As Passed by the Senate

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Am. Sub. H. B. No. 292

Representatives Oelslager, Seitz, Widener, Aslanides, Collier, Daniels, Faber, Flowers, Schaffer, Setzer

Senators Stivers, Amstutz, Austria, Coughlin, Harris, Jacobson, Mumper, Wachtmann, Spada

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A BILL

To amend section 2505.02 and to enact sections 2307.91 to 2307.94, 2307.941, 2307.95, 2307.96, and 2307.98 of the Revised Code to establish minimum medical requirements for filing certain asbestos claims, to specify a plaintiff's burden of proof in tort actions involving exposure to asbestos, to establish premises liability in relation to asbestos claims, and to prescribe the requirements for shareholder liability for asbestos claims under the doctrine of piercing the corporate veil.

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

Section 1. That section 2505.02 be amended and sections 2307.91, 2307.92, 2307.93, 2307.94, 2307.941, 2307.95, 2307.96, and 2307.98 of the Revised Code be enacted to read as follows:

Sec. 2307.91. As used in sections 2307.91 to 2307.96 of the Revised Code:

(A) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(B) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(C) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos.

(D) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(E) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(F) "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American board of preventive medicine in the specialty of occupational medicine.

(G) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(H) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(I) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(J) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(K) "Certified industrial hygienist" means an industrial hygienist who has attained the status of diplomate of the American academy of industrial hygiene subject to compliance with requirements established by the American board of industrial hygiene.

(L) "Certified safety professional" means a safety professional who has met and continues to meet all requirements established by the board of certified safety professionals and is authorized by that board to use the certified safety professional title or the CSP designation.

(M) "Civil action" means all suits or claims of a civil nature in a state or federal court, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(1) A civil action relating to any workers' compensation law;

(2) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. section 524(g);

(3) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11.

(N) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim under section 2307.92 of the Revised Code.

(O) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(P) "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration.

(Q) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (2000), as amended.

(R) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include mesothelioma.

(S) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques.

(T) "Nonmalignant condition" means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

(U) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis.

(V) "Physical impairment" means a nonmalignant condition that meets the minimum requirements specified in division (B) of section 2307.92 of the Revised Code, lung cancer of an exposed person who is a smoker that meets the minimum requirements specified in division (C) of section 2307.92 of the Revised Code, or a condition of a deceased exposed person that meets the minimum requirements specified in division (D) of section 2307.92 of the Revised Code.

(W) "Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes.

(X) "Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA guides to the evaluation of permanent impairment.

(Y) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters.

(Z) "Competent medical authority" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in section 2307.92 of the Revised Code and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(a) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted;

(b) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that was conducted without clearly establishing a doctor-patient relationship with the claimant or medical personnel involved in the examination, test, or screening process;

(c) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the claimant's medical condition that required the claimant to agree to retain the legal services of the law firm sponsoring the examination, test, or screening.

(4) The medical doctor spends not more than twenty-five per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(AA) "Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale.

(BB) "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle.

(CC) "Regular basis" means on a frequent or recurring basis.

(DD) "Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority pursuant to sections 2307.92 and 2307.93 of the Revised Code, during the last fifteen years.

(EE) "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung.

(FF) "Substantial contributing factor" means both of the following:

(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim.

(2) A competent medical authority has determined with a reasonable degree of medical certainty that without the asbestos exposures the physical impairment of the exposed person would not have occurred.

(GG) "Substantial occupational exposure to asbestos" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(1) Handled raw asbestos fibers;

(2) Fabricated asbestos-containing products so that the person was exposed to raw asbestos fibers in the fabrication process;

(3) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that exposed the person on a regular basis to asbestos fibers;

(4) Worked in close proximity to other workers engaged in any of the activities described in division (GG)(1), (2), or (3) of this section in a manner that exposed the person on a regular basis to asbestos fibers.

(HH) "Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in the lung is then compared to the concentration of that type of gas in the spirometer.

(II) "Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons.

(JJ) "Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration.

(KK) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code.

(LL) "Workers' compensation law" means Chapters 4121., 4123., 4127., and 4131. of the Revised Code.

Sec. 2307.92. (A) For purposes of section 2305.10 and sections 2307.92 to 2307.95 of the Revised Code, "bodily injury caused by exposure to asbestos" means physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor.

(B) No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(1) Evidence verifying that a competent medical authority has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each principal place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the general nature, duration, and general level of the exposure.

(2) Evidence verifying that a competent medical authority has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a competent medical authority, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) Either of the following:

(i) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening. The asbestosis or diffuse pleural thickening described in this division, rather than solely chronic obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has any of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal;

(III) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(ii) If the exposed person has a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as only a 1/0 on the ILO scale, then in order to establish that the exposed person has asbestosis, rather than solely chronic obstructive pulmonary disease, that is a substantial contributing factor to the exposed person's physical impairment the plaintiff must establish that the exposed person has both of the following:

(I) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(II) A total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal.

(C)(1) No person shall bring or maintain a tort action alleging an asbestos claim based upon lung cancer of an exposed person who is a smoker, in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to asbestos until the date of diagnosis of the exposed person's primary lung cancer. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the exposed person's occupational history and history of exposure to asbestos.

(2) If a plaintiff files a tort action that alleges an asbestos claim based upon lung cancer of an exposed person who is a smoker, alleges that the plaintiff's exposure to asbestos was the result of living with another person who, if the tort action

had been filed by the other person, would have met the requirements specified in division (C)(1)(c) of this section, and alleges that the plaintiff lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code, the plaintiff is considered as having satisfied the requirements specified in division (C)(1)(c) of this section.

(D)(1) No person shall bring or maintain a tort action alleging an asbestos claim that is based upon a wrongful death, as described in section 2125.01 of the Revised Code of an exposed person in the absence of a prima-facie showing, in the manner described in division (A) of section 2307.93 of the Revised Code, that the death of the exposed person was the result of a physical impairment, that the death and physical impairment were a result of a medical condition, and that the deceased person's exposure to asbestos was a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements:

(a) A diagnosis by a competent medical authority that exposure to asbestos was a substantial contributing factor to the death of the exposed person;

(b) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the deceased exposed person's first exposure to asbestos until the date of diagnosis or death of the deceased exposed person. The ten-year latency period described in this division is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

(c) Either of the following:

(i) Evidence of the deceased exposed person's substantial occupational exposure to asbestos;

(ii) Evidence of the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified safety professional based upon all reasonably available quantitative air monitoring data and all other reasonably available information about the deceased exposed person's occupational history and history of exposure to asbestos.

(2) If a person files a tort action that alleges an asbestos claim based on a wrongful death, as described in section 2125.01 of the Revised Code, of an exposed person, alleges that the death of the exposed person was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements specified in division (D)(1)(c) of this section, and alleges that the exposed person lived with the other person for the period of time specified in division (GG) of section 2307.91 of the Revised Code in order to qualify as a substantial occupational exposure to asbestos, the exposed person is considered as having satisfied the requirements specified in division (D)(1)(c) of this section.

(3) No court shall require or permit the exhumation of a decedent for the purpose of obtaining evidence to make, or to oppose, a prima-facie showing required under division (D)(1) or (2) of this section regarding a tort action of the type described in that division.

(E) No prima-facie showing is required in a tort action alleging an asbestos claim based upon mesothelioma.

(F) Evidence relating to physical impairment under this section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretive standards set forth in the official statement of the American thoracic society entitled "lung function testing: selection of reference values and interpretive strategies" as published in American review of respiratory disease, 1991:144:1202-1218.

(G) All of the following apply to the court's decision on the prima-facie showing that meets the requirements of division (B), (C), or (D) of this section:

(1) The court's decision does not result in any presumption at trial that the exposed person has a physical impairment that is caused by an asbestos-related condition.

(2) The court's decision is not conclusive as to the liability of any defendant in the case.

(3) The court's findings and decisions are not admissible at trial.

(4) If the trier of fact is a jury, the court shall not instruct the jury with respect to the court's decision on the prima-facie showing, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that showing.

Sec. 2307.93. (A)(1) The plaintiff in any tort action who alleges an asbestos claim shall file, within thirty days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. The defendant in the case shall be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The defendant has one hundred twenty days from the date the specified type of prima-facie evidence is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in divisions (Z)(1), (3), and (4) of section 2307.91 of the Revised Code.

(2) With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in division (A)(1) of this section within one hundred twenty days following the effective date of this section. Upon motion and for good cause shown, the court may extend the one hundred twenty-day period described in this division.

(3)(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the court that has jurisdiction over the case finds both of the following:

(i) A substantive right of a party to the case has been impaired.

(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.

(b) If a finding under division (A)(3)(a) of this section is made by the court that has jurisdiction over the case, then the court shall determine whether the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that is in effect prior to the effective date of this section.

(c) If the court that has jurisdiction of the case finds that the plaintiff has failed to provide sufficient evidence to support the plaintiff's cause of action or right to relief under division (A)(3)(b) of this section, the court shall administratively dismiss the plaintiff's claim without prejudice. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff provides sufficient evidence to support the plaintiff's cause of action or the right to relief under the law that was in effect when the plaintiff's cause of action arose.

(B) If the defendant in an action challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as provided in division (A)(1) of this section, the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall resolve the issue of whether the plaintiff has made the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code by applying the standard for resolving a motion for summary judgment.

(C) The court shall administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code. The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in division (B), (C), or (D) of section 2307.92 of the Revised Code.

Sec. 2307.94. (A) Notwithstanding any other provision of the Revised Code, with respect to any asbestos claim based upon a nonmalignant condition that is not barred as of the effective date of this section, the period of limitations shall not begin to run until the exposed person has a cause of action for bodily injury pursuant to section 2305.10 of the Revised Code. An asbestos claim based upon a nonmalignant condition that is filed before the cause of action for bodily injury pursuant to that section arises is preserved for purposes of the period of limitations.

(B) An asbestos claim that arises out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer. No damages shall be awarded for fear or risk of cancer in any tort action asserting only an asbestos claim for a nonmalignant condition.

(C) No settlement of an asbestos claim for a nonmalignant condition that is concluded after the effective date of this section shall require, as a condition of settlement, the release of any future claim for asbestos-related cancer.

Sec. 2307.941. (A) The following apply to all tort actions for asbestos claims brought against a premises owner to recover damages or other relief for exposure to asbestos on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at

the premises owner's property.

(2) If exposure to asbestos is alleged to have occurred before January 1, 1972, it is presumed that a premises owner knew that this state had adopted safe levels of exposure for asbestos and that products containing asbestos were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of asbestos in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state and that the premises owner allowed that condition to persist.

(3)(a) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove asbestos products on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that at the time of the exposure to asbestos that is alleged the premises owner had actual knowledge of the potential dangers of the asbestos products at the time of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer.

(b) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform cannot be liable for any injury to any individual resulting from asbestos exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

(c) If exposure to asbestos is alleged to have occurred on or after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes the premises owner's intentional violation of an established safety standard that was in effect at the time of the exposure and that the alleged violation was in the plaintiff's breathing zone and was the proximate cause of the plaintiff's medical condition.

(B) As used in this section:

(1) "Threshold limit values" means that, for the years 1946 through 1971, the concentration of asbestos in a worker's breathing zone did not exceed the following maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration:

(a) Asbestos: five million particles per cubic foot;

(b) Cadmium: 0.10 milligrams per cubic meter;

(c) Chromic acid and chromates (calculated as chromic oxide): 0.10 milligrams per cubic meter;

(d) Lead: 0.15 milligrams per cubic meter;

(e) Manganese: 6.0 milligrams per cubic meter;

(f) Mercury: 0.10 milligrams per cubic meter;

(g) Zinc oxide: 15.0 milligrams per cubic meter;

(h) Chlorinated diphenyls: 1.0 milligram per cubic meter;

(i) Chlorinated naphthalenes (trichlornaphthalene): 5.0 milligrams per cubic meter;

(j) Chlorinated naphthalenes (pentachlornaphthalene): 0.50 milligrams per cubic meter.

(2) "Established safety standard" means that, for the years

after 1971, the concentration of asbestos in the breathing zone of a worker does not exceed the maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration as promulgated by the occupational safety and health administration (OSHA) in effect at the time of the alleged exposure.

(3) "Employee" means an individual who performs labor or provides construction services pursuant to a construction contract as defined in section 4123.79 of the Revised Code, or a remodeling or repair contract, whether written or oral, if at least ten of the following criteria apply:

(a) The individual is required to comply with instructions from the other contracting party regarding the manner or method of performing services.

(b) The individual is required by the other contracting party to have particular training.

(c) The individual's services are integrated into the regular functioning of the other contracting party.

(d) The individual is required to perform the work personally.

(e) The individual is hired, supervised, or paid by the other contracting party.

(f) A continuing relationship exists between the individual and the other contracting party that contemplates continuing or recurring work even if the work is not full time.

(g) The individual's hours of work are established by the other contracting party.

(h) The individual is required to devote full time to the business of the other contracting party.

(i) The person is required to perform the work on the premises of the other contracting party.

(j) The individual is required to follow the order of work set by the other contracting party.

(k) The individual is required to make oral or written reports of progress to the other contracting party.

(l) The individual is paid for services on a regular basis, including hourly, weekly, or monthly.

(m) The individual's expenses are paid for by the other contracting party.

(n) The individual's tools and materials are furnished by the other contracting party.

(o) The individual is provided with the facilities used to perform services.

(p) The individual does not realize a profit or suffer a loss as a result of the services provided.

(q) The individual is not performing services for a number of employers at the same time.

(r) The individual does not make the same services available to the general public.

(s) The other contracting party has a right to discharge the individual.

(t) The individual has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Sec. 2307.95. (A) Nothing in sections 2307.92 to 2307.95 of the Revised Code is intended to do, and nothing in any of those sections shall be interpreted to do, either of the following:

(1) Affect the rights of any party in bankruptcy proceedings;

(2) Affect the ability of any person who is able to make a

showing that the person satisfies the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter 11, to make a claim or demand against that trust.

(B) Sections 2307.91 to 2307.95 of the Revised Code shall not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and shall not authorize any lawsuit that is barred by any provision of any workers' compensation law.

(C) Except as provided in division (D) of section 2307.92 of the Revised Code and in other provisions that relate to the application of that division and the procedures and criteria it contains, nothing in sections 2307.92, 2307.93, 2307.94, and 2307.95 of the Revised Code is intended, and nothing in any of those sections shall be interpreted, to affect any wrongful death claim, as described in section 2125.01 of the Revised Code.

Sec. 2307.96. (A) If a plaintiff in a tort action alleges any injury or loss to person resulting from exposure to asbestos as a result of the tortious act of one or more defendants, in order to maintain a cause of action against any of those defendants based on that injury or loss, the plaintiff must prove that the conduct of that particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based.

(B) A plaintiff in a tort action who alleges any injury or loss to person resulting from exposure to asbestos has the burden of proving that the plaintiff was exposed to asbestos that was manufactured, supplied, installed, or used by the defendant in the action and that the plaintiff's exposure to the defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. In determining whether exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

(1) The manner in which the plaintiff was exposed to the defendant's asbestos;

(2) The proximity of the defendant's asbestos to the plaintiff when the exposure to the defendant's asbestos occurred;

(3) The frequency and length of the plaintiff's exposure to the defendant's asbestos;

(4) Any factors that mitigated or enhanced the plaintiff's exposure to asbestos.

(C) This section applies only to tort actions that allege any injury or loss to person resulting from exposure to asbestos and that are brought on or after the effective date of this section.

Sec. 2307.98. (A) A holder has no obligation to, and has no liability to, the covered entity or to any person with respect to any obligation or liability of the covered entity in an asbestos claim under the doctrine of piercing the corporate veil unless the person seeking to pierce the corporate veil demonstrates all of the following:

(1) The holder exerted such control over the covered entity that the covered entity had no separate mind, will, or existence of its own.

(2) The holder caused the covered entity to be used for the purpose of perpetrating, and the covered entity perpetrated, an actual fraud on the person seeking to pierce the corporate veil primarily for the direct pecuniary benefit of the holder.

(3) The person seeking to pierce the corporate veil sustained an injury or unjust loss as a direct result of the control described in division (A)(1) of this section and the fraud described in division (A)(2) of this section.

(B) A court shall not find that the holder exerted such control over the covered entity that the covered entity did not have a separate mind, will, or existence of its own or to have caused the covered entity to be used for the purpose of perpetrating a fraud solely as a result of any of the following actions, events, or relationships:

(1) The holder is an affiliate of the covered entity and provides legal, accounting, treasury, cash management, human resources, administrative, or other similar services to the covered entity, leases assets to the covered entity, or makes its employees available to the covered entity.

(2) The holder loans funds to the covered entity or guarantees the obligations of the covered entity.

(3) The officers and directors of the holder are also officers and directors of the covered entity.

(4) The covered entity makes payments of dividends or other distributions to the holder or repays loans owed to the holder.

(5) In the case of a covered entity that is a limited liability company, the holder or its employees or agents serve as the manager of the covered entity.

(C) The person seeking to pierce the corporate veil has the burden of proof on each and every element of the person's claim and must prove each element by a preponderance of the evidence.

(D) Any liability of the holder described in division (A) of this section for an obligation or liability that is limited by that division is exclusive and preempts any other obligation or liability imposed upon that holder for that obligation or liability under common law or otherwise.

(E) This section is intended to codify the elements of the common law cause of action for piercing the corporate veil and to abrogate the common law cause of action and remedies relating to piercing the corporate veil in asbestos claims. Nothing in this section shall be construed as creating a right or cause of action that did not exist under the common law as it existed on the effective date of this section.

(F) This section applies to all asbestos claims commenced on or after the effective date of this section or commenced prior to and pending on the effective date of this section.

(G) This section applies to all actions asserting the doctrine of piercing the corporate veil brought against a holder if any of the following apply:

(1) The holder is an individual and resides in this state.

(2) The holder is a corporation organized under the laws of this state.

(3) The holder is a corporation with its principal place of business in this state.

(4) The holder is a foreign corporation that is authorized to conduct or has conducted business in this state.

(5) The holder is a foreign corporation whose parent corporation is authorized to conduct business in this state.

(6) The person seeking to pierce the corporate veil is a resident of this state.

(H) As used in this section, unless the context otherwise requires:

(1) "Affiliate" and "beneficial owner" have the same meanings

as in section 1704.01 of the Revised Code.

(2) "Asbestos" has the same meaning as in section 2307.91 of the Revised Code.

(3) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes any of the following:

(a) A claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos;

(b) A claim for damage or loss to property that is caused by the installation, presence, or removal of asbestos.

(4) "Corporation" means a corporation for profit, including the following:

(a) A domestic corporation that is organized under the laws of this state;

(b) A foreign corporation that is organized under laws other than the laws of this state and that has had a certificate of authority to transact business in this state or has done business in this state.

(5) "Covered entity" means a corporation, limited liability company, limited partnership, or any other entity organized under the laws of any jurisdiction, domestic or foreign, in which the shareholders, owners, or members are generally not responsible for the debts and obligations of the entity. Nothing in this section limits or otherwise affects the liabilities imposed on a general

partner of a limited partnership.

(6) "Holder" means a person who is the holder or beneficial owner of, or subscriber to, shares or any other ownership interest of a covered entity, a member of a covered entity, or an affiliate of any person who is the holder or beneficial owner of, or subscriber to, shares or any other ownership interest of a covered entity.

(7) "Piercing the corporate veil" means any and all common law doctrines by which a holder may be liable for an obligation or liability of a covered entity on the basis that the holder controlled the covered entity, the holder is or was the alter ego of the covered entity, or the covered entity has been used for the purpose of actual or constructive fraud or as a sham to perpetrate a fraud or any other common law doctrine by which the covered entity is disregarded for purposes of imposing liability on a holder for the debts or obligations of that covered entity.

(8) "Person" has the same meaning as in section 1701.01 of the Revised Code.

Sec. 2505.02. (A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, ~~or~~ suppression of evidence, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant

to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on ~~the effective date of this amendment~~ July 22, 1998, and all claims filed or actions commenced on or after ~~the effective date of this amendment~~ July

22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Section 2. That existing section 2505.02 of the Revised Code is hereby repealed.

Section 3. (A) The General Assembly makes the following statement of findings and intent:

(1) Asbestos claims have created an increased amount of litigation in state and federal courts that the United States Supreme Court has characterized as "an elephant mass" of cases.

(2) The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike. A recent RAND study estimates that a total of fifty-four billion dollars have already been spent on asbestos litigation and the costs continue to mount. Compensation for asbestos claims has risen sharply since 1993. The typical claimant in an asbestos lawsuit now names sixty to seventy defendants, compared with an average of twenty named defendants two decades ago. The RAND Report also suggests that at best, only one-half of all claimants have come forward and at worst, only one-fifth have filed claims to date. Estimates of the total cost of all claims range from two hundred to two hundred sixty-five billion dollars. Tragically, plaintiffs are receiving less than forty-three cents on every dollar awarded, and sixty-five per cent of the compensation paid, thus far, has gone to claimants who are not sick.

(3) The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts.

(a) Today, it is estimated that there are more than two hundred thousand active asbestos cases in courts nationwide. According to a recent RAND study, over six hundred thousand people have filed asbestos claims for asbestos-related personal injuries through the end of 2000.

(b) Before 1998, five states, Mississippi, New York, West Virginia, Texas, and Ohio, accounted for nine per cent of the cases filed. However, between 1998 and 2000, these same five states handled sixty-six per cent of all filings. Today, Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings.

(c) According to testimony by Laura Hong, a partner at the law firm of Squire, Sanders & Dempsey who has been defending companies in asbestos personal injury litigation since 1985, there are at least thirty-five thousand asbestos personal injury cases pending in Ohio state courts today.

(d) If the two hundred thirty-three Ohio state court general jurisdictional judges started trying these asbestos cases today, Ms. Hong noted, each would have to try over one hundred fifty cases before retiring the current docket. That figure conservatively computes to at least one hundred fifty trial weeks or more than three years per judge to retire the current docket.

(e) The current docket, however, continues to increase at an exponential rate. According to Judge Leo Spellacy, one of two Cuyahoga County Common Pleas Court judges appointed by the Ohio Supreme Court to manage the Cuyahoga County case management order for asbestos cases, in 1999 there were approximately twelve thousand eight hundred pending asbestos cases in Cuyahoga County. However, by the end of October 2003, there were over thirty-nine thousand pending asbestos cases. Approximately two hundred new asbestos cases are filed in Cuyahoga County every month.

(4) Nationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies, including nearly all manufacturers of asbestos textile

and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

(a) As stated by Linda Woggon, Vice President of Governmental Affairs of the Ohio Chamber of Commerce, a recent RAND study found that during the first ten months of 2002, fifteen companies facing significant asbestos-related liabilities filed for bankruptcy and more than sixty thousand jobs have been lost because of these bankruptcies. The RAND study estimates that the eventual cost of asbestos litigation could reach as high as four hundred twenty-three thousand jobs.

(b) Joseph Stiglitz, Nobel award-winning economist, in "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," calculated that bankruptcies caused by asbestos have already resulted in the loss of up to sixty thousand jobs and that each displaced worker in the bankrupt companies will lose, on average, an estimated twenty-five thousand to fifty thousand dollars in wages over the worker's career, and at least a quarter of the accumulated pension benefits.

(c) At least five Ohio-based companies have been forced into bankruptcy because of an unending flood of asbestos cases brought by claimants who are not sick.

(d) Owens Corning, a Toledo company, has been sued four hundred thousand times by plaintiffs alleging asbestos-related injury and as a result was forced to file bankruptcy. The type of job and pension loss many Toledoans have faced because of the Owens Corning bankruptcy also can be seen in nearby Licking County where, in 2000, Owens Corning laid off two hundred seventy-five workers from its Granville plant. According to a study conducted by NERA Economic Consulting in 2000, the ripple effect of those losses is predicted to result in a total loss of five hundred jobs and a fifteen-million to twenty-million dollar annual reduction in regional income.

(e) According to testimony presented by Robert Bunda, a partner at the firm of Bunda, Stutz & DeWitt in Toledo, Ohio who has been involved with the defense of asbestos cases on behalf of Owens-Illinois for twenty-four years, at least five Ohio-based companies have gone bankrupt because of the cost of paying people who are not sick. Wage losses, pension losses, and job losses have significantly affected workers for the bankrupt companies like Owens Corning, Babcox & Wilcox, North American Refractories, and A-Best Corp.

(5) The General Assembly recognizes that the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment. Eighty-nine per cent of asbestos claims come from people who do not have cancer. Sixty-six to ninety per cent of these non-cancer claimants are not sick. According to a Tillinghast-Towers Perrin study, ninety-four per cent of the fifty-two thousand nine hundred asbestos claims filed in 2000 concerned claimants who are not sick. As a result, the General Assembly recognizes that reasonable medical criteria are a necessary response to the asbestos litigation crisis in this state. Medical criteria will expedite the resolution of claims brought by those sick claimants and will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future. As stated by Dr. James Allen, a pulmonologist, Professor and Vice-Chairman of the Department of Internal Medicine at The Ohio State University, the medical criteria included in this act are reasonable criteria and are the first step toward ensuring that impaired plaintiffs are compensated. In fact, Dr. Allen noted that these criteria are minimum medical criteria. In

his clinical practice, Dr. Allen stated that he always performs additional tests before assigning a diagnosis of asbestosis and would never rely solely on these medical criteria.

(6) The cost of compensating exposed individuals who are not sick jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future; threatens savings, retirement benefits, and jobs of the state's current and retired employees; adversely affects the communities in which these defendants operate; and impairs Ohio's economy.

(7) The public interest requires the deferring of claims of exposed individuals who are not sick in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits, and savings of the state's employees and the well being of the Ohio economy.

(B) In enacting sections 2307.91 to 2307.98 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future.

Section 4. (A) As used in this section, "asbestos," "asbestos claim," "exposed person," and "substantial contributing factor" have the same meanings as in section 2307.91 of the Revised Code.

(B) The General Assembly acknowledges the Supreme Court's authority in prescribing rules governing practice and procedure in the courts of this state, as provided by Section 5 of Article IV of the Ohio Constitution.

(C) The General Assembly hereby requests the Supreme Court to adopt rules to specify procedures for venue and consolidation of asbestos claims brought pursuant to sections 2307.91 to 2307.95 of the Revised Code.

(D) With respect to procedures for venue in regard to asbestos claims, the General Assembly hereby requests the Supreme Court to adopt a rule that requires that an asbestos claim meet specific nexus requirements, including the requirement that the plaintiff be domiciled in Ohio or that Ohio is the state in which the plaintiff's exposure to asbestos is a substantial contributing factor.

(E) With respect to procedures for consolidation of asbestos claims, the General Assembly hereby requests the Supreme Court to adopt a rule that permits consolidation of asbestos claims only with the consent of all parties, and in absence of that consent, permits a court to consolidate for trial only those asbestos claims that relate to the same exposed person and members of the exposed person's household.

Section 5. It is the intent of the General Assembly in enacting section 2307.96 of the Revised Code in this act to establish specific factors to be considered when determining whether a particular plaintiff's exposure to a particular defendant's asbestos was a substantial factor in causing the plaintiff's injury or loss. The consideration of these factors involving the plaintiff's proximity to the asbestos exposure, frequency of the exposure, or regularity of the exposure in tort actions involving exposure to asbestos is consistent with the factors listed by the court in *Lohrmann v. Pittsburgh Corning Cor.* (4th Cir. 1986), 782 F.2d 1156. The General Assembly by its enactment of those factors intends to clarify and define for judges and juries that evidence which is relevant to the common law requirement that plaintiff must prove proximate causation. It recognizes this section's language is contrary to the language contained in paragraph 2 of the Syllabus of the Ohio Supreme Court in *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679. However, the General Assembly also recognizes that the courts of Ohio prior to the *Horton* decision generally followed the rationale of the *Lohrmann* decision in determining whether plaintiff had submitted any evidence that a particular defendant's product was a substantial cause of the plaintiff's injury in tort actions involving exposure to certain hazardous or toxic substances, and that the *Lohrmann* factors were of great assistance to the trial courts in the consideration of summary judgment motions and to juries when deciding issues of proximate causation. The General Assembly further recognizes that a large number of states have adopted this standard. It has also held hearings where medical evidence has been submitted indicating such a standard is medically appropriate and is scientifically sound public policy. The *Lohrmann* standard provides litigants, juries, and the courts of Ohio an objective and easily applied standard for determining whether a plaintiff has submitted evidence sufficient to sustain plaintiff's burden of proof as to proximate causation. Where specific evidence of frequency of exposure, proximity and length of exposure to a particular defendant's asbestos is lacking, summary judgment is appropriate in tort actions involving asbestos because such a plaintiff lacks any evidence of an essential element necessary to prevail. To submit a legal concept such as a "substantial factor" to a jury in these complex cases without such scientifically valid defining factors would be to invite speculation on the part of juries, something that the General Assembly has determined not to be in the best interests of Ohio and its courts.

Section 6. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

Section 7. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given affect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

Section 8. The General Assembly hereby requests the Supreme Court to collect data regarding the number of awards made pursuant to section 2323.42 or 2323.51 of the Revised Code to parties to civil actions in the courts of common pleas who were adversely affected by frivolous conduct as defined in section 2323.51 of the Revised Code or by the bringing of a civil action for which there was not a reasonable good faith basis.