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Bill Analysis
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BILL SUMMARY

Specific causes of action

- Provides that in a tort action an owner, lessee, renter, or operator of premises that are open to the public for direct access to growing agricultural produce is not imputed to extend any assurance to a person that the premises are safe from naturally occurring hazards by giving permission to the person to enter the premises or by receiving consideration for the produce picked, or to assume responsibility or liability for injury, death, or loss to person or property allegedly resulting from the natural condition of the terrain of the premises.
- Prohibits the commencement of a wrongful death action if the decedent was compensated for the decedent's injuries prior to the decedent's death, the decedent executed a valid release of the decedent's claim, and the decedent's personal injuries could be the basis of a civil action for wrongful death.
- Prohibits the commencement of a wrongful death action if a judgment for damages was entered in a civil action prior to the decedent's death, the judgment was fully satisfied, and the decedent's personal injuries that were the subject of that civil action were sustained under the same circumstances that otherwise could have been the basis of a civil action for wrongful death.
- Provides that no civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained if the period of limitation that applies to

that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

- Requires that an action based on a product liability claim and an action for bodily injury or injury to personal property be brought within two years after the cause of action accrues and provides that generally such a cause of action accrues when the injury or loss to person or property occurs.
- Provides that a cause of action for bodily injury that is not caused by exposure to asbestos, not incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, and not caused by exposure to DES or other nonsteroidal synthetic estrogens, and is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices, accrues upon the earlier of the date competent medical authority informs the plaintiff of the injury that is related to the exposure or the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure.
- Provides that a cause of action for bodily injury incurred by a veteran through the exposure to chemical defoliants or herbicides or other causative agents, including agent orange, accrues upon the earlier of the date on which competent medical authority informs the plaintiff of the injury that is related to the exposure or the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff had an injury that is related to the exposure.
- Provides that a cause of action for bodily injury caused by exposure to DES or other nonsteroidal synthetic estrogens accrues upon the earlier of the date on which competent medical authority informs the plaintiff that the plaintiff has an injury that is related to the exposure or on the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff had an injury that is related to the exposure.

Statutes of repose

- Prohibits the accrual of a wrongful death action involving, or another cause of action based on, a product liability claim against the manufacturer or supplier of a product later than ten years from the date

the product was delivered to the first purchaser or first lessee who was not engaged in a business involving the product, but excepts a wrongful death action or another cause of action from this statute of repose if the manufacturer or supplier engaged in fraud in regard to information about the product and the fraud contributed to the harm alleged.

- Specifies that the ten-year statute of repose described in the prior dot point does not bar a civil action for wrongful death or another tort action against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that has not expired and permits a wrongful death action or another tort action involving such a product liability claim to be commenced within two years after the cause of action accrues, if the cause of action accrues less than two years prior to the expiration date of the ten-year statute of repose.
- Provides that if death or bodily injury occurs during the above-described ten-year statute of repose and the claimant cannot commence a civil action during that period due to a disability, a civil action for wrongful death or a tort action based on such a product liability claim may be commenced within two years after the disability is removed.
- Provides that the ten-year statute of repose does not bar a civil action for wrongful death or bodily injury based on a product liability claim against a manufacturer or supplier of a product if the product involved is a hazardous or toxic chemical, ethical drug, ethical medical device, asbestos, chromium, chemical defoliant or herbicide, other causative agent, DES, or other nonsteroidal synthetic estrogen and the decedent's death or the claimant's bodily injury resulted from exposure to the product during the ten-year period of repose and that the cause of action in such a case accrues upon the earlier of the date on which the claimant is informed by competent medical authority that the death or bodily injury was related to the exposure to the product or the date on which by the exercise of reasonable diligence the claimant should have known that the death or bodily injury was related to the exposure to the product, requires that a civil action for wrongful death or bodily injury based on this type of cause of action be commenced within two years after the cause of action accrues, and prohibits the civil action from commencing more than two years after the cause of action accrues.

- Prohibits a cause of action to recover damages for injury or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing later than ten years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction.
- Allows a cause of action to recover damages for injury or wrongful death to be brought within two years from the date of discovery of a defective and unsafe condition of an improvement to real property if that discovery is made during the ten-year statute of repose but less than two years prior to the expiration of that period.
- Specifies that the ten-year statute of repose described in the prior two dot points does not apply to a civil action for injury or wrongful death against the owner of, tenant of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement at the time the defective and unsafe condition of the improvement constitutes proximate cause of the injury or wrongful death.
- Prohibits the above-described ten-year statute of repose from being asserted as an affirmative defense by any person who engages in fraud with regards to an improvement to real property.

Trial, liability, damages, and judgment

- Requires that the court in all tort actions instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is not subject to federal or state income tax.
- Requires the trier of fact to consider the failure to wear a seat belt as contributory fault or other tortious conduct or for any other relevant purpose with regards to an injury if the failure to wear the seat belt contributed to the harm alleged and permits the trier of fact, because of that failure, to reduce compensatory damages.
- Modifies the categories of persons who may be awarded compensatory damages in a civil action for wrongful death to include the decedent's "dependent children" instead of minor children.

- Limits the compensatory damages for noneconomic loss that may be awarded in a tort action as follows:
 - (1) Generally, the greater of \$250,000 or an amount equal to three times the plaintiff's economic loss, to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence;
 - (2) If the noneconomic losses are for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities, \$500,000 for each plaintiff or \$1 million for each occurrence.
- Provides that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits in the prior dot point.
- Requires, upon the motion of any party, the bifurcation of a tort action involving compensatory damages and punitive or exemplary damages and provides procedures for a bifurcated trial for a tort action that is tried by a jury and for a tort action that is tried by a judge.
- Limits the recovery of punitive or exemplary damages to the amount of compensatory damages awarded or \$100,000, whichever is greater or, if the defendant is a small employer, to the lesser of the amount of compensatory damages awarded or \$100,000.
- Prohibits the award of punitive or exemplary damages if punitive damages have already been awarded or collected based on the same act or course of conduct that is alleged and the aggregate of those damages exceeds the limits described in the prior dot point.
- Permits awarding punitive or exemplary damages in subsequent tort actions involving the same act or courses of conduct for which punitive or exemplary damages have already been awarded if it is determined that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of the defendant other than the injury or loss for which compensatory damages are sought.

- Permits awarding punitive or exemplary damages in subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded if the total amount of prior punitive or exemplary damages awards was insufficient to punish the defendant's behavior and to deter the defendant and others from similar behavior in the future.
- Prohibits an award of prejudgment interest on punitive or exemplary damages.
- Expands the definition of "conduct" with regards to frivolous conduct actions to include the filing of a pleading, motion, or other paper in a civil action.
- Expands the definition of "frivolous conduct" to include conduct that is for another improper purpose, conduct that cannot be supported by a good faith argument for establishment of new law, conduct that consists of allegations or other factual contentions that have no evidentiary support, or conduct that consists of denials or factual contentions that are not warranted by the evidence.
- Removes the definition of and references to "negligence claim" from the law dealing with civil actions and trial procedure and replaces the references with "tort claim."

Product liability actions

- Modifies the provision regarding defects in design or formulation of a product by specifying that a product is defective only if, at the time it left the control of the manufacturer, the foreseeable risks exceeded the benefits associated with the design or formulation.
- Removes the provision that provided that a product is defective in design or formulation if it is more dangerous than expected when used in an intended or reasonably foreseeable manner.
- Prohibits the award of punitive or exemplary damages against the manufacturer of an over-the-counter drug marketed pursuant to federal regulations and generally recognized as safe and effective and not misbranded; provides for the forfeiture of that immunity from punitive or exemplary damages if the manufacturer fraudulently and in violation of

FDA regulations withheld from the FDA information known to be material and relevant to the harm allegedly suffered or misrepresented to the FDA that type of information.

- Specifies that a manufacturer or supplier is not liable for punitive or exemplary damages if the harm is caused by a product other than a drug or device and if the manufacturer or supplier fully complied with all applicable standards with regard to the product's manufacture, construction, design, formulation, warnings, instructions, and representations when it left the manufacturer's or supplier's control.
- Specifies that the bifurcated trial provisions or ceiling on recoverable punitive and exemplary damages apply to awards of punitive or exemplary damages awarded under the Product Liability Law.
- Incorporates the product liability contributory fault provisions into the general contributory fault provisions.

Asbestos claims

- Provides the medical criteria required for an asbestos claim based on a nonmalignant condition, lung cancer, or cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach.
- Requires in a civil action in which an asbestos claim is alleged the filing of a written report and supporting test results constituting prima-facie evidence of an exposed person's physical impairment with the complaint or other initial pleading.
- Provides that the period of limitation for an asbestos-related claim based on a nonmalignant condition does not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, a physical impairment due to a nonmalignant condition.
- Limits the successor asbestos-related liabilities of certain domestic corporations.
- Provides that the assets of a successor are exempt from restraint, attachment, or execution on any judgment related to any claim for successor asbestos-related liabilities under certain specified circumstances.

- 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, an insurance corporation, or any obligation arising under the "National Labor Relations Act" or under any collective bargaining agreement.

Miscellaneous

- Permits defendants in tort actions to introduce evidence of the plaintiff's receipt of collateral benefits, except if the source of the benefits has a mandatory self-effectuating federal right of subrogation or a contractual or statutory right of subrogation.
- Limits attorney contingency fees in connection with a tort action to not exceed 35% of the first \$100,000 recovered, 25% of the next \$500,000 recovered, and 15% on any amounts recovered over \$600,000.
- Requires each licensed attorney to append to every written retainer agreement or contract for legal services a legal consumer's bill of rights and provides the form for that document.
- Makes other technical changes.

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CONTENT AND OPERATION

Specific causes of action and general availability of causes of action

Civil actions regarding picking agricultural produce

The bill provides that, in a tort action, in the absence of willful or wanton misconduct or intentionally tortious conduct, an owner, lessee, renter, or operator of premises that are open to the public for direct access to growing agricultural produce is not imputed to do either of the following (R.C. 901.52(B)):¹

(1) Extend any assurance to a person that the premises are safe from naturally occurring hazards merely by the act of giving permission to the person to enter the premises or by receiving consideration for the produce picked;

(2) Assume responsibility or liability for injury, death, or loss to person or property allegedly resulting from the natural condition of the terrain of the premises or from the condition of the terrain resulting from cultivation of the soil.

Unavailability of wrongful death action in specific situations and other changes

The bill prohibits the commencement of a wrongful death action in this state if either of the following applies (R.C. 2125.01(B)):

(1) The person liable for the decedent's personal injuries or the administrator or executor of that person's estate compensated the decedent for those injuries prior to the decedent's death; because of the payment of that compensation, the decedent executed to that person, administrator, or executor a valid release of the decedent's claim against that person or that person's estate based on the decedent's personal injuries; and those personal injuries could be the basis of a civil action for wrongful death in a court of this state.

(2) Prior to the decedent's death, a judgment for damages was entered in a civil action against the person liable for the personal injuries sustained by the decedent or against the administrator or executor of that person's estate; that person or the administrator or executor of that person's estate fully satisfied that judgment; and the decedent's personal injuries that were the subject of that civil

¹ Defined by reference to R.C. 2305.35(A)(6) to mean a civil action for damages for injury, death, or loss to person or property, including a product liability claim (R.C. 901.52(A)).

action were sustained under the same circumstances that otherwise could be the basis of a civil action for wrongful death in a court of this state.

The bill also eliminates a provision of current law that states that the same remedy (apparently the right to bring a wrongful death action) applies to any such cause of action now existing and to any cause of action before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any Ohio court and that no prior Ohio law may prevent the maintenance of such cause of action (this language appears to be dated) (R.C. 2125.01(A)). The bill makes various technical changes to the wrongful death statutes such as changing "wrongful death action" to "civil action for wrongful death," "party injured" to "injured person," and "action filed" to "commenced" (R.C. 2125.01, 2125.02, and 2125.04).

The bill also modifies the list persons for whom compensatory damages may be awarded in a wrongful death action by changing "minor children" to "dependent children" (R.C. 2125.02(B) and (E)).

See "*Statute of repose*" below for discussion of the bill's provisions related to product liability claim statutes of repose in wrongful death actions.

Borrowing statute-foreign period of limitation applies to foreign civil action

Current law provides that a civil action, unless a different limitation is prescribed by statute, may be commenced only within the period prescribed in R.C. 2305.03 to 2305.22. When interposed by proper plea by a party to an action, lapse of time is a bar to a civil action. The bill modifies this provision by providing that no civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired. (R.C. 2305.03.)

Accrual of certain causes of action

Under current law, an action for bodily injury or injuring personal property must be brought within two years after the cause of action arose. The bill modifies this provision by providing that generally an action based on a product liability claim and an action for bodily injury or injuring personal property must be brought within two years after the cause of action accrues and that generally such a cause of action accrues when the injury or loss to person or property occurs. (R.C. 2305.10(A).)

The bill provides that a cause of action for bodily injury that is not caused by exposure to asbestos or to chromium in any of its chemical forms, that is not incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, and that is not caused by exposure to diethylstilbestrol (DES) or other nonsteroidal synthetic estrogens, including exposure before birth, and that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first. (R.C. 2305.10(B)(1).)

The bill retains but technically amends the existing provision regarding the accrual of a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms (R.C. 2305.10(B)(2)).

The bill modifies the existing provision regarding the accrual of a cause of action for bodily injury incurred by a veteran through the exposure to chemical defoliants or herbicides or other causative agents, including agent orange, by stating that the cause of action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, *or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff had an injury that is related to exposure, whichever date occurs first.* (R.C. 2305.10(B)(3).)

The bill modifies the existing provision regarding the accrual of a cause of action for bodily injury caused by exposure to DES or other nonsteroidal estrogens by providing that it accrues upon the date on which the plaintiff *is informed by competent medical authority* (replaces "learns from a licensed physician") that the plaintiff has an injury *that is* (replaces "which may be") related to the exposure, or upon the date on which by exercise of reasonable diligence the plaintiff should have *known* (replaces "becomes aware") that the plaintiff has an injury *that is* (replaces "which may be") related to the exposure, whichever date occurs first. (R.C. 2305.10(B)(4).)

Statutes of repose--product liability actions

The bill generally prohibits the accrual of a wrongful death action involving, or another cause of action based on, a product liability claim against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product. The bill

excepts a wrongful death action or another cause of action from the above-described ten-year statute of repose if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product. (R.C. 2125.02(D)(2)(a) and (b) and 2305.10(C)(1) and (2).) (See **COMMENT 1**.)

The bill specifies that the above-described ten-year statute of repose does not bar a civil action for wrongful death, or another tort action, involving or based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that has not expired. The bill permits a wrongful death action, or another cause of action, involving a product liability claim to be commenced within two years after the cause of action accrues, if the cause of action accrues less than two years prior to the expiration date of the ten-year period prior to repose. (R.C. 2125.02(D)(2)(c) and (d) and 2305.10(C)(3) and (4).)

The bill provides that if the decedent's death or claimant's bodily injury occurs during the ten-year period of repose and the claimant cannot commence an action during that ten-year period due to a disability described in the tolling statute, a civil action for wrongful death involving, or an action based on, the product liability claim may be commenced within two years after the disability is removed (R.C. 2125.02(D)(2)(e) and 2305.10(C)(5)).

The bill also provides that the ten-year statute of repose does not bar a civil action for wrongful death or bodily injury based on a product liability claim against a manufacturer or supplier of a product if the product involved is a hazardous or toxic chemical, ethical drug, ethical medical device, asbestos, chromium, chemical defoliant or herbicide, other causative agent, DES, or other nonsteroidal synthetic estrogen and the decedent's death or claimant's bodily injury resulted from exposure to the product during the ten-year period. In such a case, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death or claimant's bodily injury was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death or the claimant's bodily injury was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death or bodily injury based on this cause of action must be commenced within two years after the cause of action accrues and must not be commenced more than two years after the cause of action accrues (R.C. 2125.02(D) and 2305.10(C)(6)).

The bill provides that R.C. 2125.02 and 2305.10 (contain the above-described statute of repose provisions) do not create a new cause of action or

substantive legal right against any person involving a product liability claim (R.C. 2125.02(F) and 2305.10(D)).

For the purposes of a wrongful death action, the bill defines "harm" as death. For the purposes of a tort action for bodily injury arising out of a product liability claim, "harm" means injury, death, or loss to person or property. (R.C. 2125.02(G)(5) and 2305.10(E)(3).)

The bill specifies that the above-described provisions dealing with a ten-year statute of repose for wrongful death actions involving a products liability claim (R.C. 2125.02(D) and (G)(5) to (7)) and all provisions contained in R.C. 2305.10 are to be considered purely remedial in operation and are to be applied in a remedial manner in any civil action commenced on or after the effective date of those provisions, in which those provisions are relevant, regardless of when the cause of action accrued and notwithstanding any other provision of statute or prior rule of law of this state. It also specifies that the above-described provisions dealing with a ten-year statute of repose for wrongful death actions involving a products liability claim and all provisions contained in R.C. 2305.10 are not to be construed to apply to any civil action pending prior to the effective date of those provisions. (R.C. 2125.02(H) and 2305.10(F).) (See **COMMENT 1**.)

Statutes of repose--improvements to real property

The bill generally prohibits a cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction. The bill permits a claimant who discovers a defective and unsafe condition of an improvement to real property during the above described ten-year period but less than two years prior to the expiration of that ten-year period to commence a civil action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises from that condition within two years from the date of discovery of that defective and unsafe condition. It also provides that if a cause of action that arises out of a defective and unsafe condition of an improvement to real property accrues during that ten-year period and the plaintiff cannot commence an action during that ten-year period due to a disability described in the tolling statute, the plaintiff may commence a civil action to recover damages within two years from the removal of that disability. (R.C. 2305.131(A).) (See **COMMENT 1**.)

The bill specifies that the above described ten-year statute of repose does not apply to a civil action commenced against a person who is an owner of, tenant of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement to real property at the time that the defective and unsafe condition of the improvement to real property constitutes the proximate cause of the bodily injury, injury to real or personal property, or wrongful death that is the subject matter of the civil action. The ten-year statute of repose may not be asserted as an affirmative defense by any person who engages in fraud in regard to furnishing the design, planning, supervision of construction, or construction of an improvement to real property or in regard to any relevant fact or other information that pertains to the act or omission constituting the alleged basis of the bodily injury, injury to real or personal property, or wrongful death or to the defective and unsafe condition of the improvement to real property. (R.C. 2305.131(C) and (D).)

The above-described statute of repose does not prohibit the commencement of a civil action for damages against a person who has expressly warranted or guaranteed an improvement to real property for a period longer than the ten-year period described above and whose warranty or guarantee has not expired as of the time of the alleged bodily injury, injury to real or personal property, or wrongful death. The above-described statute of repose does not create a new cause of action or substantive legal right against any person resulting from the design, planning, supervision of construction, or construction of an improvement to real property. Finally, the bill specifies that the statute that creates the above-described statute of repose is to be considered purely remedial in operation and is to be applied in a remedial manner in any civil action commenced on or after the effective date of the statute, in which the statute is relevant, regardless of when the cause of action accrued and notwithstanding any other provision of law or prior rule of law of this state. It also specifies that the statute is not to be construed to apply to any civil action pending prior to its effective date. (R.C. 2305.131(D), (E), and (F).) (See COMMENT 1.)

Trial, liability, damages, and judgment

Instruction to jury regarding taxability of damages awarded

The bill requires the court in all tort actions to instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is not subject to taxation under federal or state income tax laws. The bill defines "tort action" as a civil action for damages for injury, death, or loss to person or property, including a product liability claim but not including a civil action for damages for breach of contract or another agreement between persons. The bill specifies that the above provision is to be considered purely remedial in operation and is to be applied in a remedial manner in any civil action commenced

on or after the effective date of the provision, in which the provision is relevant, regardless of when the cause of action accrued and notwithstanding any other provision of law or prior rule of law of this state. It also specifies that the above provision is not to be construed to apply to any civil action pending prior to the effective date of the provision. (R.C. 2315.01(B).)

Seat belts

Under current law, generally the failure of a person to wear all of the available elements of a properly adjusted occupant restraining device or to ensure that each passenger of an automobile being operated by the person is wearing all of the available elements of such a device, may not be considered or used as evidence of negligence or contributory negligence, does not diminish recovery for damages in any civil action involving the person arising from the ownership, maintenance, or operation of an automobile, may not be used as a basis for a criminal prosecution other than a prosecution for a violation of the Seat Belt Law, and is not admissible as evidence in any civil or criminal action involving the person other than a prosecution for a violation of the law regulating the use of such devices (Seat Belt Law). However, if at the time of an accident involving a passenger car equipped with occupant restraining devices, any occupant of the passenger car who sustained injury or death was not wearing an available occupant restraining device, was not wearing all of the available elements of such a device, or was not wearing such a device as properly adjusted, then, consistent with the Rules of Evidence, that fact is admissible in evidence in relation to any claim for relief in a tort action to the extent that the claim for relief seeks to recover damages for injury or death to the occupant, the defendant in question is the manufacturer, designer, distributor, or seller of the passenger car, and the claim for relief against the defendant in question is that the injury or death sustained by the occupant was enhanced or aggravated by some design defect in the passenger car or that the passenger car was not crashworthy. (R.C. 4513.263(F).)

The bill replaces the above-described provisions of the occupant restraining device law with a requirement that the trier of fact in a tort action consider as contributory fault or other tortious conduct or consider for any other relevant purpose if the failure contributed to the harm alleged in the tort action the fact that an operator of an automobile on a street or highway or an operator of certain types of school buses failed in violation of the law to wear all of the available elements of a properly adjusted occupant restraining device (seat belt) or that an operator of an automobile on a street or highway failed to ensure that each minor who is a passenger of that automobile was wearing a seat belt. The bill also permits the trier of fact, because of that failure, to reduce compensatory damages under the Comparative Fault Law. (R.C. 4513.263(F).)

Compensatory damages in a wrongful death action

The bill continues to authorize a trier of fact to award compensatory damages in a civil action for wrongful death for the loss of support from the reasonably expected earning capacity of the decedent, for the loss of services of the decedent, for the loss of society of the decedent (including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by specific individuals), for loss of prospective inheritance to the decedent's heirs, and for the "mental anguish" incurred by specific individuals by reason of the decedent's death. However, the bill modifies the categories of those specified individuals to include the decedent's surviving spouse, parents, and next of kin (continuing law, although the bill specifies that it is the next of kin of the decedent) and also all of the decedent's dependent children (not the decedent's "minor" children as under current law). (R.C. 2125.02(B).)

The bill provides that the above provisions are to be considered purely remedial in operation and are to be applied in a remedial manner in any civil action commenced on or after the effective date of those provisions in which those provisions are relevant, regardless of when the cause of action accrued and notwithstanding any other provision of law or prior rule of law but are not to be applied to any civil action pending on that effective date (R.C. 2125.02(H)).

Caps on noneconomic damages

Jurisdiction

Under current R.C. 2305.01, the court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of county commissioners. Current R.C. 2323.43(D)(1) provides that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits for such damages in a civil action upon a medical, dental, optometric, or chiropractic claim. The bill specifies in R.C. 2305.01 that a court of common pleas does not have jurisdiction to award noneconomic damages (compensatory damages that represent "noneconomic loss"--see below) that exceed the caps on such damages in tort actions that are proposed in the bill; R.C. 2323.43(D)(1), under the bill, applies to the caps as expanded to apply to all tort actions. (R.C. 2305.01 and 2323.43(D)(1).)

Limits

Current law. Current law limits the damages that may be awarded in a civil action upon a medical, dental, optometric, or chiropractic claim for compensatory damages for injury, death, or loss to person or property that represent damages for noneconomic loss. Such compensatory damages generally cannot exceed the greater of \$250,000 or an amount equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence. However, if the noneconomic losses of the plaintiff are for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities, then the amount recoverable for noneconomic loss cannot exceed \$500,000 for each plaintiff or \$1 million for each occurrence. In contrast, current law prohibits any limitation on the award of compensatory damages that represent the economic loss of the person who is awarded the damages in the civil action. (R.C. 2323.43(A)(1), (2), and (3).)

Operation of the bill. The bill removes "civil action upon a medical, dental, optometric, or chiropractic claim" from the above-described provisions and replaces that phrase with "tort action." The bill also removes "death" from the phrase "injury, death, or loss to person or property." Therefore, the limits described above apply to *all* tort actions, including a medical, dental, optometric, or chiropractic claim, but do not apply to a wrongful death action or any other action based upon a person's death. The bill also makes clarifying amendments to those provisions. (See **COMMENT 2.**) (R.C. 2323.43(A)(1), (2), and (3).)

Procedure

Current law. Under current law, if a trial is conducted in the civil action upon a medical, dental, optometric, or chiropractic claim and a plaintiff prevails with respect to that claim, the court in a nonjury trial must make findings of fact, and the jury in a jury trial must return a general verdict accompanied by answers to interrogatories that must specify all of the following (R.C. 2323.43(B)):

- (1) The total compensatory damages recoverable by the plaintiff;
- (2) The portion of the total compensatory damages that represents damages for economic loss;
- (3) The portion of the total compensatory damages that represents damages for noneconomic loss.

After the trier of fact complies with the above requirements, the court must enter a judgment in favor of the plaintiff for compensatory damages for economic loss in the amount determined pursuant to paragraph (2), above, and a judgment in favor of the plaintiff for compensatory damages for noneconomic loss subject to the provision that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the above-described limits set forth in current law. Current law provides that in no event may a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in the law. The provisions on the recovery of and limits on damages must be applied in a jury trial only after the jury has made its factual findings and determination as to the damages. (R.C. 2323.43(C)(1) and (D)(1).)

Prior to the trial in the civil action, any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination of the damages within the applicable limits. If the trier of fact is a jury, the court must not instruct the jury with respect to the limit on compensatory damages for noneconomic loss, and neither counsel for any party nor a witness may inform the jury or potential jurors of that limit. (R.C. 2323.43(C)(2) and (D)(2).)

Current law further provides that any excess amount of compensatory damages for noneconomic loss that is greater than the applicable amount of the limits cannot be reallocated to any other tortfeasor beyond the amount of compensatory damages that the tortfeasor would otherwise be responsible for under the laws of Ohio (R.C. 2323.43(E)).

Operation of the bill. The bill continues the above-described procedures that apply to caps on noneconomic damages but makes them applicable to *all* tort actions, including actions upon a medical, dental, optometric, or chiropractic claim, consistent with the bill's application of the caps on noneconomic damages to all tort actions.

Definitions

The bill modifies the definitions of "economic loss" and "noneconomic loss" for the purposes of the provisions on the caps on noneconomic damages in a tort action in a manner that is consistent with the bill's extension of the caps on noneconomic damages to all tort actions and its clarification that the caps do not apply to wrongful death actions or any other action based on a person's death (R.C. 2323.43(H)(1) and (3)).

"Tort action" is defined for these provisions as a civil action for damages for injury or loss to person or property. "Tort action" includes a civil action upon

a product liability claim or a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim. "Tort action" does not include a civil action for damages for a breach of contract or other agreement between persons. (R.C. 2323.43(H)(4).)

Nonapplicability

The bill continues but modifies current law by providing that the above-described provisions do not apply to *tort* actions that are either: (1) brought against the state in the Court of Claims, including, but not limited to, actions in which a state university or college is a defendant, or (2) brought against political subdivisions of this state, if the action is commenced under or subject to R.C. Chapter 2744. (which regulates the liability of political subdivisions in tort actions). The provisions also do not apply to wrongful death actions brought pursuant to R.C. Chapter 2125. (R.C. 2323.43(G).)

General Punitive and Exemplary Damages Law changes

Bifurcated trial

The bill requires, upon the motion of any party, the bifurcation of a tort action in which a plaintiff seeks compensatory damages and punitive or exemplary damages. The initial stage of the trial must relate only to the presentation of evidence, and a determination by the trier of fact, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, all parties are prohibited from presenting, and the court is prohibited from permitting a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant. If the trier of fact determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages from the defendant, evidence may be presented in the second stage of the trial, and a determination by the trier of fact must be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages from the defendant. (R.C. 2315.21(B)(1).)

In a tort action in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, either of the following applies: (1) the court must instruct the jury to return, and the jury must return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant, or (2) the court must make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor

of the plaintiff, must make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant (R.C. 2315.21(B)(2) and (3)).

When punitive or exemplary damages may be awarded

Under current law, generally punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in paragraph (1).

The bill removes the reference to "oppression" from paragraph (1) and replaces paragraph (2) with a prohibition against the recovery of punitive or exemplary damages unless the trier of fact returns a verdict for or makes a determination of the total compensatory damages recoverable by the plaintiff from that defendant. (R.C. 2315.21(C).)

Cap on punitive or exemplary damages

Under current law, in a tort action, the trier of fact must determine the liability of any defendant for punitive and exemplary damages and the amount of those damages. The bill retains this provision but prohibits the court from entering judgment for punitive or exemplary damages in excess of the greater of the amount of the compensatory damages awarded to the plaintiff from that defendant or \$100,000. If the defendant is a small employer,² the court is prohibited from entering judgment for punitive or exemplary damages in excess of the lesser of the amount of the compensatory damages awarded to the plaintiff from the defendant or \$100,000. The bill also states that a court of common pleas does not have

² "Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual must be considered an employer under R.C. 2315.21 only if the subject of the tort action is related to the individual's capacity as an employer. (R.C. 2315.21(A)(4).)

"Small employer" means an employer who employs not more than 500 persons on a full-time permanent basis (R.C. 2315.21(A)(5)).

jurisdiction to award punitive or exemplary damages that exceed these amounts. (R.C. 2315.21(D)(1) and 2305.01.)

The bill prohibits the award in any tort action of punitive or exemplary damages against a defendant if the defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and collected, in any state or federal court, against the defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damages exceeds the amount specified in the preceding paragraph. Notwithstanding this prohibition, the bill permits the award of punitive or exemplary damages in either of the following types of tort actions (R.C. 2315.21(D)(4)(b)):

(1) In subsequent tort actions involving the same act or courses of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described earlier on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court must make specific findings of fact in the record to support its conclusion. The court must reduce the amount of any punitive or exemplary damages otherwise awardable by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court is prohibited from informing the jury about the court's determination and action.

(2) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish the defendant's behavior and to deter that defendant and others from similar behavior in the future. In that case, the court must make specific findings of fact in the record to support its conclusion. The court must reduce the amount of any punitive or exemplary damages otherwise awardable by the sum of the punitive or exemplary damages previously rendered against that defendant in any state or federal court. The court is prohibited from informing the jury about the court's determination and action. (See **COMMENT 2**.)

Judgment interest

The bill retains the general judgment interest rate for tort and other civil actions at 10% per annum (R.C. 1343.03--not in the bill). The bill provides that

no award of prejudgment interest is to include any prejudgment interest on punitive or exemplary damages found by the trier of fact (R.C. 2315.21(D)(2)).

Frivolous conduct

The bill expands the definition of "conduct" for purposes of the law providing for the recovery of attorney's fees by a party to a civil action who is adversely affected by frivolous conduct to include the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes.

The bill also expands the definition of "frivolous conduct" that applies to that law to additionally include conduct that satisfies any of the following:

(1) Conduct that obviously serves merely to harass or maliciously injure another party to the civil action or appeal (current law) *or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation* (added by the bill).

(2) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law (current law), *or cannot be supported by a good faith argument for the establishment of new law* (added by the bill).

(3) *The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.*

(4) *The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.*

The bill allows the court on its own initiative to award court costs, reasonable attorney's fees, and other reasonable expenses because of frivolous conduct. (R.C. 2323.51(A)(1) and (2) and (B)(2).)

Under current law, generally at any time prior to the commencement of the trial in a civil action or within 21 days after the entry of judgment in a civil action or at any time prior to the hearing in an appeal that is filed by an inmate or within 21 days after the entry of judgment in an appeal of that nature, the court may award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. The award may be made against a party, the party's counsel of record, or both. (R.C.

2323.51(B)(1) and (4).) The bill modifies this provision by providing that generally, at any time not more than 30 days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, against a party, the party's counsel of record, or both. (R.C. 2323.51(B)(1).)

Negligence claim

Under current law, for the purposes of the laws regarding civil actions and trial procedure (R.C. Chapters 2307. and 2315.), "negligence claim" means a civil action for damages for injury, death, or loss to person or property to the extent that the damages are sought or recovered based on allegation or proof of negligence (R.C. 2307.011(E)). The bill repeals this definition and removes references to "negligence claim" from R.C. 1775.14, 2307.29, 2315.32, 2315.34, 2315.36, and 4507.07 and replaces it with "tort claim."

Product liability actions

Abrogation of common law product liability causes of action

The bill specifically states that R.C. 2307.71 to 2307.80 are intended to abrogate all common law product liability causes of action (R.C. 2307.71(B)). Consistent with this statement, the bill specifies in several sections that the sections' references to product liability actions refer to such actions under R.C. 2307.71 to 2307.80 (R.C. 2305.25(H), 2307.011(J), 2307.60(B), 2307.71(A)(13), and 2315.32(A)).

Defects in design or formulation

Under current law, a product is defective in design or formulation if either of the following applies (R.C. 2307.75(A)):

(1) When it left the control of its manufacturer, the foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation.

(2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

The bill modifies this provision by specifying that a product is defective in design or formulation *only if, at the time* it left the control of its manufacturer, the

foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation and by repealing (2) above.

Punitive or exemplary damages

Under current law, subject to the provisions of the next paragraph, punitive or exemplary damages are not to be awarded against a manufacturer or supplier in question in connection with a product liability claim unless the claimant establishes, by clear and convincing evidence, that the harm for which the claimant is entitled to recover compensatory damages was the result of misconduct of the manufacturer or supplier in question that manifested a flagrant disregard of the safety of persons who might be harmed by the product in question. The fact by itself that a product is defective does not establish a flagrant disregard of the safety of persons who might be harmed by that product. (R.C. 2307.80(A).)

Current law also provides that if a claimant alleges in a product liability claim that a drug caused harm to the claimant, the manufacturer of the drug is not liable for punitive or exemplary damages in connection with that product liability claim if the drug that allegedly caused the harm was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the Federal Food and Drug Administration (hereafter "FDA") under the "Federal Food, Drug, and Cosmetic Act" or the "Public Health Service Act" unless it is established by a preponderance of the evidence that the manufacturer fraudulently and in violation of applicable FDA regulations withheld from the FDA information known to be material and relevant to claimant's harm or misrepresented to the FDA information of that type (R.C. 2307.80(C)).

The bill modifies the above provisions in several ways. First, it subjects the current general statement of when a manufacturer or supplier is liable for punitive or exemplary damages to another exception discussed in the second paragraph below. It also subjects the drug manufacturer immunity provision discussed in the prior paragraph to that new exception. It includes a "device" in the drug manufacturer immunity provision so that it applies to a manufacturer of a drug or a device and specifies that "device" has the same meaning as in the "Federal Food, Drug, and Cosmetic Act."³ The bill also provides an additional set of

³ "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory that is (1) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them, (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (3) intended to affect the structure or any function of the body of man or other animals, and that does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and that

circumstances when the manufacturer of a drug *or device* has immunity from punitive and exemplary damages. Under the bill, the manufacturer of a drug or device is not liable for punitive or exemplary damages if the drug or device that allegedly caused the harm that is the basis of the claim for damages was an over-the-counter drug marketed pursuant to federal regulations, was generally recognized as safe and effective and as not being misbranded pursuant to the applicable federal regulations, and satisfied in relevant and material respects each of the conditions contained in the applicable regulations and each of the conditions contained in an applicable monograph. (R.C. 2307.80(A), (C)(1), and (C)(2)(c).)

The bill provides for the forfeiture of the proposed new immunity for over-the-counter drugs if a claimant establishes, by a preponderance of the evidence, that the manufacturer fraudulently and in violation of applicable regulations of the FDA withheld from the FDA information known to be material and relevant to the harm that the claimant allegedly suffered or misrepresented to the FDA information of that type. These same conditions result in the forfeiture of the existing immunity for a drug manufacturer as discussed above. (R.C. 2307.80(C)(2).)

The bill specifies that a manufacturer or supplier is not liable for punitive or exemplary damages in connection with a claim if a claimant alleges in a product liability claim that a product other than a drug or device caused harm to the claimant and if the manufacturer or supplier fully complied with all applicable government standards relative to (1) the product's manufacture or construction, (2) the product's design or formulation, (3) adequate warnings or instructions, and (4) representations when it left the manufacturer's or supplier's control (R.C. 2307.80(D)).

Under the bill, "federal regulations" means regulations of the United States FDA that are adopted pursuant to the "Federal Food, Drug, and Cosmetic Act" and that are set forth in Parts 300, 400, 600, 800, and 1000 of Chapter I of Title 21 of the Code of Federal Regulations (R.C. 2307.80(C)(2)(b)).

The bill specifies that the bill's bifurcated trial provisions, the ceiling on recoverable punitive or exemplary damages, and the burden of proof described above under "**General Punitive and Exemplary Damages Law changes**" apply to awards of punitive or exemplary damages awarded under the Product Liability Law (R.C. 2307.80(E)).

is not dependant upon being metabolized for the achievement of its primary intended purposes.

Product liability contributory fault

Current law, as enacted by Am. Sub. S.B. 120 of the 124th General Assembly, provides that contributory negligence or other contributory tortious conduct may be asserted as an affirmative defense to a product liability claim. Contributory negligence or other contributory tortious conduct of a plaintiff does not bar the plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if that contributory negligence or other contributory tortious conduct was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery and of all other persons from whom the plaintiff does not seek recovery in this action. If the above applies, the compensatory damages recoverable by the plaintiff must be diminished by an amount that is proportionately equal to the percentage of negligence or other tortious conduct by the plaintiff. (R.C. 2315.43.)

If contributory negligence or other contributory tortious conduct is asserted and established as an affirmative defense to a product liability claim, the court in a nonjury action must make findings of fact, and the jury in a jury trial must return a general verdict accompanied by answers to interrogatories, that specify the following: (1) the total amount of compensatory damages that would have been recoverable on that product liability claim but for that negligence or other tortious conduct, (2) the portion of the compensatory damages that represents economic loss, (3) the portion of compensatory damages that represents noneconomic loss, and (4) the percentage of negligence or other tortious conduct attributable to all persons determined for the purposes of joint and several liability. (R.C. 2315.44.)

After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to the interrogatories, the court must diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of negligence or other tortious conduct that is attributable to the plaintiff. If that percentage of the negligence or other tortious conduct is greater than the sum of percentages of the tortious conduct determined to be attributable to all parties to the action from whom the plaintiff seeks recovery plus all persons from whom the plaintiff does not seek recovery in an action, the court must enter judgment in favor of the defendants. (R.C. 2315.45.)

After it makes findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, a court must enter a judgment that is in favor of the plaintiff and that imposes liability if all of the following apply: (1) contributory negligence or other contributory tortious conduct is asserted as an affirmative defense to a product liability claim, (2) it is determined that the plaintiff was contributorily negligent or engaged in other contributory tortious

conduct and that contributory negligence or other contributory tortious conduct was a direct and proximate cause of the injury, death, or loss involved, and (3) the plaintiff is entitled to recover compensatory damages from more than one party. (R.C. 2315.46.)

The bill repeals these provisions and incorporates them into the general contributory fault provisions in R.C. 2315.32 to 2315.36.

The bill removes from R.C. 1775.14, 2307.011, 2307.23, 2307.29, and 4507.07 references to R.C. 2315.41 to R.C. 2315.46.

Express or implied assumption of the risk as an affirmative defense

Current law provides that express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim, except that express or implied assumption of the risk may not be asserted as an affirmative defense to an intentional tort claim. If express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim and if it is determined that the plaintiff expressly or impliedly assumed a risk and that express or implied assumption of the risk was a direct and proximate cause of harm for which the plaintiff seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages. (R.C. 2315.42.)

The bill provides that the general contributory fault provisions under R.C. 2315.32 to 2315.36 apply to a product liability claim that is asserted pursuant to the Product Liability Law under R.C. 2307.71 to 2307.80. The bill also generally continues the assumption of the risk provisions described above. However, it provides that if implied assumption of the risk is asserted as an affirmative defense to a product liability claim against a supplier for compensatory damages under R.C. 2307.78(A), the general contributory fault provisions under R.C. 2315.32 to 2315.36 are applicable to that affirmative defense and must be used to determine whether the claimant is entitled to recover compensatory damages based on that claim and the amount of any recoverable compensatory damages. (R.C. 2307.711.)

Asbestos litigation

Medical criteria for a claim based on a nonmalignant condition

Under the bill, physical impairment⁴ of the exposed person,⁵ to which the person's exposure to asbestos⁶ is a substantial contributing factor,⁷ must be an

⁴ "Physical impairment" means a nonmalignant condition that meets the minimum requirements of R.C. 2307.92(B), lung cancer that meets the minimum requirements of

essential element of an asbestos claim. A person is prohibited from bringing or maintaining a civil action⁸ alleging an asbestos claim 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 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).)

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

(1) Evidence verifying that a qualified physician⁹ has taken a detailed occupational and exposure history of the exposed person from the exposed person

R.C. 2307.92(C), or cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach that meets the minimum requirements of R.C. 2307.92(D) (R.C. 2307.91(U)).

⁵ *"Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim (R.C. 2307.91(K)).*

⁶ *"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)).*

⁷ *"Substantial contributing factor" means that exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim, the exposure to asbestos took place on a regular basis over an extended period of time and in close proximity to the exposed person, and a qualified physician has determined with a reasonable degree of medical certainty that the physical impairment of the exposed person would not have occurred but for the asbestos exposures (R.C. 2307.91(BB)).*

⁸ *"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. The term "civil action" does not include an action relating to any workers' compensation law (R.C. Chapters 4121., 4123., 4127., and 4131.). (R.C. 2307.91(J)).*

⁹ *"Qualified physician" 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 described above and is a board-certified internist, pulmonary specialist, oncologist, or pathologist, is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person, spends no more than 10% 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, is currently licensed to practice and actively practices in the state where the plaintiff's civil*

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 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 nature, duration, and level of the exposure.

(2) Evidence verifying that a qualified physician 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 qualified physician, 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 Impairment¹⁰ and has asbestosis¹¹ or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening and that 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 either 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 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.¹²

action was filed, and receives or received payment for the treatment of the exposed person from that person's HMO or other medical provider. (R.C. 2307.91.)

¹⁰ *"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)).*

¹¹ *"Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers (R.C. 2307.91(D)).*

¹² *"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*

Medical criteria for a claim based upon lung cancer

A person is prohibited from bringing or maintaining a civil action alleging an asbestos claim¹³ based upon *lung cancer*¹⁴ in the absence of a prima-facie showing of all of the following minimum requirements (R.C. 2307.92(C)):

(1) A diagnosis by a board-certified pathologist,¹⁵ board-certified pulmonary specialist,¹⁶ or board-certified oncologist¹⁷ 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 between the date of the exposed person's first exposure to asbestos and the date of diagnosis of the exposed person's primary lung cancer;

(3) Either of the following:

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(I), (M), (N), and (O).)

¹³ *"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).)*

¹⁴ *"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 an asbestos claim based upon mesothelioma (R.C. 2307.91(P)).*

¹⁵ *"Board-certified pathologist" means a medical doctor who is currently certified by the American Board of Pathology (R.C. 2307.91(G)).*

¹⁶ *"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(H)).*

¹⁷ *"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(F)).*

(a) In the case of an exposed person who is a nonsmoker,¹⁸ either of the following requirements:

(i) Radiological or pathological evidence of asbestosis¹⁹ or radiological evidence of diffuse pleural thickening;²⁰

(ii) Evidence of the exposed person's occupational exposure to asbestos for any of the applicable minimum exposure periods in the occupations specified in R.C. 2307.92(D)(3)(b)(i), (ii), and (iii).

(b) In the case of an exposed person who is a smoker,²¹ *both* of the requirements specified in (3)(a)(i) and (ii) above.

Medical criteria for a claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach

A person is prohibited from bringing or maintaining a civil action alleging an asbestos claim based upon *cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach*, in the absence of a prima-facie showing of all of the following minimum requirements (R.C. 2307.92(D)):

(1) A diagnosis by a board-certified pathologist, board-certified pulmonary specialist, or board-certified oncologist, whichever is appropriate for the type of cancer claimed, that the exposed person has primary cancer of the colon, rectum,

¹⁸ "Nonsmoker" means the exposed person has not smoked cigarettes or used any other tobacco products within the last 15 years (R.C. 2307.91(S)).

¹⁹ "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(T)).

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

²⁰ "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified Breader as at least B2 on the ILO scale and blunting of at least one costophrenic angle (R.C. 2307.91(Y)).

²¹ "Smoker" means a person who has smoked cigarettes or other tobacco products within the last 15 years (R.C. 2307.91(Z)).

larynx, pharynx, esophagus, or stomach and that exposure to asbestos was a substantial contributing factor to that particular cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed between the date of the exposed person's first exposure to asbestos and the date of diagnosis of the exposed person's particular cancer;

(3) Either of the following requirements:

(a) Radiological or pathological evidence of asbestos or radiological evidence of diffuse pleural thickening;

(b) Evidence of the exposed person's occupational exposure to asbestos for any of the following applicable minimum exposure periods in the specified occupations:

(i) Five exposure years²² for insulators, shipyard workers, workers in manufacturing plants handling raw asbestos, boilermakers, shipfitters, steamfitters, or other trades performing similar functions;

(ii) Ten exposure years for utility and power house workers, secondary manufacturing workers, or other trades performing similar functions;

(iii) Fifteen exposure years for general construction, maintenance workers, chemical and refinery workers, marine engine room personnel and other personnel on vessels, stationary engineers and firemen, railroad engine repair workers, or other trades performing similar functions.

No prima-facie showing is required in a civil action alleging an asbestos claim based upon mesothelioma²³ (R.C. 2307.92(E)).

Evidence relating to physical impairment, including pulmonary function testing and diffusing studies, must comply with the technical recommendations for

²² "Exposure years" means that each single year of exposure prior to 1972 will be counted as one year, each single year of exposure from 1972 through 1979 will be counted as one-half year, and exposure after 1979 will not be counted, except that each year from 1972 forward for which the plaintiff can establish exposure exceeding the OSHA limit for eight-hour time-weighted average airborne concentration for a substantial portion of the year will count as one year. (R.C. 2307.91(L).)

²³ "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)).

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 presentation of prima-facie evidence 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,"** and **"Medical criteria for a claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach"** (R.C. 2307.72(G)):

(1) It 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) It is not conclusive as to the liability of any defendant in the case.

(3) It is not admissible at trial.

Asbestos litigation-required filings

The plaintiff in any civil action who alleges an asbestos claim must file together with 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,"** and **"Medical criteria for a claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach,"** whichever is applicable. 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 60 days following the effective date of this provision or 30 days prior to trial, whichever is earlier. The defendant in the case must be afforded a reasonable opportunity to challenge the adequacy of the proffered prima-facie evidence of the physical impairment. The court is required to dismiss the plaintiff's claim without prejudice upon a finding of failure to make the required prima-facie showing. (R.C. 2307.93.)

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 after

the effective date of this provision, the period of limitations does not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment due to a nonmalignant condition. 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 civil 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 the above-described provisions regarding asbestos litigation 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 and 2307.91(CC) and (DD).)

Successor asbestos-related liabilities

Definitions. The bill provides the following definitions for the purposes of the successor asbestos-related liabilities provisions (R.C. 2307.96(A)):

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

(2) "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 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) "Successor" means a domestic corporation or a subsidiary of a domestic corporation that acquired any assets of or the stock of a foreign business corporation, if the transaction occurred on or before July 29, 1977; the purchasing domestic corporation paid less than \$5 million for the acquisition; and the principal place of business of the foreign corporation was located outside the state of Ohio.

(4)(a) "Successor asbestos-related liabilities," in relation to an asset purchase or a stock purchase by a successor 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 are assumed or incurred by a successor as a result of or in connection with the asset purchase or stock purchase, merger, or consolidation, or the agreement of the asset purchase or stock purchase.

(b) "Successor asbestos-related liabilities" includes any liabilities described in the prior paragraph that, after the effective date of the asset purchase or stock purchase, 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 this state or another jurisdiction.

(5) "Transferor" means a foreign business corporation or its shareholders from which successor asbestos-related liabilities are assumed or incurred by the successor.

Limitation on liability. The bill provides that generally the cumulative successor asbestos-related liabilities of a successor are limited to the fair market value of the acquired assets or stock as determined on the effective date of the asset purchase or stock purchase, merger, or consolidation. If a transferor had assumed liability or incurred successor asbestos-related liabilities in connection with a prior asset purchase, stock purchase, merger, or consolidation involving a prior transferor, the successor asbestos-related liabilities of the successor must be limited to the fair market value of the previously acquired assets or stock as determined on the effective date of the prior asset purchase, stock purchase, merger, or consolidation. The successor has no responsibility for a successor asbestos-related liabilities in excess of those liabilities described above. (R.C. 2307.96(B).)

Exemption from restraint, attachment, or execution. The bill provides that generally the assets of a successor are exempt from restraint, attachment, or

execution on any judgment entered in this state or another jurisdiction related to any claim for successor asbestos-related liabilities if the cumulative amounts of those liabilities, after the effective date of the asset purchase or stock purchase that is covered under "Limitation on liability," above, are paid or committed to be paid by or on behalf of the successor, or by or on behalf of the transferor, in connection with any judgment, settlement, or other discharge of claims of asbestos-related liabilities exceed the fair market value of the assets or stock as determined on the effective date of the asset purchase or stock purchase, merger, or consolidation. If a transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior asset purchase, stock purchase, merger, or consolidation involving a prior transferor, the assets of the successor are exempt from restraint, attachment, or execution on any judgment entered in this state or another jurisdiction related to any claim for successor asbestos-related liabilities that, after the effective date of the prior asset purchase, stock purchase, merger, or consolidation, are paid or committed to be paid by or on behalf of the successor, or by or on behalf of the prior transferor, in connection with any judgment, settlement, or other discharge of claims of asbestos-related liabilities, exceed the fair market value of the previously acquired assets or stock as determined on the effective date of the prior asset purchase, stock purchase, merger, or consolidation. (R.C. 2307.96(C).)

Establishment of fair market value of total assets. Under the bill, a successor may establish the fair market value of the total assets by means of any method that is reasonable under the circumstances, including by reference to the going-concern value of those assets, to the purchase price attributable to or paid for the assets in an arm's length transaction, or, in the absence of other readily available information which fair market value can be determined, to the value of those assets recorded on a balance sheet. Total assets include intangible assets. A showing by the successor of a reasonable determination of the fair market value of total assets is prima-facie evidence of the fair market value of those assets. After a successor has established a reasonable determination of the fair market value of the total assets, a claimant that disputes that determination has the burden of establishing a different fair market value of those assets. (R.C. 2307.96(D)(1) and (2).)

For the purpose of adjusting the limitations on liability discussed in "Limitations on liability," above, to account for the passage of time, the fair market value of total assets on the effective date of the applicable asset purchase or stock purchase under the applicable law must be increased annually, at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the asset purchase or stock purchase plus 1%, not compounded, until the earlier of either of the following (R.C. 2307.96(D)(3)):

(1) The date of the judgment, settlement, or other discharge of claims of successor asbestos-related liabilities to which the limitations on liability are being applied;

(2) The date on which the adjusted fair market value of total assets 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 the successor or by or on behalf of a transferor, after the effective date of the asset purchase or stock purchase in connection with any judgment, settlement, or other discharge of the successor asbestos-related liabilities.

Application of the limitations on liability. The bill provides that the above limitations on liability apply to the following (R.C. 2307.96(E)(1)):

(a) 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.

(b) Successors of a successor to which the immunity provisions apply.

The limitations on liability do not apply to any of the following (R.C. 2307.96(E)(2)):

(a) Workers' compensation benefits that are paid by or on behalf of an employer to an employee pursuant to any provision of workers' compensation law in Ohio or comparable workers' compensation law of another jurisdiction;

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

(c) An insurance corporation;

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

Under the bill, a holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate or holding company of that holder, owner, or subscriber or of the corporation, is under no obligation to, and has no liability to, the corporation or to any person with respect to any obligation or liability of the corporation relating in any way to asbestos claims on the basis that the holder, owner, subscriber, affiliate, or holding company controlled the corporation or is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, a fraudulent conveyance, piercing the corporate veil, or any other similar theory, unless the person demonstrates that the holder, owner,

subscriber, affiliate, or holding company caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the person primarily for the direct pecuniary benefit of the holder, owner, subscriber, affiliate, or holding company, and then only to the extent of that direct pecuniary benefit. Any liability of the holder, owner, or subscriber of shares of a corporation or any affiliate or holding company of that holder, owner, or subscriber or of the corporation for an obligation or liability that is so limited is exclusive and preempts any other obligation or liability imposed upon a holder, owner, or subscriber of shares of a corporation or any affiliate or holding company of that holder, owner, or subscriber or of the corporation for that obligation or liability under common law or otherwise. (R.C. 2307.97.)

The bill provides that the terms and conditions of the following transactions are subject to the limitations on liability discussed in "*Limits 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)).

Collateral benefits

Current law

Current law permits a defendant, in a civil action upon a medical, dental, optometric, or chiropractic claim, to introduce evidence of any amount payable as a benefit to the plaintiff as a result of damages that result from an injury, death, or loss to person or property that is the subject of the claim, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation. If a defendant introduces evidence of a plaintiff's right to receive collateral benefits, the plaintiff

may introduce evidence of any amount the plaintiff has paid or contributed to secure any benefits of which the defendant has introduced evidence. A source of collateral benefits, of which evidence is introduced by the defendant, is prohibited from recovering any amount against the plaintiff and may not be subrogated to the plaintiff's rights against a defendant. (R.C. 2323.41.)

Operation of the bill

The bill applies this provision to all tort actions, not just medical, dental, optometric, or chiropractic claims. The bill defines "tort action" for these provisions as a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a civil action upon a product liability claim or a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons. (R.C. 2323.41(A) and (D).)

Contingent fee agreements

Written agreement and closing statement--generally

Under current law, if an attorney and a client contract for the provision of legal services in connection with a claim that is or may become the basis of a tort action and if the contract includes a contingent fee agreement, that agreement must be reduced to writing and signed by the attorney and the client. The attorney must provide the client with a signed closing statement at the time of or prior to receipt of compensation under such an agreement. Current law specifies the contents of the closing statement. For purposes of the provisions, "tort action" means a civil action for damages for injury, death, or loss to person or property, which includes a medical, dental, optometric, or chiropractic claim. It also specifically includes a product liability claim.

The bill excludes from the definition of tort action that applies to the above-described contingency fee agreement provisions a civil action based upon a medical claim, dental claim, optometric claim, or chiropractic claim. However, the bill specifically makes the above-described contingency fee agreement provisions applicable to attorney/client contingency fee contracts applicable to contracts for legal services in connection with a claim that is or may be the basis of a tort action or in connection with a medical claim, dental claim, optometric claim, or chiropractic claim. Therefore, there is no substantive change to those specific provisions. (R.C. 4705.15(A), (B), and (D).)

Contingent fee agreement--medical, dental, optometric, and chiropractic claims

Current law provides that, if pursuant to a contingency fee agreement between an attorney and a plaintiff in a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim the amount of the attorney's fees exceeds the applicable amount of the limits on compensatory damages for noneconomic loss as provided in the act, the attorney must make an application in the probate court of the county in which the civil action was commenced or in which the settlement was entered. The application must contain a statement of facts, including the amount to be allocated to the settlement of the claim, the amount of the settlement or judgment that represents the compensatory damages for economic loss and noneconomic loss, the relevant provision in the contingency fee agreement, and the dollar amount of the attorney's fees under the contingency fee agreement. The application must include the proposed distribution of the amount of the judgment or settlement.

The attorney must give written notice of the hearing and a copy of the application to all interested persons who have not waived notice of the hearing. Notwithstanding the waivers and consents of the interested persons, the probate court retains jurisdiction over the settlement, allocation, and distribution of the claim. The application must state the arrangements, if any, that have been made with respect to the attorney's fees. The attorney's fees are subject to the approval of the probate court. (R.C. 2323.43(F).)

The bill does not change these provisions.

Limits on contingency fees--tort actions other than medical, dental, optometric, and chiropractic claims

The bill provides that if an attorney and a client contract for the provision of legal services in connection with a claim that may become the basis of a tort action (because of the bill's modification of the definition of tort action, these limits do not apply to a contract in connection with a claim that may be the basis of a medical, dental, optometric, or chiropractic claim) and if the contract includes a contingent fee agreement, the agreement must not provide for the payment of a fee that exceeds, and the attorney is prohibited from collecting a contingency fee for representing the client in excess of, the following limits (R.C. 4705.15(C)(1)):

- (a) 35% of the first \$100,000 recovered on the claim;
- (b) 25% of the next \$500,000 recovered on the claim;

(c) 15% of any amount on which the recovery on the claim exceeds \$600,000.

The above-described limits apply regardless of whether the recovery is by settlement, arbitration, or judgment or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind (R.C. 4705.15(C)(2)).

Closing statement

Under current law, if an attorney represents a client in connection with a tort action (includes a medical, dental, optometric, or chiropractic claim), if their contract for the provision of legal services includes a contingent fee agreement, and if the attorney becomes entitled to compensation under that agreement, the attorney must prepare a signed closing statement and must provide the client with that statement at the time of or prior to the receipt of compensation under that agreement. Under the bill, the attorney must provide the client with the closing statement within a reasonable time, but not later than 30 days, after the claim is finally adjudicated or settled. (R.C. 4705.15(D).)

Current law provides that the closing statement must specify the manner in which the compensation of the attorney was determined under that agreement, any costs and expenses deducted by the attorney from the judgment or settlement involved, any proposed division of the attorney's fees, costs, and expenses with referring or associated counsel, and any other information that the attorney considers appropriate.

The bill retains the above requirements for what the attorney must specify in the closing statement and provides that the closing statement also must contain all of the following (these provisions apply to tort actions based on a medical, dental, optometric, or chiropractic claim) (R.C. 4705.15(D)):

(1) The actual number of hours of the attorney's legal services that were spent in connection with the claim;

(2) The total amount of the hourly fees or contingent fee for the attorney's legal services in connection with the claim;

(3) The actual fee per hour of the attorney's legal services in connection with the claim, determined by dividing the total amount of the specified hourly fees, less itemized costs and expenses, or the total contingent fee by the actual number of hours of the attorney's legal services.

Definitions

The bill defines "recovered" as the net sum recovered on a claim after deducting any disbursements, costs, and expenses incurred in connection with the prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office overhead costs or charges are not deductible disbursements or costs. (R.C. 4705.15(A)(4).)

Legal consumer's bill of rights

The bill requires that each attorney who is licensed to practice law in Ohio append to every written retainer agreement or contract for legal services a legal consumer's bill of rights that must be substantially in the following form (R.C. 4705.16(A)) (see **COMMENT 3**):

"LEGAL CONSUMER'S BILL OF RIGHTS

(A) You have the right to control your own legal affairs.

(1) Your attorney, at your request, must do all of the following:

(a) Keep you informed about the status of your matter;

(b) Promptly answering your questions;

(c) Promptly return your phone calls;

(d) Disclose any alternatives available to you for resolving your matter;

(e) Disclose the risks and benefits of each decision and alternative.

(2) You have the right and duty to make all of the key decisions in your matter, including whether, and on what terms to settle a dispute or lawsuit.

(B) You have the right to be fully informed about the costs and fee associated with your legal matter and you have the rights specified in paragraph (D) below, if you have a contingent fee agreement with your attorney.

(1) Your attorney must disclose all of the following to you:

(a) All alternative fee arrangements;

(b) Total anticipated fees and expenses through trial;

(c) Total anticipated costs;

- (d) Referral fees paid to other attorneys.
- (2) Your attorney must do all of the following:
 - (a) Sign a written fee agreement that spells out the terms of every representation of you, including the fee arrangements;
 - (b) Agree not to exceed estimated costs and fees without your consent;
 - (c) Agree to return any unexpended portion of your retainer or other advanced payments;
 - (d) Make full use of economical and efficient legal support services, including, but not limited to, paralegals, law clerks, and legal secretaries, as well as your own personal services to reduce the costs to you.
- (C) You have the right to retain qualified legal representation.
 - (1) Your attorney must do all of the following:
 - (a) Provide timely, thorough, and professional legal services;
 - (b) Advise you to solicit or arrange for the services of co-counsel if your attorney is not qualified to represent you in the areas of the law relevant to your matter;
 - (c) Respect your right to privacy and your confidential information;
 - (d) Not neglect your matter;
 - (e) Ensure that your attorney does not have a conflict of interest in representing you;
 - (f) Maintain accurate records;
 - (g) Upon your request, provide you with copies of all court documents and letters that your attorney produces or receives while representing you.
 - (2) You have the right to an accessible legal system.

If you are not satisfied with the legal services that you have retained, or with how your matter is being handled, you have the right to file a grievance with the Certified Grievance Committee of your local bar association or the Ohio State Bar Association or with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The Committee and the Board include non-attorneys as members. The Board of Grievances and Discipline of the

Supreme Court of Ohio has the authority to discipline, and to impose sanctions on, attorneys in Ohio.

(D) You have the following rights if you have a contingent fee agreement, as defined in section 4705.15 of the Revised Code, with your attorney for the provision of legal services in connection with a claim that is or may become the basis of a tort action, as defined in that section:

(1) The agreement must be in writing and signed by you and your attorney.

(2) Your attorney must provide a copy of the signed agreement to you.

(3) If your attorney becomes entitled to compensation under the contingent fee agreement, your attorney must prepare a signed closing statement and provide you with that statement within a reasonable time, but not later than thirty (30) days after the claim is finally adjudicated and settled.

(4) Your attorney's closing statement must specify all of the following:

(a) The manner in which your attorney's compensation was determined under the agreement;

(b) The actual number of hours of your attorney's legal services that were spent in connection with the claim;

(c) The total amount of the hourly fees or contingent fee for your attorney's legal services in connection with the claim;

(d) The actual fee per hour of your attorney's legal services in connection with the claim, determined by dividing the total amount of the hourly fees specified in paragraph (4)(c), above, less itemized costs and expenses, or the total contingent fee specified in that paragraph by the actual number of hours of your attorney's legal services specified in paragraph (4)(b), above;

(e) Any costs and expenses deducted by your attorney from the judgment or settlement involved;

(f) Any proposed division of your attorney's fees, costs, and expenses with referring or associated counsel;

(g) Any other information that your attorney considers appropriate."

A person who suffers an injury or loss to person has the right to be left free from unsolicited contact by plaintiff or defense attorneys or any of their

representatives for ____ days after the event resulting in the injury or loss to person (R.C. 4507.16(B)).

The Revised Code section that contains the above provisions must be called and may be cited as the "Legal Consumer's Bill of Rights" (R.C. 4507.16(C)).

Contributory fault

Current law states that the contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action. This contributory fault provision does not apply to actions brought to recover damages from an employer for personal injuries suffered by the employer's employee or for death resulting to the employee from the personal injuries, while in the employ of the employer, arising from the negligence of the employer. The bill provides that the contributory fault provision described above *does* apply to these actions. (R.C. 2315.33.)

Uncodified provisions

The bill contains the following uncodified provisions:

(1) The General Assembly declares its intent that the amendment to R.C. 2307.71 is intended to supercede the holding of the Ohio Supreme Court in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, that the common law product liability cause of action of negligent design survives the enactment of the Ohio Product Liability Act (R.C. 2307.71 to 2307.80), and to abrogate all common law product liability causes of action (Section 6).

(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 7.)

COMMENT

1. An issue may be raised that a statute of repose infringes upon the "open courts, right-to-remedy, and due course of law" provisions of Section 16 of Article I of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460 (R.C. 2305.131's ten-year statute of repose is unconstitutional as being violative of Section 16 of Article I of the Ohio Constitution); *Cyrus v. Henes* (1994), 70 Ohio St.3d 640; *Ross v. Tom Reith, Inc.* (1995), 71 Ohio St.3d 563; *Cleveland City School Dist. Bd. of Edn. v. URS Co.* (1995), 72 Ohio St.3d 188; and *State ex rel. Ohio Academy of Trial Lawyers et al. v. Sheward* (1999), 86 Ohio St.3d 451. An issue may also be raised that a statute of repose infringes upon the "equal protection" provision of Section 2 of Article I of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Issues may be raised that the cap provisions on compensatory damages for noneconomic loss and punitive or exemplary damages are unconstitutional as being violative of the "open courts, right-to-remedy, and due course of law" provisions of Section 16 of Article I of the Ohio Constitution, the right to a trial by jury established by Section 5 of Article I of the Ohio Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. An issue may be raised that R.C. 4705.16 (regarding a "Legal Consumer's Bill of Rights") is unconstitutional as being violative of the Ohio Supreme Court's jurisdiction in the admission to practice law, the discipline of persons so admitted, and all other matters relating to the practice of law. (Section 2(B)(1)(g) of Article IV of the Ohio Constitution.)

HISTORY

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