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## BILL ANALYSIS



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House Bill 5456 (Substitute S-5 as passed by the Senate)  
Sponsor: Representative Jason Wentworth  
House Committee: Michigan Competitiveness  
Senate Committee: Michigan Competitiveness

Date Completed: 3-15-18

### **RATIONALE**

Concerns have been raised about lawsuits brought to recover damages for asbestos-related diseases by plaintiffs who also might have claims against bankruptcy trusts set up to compensate people for the same harm. Today, it is common knowledge that exposure to asbestos and products containing asbestos can have serious health consequences. Until the dangers of asbestos were recognized, however, the substance had been used for decades in a number of industries, as well as the military, and in consumer products. Due to widespread exposure and the emergence of the diseases, which sometimes can many years to appear, numerous civil suits were brought, beginning in the 1970s. As liabilities grew, some of the most heavily sued defendants filed for bankruptcy protection, leading to the creation of bankruptcy settlement trusts. In 1994, legislation amended the U.S. Bankruptcy Code to permit companies to establish and fund a trust to pay for all present and future claims relating to liability for asbestos exposure. Once the entity emerges from bankruptcy, liability is assigned to the trust, and the entity is discharged of asbestos-related liability. The trust then distributes funds to eligible claimants.

Despite the existence of these trusts, many people continue to bring court actions in order to recover for asbestos-related diseases from companies that have remained solvent. Because injured parties can file claims against one or more trusts as well as litigate in court, they can potentially recover more than once for the same harm. It has been pointed out that, if a plaintiff brings a lawsuit without first filing claims against bankruptcy trusts, or files trust claims but does not disclose them when bringing a civil action, the jury might not know about the other entities that could be liable for the plaintiff's injuries and therefore cannot properly allocate fault among them. Although this situation might be addressed or mitigated by court orders, rules, or procedures that require disclosure of trust claims and other entities that could be liable, some people believe that a plaintiff who brings an asbestos-related lawsuit should be required by statute to disclose and file all such claims.

### **CONTENT**

**The bill would enact the "Asbestos Bankruptcy Trust Claims Transparency Act" as Chapter 30A of the Revised Judicature Act to do the following:**

- Require a plaintiff, at least 180 days before the initial date set for the trial in an asbestos action, to give the court and all parties a sworn statement that an investigation had been conducted and all asbestos trust claims that the plaintiff could make had been completed and filed.**
- Require the plaintiff to provide all parties with all trust claims materials (a final executed proof of claim and all other documents related to a claim against an asbestos trust).**
- Provide that the plaintiff would have a continuing duty to supplement the information and materials.**

- **Require the defendant, at least 60 days before trial, to confer with the plaintiff if the defendant believed that the plaintiff had not filed all asbestos trust claims.**
- **Permit the defendant, after conferring with the plaintiff, to seek a court order requiring the plaintiff to file additional trust claims.**
- **Require the defendant's motion to identify the asbestos trust claims that the defendant believed the plaintiff could file, and require the defendant to produce information in support of the motion.**
- **Require the plaintiff, within 10 days of receiving the motion, to file: 1) an asbestos trust claim, 2) a response stating why there was insufficient evidence to file the claim; or 3) a response requesting a determination that the cost to file exceeded the reasonably anticipated recovery.**
- **Require the court to stay the action until the plaintiff filed the trust claim if the court determined that there was sufficient basis for the plaintiff to do so.**
- **Require the court to stay the action until the plaintiff filed a statement regarding exposure to and use of asbestos, if the court determined that the cost of submitting a trust claim exceeded the plaintiff's reasonably anticipated recovery.**
- **Provide that the court could not schedule the action for trial sooner than 60 days after the plaintiff complied with these requirements.**
- **Permit a defendant to seek discovery from an asbestos trust, and provide that the plaintiff could not claim confidentiality or privilege to bar discovery.**
- **State that trust materials could be used to prove an alternative source for the cause of the plaintiff's alleged harm, and could serve as a basis to allocate responsibility for the harm.**
- **Provide that if a plaintiff filed an additional asbestos trust claim after obtaining a judgment in an asbestos action, and if the trust existed at the time of the judgment, the court could reopen and adjust the judgment by the amount of subsequent payments the plaintiff obtained and order other relief.**

#### Definitions

"Asbestos action" would mean a claim for damages or other civil or equitable relief presented in a civil action that arises out of, is based on, or is related to the health effects of exposure to asbestos, and any other derivative claim made by or on behalf of an individual exposed to asbestos or a representative, spouse, parent, child, or other relative of the individual.

"Asbestos trust" would mean a government-approved or court-approved trust, qualified settlement fund, compensation fund, or claims facility that is created as a result of an administrative or legal action, a court-approved bankruptcy, or under 11 USC 524(g), 11 USC 1121(a), or another applicable provision of law and that is intended to provide compensation to claimants arising out of, based on, or related to the health effects of exposure to asbestos.

(Title 11 of the U.S. Code is commonly referred to as the Bankruptcy Code. Chapter 5 of Title 11 governs creditors, the debtor, and the estate, and Chapter 11 allows a reorganization of the debtor. Under Section 524(g), a court that enters an order confirming a plan of reorganization may issue an injunction to enjoin entities from taking legal action for the purpose of collecting payment with respect to any claim that, under a plan of reorganization, is to be paid by a trust that assumes the liabilities of a debtor that is a defendant in an asbestos action. These provisions are described in more detail in the **BACKGROUND** section below. Under Section 1121(a), a debtor may file a plan of reorganization with a petition commencing a voluntary case, or at any time in voluntary or involuntary case.)

"Plaintiff" would mean the person bringing the asbestos action, including a personal representative if the asbestos action is brought by an estate, or a conservator or next friend if the action is brought on behalf of a minor or legally incapacitated individual.

"Trust claims materials" would mean a final executed proof of claim and all other documents and information related to a claim against an asbestos trust, including claims forms and supplementary

materials, affidavits, depositions and trial testimony, work history, and medical and health records, all documents that reflect the status of a claim against an asbestos trust, and, if the trust claim has settled, all documents related to the settlement.

"Trust governance documents" would mean all documents that relate to eligibility and payment levels, including claims payment matrices, trust distribution procedures, and plans for reorganization, for an asbestos trust.

#### Requirements for Plaintiff

Not later than 180 days before the initial date set for the trial of an asbestos action, the plaintiff would have to comply with the following requirements to provide a sworn statement and trust claims materials. As described below, the plaintiff would have a continuing duty to supplement the information and materials.

If the plaintiff failed to comply with these requirements, the court could dismiss the asbestos action.

Sworn Statement of Investigation & Filing of Claims. The plaintiff would have to provide the court and parties with a sworn statement indicating that an investigation had been conducted and that, based on information reasonably available to the plaintiff and plaintiff's counsel, all asbestos trust claims that could be made by the plaintiff or any person on the plaintiff's behalf had been completed and filed. If the plaintiff or plaintiff's counsel later became aware that additional trust claims could be filed, the sworn statement would have to be supplemented, as described below. A deferral or placeholder claim that was missing necessary documentation for the asbestos trust to review and pay the claim would not meet these requirements.

The sworn statement would have to indicate whether there had been a request to defer, delay, suspend, or toll, withdraw, or otherwise alter the standing of any asbestos trust claim, and provide the status and disposition of each such claim.

The sworn statement would have to be signed by the plaintiff and the plaintiff's counsel.

Trust Claims Materials. The plaintiff would be required to provide all parties with all trust claims materials, including trust claims materials that related to conditions other than those that were the basis for the asbestos action. The materials also would have to include all trust claims materials from all law firms connected to the plaintiff in relation to exposure to asbestos, including anyone at a law firm involved in the action, any referring law firm, and any other law firm that had filed an asbestos trust claim for the plaintiff or on the plaintiff's behalf. These documents would have to be accompanied by an affidavit certifying that the trust claims materials submitted were true and complete.

If the plaintiff's asbestos trust claim were based on exposure to asbestos through another individual, the plaintiff would have to produce all trust claims materials submitted by the other individual to any asbestos trust if the materials were available to the plaintiff or plaintiff's counsel.

Continuing Duty to Supplement. The plaintiff would have a continuing duty to supplement the information and materials required to be provided. The plaintiff would have to do so within 30 days after the plaintiff or a person on the plaintiff's behalf supplemented an existing asbestos trust claim, received additional information or materials related to an asbestos trust claim, or filed an additional asbestos trust claim.

#### Defendant's Confer with Plaintiff; Motion to Require Filing of Additional Claim

At least 60 days before trial, the defendant would have to confer with the plaintiff if the defendant believed that the plaintiff had not filed all asbestos trust claims as required above. After conferring with the plaintiff, the defendant could move the court for an order to require the plaintiff to file

additional trust claims. The motion would have to identify the asbestos trust claims that the defendant believed the plaintiff could file. The defendant also would be required to produce or describe the information it possessed or was aware of in support of the motion.

If the defendant had previously filed a motion under these provisions, the court could not grant a subsequent motion if the defendant knew that the plaintiff met the criteria for payment for the additional trust claim identified in the subsequent motion at the time the earlier motion was filed.

Within 10 days after receiving the motion, the plaintiff would have to do one of the following:

- File the asbestos trust claims.
- File with the court a written response stating that there was insufficient evidence for the plaintiff to file the asbestos trust claims.
- File with the court a written response requesting a determination that the cost to file the claims exceeded the plaintiff's reasonably anticipated recovery.

Within 10 days after the plaintiff filed a written response, the court would have to determine if there was sufficient basis for the plaintiff to file the asbestos trust claims identified in the motion. If it determined that there was a sufficient basis, the court would have to stay the asbestos action until the plaintiff filed the asbestos trust claim and produced all related trust claims materials.

If the court determined that the cost of submitting an asbestos trust claim exceeded the plaintiff's reasonably anticipated recovery, the court would have to stay the asbestos action until the plaintiff filed with the court and provided to all parties a verified statement of the plaintiff's history of exposure to, use of, or other connection to asbestos covered by the asbestos trust.

The court could not schedule the asbestos action for trial sooner than 60 days after the plaintiff complied with the applicable requirements.

#### Presumption of Relevance; Discovery

Trust claims materials and trust governance documents would be presumed to be relevant and authentic, and would be admissible in evidence in an asbestos action. A claim of privilege would not apply to trust claims materials or trust governance documents.

A defendant in an asbestos action could seek discovery from an asbestos trust. The plaintiff could not claim privilege or confidentiality to bar discovery. The plaintiff would have to provide consent at the time of asbestos trust identification, including authorization for release of trust materials or other expression of permission that could be required by the trust to release information and materials a defendant sought.

#### Use of Trust Materials

Trust materials could be used to prove, without limitation, an alternative source for the cause of the plaintiff's alleged harm, and could serve as a basis to allocate responsibility for the alleged harm.

#### Subsequent Asbestos Trust Claim

If a plaintiff or a person on the plaintiff's behalf filed an additional asbestos trust claim after obtaining a judgment in an asbestos action, and if that trust were in existence at the time the plaintiff obtained the judgment, the trial court, on a motion by a defendant or judgment debtor seeking sanctions or other relief, would have jurisdiction to reopen and adjust the judgment by the amount of any subsequent asbestos trust payments obtained by the plaintiff, and order any other relief that the court considered proper.

A defendant or judgment debtor would have to file any such motion within a reasonable time and not more than one year after the judgment was entered.

### Application of Chapter 30A

Proposed Chapter 30A would apply to asbestos actions filed on or after its effective date. It also would apply to any pending asbestos actions in which trial had not begun on or before the chapter's effective date. Chapter 30A would not apply, however, to a pending asbestos action in which trial had been scheduled to occur before November 1, 2018.

If the application of Chapter 30A would unconstitutionally affect a vested right, the chapter would have to be applied prospectively only.

Proposed MCL 600.3010-600.3016

## **BACKGROUND**

### History of Asbestos Use<sup>1</sup>

Derived from a Greek term meaning inextinguishable or indestructible, the term "asbestos" refers to six minerals that occur naturally in the environment. Asbestos is mined and then processed and refined into fluffy fibers, which are mixed with a binding agent, resulting in a product that is strong, flexible, and heat-resistant. Asbestos mining and use first began some 4,000 years ago. When the Industrial Revolution arrived, asbestos gained significant popularity, particularly as a way to control the heat build-up in steam engines. Asbestos also served as an insulator for high-temperature products such as steam pipes, turbines, ovens, and kilns. The increased demand for asbestos led to its commercial mining in North America, Russia, and elsewhere.

In the United States, asbestos became important as the railroad infrastructure was put in place. By World War II, asbestos was widely used in the ship-building, automobile, and construction industries. In the military, asbestos was used in the construction of barracks and was present throughout aircraft, ships, and vehicles. Asbestos also was commonly used in the construction of homes, schools, and other public buildings, as well as in consumer products, such as portable heaters, hand-held hair dryers, electric blankets, and gas fireplace logs.

### Asbestos Exposure & Disease<sup>2</sup>

By 1900, doctors started reporting lung sickness and pulmonary fibrosis in patients who had worked in asbestos mines and textile factories. In the late 1970s, the U.S. Consumer Product Safety Commission banned the use of asbestos fibers in wallboard patching and gas fireplaces. In 1989, the U.S. Environmental Protection Agency (EPA) banned all new uses of asbestos, and established regulations that require school systems to inspect buildings for the presence of damaged asbestos and to eliminate or reduce occupants' exposure by removing the asbestos or encasing it.

Asbestos has been classified as a known human carcinogen by the U.S. Department of Health and Human Services, the EPA, and the International Agency for Research on Cancer. Asbestos-related diseases include an aggressive and deadly form of cancer called malignant mesothelioma, as well as a chronic lung disease called asbestosis. Asbestos exposure also may increase the risk of nonmalignant disorders of the lung and pleura (tissue around the lungs). In addition, there is evidence that asbestos exposure is linked to increased risk of cancers of the larynx, ovary, stomach, and other organs. Generally, those who develop asbestos-related diseases show no symptoms for 10 to 40 years after exposure.

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<sup>1</sup> Sources of information include *Asbestos Exposure and Cancer Risk*, National Cancer Institute; *The History of Asbestos*, History Cooperative; and asbestosnetwork.com.

<sup>2</sup> See Note 1.

Since the 1940s, millions of Americans have been exposed to asbestos through their occupations. In addition to workers in the construction, automotive, ship-building, and mining industries, individuals who may have been exposed through their jobs include teachers, firefighters, railroad workers, plumbers, electricians, and auto mechanics. There also is evidence that family members of workers heavily exposed to asbestos face an increased risk of developing mesothelioma due to the presence of fibers brought into the home on the shoes, clothing, skin, and hair of the workers.

### Bankruptcy Trusts<sup>3</sup>

The toxicity of asbestos, combined with its widespread use, led to what some have called an explosion of litigation, beginning in the 1970s. A 2005 RAND report estimated that, through 2002, approximately 730,000 people had filed asbestos claims against at least 8,400 corporate defendants. As the major asbestos manufacturers discovered that their liabilities were escalating, unpredictable, and unmanageable, many sought reorganization of their debts through bankruptcy.

One of the first companies to petition for reorganization was Johns-Manville Corporation--at the time the largest producer of asbestos-containing products. When Johns-Manville filed for Chapter 11 bankruptcy protection in 1982, the company had been named in approximately 12,500 asbestos-exposure lawsuits, brought by more than 16,000 claimants, with new suits being filed at the rate of 425 per month. The Johns-Manville bankruptcy proceedings created a model for other defendants to follow in discharging liabilities for asbestos claims through the creation of a settlement trust, funded by a majority of the bankrupt entity's stock, for the purpose of paying asbestos claimants for their injuries.

In 1994, essentially "borrowing" the Johns-Manville approach, the U.S. Congress enacted Section 524(g) of the Bankruptcy Code. This law permits a company subject to mass tort claims to establish and fund a trust to address and pay all present and future claims related to liability for asbestos exposure. Once the entity emerges from bankruptcy, all liabilities for asbestos exposure are assigned to the trust and the entity is discharged of asbestos-related liability. The trust distributes funds on the basis of Trust Distribution Procedures, which include a schedule of diseases as well as exposure and medical criteria a claimant must meet in order to receive a distribution.

Specifically, under Section 524(g), a court that enters an order confirming a plan of reorganization under Chapter 11 may issue, in connection with the order, an injunction to enjoin entities from taking legal action for the purpose of collecting, recovering, or receiving payment with respect to any claim that, under a plan of reorganization, is to be paid in whole or in part by a trust, except legal actions permitted by the injunction. The trust must meet all of the following criteria:

- It is to assume the liabilities of a debtor that has been named as a defendant in personal injury, wrongful death, or property damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.
- It is to be funded in whole or in part by the securities of one or more debtors involved in the plan of reorganization and by the obligation of the debtor or debtors to make future payments, including dividends.
- It is to own a majority of the voting shares of each such debtor, the parent company of each debtor, or a subsidiary of each such debtor that also is a debtor.
- It is to use its assets or income to pay claims and demands.

In addition, the court must make certain determinations, including that the debtor is likely to be subject to substantial future claims for payment arising out of the same or similar conduct that gave rise to the claims addressed by the injunction; that the actual amounts, numbers, and timing of those claims cannot be determined; and that pursuit of those demands outside the procedures

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<sup>3</sup> *Asbestos Bankruptcy Trusts*, "An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts", by Lloyd Dixon, Geoffrey McGovern, & Amy Coombe, RAND Institute for Civil Justice, 2010; and *Bankruptcy Trusts and Asbestos Litigation*, by Lee Blanton Ziffer, American Bar Association Section of Litigation, 6-11-2012

prescribed by the plan would be likely to threaten its purpose to deal equitably with claims and future demands.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

As a result of an avalanche of asbestos litigation, the largest and most culpable defendants have obtained bankruptcy protection, leaving those entities immune from suit. Since many individuals continue to seek compensation for asbestos exposure, which may have occurred decades earlier, plaintiffs are turning to still-solvent entities for relief. It has been estimated that asbestos defendants now number 8,500, including many small and medium-sized businesses, in industries that cover 85% of the U.S. economy, according to the American Legislative Exchange Council. These entities are sometimes called peripheral defendants, and often have little or nothing to do with a plaintiff's alleged exposure. Nevertheless, they have to endure lengthy and expensive litigation to prove their lack of liability, or are forced to settle in order to avoid a trial.

This problem is exacerbated when plaintiffs fail to disclose trust claims that they have filed, or delay filing trust claims until the civil lawsuit has been resolved, or both. Under Michigan law, in most actions seeking damages for personal injury, the liability of each defendant is "several only and not joint". This means that if more than one person, including someone who is not a party to the action, contributed to the plaintiff's injuries, a defendant is liable only for the percentage of the damages for which that defendant was at fault. In an asbestos action, for example, a defendant might have once employed a plaintiff who has mesothelioma, but the plaintiff's exposure to asbestos might have come from an entirely different job site. If the plaintiff does not disclose that he or her has filed a trust claim to recover for his or her disease, or is eligible for compensation from a trust but has not filed a claim, the jury is not aware of the other source or sources of the plaintiff's exposure and cannot properly determine the extent of the defendant's fault. The defendant cannot adequately defend itself and is denied the right to a reduction of the damages based on the liability of another entity.

The bill would alleviate this situation by mandating transparency in asbestos litigation. First, the bill would ensure full disclosure by requiring a plaintiff to provide a sworn statement that all trust claims he or she could make had been completed and filed, and to provide all trust claims materials to all of the parties. Then, if the defendant believed that the plaintiff had not filed all trust claims, the defendant would have to confer with the plaintiff and could seek a court order requiring him or her to file the additional claims. If the court agreed that there was a sufficient basis for the plaintiff to file an additional claim, the lawsuit could not proceed until he or she did so. If the plaintiff established that the cost to file a claim would be more than the amount he or she would likely recover, the lawsuit could not proceed until the plaintiff gave the court and all parties information about his or her history of exposure to asbestos, use of asbestos, or other connection with asbestos. In either case, the court and the jury would be fully informed about other entities that could be responsible for the plaintiff's exposure. If the plaintiff did not comply, the court could dismiss the lawsuit.

The bill also would enhance transparency by allowing a defendant to seek discovery from an asbestos trust, which would enable the defendant to gather evidence by requesting the production of documents, requesting answers to written interrogatories, and deposing witnesses. In addition, the bill would prevent a plaintiff from claiming that information was privileged or confidential, and would require the plaintiff to consent to the release of materials sought by the defendant.

Furthermore, the plaintiff would be under a continuing obligation to supplement the information originally provided about his or her trust claims, and would have to do so if he or she supplemented an existing trust claim, received additional information related to a claim, or filed an additional claim. Finally, if the plaintiff obtained a judgment in the asbestos action, and subsequently filed a

trust claim that existed when the judgment was entered, the court could adjust the judgment by the amount the plaintiff received from trust payments and could order other relief.

In sum, if the bill were enacted, a defendant would no longer have choose between undergoing an expensive and protracted trial in which it cannot properly defend itself, or entering into a settlement simply to avoid the time and cost of litigation, as well as the potential damage to the defendant's reputation and exposure to additional lawsuits. Because juries would be fully informed about a plaintiff's trust claims, the individual's history of asbestos use and exposure, and other responsible entities, jurors would be able to determine the extent of the defendant's liability, if any, and could apportion the fault among all of the entities accordingly.

### **Supporting Argument**

The bill would improve upon current practices in Michigan courts involving asbestos personal injury cases. Under Case Management Orders (CMOs) issued in Wayne County, and used throughout the State, plaintiffs already are required to provide copies of all bankruptcy claims forms that they have submitted. The bill would require a plaintiff not only to disclose all trust claims that he or she filed or could file, but also to file them. Further, the bill essentially would codify existing standards for disclosure in what is called a discovery brochure. In addition to providing the names of a plaintiff's employers, the specific job or site where the plaintiff was exposed to asbestos products, and the identification of all other products used on the job or exposure site, the plaintiff must identify witnesses who could testify about his or her exposure or about the defendant's product or premises, as well as information concerning all exposure to asbestos-containing products known or reasonably available to the plaintiff or his or her attorney, including products manufactured or distributed by companies that are not defendants to the action. In other words, a plaintiff already is required to identify other entities that, to his or her knowledge, might be responsible for the exposure, whether or not they are parties to the action, nonparties, solvent, or bankrupt.

The bill also would require transparency on the part of the defendant by requiring the defendant to confer with the plaintiff if it believed that he or she could file additional trust claims. If the defendant then sought a court order requiring the plaintiff to file additional claims, the motion would have to identify the claims and provide supporting information. In addition to enhancing transparency, these provisions could expedite the resolution of the dispute.

### **Supporting Argument**

While ensuring transparency in asbestos cases, the bill would give a plaintiff adequate time to perform discovery before he or she would be required, not later than 180 days before the trial date, to provide a sworn statement that all bankruptcy trust claims had been completed and filed. Typically, there are two years between the time a plaintiff files an asbestos action and a trial begins. Under the bill, the plaintiff would have approximately a year and a half to gather all of the evidence needed to properly file trust claims. This process includes obtaining medical records, employment records, social security information, and product information, locating and deposing witnesses, and submitting interrogatories, or written questionnaires. In many instances, a plaintiff will have to get a court order for the production of documents. The time frame proposed by the bill would be fair and reasonable.

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Michael Siracuse

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.