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Bill Analysis
Legislative Service Commission

S.B. 370
127th General Assembly
(As Introduced)

Sen. Seitz

BILL SUMMARY

- Requires that within a specified period of time a claimant provide to all parties in an asbestos tort action a sworn statement by the claimant identifying all existing asbestos trust claims made by or on behalf of the claimant and requires the claimant, if the claimant subsequent to the submission of the sworn statement files or submits any additional asbestos trust claims not previously disclosed, to provide to all of the parties in the asbestos tort action an amendment updating the statement and identifying the additional asbestos trust claims.
- Provides that no asbestos tort action can proceed to trial earlier than 180 days after the claimant has exchanged with all of the parties in the asbestos tort action all of the information required under the bill.
- Allows any defendant in an asbestos tort action to file a motion with the court, with notice to the claimant and to all of the parties in the action, for an order to stay the proceeding that specifies additional asbestos trusts against which the defendant in good faith believes the claimant may make a successful asbestos trust claim and specifies that the claimant, within 14 days after the filing of the defendant's motion, may comply with the defendant's motion or file a response to the motion.
- Provides that if the court determines that there is a good faith basis for filing an asbestos trust claim with, or submitting an asbestos trust claim to, an asbestos trust indentified in the defendant's motion for an order to stay the proceedings, the court must stay the proceedings until certain specified conditions are met.

- Provides that a non-cancer asbestos trust claim and a cancer asbestos trust claim are based on distinct injuries caused by a person's exposure to asbestos.
- Provides that if a claimant previously filed a non-cancer asbestos trust claim with, or submitted a non-cancer asbestos trust claim to, an asbestos trust and subsequently filed an asbestos tort action based on a cancer asbestos claim, a cancer asbestos trust claim that is subject to disclosure or is identified as specified in the bill means both the earlier filed non-cancer asbestos trust claim and the cancer asbestos claim that is the subject of the subsequent asbestos tort action.
- Provides that asbestos trust claims and the information that is the subject of disclosure under the bill are presumed to be authentic, relevant to, and discoverable in, an asbestos tort action.
- Permits the parties in the asbestos tort action to introduce at trial any trust claims material to prove alternative causation for the exposed person's claimed injury, death, or loss to person, to prove a basis to allocate responsibility for the claimant's claimed injury, death, or loss to person, and to prove issues relevant to an adjudication of the asbestos claim.
- Allows the parties to the asbestos tort action to seek additional disclosure and discovery of information relevant to the action by any mechanism provided for by any applicable section of the Revised Code, the Rules of Civil Procedure, any local rule, or any case management order.
- Allows the court in an asbestos tort action to impose any sanction provided by a law of this state, including, but not limited to, vacating a judgment rendered in an asbestos tort action, for a claimant's failure to comply with the disclosure requirements under the bill.
- Specifies the procedures for the trial court to follow if a claimant files any additional asbestos trust claim with, or submits any additional asbestos trust claim to, an asbestos trust that was in existence at the time the claimant obtained that judgment.
- Specifies in uncodified law that the bill applies to asbestos tort actions filed on or after the effective date of the bill and to pending asbestos tort actions in which the trial court has not commenced as of the effective date of the bill.

- Includes a severability clause in uncodified law.
- Provides in uncodified law the General Assembly's statements of findings and intent.

CONTENT AND OPERATION

Definitions

The bill provides the following definitions for use in the bill (R.C. 2307.951):

(1) "Asbestos."

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

(3) "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 (by reference to R.C. 2307.91).

(4) "Asbestos tort action" means a tort action based on an asbestos claim.

(5) "Asbestos trust" means and encompasses all trust entities, claims agents, or claims processing facilities created pursuant to the jurisdiction of a United States Bankruptcy Court and section 524(g) of Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. 524(g), or other applicable provision of law and formed for the purpose of compensating claimants asserting eligible asbestos claims.

(6) "Asbestos trust claim" means any claim for compensation by an exposed person or the exposed person's asserted representative against any asbestos trust.

(7) "Cancer" means a malignant condition.

(8) "Claimant" means any person asserting an asbestos claim or asbestos trust claim. "Claimant" includes a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff.

(9) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim.

(10) "Non-cancer" means a nonmalignant condition.

(11) "Proof of claim" means any form of documentation that a potential claimant against an asbestos trust submits or provides to the asbestos trust that attests to or asserts the existence of any liquidated or unliquidated asbestos claim that the claimant may have against the asbestos trust or its predecessors under any theory of law.

(12) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons (by reference to R.C. 2307.91).

(13) "Trust claims material" means documents constituting an asbestos trust claim, including, but not limited to, claim forms, proofs of claim, and informational material required by an asbestos trust to be submitted by a claimant in order to have the claim evaluated by the asbestos trust and relied upon by the asbestos trust in making its compensation determination.

(14) "Trust governance documents" means and encompasses all documents that set forth in the plan of reorganization and related orders, terms, conditions, distribution procedures, payment schedules and matrixes, evaluation paradigms and adjustment formulas, and all other policies and procedures that are utilized to determine a claimant's eligibility for, and the amounts or levels of, payment to a claimant by an asbestos trust.

Asbestos tort actions

Sworn statement of asbestos trust claims

The bill provides that within 30 days of commencing an asbestos tort action that is not otherwise barred or deferred under applicable law, or within 30 days of the effective date of R.C. 2307.952 (section of the bill being discussed in this part of the analysis) with respect to asbestos tort actions that are pending on that effective date, a claimant must provide to all of the parties in the action a sworn statement by the claimant, under penalty of perjury, identifying all existing asbestos trust claims made by or on behalf of the claimant. The sworn statement

must disclose the date on which each asbestos trust claim against the relevant asbestos trust was made and whether any request for a deferral, delay, suspension, or tolling of the asbestos trust claims process has been submitted. The submission of the sworn statement is in addition to any disclosure requirements otherwise imposed by law, civil rule, court order or ruling, applicable agreement or stipulation, local rule, or case management order. (R.C. 2307.952(A)(1)(a) and (b).)

If the claimant, subsequent to the submission of the sworn statement described above files or submits any additional asbestos trust claims not previously disclosed, the bill requires the claimant to provide to all of the parties in the asbestos tort action an amendment updating the statement and identifying the additional asbestos trust claims. The claimant must provide the amendment within 30 days of filing an asbestos trust claim with, or submitting an asbestos trust claim to, any additional asbestos trust. With respect to any asbestos trust claim that a claimant disclosed in an amendment to the sworn statement, the claimant must provide to all of the parties in the asbestos tort action all trust claims material pertaining to each additional asbestos trust claim identified in that amendment. The claimant must provide the trust claims materials within 30 days of filing or submitting each additional asbestos trust claim. (R.C. 2307.952(A)(2) and (3).)

The bill provides that no asbestos tort action may proceed to trial earlier than 180 days after the claimant has exchanged with all of the parties in the asbestos tort action all of the information specified above. The bill does not prevent a court of competent jurisdiction from requiring disclosures in addition to the disclosures required above. (R.C. 2307.952(B) and (C).)

Motion for an order to stay the proceedings

The bill provides that any defendant in an asbestos tort action may file a motion with the court, with notice to the claimant and to all of the parties in the action, for an order to stay the proceedings. A defendant's motion to stay the proceedings must set forth all of the following (R.C. 2307.953(A)):

(1) The identities of all asbestos trusts not previously disclosed by the claimant pursuant to the bill against which the claimant has not made any asbestos trust claims but against which the defendant in good faith believes the claimant may make a successful asbestos trust claim;

(2) The information that the defendant believes supports the additional asbestos trust claims described in (1) above;

(3) A description of the information sufficient to meet the asbestos trust claim requirements of the asbestos trusts described in (1) above.

Within 14 days after the filing of the defendant's motion for an order to stay the proceedings, the claimant may do the following (R.C. 2307.953(B)):

(1) File the asbestos trust claims with or submit them to the asbestos trusts identified in the defendant's motion for an order to stay the proceedings. The submission to the court and to all of the parties in the asbestos tort action of proof demonstrating that the asbestos trust claims identified in the defendant's motion to stay the proceedings have been filed with or submitted to the appropriate asbestos trusts is dispositive of the defendant's motion for an order to stay the proceedings. Alternatively, the bill allows the defendant to withdraw the motion to stay the proceedings.

(2) File with the court a response to the defendant's motion for an order to stay the proceedings requesting a determination by the court that the information supporting the asbestos trust claims against the asbestos trusts identified in the defendant's motion for an order to stay the proceedings should be modified prior to the filing of an asbestos trust claim with, or the submission of an asbestos trust claim to, an asbestos trust or that there is insufficient information to file or submit the asbestos trust claim identified in the defendant's motion for an order to stay the proceedings.

If the claimant files a response pursuant to (2) above, the bill requires the court to determine if an asbestos trust claim could be submitted in good faith to each asbestos trust identified in the defendant's motion for an order to stay the proceedings. The claimant has the burden of proof, by a preponderance of the evidence, to demonstrate that the information set forth by the defendant should be modified prior to the filing of an asbestos trust claim with, or the submission of an asbestos trust claim to, each asbestos trust or that the asbestos trust claims should not be filed with or submitted to the asbestos trust because the claims cannot be made in good faith. (R.C. 2307.953(C).)

The bill provides that if the court determines that there is a good faith basis for filing an asbestos trust claim with, or submitting an asbestos trust claim to, an asbestos trust identified in the defendant's motion for an order to stay the proceedings, the court must stay the proceedings until the claimant files the asbestos trust claims with or submits them to the asbestos trusts identified in the defendant's motion for an order to stay the proceedings and has otherwise met the obligations set forth in the bill for disclosing all existing asbestos trust claims made by or on behalf of the claimant and for filing or submitting additional such claims following a motion to stay (R.C. 2307.953(D)).

Non-cancer and cancer asbestos trust claims

The bill provides that a non-cancer asbestos trust claim and a cancer asbestos trust claim are based on distinct injuries caused by a person's exposure to asbestos. A non-cancer asbestos trust claim that is subject to disclosure or is identified under the bill means the non-cancer asbestos claim that is the subject of the asbestos tort action in which the defendant seeks discovery. If a claimant previously filed a non-cancer asbestos trust claim with, or submitted a non-cancer asbestos claim to, an asbestos trust and subsequently filed an asbestos tort action based on a cancer asbestos claim, a cancer asbestos trust claim that is subject to disclosure or is identified in this provision means both the earlier filed non-cancer asbestos trust claim and the cancer asbestos claim that is the subject of the subsequent asbestos tort action. (R.C. 2307.954(A).)

Asbestos trust claims and trust claims material

The bill provides that asbestos trust claims and the information that is the subject of disclosure under the bill are presumed to be authentic, relevant to, and discoverable in, an asbestos tort action. Notwithstanding any other provision of law or agreement, no claim of privilege can apply to asbestos trust claims and trust claims material. The parties in the asbestos tort action may introduce at trial any trust claims material to prove alternative causation for the exposed person's claimed injury, death, or loss to person, to prove a basis to allocate responsibility for the claimant's claimed injury, death, or loss to person, and to prove issues relevant to an adjudication of the asbestos claim. (R.C. 2307.954(B).)

Additional disclosure

The bill provides that in addition to the disclosure requirements set forth in the bill, the parties to the asbestos tort action may seek additional disclosure and discovery of information relevant to the action by any mechanism provided for by any applicable section of the Revised Code, the Rules of Civil Procedure, any local rule, or any case management order. In addition to the disclosure described above, any defendant in the asbestos tort action also may seek discovery of the claimant's asbestos trust claims directly from the asbestos trusts involved. Under the bill, within 30 days of commencing an asbestos tort action that is not otherwise barred or deferred under applicable law, or within 30 days of the effective date of the provisions of the bill discussed in this paragraph with respect to asbestos tort actions that are pending on that effective date, a claimant must provide to all of the parties in the asbestos tort action the consent, authorization, or permission that may be required by any asbestos trust for the release of information and materials that are subject to the disclosure requirements of the bill or any additional disclosure under this provision. (R.C. 2307.954(C).)

Imposition of sanctions

The bill allows the court in an asbestos tort action, upon the filing by a defendant or judgment debtor of an appropriate motion seeking sanctions or other relief, to impose any sanction provided by a law of this state, including, but not limited to, vacating a judgment rendered in an asbestos tort action, for a claimant's failure to comply with the disclosure requirements of the bill (R.C. 2307.954(D)).

Filing or submitting additional asbestos trust claims

Under the bill, if a claimant, subsequent to obtaining a judgment in an asbestos tort action in this state, files any additional asbestos trust claim with, or submits any additional asbestos trust claim to, an asbestos trust that was in existence at the time the claimant obtained that judgment, the trial court, upon the filing by a defendant or judgment debtor of an appropriate motion seeking sanctions or other relief, has jurisdiction to reopen its judgment in the asbestos tort action and do either of the following (R.C. 2307.954(E)):

- (1) Adjust the judgment by the amount of any subsequent asbestos trust payments obtained by the claimant;
- (2) Order any other relief to the parties that the court considers just and proper.

Uncodified law provisions

Applicability of the bill

Section 2 provides that R.C. 2307.951 to 2307.954 (provisions of the bill discussed above in this analysis), as enacted by the bill, apply to asbestos tort actions filed on or after the effective date of the bill and to pending asbestos tort actions in which the trial has not commenced as of the effective date of the bill. As used in the section, "asbestos tort action" has the same meaning as in R.C. 2307.951. (Section 2.)

Severability

The bill provides that if any provision that constitutes the whole or part of a section of the Revised Code enacted by the bill or if any application of any provision that constitutes the whole or part of a section of the Revised Code enacted by the bill is held invalid, the invalidity does not affect other provisions of the section or applications of other provisions of the section that can be given effect without the invalid provision or application. To this end, the provisions that constitute the whole or part of the sections of the Revised Code enacted by the bill and their applications are independent and severable. (Section 3(A).)

If any provision that constitutes the whole or part of a section of the Revised Code enacted by the bill or if any application of any provision that constitutes the whole or part of a section of the Revised Code enacted by the bill is held to be preempted by federal law, the preemption does not affect other provisions of the section or applications of other provisions of the section that can be given effect without the preempted provision or application. To this end, the provisions that constitute the whole or part of the sections of the Revised Code enacted by the bill and their applications are independent and severable. (Section 3(B).)

Statements of findings and intent

The General Assembly makes the following statements of findings and intent (Section 4):

(1) The United States Supreme Court has described asbestos litigation in this country as a crisis.

(2) Asbestos litigation has forced an estimated 85 employers into bankruptcy. The rate of asbestos-driven bankruptcies has accelerated in recent years. Between 2000 and 2007, there were more asbestos-related bankruptcy filings than in either of the prior two decades.

(3) Personal injury lawyers have responded to those bankruptcies by expanding their search for solvent defendants. The number of asbestos defendants now includes over 8,500 companies, including many small and medium size companies, in industries that cover 85% of the United States economy.

(4) Asbestos claimants often seek compensation for alleged asbestos-related conditions from civil defendants that remain solvent in civil court tort actions and from trusts or claims facilities formed in asbestos bankruptcy proceedings.

(5) There is limited coordination and transparency between these two paths to recovery. Ohio courts have already experienced the problem of instances of claimants failing to provide information and materials regarding asbestos trust claims that they have commenced. This lack of transparency creates a strong potential for abuse of the judicial process, as plaintiffs may allege facts intended to maximize recoveries from trusts created through the bankruptcy system while also alleging different or conflicting facts to maximize recoveries from tort system defendants.

(6) It is in the interest of justice that there be transparency for claims made in the bankruptcy system and for claims made in civil asbestos litigation.

Transparency will address the potential for abuse, fraud, and duplicate and inconsistent payments.

(7) Presentation of abusive, fraudulent, or inconsistent claims undermines the integrity of Ohio's judicial system.

(8) The current lack of transparency in the tort system may result in businesses in this state being unfairly penalized and deprived of their rights.

(9) New asbestos trusts are being formed and are anticipated to be funded with approximately \$30 billion in assets. As a consequence, it is critical to the interests of justice and to the economy of the state of Ohio that the distribution of these assets be made in a manner that incorporates full and consistent disclosure when recovery is sought through an asbestos tort action in Ohio against solvent companies or through a trust claim against a bankrupt entity. All relevant asbestos exposure information should be made available in a timely manner so that solvent companies do not unnecessarily absorb the liabilities of bankrupt trust entities that are not subject to tort actions. Transparency will help ensure that all responsible parties are allocated an equitable share of any liability and will encourage injured persons to promptly seek an appropriate recovery from all appropriate sources.

(10) The General Assembly has established apportionment of liability as a public policy. Pursuant to Ohio apportionment law, bankrupt entities are currently assigned a proportion of liability by the trier of fact. As a consequence, the bill furthers this existing public policy of the State of Ohio by ensuring that asbestos tort actions are resolved on the basis of all available evidence and on the full merits. With the advent of an increasing number of significant asbestos trusts, it is apparent that asbestos trusts and the claimants asserting claims against them will be primary sources of information and evidence that will ensure that Ohio's public policy of apportionment of liability and of civil trials based upon all available evidence will be protected and promoted.

(11) It is the intent of the General Assembly that the bill apply to claims made against any currently operating asbestos trusts and to any asbestos trusts created on and after the effective date of the bill.

HISTORY

ACTION	DATE
Introduced	11-04-08

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