*Aida S. Montano* *Legislative Service Commission*

# Sub. S.B. 80

125th General Assembly
(As Passed by the Senate)

**Sens. Stivers, Hottinger, Goodman, Wachtmann, Amstutz, Randy Gardner, Austria, Nein, Schuring, Armbruster, Coughlin, Carey, Harris, Mumper, Schuler**

## BILL SUMMARY

***Specific causes of action***

- Provides that in a tort action, generally, an owner, lessee, renter, or operator of premises that are open to the public for direct access to growing agricultural produce is not imputed to extend any assurance to a person that the premises are safe from naturally occurring hazards by giving permission to the person to enter the premises or by receiving consideration for the produce picked, or to assume responsibility or liability for injury, death, or loss to person or property allegedly resulting from the condition of the terrain of the premises.

- Prohibits the commencement of a wrongful death action if the decedent was compensated for the decedent's injuries prior to the decedent's death, the decedent executed a valid release of the decedent's claim, and the decedent's personal injuries were sustained under the same circumstances that otherwise could be the basis of a civil action for wrongful death.

- Prohibits the commencement of a wrongful death action if a judgment for damages was entered in a civil action prior to the decedent's death, the judgment was fully satisfied, and the decedent's personal injuries that were the subject of that civil action were sustained under the same circumstances that otherwise could have been the basis of a civil action for wrongful death.

- Provides that no civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained if the period of limitation that applies to

that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

- Requires that generally an action based on a product liability claim and an action for bodily injury or injury to personal property be brought within two years after the cause of action accrues and provides that generally such a cause of action accrues when the injury or loss to person or property occurs.

- Provides that a cause of action for bodily injury that is not caused by exposure to chromium or asbestos, not incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, and not caused by exposure to DES or other nonsteroidal synthetic estrogens, and is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices, accrues upon the earlier of the date competent medical authority informs the plaintiff of the injury that is related to the exposure or the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure.

- Provides that a cause of action for bodily injury incurred by a veteran through the exposure to chemical defoliants or herbicides or other causative agents, including agent orange, accrues upon the earlier of the date on which competent medical authority informs the plaintiff of the injury that is related to the exposure or the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff had an injury that is related to the exposure.

- Provides that a cause of action for bodily injury caused by exposure to DES or other nonsteroidal synthetic estrogens accrues upon the earlier of the date on which competent medical authority informs the plaintiff that the plaintiff has an injury that is related to the exposure or on the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure.

***Statutes of repose***

- Prohibits the accrual of a wrongful death action involving, or another cause of action based on, a product liability claim against the manufacturer or supplier of a product later than ten years from the date

the product was delivered to the first purchaser or first lessee who was not engaged in a business involving the product, but excepts a wrongful death action or another cause of action from this statute of repose if the manufacturer or supplier engaged in fraud in regard to information about the product and the fraud contributed to the harm alleged.

- Specifies that the ten-year statute of repose described in the prior dot point does not bar a civil action for wrongful death or another tort action against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the decedent's death or the accrual of the cause of action, has not expired and permits a wrongful death action or another tort action involving such a product liability claim to be commenced within two years after the death or after the cause of action accrues, if the death occurs or the cause of action accrues less than two years prior to the expiration date of the ten-year statute of repose.

- Provides that if the decedent's death occurs or the claimant's cause of action accrues during the above-described ten-year statute of repose and the claimant cannot commence a civil action during that period due to a disability, a civil action for wrongful death or a tort action based on such a product liability claim may be commenced within two years after the disability is removed.

- Provides that the ten-year statute of repose does not bar a civil action for wrongful death or bodily injury based on a product liability claim against a manufacturer or supplier of a product if the product involved is a hazardous or toxic chemical, ethical drug, ethical medical device, chromium, chemical defoliant or herbicide, other causative agent, DES, or other nonsteroidal synthetic estrogen and the decedent's death or the claimant's bodily injury resulted from exposure to the product during the ten-year period of repose and that the cause of action in such a case accrues upon the earlier of the date on which the claimant is informed by competent medical authority that the death or bodily injury was related to the exposure to the product or the date on which by the exercise of reasonable diligence the claimant should have known that the death or bodily injury was related to the exposure to the product, requires that a civil action for wrongful death or bodily injury based on this type of cause of action be commenced within two years after the cause of action

accrues, and prohibits the civil action from commencing more than two years after the cause of action accrues.

- Provides that the ten-year statute of repose does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is asbestos, that the cause of action based on asbestos that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to asbestos, whichever date occurs first, and that the civil action for wrongful death must be commenced within two years after the cause of action accrues and may not be commenced more than two years after the cause of action accrues.

- Provides that the ten-year statute of repose does not bar an action based on a product liability claim against a manufacturer or supplier of a product for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

- Prohibits a cause of action to recover damages for injury or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing later than ten years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction.

- Allows a cause of action to recover damages for injury or wrongful death to be brought within two years from the date of discovery of a defective and unsafe condition of an improvement to real property if that discovery is made during the ten-year statute of repose but less than two years prior to the expiration of that period.

- Specifies that the ten-year statute of repose described in the prior two dot points does not apply to a civil action for injury or wrongful death against the owner of, tenant of, landlord of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement at the time the defective and unsafe condition of the improvement constitutes proximate cause of the injury or wrongful death.

- Prohibits the above-described ten-year statute of repose from being asserted as an affirmative defense by any defendant who engages in fraud with regards to an improvement to real property.

***Trial, liability, damages, and judgment***

- Requires that the court in all tort actions instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is not subject to federal or state income tax.

- Requires the trier of fact to consider the failure to wear a seat belt as contributory fault or other tortious conduct or for any other relevant purpose with regards to an injury if the failure to wear the seat belt contributed to the harm alleged and permits the trier of fact, because of that failure, to reduce compensatory damages.

- Modifies the categories of persons who may be awarded compensatory damages in a civil action for wrongful death to include the decedent's "dependent children" instead of minor children.

- Limits the compensatory damages for noneconomic loss that may be awarded in a tort action as follows:

  (1) Generally, the greater of $250,000 or an amount equal to three times the plaintiff's economic loss, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 for each occurrence;

  (2) If the noneconomic losses are for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining

activities, $500,000 for each plaintiff or $1 million for each occurrence.

- Provides that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits in the prior dot point.

- Requires, upon the motion of any party, the bifurcation of a tort action involving compensatory damages and punitive or exemplary damages and provides procedures for a bifurcated trial for a tort action that is tried by a jury and for a tort action that is tried by a judge.

- Modifies the conditions under which punitive or exemplary damages may be awarded.

- Limits the recovery of punitive or exemplary damages to the amount of compensatory damages awarded or $100,000, whichever is greater or, if the defendant is a small employer, to the lesser of the amount of compensatory damages awarded or $100,000.

- Provides that the limitation on punitive or exemplary damages does not apply to a tort action for bodily injury against a defendant who has been convicted of or pleaded guilty to rape, sexual battery, unlawful sexual conduct with a minor, OMVI, or OMVUAC if the bodily injury that is the basis of the tort action was caused by that defendant.

- Prohibits the award of punitive or exemplary damages if punitive damages have already been awarded or collected based on the same act or course of conduct that is alleged and the aggregate of those damages exceeds the limits described in the prior dot point.

- Permits awarding punitive or exemplary damages in subsequent tort actions involving the same act or courses of conduct for which punitive or exemplary damages have already been awarded if it is determined that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of the defendant other than the injury or loss for which compensatory damages are sought.

- Permits awarding punitive or exemplary damages in subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded if the total amount of

prior punitive or exemplary damages awards was insufficient to punish the defendant's behavior and to deter the defendant and others from similar behavior in the future.

- Prohibits an award of prejudgment interest on punitive or exemplary damages.

***Frivolous conduct***

- Expands the definition of "conduct" with regards to frivolous conduct actions to include the filing of a pleading, motion, or other paper in a civil action.

- Expands the definition of "frivolous conduct" to include conduct that is for another improper purpose, conduct that cannot be supported by a good faith argument for establishment of new law, conduct that consists of allegations or other factual contentions that have no evidentiary support, or conduct that consists of denials or factual contentions that are not warranted by the evidence.

***Product liability actions***

- Specifically states that R.C. 2307.71 to 2307.80 (Product Liability Law) are intended to abrogate all common law product liability causes of action.

- Modifies the provision regarding defects in design or formulation of a product by specifying that a product is defective only if, at the time it left the control of the manufacturer, the foreseeable risks exceeded the benefits associated with the design or formulation.

- Removes the provision that provided that a product is defective in design or formulation if it is more dangerous than expected when used in an intended or reasonably foreseeable manner.

- Prohibits the award of punitive or exemplary damages against the manufacturer of an over-the-counter drug marketed pursuant to federal regulations and generally recognized as safe and effective and not misbranded; provides for the forfeiture of that immunity from punitive or exemplary damages if the manufacturer fraudulently and in violation of FDA regulations withheld from the FDA information known to be

material and relevant to the harm allegedly suffered or misrepresented to the FDA that type of information.

- Specifies that a manufacturer or supplier is not liable for punitive or exemplary damages if the harm is caused by a product other than a drug or device and if the manufacturer or supplier fully complied with all applicable government standards with regard to the product's manufacture, construction, design, formulation, warnings, instructions, and representations when it left the manufacturer's or supplier's control.

- Specifies that the bifurcated trial provisions, the ceiling on recoverable punitive and exemplary damages, and the exclusion of prejudgment interest apply to awards of punitive or exemplary damages awarded under the Product Liability Law.

- Incorporates the product liability contributory fault provisions into the general contributory fault provisions.

***Asbestos claims***

- Provides the medical criteria required for an asbestos claim based on a nonmalignant condition, lung cancer, or cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach.

- Requires in a civil action in which an asbestos claim is alleged the filing with the complaint or other initial pleading of a written report and supporting test results constituting prima-facie evidence of an exposed person's physical impairment that meets the minimum requirements for the particular claim.

- Provides that the period of limitation for an asbestos-related claim based on a nonmalignant condition does not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, a physical impairment due to a nonmalignant condition.

- Limits the successor asbestos-related liabilities of certain domestic corporations.

- Provides that the assets of a successor are exempt from restraint, attachment, or execution on any judgment related to any claim for successor asbestos-related liabilities under certain specified circumstances.

- Provides that the bill's limitations on successor asbestos-related liabilities apply to all asbestos claims and all litigation involving asbestos claims, including claims and litigation pending on the bill's effective date, and that those limitations do not apply to workers' compensation benefits, claims against a successor that do not constitute claims for a successor asbestos-related liability, an insurance corporation, or any obligation arising under the "National Labor Relations Act" or under any collective bargaining agreement.

***Miscellaneous***

- Permits defendants in tort actions to introduce evidence of the plaintiff's receipt of collateral benefits, except if the source of the benefits has a mandatory self-effectuating federal right of subrogation or a contractual or statutory right of subrogation.

- Limits attorney contingency fees in connection with a tort action, other than an action based on a medical, dental, optometric, or chiropractic claim, to not exceed 35% of the first $100,000 recovered, 25% of the next $500,000 recovered, and 15% on any amounts recovered over $600,000.

- Requires each attorney who is licensed to practice law in Ohio to append to every written retainer agreement or contract for legal services a legal consumer's bill of rights and provides the form for that document.

- Removes the definition of and references to "negligence claim" from the law dealing with civil actions and trial procedure and replaces the references with "tort claim."

- Provides that an owner, lessee, or occupant of premises does not owe a duty to a user of a recreational trail to keep the premises safe for entry or use by a user of a recreational trail and does not assume, has no responsibility for, does not incur liability for, and is not liable for any injury to person or property caused by any act of a user of a recreational trail.

- Modifies the definitions of "premises" and "recreational user" for the purposes of the existing exceptions from liability to a recreational user of an owner, lessee, or occupant of premises to include privately owned lands, ways, and waters leased to a private person, firm, or organization.

- Provides the General Assembly's findings of fact and intent.

- Specifically requests the Supreme Court to reconsider certain holdings and to adopt certain rules related to asbestos claims and a legal consumer's bill of rights.

- Makes other technical changes.

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## CONTENT AND OPERATION

### ***Specific causes of action and general availability of causes of action***

#### ***Civil actions regarding picking agricultural produce***

The bill provides that, in a tort action, in the absence of willful or wanton misconduct or intentionally tortious conduct, an owner, lessee, renter, or operator of premises that are open to the public for direct access to growing agricultural produce is not imputed to do either of the following (R.C. 901.52(B)):[1]

[1] *"Tort action" is defined by reference to R.C. 2305.35(A)(6) to mean a civil action for damages for injury, death, or loss to person or property, including a product liability claim, but not including an action for damages for a breach of contract or another agreement between persons. (R.C. 901.52(A)).*

(1) Extend any assurance to a person that the premises are safe from naturally occurring hazards merely by the act of giving permission to the person to enter the premises or by receiving consideration for the produce picked;

(2) Assume responsibility or liability for injury, death, or loss to person or property allegedly resulting from the natural condition of the terrain of the premises or from the condition of the terrain resulting from cultivation of the soil.

***Unavailability of wrongful death action in specific situations and other changes***

The bill prohibits the commencement of a wrongful death action in this state if either of the following applies (R.C. 2125.01(B)):

(1) The person liable for the decedent's personal injuries or the administrator or executor of that person's estate compensated the decedent for those injuries prior to the decedent's death; because of the payment of that compensation, the decedent executed to that person, administrator, or executor a valid release of the decedent's claim against that person or that person's estate based on the decedent's personal injuries; and those personal injuries were sustained under the same circumstances that otherwise could be the basis of a civil action for wrongful death in a court of this state.

(2) Prior to the decedent's death, a judgment for damages was entered in a civil action against the person liable for the personal injuries sustained by the decedent or against the administrator or executor of that person's estate; that person or the administrator or executor of that person's estate fully satisfied that judgment; and the decedent's personal injuries that were the subject of that civil action were sustained under the same circumstances that otherwise could be the basis of a civil action for wrongful death in a court of this state.

The bill also eliminates a provision of current law that states that the same remedy (apparently the right to bring a wrongful death action) applies to any such cause of action now existing and to any cause of action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any Ohio court and that no prior Ohio law may prevent the maintenance of such cause of action (this language appears to be dated) (R.C. 2125.01(A)). The bill makes various technical changes to the wrongful death statutes such as changing "wrongful death action" to "civil action for wrongful death," "party injured" to "injured person," and "action filed" to "commenced" (R.C. 2125.01, 2125.02, and 2125.04).

The bill also modifies the list of persons for whom compensatory damages for loss of society of the decedent and mental anguish may be awarded in a

wrongful death action by changing "minor children" to "dependent children" (R.C. 2125.02(B)). The bill changes "deceased child" to "deceased minor" in the provision precluding a parent who abandoned the minor from receiving damages in a wrongful death action based on the minor's death (R.C. 2125.02(E)).

See "***Statute of repose***," below, for discussion of the bill's provisions related to product liability claim statutes of repose in wrongful death actions.

***Borrowing statute-foreign period of limitation applies to foreign civil action***

Current law provides that a civil action, unless a different limitation is prescribed by statute, may be commenced only within the period prescribed in R.C. 2305.03 to 2305.22. When interposed by proper plea by a party to an action, lapse of time is a bar to a civil action. The bill modifies this provision by providing that no civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired. (R.C. 2305.03.)

***Accrual of certain causes of action***

Under current law, an action for bodily injury or injuring personal property must be brought within two years after the cause of action arose. The bill modifies this provision by providing that generally an action based on a product liability claim and an action for bodily injury or injuring personal property must be brought within two years after the cause of action accrues and that generally such a cause of action accrues when the injury or loss to person or property occurs. (R.C. 2305.10(A).)

The bill provides that a cause of action for bodily injury that is not caused by exposure to chromium in any of its chemical forms, that is not incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, that is not caused by exposure to diethylstilbestrol (DES) or other nonsteroidal synthetic estrogens, including exposure before birth, and that is not caused by exposure to asbestos and that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first. (R.C. 2305.10(B)(1).)

The bill retains but technically amends the existing provision regarding the accrual of a cause of action for bodily injury caused by exposure to chromium in any of its chemical forms, removes asbestos from this provision, and creates a new similar provision for asbestos as discussed below (R.C. 2305.10(B)(2)).

The bill modifies the existing provision regarding the accrual of a cause of action for bodily injury incurred by a veteran through the exposure to chemical defoliants or herbicides or other causative agents, including agent orange, by stating that the cause of action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, *or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff had an injury that is related to exposure, whichever date occurs first.* (R.C. 2305.10(B)(3).)

The bill modifies the existing provision regarding the accrual of a cause of action for bodily injury caused by exposure to DES or other nonsteroidal estrogens by providing that it accrues upon the date on which the plaintiff *is informed by competent medical authority* (replaces "learns from a licensed physician") that the plaintiff has an injury *that is* (replaces "which may be") related to the exposure, or upon the date on which by exercise of reasonable diligence the plaintiff should have *known* (replaces "becomes aware") that the plaintiff has an injury *that is* (replaces "which may be") related to the exposure, whichever date occurs first. (R.C. 2305.10(B)(4).)

The bill provides that a cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first (R.C. 2305.10(B)(5)).

***Statutes of repose--product liability actions***

The bill generally prohibits the accrual of a wrongful death action involving, or another cause of action based on, a product liability claim against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product. The bill excepts a wrongful death action or another cause of action from the above-described ten-year statute of repose if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that

product. (R.C. 2125.02(D)(2)(a) and (b) and 2305.10(C)(1) and (2).) (See **COMMENT** 1.)

The bill specifies that the above-described ten-year statute of repose does not bar a civil action for wrongful death, or another tort action, involving or based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the decedent's death or the accrual of the cause of action, has not expired in accordance with the warranty's terms. The bill permits a wrongful death action, or another cause of action, involving a product liability claim to be commenced within two years after the decedent's death or after the cause of action accrues, if the death occurs or the cause of action accrues less than two years prior to the expiration date of the ten-year period prior to repose. (R.C. 2125.02(D)(2)(c) and (d) and 2305.10(C)(3) and (4).)

The bill provides that if the decedent's death occurs, or the claimant's cause of action accrues, during the ten-year period of repose and the claimant cannot commence an action during that ten-year period due to a disability described in the tolling statute, a civil action for wrongful death involving, or an action based on, the product liability claim may be commenced within two years after the disability is removed (R.C. 2125.02(D)(2)(e) and 2305.10(C)(5)).

The bill provides that the above-described ten-year statute of repose does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is asbestos. If this provision applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the asbestos or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the asbestos, whichever date occurs first. A civil action for wrongful death based on a cause of action described above must be commenced within two years after the cause of action accrues and may not be commenced more than two years after the cause of action accrues. (R.C. 2125.02(D)(2)(g).)

The bill also provides that the above-described ten year statute of repose does not bar an action for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first (R.C. 2305.10(C)(6)).

The bill also provides that the ten-year statute of repose does not bar a civil action for wrongful death or bodily injury based on a product liability claim against a manufacturer or supplier of a product if the product involved is a hazardous or toxic chemical, ethical drug, ethical medical device, chromium, chemical defoliant or herbicide or other causative agent (involving a decedent or claimant who is a veteran), DES, or other nonsteroidal synthetic estrogen and the decedent's death or claimant's bodily injury resulted from exposure to the product during the ten-year period. In such a case, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death or claimant's bodily injury was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death or the claimant's bodily injury was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death or bodily injury based on this cause of action must be commenced within two years after the cause of action accrues and must not be commenced more than two years after the cause of action accrues (R.C. 2125.02(D)(2)(f) and 2305.10(C)(7)).

The bill provides that R.C. 2125.02 and 2305.10 (contain the above-described statute of repose provisions) do not create a new cause of action or substantive legal right against any person involving a product liability claim (R.C. 2125.02(F) and 2305.10(D)).

For the purposes of a wrongful death action, the bill defines "harm" as death. For the purposes of a tort action for bodily injury arising out of a product liability claim, "harm" means injury, death, or loss to person or property. (R.C. 2125.02(G)(5) and 2305.10(E)(3).)

The bill specifies that the above-described provisions dealing with a ten-year statute of repose for wrongful death actions involving a products liability claim (R.C. 2125.02(D) and (G)(5) to (7)) and all provisions contained in R.C. 2305.10 are to be considered purely remedial in operation and are to be applied in a remedial manner in any civil action commenced on or after the effective date of those provisions, in which those provisions are relevant, regardless of when the cause of action accrued and notwithstanding any other provision of statute or prior rule of law of this state. It also specifies that the above-described provisions dealing with a ten-year statute of repose for wrongful death actions involving a products liability claim and all provisions contained in R.C. 2305.10 are not to be construed to apply to any civil action pending prior to the effective date of those provisions. (R.C. 2125.02(H) and 2305.10(F).) (See **COMMENT** 1.)

***Statutes of repose--improvements to real property***

The bill generally prohibits a cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction. The bill permits a claimant who discovers a defective and unsafe condition of an improvement to real property during the above described ten-year period but less than two years prior to the expiration of that ten-year period to commence a civil action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises from that condition within two years from the date of discovery of that defective and unsafe condition. It also provides that if a cause of action that arises out of a defective and unsafe condition of an improvement to real property accrues during that ten-year period and the plaintiff cannot commence an action during that ten-year period due to a disability described in the tolling statute, the plaintiff may commence a civil action to recover damages within two years from the removal of that disability. (R.C. 2305.131(A).) (See **COMMENT** 1.)

The bill specifies that the above described ten-year statute of repose does not apply to a civil action commenced against a person who is an owner of, tenant of, landlord of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement to real property at the time that the defective and unsafe condition of the improvement to real property constitutes the proximate cause of the bodily injury, injury to real or personal property, or wrongful death that is the subject matter of the civil action. The ten-year statute of repose may not be asserted as an affirmative defense by any defendant who engages in fraud in regard to furnishing the design, planning, supervision of construction, or construction of an improvement to real property or in regard to any relevant fact or other information that pertains to the act or omission constituting the alleged basis of the bodily injury, injury to real or personal property, or wrongful death or to the defective and unsafe condition of the improvement to real property. (R.C. 2305.131(B) and (C).)

The above-described statue of repose does not prohibit the commencement of a civil action for damages against a person who has expressly warranted or guaranteed an improvement to real property for a period longer than the ten-year

period described above and whose warranty or guarantee has not expired as of the time of the alleged bodily injury, injury to real or personal property, or wrongful death in accordance with the terms of the warranty or guarantee. The above-described statute of repose does not create a new cause of action or substantive legal right against any person resulting from the design, planning, supervision of construction, or construction of an improvement to real property. Finally, the bill specifies that the statute that creates the above-described statute of repose is to be considered purely remedial in operation and is to be applied in a remedial manner in any civil action commenced on or after the effective date of the statute, in which the statute is relevant, regardless of when the cause of action accrued and notwithstanding any other provision of law or prior rule of law of this state. It also specifies that the statute is not to be construed to apply to any civil action pending prior to its effective date. (R.C. 2305.131(D), (E), and (F).) (See **COMMENT** 1.)

***Trial, liability, damages, and judgment***

***Instruction to jury regarding taxability of damages awarded***

The bill requires the court in all tort actions to instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is not subject to taxation under federal or state income tax laws. The bill defines "tort action" as a civil action for damages for injury, death, or loss to person or property, including a product liability claim but not including a civil action for damages for breach of contract or another agreement between persons. The bill specifies that the above provision is to be considered purely remedial in operation and is to be applied in a remedial manner in any civil action commenced on or after the effective date of the provision, in which the provision is relevant, regardless of when the cause of action accrued and notwithstanding any other provision of law or prior rule of law of this state. It also specifies that the above provision is not to be construed to apply to any civil action pending prior to the effective date of the provision. (R.C. 2315.01(B).)

***Seat belts***

Under current law, generally the failure of a person to wear all of the available elements of a properly adjusted occupant restraining device or to ensure that each passenger of an automobile being operated by the person is wearing all of the available elements of such a device, may not be considered or used as evidence of negligence or contributory negligence, does not diminish recovery for damages in any civil action involving the person arising from the ownership, maintenance, or operation of an automobile, may not be used as a basis for a criminal prosecution other than a prosecution for a violation of the Seat Belt Law, and is not admissible as evidence in any civil or criminal action involving the person other than a prosecution for a violation of the law regulating the use of

such devices (Seat Belt Law). However, if at the time of an accident involving a passenger car equipped with occupant restraining devices, any occupant of the passenger car who sustained injury or death was not wearing an available occupant restraining device, was not wearing all of the available elements of such a device, or was not wearing such a device as properly adjusted, then, consistent with the Rules of Evidence, that fact is admissible in evidence in relation to any claim for relief in a tort action to the extent that the claim for relief seeks to recover damages for injury or death to the occupant, the defendant in question is the manufacturer, designer, distributor, or seller of the passenger car, and the claim for relief against the defendant in question is that the injury or death sustained by the occupant was enhanced or aggravated by some design defect in the passenger car or that the passenger car was not crashworthy. (R.C. 4513.263(F).)

The bill replaces the above-described provisions of the occupant restraining device law with a requirement that the trier of fact in a tort action consider as contributory fault or other tortious conduct or consider for any other relevant purpose if the failure contributed to the harm alleged in the tort action the fact that an operator of an automobile on a street or highway or an operator of certain types of school buses failed in violation of the law to wear all of the available elements of a properly adjusted occupant restraining device (seat belt), that a passenger occupying a seating position on the front seat of an automobile failed to wear a seat belt in violation of the law, or that an operator of an automobile on a street or highway failed to ensure that each minor who is a passenger of that automobile was wearing a seat belt. The bill also permits the trier of fact, because of that failure, to reduce compensatory damages under the Comparative Fault Law. The bill repeals the provision described in the last sentence of the preceding paragraph regarding the admissibility in evidence of the failure to wear a seat belt under certain circumstances if the defendant is the manufacturer, designer, distributor, or seller of the passenger car. (R.C. 4513.263(F).)

***Compensatory damages in a wrongful death action***

The bill continues to authorize a trier of fact to award compensatory damages in a civil action for wrongful death for the loss of support from the reasonably expected earning capacity of the decedent, for the loss of services of the decedent, for the loss of society of the decedent (including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by specific individuals), for loss of prospective inheritance to the decedent's heirs, and for the "mental anguish" incurred by specific individuals by reason of the decedent's death. However, the bill modifies the categories of those specified individuals to include the decedent's surviving spouse, parents, and next of kin (continuing law, although the bill specifies that it is the next of kin of the decedent) and also all of

the decedent's dependent children (not the decedent's "minor" children as under current law). (R.C. 2125.02(B).)

***Caps on noneconomic damages***

***Jurisdiction***

Under current R.C. 2305.01, the court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of county commissioners. Current R.C. 2323.43(D)(1) provides that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits for such damages in a civil action upon a medical, dental, optometric, or chiropractic claim. The bill specifies in R.C. 2305.01 that a court of common pleas does not have jurisdiction to award noneconomic damages (compensatory damages that represent "noneconomic loss"--see below) that exceed the caps on such damages in tort actions that are proposed in the bill; R.C. 2323.43(D)(1), under the bill, applies to the caps as expanded to apply to all tort actions. (R.C. 2305.01 and 2323.43(D)(1).)

***Limits***

***Current law***. Current law limits the damages that may be awarded in a civil action upon a medical, dental, optometric, or chiropractic claim for compensatory damages for injury, death, or loss to person or property that represent damages for noneconomic loss. Such compensatory damages generally cannot exceed the greater of $250,000 or an amount equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 for each occurrence. However, if the noneconomic losses of the plaintiff are for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities, then the amount recoverable for noneconomic loss cannot exceed $500,000 for each plaintiff or $1 million for each occurrence. In contrast, current law prohibits any limitation on the award of compensatory damages that represent the economic loss of the person who is awarded the damages in the civil action. (R.C. 2323.43(A)(1), (2), and (3).)

***Operation of the bill***. The bill removes "civil action upon a medical, dental, optometric, or chiropractic claim" from the above-described provisions and replaces that phrase with "tort action." The bill also removes "death" from the phrase "injury, death, or loss to person or property." Therefore, the limits

described above apply to *all* tort actions, including a medical, dental, optometric, or chiropractic claim, but do not apply to a wrongful death action or any other action based upon a person's death. The bill also makes clarifying amendments to those provisions. (See **COMMENT** 2.) (R.C. 2323.43(A)(1), (2), and (3).)

***Procedure***

***Current law***. Under current law, if a trial is conducted in the civil action upon a medical, dental, optometric, or chiropractic claim and a plaintiff prevails with respect to that claim, the court in a nonjury trial must make findings of fact, and the jury in a jury trial must return a general verdict accompanied by answers to interrogatories that must specify all of the following (R.C. 2323.43(B)):

(1) The total compensatory damages recoverable by the plaintiff;

(2) The portion of the total compensatory damages that represents damages for economic loss;

(3) The portion of the total compensatory damages that represents damages for noneconomic loss.

After the trier of fact complies with the above requirements, the court must enter a judgment in favor of the plaintiff for compensatory damages for economic loss in the amount determined pursuant to paragraph (2), above, and a judgment in favor of the plaintiff for compensatory damages for noneconomic loss subject to the provision that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the above-described limits set forth in current law. Current law provides that in no event may a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in the law. The provisions on the recovery of and limits on damages must be applied in a jury trial only after the jury has made its factual findings and determination as to the damages. (R.C. 2323.43(C)(1) and (D)(1).)

Prior to the trial in the civil action, any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination of the damages within the applicable limits. If the trier of fact is a jury, the court must not instruct the jury with respect to the limit on compensatory damages for noneconomic loss, and neither counsel for any party nor a witness may inform the jury or potential jurors of that limit. (R.C. 2323.43(C)(2) and (D)(2).)

Current law further provides that any excess amount of compensatory damages for noneconomic loss that is greater than the applicable amount of the

limits cannot be reallocated to any other tortfeasor beyond the amount of compensatory damages that the tortfeasor would otherwise be responsible for under the laws of Ohio (R.C. 2323.43(E)).

***Operation of the bill***. The bill continues the above-described procedures that apply to caps on noneconomic damages but makes them applicable to *all* tort actions, including actions upon a medical, dental, optometric, or chiropractic claim, consistent with the bill's application of the caps on noneconomic damages to all tort actions.

***Definitions***

The bill modifies the definitions of "economic loss" and "noneconomic loss" for the purposes of the provisions on the caps on noneconomic damages in a tort action in a manner that is consistent with the bill's extension of the caps on noneconomic damages to all tort actions and its clarification that the caps do not apply to wrongful death actions or any other action based on a person's death (R.C. 2323.43(H)(1) and (3)).

"Occurrence" is defined for these provisions as all claims resulting from or arising out of any one person's bodily injury. (R.C. 2323.43(H)(4).)

"Tort action" is defined for these provisions as a civil action for damages for injury or loss to person or property. "Tort action" includes a civil action upon a product liability claim or a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim. "Tort action" does not include a civil action for damages for a breach of contract or other agreement between persons. (R.C. 2323.43(H)(5).)

***Nonapplicability***

The bill continues but modifies current law by providing that the above-described provisions do not apply to *tort* actions that are either: (1) brought against the state in the Court of Claims, including, but not limited to, actions in which a state university or college is a defendant, or (2) brought against political subdivisions of this state, if the action is commenced under or subject to R.C. Chapter 2744. (which regulates the liability of political subdivisions in tort actions). The provisions also do not apply to wrongful death actions brought pursuant to R.C. Chapter 2125. (R.C. 2323.43(G).)

***General Punitive and Exemplary Damages Law changes***

***Bifurcated trial***

The bill requires, upon the motion of any party, the bifurcation of a tort action in which a plaintiff seeks compensatory damages and punitive or exemplary damages. The initial stage of the trial must relate only to the presentation of evidence, and a determination by the trier of fact, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, all parties are prohibited from presenting, and the court is prohibited from permitting a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant. If the trier of fact determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages from the defendant, evidence may be presented in the second stage of the trial, and a determination by the trier of fact must be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages from the defendant. (R.C. 2315.21(B)(1).)

In a tort action in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, either of the following applies: (1) if the action is tried to a jury, the court must instruct the jury to return, and the jury must return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant, or (2) if the action is tried to a court, the court must make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, must make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant (R.C. 2315.21(B)(2) and (3)).

***When punitive or exemplary damages may be awarded***

Under current law, generally punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in paragraph (1).

The bill removes the reference to "oppression" from paragraph (1) and replaces paragraph (2) with a prohibition against the recovery of punitive or exemplary damages unless the trier of fact returns a verdict for or makes a determination of the total compensatory damages recoverable by the plaintiff from that defendant. The bill provides that the defendant as "principal" or "master" as described in paragraph (1) must have "knowingly" authorized, participated in, or ratified actions or omissions of an agent or servant in order for punitive or exemplary damages to be awarded. (R.C. 2315.21(C).)

***Cap on punitive or exemplary damages***

Under current law, in a tort action, the trier of fact must determine the liability of any defendant for punitive and exemplary damages and the amount of those damages. The bill retains this provision but generally prohibits the court from entering judgment for punitive or exemplary damages in excess of the greater of the amount of the compensatory damages awarded to the plaintiff from that defendant or $100,000. If the defendant is a small employer,[2] the court is prohibited from entering judgment for punitive or exemplary damages in excess of the lesser of the amount of the compensatory damages awarded to the plaintiff from the defendant or $100,000. The bill also states that a court of common pleas does not have jurisdiction, in any tort action to which the amounts apply, to award punitive or exemplary damages that exceed these amounts. (R.C. 2315.21(D)(1) and (2) and 2305.01.)

The bill generally prohibits the award in any tort action of punitive or exemplary damages against a defendant if the defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and collected, in any state or federal court, against the defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damages exceeds the amount specified in the preceding

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[2] *"Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual must be considered an employer under R.C. 2315.21 only if the subject of the tort action is related to the individual's capacity as an employer. (R.C. 2315.21(A)(4).)*

*"Small employer" means an employer who employs not more than 500 persons on a full-time permanent basis (R.C. 2315.21(A)(5)).*

paragraph (R.C. 2315.21(D)(5)(a)). Notwithstanding this prohibition, the bill permits the award of punitive or exemplary damages in either of the following types of tort actions (R.C. 2315.21(D)(5)(b)):

(1) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described above in "***When punitive or exemplary damages may be awarded***" on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court must make specific findings of fact in the record to support its conclusion. The court must reduce the amount of any punitive or exemplary damages otherwise awardable by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court is prohibited from informing the jury about the court's determination and action.

(2) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish the defendant's behavior and to deter that defendant and others from similar behavior in the future. In that case, the court must make specific findings of fact in the record to support its conclusion. The court must reduce the amount of any punitive or exemplary damages otherwise awardable by the sum of the punitive or exemplary damages previously rendered against that defendant in any state or federal court. The court is prohibited from informing the jury about the court's determination and action. (See **COMMENT** 2.)

The bill provides that the limitation on punitive or exemplary damages does not apply to a tort action for bodily injury against a defendant who has been convicted of or pleaded guilty to a criminal offense that is a violation of R.C. 2907.02 (rape), 2907.03 (sexual battery), 2907.04 (unlawful sexual conduct with a minor), or 4511.19 (OMVI or OMVUAC) if the bodily injury that is the basis of the tort action was caused by that defendant (R.C. 2315.21(D)(6)).

Existing law provides that R.C. 2315.21, which deals with punitive or exemplary damages, does not apply to tort actions against the state in the Court of Claims. The bill further provides that R.C. 2315.21 does not apply to tort actions against a state university or college that are subject to R.C. 3345.40(B)(1) or to tort actions against a political subdivision of this state that are commenced under or are subject to R.C. Chapter 2744. (regarding political subdivision tort liability). (R.C. 2515.21(E).)

***Judgment interest***

The bill retains the general judgment interest rate for tort and other civil actions at 10% per annum (R.C. 1343.03--not in the bill). The bill provides that no award of prejudgment interest is to include any prejudgment interest on punitive or exemplary damages found by the trier of fact (R.C. 2315.21(D)(3)).

***Frivolous conduct***

The bill expands the definition of "conduct" for purposes of the law providing for the recovery of attorney's fees by a party to a civil action who is adversely affected by frivolous conduct to include the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes.

The bill also expands the definition of "frivolous conduct" that applies to that law to additionally include conduct that satisfies any of the following:

(1) Conduct that obviously serves merely to harass or maliciously injure another party to the civil action or appeal (current law) *or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation* (added by the bill).

(2) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law (current law), *or cannot be supported by a good faith argument for the establishment of new law* (added by the bill).

(3) *The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.*

(4) *The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.*

The bill allows the court on its own initiative to award court costs, reasonable attorney's fees, and other reasonable expenses because of frivolous conduct. (R.C. 2323.51(A)(1)(a) and (2)(a) and (B)(2).)

Under current law, generally at any time prior to the commencement of the trial in a civil action or within 21 days after the entry of judgment in a civil action or at any time prior to the hearing in an appeal against a government entity or employee that is filed by an inmate or within 21 days after the entry of judgment

in an appeal of that nature, the court may award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. The award may be made against a party, the party's counsel of record, or both. (R.C. 2323.51(B)(1) and (4).) The bill modifies this provision by providing that generally, at any time not more than 30 days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, against a party, the party's counsel of record, or both. (R.C. 2323.51(B)(1).)

***Negligence claim***

Under current law, for the purposes of the laws regarding civil actions and trial procedure (R.C. Chapters 2307. and 2315.), "negligence claim" means a civil action for damages for injury, death, or loss to person or property to the extent that the damages are sought or recovered based on allegation or proof of negligence (R.C. 2307.011(E)). The bill repeals this definition and removes references to "negligence claim" from R.C. 1775.14, 2307.29, 2315.32, 2315.34, 2315.36, and 4507.07 and replaces it with "tort claim."

***Product liability actions***

***Abrogation of common law product liability causes of action***

The bill specifically states that R.C. 2307.71 to 2307.80 are intended to abrogate all common law product liability causes of action (R.C. 2307.71(B)). It limits the definition of "product liability claim" to a claim that is asserted in a civil action *pursuant to R.C. 2307.71 to 2307.80* (R.C. 2307.01(A)(13)). Consistent with the above statement, the bill specifies in several sections that the sections' references to product liability claims refer to such claims under R.C. 2307.71 to 2307.80 (R.C. 2305.25(H), 2307.011(J), and 2307.60(B)).

***Defects in design or formulation***

Under current law, a product is defective in design or formulation if either of the following applies (R.C. 2307.75(A)):

(1) When it left the control of its manufacturer, the foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation.

(2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

The bill modifies this provision by specifying that a product is defective in design or formulation *only if, at the time* it left the control of its manufacturer, the foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation and by repealing (2) above.

***Punitive or exemplary damages***

Under current law, subject to the provisions of the next paragraph, punitive or exemplary damages are not to be awarded against a manufacturer or supplier in question in connection with a product liability claim unless the claimant establishes, by clear and convincing evidence, that the harm for which the claimant is entitled to recover compensatory damages was the result of misconduct of the manufacturer or supplier in question that manifested a flagrant disregard of the safety of persons who might be harmed by the product in question. The fact by itself that a product is defective does not establish a flagrant disregard of the safety of persons who might be harmed by that product. (R.C. 2307.80(A).)

Current law also provides that if a claimant alleges in a product liability claim that a drug caused harm to the claimant, the manufacturer of the drug is not liable for punitive or exemplary damages in connection with that product liability claim if the drug that allegedly caused the harm was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the Federal Food and Drug Administration (hereafter "FDA") under the "Federal Food, Drug, and Cosmetic Act" or the "Public Health Service Act" unless it is established by a preponderance of the evidence that the manufacturer fraudulently and in violation of applicable FDA regulations withheld from the FDA information known to be material and relevant to the claimant's harm or misrepresented to the FDA information of that type (R.C. 2307.80(C)).

The bill modifies the above provisions in several ways. First, it subjects the current general statement of when a manufacturer or suppler is liable for punitive or exemplary damages to another exception discussed in the second paragraph below. It also subjects the drug manufacturer immunity provision discussed in the prior paragraph to that new exception. It includes a "device" in the drug manufacturer immunity provision so that it applies to a manufacturer of a drug or a device and specifies that "device" has the same meaning as in the "Federal Food, Drug, and Cosmetic Act."[3] The bill also provides an additional set of

[3] *"Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory that is (1) recognized in the official National Formulary, or the United States*

circumstances when the manufacturer of a drug *or device* has immunity from punitive and exemplary damages. Under the bill, the manufacturer of a drug or device is not liable for punitive or exemplary damages if the drug or device that allegedly caused the harm that is the basis of the claim for damages was an over-the-counter drug marketed pursuant to federal regulations, was generally recognized as safe and effective and as not being misbranded pursuant to the applicable federal regulations, and satisfied in relevant and material respects each of the conditions contained in the applicable regulations and each of the conditions contained in an applicable monograph. (R.C. 2307.80(A), (C)(1)(b), and (C)(3)(c).)

The bill provides for the forfeiture of the proposed new immunity for over-the-counter drugs if a claimant establishes, by a preponderance of the evidence, that the manufacturer fraudulently and in violation of applicable regulations of the FDA withheld from the FDA information known to be material and relevant to the harm that the claimant allegedly suffered or misrepresented to the FDA information of that type. These same conditions result in the forfeiture of the existing immunity for a drug manufacturer as discussed above. (R.C. 2307.80(C)(2).)

The bill specifies that a manufacturer or supplier is not liable for punitive or exemplary damages in connection with a claim if a claimant alleges in a product liability claim that a product other than a drug or device caused harm to the claimant and if the manufacturer or supplier fully complied with all applicable government standards relative to (1) the product's manufacture or construction, (2) the product's design or formulation, (3) adequate warnings or instructions, and (4) representations when it left the manufacturer's or supplier's control (R.C. 2307.80(D)).

Under the bill, "federal regulations" means regulations of the United States FDA that are adopted pursuant to the "Federal Food, Drug, and Cosmetic Act" and that are set forth in Parts 300, 400, 600, 800, and 1000 of Chapter I of Title 21 of the Code of Federal Regulations (R.C. 2307.80(C)(3)(b)).

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*Pharmacopeia, or any supplement to them, (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (3) intended to affect the structure or any function of the body of man or other animals, and that does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and that is not dependant upon being metabolized for the achievement of its primary intended purposes.*

The bill specifies that the bill's bifurcated trial provisions, the ceiling on recoverable punitive or exemplary damages, and the exclusion of pre-judgment interest described above under "***General Punitive and Exemplary Damages Law changes***" apply to awards of punitive or exemplary damages awarded under the Product Liability Law (R.C. 2307.80(E)).

***Product liability contributory fault***

Current law, as enacted by Am. Sub. S.B. 120 of the 124th General Assembly, provides that contributory negligence or other contributory tortious conduct may be asserted as an affirmative defense to a product liability claim. Contributory negligence or other contributory tortious conduct of a plaintiff does not bar the plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if that contributory negligence or other contributory tortious conduct was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery and of all other persons from whom the plaintiff does not seek recovery in this action. If the above applies, the compensatory damages recoverable by the plaintiff must be diminished by an amount that is proportionately equal to the percentage of negligence or other tortious conduct by the plaintiff. (R.C. 2315.43.)

If contributory negligence or other contributory tortious conduct is asserted and established as an affirmative defense to a product liability claim, the court in a nonjury action must make findings of fact, and the jury in a jury trial must return a general verdict accompanied by answers to interrogatories, that specify the following: (1) the total amount of compensatory damages that would have been recoverable on that product liability claim but for that negligence or other tortious conduct, (2) the portion of the compensatory damages that represents economic loss, (3) the portion of compensatory damages that represents noneconomic loss, and (4) the percentage of negligence or other tortious conduct attributable to all persons determined for the purposes of joint and several liability. (R.C. 2315.44.)

After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to the interrogatories, the court must diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of negligence or other tortious conduct that is attributable to the plaintiff. If that percentage of the negligence or other tortious conduct is greater than the sum of percentages of the tortious conduct determined to be attributable to all parties to the action from whom the plaintiff seeks recovery plus all persons from whom the plaintiff does not seek recovery in an action, the court must enter judgment in favor of the defendants. (R.C. 2315.45.)

After it makes findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, a court must enter a judgment that is in favor of the plaintiff and that imposes liability if all of the following apply: (1) contributory negligence or other contributory tortious conduct is asserted as an affirmative defense to a product liability claim, (2) it is determined that the plaintiff was contributorily negligent or engaged in other contributory tortious conduct and that contributory negligence or other contributory tortious conduct was a direct and proximate cause of the injury, death, or loss involved, and (3) the plaintiff is entitled to recover compensatory damages from more than one party. (R.C. 2315.46.)

The bill repeals these provisions and incorporates them into the general contributory fault provisions in R.C. 2315.32 to 2315.36.

The bill removes from R.C. 1775.14, 2307.011, 2307.23, 2307.29, and 4507.07 references to R.C. 2315.41 to R.C. 2315.46.

***Express or implied assumption of the risk as an affirmative defense***

Current law provides that express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim, except that express or implied assumption of the risk may not be asserted as an affirmative defense to an intentional tort claim. If express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim and if it is determined that the plaintiff expressly or impliedly assumed a risk and that express or implied assumption of the risk was a direct and proximate cause of harm for which the plaintiff seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages. (R.C. 2315.42.)

The bill provides that, subject to the provisions described below, the general contributory fault provisions under R.C. 2315.32 to 2315.36 apply to a product liability claim that is asserted pursuant to the Product Liability Law under R.C. 2307.71 to 2307.80. The bill also generally continues and relocates the assumption of the risk provisions described above. However, it provides that if implied assumption of the risk is asserted as an affirmative defense to a product liability claim against a supplier for compensatory damages based on negligence under R.C. 2307.78(A)(1), the general contributory fault provisions under R.C. 2315.32 to 2315.36 are applicable to that affirmative defense and must be used to determine whether the claimant is entitled to recover compensatory damages based on that claim and the amount of any recoverable compensatory damages. (R.C. 2307.711.)

***Asbestos litigation***

***Medical criteria for a claim based on a nonmalignant condition***

Under the bill, physical impairment[4] of the exposed person,[5] to which the person's exposure to asbestos[6] is a substantial contributing factor,[7] must be an essential element of an asbestos claim.[8] A person is prohibited from bringing or maintaining a civil action[9] alleging an asbestos claim based on a *nonmalignant condition* (a condition that is caused or may be caused by asbestos other than a diagnosed cancer (R.C. 2307.91(R)) in the absence of a prima-facie showing 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

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[4] *"Physical impairment" means a nonmalignant condition that meets the minimum requirements of R.C. 2307.92(B), lung cancer that meets the minimum requirements of R.C. 2307.92(C), or cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach that meets the minimum requirements of R.C. 2307.92(D) (R.C. 2307.91(U)).*

[5] *"Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim (R.C. 2307.91(K)).*

[6] *"Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered (R.C. 2307.91(B)).*

[7] *"Substantial contributing factor" means that exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim, the exposure to asbestos took place on a regular basis over an extended period of time and in close proximity to the exposed person, and a qualified physician has determined with a reasonable degree of medical certainty that the physical impairment of the exposed person would not have occurred but for the asbestos exposures (R.C. 2307.91(BB)).*

[8] *"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. (R.C. 2307.91(C).)*

[9] *"Civil action" means all suits or claims of a civil nature in state or federal court, whether cognizable as cases at law or in equity or admiralty. The term "civil action" does not include an action relating to any workers' compensation law (R.C. Chapters 4121., 4123., 4127., and 4131.). (R.C. 2307.91(J) and (DD).)*

substantial contributing factor to the medical condition. (R.C. 2307.92(A) and (B).)

That prima-facie showing must include all of the following minimum requirements (R.C. 2307.92(B)):

(1) Evidence verifying that a qualified physician[10] 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 exposed person's principal places of employment and exposures to airborne contaminants and whether each 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 nature, duration, and level of the exposure.

(2) Evidence verifying that a qualified physician 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 qualified physician, based on a medical examination and pulmonary function testing of the exposed person, that 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[11] and has asbestosis[12] or diffuse pleural thickening, based at a

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[10] *"Qualified physician" 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 medical criteria requirements described above and is a board-certified internist, pulmonary specialist, oncologist, or pathologist, is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person, spends no more than 10% of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential civil actions, and whose medical group, professional corporation, clinic, or other affiliated group earns not more than 20% of their revenues from providing those services, is currently licensed to practice and actively practices in the state where the plaintiff's civil action was filed, and receives or received payment for the treatment of the exposed person from that person's HMO or other medical provider. (R.C. 2307.91(W).)*

[11] *"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 (R.C. 2307.91(A)).*

minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening and that the asbestosis or diffuse pleural thickening, 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 either 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 or a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.[13]

***Medical criteria for a claim based upon lung cancer***

A person is prohibited from bringing or maintaining a civil action alleging an asbestos claim based upon *lung cancer*[14] in the absence of a prima-facie showing of all of the following minimum requirements (R.C. 2307.92(C)):

(1) A diagnosis by a board-certified pathologist,[15] board-certified pulmonary specialist,[16] or board-certified oncologist[17] that the exposed person has

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[12] *"Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers (R.C. 2307.91(D)).*

[13] *"Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenenced in the AMA Guides to the Evaluation of Permanent Impairment (R.C. 2307.91(V)).*

*"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. "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration. "Spirometry" means the measurement of volume of air inhaled or exhaled by the lung. "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 (1980) as amended. "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. § 37.51(b), as amended. (R.C. 2307.91(I), (M), (N), (O), and (AA).)*

[14] *"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 an asbestos claim based upon mesothelioma (R.C. 2307.91(P)).*

[15] *"Board-certified pathologist" means a medical doctor who is currently certified by the American Board of Pathology (R.C. 2307.91(G)).*

[16] *"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 (R.C. 2307.91(H)).*

primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed between the date of the exposed person's first exposure to asbestos and the date of diagnosis of the exposed person's primary lung cancer;

(3) Either of the following:

(a) In the case of an exposed person who is a nonsmoker,[18] either of the following requirements:

(i) Radiological or pathological evidence of asbestosis[19] or radiological evidence of diffuse pleural thickening;[20]

(ii) Evidence of the exposed person's occupational exposure to asbestos for any of the applicable minimum exposure periods in the occupations specified in R.C. 2307.92(D)(3)(b)(i), (ii), and (iii) (see (3)(b) under "***Medical criteria for a claim based upon cancer of the colon, etc.***," below).

(b) In the case of an exposed person who is a smoker,[21] *both* of the requirements specified in (3)(a)(i) and (ii) above.

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[17] *"Board-certified oncologist" means a medical doctor who is currently certified by the American Board of Internal Medicine in the subspecialty of medical oncology (R.C. 2307.91(F)).*

[18] *"Nonsmoker" means the exposed person has not smoked cigarettes or used any other tobacco products within the last 15 years (R.C. 2307.91(S)).*

[19] *"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 (R.C. 2307.91(T)).*

*"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 (R.C. 2307.91(X)).*

[20] *"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 (R.C. 2307.91(Y)).*

[21] *"Smoker" means a person who has smoked cigarettes or other tobacco products within the last 15 years (R.C. 2307.91(Z)).*

***Medical criteria for a claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach***

A person is prohibited from bringing or maintaining a civil action alleging an asbestos claim based upon *cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach*, in the absence of a prima-facie showing of all of the following minimum requirements (R.C. 2307.92(D)):

(1) A diagnosis by a board-certified pathologist, board-certified pulmonary specialist, or board-certified oncologist, whichever is appropriate for the type of cancer claimed, that the exposed person has primary cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach and that exposure to asbestos was a substantial contributing factor to that particular cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed between the date of the exposed person's first exposure to asbestos and the date of diagnosis of the exposed person's particular cancer;

(3) Either of the following requirements:

(a) Radiological or pathological evidence of asbestos or radiological evidence of diffuse pleural thickening;

(b) Evidence of the exposed person's occupational exposure to asbestos for any of the following applicable minimum exposure periods in the specified occupations:

(i) Five exposure years[22] for insulators, shipyard workers, workers in manufacturing plants handling raw asbestos, boilermakers, shipfitters, steamfitters, or other trades performing similar functions;

(ii) Ten exposure years for utility and power house workers, secondary manufacturing workers, or other trades performing similar functions;

(iii) Fifteen exposure years for general construction, maintenance workers, chemical and refinery workers, marine engine room personnel and other personnel

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[22] *"Exposure years" means that each single year of exposure prior to 1972 will be counted as one year, each single year of exposure from 1972 through 1979 will be counted as one-half year, and exposure after 1979 will not be counted, except that each year from 1972 forward for which the plaintiff can establish exposure exceeding the OSHA limit for eight-hour time-weighted average airborne concentration for a substantial portion of the year will count as one year. (R.C. 2307.91(L).)*

on vessels, stationary engineers and firemen, railroad engine repair workers, or other trades performing similar functions.

No prima-facie showing is required in a civil action alleging an asbestos claim based upon mesothelioma[23] (R.C. 2307.92(E)).

Evidence relating to physical impairment, including pulmonary function testing and diffusing studies, must 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 interpretative standards set forth in the official statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values and Interpretative Strategies" as published in American Review of Respiratory Disease, 1991:144:1202-1218. (R.C. 2307.92(F).)

All of the following apply to the presentation of prima-facie evidence that meets the requirements described above in "***Medical criteria for a claim based upon a nonmalignant condition***," "***Medical criteria for a claim based upon lung cancer***," and "***Medical criteria for a claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach***" (R.C. 2307.72(G)):

(1) It 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) It is not conclusive as to the liability of any defendant in the case.

(3) It is not admissible at trial.

***Asbestos litigation-required filings***

The plaintiff in any civil action who alleges an asbestos claim must file together with 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 described above in "***Medical criteria for a claim based upon a nonmalignant condition***," "***Medical criteria for a claim based upon lung cancer***," and "***Medical criteria for a claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or***

[23] *"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 (R.C. 2307.91(Q)).*

***stomach***," whichever is applicable. With respect to any asbestos claim that is pending on the effective date of this provision, the plaintiff must file the written report and supporting test results 60 days following the effective date of this provision or 30 days prior to trial, whichever is earlier. The defendant in the case must be afforded a reasonable opportunity to challenge the adequacy of the proffered prima-facie evidence of the physical impairment. The court is required to dismiss the plaintiff's claim without prejudice upon a finding of failure to make the required prima-facie showing. (R.C. 2307.93.)

***Asbestos litigation-statute of repose***

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 provision, the period of limitations does not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment due to a nonmalignant condition. An asbestos claim that arises out of a nonmalignant condition is a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer. The court is prohibited from awarding damages for fear or risk of cancer in any civil action asserting only an asbestos claim for a nonmalignant condition. No settlement of an asbestos claim for a nonmalignant condition that is concluded after the effective date of this provision may require, as a condition of settlement, the release of any future claim for asbestos-related cancer. (R.C. 2307.94.)

***Asbestos litigation-scope or operation***

The bill provides that the above-described provisions regarding asbestos litigation do 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 may not authorize any lawsuit that is barred by any provision of any workers' compensation law. "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. "Workers' compensation law" means R.C. Chapters 4121., 4123., 4127., and 4131. (R.C. 2307.95 and 2307.91(CC) and (DD).)

***Successor asbestos-related liabilities***

***Definitions***. The bill provides the following definitions for the purposes of the successor asbestos-related liabilities provisions (R.C. 2307.96(A)):

(1) "Asbestos" has the same meaning as in the above-described asbestos provisions.

(2) "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 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.

(3) "Successor" means a domestic corporation or a subsidiary of a domestic corporation that acquired any assets of or the stock of a foreign business corporation, if the transaction occurred on or before July 29, 1977; the purchasing domestic corporation paid less than $5 million for the acquisition; and the principal place of business of the foreign corporation was located outside the state of Ohio.

(4)(a) "Successor asbestos-related liabilities," in relation to an asset purchase or a stock purchase by a successor means any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, if the liabilities are related in any way to asbestos claims and are assumed or incurred by a successor as a result of or in connection with the asset purchase or stock purchase, merger, or consolidation, or the agreement of the asset purchase or stock purchase.

(b) "Successor asbestos-related liabilities" includes any liabilities described in the prior paragraph that, after the effective date of the asset purchase or stock purchase, are paid, otherwise discharged, committed to be paid, or committed to be otherwise discharged by or on behalf of the successor, or by or on behalf of a transferor, in connection with any judgment, settlement, or other discharge of those liabilities in this state or another jurisdiction.

(5) "Transferor" means a foreign corporation or its shareholders from which successor asbestos-related liabilities are assumed or incurred by the successor.

***Limitation on liability***. The bill provides that generally the cumulative successor asbestos-related liabilities of a successor are limited to the fair market value of the acquired assets or stock as determined on the effective date of the asset purchase or stock purchase, merger, or consolidation. If a transferor had

assumed or incurred successor asbestos-related liabilities in connection with a prior asset purchase, stock purchase, merger, or consolidation involving a prior transferor, the successor asbestos-related liabilities of the successor must be limited to the fair market value of the previously acquired assets or stock as determined on the effective date of the prior asset purchase, stock purchase, merger, or consolidation. The successor has no responsibility for any successor asbestos-related liabilities in excess of the limitation of those liabilities described above. (R.C. 2307.96(B).)

***Exemption from restraint, attachment, or execution***. The bill provides that generally the assets of a successor are exempt from restraint, attachment, or execution on any judgment entered in this state or another jurisdiction related to any claim for successor asbestos-related liabilities if the cumulative amounts of those liabilities that, after the effective date of the asset purchase or stock purchase that is covered under "***Limitation on liability***," above, are paid or committed to be paid by or on behalf of the successor, or by or on behalf of the transferor, in connection with any judgment, settlement, or other discharge of claims of asbestos-related liabilities exceed the fair market value of the assets or stock as determined on the effective date of the asset purchase or stock purchase, merger, or consolidation. If a transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior asset purchase, stock purchase, merger, or consolidation involving a prior transferor, the assets of the successor are exempt from restraint, attachment, or execution on any judgment entered in this state or another jurisdiction related to any claim for successor asbestos-related liabilities if the cumulative amounts of those liabilities that, after the effective date of the prior asset purchase, stock purchase, merger, or consolidation, are paid or committed to be paid by or on behalf of the successor, or by or on behalf of the prior transferor, in connection with any judgment, settlement, or other discharge of claims of asbestos-related liabilities, exceed the fair market value of the previously acquired assets or stock as determined on the effective date of the prior asset purchase, stock purchase, merger, or consolidation. (R.C. 2307.96(C).)

***Establishment of fair market value of total assets***. Under the bill, a successor may establish the fair market value of the total assets by means of any method that is reasonable under the circumstances, including by reference to the going-concern value of those assets, to the purchase price attributable to or paid for the assets in an arm's length transaction, or, in the absence of other readily available information from which fair market value can be determined, to the value of those assets recorded on a balance sheet. Total assets include intangible assets. A showing by the successor of a reasonable determination of the fair market value of total assets is prima-facie evidence of the fair market value of those assets. After a successor has established a reasonable determination of the fair market value of the total assets, a claimant that disputes that determination has

the burden of establishing a different fair market value of those assets. (R.C. 2307.96(D)(1) and (2).)

For the purpose of adjusting the limitations on liability discussed in "***Limitations on liability***" and "***Exemption from restraint, attachment, or execution***," above, to account for the passage of time, the fair market value of total assets on the effective date of the applicable asset purchase or stock purchase under the applicable law must be increased annually, at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the asset purchase or stock purchase plus 1%, not compounded, until the earlier of either of the following (R.C. 2307.96(D)(3)):

(1) The date of the judgment, settlement, or other discharge of claims of successor asbestos-related liabilities to which the limitations on liability are being applied;

(2) The date on which the adjusted fair market value of total assets is first exceeded by the cumulative amounts of successor asbestos-related liabilities that are paid or committed to be paid by or on behalf of the successor or by or on behalf of a transferor, after the effective date of the asset purchase or stock purchase in connection with any judgment, settlement, or other discharge of the successor asbestos-related liabilities.

***Application of the limitations on liability***. The bill provides that the above limitations on liability apply to the following (R.C. 2307.96(E)(1)):

(a) All asbestos claims, including asbestos claims that are pending on the effective date of this provision, and all litigation involving asbestos claims, including litigation that is pending on the effective date of this provision.

(b) Successors of a successor to which the immunity provisions apply.

The limitations on liability do not apply to any of the following (R.C. 2307.96(E)(2)):

(a) Workers' compensation benefits that are paid by or on behalf of an employer to an employee pursuant to any provision of the workers' compensation law (R.C. Chapter 4121., 4123., 4127., or 4131.) in Ohio or comparable workers' compensation law of another jurisdiction;

(b) Any claim against a successor that does not constitute a claim for a successor asbestos-related liability;

(c) An insurance corporation;

(d) Any obligation arising under the "National Labor Relations Act" or under any collective bargaining agreement.

Under the bill, a holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate or holding company of that holder, owner, or subscriber or of the corporation, is under no obligation to, and has no liability to, the corporation or to any person with respect to any obligation or liability of the corporation relating in any way to asbestos claims on the basis that the holder, owner, subscriber, affiliate, or holding company controlled the corporation or is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, a fraudulent conveyance, piercing the corporate veil, or any other similar theory, unless the person demonstrates that the holder, owner, subscriber, affiliate, or holding company caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the person primarily for the direct pecuniary benefit of the holder, owner, subscriber, affiliate, or holding company, and then only to the extent of that direct pecuniary benefit. Any liability of the holder, owner, or subscriber of shares of a corporation described above or any affiliate or holding company of that holder, owner, or subscriber or of the corporation for an obligation or liability that is so limited is exclusive and preempts any other obligation or liability imposed upon a holder, owner, or subscriber of shares of that corporation or any affiliate or holding company of that holder, owner, or subscriber or of the corporation for that obligation or liability under common law or otherwise. (R.C. 2307.97.)

The bill provides that the terms and conditions of the following transactions are subject to the limitations on liability discussed in "***Limitations on liability***" and "***Exemption from restraint, attachment, or execution***," above: a lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets, with or without the good will, of a corporation, if not made in the usual and regular course of its business that is authorized (1) by the directors, either before or after authorization by the shareholders or (2) at a meeting of the shareholders held for that purpose, by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on the proposal, or, if the articles so provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of the voting power, and by the affirmative vote of the holders of shares of any particular class that is required by the articles (R.C. 1701.76(F)).

***Merger or consolidation***. The bill provides that, with regards to when a merger or consolidation becomes effective, all obligations belonging to or due to each constituent entity, the liability of the surviving or new entity for all the obligations of each constituent entity, and all the rights of creditors of each

constituent entity that are preserved unimpaired are subject to the above-discussed limitations under the successor asbestos-related liability provisions of the bill (R.C. 1701.82(A)(3), (4), and (5)).

***Collateral benefits***

***Current law***

Current law permits a defendant, in a civil action upon a medical, dental, optometric, or chiropractic claim, to introduce evidence of any amount payable as a benefit to the plaintiff as a result of damages that result from an injury, death, or loss to person or property that is the subject of the claim, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation. If a defendant introduces evidence of a plaintiff's right to receive collateral benefits, the plaintiff may introduce evidence of any amount the plaintiff has paid or contributed to secure any benefits of which the defendant has introduced evidence. A source of collateral benefits, of which evidence is introduced by the defendant, is prohibited from recovering any amount against the plaintiff and may not be subrogated to the plaintiff's rights against a defendant. (R.C. 2323.41.)

***Operation of the bill***

The bill applies this provision to all tort actions, not just medical, dental, optometric, or chiropractic claims. The bill defines "tort action" for these provisions as a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a civil action upon a product liability claim or a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim. "Tort action" does not include a civil action for damages for a breach of contract or another agreement between persons. (R.C. 2323.41(A) and (D).)

***Contingent fee agreements***

***Written agreement and closing statement--generally***

Under current law, if an attorney and a client contract for the provision of legal services in connection with a claim that is or may become the basis of a tort action and if the contract includes a contingent fee agreement, that agreement must be reduced to writing and signed by the attorney and the client. The attorney must provide the client with a signed closing statement at the time of or prior to receipt of compensation under such an agreement. Current law specifies the contents of the closing statement. For purposes of these provisions, "tort action" means a civil action for damages for injury, death, or loss to person or property, which includes

a medical, dental, optometric, or chiropractic claim. It also specifically includes a product liability claim.

The bill excludes from the definition of tort action that applies to the above-described contingency fee agreement provisions a civil action based upon a medical claim, dental claim, optometric claim, or chiropractic claim. However, the bill specifically makes the above-described contingency fee agreement provisions applicable to attorney/client contingency fee contracts applicable to contracts for legal services in connection with a claim that is or may be the basis of a tort action or in connection with a medical claim, dental claim, optometric claim, or chiropractic claim. Therefore, there is no substantive change to those specific provisions. (R.C. 4705.15(A)(2), (B), and (D).)

***Contingent fee agreement--medical, dental, optometric, and chiropractic claims***

Continuing law provides that, if pursuant to a contingency fee agreement between an attorney and a plaintiff in a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim, the amount of the attorney's fees exceeds the applicable amount of the limits on compensatory damages for noneconomic loss as provided in the law, the attorney must make an application in the probate court of the county in which the civil action was commenced or in which the settlement was entered. The application must contain a statement of facts, including the amount to be allocated to the settlement of the claim, the amount of the settlement or judgment that represents the compensatory damages for economic loss and noneconomic loss, the relevant provision in the contingency fee agreement, and the dollar amount of the attorney's fees under the contingency fee agreement. The application must include the proposed distribution of the amount of the judgment or settlement.

The attorney must give written notice of the hearing and a copy of the application to all interested persons who have not waived notice of the hearing. Notwithstanding the waivers and consents of the interested persons, the probate court retains jurisdiction over the settlement, allocation, and distribution of the claim. The application must state the arrangements, if any, that have been made with respect to the attorney's fees. The attorney's fees are subject to the approval of the probate court. (R.C. 2323.43(F).)

The bill does not change these provisions.

***Limits on contingency fees--tort actions other than medical, dental, optometric, and chiropractic claims***

The bill provides that if an attorney and a client contract for the provision of legal services in connection with a claim that may become the basis of a tort action (because of the bill's modification of the definition of tort action, these limits do not apply to a contract in connection with a claim that may be the basis of a medical, dental, optometric, or chiropractic claim) and if the contract includes a contingent fee agreement, the agreement must not provide for the payment of a fee that exceeds, and the attorney is prohibited from collecting a contingency fee for representing the client in excess of, the following limits (R.C. 4705.15(C)(1)):

(a) 35% of the first $100,000 recovered on the claim;

(b) 25% of the next $500,000 recovered on the claim;

(c) 15% of any amount on which the recovery on the claim exceeds $600,000.

The above-described limits apply regardless of whether the recovery is by settlement, arbitration, or judgment or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind (R.C. 4705.15(C)(2)).

***Closing statement***

Under current law, if an attorney represents a client in connection with a tort action (includes a medical, dental, optometric, or chiropractic claim), if their contract for the provision of legal services includes a contingent fee agreement, and if the attorney becomes entitled to compensation under that agreement, the attorney must prepare a signed closing statement and must provide the client with that statement at the time of or prior to the receipt of compensation under that agreement. Under the bill, the attorney must provide the client with the closing statement within a reasonable time, but not later than 30 days, after the claim is finally adjudicated or settled. (R.C. 4705.15(D).)

Current law provides that the closing statement must specify the manner in which the compensation of the attorney was determined under that agreement, any costs and expenses deducted by the attorney from the judgment or settlement involved, any proposed division of the attorney's fees, costs, and expenses with referring or associated counsel, and any other information that the attorney considers appropriate.

The bill retains the above requirements for what the attorney must specify in the closing statement and provides that the closing statement also must contain

all of the following (these provisions apply to tort actions based on a medical, dental, optometric, or chiropractic claim) (R.C. 4705.15(D)):

(1) The actual number of hours of the attorney's legal services that were spent in connection with the claim;

(2) The total amount of the hourly fees or contingent fee for the attorney's legal services in connection with the claim;

(3) The actual fee per hour of the attorney's legal services in connection with the claim, determined by dividing the total amount of the specified hourly fees, less itemized costs and expenses, or the total contingent fee by the actual number of hours of the attorney's legal services.

***Definitions***

The bill defines "recovered" as the net sum recovered on a claim after deducting any disbursements, costs, and expenses incurred in connection with the prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office overhead costs or charges are not deductible disbursements or costs. (R.C. 4705.15(A)(4).)

***Legal consumer's bill of rights***

The bill requires that each attorney who is licensed to practice law in Ohio append to every written retainer agreement or contract for legal services a legal consumer's bill of rights that must be substantially in the following form (R.C. 4705.16(A)) (see **COMMENT** 3):

"LEGAL CONSUMER'S BILL OF RIGHTS

(A) You have the right to control your own legal affairs.

(1) Your attorney, at your request, must do all of the following:

(a) Keep you informed about the status of your legal matter;

(b) Promptly answer your questions;

(c) Promptly return your phone calls;

(d) Disclose any alternatives available to you for resolving your legal matter;

(e) Inform you of all relevant and legal considerations to assist you in making a decision and advise you of the possible effect of each legal alternative, including any harsh consequences that might result.

(2) You have the right and duty to make decisions in your matter, including whether, and on what terms to settle a dispute or lawsuit.

(B) You have the right to be fully informed about the costs and fee associated with your legal matter and you have the rights specified in paragraph (D) below, if you have a contingent fee agreement with your attorney.

(1) Your attorney must disclose all of the following to you:

(a) All alternative fee arrangements and the reasons for the particular fee arrangement proposed by the attorney;

(b) Total anticipated fees and expenses through trial;

(c) Total anticipated costs;

(d) The basis of the fee charges to be made.

(2) Your attorney must do all of the following:

(a) Sign a written fee agreement that spells out the terms of every representation of you, including the fee arrangements;

(b) Agree not to exceed estimated costs and fees without your consent;

(c) Agree to return any unexpended portion of your retainer or other advanced payments;

(d) Make full use of economical and efficient legal support services under your attorney's supervision, including, but not limited to, paralegals, law clerks, and legal secretaries, as well as your own personal services to reduce the costs to you;

(e) Agree to charge a reasonable fee based on the factors specified in Disciplinary Rule 2-106(B) of the Code of Professional Responsibility.

(C) You have the right to retain qualified and competent legal representation.

(1) Your attorney must do all of the following:

(a) Provide timely, thorough, competent, and professional legal services;

(b) Advise you to solicit or arrange for the services of co-counsel if your attorney is not qualified to represent you in the areas of the law relevant to your matter;

(c) Respect your right to privacy and your confidential information that is protected by the attorney-client privilege and not reveal your confidences and secrets except under any of the circumstances specified in Disciplinary Rule 4-101(C) of the Code of Professional Conduct;

(d) Not neglect your legal matter;

(e) Ensure that your attorney does not have a conflict of interest in representing you;

(f) Maintain accurate records;

(g) Upon your request, provide you with copies of all court documents and letters that your attorney produces or receives while representing you.

(2) You have the right to an accessible legal system.

If you are not satisfied with the legal services that you have retained, or with how your matter is being handled, you have the right to file a grievance with the Certified Grievance Committee of your local bar association or the Ohio State Bar Association or with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The Committee and the Board include non-attorneys as members. The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has the authority to discipline, and to impose sanctions on, attorneys in Ohio.

(D) You have the following rights if you have a contingent fee agreement, as defined in section 4705.15 of the Revised Code, with your attorney for the provision of legal services in connection with a claim that is or may become the basis of a tort action, as defined in that section:

(1) The agreement must be in writing and signed by you and your attorney.

(2) Your attorney must provide a copy of the signed agreement to you.

(3) If your attorney becomes entitled to compensation under the contingent fee agreement, your attorney must prepare a signed closing statement and provide you with that statement within a reasonable time, but not later than thirty (30) days after the claim is finally adjudicated and settled.

(4) Your attorney's closing statement must specify all of the following:

(a) The manner in which your attorney's compensation was determined under the agreement;

(b) The actual number of hours of your attorney's legal services that were spent in connection with the claim;

(c) The total amount of the hourly fees or contingent fee for your attorney's legal services in connection with the claim;

(d) The actual fee per hour of your attorney's legal services in connection with the claim, determined by dividing the total amount of the hourly fees specified in paragraph (4)(c), above, less itemized costs and expenses, or the total contingent fee specified in that paragraph by the actual number of hours of your attorney's legal services specified in paragraph (4)(b), above;

(e) Any costs and expenses deducted by your attorney from the judgment or settlement involved;

(f) Any proposed division of your attorney's fees, costs, and expenses with referring or associated counsel;

(g) Any other information that your attorney considers appropriate."

The client's attorney must deposit in an interest-bearing trust account identified as IOLTA or an interest on lawyer's trust account any client funds held by the attorney that are nominal in amount or are to be held for a short period of time in accordance with R.C. 4705.09 and 4705.10 and any applicable provisions of the Code of Professional Conduct (R.C. 4507.16(B)).

The Revised Code section that contains the above provisions must be called and may be cited as the "Legal Consumer's Bill of Rights" (R.C. 4507.16(C)).

***Contributory fault***

Current law states that the contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action. This contributory fault provision does not apply to actions brought to recover damages from an employer for personal injuries suffered by the employer's employee or for death resulting to the employee from the personal injuries, while in the employ of the employer, arising from the negligence of the employer. Under the bill, the

contributory fault provision described above *does* apply to these actions. (R.C. 2315.33.)

***Immunity from liability for an owner, lessee, or occupant of premises with regard to a user of a recreational trail***

The bill provides that an owner, lessee, or occupant of premises does not owe any duty to a user of a recreational trail to keep the premises safe for entry or use by a user of a recreational trail. An owner, lessee, or occupant of premise does not assume, has no responsibility for, does not incur liability for, and is not liable for any injury to person or property caused by any act of a user of a recreational trail. (R.C. 1519.07(B)(1) and (2).)

For the purposes of the above provision (R.C. 1519.07(A)):

(1) "Premises" is defined as a parcel of land together with any waters, buildings, or structures on it that is privately owned and that is directly adjacent to a recreational trail.

(2) "Recreational trail" is defined as a public trail that is used for hiking, bicycling, horseback riding, ski touring, canoeing, or other nonmotorized forms of recreational travel and that interconnects state parks, forests, wildlife areas, nature preserves, scenic rivers, or other places of scenic or historic interest.

(3) "User of a recreational trail" is defined as a person who, in the course of using a recreational trail, enters on premises without first obtaining express permission to be there from the owner, lessee, or occupant of the premises.

The bill also modifies the definitions of "premises" and "recreational user" in R.C. 1533.18 that apply to the existing exceptions from liability of an owner, lessee, or occupant of premises to a recreational user. Under the bill, "premises" includes all *privately owned* lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon, and "recreational user" includes a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, *or a lease payment paid to the owner of privately owned lands*, to enter upon premises to hunt, fish, trap, camp, hike, swim, operate a snowmobile or all-purpose vehicle, or engage in other recreational pursuits. (R.C. 1533.18(A) and (B).)

***Statement of findings and intent and other uncodified provisions***

The General Assembly makes the following statement of findings and intent in the bill (Section 6):

(A) The General Assembly finds:

(1) The current civil litigation system represents an increasing danger to the economic viability of the state of Ohio.

(2) The current tort system forces companies into bankruptcy, deprives Ohioans of essential jobs, and stifles further innovation.

(3) The General Assembly recognizes that civil justice reform strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued.

(4) This state has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits that clog the court system, threaten Ohio jobs, drive up costs to consumers, and stifle innovation. The General Assembly bases its findings on this state interest upon the following evi dence:

(a) A National Bureau of Economic Research study estimates that states that have adopted abuse reforms have experienced employment growth between 11% and 12%, productivity growth of 7% to 8%, and total output growth between 10% and 20% for liability reducing reforms.

(b) According to a 2002 study from the White House Council of Economic Advisors, the cost of tort litigation is equal to a 2 1/10% wage and salary tax, a 1 3/10% tax on personal consumption, and a 3 1/10% tax on capital investment income.

(c) The 2003 Harris Poll of 928 senior corporate attorneys conducted by the United States Chamber of Commerce's Institute for Legal Reform reports that eight out of ten respondents claim that the litigation environment in a state could affect important business decisions about their company, such as where to locate or do business. In addition, one in four senior attorneys surveyed cited limits on damages as one specific means for state policy makers to improve the litigation environment in their state and promote economic development.

(d) The cost of the United States tort system grew at a record rate in 2001, according to a February 2003 study published by Tillinghast-Towers Perrin. The system, however, failed to return even 50 cents for every dollar to people who were injured. Tillinghast-Towers Perrin also found that 54% of the total cost accounted for attorney's fees, both for plaintiffs and defendants, and administration. Only 22% of the tort system's cost was used directly to reimburse people for the economic damages associated with injuries and losses they sustain.

(e) The Tillinghast-Towers Perrin study also found that the cost of the United States tort system grew 14 3/10% in 2001, the highest increase since 1986, greatly exceeding overall economic growth of 2 6/10%. As a result, the cost of the United States tort system rose to $205 billion total or $721 per citizen, equal to a 5% tax on wages.

(f) As stated in testimony by Ohio Department of Development Director Bruce Johnson, as a percentage of the gross domestic product, United States tort costs have grown from 6/10% to 2% since 1950, about double the percentage that other industrialized nations pay annually. These tort costs put Ohio businesses at a disadvantage vis-a-vis foreign competition and are not helpful to development.

(5)(a) Reform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system.

(b) In prohibiting a court from entering judgment for punitive or exemplary damages in excess of the greater of the amount of compensatory damages awarded to the plaintiff or $100,000 and, with respect to an employer with 500 or few employees, from entering judgment for punitive or exemplary damages in excess of the lesser of the amount of compensatory damages awarded to the plaintiff or $100,000, the General Assembly finds the following:

(i) Punitive or exemplary damages awarded in tort actions are similar in nature to fines and additional court costs imposed in criminal actions, because punitive or exemplary damages, fines, and additional court costs are designed to punish a tortfeasor for certain wrongful actions or omissions.

(ii) The absence of a statutory ceiling upon recoverable punitive or exemplary damages in tort actions has resulted in excessive and occasionally multiple awards of punitive or exemplary damages that have no rational connection to the wrongful actions or omissions of the tortfeasor.

(iii) The distinction between small employers and other defendants based on the number of full-time permanent employees distinguishes all other defendants including individuals and nonemployers. This distinction is rationally based on size considering both the economic capacity of an employer to maintain that number of employees and to impact the community at large, as exemplified by the United States Small Business Administration's Office of Advocacy.

(c) The limits on punitive or exemplary damages as specified in section 2315.21 of the Revised Code, as amended by this act, are based on guidance recently provided by the United States Supreme Court in *State Farm Mutual Insurance v. Campbell* (2003), 123 S.Ct. 1513. In determining whether a $145 million award of punitive damages was appropriate, the United States Supreme

Court referred to the three guideposts for punitive damages articulated in *BMW of North America Inc. v. Gore* (1996), 517 U.S. 599: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. According to the United States Supreme Court, "few awards exceeding a single digit ratio between punitive damages and compensatory damages . . . will satisfy due process." *Id.* at 31.

(d) The limits on punitive or exemplary damages as specified in section 2315.21 of the Revised Code, as amended by this act, are based on testimony asking members of the General Assembly to recognize the economic impact of excessive and occasionally multiple punitive damages awards and stating that a number of other states have imposed limits on punitive or exemplary damage awards.

(6)(a) Noneconomic damages include such things as pain and suffering, emotional distress, and loss of consortium or companionship, which do not involve an economic loss and have, therefore, no precise economic value. The General Assembly recognizes that it is very difficult for juries to assign a dollar value to these losses, particularly with the minimal guidance the juries are normally given. As a result, these awards tend to be erratic and, because of the highly charged environment of personal injury trials, excessive.

(b) The limits on compensatory damages representing noneconomic loss, as specified in section 2323.43 of the Revised Code, as amended by this act, are based on testimony asking members of the General Assembly to recognize these distinctions and stating that the cap amounts are similar to caps on awards adopted by other states.

(c) In *Schiller v. Wal-Mart Stores, Inc.* (1997), 949 P.2d 89, one of the issues addressed by the Court of Appeals of Colorado is whether the caps on noneconomic damages constitute a violation of the rights to equal protection and due process as provided under the United States and Colorado Constitutions, as well as the right, pursuant to Article 2, Section 6 of the Colorado Constitution, to access to the courts. Article 2, Section 6 provides that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and right and justice should be administered without sale, denial, or delay."

(d) On a question of law certified from the United States District Court for the District of Idaho, the Supreme Court of Idaho held that the cap on noneconomic damages was constitutional. In *Kirkland v. Blaine County Medical Center* (2000), 134 Idaho 464, the Supreme Court of Idaho addressed the issue of

whether the limit on noneconomic damages was unconstitutional under the Idaho Constitution. The Court held that the limit on noneconomic damages was constitutional and did not violate the right to a jury trial in that the limit on noneconomic damages was a modification of a common law remedy that was within the powers of the legislature and did not infringe upon the jury's right to decide cases.

(e) In *Edmonds v. Murphy* (1990), 83 Md. App. 133, the Court of Special Appeals held that the limit on noneconomic damages did not violate Article 19 of the Maryland Declaration of Rights, which provides "[t]hat every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land." The Court held that "[t]he majority of courts that have addressed [noneconomic damages] caps under either a Fourteenth Amendment due process analysis or an analysis under state constitutional provisions similar to Article 19 have upheld caps." The Court agreed with the "sound reasoning of the majority of courts that have analyzed caps under due process analysis or under constitutional provisions similar to Article 19 and found no constitutional violation." Accordingly, the Court of Special Appeals of Maryland held that the limits on noneconomic damages did not violate the state's "open courts" provision.

(7)(a) Statutes of repose are vital instruments that provide time limits, closure, and peace of mind to potential parties of lawsuits.

(b) Forty-seven other states have adopted statutes of repose to protect architects, engineers, and constructors of improvements to real property from lawsuits arising after a specific number of years after completion of an improvement to real property. The General Assembly recognizes that Kentucky, New York, and Ohio are the only three states that do not have a statute of repose. The General Assembly also acknowledges that Ohio stands by itself, due to the fact that both Kentucky and New York have a rebuttable presumption that exists and only if a plaintiff can overcome that presumption can a claim continue.

(c) As stated in testimony by Jack Pottmeyer, architect and managing principal of MKC Associates, Inc., this unlimited liability forces professionals to maintain records in perpetuity, because those professionals cannot reasonably predict when a record from 15 or 20 years earlier may become the subject of a civil action. Those actions occur despite the fact that, over the course of many years, owners of the property or those responsible for its maintenance could make modifications or other substantial changes that would significantly change the intent or scope of the original design of the property designed by an architectural firm. The problem is compounded by the fact that professional liability insurance for architects and engineers is offered by relatively few insurance carriers and is

written on what is known as a "claims made basis," meaning a policy must be in effect when the claim is made, not at the time of the service, in order for the claim to be paid. Without a statute of repose, professional liability insurance must be maintained forever to ensure coverage of any potential claim on previous services. These minimum annual premiums can add up, averaging between $3,500 and $5,000 annually, which is especially burdensome for a retired design professional.

(8)(a) The collateral source rule prohibits a defendant from introducing evidence that the plaintiff received any benefits from sources outside the dispute. The General Assembly recognizes that this rule allows a plaintiff to recover the full amount of damages twice and also undermines the basis of a fault-based liability system.

(b) Twenty-one states have modified or abolished the collateral source rule.

(9)(a) 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 that "defies customary judicial administration and calls for national legislation." *Ortiz v. Fibreboard Corporation* (1999), 119 S.Ct. 2295, 2303.

(b) The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike.

(c) The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts, with over 200,000 cases pending and over 50,000 new cases filed each year.

(d) Asbestos personal injury litigation has already contributed to the bankruptcy of more than 60 companies, including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

(e) The General Assembly recognizes that the vast majority of 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.

(f) The cost of compensating exposed individuals who are not ill 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.

(g) As stated in testimony by Robert Bunda, a trial lawyer who has been involved with the defense of asbestos claims on behalf of Owens-Illinois, Inc. for 24 years, there is something terribly wrong with the current civil justice system, evidenced by the fact that Owens-Illinois has been sued over 300,000 times for its brief involvement in manufacturing asbestos. According to Mr. Bunda, at least five Ohio-based companies have gone bankrupt because of the cost of paying people who are not sick. These bankruptcies have imperiled the availability of even modest compensation for the most seriously injured asbestos workers. They have also imperiled jobs, the health benefits, and the retirement funds of tens of thousands of blue-collar workers. New jobs are not being created in Ohio, and existing Ohio jobs are being destroyed.

(h) According to a study conducted by NERA Economic Consulting, in 2000, Owens-Corning laid off 275 employees from its Granville, Ohio plant. The ripple effect of those job losses predicts total employment in the county of almost 500 jobs and a $15 million to $20 million annual reduction in regional income.

(i) The public interest requires the deferring of claims of exposed individuals who are not ill 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 section 2305.131 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:

(1) To declare that the ten-year statute of repose prescribed by section 2305.131 of the Revised Code, as enacted by this act, is a specific provision intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2305.09 of the Revised Code, the general two-year statute of limitations prescribed by section 2305.10 of the Revised Code, and other general statutes of limitation prescribed by the Revised Code;

(2) To recognize that, subsequent to the completion of the construction of an improvement to real property, all of the following generally apply to the persons who provided services for the improvement or who furnished the design, planning, supervision of construction, or construction of the improvement:

(a) They lack control over the improvement, the ability to make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement.

(b) They lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement.

(c) They have no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes described in division (E)(5)(b) of this section.

(3) To recognize that, more than ten years after the completion of the construction of an improvement to real property, the availability of relevant evidence pertaining to the improvement and the availability of witnesses knowledgeable with respect to the improvement is problematic;

(4) To recognize that maintaining records and other documentation pertaining to services provided for an improvement to real property or the design, planning, supervision of construction, or construction of an improvement to real property for a reasonable period of time is appropriate and to recognize that, because the useful life of an improvement to real property may be substantially longer than ten years after the completion of the construction of the improvement, it is an unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after that completion;

(5) To declare that section 2305.131 of the Revised Code, as enacted by this act, strikes a rational balance between the rights of prospective claimants and the rights of design professionals, construction contractors, and construction subcontractors and to declare that the ten-year statute of repose prescribed in that section is a rational period of repose intended to preclude the pitfalls of stale litigation but not to affect civil actions against those in actual control and possession of an improvement to real property at the time that a defective and unsafe condition of that improvement causes an injury to real or personal property, bodily injury, or wrongful death.

(C) In enacting division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:

(1) To declare that the ten-year statute of repose prescribed by division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code, as enacted by this act, are specific provisions intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2305.09 of the Revised Code, the general two-year statutes

of limitations prescribed by sections 2125.02 and 2305.10 of the Revised Code, and other general statutes of limitations prescribed by the Revised Code;

(2) To declare that, subject to the two-year exceptions prescribed in division (D)(2)(d) of section 2125.02 and in division (C)(4) of section 2305.10 of the Revised Code, the ten-year statutes of repose shall serve as a limitation upon the commencement of a civil action in accordance with an otherwise applicable statute of limitations prescribed by the Revised Code;

(3) To recognize that subsequent to the delivery of a product, the manufacturer or supplier lacks control over the product, over the uses made of the product, and over the conditions under which the product is used;

(4) To recognize that under the circumstances described in division (C)(3) of this section, it is more appropriate for the party or parties who have had control over the product during the intervening time period to be responsible for any harm caused by the product;

(5) To recognize that, more than ten years after a product has been delivered, it is very difficult for a manufacturer or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product, thus severely disadvantaging manufacturers or suppliers in their efforts to defend actions based on a product liability claim;

(6) To recognize the inappropriateness of applying current legal and technological standards to products manufactured many years prior to the commencement of an action based on a product liability claim;

(7) To recognize that a statute of repose for product liability claims would enhance the competitiveness of Ohio manufacturers by reducing their exposure to disruptive and protracted liability with respect to products long out of their control, by increasing finality in commercial transactions, and by allowing manufacturers to conduct their affairs with increased certainty;

(8) To declare that division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code, as enacted by this act, strike a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers and to declare that the ten-year statutes of repose prescribed in those sections are rational periods of repose intended to preclude the problems of stale litigation but not to affect civil actions against those in actual control and possession of a product at the time that the product causes an injury to real or personal property, bodily injury, or wrongful death;

(D) In enacting sections 2307.91 to 2307.97 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.

(E) The General Assembly declares its intent that the amendment to R.C. 2307.71 is intended to supersede the holding of the Ohio Supreme Court in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, that the common law product liability cause of action of negligent design survives the enactment of the Ohio Product Liability Act (R.C. 2307.71 to 2307.80), and to abrogate all common law product liability causes of action.

(F) The Ohio General Assembly respectfully requests the Ohio Supreme Court to uphold this intent in the courts of Ohio, to reconsider its holding on damage caps in *State v. Sheward* (1999), Ohio St. 3d 451, to reconsider its holding on the deductibility of collateral source benefits in *Sorrel v. Thevenir* (1994), 69 Ohio St. 3d 415, and to reconsider its holding on statutes of repose in *Sedar v. Knowlton Constr. Co.* (1990) 49 Ohio St. 3d 193.

The bill also provides the following in uncodified law:

(A) The General Assembly acknowledges the 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.

(B) The General Assembly requests the Supreme Court to adopt a "Legal Consumer's Bill of Rights.

(C) The General Assembly requests the Supreme Court to adopt rules to specify procedures for venue and consolidation of asbestos claims brought pursuant to R.C. 2307.91 to 2307.95. With respect to procedures for venue in regard to asbestos claims, the General Assembly 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. With respect to procedures for consolidation of asbestos claims, the General Assembly requests the Supreme Court to adopt a rule that permits

consolidation of asbestos claims only with the consent of all parties and, in the 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.

As used in the above uncodified provisions, "asbestos," "asbestos claim," "exposed person," and "substantial contributing factor" have the same meanings as in R.C. 2307.91 of the bill. (Section 7.)

The bill includes severability clauses (Sections 8 and 9).

## COMMENT

1. An issue may be raised that a statute of repose infringes upon the "open courts, right-to-remedy, and due course of law" provisions of Section 16 of Article I of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460 (R.C. 2305.131's ten-year statute of repose is unconstitutional as being violative of Section 16 of Article I of the Ohio Constitution); *Cyrus v. Henes* (1994), 70 Ohio St.3d 640; *Ross v. Tom Reith, Inc.* (1995), 71 Ohio St.3d 563; *Cleveland City School Dist. Bd. of Edn. v. URS Co.* (1995), 72 Ohio St.3d 188; and *State ex rel. Ohio Academy of Trial Lawyers et al. v. Sheward* (1999), 86 Ohio St.3d 451. An issue may also be raised that a statute of repose infringes upon the "equal protection" provision of Section 2 of Article I of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Issues may be raised that the cap provisions on compensatory damages for noneconomic loss and punitive or exemplary damages are unconstitutional as being violative of the "open courts, right-to-remedy, and due course of law" provisions of Section 16 of Article I of the Ohio Constitution, the right to a trial by jury established by Section 5 of Article I of the Ohio Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, and *State ex. Rel. Ohio Academy of Trial Lawyers et al. v. Sheward, supra*.

3. An issue may be raised that R.C. 4705.16 (regarding a "Legal Consumer's Bill of Rights") is unconstitutional as being violative of the Ohio Supreme Court's jurisdiction in the admission to practice law, the discipline of persons so admitted, and all other matters relating to the practice of law. (Section 2(B)(1)(g) of Article IV of the Ohio Constitution.)

## HISTORY

| ACTION | DATE | JOURNAL ENTRY |
|---|---|---|
| Introduced | 05-01-03 | pp. 310-311 |
| Reported, S. Judiciary on Civil Justice | 06-11-03 | p. 447 |
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