

ASBESTOS BANKRUPTCY TRUST CLAIMS

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House Bill 5456 as reported from committee

Sponsor: Rep. Jason Wentworth

Committee: Michigan Competitiveness

Complete to 2-7-18

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

BRIEF SUMMARY:

House Bill 5456 would amend 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 would be 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 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 within 30 days after the action is filed (or 30 days after HB 5456 takes effect, whichever is later):

- Provide a statement signed by the plaintiff and his or her lawyer, under penalty of perjury, attesting that all potential claims against an asbestos trust have been investigated and that all the claims that could be made by the plaintiff have been

completed and filed. (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 stay request

Under the bill, if the defendant in an asbestos action identified an asbestos trust claim not previously identified that the defendant thinks the plaintiff could file, the defendant could request a stay of the proceeding. 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.

If the court finds that there is a sufficient basis for the plaintiff to file the claim, 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.

Any trust materials that are sufficient to entitle a claim to consideration for payment under the trust governance documents would also be sufficient to support a jury finding that the plaintiff was exposed to products for which the trust was established to provide compensation and that this exposure is a substantial contributing factor in causing the plaintiff's injury.

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, 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:

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.¹

¹ Model Asbestos Claims Transparency Act, <https://www.alec.org/model-policy/asbestos-claims-transparency-act/>

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. The bill awaits a hearing in the Senate Judiciary Committee.²

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 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.

² 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>

POSITIONS:

Representatives of the following organizations testified in support of the bill:

- U.S. Chamber Institute for Legal Reform (1-31-18)
- Morbark, LLC (1-31-18)
- Michigan Chamber of Commerce (1-31-18)
- National Federation of Independent Business (1-31-18)

The following organizations support the bill:

- Insurance Alliance of Michigan (1-31-18)
- Norfolk Southern Railway (1-31-18)
- Michigan Railroads Association (1-31-18)
- Michigan Manufacturers Association (1-31-18)
- Ford Motor Company (1-31-18)
- Grand Rapids Chamber of Commerce (1-31-18)
- Home Builders Association of Michigan (2-7-18)

The Michigan Veterans Affairs Agency indicated neutrality on the bill. (1-31-18)

Representatives of the following organizations testified in opposition to the bill:

- Michigan Association for Justice (1-31-18)
- American Legion Department of Michigan (2-7-18, and indicated opposition 1-31-18)

The Michigan Professional Fire Fighters Union opposes the bill. (2-7-18)

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■ 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.