

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0002/P1dn
PJH:sac:jf

September 13, 2012

Representative Jacque,

Please review this preliminary draft to ensure that it complies with your intent. Please take particular note where I deviated from or deleted language submitted by your office and let me know if you would like to discuss any of those changes. If the draft meets your approval, I will write the analysis and put the draft into introducible form. If you need any changes or would like to discuss any part of the draft, please let me know. I look forward to hearing from you.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov

AN ACT *to create* 802.025 of the statutes; **relating to:** torts and personal injury

trusts.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 802.025 of the statutes is created to read:

802.025 Pleading certain personal injury actions; stay of proceedings.

(1) DEFINITIONS. In this section: (a) “Personal injury claims” means any claim for damages, losses, indemnification, contribution, restitution, or other relief, including punitive damages, arising out of, based on, or in any way related to bodily injury or harm, to the extent such claims are recognized under Wisconsin law, including the following: loss of consortium; loss of support; personal injury or death; mental or emotional injury; risk or fear of disease or other injury; the costs of medical monitoring or surveillance; or any claim made by or on behalf of any person, or a representative, spouse, parent, minor, or other relative of the person. The term “personal injury claim” does not include a claim for compensatory benefits pursuant to workers’ compensation or veterans’ benefits.

(ab) “Personal injury trust” means a trust or compensation fund, or claims facility created as a result of an administrative or legal action, bankruptcy, agreement, or other settlement, including but not limited to all trusts or compensation funds created or pursuant to 11 USC 524 (g) or 49 USC 40101, that are is-intended to provide compensation to claimants alleging personal injury claims as a result of harm for which the entity creating that is subject of the trust, or compensation fund, or claims facility is alleged to be responsible.

(cb) “Trust claims materials” means all documents and information, including but not limited to claim forms and supplementary material, relevant or related to a pending or potential claim against a personal injury trust.

(de) "Trust governance document" means any documents which determine eligibility and payment levels for personal injury trusts, including claims payment that identifies criteria for determining who is eligible to receive compensation from a personal injury trust or that identifies payment levels or matrices, trust distribution procedures, or plans for reorganization, and related orders.

***NOTE: Please note that I incorporated only the definitions that are unique to this section. I didn't, for example, include the proffered definitions of "personal injury claim" or "tort action" because those terms are not unique to, or defined differently for use in, this section. If you believe that the terms I omitted are defined differently for use in this section, please let me know and we can work on wording for those definitions. [RESPONSE: While personal injury claim is used in other parts of the statutes, I would like "personal injury claim" to be explicitly defined for this section (see above). Since tort is widely used and generally accepted in Wisconsin's statutes and case law, that definition can be excluded for this section.]

change into a suit order to "dispose"

(2) REQUIRED DISCLOSURES BY PLAINTIFF. (a) A plaintiff who commences an action for a personal injury or other tort shall, within 30 days after he or she commences the action, provide to the court and to all parties a sworn statement ~~swearing or affirming one of the following:~~

1. ~~The plaintiff has no claim, and does not anticipate filing a claim, against a personal injury trust.~~
2. The plaintiff identifying all claims the plaintiff has or anticipates filing a claim against a personal injury trust.

(b) If a plaintiff has filed a claim against a personal injury trust, he or she shall provide to the court and to all parties a final executed proof of claim and all other trust claims materials and documents or information relevant to each claim the plaintiff has against a personal injury trust.

Such relevant documents and other information includes, but is not limited to, work histories, affidavits, depositions and trial testimony of the plaintiff and others as well as all medical documentation, which includes, but is not limited to, X-rays, test results, doctors' reports and

Put in Trust of claims materials

pathology results. The plaintiff shall also state whether there has been a request to defer, delay, suspend, or toll the claim against the personal injury trust. The statement shall be in addition to any existing preliminary disclosure requirements otherwise imposed by law or applicable agreement, ruling, or judicial order. The statement shall include under penalty of perjury an attestation by the plaintiff that the statement is based on a good faith investigation of all potential claims against personal injury trusts. In the event information obtained subsequent to the submission of the statement supports the filing of additional claims against personal injury trusts, the plaintiff shall update the statement by amendment filed and served within 30 days of the receipt of the additional information.

CA
shall
provide
supp
ment
30 days
(15)

(c) If the plaintiff anticipates a claim against a personal injury trust, the party shall provide to the court and to all parties all trust claims materials relevant to each claim the party anticipates against a personal injury trust and shall, at the time of its filing, produce the final executed proof of claim-

(3) DISCOVERY; USE OF MATERIALS. ~~(a) Trust claims materials and trust governance documents relating to a claim filed by the plaintiff are presumed relevant to the personal injury or other tort action. A plaintiff may not claim privilege or confidentiality as an objection to discovery, or presentation in court, of trust claims materials or trust governance documents.~~

~~(a)~~ (b) The court shall presume trust claims materials and trust governance documents to be relevant, discoverable, and authentic and shall allow any party to present the trust claims materials to prove, without limitation, alternative causation for a plaintiff's injuries or to allocate liability for the plaintiff's injury. 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 plaintiff's alleged injury as well as serve as a basis to allocate responsibility for the plaintiff's claim.

redundant
see
previous
sentence

(b) In addition to the mandatory disclosure requirements permitted under sub. (3), the discovery procedures permitted under ch. 804 shall apply in all proceedings under this section. Defendants in a tort action may also seek discovery from the personal injury trusts. The plaintiff shall assist in any discovery from the personal injury trust 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 plaintiffs will not preclude discovery by defendants under this section.

****NOTE: I changed the language in this section to comply with drafting standards.

I have some doubts as to whether the court can be compelled to accept the trust claims materials as "presumably authentic" without having some kind of threshold for establishing the authenticity of the documents. Please let me know your thoughts on this.

(4) SCHEDULING TRIAL; STAY OF ACTION. (a) The court may not schedule a trial in a personal injury action until at least 180 days after the plaintiff makes the disclosures required under sub. (2).

(b) If a party states under sub. (2) that he or she anticipates a claim against a personal injury trust, the court shall stay all proceedings until ~~either of the following occur:~~

- ~~1. The party files his or claim against the personal injury trust and provides to the court and to all parties a final executed proof of claim and all other trust claims materials relevant to each claim the party has against a personal injury trust. The party shall also state whether there has been a request to defer, delay, suspend, or toll the claim against the personal injury trust.~~
- ~~2. The party swears or affirms that he or she will not file the claim that he or she anticipated filing against the personal injury trust.~~

def's don't file an order to show cause. The can petition for one, the order is (d)

(5) DEFENDANTS' IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE

PERSONAL INJURY TRUSTS. (a) Any defendant may proceed by order to show cause in the court hearing the tort action setting forth the names of additional ~~identify a~~ personal injury trusts against which the defendant in good faith believes the plaintiff can file a successful claim. For each personal injury trust a defendant identifies, the ~~defendant~~ order to show cause 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. ~~believing that the plaintiff has a claim that would satisfy criteria set forth in the personal injury trust's trust governance documents and the amount of money the defendant believes the personal injury trust should pay for the claim.~~

(b) Within 10 days of receiving a motion under par. (a), the plaintiff shall, for each personal injury trust identified by the defendant, do one of the following:

1. File a claim with the personal injury trust.
2. File a written response with the court that demonstrates that there is insufficient

evidence to permit a claim to be filed in good faith under the applicable ~~sets forth reasons why the plaintiff may not file a claim with the personal injury trust~~ distribution procedure identified by the defendant.

(c) The court shall determine, for each personal injury trust identified under par. (a), whether there is a good faith basis for the plaintiff to file a claim with the personal injury trust. The plaintiff shall have the burden of proving that he or she does not meet criteria set forth in the personal injury trust's trust governance documents ~~or that his or her claim is otherwise barred.~~

It isn't that for the defendant to

(d) If the court determines that there is a good faith basis for the plaintiff to file a claim against a personal injury trust identified by a defendant, the court shall order the plaintiff to file a claim with the personal injury trust and shall stay the immediate action until the plaintiff swears or affirms that he or she has filed the claim against the personal injury trust and the plaintiff provides to the court and to all parties a final executed proof of claim and all other trust claims

materials- identified in sub. (1)(c). ~~relevant to each claim the plaintiff has against a personal injury trust.~~

(e) Not less than 60 days after the plaintiff provides the documentation required under par. (d), the court may schedule the plaintiff's action for trial. A schedule of all personal injury trust claims made shall be reflected in a trust claims order which shall be entered into 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.

list of findings
nothing is "ordered" already the order is complete

***NOTE: Please note that I have changed this portion of the submitted materials to reflect our drafting conventions and general court procedures. I have made a number of changes, in particular to the requirements that the trial court "certify" certain things or enter certain "orders." I don't think, for example, that it makes sense to require a court to certify that discovery is complete – the parties swear, when they comply with discovery, that their responses are complete and are required to update as necessary. If a party feels that discovery is not yet complete, the party may move to delay the proceedings until discovery is complete.

***NOTE: Similarly, I didn't require the court to enter a "Trust Claims Order" because I don't see that anything is being ordered by the court. A list of personal injury trust claims will have been provided by the plaintiff in compliance with the initial pleadings and/or the court order (if any) under par. (d).

(6) VALUATION OF PERSONAL INJURY TRUST CLAIMS; JUDICIAL NOTICE. If a plaintiff proceeds to trial under this section before one of more of his or her personal injury trust claims is resolved, there is a rebuttable presumption that the plaintiff is entitled to, and will receive, the compensation specified in the trust governance document applicable to his or her claim. The court shall take judicial notice that the trust governance document specifies

1 failure to adequately maintain the finished product or use of the finished product in
2 a manner that was not an intended use of the finished product.

3 **SECTION 3s.** 895.047 (3) (g) of the statutes is created to read:

4 895.047 (3) (g) A manufacturer, seller, distributor, or promoter of a product
5 component or product ingredient and a seller, distributor, or promoter of a raw
6 material supplied to a manufacturer of a finished product have no duty in claims
7 involving negligence, strict liability, or breach of warranty to warn the ultimate
8 purchaser or user of a finished product of any risks or characteristics of the finished
9 product.

10 **SECTION 3w.** 895.047 (3) (h) of the statutes is created to read:

11 895.047 (3) (h) A manufacturer, seller, distributor, or promoter of a product is
12 not liable to a claimant for damages if the product was sold or distributed to a
13 sophisticated user of the product who is either aware or should be aware of the risks
14 associated with the use of the product and how to safely use the product.

15 **SECTION 3y.** 895.047 (6) of the statutes, as created by 2011 Wisconsin Act 2, is
16 repealed.”.

17 **3.** Page 2, line 16: delete “This act” and substitute “INTEREST ON JUDGMENTS.
18 The treatment of sections 807.01 (4), 814.04 (4), and 815.05 (8) of the statutes”.

19 **4.** Page 2, line 17: after that line insert:

20 “(2c) CIVIL ACTIONS. The treatment of sections 895.045 (3) (a) and (f), 895.046
21 (1), (1g), (2), and (8), and 895.047 (3) (f), (g), and (h) and (6) of the statutes first applies
22 to actions or special proceedings pending or commenced on the effective date of this
23 subsection.”.

24 (END)

SECTION 2. Initial applicability.

(1) This act first applies to ~~actions filed on the effective date of this subsection on the day~~
~~it is enacted.~~ The act applies to all tort claims filed on or after the effective date. The act also
applies to any pending tort claims in which trial has not commenced as of the effective date.

SECTION 3. Severability. If any provision or clause of this section or its application to
any person or circumstance is held invalid, the invalidity does not affect other provisions or
applications of this section that can be given effect without the invalid provision or application,
and to this end the provisions of this section are severable.

(END)

*We don't do
separability -
already in
990.001(11)*

*deadlines?
retroactive?*

compensation amounts and shall establish an attributed value to the plaintiff's personal injury trust claim. ~~The defendant shall be entitled to a setoff in this amount from any damages he or she owes to the plaintiff to the same extent he or she would be entitled to the setoff if the plaintiff's trust claim has resolved.~~

(7) SET-OFFS; CREDITS. As it pertains to this section, the defendant 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 the verdict, defendants remaining in the tort action may pursue those claims by assignment according to whatever rights were held by plaintiffs. To the extent that any applicable law provides broader relief to the defendants than is set forth herein, nothing in this section shall prohibit any defendant from pursuing such broader relief.

which claims a [identical comparable] tort claim or

received by plaintiff from recovered

the defend

***NOTE: I did not include the separate section about setoff or credits, because I believe this simply restates the general law of setoffs in civil litigation. By putting a general rule into a specific statute, it implies that the general rule does not apply to specific statutes that do not contain the rule. I want to avoid this impression, but if you believe that the general rule of setoff or subrogation is meant to apply in a different way in this section, please let me know and we can work on the proper wording.

(87) FAILURE TO PROVIDE INFORMATION; SANCTIONS. A plaintiff who fails to provide all of the information required under subs. (2), (4) (b), or (5) (d) is subject to ss. 802.05, 804.12, 805.03, and 895.044. The court at its discretion may dismiss the tort action with prejudice upon a finding that the plaintiff willfully failed to comply with the requirements of this section.

- no that's what those sections do

5/10/03

Hurley, Peggy

From: Hurley, Peggy
Sent: Monday, November 19, 2012 4:29 PM
To: 'Andrew C. Cook '
Cc: Murphy, Michael
Subject: RE: Personal Injury Trust Claims

Thanks, Andy.

In this latest draft, I am requiring the court to identify each personal injury claim a plaintiff has made against a personal injury trust that is substantially similar to the immediate action (this will be in sub. (5) of the bill) and to establish an attributed value to every personal injury trust claim that is pending but not resolved at the time of trial (this is already in sub. (6) of the bill).

I think it makes sense to state that the defendant is entitled to a set-off against damages in the amount paid by a personal injury trust identified in sub. (5) plus any attributed value established in sub. (6). This will eliminate any ambiguity as to which trust payouts (or potential payouts) should qualify for set-off purposes.

I am afraid I am still not understanding the assignment language. I am not sure what a "release or releases are obtained for the benefit of the Personal Injury Trusts" would be (or who would obtain them), or what claims the defendants are entitled to pursue. Let's say a plaintiff is suing 3 current manufacturers of XYZ and has already obtained a payout (\$500k, just for example) from a personal injury trust established when a former manufacturer of XYZ went bankrupt. Let's say, further, that the plaintiff is seeking \$2 million in damages.

Under this scenario, the set-off language already guarantees that the most the 3 defendants will pay is \$1.5 million, because the plaintiff has already received \$500k from the trust. If one defendant offers to settle the plaintiff's case and be removed from the litigation for, say, \$600k, and the plaintiff agrees, then what? I am not sure what (or whose) claims the remaining 2 defendants are entitled to pursue. I am also not sure how a settling co-defendant would obtain releases on behalf of the trust. The trust is not a party to this lawsuit, because by the time the immediate action goes to trial, all potential claims against a trust have either been resolved or given an attributed value. Is this language intending to ensure that the first settling co-defendant doesn't use the entire \$500k offset to reduce its own liability (i.e., to reduce its \$600k settlement to a \$100k payout)? If that is the case, I think it would be simpler to state that the offset amounts shall be distributed evenly (or perhaps proportionately, according to the liability established by verdict) among the defendants in the immediate action.

With regard to the initial applicability provision, I can draft that the bill applies to actions pending or commenced on the effective date, but the practical difficulties we discussed earlier today remain. I've been trying to think of a way for a court to apply the bill retroactively but I keep getting caught up in the fact that the bill requires the court to order certain disclosures within 30 days after the case is filed and prohibits a court from scheduling a trial until at least 180 days have passed since the plaintiff made those disclosures.

If, say, a slip-and-fall case, is filed today and is set for trial in February, and this bill passes in January, a court could not comply with the new law. More than 30 days will have passed since the suit was filed, and even if the plaintiff has no relevant trust claims pending, the bill calls for a 180 day delay in setting the case for trial. The effect can be somewhat mitigated by limiting the 180 day delay in setting a tort action for trial only if the plaintiff identifies relevant personal injury trust claims, but the discovery/disclosure problem remains.

I look forward to hearing your thoughts on these matters. Thanks, again, for your continued assistance.

Peggy

From: Andrew C. Cook [mailto:cook@hamilton-consulting.com]
Sent: Monday, November 19, 2012 2:47 PM
To: Hurley, Peggy
Cc: Murphy, Michael
Subject: Personal Injury Trust Claims

Peggy,

Please see below:

Re: the setoff section: The first sentence says the defendants are entitled to set-off/credit for the full value of the trust claims. The second sentence is intended to say that when a co-defendant settles – if a release or releases are obtained for the benefit of the Trust – the defendants remaining in the tort action may pursue those claims against the Trust.

It's basically trying to make sure that the defendants who go to verdict – and presumably pay all or some of the Trusts portion of the liability (or the liability assigned to the company that has formed the trust), can – by assignment – pursue whatever rights the settling defendants had.

There is a sentence missing from the last draft that makes the clause seem nonsensical. This is what it used to say:

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.

Please let me know if you have any questions.

Thanks,

Andy

Andrew C. Cook
The Hamilton Consulting Group, LLC.
10 East Doty Street, Suite 500
Madison, WI 53703
cook@hamilton-consulting.com
Phone (608) 258-9506
Fax (608) 283-2589
www.hamilton-consulting.com

h/c to AC 11-26:

- proportionate use of set-offs
- ensure all trust payouts & assigned values are accounted for
- skip last sentence
- applies to pending if trial not commenced
- add date to 30 day disc. requirement
- 2 - add ^{if} trust id'd to other provisions.

2013 DRAFTING REQUEST

Bill

Received: 9/4/2012 Received By: phurley
Wanted: As time permits Companion to 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.wi.gov
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

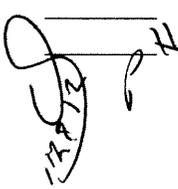
Topic:

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		scalvin 9/13/2012	9/13/2012	_____	lparisi 9/13/2012		
FE Sent For:		11/27/12	11/27/12				

<END>



P2

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Insert 1.5

gen act

1
2
3
4
5
6
7
8
9
10

AN ACT to create 802.025 of the statutes; **relating to:** torts and personal injury trusts.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 802.025 of the statutes is created to read:

802.025 Pleading certain personal injury actions; stay of proceedings.

(1) DEFINITIONS. In this section: (a) "Personal injury trust" means a trust or compensation fund created as a result of a bankruptcy, agreement, or other settlement or pursuant to 11 USC 524 (g) or 49 USC 40101, that is intended to provide compensation to claimants alleging personal injury as a result of harm for which the entity that is subject of the trust, or compensation fund is alleged to be responsible.

or claims facility

an administrative or legal action

creating

or claims facility

9

SECTION 1

Insert 2.2

1 (b) "Trust claims materials" means all documents and information relevant or
2 related to a pending or potential claim against a personal injury trust.

3 (c) "Trust governance document" means any document that identifies criteria
4 for determining who is eligible to receive compensation from a personal injury trust
5 or that identifies payment levels or matrices, trust distribution procedures, or plans
6 for reorganization.

for a personal injury trust

****NOTE: Please note that I incorporated only the definitions that are unique to this section. I didn't, for example, include the proffered definitions of "personal injury claim" or "tort action" because those terms are not unique to, or defined differently for use in, this section. If you believe that the terms I omitted are defined differently for use in this section, please let me know and we can work on wording for those definitions.

7 (2) REQUIRED DISCLOSURES BY PLAINTIFF. (a) A plaintiff who commences an
8 action for a personal injury or other tort shall, within 30 days after he or she
9 commences the action, provide to the court and to all parties a statement swearing
10 or affirming one of the following:

11 1. The plaintiff has no claim, and does not anticipate filing a claim, against a
12 personal injury trust.

13 2. The plaintiff has or anticipates filing a claim against a personal injury trust.

14 (b) If a plaintiff has a claim against a personal injury trust, he or she shall
15 provide to the court and to all parties a final executed proof of claim and all other
16 trust claims materials relevant to each claim the plaintiff has against a personal
17 injury trust. The plaintiff shall also state whether there has been a request to defer,
18 delay, suspend, or toll the claim against the personal injury trust.

19 (c) If the plaintiff anticipates a claim against a personal injury trust, the party
20 shall provide to the court and to all parties all trust claims materials relevant to each
21 claim the party anticipates against a personal injury trust.

Insert 3.5
2

Insert 2.7

Insert 3.1

1 (3) DISCOVERY; USE OF MATERIALS. (a) Trust claims materials and trust
2 governance documents relating to a claim filed by the plaintiff are presumed relevant
3 to the personal injury or other tort action. A plaintiff may not claim privilege or
4 confidentiality as an objection to discovery, or presentation in court, of trust claims
5 materials or trust governance documents.

6 (b) The court shall presume trust claims materials and trust governance
7 documents to be authentic and shall allow any party to present the trust claims
8 materials to prove alternative causation for a plaintiff's injuries or to allocate
9 liability for the plaintiff's injury.

relevant and

***NOTE: I changed the language in this section to comply with drafting standards. I have some doubts as to whether the court can be compelled to accept the trust claims materials as "presumably authentic" without having some kind of threshold for establishing the authenticity of the documents. Please let me know your thoughts on this.

Insert 3.9

10 (4) SCHEDULING TRIAL; STAY OF ACTION. (a) The court may not schedule a trial
11 in a personal injury action until at least 180 days after the plaintiff makes the
12 disclosures required under sub. (2).

Insert 3.12

13 (b) If a party states under sub. (2) that he or she anticipates a claim against a
14 personal injury trust, the court shall stay all proceedings until either of the following
15 occur:

16 1. The party files his or ^{the} ^{her} claim against the personal injury trust and provides
17 to the court and to all parties a final executed proof of claim and all other trust claims
18 materials relevant to each claim the party has against a personal injury trust. The
19 party shall also state whether there has been a request to defer, delay, suspend, or
20 toll the claim against the personal injury trust.

21 2. The party swears or affirms that he or she will not file the claim that he or
22 she anticipated filing against the personal injury trust.

move the court for an order under P.M.I. (d) by

1 *tr*

(5) DEFENDANTS IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE PERSONAL INJURY

2 TRUSTS. (a) Any defendant may ~~identify~~ ^{identify} a personal injury trust against which the
3 defendant in good faith believes the plaintiff can file a successful claim. For each
4 personal injury trust a defendant identifies, the defendant shall set forth the factual
5 basis for believing that the plaintiff has a claim that would satisfy criteria set forth
6 in the personal injury trust's trust governance documents and the amount of money
7 the defendant believes the personal injury trust should pay for the claim.

insert 4.7

8 (b) Within 10 days of receiving a motion under par. (a), the plaintiff shall, for
9 each personal injury trust identified by the defendant, do one of the following:

- 10 1. File a claim with the personal injury trust.
- 11 2. File a written response with the court that sets forth reasons why the

12 plaintiff may not file a claim with the personal injury trust identified by the
13 defendant. *there is insufficient evidence to permit the plaintiff to file a claim in good faith under the personal injury trust distribution procedure*

14 (c) The court shall determine, for each personal injury trust identified under
15 par. (a), whether there is a good faith basis for the plaintiff to file a claim with the
16 personal injury trust. The plaintiff shall have the burden of proving that he or she
17 does not meet criteria set forth in the personal injury trust's trust governance
18 documents or that his or her claim is otherwise barred

19 (d) If the court determines that there is a good faith basis for the plaintiff to file
20 a claim against a personal injury trust identified by a defendant, the court shall order
21 the plaintiff to file a claim with the personal injury trust and shall stay the
22 immediate action until the plaintiff swears or affirms that he or she has filed the
23 claim against the personal injury trust and the plaintiff provides to the court and to
24 all parties a final executed proof of claim and all other trust claims materials relevant
25 to each claim the plaintiff has against a personal injury trust.

1 (e) Not less than 60 days after the plaintiff provides the documentation
2 required under par. (d), the court may schedule the plaintiff's action for trial.

***NOTE: Please note that I have changed this portion of the submitted materials to reflect our drafting conventions and general court procedures. I have made a number of changes, in particular to the requirements that the trial court "certify" certain things or enter certain "orders." I don't think, for example, that it makes sense to require a court to certify that discovery is complete - the parties swear, when they comply with discovery, that their responses are complete and are required to update as necessary. If a party feels that discovery is not yet complete, the party may move to delay the proceedings until discovery is complete.

***NOTE: Similarly, I didn't require the court to enter a "Trust Claims Order" because I don't see that anything is being ordered by the court. A list of personal injury trust claims will have been provided by the plaintiff in compliance with the initial pleadings and/or the court order (if any) under par. (d).

Insert 5.2

3 **(6) VALUATION OF PERSONAL INJURY TRUST CLAIMS; JUDICIAL NOTICE.** If a plaintiff
4 proceeds to trial under this section before one of more of his or her personal injury
5 trust claims is resolved, there is a rebuttable presumption that the plaintiff is
6 entitled to, and will receive, the compensation specified in the trust governance
7 document applicable to his or her claim. The court shall take judicial notice that the
8 trust governance document specifies compensation amounts and shall establish an
9 attributed value to the plaintiff's personal injury trust claim. The defendant shall

10 be entitled to a setoff in this amount from any damages he or she owes to the plaintiff
11 to the same extent he or she would be entitled to the setoff if the plaintiff's trust claim
12 has resolved.

***NOTE: I did not include the separate section about setoff or credits, because I believe this simply restates the general law of setoffs in civil litigation. By putting a general rule into a specific statute, it implies that the general rule does not apply to specific statutes that do not contain the rule. I want to avoid this impression, but if you believe that the general rule of setoff or subrogation is meant to apply in a different way in this section, please let me know and we can work on the proper wording.

Insert 5.2

13 **(7) FAILURE TO PROVIDE INFORMATION; SANCTIONS.** A plaintiff who fails to provide
14 all of the information required under subs. (2), (4) (b), or (5) (d) is subject to ss. 802.05,
15 804.12, 805.03, and 895.044.

(A)

SECTION 2. Initial applicability.

1 (1) This act first applies to actions filed on the effective date of this subsection.

2 (END)

10
Insert 6.1

2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0002/P/ins
PJH:sac:jf

~~INSERT ANALYSIS~~

~~This bill creates a~~
INSERT 1.5:

(a) "Personal injury claim" means any claim for damages, loss, indemnification, contribution, restitution or other relief, including punitive damages, that is related to bodily injury or another harm, including loss of consortium, society, or companionship, loss of support, personal injury or death, mental or emotional injury, risk or fear of disease or other ⁱⁿjury, or costs of medical monitoring or surveillance. "Personal injury claim" ^{is} includes a claim made by or on behalf of the person who claims the injury or harm or by or on behalf of the person's representative, spouse, parent, minor child, or other relative. "Personal injury claim" does not include a claim for compensatory benefits pursuant to worker's compensation or veterans benefits.

INSERT 2.2:

"Trust claims materials" include claims forms and supplementary materials, affidavits, depositions and trial testimony, work history, and medical ^{and} ^{or} health records.

INSERT ² 3.5:

determines eligibility and payment levels, including claims payment

INSERT 3.1:

(a) Within 30 days after the effective date of this paragraph [LRB inserts date] or within 30 days after an action for a personal injury or other tort is filed in circuit court, the court shall order the plaintiff to provide to the court and to all parties a statement identifying all personal injury claims the plaintiff has or anticipates filing against a personal injury trust that are identical or substantially similar to the claims filed in the immediate action. The statement shall include an

1 attestation that the plaintiff swears or affirms, under penalties of perjury, that the
2 statement is complete and is based on the plaintiff's good faith investigation of all
3 potential claims against personal injury trusts.

4 (b) The court shall order the plaintiff to produce to the court and to all parties,
5 for each personal injury claim he or she filed against a personal injury trust
6 identified in par. (a), a final executed proof of claim and all other trust claims
7 materials relevant to each claim.

8 (c) The court shall order the plaintiff to produce to the court and to all parties,
9 for each personal injury claim he or she anticipates filing against a personal injury
10 trust identified in par. (a), all trust claims materials relevant to each claim. The court

11 shall order the plaintiff ^{to} produce to the court and to all parties a final executed proof
12 of claim for each claim when the plaintiff files claim. *the each order*

13 (d) The court shall order the plaintiff to supplement the information and
14 materials he or she provided pursuant to the orders entered under pars. (a), (b), or
15 (c) within 30 days after the plaintiff receives additional information, ^{or} materials, ^{or}
16 files an additional claim. *or*

17 (e) Notwithstanding par. (d), the plaintiff may not, less than 30 days prior to
18 trial, amend or supplement the information or materials he or she provided pursuant
19 to this subsection to identify an additional personal injury claim or an additional
20 personal injury trust against which he or she may have a claim without leave of the
21 court. The court may not grant leave to ^{the} plaintiff under this paragraph unless the
22 court finds that mistake, inadvertence, surprise, excusable neglect, or fraud
23 prevented the timely inclusion of the information or materials.

24 INSERT 3.9:

1 No claims of privilege may apply to trust claims materials or trust governance
2 documents.

3 (b) A defendant in a personal injury claim may seek discovery against a
4 personal injury trust identified under sub. (2). The plaintiff may not claim privilege
5 or confidentiality to bar discovery under this paragraph and shall provide consent
6 or other expression of permission that may be required by the personal injury trust
7 to release information and materials sought by the defendant.

8 INSERT 3.12:

9 This paragraph does not apply if the plaintiff states, pursuant to sub. (2) that
10 he or she has not filed and does not anticipate filing any claim against a personal
11 injury trust that is identical or substantially similar to the claims filed in the
12 immediate action.

13 INSERT 4.7:

14 produce or describe the evidence sufficient to meet the personal injury trust
15 distribution procedure requirements to file a valid claim and the amount of money
16 the trust should pay for the claim.

17 INSERT 5.2

18 (f) Not less than 30 days prior to trial, the court shall enter into the record a
19 trust claims document that identifies each personal injury claim the plaintiff has
20 made against a personal injury trust. The court may not amend this document
21 unless the court finds that mistake, inadvertence, surprise, excusable neglect, or
22 fraud prevented the timely inclusion of relevant information or materials.

23 INSERT 5.12

24 (7) SETOFFS; CREDIT. In any personal injury claim for which damages are
25 awarded, a defendant is entitled to a setoff or credit in the amount of the valuation

1 established under sub. (6) and any amount the plaintiff has been awarded from a
2 personal injury trust claim identified in sub. (5) (f). If multiple defendants are found
3 liable for damages, the court shall distribute the amount of set~~off~~^{off} or credit
4 proportionally, according to the liability of each defendant. No defendant may, by
5 virtue of settlement or other disposition of the action, claim more than its
6 proportionate share of the amount of set~~off~~^{off} or credit to which it is entitled under this
7 section.

8 INSERT 6.1:

9 and to actions pending on the effective date of this subsection if trial has not
10 commenced in the action^g

1 (b) "Trust claims materials" means all documents and information relevant or
2 related to a pending or potential claim against a personal injury trust.

3 (c) "Trust governance document" means any document that identifies criteria
4 for determining who is eligible to receive compensation from a personal injury trust
5 or that identifies payment levels or matrices, trust distribution procedures, or plans
6 for reorganization.

****NOTE: Please note that I incorporated only the definitions that are unique to this section. I didn't, for example, include the proffered definitions of "personal injury claim" or "tort action" because those terms are not unique to, or defined differently for use in, this section. If you believe that the terms I omitted are defined differently for use in this section, please let me know and we can work on wording for those definitions.

7 (2) REQUIRED DISCLOSURES BY PLAINTIFF. (a) A plaintiff who commences an
8 action for a personal injury or other tort shall, within 30 days after he or she
9 commences the action, provide to the court and to all parties a statement swearing
10 or affirming one of the following:

11 1. The plaintiff has no claim, and does not anticipate a claim, against a personal
12 injury trust.

13 2. The plaintiff has or anticipates a claim against a personal injury trust.

14 (b) If a plaintiff has a claim against a personal injury trust, he or she shall
15 provide to the court and to all parties a final executed proof of claim and all other
16 trust claims materials relevant to each claim the plaintiff has against a personal
17 injury trust. The plaintiff shall also state whether there has been a request to defer,
18 delay, suspend, or toll the claim against the personal injury trust.

19 (c) If the plaintiff anticipates a claim against a personal injury trust, the party
20 shall provide to the court and to all parties all trust claims materials relevant to each
21 claim the party anticipates against a personal injury trust.

filing

filing

1 **(3) DISCOVERY; USE OF MATERIALS.** (a) Trust claims materials and trust
2 governance documents relating to a claim filed by the plaintiff are presumed relevant
3 to the personal injury or other tort action. A plaintiff may not claim privilege or
4 confidentiality as an objection to discovery, or presentation in court, of trust claims
5 materials or trust governance documents.

6 (b) The court shall presume trust claims materials and trust governance
7 documents to be authentic and shall allow any party to present the trust claims
8 materials to prove alternative causation for a plaintiff's injuries or to allocate
9 liability for the plaintiff's injury.

 ****NOTE: I changed the language in this section to comply with drafting standards.
I have some doubts as to whether the court can be compelled to accept the trust claims
materials as "presumably authentic" without having some kind of threshold for
establishing the authenticity of the documents. Please let me know your thoughts on this.

10 **(4) SCHEDULING TRIAL; STAY OF ACTION.** (a) The court may not schedule a trial
11 in a personal injury action until at least 180 days after the plaintiff makes the
12 disclosures required under sub. (1)².

13 (b) If a party states under sub. (2) that he or she anticipates a claim against a
14 personal injury trust, the court shall stay all proceedings until either of the following
15 occur:

16 1. The party files his or claim against the personal injury trust and provides
17 to the court and to all parties a final executed proof of claim and all other trust claims
18 materials relevant to each claim the party has against a personal injury trust. The
19 party shall also state whether there has been a request to defer, delay, suspend, or
20 toll the claim against the personal injury trust.

21 2. The party swears or affirms that he or she will not file the claim that he or
22 she anticipated filing against the personal injury trust.

1 **(5) DEFENDANTS' IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE PERSONAL INJURY**
2 TRUSTS. (a) Any defendant may identify a personal injury trust against which the
3 defendant in good faith believes the plaintiff can file a successful claim. For each
4 personal injury trust a defendant identifies, the defendant shall set forth the factual
5 basis for believing that the plaintiff has a claim that would satisfy criteria set forth
6 in the personal injury trusts' trust governance documents and the amount of money
7 the defendant believes the personal injury trust should pay for the claim.

8 (b) Within 10 days of receiving a motion under par. (a), the plaintiff shall, for
9 each personal injury trust identified by the defendant, do one of the following:

10 1. File a claim with the personal injury trust.

11 2. File a written response with the court that sets forth reasons why the
12 plaintiff may not file a claim with the personal injury trust identified by the
13 defendant.

14 (c) The court shall determine, for each personal injury trust identified under
15 par. (a), whether there is a good faith basis for the plaintiff to file a claim with the
16 personal injury trust. The plaintiff shall have the burden of proving that he or she
17 does not meet criteria set forth in the personal injury trusts' trust governance
18 documents or that his or her claim is otherwise barred.

19 (d) If the court determines that there is a good faith basis for the plaintiff to file
20 a claim against a personal injury trust identified by a defendant, the court shall order
21 the plaintiff to file a claim with the personal injury trust and shall stay the
22 immediate action until the plaintiff swears or affirms that he or she has filed the
23 claim against the personal injury trust and the plaintiff provides to the court and to
24 all parties a final executed proof of claim and all other trust claims materials relevant
25 to each claim the plaintiff has against a personal injury trust.

1 (e) Not less than 60 days after the plaintiff provides the documentation
2 required under par. (d), the court may schedule the plaintiff's action for trial.

****NOTE: Please note that I have changed this portion of the submitted materials to reflect our drafting conventions and general court procedures. I have made a number of changes, in particular to the requirements that the trial court "certify" certain things or enter certain "orders." I don't think, for example, that it makes sense to require a court to certify that discovery is complete - the parties swear, when they comply with discovery, that their responses are complete and are required to update as necessary. If a party feels that discovery is not yet complete, the party may move to delay the proceedings until discovery is complete.

****NOTE: Similarly, I didn't require the court to enter a "Trust Claims Order" because I don't see that anything is being ordered by the court. A list of personal injury trust claims will have been provided by the plaintiff in compliance with the initial pleadings and/or the court order (if any) under par. (d).

3 (6) VALUATION OF PERSONAL INJURY TRUST CLAIMS; JUDICIAL NOTICE. If a plaintiff
4 proceeds to trial under this section before one of more of his or her personal injury
5 trust claims is resolved, there is a rebuttable presumption that the plaintiff is
6 entitled to, and will receive, the compensation specified in the trust governance
7 document applicable to his or her claim. The court shall take judicial notice that the
8 trust governance documents specify compensation amounts and shall establish an
9 attributed value to the plaintiff's personal injury trust claim. The defendant shall
10 be entitled to a setoff in this amount from any damages he or she owes to the plaintiff
11 to the same extent he or she would be entitled to the setoff if the plaintiff's trust
12 claims have resolved. claim has

X
****NOTE: I did not include the separate section about setoff or credits, because I believe this simply restates the general law of setoffs in civil litigation. By putting a general rule into a specific statute, it implies that the general rule does not apply to specific statutes that do not contain the rule. I want to avoid this impression, but if you believe that the general rule of setoff or subrogation is meant to apply in a different way in this section, please let me know and we can work on the proper wording.

13 (7) FAILURE TO PROVIDE INFORMATION; SANCTIONS. A plaintiff who fails to provide
14 all of the information required under subs. (2), (4) (b), or (5) (d) is subject to ss. 802.05,
15 804.12, 805.03, and 895.044.

16
SEC# (E) Initial applicability. (END)
(1) This act first applies to actions filed on the effective date of this subsect.

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0002/?dn

PJH:~):...

Sac

- date -

Representative Jacque,

Please review this preliminary draft to ensure that it complies with your intent. Please take particular note where I deviated from or deleted language submitted by your office and let me know if you would like to discuss any of those changes. If the draft meets your approval, I will write the analysis and put the draft into introducible form. If you need any changes or would like to discuss any part of the draft, please let me know. I look forward to hearing from you.

Peggy Hurley
Legislative Attorney
Phone: (608) 266-8906
E-mail: peggy.hurley@legis.wisconsin.gov