

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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PJH:sac:jf

March 28, 2013

Jamie,

Please review this substitute amendment to be sure it reflects your intent. As we discussed, due to the time constraints, I have in most cases simply used the language your office submitted to me in preparing this substitute amendment. I am not entirely sure that the language is as clear as it needs to be, or that it will work as intended. Please review the language in s. 802.025 (4) (b), (6), and (7) closely.

I believe that the changes to sub. (4) (b) regarding taking a deposition of a person who may become ill or otherwise incapacitated could be accomplished by amending s. 804.02 to include actions that are stayed under s. 802.025 (4) or (5). Section 804.02 already contains a mechanism for a person who wishes to perpetuate his or her testimony (or the testimony of another person) for use in a future action. Chapter 804 contains general provisions regarding the use of depositions, including depositions conducted in order to perpetuate testimony to avoid a delay or miscarriage of justice. I believe that your intent may be accomplished more clearly and effectively by simply amending s. 804.02, rather than trying to recreate some of its provisions within s. 802.025 (4) (b) and then to apply the sub. (4) (b) rules to stays entered into under sub. (5) (d).

As directed, I have left the provisions in sub. (6) as written in AB 19. However, given the changes to sub. (7) in the substitute amendment, some of those provisions may not make sense. Subsection (6) requires the court to take judicial notice of compensation amounts that are set forth in any applicable trust governance documents and to establish an attributed value to the plaintiff's claims against a trust.

In AB 19, sub. (7) required the court to grant a credit or set-off to any liable defendant in those amounts. However, the language requiring the court to grant the set-offs is removed from sub. (7) in the substitute amendment. Instead, sub. (7) now entitles a defendant to a credit equal to a percentage of causal responsibility or negligence attributed by a factfinder to any relevant personal injury trust.

As we discussed, I think there are cleaner ways to notwithstanding the provisions of s. 895.045 with regard to comparative responsibility and actions involving personal injury trusts. At a minimum, I would suggest cleaning up the language so that subs. (6) and (7) are consistent and either remove references in sub. (6) to an attributed value of claims against personal injury trust, require the court or other factfinder to

determine a percentage of liability for each named personal injury trust, or eliminate sub. (6) altogether. With the changes to sub. (7), the fact-finding set forth in sub. (6) may not be necessary at all.

Subsection (7) has the changes forwarded to me. I am not sure that the language is as clear as it could be, however. The subsection now notwithstanding the provisions of s. 895.045, but s. 895.045 does not use the concept of “credits.” Instead, that statute deals with liability as it relates to the proportionate causal responsibility for a plaintiff’s harm. I would suggest, if you wish to notwithstanding the provisions of s. 895.045, that you incorporate the terms that are used in that statute to set forth the way you intend damages to be apportioned (or the way you intend for defendants to be held liable) in sub. (7).

For example, instead of mentioning “credits,” sub. (7) could lift language from s. 895.045 and say something like “Notwithstanding s. 895.045 (1) or (3), a defendant or product defendant’s responsibility for the damages to the injured party is limited to that defendant’s or product defendant’s percentage of responsibility for the damages to the injured party. Apportionment of damages under this subsection shall include a determination of the percentage of responsibility for the damages that shall be attributed to a personal injury trust identified in the action.”

My suggested language isn’t perfect, but it lifts as much language as possible from s. 895.045 and it works to apportion liability among the responsible parties, regardless of whether they are found 51% or more responsible. This language also requires the factfinder to figure out how much of the responsibility the personal injury trust bears (although the language requiring that apportionment could also replace what is now in sub. (6)).

Please let me know if you have any questions or would like to discuss any of these points further. I will be back in the office on April 2, and I would be happy to sit down with you to discuss the draft and any concerns you may have.

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