

2013 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB19)

Received: 3/22/2013 Received By: phurley
Wanted: As time permits Same as LRB:
For: André Jacque (608) 266-9870 By/Representing: Jamie
May Contact: Drafter: phurley
Subject: Courts - miscellaneous/other Addl. Drafters:
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:

Liability trust funds substitute

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 3/27/2013	scalvin 3/28/2013	jfrantze 3/28/2013	_____			
/1	phurley 4/2/2013			_____	lparisi 3/28/2013	lparisi 3/28/2013	
/2		scalvin 4/2/2013	jmurphy 4/2/2013	_____	srose 4/2/2013	srose 4/2/2013	

FE Sent For:

<END>

2013 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB19)

Received: 3/22/2013 Received By: phurley
Wanted: As time permits Same as LRB:
For: André Jacque (608) 266-9870 By/Representing: Jamie
May Contact: Drafter: phurley
Subject: Courts - miscellaneous/other Addl. Drafters:
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:

Liability trust funds substitute

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 3/27/2013	scalvin 3/28/2013	jfrantze 3/28/2013	_____			
/1		1/2 sac 04/02/2013	Jan 4/2	_____	lparisi 3/28/2013	lparisi 3/28/2013	

FE Sent For:

<END>

2013 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB19)

Received: 3/22/2013 Received By: phurley
Wanted: As time permits Same as LRB:
For: André Jacque (608) 266-9870 By/Representing: Jamie
May Contact: Drafter: phurley
Subject: Courts - miscellaneous/other Addl. Drafters:
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

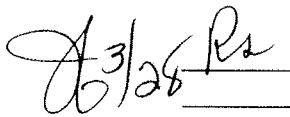
Topic:

Liability trust funds substitute

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	11 SAC 03/28/2013					

FE Sent For:

<END>

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 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" 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.

(b) "Personal injury trust" means a trust, compensation fund or claims facility created as a result of an administrative or legal action, 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 claims as a result of harm, also potentially compensable in the immediate action, for which the entity creating the trust, compensation fund, or claims facility is alleged to be responsible.

(c) "Trust claims materials" means all documents and information relevant or related to a pending or potential claim against a personal injury trust. "Trust claims materials" include, without limitation, claims forms and supplementary materials, proofs of claims, affidavits, depositions and trial testimony, work history, and medical and health records.

(d) "Trust governance document" means any document that determines eligibility and payment levels, including claims payment matrices, trust distribution procedures, or plans for reorganization, for a personal injury trust.

(2) REQUIRED DISCLOSURES BY PLAINTIFF. (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~~ shall ~~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, and for each claim, whether there has been a request to defer, delay, suspend, or toll the claim against the personal injury trust. The statement shall include an attestation that the plaintiff swears or affirms, under penalties of perjury, that the statement is complete and is based on the plaintiff's good faith investigation of all potential claims against personal injury trusts.

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

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

(a), all trust claims materials relevant to each claim. ~~The court shall order the plaintiff~~ shall ~~to also produce to the court and to all parties a final executed proof of claim for each claim when the plaintiff files the claim.~~

(d) ~~The court shall order the plaintiff~~ shall ~~to supplement the information and materials he or she provided pursuant to each order entered under par. (a), (b), or (c) within 30 days after the plaintiff files any additional claim or receives~~ any additional trust claim information or materials.

(3) DISCOVERY; USE OF MATERIALS. (a) ~~The court shall presume that~~ Trust claims materials and trust governance documents are to be relevant and authentic and admissible in evidence 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. No claims of privilege may apply to trust claims materials or trust governance documents.

(b) A defendant in a personal injury claim may seek discovery against a personal injury trust identified under sub. (2). The plaintiff may not claim privilege or confidentiality to bar discovery under this paragraph of any information relevant to plaintiff's personal injury claim under the control of a personal injury trust and the plaintiff shall provide all consents or other expression of permission that may be required by the personal injury trust to release information and materials sought by the defendant.

(4) SCHEDULING TRIAL; STAY OF ACTION. (a) The court shall not commence the ~~may not~~ schedule a trial of in a personal injury action until at least 180 days after the plaintiff makes the disclosures required under sub. (2). However, under exigent circumstances and for good cause shown, a court may shorten this period, but under no circumstances shall a trial be commenced less than 60 days after the last of the required disclosures is made.

(b) If a plaintiff party states under sub. (2) that he or she anticipates making one or more a claims against any personal injury trusts, ~~the court shall stay then~~ all proceedings in the action shall be stayed until the plaintiff party files all such his or her claims against the personal injury trust and provides the parties with the to the court and disclosures required by sub. (2) for all such claims. However, nothing in this section shall prohibit a court, under exigent circumstances and for good cause shown, to permit any party at any time to take the deposition of a plaintiff or any other witness whose health or other circumstances make it sufficiently likely that the person will be

unavailable or otherwise unable, or have reduced capacity (including due to declining physical or mental abilities) to give testimony once the stay is lifted. The court may also require any of the parties to provide such additional discovery in connection with any such deposition as the court believes is appropriate in order that all parties may fairly and fully prepare for and examine or cross-examine the witness at any such deposition. ~~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.~~

(5) DEFENDANT'S IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE PERSONAL

INJURY TRUSTS. (a) Any party defendant may move the court for an order requiring the plaintiff to file a claim against one or more personal injury trusts under par. (d) by identifying a personal injury trust against from which that party the defendant in good faith believes the plaintiff can recover. file a successful claim. The party moving for such an order ~~For each personal injury trust a defendant identifies, the defendant shall produce or describe the evidence it believes is sufficient to meet the requirements of each such personal injury trust for filing distribution procedure requirements to file a valid claim, and the amount of money the trust should pay for the claim.~~

(b) Within 10 days, or such other time as the court may prescribe, of receiving a motion under par. (a), the plaintiff shall, for each personal injury trust identified by the moving party ~~defendant,~~ do one of the following:

1. File a claim with each such ~~the~~ personal injury trust.

2. File a written response with the court that sets forth reasons why there is insufficient evidence to permit the plaintiff to file a claim in good faith under 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.

(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 any other party, 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 relevant to each claim such claim. If a stay goes into effect under this subsection, the provisions of subsection (4)(b) apply during the stay with respect to depositions the plaintiff has against a personal injury trust.~~

(e) Trial of plaintiff's action shall not be started 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.~~

(f) At any time before the close of evidence at trial, any party may ~~Not less than 30 days prior to trial, the court shall~~ enter into the record a trust claims documents that identifyies each personal injury trust against which claim the plaintiff has made against a personal injury claim trust.

(6) USE OF TRUST CLAIM MATERIALS AT TRIAL. VALUATION OF PERSONAL INJURY TRUST CLAIMS; JUDICIAL NOTICE. Trust claim materials which are sufficient to

leave as is in SB. b according to LLC by Jamie 3-27

??
??
Circuit

entitle a claim to consideration for payment under the applicable trust governance documents are sufficient by themselves to support a jury finding that the plaintiff was exposed to asbestos from the product or products for which the trust was established to provide compensation and that such exposure was a substantial factor in causing the plaintiff's injury which is at issue in the action. 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 compensation amounts and shall establish an attributed value to the plaintiff's personal injury trust claim.

(7) SETOFFS; CREDIT. If any defendant is found to be 51 percent or more causally negligent and/or any product defendant is found to be 51 percent or more causally responsible for the plaintiff's injury such that the defendant or product would be jointly and severally liable for plaintiff's entire damages under the provisions of s.895.045(1) or s. 895.045(3)(d), then, notwithstanding the provisions of those sections imposing joint and several liability on that defendant or product defendant, that defendant or product defendant is entitled to a credit against the amount of damages for which it would otherwise be liable equal to the percentage of causal negligence and/or the percentage of causal responsibility which the fact finder attributed to any and all personal injury trusts or products for which personal injury trusts provide compensation. In any personal injury claim for which damages are awarded, a defendant is entitled to a setoff or credit in the amount of the valuation established under sub. (6) and any amount the plaintiff has been awarded from a personal injury trust claim identified in sub. (5) (f). If multiple defendants

(3)
Created in
Act 2
strict
liability

Apply 51

are found liable for damages, the court shall distribute the amount of setoff or credit proportionally, according to the liability of each defendant.

(8) FAILURE TO PROVIDE INFORMATION; SANCTIONS. A plaintiff who fails to provide timely 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.

SECTION 2. Initial applicability.

(1) This act first applies to actions filed on the effective date of this subsection and to actions pending on the effective date of this subsection if trial has not commenced in the action.

*that arise 1/c to Jamie
2-27 email
leave as is*

1) In the definition of Personal Injury Trust (page 3), add the phrase "qualified settlement fund" after the word "trust" in line 1 – so the line would read: (b) "Personal injury trust" means a trust, **qualified settlement fund**, compensation fund or claims facility This phrase (qualified settlement fund) is a term of art, often referred to when setting up payment funds, and is specifically provided for in the U.S. Treasury Regulations 26 C.F.R. §§1.468B-1 through 1.468B-5.

2) Also on page 3, line 22: add the phrase "and plaintiff's counsel's" after the word "plaintiff's" so the line would read: complete and is based on the plaintiff's **and plaintiff's counsel's** good faith investigation of all potential claims This is necessary because we often face the situation where a plaintiff can legitimately say that are personally unaware of any trust claims, because the plaintiff's counsel did all the work and submitted the claims. So we need to cover counsel as well as the plaintiff himself.

3) Finally, on page 4 in the section about supplementing information – at line 10 add the phrase ", supplements an existing claim or produces" after the word "claim" so that the entire line reads: within 30 days after the plaintiff files an additional claim, **supplements an existing claim or produces** or receives additional This will make sure that all additional information that could be provided is indeed provided.

Hurley, Peggy

From: Julian, Jamie
Sent: Tuesday, March 26, 2013 3:49 PM
To: Hurley, Peggy
Subject: RE: Need trust transparency sub draft

Importance: High

Hi Peggy,

Here are the answers to your questions. We need this back by Monday April 1. Note especially that I previously gave you incorrect information regarding what claims this legislation will effect beginning on its effective date.

1) The language regarding what is sufficient to prove that a plaintiff was exposed to asbestos (in sub. 6) seems to come from nowhere. Asbestos is not otherwise referred to in this draft; should it be?

The language in sub. 6 about what is sufficient to prove exposure to asbestos is to address plaintiffs' counsel's arguments that the amount and type of evidence needed to prove eligibility to recover from the trusts is less than what is required in court to prove that a plaintiff was exposed to a product and that exposure was a substantial factor in producing the plaintiff's injury. This language is needed to prevent a plaintiff from double-dipping. Without it, some courts may say that even though the plaintiff has received money from the trusts, the evidence in the trust claim forms is not sufficient to prove an injury-causing exposure in court. This section referred to asbestos because that is what I was thinking about and what I understood the legislation to be concerned with. While your point is probably a good one - we can remove the reference to asbestos but then will have to come up with general language (probably somewhat clumsy) about "exposure to the products for which the trusts are responsible and that such exposure was a substantial factor in producing the claimant's injuries at issue in the claim"

2) Similarly, the use of the phrase "product defendant" is new. What is a "product defendant," and how does it differ from a "defendant"?

The term "product defendant" comes from Wis. Stat. sec. 895.045(3)(d), where the Legislature used that specific term to describe any defendant in the chain of manufacture, distribution and sale of a defective product. A defendant can be sued either for its conduct (negligence) or in strict liability for making or selling a defective product (a "product defendant"). A company can be held liable both for negligence and in strict liability (see generally, sec. 895.045). Note that these provisions in 895.045 about "product defendants" were created by 2011 Act 2, which was the Legislature's attempt to fix the Wisconsin Supreme Court's *Fuchsgruber* decision in which the Court took a strained interpretation of the 1995 amendments to Wisconsin's comparative negligence law.

3) In sub. (7) of the draft, the language that would allow for a set off or a credit in the amount of the valuation and any amount already paid to plaintiff (or presumed owed to the plaintiff from a personal injury trust) is stricken and replaced with language that allows a credit against the amount of damages for which it would otherwise be liable equal to "the percentage of causal negligence or causation . . . that the fact finder attributed to **any and all personal injury trusts or products for which personal injury trusts provide compensation.**" I don't understand the bolded language - where does a fact finder attribute a percentage of negligence or causation to a personal injury trust? I don't see any mechanism for this fact finding to take place, and I also don't understand how it would play out in litigation.

The jury gets a special verdict form with all of the companies, individuals, bankruptcy trusts and other entities (whether or not parties in the lawsuit) listed on it for which there is evidence that the named company, person or entity was at fault (either because it acted negligently or because it made or sold a defective product). The jury decides whether that person, company or entity was at fault; if so, whether that fault was a cause (a substantial factor) in bringing about the

plaintiff's injury; and if so, what percentage of the total fault should be assigned to that company, person or entity. That is why sub. 6 is so important: it allows the jury to find that the products for which the trusts are responsible caused the plaintiff's injury so that a percentage of fault can be assigned by the jury to the trusts. As to how this plays out in litigation, it is much simpler than what was originally proposed. When the jury returns the verdict, the percentages are spelled out. The court takes those percentages found by the jury and fashions the judgment. This is much more straight forward than trying to prove up what amounts the various trusts will ultimately pay to a plaintiff. It's also fair to the plaintiffs (and defendants) in that if the jury does not believe that the products for which the trust is responsible caused the plaintiff's injury, then there is no deduction from the verdict for those products.

4) Finally, just to clarify the initial applicability, do you mean "claims that are filed" on the effective date, or "claims that arise" on the effective date?

Please leave the current language in AB 19/SB 13 as is.

Jamie Julian

Office of Rep. André Jacque
2nd Assembly District

Room 123 West
State Capitol
P.O. Box 8952
Madison, WI 53709

(608) 266-9870

From: Hurley, Peggy
Sent: Friday, March 22, 2013 10:16 AM
To: Julian, Jamie
Subject: RE: Need trust transparency sub draft

Hi Jamie,

I can draft these changes for you on a "rush" basis, but some of the language submitted to me doesn't make a lot of sense to me. For example, the language regarding what is sufficient to prove that a plaintiff was exposed to asbestos (in sub. 6) seems to come from nowhere. Asbestos is not otherwise referred to in this draft; should it be? Similarly, the use of the phrase "product defendant" is new. What is a "product defendant," and how does it differ from a "defendant"?

In sub. (7) of the draft, the language that would allow for a set off or a credit in the amount of the valuation and any amount already paid to plaintiff (or presumed owed to the plaintiff from a personal injury trust) is stricken and replaced with language that allows a credit against the amount of damages for which it would otherwise be liable equal to "the percentage of causal negligence or causation . . . that the fact finder attributed to **any and all personal injury trusts or products for which personal injury trusts provide compensation.**" I don't understand the bolded language – where does a fact finder attribute a percentage of negligence or causation to a personal injury trust? I don't see any mechanism for this fact finding to take place, and I also don't understand how it would play out in litigation.

Finally, just to clarify the initial applicability, do you mean "claims that are filed" on the effective date, or "claims that arise" on the effective date? Please advise.

Peggy

From: Julian, Jamie
Sent: Friday, March 22, 2013 9:38 AM
To: Hurley, Peggy
Subject: Need trust transparency sub draft

Jamie Julian

Office of Rep. André Jacque
2nd Assembly District

Room 123 West
State Capitol
P.O. Box 8952
Madison, WI 53709

(608) 266-9870

Hurley, Peggy

From: Hurley, Peggy
Sent: Wednesday, March 27, 2013 9:04 AM
To: Julian, Jamie
Subject: RE: Need trust transparency sub draft

Thanks, Jamie.

I will try to come up with some language regarding the standard of proof that is not specific to asbestos, but applicable to any product for which a liability trust exists.

With regard to the "credits" section, it appears that you wish to notwithstanding the provisions of s. 895.045 (1) and (3) so that, in cases involving a personal injury trust, a product defendant is only liable for its percentage of causal responsibility, even if the fact-finder determines that its responsibility is 51% or more. Is that correct?

If so, I think it would be easier to simply say that, notwithstanding s. 895.045, in an action involving an injury for which the plaintiff has filed or may file a claim against a personal injury trust, the responsibility of a product defendant is limited to that product defendant's percentage of responsibility for the damages to the injured party.

If you want to apply (and not notwithstanding) the provisions of s. 895.045 (1) and (3) so that any entity with at least 51% responsibility may be jointly and severally liable for all of the damages, I think it would be easier to say that, in calculating damages under s. 895.045, the fact finder shall determine the percentage of liability attributable to any personal injury trust identified in sub. (5) [of the bill].

Please let me know your thoughts. I know you are working under a tight deadline, and I will be out of the office this Friday and next Monday, so please let me know as soon as you can. Thanks!

Peggy

From: Julian, Jamie
Sent: Tuesday, March 26, 2013 3:49 PM
To: Hurley, Peggy
Subject: RE: Need trust transparency sub draft
Importance: High

Hi Peggy,

Here are the answers to your questions. We need this back by Monday April 1. Note especially that I previously gave you incorrect information regarding what claims this legislation will effect beginning on its effective date.

1) The language regarding what is sufficient to prove that a plaintiff was exposed to asbestos (in sub. 6) seems to come from nowhere. Asbestos is not otherwise referred to in this draft; should it be?

The language in sub. 6 about what is sufficient to prove exposure to asbestos is to address plaintiffs' counsel's arguments that the amount and type of evidence needed to prove eligibility to recover from the trusts is less than what is required in court to prove that a plaintiff was exposed to a product and that exposure was a substantial factor in producing the plaintiff's injury. This language is needed to prevent a plaintiff from double-dipping. Without it, some courts may say that even though the plaintiff has received money from the trusts, the evidence in the trust claim forms is not sufficient to prove an injury-causing exposure in court. This section referred to asbestos because that is what I

was thinking about and what I understood the legislation to be concerned with. While your point is probably a good one - we can remove the reference to asbestos but then will have to come up with general language (probably somewhat clumsy) about "exposure to the products for which the trusts are responsible and that such exposure was a substantial factor in producing the claimant's injuries at issue in the claim"

2) Similarly, the use of the phrase "product defendant" is new. What is a "product defendant," and how does it differ from a "defendant"?

The term "product defendant" comes from Wis. Stat. sec. 895.045(3)(d), where the Legislature used that specific term to describe any defendant in the chain of manufacture, distribution and sale of a defective product. A defendant can be sued either for its conduct (negligence) or in strict liability for making or selling a defective product (a "product defendant"). A company can be held liable both for negligence and in strict liability (see generally, sec. 895.045). Note that these provisions in 895.045 about "product defendants" were created by 2011 Act 2, which was the Legislature's attempt to fix the Wisconsin Supreme Court's *Fuchsgruber* decision in which the Court took a strained interpretation of the 1995 amendments to Wisconsin's comparative negligence law.

3) In sub. (7) of the draft, the language that would allow for a set off or a credit in the amount of the valuation and any amount already paid to plaintiff (or presumed owed to the plaintiff from a personal injury trust) is stricken and replaced with language that allows a credit against the amount of damages for which it would otherwise be liable equal to "the percentage of causal negligence or causation . . . that the fact finder attributed to **any and all personal injury trusts or products for which personal injury trusts provide compensation.**" I don't understand the bolded language - where does a fact finder attribute a percentage of negligence or causation to a personal injury trust? I don't see any mechanism for this fact finding to take place, and I also don't understand how it would play out in litigation.

The jury gets a special verdict form with all of the companies, individuals, bankruptcy trusts and other entities (whether or not parties in the lawsuit) listed on it for which there is evidence that the named company, person or entity was at fault (either because it acted negligently or because it made or sold a defective product). The jury decides whether that person, company or entity was at fault; if so, whether that fault was a cause (a substantial factor) in bringing about the plaintiff's injury; and if so, what percentage of the total fault should be assigned to that company, person or entity. That is why sub. 6 is so important: it allows the jury to find that the products for which the trusts are responsible caused the plaintiff's injury so that a percentage of fault can be assigned by the jury to the trusts. As to how this plays out in litigation, it is much simpler than what was originally proposed. When the jury returns the verdict, the percentages are spelled out. The court takes those percentages found by the jury and fashions the judgment. This is much more straight forward than trying to prove up what amounts the various trusts will ultimately pay to a plaintiff. It's also fair to the plaintiffs (and defendants) in that if the jury does not believe that the products for which the trust is responsible caused the plaintiff's injury, then there is no deduction from the verdict for those products.

4) Finally, just to clarify the initial applicability, do you mean "claims that are filed" on the effective date, or "claims that arise" on the effective date?

Please leave the current language in AB 19/SB 13 as is.

Jamie Julian

Office of Rep. André Jacque
2nd Assembly District

Room 123 West
State Capitol
P.O. Box 8952

Madison, WI 53709

(608) 266-9870

From: Hurley, Peggy
Sent: Friday, March 22, 2013 10:16 AM
To: Julian, Jamie
Subject: RE: Need trust transparency sub draft

Hi Jamie,

I can draft these changes for you on a "rush" basis, but some of the language submitted to me doesn't make a lot of sense to me. For example, the language regarding what is sufficient to prove that a plaintiff was exposed to asbestos (in sub. 6) seems to come from nowhere. Asbestos is not otherwise referred to in this draft; should it be? Similarly, the use of the phrase "product defendant" is new. What is a "product defendant," and how does it differ from a "defendant"?

In sub. (7) of the draft, the language that would allow for a set off or a credit in the amount of the valuation and any amount already paid to plaintiff (or presumed owed to the plaintiff from a personal injury trust) is stricken and replaced with language that allows a credit against the amount of damages for which it would otherwise be liable equal to "the percentage of causal negligence or causation . . . that the fact finder attributed to **any and all personal injury trusts or products for which personal injury trusts provide compensation.**" I don't understand the bolded language – where does a fact finder attribute a percentage of negligence or causation to a personal injury trust? I don't see any mechanism for this fact finding to take place, and I also don't understand how it would play out in litigation.

Finally, just to clarify the initial applicability, do you mean "claims that are filed" on the effective date, or "claims that arise" on the effective date? Please advise.

Peggy

From: Julian, Jamie
Sent: Friday, March 22, 2013 9:38 AM
To: Hurley, Peggy
Subject: Need trust transparency sub draft

Jamie Julian

Office of Rep. André Jacqué
2nd Assembly District

Room 123 West
State Capitol
P.O. Box 8952
Madison, WI 53709

(608) 266-9870



LRB-00022/1
PJH:sac:ts
stamp

2013 ASSEMBLY BILL 19

5/2-28-15
note

50022/1

February 15, 2013 – Introduced by Representatives JACQUE, HONADEL, KUGLITSCH, MURPHY, SCHRAA, SPIROS, STONE, STRACHOTA, THIESEELDT and WEININGER, cosponsored by Senators GROTHMAN and LASEE. Referred to Committee on Judiciary.

1 **AN ACT to create** ^{gen cat} 802.025 of the statutes; **relating to:** torts and personal injury
2 trusts.

Analysis by the Legislative Reference Bureau

This bill creates discovery and scheduling requirements for certain types of tort actions and limits a defendant's liability for a plaintiff's injury under certain circumstances. Under the bill, a plaintiff who files a tort action must disclose, within 30 days after he or she files the action, whether he or she has filed or anticipates filing a claim against a personal injury trust. A personal injury trust is a trust or compensation fund that is established pursuant to a bankruptcy or other legal action in order to compensate persons who file claims as a result of harm potentially compensable in the plaintiff's tort action, for which the entity that established the personal injury trust is alleged to be responsible.

Under the bill, if the plaintiff indicates that he or she has filed or anticipates filing a claim against a personal injury trust, the bill requires the court to stay the immediate proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust. The bill also allows a defendant to identify a personal injury trust not named by the plaintiff, but against whom the defendant believes the plaintiff has a legitimate claim. If the court agrees that there is a good faith basis for the plaintiff to file a claim against the personal injury trust, the bill requires the court to order the plaintiff to file a claim against the trust and stay the proceedings until the plaintiff produces a final executed proof of claim against the personal injury trust.

Under the bill, the plaintiff must provide all parties to his or her immediate suit with all documents, records, trial or discovery materials, and other information

ASSEMBLY BILL 19

relevant to any claim against a personal injury trust. The bill allows any party to use these materials in the immediate action to prove alternate causation of, or to allocate liability for, the plaintiff's injury. The bill allows a defendant in the immediate action to seek discovery from a personal injury trust against which the plaintiff has filed or anticipates filing an action.

The bill requires the court to enter into the record a list that identifies each personal injury the claim the plaintiff has made against a personal injury trust.

Under the bill, if a defendant in the immediate action is found liable for the plaintiff's injury, the defendant is entitled to a setoff in the amount of any money the plaintiff received from a personal injury trust for a substantially similar injury. If the immediate action proceeds to trial before the plaintiff's claim against a personal injury trust is resolved, the bill requires the court to establish an attributed value to the plaintiff's claim against the personal injury trust and to afford the defendant a setoff in that amount.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

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

2 **802.025 Pleading certain personal injury actions; stay of proceedings.**

3 (1) **DEFINITIONS.** In this section: (a) "Personal injury claim" means any claim for
4 damages, loss, indemnification, contribution, restitution or other relief, including
5 punitive damages, that is related to bodily injury or another harm, including loss of
6 consortium, society, or companionship, loss of support, personal injury or death,
7 mental or emotional injury, risk or fear of disease or other injury, or costs of medical
8 monitoring or surveillance. "Personal injury claim" includes a claim made by or on
9 behalf of the person who claims the injury or harm or by or on behalf of the person's
10 representative, spouse, parent, minor child, or other relative. "Personal injury
11 claim" does not include a claim for compensatory benefits pursuant to worker's
12 compensation or veterans benefits.

ASSEMBLY BILL 19

qualified settlement fund,

Proofs of claims

1 (b) "Personal injury trust" means a trust, compensation fund or claims facility
2 created as a result of an administrative or legal action, bankruptcy, agreement, or
3 other settlement or pursuant to 11 USC 524 (g) or 49 USC 40101, that is intended
4 to provide compensation to claimants alleging personal injury claims as a result of
5 harm, also potentially compensable in the immediate action, for which the entity
6 creating the trust, compensation fund, or claims facility is alleged to be responsible.

7 (c) "Trust claims materials" means all documents and information relevant or
8 related to a pending or potential claim against a personal injury trust. "Trust claims
9 materials" include claims forms and supplementary materials, affidavits,
10 depositions and trial testimony, work history, and medical and health records.

11 (d) "Trust governance document" means any document that determines
12 eligibility and payment levels, including claims payment matrices, trust distribution
13 procedures, or plans for reorganization, for a personal injury trust.

14 (2) REQUIRED DISCLOSURES BY PLAINTIFF. (a) Within 30 days after the effective
15 date of this paragraph [LRB inserts date] or within 30 days after an action for a
16 personal injury or other tort is filed in circuit court, the court shall order the plaintiff
17 to provide to the court and to all parties a statement identifying all personal injury
18 claims the plaintiff has or anticipates filing against a personal injury trust, and for
19 each claim, whether there has been a request to defer, delay, suspend, or toll the claim
20 against the personal injury trust. The statement shall include an attestation that
21 the plaintiff swears or affirms, under penalties of perjury, that the statement is
22 complete and is based on the plaintiff's good faith investigation of all potential claims
23 against personal injury trusts.

24 (b) The court shall order the plaintiff to produce to the court and to all parties,
25 for each personal injury claim he or she filed against a personal injury trust

without limitation,

shall

shall

and plaintiff's counsel's

ASSEMBLY BILL 19

SECTION 1

supplements an existing claim, or produces

1 identified in par. (a), a final executed proof of claim and all other trust claims
2 materials relevant to each claim.

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

8 (d) The court shall order the plaintiff to supplement the information and
9 materials he or she provided pursuant to each order entered under par. (a), (b), or (c)
10 within 30 days after the plaintiff files an additional claim or receives additional
11 information or materials.

12 (3) DISCOVERY; USE OF MATERIALS. (a) The court shall presume trust claims
13 materials and trust governance documents to be relevant and authentic and shall
14 allow any party to present the trust claims materials to prove, without limitation,
15 alternative causation for a plaintiff's injuries or to allocate liability for the plaintiff's
16 injury. No claims of privilege may apply to trust claims materials or trust governance

17 documents of any information relevant to the plaintiff's personal
18 injury claim under the control of a personal injury trust

19 (b) A defendant in a personal injury claim may seek discovery against a
20 personal injury trust identified under sub. (2). The plaintiff may not claim privilege
21 or confidentiality to bar discovery under this paragraph and shall provide consents
22 or other expression of permission that may be required by the personal injury trust
23 to release information and materials sought by the defendant.

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

Insert 2.25

any

admissible in evidence

the plaintiff

commence the

of

ASSEMBLY BILL 19

1 (b) If a party states under sub. (2) that he or she anticipates a claim against a
 2 personal injury trust, the court shall stay all proceedings until the party files his or
 3 her claim against the personal injury trust and provides to the court and to all parties
 4 a final executed proof of claim and all other trust claims materials relevant to each
 5 claim the party has against a personal injury trust. The party shall also state
 6 whether there has been a request to defer, delay, suspend, or toll the claim against
 7 the personal injury trust.

8 (5) DEFENDANT'S IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE PERSONAL INJURY

9 TRUSTS. (a) Any defendant may move the court for an order under par. (d) by
 10 identifying a personal injury trust against which the defendant in good faith believes
 11 the plaintiff can file a successful claim. For each personal injury trust a defendant
 12 identifies, the defendant shall produce or describe the evidence sufficient to meet the
 13 personal injury trust distribution procedure requirements to file a valid claim and
 14 the amount of money the trust should pay for the claim.

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

- 17 1. File a claim with ^{of each} the personal injury trust ^{identified}.
- 18 2. File a written response with the court that sets forth reasons why there is
 19 insufficient evidence to permit the plaintiff to file a claim in good faith under the
 20 personal injury trust distribution procedure identified by the defendant.

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

, or such other ^{time} prescribed by the court,

Insert
S.X
5.7

Insert
S.14

Keep 9 ->

moving party

ASSEMBLY BILL 19

any other party

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

Insert 6.7

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

Trial of a plaintiff's action may not begin

10 (f) Not less than 30 days prior to trial, the court shall enter into the record a
 11 trust claims document that identifies each personal injury claim the plaintiff has
 12 made against a personal injury trust.

Insert 6.12

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

20 (7) SETOFFS; CREDIT. In any personal injury claim for which damages are
 21 awarded, a defendant is entitled to a setoff or credit in the amount of the valuation
 22 established under sub. (6) and any amount the plaintiff has been awarded from a
 23 personal injury trust claim identified in sub. (5) (f). If multiple defendants are found
 24 liable for damages, the court shall distribute the amount of setoff or credit
 25 proportionally, according to the liability of each defendant.

Insert 6.25

ASSEMBLY BILL 19

timely

① (8) FAILURE TO PROVIDE INFORMATION; SANCTIONS. A plaintiff who fails to provide
2 all of the information required under subs. (2), (4) (b), or (5) (d) is subject to ss. 802.05,
3 804.12, 805.03, and 895.044.

4 **SECTION 2. Initial applicability.**

5 (1) This act first applies to actions filed on the effective date of this subsection
6 and to actions pending on the effective date of this subsection if trial has not
7 commenced in the action.

8 (END)

1 INSERT 2.25:

2 The court may, under exigent circumstances and for good cause shown, shorten
3 this period but under no circumstances may a trial be commenced less than 60 days
4 after the last of the required disclosures is made.

5
6 INSERT 5.7:

7 (b) If a plaintiff states under sub. (2) that he or she anticipates making one or
8 more claims against any personal injury trusts, then all proceedings in the action
9 shall be stayed until the plaintiff files all such claims and provides the parties with
10 the disclosures required by sub. (2) for all such claims. Nothing in this section shall
11 prohibit a court, under exigent circumstances and for good cause shown, to permit
12 any party at any time to take a deposition of a plaintiff or any other witness whose
13 health or other circumstances make it sufficiently likely that the person will be
14 unavailable or otherwise unable, or have reduced capacity, including due to declining
15 health or mental abilities, to give testimony when the stay is lifted. The court may
16 also require any party to provide such additional discovery in connection with any
17 such deposition as the court believes is appropriate in order that all parties may
18 fairly and fully prepared for and examine or cross-examine the witness at any such
19 deposition.

20 INSERT 5.14:

21 ^{not} (a) Any party may move the court for an order requiring the plaintiff to file a
22 claim against one or more personal injury trusts from which that party in good faith
23 believes the plaintiff can recover. The party moving for such an order shall

1 produce or describe the evidence it believe^s is sufficient to meet the
2 requirements of each such personal injury trust for filing a valid claim.

3
4 INSERT 6.7:

5 ^{no ff} If a stay goes into effect under this subsection, the provisions of sub. (4) (b) with
6 respect to depositions apply during the stay.

7
8 INSERT 6.12:

9 ^{ff} (f) Any party may, at any time before the close of evidence at trial, enter into
10 the record trust claims documents that identify each personal injury trust against
11 which the plaintiff has made a personal injury claim.

12
13 INSERT 6.25:

14 ^{no ff} DAMAGES; LIABILITY. If any defendant is found to be 51 percent or more causally
15 negligent or any product defendant is found to be 51 percent or more causally
16 responsible for the plaintiff's injury such that the defendant or product defendant
17 would be jointly and severally liable for the plaintiff's entire damages under s.

895.045 (8) 896.045 (1) or (3) (d), then notwithstanding those sections, the defendant or product
19 defendant is entitled to a credit against the amount of damages for which it would
20 otherwise be liable equal to the percentage of causal negligence or causal
21 responsibility that the fact finder attributes to any personal injury trust or to a
22 product for which a personal injury trust provides compensation.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

13 50023/ldn
13 50023/ldn
PJH sac

- date -

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. 802.045 (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 804.02, rather than trying to recreate some of its provisions within 802.045 (4) (b) and then to apply the (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 ~~government~~ documents and to establish an attributed value to the plaintiff's claims against a trust. *governance*

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 sub. (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.

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

13s0022/1dn
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

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.

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

Hurley, Peggy

From: Julian, Jamie
Sent: Tuesday, April 02, 2013 9:03 AM
To: Hurley, Peggy
Subject: RE: (RUSH) - trust transparency

Ah! I mean, this **needs to go** in our sub.

I'll send the stripes over asap.

Jamie Julian

Office of Rep. André Jacques
2nd Assembly District

Room 123 West
State Capitol
P.O. Box 8952
Madison, WI 53709

(608) 266-9870

From: Hurley, Peggy
Sent: Tuesday, April 02, 2013 9:01 AM
To: Julian, Jamie
Subject: RE: (RUSH) - trust transparency

Hi Jamie,

I will need the stripes back before I can draft this.

From: Julian, Jamie
Sent: Tuesday, April 02, 2013 9:00 AM
To: Hurley, Peggy
Subject: (RUSH) - trust transparency
Importance: High

This need to do in our sub, thanks!

(6) USE OF TRUST CLAIM MATERIALS AT TRIAL. Trust claim materials which are sufficient to entitle a claim to consideration for payment under the applicable trust governance documents are sufficient by themselves to support a jury finding that the plaintiff was exposed to products for which the trust was established to provide compensation and that such exposure was a substantial factor in causing the plaintiff's injury which is at issue in the action.

Jamie Julian

Office of Rep. André Jacques

2nd Assembly District

Room 123 West
State Capitol
P.O. Box 8952
Madison, WI 53709

(608) 266-9870



State of Wisconsin
2013 - 2014 LEGISLATURE



LRBs0022/1

PJH:sac

Handwritten initials and signature

ASSEMBLY SUBSTITUTE AMENDMENT ,
TO ASSEMBLY BILL 19

today
4-2-13

gen act

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

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

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

4 **802.025 Pleading certain personal injury actions; stay of proceedings.**

5 (1) DEFINITIONS. In this section: (a) "Personal injury claim" means any claim for
6 damages, loss, indemnification, contribution, restitution or other relief, including
7 punitive damages, that is related to bodily injury or another harm, including loss of
8 consortium, society, or companionship, loss of support, personal injury or death,
9 mental or emotional injury, risk or fear of disease or other injury, or costs of medical
10 monitoring or surveillance. "Personal injury claim" includes a claim made by or on
11 behalf of the person who claims the injury or harm or by or on behalf of the person's

1 representative, spouse, parent, minor child, or other relative. "Personal injury
2 claim" does not include a claim for compensatory benefits pursuant to worker's
3 compensation or veterans benefits.

4 (b) "Personal injury trust" means a trust, qualified settlement fund,
5 compensation fund or claims facility created as a result of an administrative or legal
6 action, bankruptcy, agreement, or other settlement or pursuant to 11 USC 524 (g) or
7 49 USC 40101, that is intended to provide compensation to claimants alleging
8 personal injury claims as a result of harm, also potentially compensable in the
9 immediate action, for which the entity creating the trust, compensation fund, or
10 claims facility is alleged to be responsible.

11 (c) "Trust claims materials" means all documents and information relevant or
12 related to a pending or potential claim against a personal injury trust. "Trust claims
13 materials" include, without limitation, claims forms and supplementary materials,
14 proofs of claims, affidavits, depositions and trial testimony, work history, and
15 medical and health records.

16 (d) "Trust governance document" means any document that determines
17 eligibility and payment levels, including claims payment matrices, trust distribution
18 procedures, or plans for reorganization, for a personal injury trust.

19 **(2) REQUIRED DISCLOSURES BY PLAINTIFF.** (a) Within 30 days after the effective
20 date of this paragraph [LRB inserts date] or within 30 days after an action for a
21 personal injury or other tort is filed in circuit court, the plaintiff shall provide to the
22 court and to all parties a statement identifying all personal injury claims the plaintiff
23 has or anticipates filing against a personal injury trust, and for each claim, whether
24 there has been a request to defer, delay, suspend, or toll the claim against the
25 personal injury trust. The statement shall include an attestation that the plaintiff

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

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

7 (c) The plaintiff shall produce to all parties, for each personal injury claim he
8 or she anticipates filing against a personal injury trust identified in par. (a), all trust
9 claims materials relevant to each claim. The plaintiff shall produce to all parties a
10 final executed proof of claim for each claim when the plaintiff files the claim.

11 (d) The plaintiff shall supplement the information and materials he or she
12 provided pursuant to par. (a), (b), or (c) within 30 days after the plaintiff files any
13 additional claim, supplements an existing claim, or produces or receives any
14 additional trust claim materials.

15 (3) DISCOVERY; USE OF MATERIALS. (a) Trust claims materials and trust
16 governance documents are relevant and authentic and admissible in evidence to
17 prove, without limitation, alternative causation for a plaintiff's injuries or to allocate
18 liability for the plaintiff's injury. No claims of privilege apply to trust claims
19 materials or trust governance documents.

20 (b) A defendant in a personal injury claim may seek discovery against a
21 personal injury trust identified under sub. (2). The plaintiff may not claim privilege
22 or confidentiality to bar discovery of any information relevant to the plaintiff's
23 personal injury claim under the control of a personal injury trust and the plaintiff
24 shall provide consents or other expression of permission that may be required by the
25 personal injury trust to release information and materials sought by the defendant.

1 (4) SCHEDULING TRIAL; STAY OF ACTION. (a) The court may not commence the trial
2 of a personal injury action until at least 180 days after the plaintiff makes the
3 disclosures required under sub. (2). The court may, under exigent circumstances and
4 for good cause shown, shorten this period but under no circumstances may a trial be
5 commenced less than 60 days after the last of the required disclosures is made.

6 (b) If a plaintiff states under sub. (2) that he or she anticipates making one or
7 more claims against any personal injury trusts, then all proceedings in the action
8 shall be stayed until the plaintiff files all such claims and provides the parties with
9 the disclosures required by sub. (2) for all such claims. Nothing in this section shall
10 prohibit a court, under exigent circumstances and for good cause shown, to permit
11 any party at any time to take a deposition of a plaintiff or any other witness whose
12 health or other circumstances make it sufficiently likely that the person will be
13 unavailable or otherwise unable, or have reduced capacity, including due to declining
14 health or mental abilities, to give testimony when the stay is lifted. The court may
15 also require any party to provide such additional discovery in connection with any
16 such deposition as the court believes is appropriate in order that all parties may
17 fairly and fully prepare for and examine or cross-examine the witness at any such
18 deposition.

19 (5) DEFENDANT'S IDENTIFICATION OF ADDITIONAL OR ALTERNATIVE PERSONAL INJURY
20 TRUSTS. (a) Any party may move the court for an order requiring the plaintiff to file
21 a claim against one or more personal injury trusts from which that party in good faith
22 believes the plaintiff can recover. The party moving for such an order shall produce
23 or describe the evidence it believe is sufficient to meet the requirements of each such
24 personal injury trust for filing a valid claim.

1 (a) Any party may move the court for an order requiring the plaintiff to file a
2 claim against one or more personal injury trusts from which that party in good faith
3 believes the plaintiff can recover. The party moving for such an order shall produce
4 or describe the evidence it believes is sufficient to meet the requirements of each such
5 personal injury trust for filing a valid claim.

6 (b) Within 10 days, or such other time prescribed by the court, of receiving a
7 motion under par. (a), the plaintiff shall, for each personal injury trust identified by
8 the moving party, do one of the following:

9 1. File a claim with each personal injury trust identified.

10 2. File a written response with the court that sets forth reasons why there is
11 insufficient evidence to permit the plaintiff to file a claim in good faith under the
12 personal injury trust distribution procedure identified by the defendant.

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

18 (d) If the court determines that there is a good faith basis for the plaintiff to file
19 a claim against a personal injury trust identified by any other party, the court shall
20 stay the action until the plaintiff swears or affirms that he or she has filed the claim
21 against the personal injury trust and the plaintiff provides to all parties a final
22 executed proof of claim and all other trust claims materials relevant to each such
23 claim. If a stay goes into effect under this subsection, the provisions of sub. (4) (b)
24 with respect to depositions apply during the stay.

1 (e) Trial of a plaintiff's action may not begin less than 60 days after the plaintiff
2 provides the documentation required under par. (d).

3 (f) Any party may, at any time before the close of evidence at trial, enter into
4 the record trust claims documents that identify each personal injury trust against
5 which the plaintiff has made a personal injury claim.

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

INSET
6.12

13 (7) DAMAGES; LIABILITY. If any defendant is found to be 51 percent or more
14 causally negligent or any product defendant is found to be 51 percent or more
15 causally responsible for the plaintiff's injury such that the defendant or product
16 defendant would be jointly and severally liable for the plaintiff's entire damages
17 under s. 895.045 (1) or (3) (d), then notwithstanding those sections, the defendant or
18 product defendant is entitled to a credit against the amount of damages for which it
19 would otherwise be liable equal to the percentage of causal negligence or causal
20 responsibility that the fact finder attributes to any personal injury trust or to a
21 product for which a personal injury trust provides compensation.

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

25 SECTION 2. Initial applicability.

**2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRBs0022/lins
PJH:sac:jf

INSERT 6.12:

(6) USE OF TRUST CLAIM MATERIALS AT TRIAL. Trust claim materials that are sufficient to entitle a claim to consideration for payment under the applicable trust governance documents are sufficient, by themselves, to support a jury finding that the plaintiff was exposed to products for which the trust was established to provide compensation and that such exposure was a substantial factor in causing the plaintiff's injury that is at issue in the action.