Ohio Legislative Service Commission

Bill Analysis

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H.B. 380

129th General Assembly
(As Introduced)

Reps. Blessing, Slaby, Hackett, McGregor, J. Adams

BILL SUMMARY

- Enacts a procedure in asbestos tort actions for the discovery of asbestos trust claims for compensation submitted by a claimant to asbestos trust entities created pursuant to a bankruptcy court's jurisdiction.

- Requires a claimant, after filing the complaint or other initial pleading in an asbestos tort action, to provide to all of the parties in the action a sworn statement identifying all existing asbestos trust claims made by or on behalf of the claimant and all trust claims material pertaining to each such identified claim.

- Requires a claimant to provide to all of the parties in the action an amendment updating the sworn statement that identifies additional asbestos trust claims made.

- Permits a defendant in the action to file a motion for an order to stay the proceedings setting forth the identities of asbestos trusts not previously disclosed by the claimant 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 claim.

- Provides that a claimant may file a response to the defendant's motion asking the court to make a determination regarding the modification or sufficiency of the information required to make an asbestos trust claim identified in the defendant's motion.

- Specifies that the claimant has the burden of proof by a preponderance of the evidence of the allegations in the claimant's response.

- If the court determines that there is a good faith basis for filing a claim with the asbestos trust identified in the defendant's motion, requires the court to stay the proceedings until the claimant files the claim.

- States that a noncancer asbestos claim and a cancer asbestos claim are based on distinct injuries caused by a person's exposure to asbestos.

- Provides that if a claimant previously filed a noncancer asbestos trust claim with an asbestos trust and subsequently filed an asbestos tort action based on a cancer asbestos claim, a cancer asbestos claim that is subject to disclosure means both the earlier filed noncancer asbestos trust claim and the cancer asbestos claim that is the subject of the subsequent action.

- Generally permits the parties in the action to introduce at trial any trust claims material to prove alternative causation for the claimed injury, death, or loss, to prove a basis to allocate responsibility, and to prove issues relevant to an adjudication of the asbestos claim.

- Permits the parties to the action to seek additional discovery of relevant information by any mechanism provided for by law, rule, or case management order and permits the defendant to seek discovery of the claimant's asbestos trust claims directly from the asbestos trusts involved.

- Authorizes the court, upon a defendant's or judgment debtor's motion, to impose any lawful sanction for a claimant's failure to comply with the disclosure requirements.

- Permits the court to reopen its judgment and adjust the amount of subsequent asbestos trust payments obtained by the claimant if the claimant, subsequent to obtaining the judgment, makes any additional asbestos trust claim to an asbestos trust that was in existence at the time of the judgment.

- Provides that the bill's provisions apply to asbestos tort actions filed on or after the bill's effective date and to pending asbestos tort actions in which trial has not commenced as of that effective date.

- Contains the General Assembly's statement of findings and intent.

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CONTENT AND OPERATION

Asbestos claimant's sworn statement of asbestos trust claims

The bill provides that within 30 days after filing the complaint or other initial pleading in an "asbestos tort action" that is not otherwise barred or deferred under applicable law or within 30 days of the bill's effective date 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, under penalty of perjury, identifying all existing "asbestos trust claims" made by or on behalf of the claimant and all "trust claims material" pertaining to each identified asbestos trust claim. 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 this 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.[1] (See "**Definitions**," below, for the definitions of the terms in quotation marks.)

If the claimant, subsequent to the submission of the above sworn statement files with or submits to any asbestos trust 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 any such amendment within 30 days of filing with or submitting to any asbestos trust an additional asbestos trust claim. Within 30 days of filing or submitting each additional asbestos trust claim, the claimant

[1] R.C. 2307.952(A)(1).

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.[2]

Under the bill, the failure to provide to all parties in the asbestos tort action all trust claims material as required by the bill in a timely manner constitutes grounds for the court to decline to assign an initial trial date or extend the date set for trial. The bill provides that nothing in its provisions prevents a court of competent jurisdiction from requiring any disclosures in addition to the above required disclosures.[3]

Defendant's motion for an order to stay proceedings

The bill permits any defendant in an asbestos tort action to file a motion with the court, with notice to the claimant and all of the parties in the action, for an order to stay the proceedings. The motion must set forth credible evidence demonstrating all of the following:[4]

(1) The identities of all asbestos trusts not previously disclosed by the claimant in its above described sworn statement or amendment to the statement 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 either of the following:[5]

(1) File the asbestos trust claims with or submit them to the asbestos trusts identified in the defendant's motion. 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 have been filed with or submitted to the appropriate asbestos trusts is dispositive of the defendant's motion for an order to stay

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[2] R.C. 2307.952(A)(2) and (3).

[3] R.C. 2307.952(B) and (C).

[4] R.C. 2307.953(A).

[5] R.C. 2307.953(B).

the proceedings. Alternatively, the defendant may withdraw its motion for an order to stay the proceedings.

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

If the defendant has not met its burden for its motion for an order to stay the proceedings as described above and if the claimant files a response pursuant to the immediately preceding paragraph (2), the court must determine if a successful asbestos trust claim could be submitted in good faith to each asbestos trust identified in the defendant's motion. The claimant has the burden of proof, by a preponderance of the evidence, to demonstrate: (a) that the information set forth by the defendant that the defendant believes supports the additional asbestos trust claims and the description of the information sufficient to meet the asbestos trust claim requirements 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 identified in the defendant's motion, or (b) that the asbestos trust claim should not be filed with or submitted to the asbestos trust because a successful asbestos trust claim cannot be made in good faith.[6]

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 them with or submits them to the asbestos trusts identified in the defendant's motion and has otherwise met the obligations set forth in the bill.[7]

Cancer and noncancer asbestos trust claims

The bill provides that a "noncancer" asbestos trust claim and a "cancer" asbestos trust claim (see "**Definitions**," below) are based on distinct injuries caused by a person's exposure to asbestos. A noncancer asbestos trust claim that is subject to disclosure under the above described provisions of the bill or is identified in this and the following provisions of this analysis means the noncancer asbestos claim that is the subject of the asbestos tort action in which the defendant seeks discovery pursuant to the bill. If a

[6] R.C. 2307.953(C).

[7] R.C. 2307.953(D).

claimant previously filed a noncancer asbestos trust claim with, or submitted a noncancer asbestos trust claim to, an asbestos trust and subsequently filed an asbestos tort action based on a cancer "asbestos claim" (see "**Definitions**," below), a cancer asbestos trust claim that is subject to disclosure under the above described provisions of the bill or is identified in this provision of this analysis means both the earlier filed noncancer asbestos trust claim and the cancer asbestos claim that is the subject of the subsequent asbestos tort action.[8]

Asbestos trust claims and information subject to disclosure

The bill states that asbestos trust claims and the information that is the subject of disclosure under its provisions are presumed to be authentic, relevant to, and discoverable in an asbestos tort action. Notwithstanding any agreement or confidentiality provision, trust claims material are presumed to not be privileged. The parties in the asbestos tort action may introduce at trial any trust claims material to prove alternative causation for the "exposed person's" (see "**Definitions**," below) 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 unless the exclusion of the trust claims material is otherwise required by the rules of evidence. An asbestos trust claim rejected by an asbestos trust may be excluded as evidence if the exclusion is required by the rules of evidence.[9]

Additional disclosure and discovery

The bill provides that in addition to its disclosure requirements, 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 this additional disclosure, any defendant in the asbestos tort action also may seek discovery of the claimant's asbestos trust claims directly from the asbestos trusts involved.[10]

Sanctions or relief

The bill authorizes the court in an asbestos tort action, upon the filing by a defendant or judgment debtor of an appropriate motion seeking sanctions or other

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[8] R.C. 2307.954(A).

[9] R.C. 2307.954(B).

[10] R.C. 2307.954(C).

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 bill's disclosure requirements.[11]

Under the bill, if a claimant, subsequent to obtaining a judgment in an asbestos tort action in Ohio, 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: (1) adjust the judgment by the amount of any subsequent asbestos trust payments obtained by the claimant, or (2) order any other relief to the parties that the court considers just and proper. As used in this paragraph, "asbestos trust" means and encompasses all trust entities, claims agents, or claims processing facilities that are 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 that are formed for the purpose of compensating claimants asserting eligible asbestos claims (this definition is different from the general definition of "asbestos trust," below).[12]

Definitions

The bill defines the following terms for purposes of its provisions:[13]

"Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.[14]

"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

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[11] R.C. 2307.954(D).

[12] R.C. 2307.954(E).

[13] R.C. 2307.951.

[14] By reference to R.C. 2307.91(B).

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.[15]

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

Except as otherwise defined in "**Sanctions or relief**," above, "asbestos trust" means and encompasses all trust entities, claims agents, or claims processing facilities that are 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, that are formed for the purpose of compensating claimants asserting eligible asbestos claims and are in existence on the date initially set for trial in the asbestos tort action.

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

"Cancer" means a malignant condition.

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

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

"Noncancer" means a nonmalignant condition.

"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.

"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 R.C. 2307.71 to 2307.80. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.[16]

"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

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[15] By reference to R.C. 2307.91(C).

[16] By reference to R.C. 2307.91(II).

evaluated by the asbestos trust and relied upon by the asbestos trust in making its compensation determination.

"Trust governance documents" means and encompasses all documents that are 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.

Applicability

The bill states that its provisions apply to asbestos tort actions filed on or after the effective date of the bill and to pending asbestos tort actions in which trial has not commenced as of that effective date.[17]

Severability

The bill includes the following specific severability provisions:[18]

(1) 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. This provision is basically the same as existing R.C. 1.50.

(2) 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.

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[17] Section 2.

[18] Section 3.

Statement of findings and intent

The bill states that the General Assembly makes the following statements of findings and intent:[19]

(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 these bankruptcies by expanding their search for solvent defendants. The number of asbestos defendants now includes over 8,500 companies, including many small- and medium-sized 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 Ohio being unfairly penalized and deprived of their rights.

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[19] Section 4.

(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 of liability law, bankrupt entities are currently assigned a proportion of liability by the trier of fact. As a consequence, this 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 this bill apply to claims made against any currently operating asbestos trusts and to any asbestos trusts created on and after its effective date.

HISTORY

ACTION	DATE
Introduced	11-15-11

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