



Dennis M. Papp

Bill Analysis
Legislative Service Commission

Sub. H.B. 292*
125th General Assembly
(As Reported by S. Judiciary)

Reps. Oelslager, Seitz, Widener, Aslanides, Collier, Daniels, Faber, Flowers, Schaffer, Setzer

BILL SUMMARY

- Provides that, for purposes of the existing statute of limitations for asbestos-related civil actions and the bill's provisions, "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 minimum requirements that are medical in nature for bringing or maintaining an asbestos claim based on a nonmalignant condition or based on lung cancer of an exposed person who is a smoker, or based on a wrongful death of an exposed person.
- 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 the exposed person's physical impairment that meets the minimum requirements for the particular claim.
- Provides procedures for the defendant in the case in which an asbestos claim is alleged 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

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

plaintiff whose case has been administratively dismissed to reinstate the case.

- Provides that, for any cause of action arising before the bill's effective date, the bill's minimum requirements are to be applied unless the court with jurisdiction over the case finds that a party's substantive right has been altered and that alteration is otherwise in violation of the Ohio Constitution's retroactivity clause.
- Provides that a proceeding for a prima-facie showing of the minimum requirements for an asbestos claim or a finding made under the provision described in the preceding dot point are provisional remedies that are subject to appeal under current law.
- Provides that no prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.
- Specifies that, except for the provisions establishing the medical criteria for a prima-facie case based upon a wrongful death and related provisions, the asbestos litigation provisions are not intended and are not to be interpreted to affect any wrongful death claims.
- Provides that, notwithstanding any other provision of law, with respect to an asbestos claim based upon a nonmalignant condition that is not barred as of the bill's effective date, the period of limitations does not begin to run until the exposed person has a cause of action for bodily injury pursuant to the existing statute of limitations for asbestos-related civil actions.
- Provides that a premises owner generally 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 or related subrogation provisions.
- In tort actions alleging injury or loss to person resulting from exposure to asbestos as a result of a defendant's tortious act, requires the plaintiff to prove that that particular defendant's conduct, and the exposure to asbestos, was a substantial factor in causing the injury or loss.
- Describes the General Assembly's intent in enacting the provisions covered by the preceding dot point.
- Enacts elements that have to be proven with respect to the liability of a shareholder in an asbestos claim under the common law doctrine of piercing the corporate veil.
- Specifies that any liability of the shareholder under its piercing the corporate veil provisions 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 its provisions regarding piercing the corporate veil in asbestos claims 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 its provisions regarding piercing the corporate veil in asbestos claims apply to all asbestos claims commenced on or after the bill's effective date or commenced prior to and pending on that effective date.
- Requests the Supreme Court to collect data regarding awards for frivolous conduct and a lack of reasonable good faith basis for certain civil actions.
- Provides the General Assembly's findings and intent regarding its provisions.
- Specifically requests the Supreme Court to adopt certain rules related to asbestos claims.

- Includes severability clauses regarding items it contains, and the application of such items.

TABLE OF CONTENTS

Background--statute of limitations for actions for bodily injury caused by exposure to asbestos.....	4
Asbestos litigation--minimum requirements.....	5
Medical criteria for a claim based on a nonmalignant condition.....	5
Medical criteria for a claim based upon lung cancer of a smoker.....	6
Medical criteria for claim based upon a wrongful death.....	7
Mesothelioma-based asbestos claim--no prima-facie showing required.....	8
Evidence standards; effect of court's decision.....	8
Asbestos litigation--required filings.....	9
Asbestos litigation--appeal.....	10
Asbestos litigation--regarding claims based upon a nonmalignant condition.....	11
Premises liability regarding asbestos claims.....	12
Asbestos claims against premises owner.....	12
Definitions that apply only to premises liability provisions.....	13
Asbestos litigation--scope or operation.....	14
Exposure to asbestos--plaintiff's burden of proof.....	15
General definitions.....	16
Piercing the corporate veil doctrine--asbestos claims.....	20
Definitions.....	21
Criteria under doctrine.....	22
Burden of proof; nature of liability; legislative intent.....	23
Applicability.....	24
Request for Supreme Court to collect data regarding awards for "frivolous conduct" and "lack of reasonable good faith basis" for a medical, dental, optometric, or chiropractic claim.....	24
Statement of findings and intent and other uncodified provisions.....	25
Severability.....	28

CONTENT AND OPERATION

Background--statute of limitations for actions for bodily injury caused by exposure to asbestos

Existing R.C. 2305.10, not in the bill, provides in relevant part that an action for bodily injury or injuring personal property must be brought within two years after the cause of the 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.

Asbestos litigation--minimum requirements

Medical criteria for a claim based on a nonmalignant condition

The bill provides that for purposes of existing R.C. 2305.10, as described above in "**Background**," and R.C. 2307.92 to 2307.95, as enacted in the bill and described below, "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" (see "**General definitions**," below for definitions of the terms in quotation marks). The bill prohibits a person from bringing or maintaining a "tort action" alleging an "asbestos claim" (see "**General definitions**," below for definitions of the terms in quotation marks) based on a *nonmalignant condition* (which, under R.C. 2307.91(R) is a condition that is caused or may be caused by asbestos other than a diagnosed cancer) 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 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 authority" (see "**General definitions**," below) has taken a detailed occupational and exposure history of the exposed person from the 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 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" (see **General definitions**," below), and that either of the following applies:

(a) The exposed person has "asbestosis" or diffuse pleural thickening, based at a minimum on "radiological evidence of asbestosis" or "pathological evidence of asbestosis" or "radiological evidence of diffuse pleural thickening" (see **General definitions**," below for definitions of the terms in quotation marks). 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 any of the following: (1) 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," (ii) a "total lung capacity," by plethysmography or timed gas dilution, below the predicted lower limit of normal, or (iii) a chest x-ray showing small, irregular opacities (s, t) graded by a "certified B-reader" at least 2/1 on the "ILO scale" (see **General definitions**," below for definitions of the terms in quotation marks).

(b) 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 of the following: (i) 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 (ii) 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

The bill prohibits a person from bringing or maintaining a tort action alleging an asbestos claim based upon "*lung cancer*" of an exposed person who is a "smoker" (see **General definitions**," below for definitions of the terms in quotation marks), 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 substantial contributing factor to the medical condition. That prima-facie showing must include all of the following minimum requirements (R.C. 2307.92(C)(1)):

(1) A diagnosis by a competent medical authority 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 asbestos" (see "General definitions," below), or (b) evidence of the exposed 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, alleges 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 alleges that the plaintiff lived with the other person for the period of time specified in R.C. 2307.91(GG) (that provision contains the definition of "substantial occupational exposure to asbestos"--see "General definitions," below), the plaintiff is considered as having satisfied those requirements (R.C. 2307.92(C)(2)).

Medical criteria for claim based upon a wrongful death

The bill prohibits a person from bringing or maintaining a tort action alleging an asbestos claim that is based upon a wrongful death (as described in R.C. 2125.01) of an exposed person in the absence of a prima-facie showing, in the manner described below in "Asbestos litigation--required filings," that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing must include all of the following minimum requirements (R.C. 2307.92(D)(1)):

(1) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this division 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 deceased exposed person's substantial occupational exposure to asbestos, or (b) evidence of the deceased exposed 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 deceased exposed person's occupational history and history of exposure to asbestos.

If a person files a tort action that alleges an asbestos claim based on a wrongful death (as described in R.C. 2125.01) of an exposed person, alleges that the death of the exposed person 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 specified above in paragraph (3), and alleges that the exposed person lived with the other person for the period of time specified in R.C. 2307.91(GG) (under the definition of "substantial occupational exposure to asbestos"--see below) in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied those requirements (R.C. 2307.92(D)(2)).

The bill prohibits any court from requiring or permitting the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under the provisions described in this part of the analysis regarding a tort action of the type described in those provisions (R.C. 2307.92(D)(3)).

Mesothelioma-based asbestos claim--no prima-facie showing required

The bill provides that no prima-facie showing is required in a tort action alleging an asbestos claim based upon "mesothelioma" (see "**General definitions**," below) (R.C. 2307.92(E)).

Evidence standards; effect of court's decision

Under the bill, evidence relating to physical impairment under R.C. 2307.92, 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(F).)

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

(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

Under the bill, the plaintiff in any tort action who alleges an asbestos claim must file, within 30 days after filing 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," "Medical criteria for a claim based upon lung cancer of a smoker," and "Medical criteria for a claim based upon a wrongful death," 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 clauses (1), (3), and (4) of the definition of "competent medical authority," as described below in "General definitions." (R.C. 2307.93(A)(1).)

With respect to any asbestos claim that is pending on the bill's effective date, the plaintiff must file the written report and supporting test results described

in the preceding paragraph within 120 days following the bill's effective date. Upon motion and for good cause shown, the court may extend this 120-day period.

For any cause of action that arises before the bill's effective date, the bill's 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 impaired, and (2) that impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution (see **COMMENT 1**). 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 bill's effective date. 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 as described in the third preceding paragraph above, the court must determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements under the bill as described above. 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 so 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, every "final order," judgment, or decree of a court and, when provided by law, the "final order" of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the

Supreme Court, whichever has jurisdiction. Under current law, an order is a "final order" that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is any of a list 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" currently 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) and 2505.03(A).)

The bill modifies the above definition of "provisional remedy" by including in the list of specified examples a proceeding for a prima-facie showing of the minimum requirements for an asbestos claim under the bill and a finding made pursuant to R.C. 2307.93(A)(3) regarding a finding involving the application of the bill's medical criteria to an existing cause of action. 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--regarding claims based upon a nonmalignant condition

The bill provides that, 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 bill's effective date, the period of limitations does not begin to run until the exposed person has a cause of action for bodily injury pursuant to existing R.C. 2305.10, as described above in "**Background.**" An asbestos claim based upon a nonmalignant condition that is filed before the cause of action for bodily injury pursuant to that section 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 bill's effective date may require, as a condition of settlement, the release of any future claim for asbestos-related cancer. (R.C. 2307.94.)

Premises liability regarding asbestos claims

The bill enacts rules that govern the determination of the potential liability of a "premises owner" (see below) for injuries to an individual allegedly resulting from exposure to asbestos.

Asbestos claims against premises owner

The bill defines "premises owner" as 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 (R.C. 2307.91(W)). Under the bill, the following apply to all tort actions for asbestos claims brought against a premises owner 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 that apply only to premises liability provisions**," 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 was engaged to work with, install, or remove asbestos products on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that at the time of the alleged exposure to asbestos the premises owner had actual knowledge of the potential dangers of the asbestos products at the time of the alleged exposure that was 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 that apply only to premises liability provisions," 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 *on or 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 that apply only to premises liability provisions," below) that was 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 that apply only to premises liability provisions

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

(1) "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.

(2) "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.

(3) "Employee" means an individual who performs labor or provides construction services pursuant to a "construction contract" as defined in existing R.C. 4123.79 (see **COMMENT 2**), 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.

Asbestos litigation--scope or operation

The bill provides that nothing in the above-described provisions regarding asbestos litigation and premises liability 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 premises liability do not affect the scope or operation of any "workers' compensation law" or "veterans' benefit program" (see **General definitions**," below) 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. (R.C. 2307.95(B).)

The bill provides that, except as described above in **Medical criteria for a claim based upon a wrongful death**" and in related provisions of the bill, 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; the bill does not include in this provision a reference to the above-described provisions regarding premises liability (R.C. 2307.95(C)).

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, all of the following apply (R.C. 2307.96(A) and (B)):

(1) If the injury or loss results from that exposure as 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 plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's 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 the defendant's asbestos, (b) the proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred, (c) the frequency and length of the plaintiff's exposure to the defendant's asbestos, and (d) any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

The bill specifies that the above provisions apply 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 bill's effective date (R.C. 2307.96(C)).

The bill provides that it is the intent of the General Assembly in enacting R.C. 2307.96 to establish specific factors to be considered when determining whether a particular plaintiff's exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. The consideration of these factors involving the plaintiff's proximity to the asbestos exposure, frequency of the exposure, or regularity of the exposure in tort actions involving exposure to asbestos is consistent with the factors listed by the court in *Lohrmann v. Pittsburgh Corning Cor.* (4th Cir. 1986), 782 F.2d 1156. The General Assembly by its enactment of those factors intends to clarify and define for judges and juries that evidence which is relevant to the common law requirement that plaintiff must prove proximate causation. It recognizes this section's language is contrary to the

language contained in paragraph 2 of the Syllabus of the Ohio Supreme Court in *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679. However, the General Assembly also recognizes that the courts of Ohio prior to the *Horton* decision generally followed the rationale of the *Lohrmann* decision in determining whether plaintiff had submitted any evidence that a particular defendant's product was a substantial cause of the plaintiff's injury in tort actions involving exposure to certain hazardous or toxic substances, and that the *Lohrmann* factors were of great assistance to the trial courts in the consideration of summary judgment motions and to juries when deciding issues of proximate causation. The General Assembly further recognizes that a large number of states have adopted this standard. It has also held hearings where medical evidence has been submitted indicating such a standard is medically appropriate and is scientifically sound public policy. The *Lohrmann* standard provides litigants, juries, and the courts of Ohio an objective and easily applied standard for determining whether a plaintiff has submitted evidence sufficient to sustain plaintiff's burden of proof as to proximate causation. Where specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant's asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an essential element necessary to prevail. To submit a legal concept such as a "substantial factor" to a jury in these complex cases without such scientifically valid defining factors would be to invite speculation on the part of juries, something that the General Assembly has determined not to be in the best interests of Ohio and its courts. (Section 5.)

General definitions

The bill defines the following terms, for purposes of all of its provisions described in the preceding portions of this analysis (R.C. 2307.91):

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.

Asbestos means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

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.

Asbestosis means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

Board-certified internist means a medical doctor who is currently certified by the American Board of Internal Medicine.

Board-certified occupational medicine specialist means a medical doctor who is currently certified by the American Board of Preventive Medicine in the specialty of occupational medicine.

Board-certified oncologist means a medical doctor who is currently certified by the American Board of Internal Medicine in the subspecialty of medical oncology.

Board-certified pathologist means a medical doctor who is currently certified by the American Board of Pathology.

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.

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.

Certified industrial hygienist means an industrial hygienist who has attained the status of diplomate of the American academy of industrial hygiene subject to compliance with requirements established by the American board of industrial hygiene.

Certified safety professional means a safety professional who has met and continues to meet all requirements established by the board of certified safety professionals and is authorized by that board to use the certified safety professional title or the CSP designation.

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 a civil action: (1) relating to any workers' compensation law, (2) alleging any claim or demand made against a trust established pursuant to 11 U.S.C. 524(g), or (3) 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.



Competent medical authority means 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 specified in the bill's R.C. 2307.92 and who: (1) 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, 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 his or her 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.

Exposed person means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under the bill's R.C. 2307.92.

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.

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 (2000) as amended.

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.

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.

Nonmalignant condition means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

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.

Physical impairment means a nonmalignant condition that meets the minimum requirements of the bill's R.C. 2307.92(B), lung cancer of an exposed person who is a smoker that meets the minimum requirements of the bill's R.C. 2307.92(C), or a condition of a deceased exposed person that meets the requirements of the bill's R.C. 2307.92(D).

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.

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.

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.

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.

Regular basis means on a frequent or recurring basis.

Smoker means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to the bill's R.C. 2307.92 and 2307.93, during the last 15 years.

Spirometry means the measurement of volume of air inhaled or exhaled by the lung.

Substantial contributing factor means both of the following: (1) exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim, and (2) 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.

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 proximity to other workers engaged in any of the activities described in clauses (1), (2), or (3) of this paragraph in a manner that exposed the person on a "regular basis" (see above) to asbestos fibers.

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.

Tort action means a civil action for damages for injury, death, or loss to person, including a product liability claim that is subject to existing R.C. 2307.71 to 2307.80. **Tort action** does not include a civil action for damages for a breach of contract or another agreement between persons.

Total lung capacity means the volume of air contained in the lungs at the end of a maximal inspiration.

Veterans' benefit program means any program for benefits in connection with military service administered by the U.S. Veterans' Administration under Title 38 of the U.S. Code.

Workers' compensation law means existing R.C. Chapters 4121., 4123., 4127., and 4131.

Piercing the corporate veil doctrine--asbestos claims

The bill enacts a series of criteria that must be proven with respect to the liability of a shareholder in an asbestos claim under the common law doctrine of "piercing the corporate veil."

Definitions

The bill provides the following definitions that apply, 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 existing R.C. 1704.01(C)(1)--not in the bill).

(2) "Beneficial owner" of shares means a person who, with respect to particular shares, meets any of the following specified conditions (by reference to existing R.C. 1704.01(C)(4)--not in the bill): (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.

(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. The bill states in the division containing this definition that 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 or beneficial owner of, 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 or beneficial owner of, 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 by which 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 existing R.C. 1701.01(G)--not in the bill).

(7) "Asbestos" has the same meaning as in the preceding part of the analysis, entitled "General definitions."

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

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

Criteria under 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 "**Criteria under 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 in asbestos claims 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 bill's effective date. (R.C. 2307.98(C), (D), and (E).)

Applicability

The bill states that its provisions regarding piercing the corporate veil in asbestos claims apply to all asbestos claims commenced on or after the bill's effective date or commenced prior to and pending on the bill's effective date.

The bill states that those 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).)

Request for Supreme Court to collect data regarding awards for "frivolous conduct" and "lack of reasonable good faith basis" for a medical, dental, optometric, or chiropractic claim

The bill includes a provision, in uncodified law, stating that the General Assembly requests the Supreme Court to collect data regarding the number of awards made pursuant to R.C. 2323.42 or 2323.51 to parties in civil actions in the courts of common pleas who were adversely affected by frivolous conduct as defined in R.C. 2323.51 or by the bringing of a civil action for which there was not a reasonable good faith basis (Section 8). Existing R.C. 2323.42, not in the bill, pertains to awards to defendants in civil actions based on a medical claim, dental claim, optometric claim, or chiropractic claim when it is shown that there was no reasonable good faith basis for asserting the claim. R.C. 2323.51 pertains to awards to a party for frivolous conduct in a civil action that adversely affected the party.

Statement of findings and intent and other uncodified provisions

The bill provides that 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 the bill 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 R.C. 2307.91 to 2307.98, 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(B) to (E)):

(1) The General Assembly acknowledges the Court's authority in prescribing rules governing practice and procedure in Ohio's courts, 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 (Section 4(A)).

Severability

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

(1) If any item of law that constitutes the whole or part of a section of law contained in the bill, or if any application of any item of law that constitutes the whole or part of a section of law contained in the bill, 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 the bill are composed, and their applications, are independent and severable.

(2) If any item of law that constitutes the whole or part of a section of law contained in the bill, or if any application of any item of law contained in the bill, 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 affect. The items of law of which the sections of the bill are composed, and their applications, are independent and severable.

COMMENT

1. Section 28, Article II, Ohio Constitution addresses the authority of the General Assembly to pass retroactive laws or laws impairing the obligation of contracts. It provides that:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

2. Existing R.C. 4123.79(C)(2), not in the bill, defines "construction contract" as any oral or written agreement involving any activity in connection with the erection, alteration, repair, replacement, renovation, installation, or demolition of any building, structure, highway, or bridge.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	10-02-03	p. 1091
Reported, H. Civil & Commercial Law	12-10-03	pp. 1321-1322
Passed House (61-36)	12-10-03	pp. 1322-1323
Reported, S. Judiciary	---	---

h0292-rs-125.doc/kl

