

ASBESTOS BANKRUPTCY TRUST CLAIMS

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5456 as enacted
Public Act 100 of 2018

Analysis available at
<http://www.legislature.mi.gov>

Sponsor: Rep. Jason Wentworth
House Committee: Michigan Competitiveness
Senate Committee: Michigan Competitiveness
Complete to 7-2-18

BRIEF SUMMARY: House Bill 5456 amends the Revised Judicature Act to add Chapter 30A, regarding civil actions involving the health effects of asbestos exposure (“asbestos actions”) and claims against a trust or settlement fund established to provide compensation to claimants related to asbestos (an “asbestos trust”). Chapter 30A is designated the “Asbestos Bankruptcy Trust Claims Transparency Act.”

FISCAL IMPACT: The bill would have no fiscal impact on the state or units of local government.

THE APPARENT PROBLEM:

According to House committee testimony, the bill is intended to address the concern of plaintiffs “double dipping” when making asbestos claims. Currently, persons seeking compensation for asbestos exposure may seek redress in both the tort system and by filing a claim against an asbestos bankruptcy trust. The approximately 60 asbestos bankruptcy trusts were set up by firms that have filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code in order to pay personal injury claims based on asbestos exposure, and have assets of about \$25 billion. Plaintiffs may also seek compensation in the tort system against solvent defendants.

The bill would retain the ability to seek compensation in both systems, but require a person to file certain materials at the beginning of a civil trial, asserting that the person was also exhausting trust claims in addition to tort claims. According to committee testimony, this disclosure would pull back the curtain between the two systems and allow juries to apportion fault based on a totality of contributing factors.

THE CONTENT OF THE BILL:

Plaintiff statement and trust claims materials

The bill would require the plaintiff in an asbestos action to do all of the following not later than 180 days before the initial date set for the trial of an asbestos action:

- Provide a statement signed by the plaintiff and his or her lawyer attesting that all potential claims against an asbestos trust have been investigated and that, based on information reasonably available to the plaintiff and his or her lawyer, all the claims that could be made by the plaintiff have been completed and filed. If either later becomes aware that additional trust claims can be filed, the sworn statement would have to be supplemented. (Incomplete, deferral, or “placeholder” claims would not be considered completed and filed.) The statement would also have to give the status of

each claim filed and indicate any requests to defer, suspend, withdraw, or otherwise alter the standing of a claim.

- Provide all *trust claims materials* to all parties to the action, including materials relating to conditions other than those that are the basis for the asbestos action. The asbestos trust would also have to certify that the *trust claims materials* submitted are true and complete.

Trust claims materials would mean a final executed proof of claim and all other documents related to a claim against an asbestos trust. They would include claims forms, supplementary materials, affidavits, depositions, trial testimony, work history, medical and health records, documents reflecting the status of a claim, and all documents related to the settlement of a settled claim.

- If the plaintiff's claim against an asbestos trust was based on exposure to asbestos through another individual, produce the *trust claims materials* that were submitted to an asbestos trust by that individual, if they are available to the plaintiff or his or her lawyer.

The plaintiff would have 30 days after modifying a claim, receiving information related to a claim, or filing a new claim to update the *trust claims materials* provided above. If the plaintiff failed to provide the *trust claims materials*, or failed to update them within 30 days, the court could dismiss the asbestos action.

A *plaintiff* in an asbestos action would include a personal representative for an estate or a conservator or next friend for a minor or incapacitated individual.

Defendant filing motion to compel

Under the bill, the defendant in an asbestos action would have to confer with the plaintiff at least 60 days before the trial if the defendant believes that the plaintiff has not filed all required asbestos trust claims. Then, the defendant could move the court for an order to require the plaintiff to file those claims. The defendant would have to identify the claims and produce or describe any supporting information. The court would not grant the motion if the defendant filed previously, knew of the claims identified in the subsequent motion, and did not identify them at that time.

Within 10 days after receiving the motion, the plaintiff would then have to file the asbestos trust claim, file a response stating why there is insufficient evidence to file such a claim, or file a response requesting the court to determine that the cost of filing the claim would exceed the amount the plaintiff could expect to recover.

Then, within 10 days of the plaintiff's response, the court would determine if there is a sufficient basis for the plaintiff to file the claim. If so, the court would be required to stay the asbestos action until the plaintiff files the claim and produces the related trust claims materials.

If the court finds that the cost of submitting the claim exceeds the amount the plaintiff could reasonably expect to recover, the court would be required to stay the asbestos action until the

plaintiff files a verified statement of his or her history of exposure to, or other connection with, the asbestos that is covered by the asbestos trust.

The court could not schedule the asbestos action for trial less than 60 days after the plaintiff complies with the above.

Adjustment of judgment

The bill would provide that if a plaintiff obtained a judgment in an asbestos action and went on to file a claim against an asbestos trust that was in existence at the time of that judgment, the defendant could file a motion to have the court reopen and adjust the judgment by the amount of the subsequent asbestos trust payments the plaintiff obtained. The defendant's motion could not be filed more than 1 year after the judgment was entered.

Trust governance documents, asbestos trust discovery

The bill would make trust claims materials and *trust governance documents* admissible in evidence in an asbestos action. The bill would exempt them from any claim of privilege and establish the presumption that they are relevant and authentic.

Trust governance documents would mean all documents that relate to eligibility and payment levels for an asbestos trust. They would include claims payment matrices, trust distribution procedures, and plans for reorganization.

Under the bill, the defendant in an asbestos action could seek discovery from an asbestos trust. The plaintiff would not be allowed to claim privilege or confidentiality, and would be required to provide consent, including giving the asbestos trust any authorization it may require to release the materials sought by the defendant.

Trust materials could be used to prove, without limitation, an alternative source for the cause of the plaintiff's alleged harm and could serve as a basis to allocate responsibility for that harm.

Applicability

Chapter 30A would apply to asbestos actions filed on or after the effective date of HB 5456 and to pending actions in which trial has not begun on or before that date. However, it would not apply to pending asbestos actions in which trial has been scheduled to occur before November 1, 2018. If the application of the chapter would unconstitutionally affect a vested right, the chapter would only be applied prospectively.

Proposed MCL 600.3010 et seq.

BACKGROUND:

Asbestos itself is a naturally occurring fiber that was widely used in industrial products in the U.S. throughout much of the 20th century. While its beneficial properties of sound absorption and resistance to heat, fire, and electricity made it desirable as insulation and in other applications, concerns over its link to mesothelioma and lung cancer surfaced as early as the 1920s. In 1973, the U.S. Court of Appeals for the Fifth Circuit upheld the first successful

asbestos suit,¹ and litigation exploded. According to a 2005 Rand report, approximately 730,000 people had filed an asbestos claim through 2002.²

In a 2014 U.S. bankruptcy court matter, colloquially called the *Garlock* case,³ the court found that the Garlock company's previous settlements had been "infected with the impropriety of some law firms and inflated by the cost of defense." Generally, the court found a "pattern of misrepresentation" in which a plaintiff would file a tort case against Garlock (or other viable defendants), either alleging that exposure to its products was the plaintiff's only exposure to asbestos or disclosing a small number of other potential exposures. Then, once Garlock had settled, the plaintiff would file approximately 10-20 trust claims, alleging exposure that he or she had previously denied had occurred.

These practices came to light once the court allowed Garlock full discovery of 15 of its settled cases (the trust claims in those cases were previously sealed based on the argument that they would reveal confidential commercial information) and Garlock found that exposure evidence had been withheld in all 15.

Model legislation from the American Legislative Exchange Council (ALEC), which is also called the Asbestos Claims Transparency Act, includes many of the changes in the bill.⁴ Since 2011, at least twelve states have enacted similar laws.

- Arizona, Rev Stat §12-782 (2015)
- Iowa, Senate File 376 (2017)
- Mississippi, House Bill 1426 (2017)
- North Dakota, House Bill 1197 (2017)
- Ohio, House Bill 380 (2011)
- Oklahoma, Senate Bill 1792 (2012)
- South Dakota, Senate Bill 138 (2017)
- Tennessee, Senate Bill 2062 (2016)
- Texas, House Bill 1492 (2015)
- Utah, House Bill 403 (2016)
- West Virginia, Code §55-7F (2016)
- Wisconsin, Act 124 (2013)

A similar effort is also progressing at the federal level. In March of 2017, the U.S. House of Representatives passed H.R. 985, which folded the Furthering Asbestos Claim Transparency Act (FACT) into the proposed Fairness in Class Actions Act of 2017. As of June 21, 2018, the bill awaits a hearing in the Senate Judiciary Committee.⁵

ARGUMENTS:

For:

Proponents argue that the bill is intended to foster transparency between the two systems handling asbestos claims. They say that many of the solvent companies against whom claims are being filed are peripheral defendants—that the plaintiff's main exposure was because of a company for which there is an asbestos bankruptcy trust, and any exposure to the defendant's products may have only been for a day. They argue that much of the asbestos litigation today is an endless search for a

¹ *Borel v Fibreboard*, 493 F2d 1076 (5th Cir 1973)

² https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf

³ *In re Garlock Sealing Technologies LLC, et al*, 504 B R 71 (2014) <https://www.scribd.com/doc/222432273/US-Bankruptcy-Court-Granting-NC-Ford-Motor-Garlock>

⁴ Model Asbestos Claims Transparency Act, <https://www.alec.org/model-policy/asbestos-claims-transparency-act/>

⁵ H.R. 985-Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, <https://www.congress.gov/bill/115th-congress/house-bill/985>

solvent bystander. Accordingly, they state that the main goal of the legislation is to require plaintiffs to file trust claims before proceeding to trial.

Against:

The bill's critics argue that the bill's true intent—and its main drawback—is delay. They say that the bill is intended to slow the court process for people with only months to live. The latency period for asbestos—or the period between exposure and the discovery of the illness—may be 40 years or more, and the average life expectancy upon diagnosis of mesothelioma is 12 to 21 months.

They argue that under the bill, a defendant could wait out the year-long run-up to the trial, then, 60 days before the trial is to begin, file a motion requesting a stay. In the stay, the defendant must identify any asbestos trust claims not previously identified that the defendant believes the plaintiff can file. The plaintiff then has ten days to respond, and if the court finds that there is a sufficient basis for the plaintiff to file the trust claim, it may stay the case until the plaintiff does so. This timing issue is especially critical given the health status of the plaintiffs in these cases, opponents argue.

Against:

Opponents also argue that the bill is unnecessary because the system of handling asbestos claims in Michigan is working. According to committee testimony, the majority of claims are filed in Wayne County, and Case Management Order (CMO) #16 for Wayne County Circuit Court,⁶ entered in 2009, already requires disclosure of exposure. They argue that the state should simply adopt a requirement similar to that in CMO #16.

Specifically, CMO #16 reads:

At the time of filing the Brochure, it shall be the duty of the plaintiff's attorney, or the plaintiff if not represented by counsel, in all malignancy cases to serve a copy of all submitted bankruptcy claim forms to all defendants, this is a continuing obligation until the conclusion of a trial or settlement. In all other cases, bankruptcy claims forms shall be submitted 48 hours before trial.

Response:

There may be a concern that, while disclosure is required of all bankruptcy claim forms submitted before or during the tort case, this would not prevent a defendant from waiting to file those forms until after the case concludes, thereby negating the requirement's effect.

Legislative Analyst: Jenny McInerney
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

⁶ <https://www.3rdcc.org/Documents/Civil/Asbestos/MasterOrders/Case%20Management%20Order%20-%20Ord%20No.%2016%5E%5E%5E.pdf>