As stated by Dr. James Allen, a pulmonologist, Professor and Vice-Chairman of the Department of Internal Medicine at The Ohio State University, the medical criteria included in House Bill 292 are reasonable criteria and are the first step toward ensuring that impaired plaintiffs are compensated. In fact, Dr. Allen noted that these criteria are minimum medical criteria. In his clinical practice, Dr. Allen stated that he always performs additional tests before assigning a diagnosis of asbestosis and would never rely solely on these medical criteria.

(6) The cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future; threatens savings,

retirement benefits, and jobs of the state's current and retired employees; adversely affects the communities in which these defendants operate; and impairs Ohio's economy.

(7) The public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits, and savings of the state's employees and the well being of the Ohio economy.

The bill provides that in enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos, (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure, (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings, and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future (Section 3(B)).

The bill also provides the following in uncodified law (Section 4):

(1) The General Assembly acknowledges the Court's authority in prescribing rules governing practice and procedure in the courts of this state, as provided by Section 5 of Article IV of the Ohio Constitution.

(2) The General Assembly requests the Supreme Court to adopt rules to specify procedures for venue and consolidation of asbestos claims brought pursuant to R.C. 2307.91 to 2307.95. With respect to procedures for venue in regard to asbestos claims, the General Assembly requests the Supreme Court to adopt a rule that requires that an asbestos claim meet specific nexus requirements, including the requirement that the plaintiff be domiciled in Ohio or that Ohio is the state in which the plaintiff's exposure to asbestos is a substantial contributing factor. With respect to procedures for consolidation of asbestos claims, the General Assembly requests the Supreme Court to adopt a rule that permits consolidation of asbestos claims only with the consent of all parties and, in the absence of that consent, permits a court to consolidate for trial only those asbestos claims that relate to the same exposed person and members of the exposed person's household.

As used in the above uncodified provisions, "asbestos," "asbestos claim," "exposed person," and "substantial contributing factor" have the same meanings as in R.C. 2307.91 of the bill.

Severability

The bill includes the following severability clauses (Sections 6 and 7).

If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given effect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

COMMENT

R.C. 2305.10 provides in relevant part that an action for bodily injury or injuring personal property must be brought within two years after the cause of action arose. For purposes of this provision, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, the plaintiff should have become aware that the plaintiff had been injured by the exposure, whichever date occurs first.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	10-02-03	p. 1091
Reported, H. Civil & Commercial Law	---	---
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