

2013 DRAFTING REQUEST

Bill

Received: **9/4/2012** Received By: **phurley**
 Wanted: **As time permits** Same as LRB:
 For: **Andre Jacque (608) 266-9870** By/Representing:
 May Contact: Drafter: **phurley**
 Subject: **Courts - civil procedure** Addl. Drafters:
Courts - miscellaneous/other Extra Copies:

Submit via email: **YES**
 Requester's email: **Rep.Jacque@legis.wisconsin.gov**
 Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Civil liability trusts

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	phurley 9/6/2012			_____			
/P1	phurley 11/26/2012	scalvin 11/27/2012	jfrantze 9/13/2012	_____	lparisi 9/13/2012		
/P2	phurley 12/18/2012	scalvin 11/29/2012	rschluet 11/29/2012	_____	srose 11/29/2012		State S&L
/P3	phurley	scalvin	jmurphy	_____	srose		State

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	1/7/2013	12/22/2012	1/2/2013	_____	1/2/2013		S&L
/1		scalvin 1/7/2013	rschluet 1/8/2013	_____	mbarman 1/8/2013	srose 2/5/2013	State S&L

FE Sent For:

**at
Intro**

<END>

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01/07/13

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Received: 9/4/2012 Received By: phurley
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For: Andre Jacque (608) 266-9870 By/Representing:
May Contact: Drafter: phurley
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Proofed

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1/2/2013

Jacketed

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Jan 1/2/13

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1/2	phurley	1/Pl sae 9/13/12	J 9/13	Ken 9/13	9/13		

FE Sent For:

<END>

Hurley, Peggy

From: Murphy, Michael
Sent: Thursday, October 25, 2012 4:04 PM
To: Hurley, Peggy
Subject: LRB-0002 Re-Draft (corrections)

Hello Peggy,

Thank you for your assistance. We have provided answers to the questions you have raised below:

I will remove the "but not limited to" language throughout the bill. On the second point, however, our drafting conventions don't allow keeping a reference to chapter 804. This is because chapter 804 is the general law of the land. It applies to lawsuits in the absence of something saying that it does NOT apply. By including in a specific statute that the general law of the land applies to that statute, it creates the implication that chapter 804 does *not* apply to statutes that do not include that language.

all non 804 case

RESPONSE: We were able to find a place in statute where this language exists – in fact, the drafting pulls directly from statute, as in Wis. Stat. § 48.293(4). We would like to include this statutory reference to ch. 804 as provided. If the phrasing pre-exists in statute, I am not sure how this can contradict LRB's drafting conventions.

The same analysis applies to section (7), regarding set-offs and credits. I explained why I did not include that language in my preliminary draft, but the document you sent back to me simply restates the language without explaining why the usual drafting standard should not apply.

RESPONSE: As above, we have found other parts of the statutes where "setoffs" are permitted as in <https://docs.legis.wisconsin.gov/statutes/statutes/645/III/56/1>. The legislature may include these in the statutes and we therefore would like to preserve the "setoff" section in the legislation. It will not adversely affect other laws and ensures that offsets are allowed in this particular section.

On the third point, I don't think I can call this an "order." An order would require the judge to actually require (or to prohibit) some action, and the submitted language does not contain any order. I apologize if I am missing something, but if your client could explain how a listing of pending personal injury trust claims is an order, that would be helpful to me.

RESPONSE: Please use the language below. This definition does constitute an order because it is ordering the plaintiff to provide the court with requested information. (See definition below):

-already reported (2)

"Trust claims order" means an order of the court, entered no later than 30 days prior to trial, ordering the plaintiff to provide the court with a list of all the personal injury trusts with which the plaintiff has filed or anticipates filing a claim, identified as part of the plaintiff's required disclosures or in response to an order to show cause. Such order shall be deemed to be a final order and may only be amended upon a showing of mistake, inadvertence, surprise, excusable neglect or fraud.

Finally, the document you sent back contains some drafting changes that are small, but important to get right. An example is on page 2, in paragraph (2) (b). The language there requires the plaintiff to provide "...trust claims materials" and you inserted "and documents or information".... Yet the definition of "trust claims materials" includes documents and information, so this language does not need to be repeated. The document you submitted also adds to this paragraph language to the effect of: "Such relevant documents and other information includes, but is not limited to, work histories, affidavits, etc. etc." This language, in my opinion, belongs in the definition of trust claims materials. Arguably, all of these things are already included in the rather broad definition of trust claims materials, but even if they

are not, it doesn't make sense to have a broad definition of trust claims materials and then to also have a list, in another statutory section, of specific things that a plaintiff must include.

RESPONSE: Changing the language as you suggest is fine.

I am pretty sure this will meet all the requirements. Thanks again, Peggy!

MICHAEL P. MURPHY

OFFICE OF STATE REPRESENTATIVE

André Jacque

2ND ASSEMBLY DISTRICT
P.O. Box 8953 • Madison, WI 53708-8952
(608) 266-9870 • Fax: (608) 282-3602
Toll-Free: (888) 534-0002
Rep.Jacque@legis.wi.gov

From: Hurley, Peggy
Sent: Wednesday, October 24, 2012 1:32 PM
To: Murphy, Michael
Subject: RE: LRB-0002 Re-Draft

Thanks, Michael.

I will remove the "but not limited to" language throughout the bill. On the second point, however, our drafting conventions don't allow keeping a reference to chapter 804. This is because chapter 804 is the general law of the land. It applies to lawsuits in the absence of something saying that it does NOT apply. By including in a specific statute that the general law of the land applies to that statute, it creates the implication that chapter 804 does *not* apply to statutes that do not include that language. The same analysis applies to section (7), regarding set-offs and credits. I explained why I did not include that language in my preliminary draft, but the document you sent back to me simply restates the language without explaining why the usual drafting standard should not apply.

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Finally, the document you sent back contains some drafting changes that are small, but important to get right. An example is on page 2, in paragraph (2) (b). The language there requires the plaintiff to provide "...trust claims materials" and you inserted "and documents or information".... Yet the definition of "trust claims materials" includes documents and information, so this language does not need to be repeated. The document you submitted also adds to this paragraph language to the effect of: "Such relevant documents and other information includes, but is not limited to, work histories, affidavits, etc. etc." This language, in my opinion, belongs in the definition of trust claims materials. Arguably, all of these things are already included in the rather broad definition of trust claims materials, but even if they are not, it doesn't make sense to have a broad definition of trust claims materials and then to also have a list, in another statutory section, of specific things that a plaintiff must include.

I am trying to get the cleanest and most effective draft to you. Wisconsin statutes may be drafted in a way that other states' statutes are not, and our office has drafting standards that must be followed. I will redraft your bill to reflect

some of the changes submitted to me, but there will be some times when I deviate from the submitted language. In each of those cases, I will try to explain why I am deviating from the submitted language so that you and your client can discuss the draft as written. If I misinterpreted something, or if there is a compelling reason to deviate from drafting standards, please let me know. As always, I am available to meet in your office or mine to go over the draft in detail.

Peggy

From: Murphy, Michael
Sent: Wednesday, October 24, 2012 10:34 AM
To: Hurley, Peggy
Subject: RE: LRB-0002 Re-Draft

Hello Peggy,

You will find the requested clarifications below. Please update the bill draft accordingly.

Thanks!

1. You may remove the “but not limited” language so that it reads:

“Personal injury trust” means a trust compensation fund, or claims facility created as a result of an administrative legal action, bankruptcy, agreement, or other settlement, including all trusts or compensation funds created pursuant to 11 USC 524 (g)...”

2. Please keep the reference to ch. 804 in section (3)(b).

3. Definition of trust claims order:

“Trust claims order” means an order of the court, entered no later than 30 days prior to trial, listing all the personal injury trusts with which the plaintiff has filed or anticipates filing a claim, identified as part of the plaintiff’s required disclosures or in response to an order to show cause. Such order shall be deemed to be a final order and may only be amended upon a showing of mistake, inadvertence, surprise, excusable neglect or fraud.

MICHAEL P. MURPHY

OFFICE OF STATE REPRESENTATIVE

André Jacque

2ND ASSEMBLY DISTRICT
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Toll-Free: (888) 534-0002
Rep.Jacque@legis.wi.gov

From: Hurley, Peggy
Sent: Tuesday, October 16, 2012 8:46 AM
To: Murphy, Michael
Subject: RE: LRB-0002 Re-Draft

Hi Michael,

I will take a look and let you know if I have any questions.

Peggy

From: Murphy, Michael
Sent: Monday, October 15, 2012 3:26 PM
To: Hurley, Peggy
Subject: LRB-0002 Re-Draft

Hello Peggy,

Thank you for your help on LRB-0002. We would be grateful if you would provide an updated version of the draft with the changes described in the attachment below included.

Have a great week!

MICHAEL P. MURPHY

OFFICE OF STATE REPRESENTATIVE

André Jacque

2ND ASSEMBLY DISTRICT
P.O. Box 8953 • Madison, WI 53708-8952
(608) 266-9870 • Fax: (608) 282-3602
Toll-Free: (888) 534-0002
Rep.Jacque@legis.wi.gov

<< File: Edits to LRB 0002P1.doc >>

Hurley, Peggy

From: Murphy, Michael
Sent: Monday, October 15, 2012 3:26 PM
To: Hurley, Peggy
Subject: LRB-0002 Re-Draft

Hello Peggy,

Thank you for your help on LRB-0002. We would be grateful if you would provide an updated version of the draft with the changes described in the attachment below included.

Have a great week!

MICHAEL P. MURPHY

OFFICE OF STATE REPRESENTATIVE

André Jacque

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Section II – Required Trust Disclosures

- (1) **Required Disclosures.** Within 30 days of commencing a tort action not otherwise barred or deferred under Wisconsin law, and no less than 180 days prior to trial of that action, a claimant shall provide to all parties a statement of any and all existing or anticipated claims against Personal Injury Trusts. Such statement shall be in addition to any existing preliminary disclosure requirements otherwise imposed by law or applicable agreement, ruling, or judicial order. Such statement shall include under penalty of perjury an attestation by the claimant that the statement is based on a good faith investigation of all potential claims against Personal Injury Trusts. The statement shall also disclose when the claim was or will be made and whether there has been any request for deferral, delay, suspension or tolling of the Personal Injury Trust claims process. In the event information obtained subsequent to the submission of the statement supports the filing of additional claims against Personal Injury Trusts, the claimant shall update the statement by amendment filed and served within 30 days of the receipt of the additional information. A claimant shall also produce to all parties within the time period specified in this subsection in such tort action the following additional materials:
- (a) As to any claims already asserted against the Personal Injury Trusts, the claimant must produce final executed proofs of claim together with any supporting materials used to support such claim against the Personal Injury Trusts. A claimant must also produce all documents or information relevant or related to such claims asserted against the Personal Injury Trusts, including, but not limited to work histories, affidavits, depositions and trial testimony of the claimant and others as well as all medical documentation (including but not limited to X-rays, test results, doctors' reports and pathology results).
 - (b) As to any claims that a claimant has not yet asserted against the Personal Injury Trusts but has disclosed pursuant to the requirements of subparagraph (1) regarding potential claims, all materials described in subparagraph (1) shall be produced, including, at the time of its filing, the final executed proof of claim.
 - (c) Claimant's tort action shall be stayed in its entirety until such time as the claimant certifies that all anticipated claims against Personal Injury Trusts have been filed and that claimant has satisfied the requirements of (1)(b), above.
- (2) **Defendant's Order to Show Cause regarding Additional Trust Claims; Court Certification and Trust Claims Order.** (a) Any defendant may proceed by Order to Show Cause (OSC) in the court hearing such tort action setting forth the names of additional Personal Injury Trusts against which the plaintiff has not made, but which the defendant in good faith believes the claimant can make a successful claim. The OSC shall set forth the factual basis for the claim describing the evidence sufficient to meet the Personal Injury Trust distribution procedure requirements to file valid claims against such Personal Injury Trust and the amount of money the trust should pay for the claim. In response, within 10 days thereafter, the claimant shall:

- i. File the claim with the Personal Injury Trust as set forth by the defendant's notice which will be dispositive as to the OSC as to that Trust; or
- ii. Show cause before the court hearing of such tort action for a determination that
 - 1. The proof of claim should be modified and then submitted, or
 - 2. That there is insufficient evidence to permit the claim to be filed in good faith under the applicable Personal Injury Trust distribution procedures. The court hearing the tort action shall decide the issue on the basis of declarations, deposition excerpts, interrogatory responses, and such other evidence as the court deems appropriate. The claimant shall have the burden of proving that the claim should be modified and then submitted or should not be filed because it does not meet the Personal Injury Trust distribution procedure requirements. If the court hearing the tort action determines that there is good faith basis for filing the claim, the claimant shall promptly file the claim with the Personal Injury Trust as it was submitted by the defendant or as modified by the court hearing the tort action. The claimant's tort action shall be stayed until such time as the claimant certifies that claimant has complied with the Court's order and has disclosed the materials required to be disclosed by Section II(1).

the cert of material that don't meet

(b) Not later than 60 days before the scheduled trial date of a tort action, the court hearing such tort action must certify in writing that the discovery described in paragraph (1) and subparagraphs (1)(a) and (1)(b) is complete. Furthermore, no trial date may be assigned nor trial commenced absent certification of the completion of discovery and a determination that all additional Personal Injury Trust Claims required to be made in response to an OSC have been submitted to the relevant Personal Injury Trust(s). A schedule of all Personal Injury Trust Claims made shall be reflected in a "Trust Claims Order" which must be entered no later than 30 days prior to trial. The Trust Claims Order shall be deemed to be a final order and may be amended only upon a showing of mistake, inadvertence, surprise, excusable neglect or fraud.

why? order what? 2/20/2018

(3) Treatment of Trust Claims and Claims Material. Trust Claims and Claims Material (as well as related discovery materials) are presumptively relevant to and discoverable in a tort action and shall be presumed by the court to be authentic. Notwithstanding any other provision of law or agreement, no claims of privilege shall apply to Trust Claims and Claims Materials, and such Trust Claims and Claims Materials may be used by the parties in the tort action to prove, without limitation, alternative causation for the claimant's alleged injury as well as serve as a basis to allocate responsibility for the claimant's claim.

Confined in draft

(4) Discovery of Other Materials. In addition to the mandatory disclosure requirements of this chapter, additional disclosure and discovery of information relevant to the tort action may be sought by any mechanism provided by Wisconsin Rules of Civil Procedure. Defendants in a tort action may also seek discovery from the Personal Injury Trusts. The

claimant shall assist in any discovery from the Personal Injury Trusts and provide whatever consent or expression of permission may be required by the Personal Injury Trusts for release of such information and materials. Claims of privilege and or confidentiality by claimants will not preclude discovery by defendants under this chapter.

(5) **Personal Injury Trust Claim Values.** In the event a matter proceeds to trial before the claimant has received a decision from a Personal Injury Trust or Trusts, as to each such claim, there shall be a rebuttable presumption that the claimant will receive the compensation specified for his or her claimed disease or injury in the relevant Trust Governance Documents. The court shall take judicial notice of these documents and the payment amounts specified therein. For each such pending claim, the court shall establish an attributed value that will be used for purposes of calculation of verdict or settlement set-offs or credits.

(6) **Sanctions for Non-Compliance.** Failure by the claimant to comply with the discovery requirements contained in this chapter shall be a basis for sanctions against the claimant, including, at the discretion of the court, upon a finding that the claimant willfully failed to comply with the requirements of this chapter, dismissal of the tort action with prejudice.

(7) **Set-Offs.** The defendants will be entitled to set-offs or credits of the full value of the Trust Claims against any judgment rendered against them in the tort action. In the event that a co-defendant settles or otherwise resolves the tort claims against it prior to verdict, if a release or releases are obtained for the benefit of the Personal Injury Trusts, the defendants remaining in the tort action may pursue those claims by assignment according to whatever rights were held by claimants. To the extent that any applicable law provides broader relief to the defendants than is set forth herein, nothing in this provision shall prohibit any defendant from pursuing such broader relief.

804.12
(1)(a)

already
law

but they
got set off.

(2) (5) (5)
(4) (5)

Hurley, Peggy

From: Murphy, Michael
Sent: Thursday, July 05, 2012 11:25 AM
To: Hurley, Peggy
Subject: FW: Draft Request - Rep. Jacque

Attachments: 20120705113009042.pdf

Hello Peggy,

Here is an article that sheds some more light into the intention of the bill. It sounds like the proposed change does concern the issue of discovery. However, Andy will be giving you a call later today to clarify.

Best Regards,

MICHAEL P. MURPHY

OFFICE OF STATE REPRESENTATIVE

André Jacque

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Rep.Jacque@legis.wi.gov



2012070511300904
2.pdf (224 KB)...

From: Murphy, Michael
Sent: Thursday, July 05, 2012 10:35 AM
To: LRB.Legal
Subject: Draft Request - Rep. Jacque

Hello LRB Team,

Please draft for our office a version of this Ohio bill according to our statute.

Thanks!

MICHAEL P. MURPHY

OFFICE OF STATE REPRESENTATIVE

André Jacque

2ND ASSEMBLY DISTRICT
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+ Global Warming
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+ Labor Issues
+ Lead Paint
+ Sub-Prime Mortgages

Asbestos

MONDAY, MARCH 19, 2012 10:33:00 AM

Ohio Senate mulling change to asbestos claims

BY MICHAEL P. TREMOGLIE

COLUMBUS, Ohio (Legal Newsline) - The Ohio Senate heard testimony Wednesday about a bill passed by their colleagues in the House which concerns full disclosure by plaintiffs in asbestos litigation.

The bill imposes certain requirements for the plaintiffs in relation to filing claims with asbestos trusts. The proposed legislation now being considered requires that defendants must be informed of all claims submitted to asbestos trusts before and during the trial.

Defense counsel may also request plaintiffs file a claim with any asbestos trust, from which the defense counsel believes the plaintiffs are eligible to receive damages.

The language of the bill states, "a claimant shall 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 and all trust claims material pertaining to each identified asbestos trust claim. The sworn statement shall 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."



Behrens

Furthermore it provides that, "If the claimant, subsequent to the submission of the sworn statement under division (A)(1)(a) of this section, files with or submits to any asbestos trust additional asbestos trust claims not previously disclosed, the claimant shall provide to all of the parties in the asbestos tort action an amendment updating the sworn statement and identifying the additional asbestos trust claims."

HB 380 also mandates, "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 shall set forth credible evidence that demonstrates all of the following: (1) The identities of all asbestos trusts not previously disclosed by the claimant pursuant to section 2307.952 of the Revised Code 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."

Douglas Simek of the Cleveland law firm of Sutter O'Connell thinks the law is "a great idea." He said that this is already being done in the county where he litigates cases.

"Cuyahoga County (Ohio) courts have already ruled that this information is discoverable and admissible at trial," he said.

But trial lawyers do not think it is such a great idea. John Van Doorn is the Executive Director of the Ohio Association for Justice, the advocacy group for Ohio trial lawyers.

"HB 380 represents an effort by defendants and insurers to reduce payments to asbestos victims under the guise of increasing the transparency of the asbestos bankruptcy process," he said. "Their efforts are the latest in their campaign to deprive victims of adequate compensation for their astronomical medical costs."

Mark Behrens is a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P., in Washington, D.C. He testified on March 13 before the Ohio Senate about the bill.

"Because the trusts operate opaquely and make little effort to compare their claims amongst each other or to claims made in the tort system, the trust system is fertile ground for inequity," he told the Senate committee.

He provided an example of one company that reported a random sampling of discovery responses by plaintiffs who sued them that indicated massive inconsistencies. He said of 255 plaintiffs who also filed



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claims against an asbestos trust only 19 had disclosed their exposure.

Behrens noted that each trust operates independently and that plaintiffs' attorneys are members of the Trust Advisory Committees. These committees are very influential in trustee selection. They also essentially manage the audit and quality control for the trusts.

"While involved in trust governance," he informed the committee, "plaintiffs' attorneys are also actively engaged in soliciting trusts claims through television and internet advertising, filing trust claims, and receiving contingent fees from trusts' payments."

Alluding to what Simek said, Behrens testified that plaintiffs and the trusts have not cooperated in making this information available, despite the acknowledgement by the courts of the propriety of the discovery.

Behrens also said that this current system can be easily manipulated.

He observed that "the trusts' standards are less than demanding." He also remarked that the lack of transparency by the trusts provides an inducement to be contrary.

"Abuse of the trust process has the potential to impact both defendants and bankruptcy trusts, as starkly demonstrated in the Ohio case of *Kananian v. Lorillard Tobacco Co.*," Behrens told the senators.

"As I'm sure you're aware, in that case, Judge Harry Hanna barred a prominent California asbestos personal injury law firm from practicing before his court after he found that the firm and one of its partners failed to abide by the rules of the court proscribing dishonesty, fraud, deceit, and misrepresentation.

"Judge Hanna's ruling received national attention for exposing 'one of the darker corners of tort abuse' in asbestos litigation: inconsistencies between allegations made in open court and those submitted to trusts set up by bankrupt companies to pay asbestos-related claims."

He added that this case was not an isolated one. He mentioned another in which defendants wanted discovery of trust claims.

Despite prior rulings making trust claims material available, it was necessary to file motions to compel the plaintiff's counsel to produce the information.

According to Behrens, during a hearing on the matter, the plaintiff's counsel said he had been slow in producing the material because he disagreed with the court. But Behrens alleged another motivation.

"The reason for the counsel's reluctance to produce the trust materials became clear when the documents were produced shortly before trial," Behrens said.

"There were substantial and inexplicable discrepancies between the positions taken in court and before the trusts. Despite specific and explicit discovery requests, the plaintiff had failed to disclose nine trust claims. In addition, the exposure period alleged in the litigation was significantly and materially different from the exposure period alleged in the trust claims."

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As Passed by the House

129th General Assembly

Regular Session

2011-2012

Am. H. B. No. 380

Representative Blessing

**Cosponsors: Representatives Slaby, Hackett, McGregor, Adams, J.,
Amstutz, Buchy, Wachtmann Speaker Batchelder**

A BILL

To enact sections 2307.951, 2307.952, 2307.953, and 2307.954 of the Revised Code to require claimants in asbestos tort actions to make certain disclosures pertaining to asbestos trust claims that have been submitted to asbestos trust entities for the purpose of compensating the claimant for asbestos exposure.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 2307.951, 2307.952, 2307.953, and 2307.954 of the Revised Code be enacted to read as follows:

Sec. 2307.951. As used in this section and sections 2307.952 to 2307.954 of the Revised Code:

(A) "Asbestos," "asbestos claim," and "tort action" have the same meanings as in section 2307.91 of the Revised Code.

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

(C) Except as otherwise provided in division (E) of section 2307.954 of the Revised Code, "asbestos trust" means and

encompasses all trust entities, claims agents, or claims 18
processing facilities that are created pursuant to the 19
jurisdiction of a United States bankruptcy court and section 20
524(g) of Chapter 11 of the United States Bankruptcy Code, 11 21
U.S.C. 524(g), or other applicable provision of law, that are 22
formed for the purpose of compensating claimants asserting 23
eligible asbestos claims, and that are in existence on the date 24
initially set for trial in the asbestos tort action. 25

(D) "Asbestos trust claim" means any claim for compensation 26
by an exposed person or the exposed person's representative 27
against any asbestos trust. 28

(E) "Cancer" means a malignant condition. 29

(F) "Claimant" means any person asserting an asbestos claim 30
or asbestos trust claim. "Claimant" includes a plaintiff, 31
counterclaimant, cross-claimant, or third-party plaintiff. 32

(G) "Exposed person" means any person whose exposure to 33
asbestos or to asbestos-containing products is the basis for an 34
asbestos claim. 35

(H) "Noncancer" means a nonmalignant condition. 36

(I) "Proof of claim" means any form of documentation that a 37
potential claimant against an asbestos trust submits or provides 38
to the asbestos trust that attests to or asserts the existence of 39
any liquidated or unliquidated asbestos claim that the claimant 40
may have against the asbestos trust or its predecessors under any 41
theory of law. 42

(J) "Trust claims material" means documents constituting an 43
asbestos trust claim, including, but not limited to, claim forms, 44
proofs of claim, and informational material required by an 45
asbestos trust to be submitted by a claimant in order to have the 46
claim evaluated by the asbestos trust and relied upon by the 47
asbestos trust in making its compensation determination. 48

Sec. 2307.952. (A) (1) (a) Within thirty days after filing the 49
complaint or other initial pleading in an asbestos tort action 50
that is not otherwise barred or deferred under applicable law or 51
within thirty days of the effective date of this section with 52
respect to asbestos tort actions that are pending on that 53
effective date, a claimant shall provide to all of the parties in 54
the action a sworn statement by the claimant, under penalty of 55
perjury, identifying all existing asbestos trust claims made by or 56
on behalf of the claimant and all trust claims material pertaining 57
to each identified asbestos trust claim. The sworn statement shall 58
disclose the date on which each asbestos trust claim against the 59
relevant asbestos trust was made and whether any request for a 60
deferral, delay, suspension, or tolling of the asbestos trust 61
claims process has been submitted. 62

(b) The submission of the sworn statement under division 63
(A) (1) (a) of this section shall be in addition to any disclosure 64
requirements otherwise imposed by law, civil rule, court order or 65
ruling, applicable agreement or stipulation, local rule, or case 66
management order. 67

(2) If the claimant, subsequent to the submission of the 68
sworn statement under division (A) (1) (a) of this section, files 69
with or submits to any asbestos trust additional asbestos trust 70
claims not previously disclosed, the claimant shall provide to all 71
of the parties in the asbestos tort action an amendment updating 72
the sworn statement and identifying the additional asbestos trust 73
claims. The claimant shall provide any amendment under division 74
(A) (2) of this section within thirty days of filing an additional 75
asbestos trust claim with, or submitting an additional asbestos 76
trust claim to, any asbestos trust. 77

(3) With respect to any asbestos trust claim that a claimant 78
discloses under division (A) (2) of this section in an amendment to 79

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the sworn statement, the claimant shall 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 shall provide the trust claims materials under division (A)(3) of this section within thirty days of filing or submitting each additional asbestos trust claim.

(B) Failure to provide to all of the parties in the asbestos tort action all trust claims material as required by this section in a timely manner shall constitute grounds for the court to decline to assign an initial trial date or extend the date set for trial in the action.

(C) Nothing in this section prevents a court of competent jurisdiction from requiring any disclosures in addition to the disclosures required under this section.

Sec. 2307.953. (A) 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 shall set forth credible evidence that demonstrates all of the following:

(1) The identities of all asbestos trusts not previously disclosed by the claimant pursuant to section 2307.952 of the Revised Code 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 division (A)(1) of this section;

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

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in division (A)(1) of this section.

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(B) Within fourteen days after the filing of the defendant's motion for an order to stay the proceedings under division (A) of this section, the claimant may do either of the following:

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(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 defendant may withdraw the motion brought under division (A) of this section.

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(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.

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(C) If the defendant has met its burden under division (A) of this section and if the claimant files a response pursuant to division (B)(2) of this section, the court shall determine if a successful 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 brought under division (A) of this section. The claimant has the burden of proof, by a preponderance of the evidence, to demonstrate that the information set forth by

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the defendant pursuant to divisions (A)(2) and (3) of this section 142
should be modified prior to the filing of an asbestos trust claim 143
with, or the submission of an asbestos trust claim to, each 144
asbestos trust identified in the defendant's motion or that the 145
asbestos trust claim should not be filed with or submitted to the 146
asbestos trust because a successful asbestos trust claim cannot be 147
made in good faith. 148

(D) If the court determines that there is a good faith basis 149
for filing an asbestos trust claim with, or submitting an asbestos 150
trust claim to, an asbestos trust identified in the defendant's 151
motion for an order to stay the proceedings brought under division 152
(A) of this section, the court shall stay the proceedings until 153
the claimant files the asbestos trust claims with or submits them 154
to the asbestos trusts identified in the defendant's motion for an 155
order to stay the proceedings and has otherwise met the 156
obligations set forth in this section and section 2307.952 of the 157
Revised Code. 158

Sec. 2307.954. (A) A noncancer asbestos trust claim and a 159
cancer asbestos trust claim are based on distinct injuries caused 160
by a person's exposure to asbestos. A noncancer asbestos trust 161
claim that is subject to disclosure under section 2307.952 or 162
2307.953 of the Revised Code or is identified in this section 163
means the noncancer asbestos claim that is the subject of the 164
asbestos tort action in which the defendant seeks discovery 165
pursuant to sections 2307.951 to 2307.954 of the Revised Code. If 166
a claimant previously filed a noncancer asbestos trust claim with, 167
or submitted a noncancer asbestos trust claim to, an asbestos 168
trust and subsequently filed an asbestos tort action based on a 169
cancer asbestos claim, a cancer asbestos trust claim that is 170
subject to disclosure under section 2307.952 or 2307.953 of the 171
Revised Code or is identified in this section means both the 172
earlier filed noncancer asbestos trust claim and the cancer 173

asbestos claim that is the subject of the subsequent asbestos tort 174
action. 175

(B) Asbestos trust claims and the information that is the 176
subject of disclosure under section 2307.952 or 2307.953 of the 177
Revised Code are presumed to be authentic, relevant to, and 178
discoverable in an asbestos tort action. Notwithstanding any 179
agreement or confidentiality provision, trust claims material are 180
presumed to not be privileged. The parties in the asbestos tort 181
action may introduce at trial any trust claims material to prove 182
alternative causation for the exposed person's claimed injury, 183
death, or loss to person, to prove a basis to allocate 184
responsibility for the claimant's claimed injury, death, or loss 185
to person, and to prove issues relevant to an adjudication of the 186
asbestos claim, unless the exclusion of the trust claims material 187
is otherwise required by the rules of evidence. An asbestos trust 188
claim rejected by an asbestos trust may be excluded as evidence if 189
the exclusion is required by the rules of evidence. 190

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(C) In addition to the disclosure requirements set forth in 191
sections 2307.952 and 2307.953 of the Revised Code, the parties to 192
the asbestos tort action may seek additional disclosure and 193
discovery of information relevant to the action by any mechanism 194
provided by any applicable section of the Revised Code, the Rules 195
of Civil Procedure, any local rule, or any case management order. 196
In addition to the disclosure described in this division, any 197
defendant in the asbestos tort action also may seek discovery of 198
the claimant's asbestos trust claims directly from the asbestos 199
trusts involved. 200

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(D) In an asbestos tort action, upon the filing by a 201
defendant or judgment debtor of an appropriate motion seeking 202
sanctions or other relief, the court may impose any sanction 203
provided by a law of this state, including, but not limited to, 204
vacating a judgment rendered in an asbestos tort action for a 205

claimant's failure to comply with the disclosure requirements of this section and sections 2307.952 and 2307.953 of the Revised Code.

(E)(1) If subsequent to obtaining a judgment in an asbestos tort action in this state 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, 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:

(a) Adjust the judgment by the amount of any subsequent asbestos trust payments obtained by the claimant;

(b) Order any other relief to the parties that the court considers just and proper.

(2) As used in division (E) of this section, "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.

Section 2. Sections 2307.951 to 2307.954 of the Revised Code, as enacted by this act, apply to asbestos tort actions filed on or after the effective date of this act and to pending asbestos tort actions in which trial has not commenced as of the effective date of this act.

As used in this section, "asbestos tort action" has the same meaning as in section 2307.951 of the Revised Code, as enacted by

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Section 3. (A) If any provision that constitutes the whole or 237
part of a section of the Revised Code enacted by this act or if 238
any application of any provision that constitutes the whole or 239
part of a section of the Revised Code enacted by this act is held 240
invalid, the invalidity does not affect other provisions of the 241
section or applications of other provisions of the section that 242
can be given effect without the invalid provision or application. 243
To this end, the provisions that constitute the whole or part of 244
the sections of the Revised Code enacted by this act and their 245
applications are independent and severable. 246

(B) If any provision that constitutes the whole or part of a 247
section of the Revised Code enacted by this act or if any 248
application of any provision that constitutes the whole or part of 249
a section of the Revised Code enacted by this act is held to be 250
preempted by federal law, the preemption does not affect other 251
provisions of the section or applications of other provisions of 252
the section that can be given effect without the preempted 253
provision or application. To this end, the provisions that 254
constitute the whole or part of the sections of the Revised Code 255
enacted by this act and their applications are independent and 256
severable. 257

Section 4. The General Assembly makes the following 258
statements of findings and intent: 259

(A) The United States Supreme Court has described asbestos 260
litigation in this country as a crisis. 261

(B) Asbestos litigation has forced an estimated eighty-five 262
employers into bankruptcy. The rate of asbestos-driven 263
bankruptcies has accelerated in recent years. Between 2000 and 264
2007, there were more asbestos-related bankruptcy filings than in 265
either of the prior two decades. 266

severability

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(C) Personal injury lawyers have responded to these 267
bankruptcies by expanding their search for solvent defendants. The 268
number of asbestos defendants now includes over eight thousand 269
five hundred companies, including many small- and medium-sized 270
companies, in industries that cover eighty-five per cent of the 271
United States economy. 272

(D) Asbestos claimants often seek compensation for alleged 273
asbestos-related conditions from civil defendants that remain 274
solvent in civil court tort actions and from trusts or claims 275
facilities formed in asbestos bankruptcy proceedings. 276

(E) There is limited coordination and transparency between 277
these two paths to recovery. Ohio courts have already experienced 278
the problem of instances of claimants failing to provide 279
information and materials regarding asbestos trust claims that 280
they have commenced. This lack of transparency creates a strong 281
potential for abuse of the judicial process, as plaintiffs may 282
allege facts intended to maximize recoveries from trusts created 283
through the bankruptcy system while also alleging different or 284
conflicting facts to maximize recoveries from tort system 285
defendants. 286

(F) It is in the interest of justice that there be 287
transparency for claims made in the bankruptcy system and for 288
claims made in civil asbestos litigation. Transparency will 289
address the potential for abuse, fraud, and duplicate and 290
inconsistent payments. 291

(G) Presentation of abusive, fraudulent, or inconsistent 292
claims undermines the integrity of Ohio's judicial system. 293

(H) The current lack of transparency in the tort system may 294
result in businesses in this state being unfairly penalized and 295
deprived of their rights. 296

(I) New asbestos trusts are being formed and are anticipated 297

to be funded with approximately thirty billion dollars in assets. 298
As a consequence, it is critical to the interests of justice and 299
to the economy of the state of Ohio that the distribution of these 300
assets be made in a manner that incorporates full and consistent 301
disclosure when recovery is sought through an asbestos tort action 302
in Ohio against solvent companies or through a trust claim against 303
a bankrupt entity. All relevant asbestos exposure information 304
should be made available in a timely manner so that solvent 305
companies do not unnecessarily absorb the liabilities of bankrupt 306
trust entities that are not subject to tort actions. Transparency 307
will help ensure that all responsible parties are allocated an 308
equitable share of any liability and will encourage injured 309
persons to promptly seek an appropriate recovery from all 310
appropriate sources. 311

(J) The General Assembly has established apportionment of 312
liability as a public policy. Pursuant to Ohio apportionment of 313
liability law, bankrupt entities are currently assigned a 314
proportion of liability by the trier of fact. As a consequence, 315
this act furthers this existing public policy of the State of Ohio 316
by ensuring that asbestos tort actions are resolved on the basis 317
of all available evidence and on the full merits. With the advent 318
of an increasing number of significant asbestos trusts, it is 319
apparent that asbestos trusts and the claimants asserting claims 320
against them will be primary sources of information and evidence 321
that will ensure that Ohio's public policy of apportionment of 322
liability and of civil trials based upon all available evidence 323
will be protected and promoted. 324

(K) It is the intent of the General Assembly that this act 325
apply to claims made against any currently operating asbestos 326
trusts and to any asbestos trusts created on and after the 327
effective date of this act. 328