

Legislative Analysis



ASBESTOS: SUCCESSOR CORPORATION LIABILITY

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House Bill 4601 with House committee amendment

Sponsor: Rep. Joe Haveman

Committee: Judiciary

First Analysis (2-15-12)

BRIEF SUMMARY: The bill would limit the liability of a successor corporation that acquired or merged – before 1972 – with a predecessor corporation that had engaged in asbestos-related activities.

FISCAL IMPACT: The bill would have no fiscal impact on the judicial branch.

THE APPARENT PROBLEM:

Currently, under the rule of successor liability, a successor corporation (one that acquires or merges with another) can be held liable for any civil actions filed against the business acquired (predecessor corporation), up to the total value of the successor corporation, even if it did nothing to create the liability or the liability had been created before the merger or acquisition.

One example is Crown Cork & Seal, a leading supplier of packaging products worldwide and inventor of the bottle cap. According to the American Legislative Exchange Council and other sources, in November 1963, Crown purchased a majority of the stock of a competitor in the bottle cap business - Mundet Corporation. Mundet had also operated a side business that made, sold, and installed asbestos insulation, but had shut down that side of the business before the stock purchase. Within 93 days after Crown obtained its stock ownership, Mundet sold off what was left of its insulation business. Within two years, Crown acquired all of Mundet's stock and the two companies merged in early 1966. The cost of the stock purchase was \$7 million.

It wasn't until the 1970s and 1980s that the public became aware of the health hazards of asbestos exposure and the link to certain cancers such as mesothelioma and lung cancer. Once the link was known, many who had been injured by asbestos exposure sued various asbestos-related companies. Because Crown had acquired a majority of Mundet's stock shortly before, rather than after, Mundet divested itself of its insulation division, Crown became liable for damages arising from Mundet's insulation business under the rule of successor liability.

According to a Crown representative, the company has paid out over \$700 million in asbestos-related claims arising from Mundet's old asbestos insulation business, ten times the original purchase price to acquire the Mundet stock. This continuing liability has dramatically reduced the value of Crown's stock and increased the interest rate the company must pay to borrow money. Reportedly, dozens of companies have been forced

out of business due to asbestos liability "inherited" from the predecessor companies they acquired.

To address this issue, the American Legislative Exchange Council (ALEC) created model legislation known as the Successor Asbestos-Related Liability Fairness Act. Under that model legislation, successor liability is capped at 100 percent of the total gross assets of a predecessor company at the time of a merger or acquisition. Since 2001, fifteen states have adopted legislation based on the ALEC model act. Some believe that Michigan should follow the lead of those other states and adopt similar legislation.

THE CONTENT OF THE BILL:

House Bill 4601 would add Chapter 30, entitled "Limitation of Successor Asbestos-Related Liability," to the Revised Judicature Act. The new section would limit the liability of a successor corporation that acquired or merged – before 1972 – with a predecessor corporation that had engaged in asbestos-related activities. Among other things, the bill would:

- Apply the liability limitations to a corporation that became a successor before January 1, 1972, or that is a successor to such a corporation.
- Apply the bill's provisions to actions that include an asbestos claim that was filed on or after the bill's effective date or that was pending but trial of the action had not begun as of the bill's effective date.
- Limit the cumulative successor asbestos-related liability of a corporation to the fair market value of the total gross assets of the transferor (as established in the bill) determined at the time of the merger or consolidation and adjusted for each year since the merger as specified in the bill. The corporation would have no responsibility for successor asbestos-related liability in excess of this limitation.
- Exclude from the liability limitations a claim for workers' compensation benefits paid to an employee under the Worker's Disability Compensation Act or a comparable workers' compensation law of another jurisdiction; a claim against a corporation that is not a successor asbestos-related liability; and an obligation under the National Labor Relations Act or under a collective bargaining agreement. The liability limitations would also not apply to a successor that, after the merger or consolidation, continued in the business of mining asbestos, selling or distributing asbestos fibers, or manufacturing, distributing, removing, or installing products that contained asbestos that were the same or substantially the same as the products previously manufactured, distributed, removed, or installed by the transferor.
- Require a court to liberally apply, to the fullest extent permissible, the limitation in liability under the bill in an action that included successor asbestos-related liability.

- Require procedural provisions of the bill to be applied retroactively by a court. However, if an application of the bill would unconstitutionally affect a vested right, the provision would only be applied prospectively.
- Define several terms, including "asbestos claim," "successor," "successor asbestos-related liability," and "transferor."
- Specify that the bill's provisions are severable.

MCL 600.3001

BACKGROUND INFORMATION:

The bill is a reintroduction of legislation introduced in the 2007-2008 legislative session (SB 591, which was passed by the Senate) and 2009-2010 (HB 5167).

ARGUMENTS:

For:

Some feel that the law of successor liability is outdated and lacks sense as either legal or economic policy. Basically, the assets of a company that bought out another company that had been involved in the asbestos business are depleted by those who sue first, leaving little to nothing for those whose symptoms appear at a later time. Dozens of companies have been driven into bankruptcy, long after the company acquired stopped producing asbestos products.

The bill would provide some relief by limiting successor liability to the value of the acquired company at the time it was bought out. This is the same level of liability the company would have had if it had never been acquired by or merged with another business in the first place. In addition, the cap on asbestos liability would only apply to mergers that took place prior to 1972, which is when federal OSHA rules pertaining to asbestos were adopted and when the danger of asbestos was made clear to the public. Even if a company had done due diligence before a merger, it would not have recognized the potential liability it was acquiring until after that 1972 date.

The bill in particular will relieve Crown Cork & Seal from further liability. The company has already spent over \$700 million in claims and other asbestos-related expenses - an amount 10 times the cost to acquire Mundet Cork. Without such relief, money that could go into expansion and job creation would instead go to pay claims for people who may not even be sick. According to ALEC, up to 90 percent of recent asbestos claimants are not even sick. It is one thing if a company was truly responsible for exposing their workers or customers to asbestos, but some successor corporations, like Crown, never actually engaged in the asbestos business. Thus, House Bill 4601 would provide just and fair relief to Crown and other companies that would fit within the bill's parameters.

Against:

The bill has been touted as providing relief to Crown Cork and Seal by only applying to mergers or acquisitions completed before 1972. However, it will have greater applicability, as there were other mergers involving asbestos businesses before that date. This could leave many former workers, customers, and their families who were exposed to asbestos dust without recourse for injuries resulting from that exposure. If the intent is to relieve Crown of any further liability due to the unique circumstances of its merger with Mundet, then the bill should be amended to apply to mergers taking place before 1964.

Against:

The bill means Crown Cork & Seal would be off the hook financially from any resident of Michigan who discovers that his or her asbestos-related illness is linked to a product manufactured, sold, or installed by the former Mundet Cork Company or by any asbestos company that had been acquired or merged with another prior to 1972. In 2008, about 1,000 cases were pending against Crown. Any still pending would be immediately dismissed, regardless of the merit of the claim or the legal expenses already incurred by the plaintiffs. Some may be able to sue under worker's compensation laws if the exposure came from their employers' use of asbestos materials obtained from a company such as Mundet. But for most, they will only have Medicaid or Medicare to fall back on - thus shifting the cost to Michigan taxpayers. Better to let the courts sort out if liability attaches.

Against:

Many in the building trades oppose House Bill 4601. They are the ones most severely affected by asbestos-related illnesses. Approximately 3,000 people nationally die each year from mesothelioma alone, an aggressive cancer of the lungs and stomach lining caused by asbestos exposure. Eventually the numbers will decrease, but not any time soon, as the wives and children who had second-hand exposure to asbestos from the dust on their spouses' and fathers' clothes are now beginning to exhibit symptoms. These individuals should have the same opportunity to seek relief as others have had. If fairness is being touted in favor of the bill, how "fair" is changing the rules to the game when the game is in progress? After all, the bill doesn't apply to future claims if the successor company has already hit the cap, it also targets claims that are already filed and in the process of litigation.

POSITIONS:

A representative of Crown Cork & Seal Company testified in support of the bills. (10-20-11)

A representative of the Michigan Building and Construction Trades Council testified in opposition to the bills. (10-20-11)

A representative of the Utility Workers Union of America testified in opposition to the bills. (10-20-11)

A representative of Michael B. Serling PC, and their clients, testified in opposition to the bills. (10-20-11)

The Negligence Law Section -- State Bar of Michigan indicated opposition to the bills. (12-1-11)

Legislative Analyst: Susan Stutzky
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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.