OHIO ASSOCIATION for JUSTICE
TRIAL LAWYERS HELPING PEOPLE

Opposition Testimony to SB 63
Senate Insurance Committee
March 29, 2023

Chair Hackett, Vice-Chair Lang, and Ranking Member Craig,

My name is Shawn M. Acton. I am an attorney from Cleveland, Ohio. For the past twenty-two years, I have represented mesothelioma victims and their families. I have tried well over one hundred fifty civil cases to verdict as lead trial counsel, including some mesothelioma cases. I am here today on behalf of the Ohio Association of Justice ("OAJ") and my clients living throughout the State of Ohio, including veterans and civilians who have contracted and/or died from mesothelioma.

I, and the OAJ, are deeply concerned about SB 63 in its current form ("SB 63" or "the Bill"). OAJ members, as attorneys for victims of asbestos poisoning, seek to have the responsible entities pay for only their fair share of harm done to veterans and civilians, rather than have families, the health care system, and/or the government pay. SB 63 will eliminate the opportunity for Ohio veterans and civilians to bring valid claims against culpable entities in a substantial number of cases.

Overview:

First, there is not a pervasive over-naming problem in Ohio. If a mesothelioma victim did not work with or around a particular type of asbestos-containing product, manufacturers and suppliers of that product are not sued. Moreover, the same defendants are not sued repeatedly in a "cookie cutter" fashion. All parties can agree that asbestos litigation is extremely complex and involves multiple defendants. For example, a tradesman working out of union hall for decades may have worked for dozens of different employers and on hundreds of different jobsites, sometimes for a day or two at a time. Multiple companies may be liable under Ohio law for harm done to a mesothelioma victim; however, each company is only liable for its fair share of harm caused by the victim's exposure to that separate company's product.

Second, OAJ does not oppose the general precept that defendants have a right to know why they are being sued. In fact, OAJ unsuccessfully attempted to compromise and achieve the alleged purpose of SB 63. The Proponents proclaim: "tell us why these companies are being sued." OAJ is willing to think creatively about this alleged problem. The simplest solution is to delete only the most egregious disclosures and allow the judge some discretion to determine whether the plaintiff has complied with SB 63. Additionally, we considered suggesting language to allow, for a period of time, a claim to be revised after the complaint is filed. This would allow plaintiffs to initially "under-name" on complaints and discourage over-naming.

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Mesothelioma

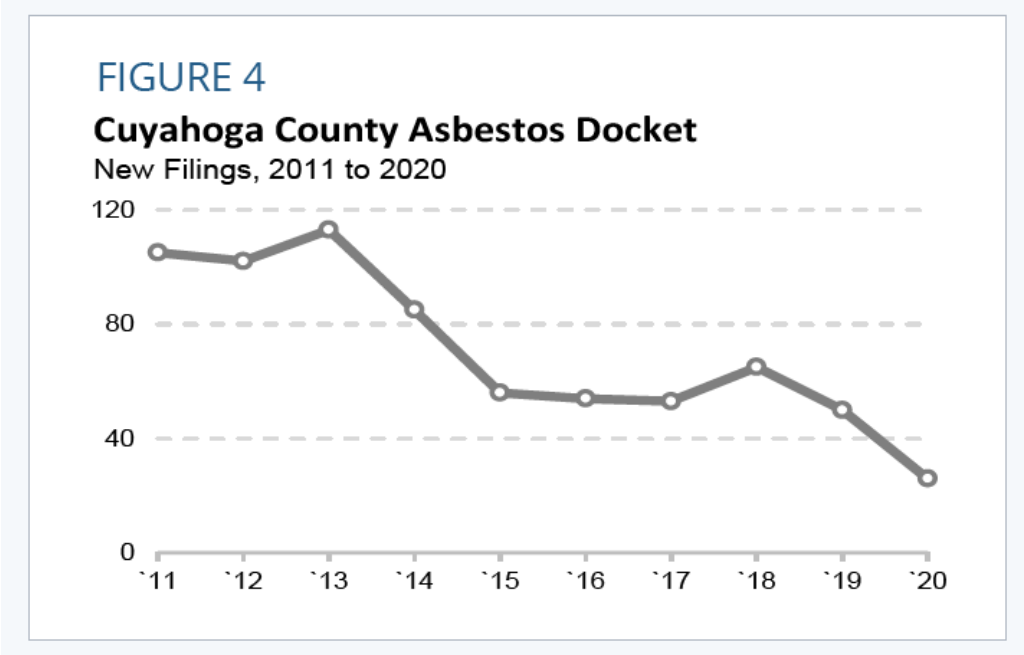
Mesothelioma is an incurable, malignant tumor that most often occurs in the lining of the lungs called the pleura. Mesothelioma is almost always caused by asbestos exposure, with few and rare exceptions. Mesothelioma is also associated with an extremely long latency period. This means that the disease does not manifest itself until ten to fifty plus years after exposure to asbestos. Unlike lung cancer, malignant mesothelioma is also an extremely rare tumor with approximately three thousand cases diagnosed in the United States each year. As the disease rapidly progresses, mesothelioma victims lose the ability to independently care for themselves and require assistance with the most basic human functions such as breathing, eating, and drinking. Eventually, mesothelioma painfully suffocates its victims from within. Death usually occurs within months to a year after diagnosis. There is no known safe level of exposure to asbestos at occupational levels in which mesothelioma will not occur in humans. To illustrate this, there are many reported instances where a wife contracted mesothelioma solely through washing her husband's asbestos-contaminated work clothes.

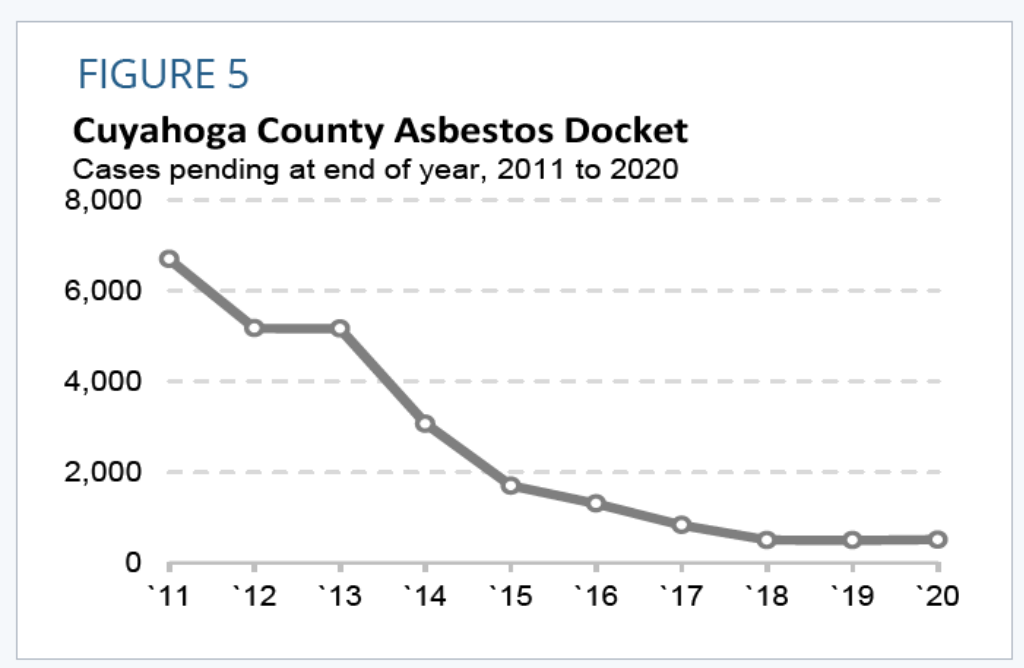
Ohio legislators already banned lawsuits involving virtually all non-malignant asbestos related diseases and lung cancer in people who were also smokers; therefore, SB 63 only affects mesothelioma victims and their families. In these cases, a small number of mesothelioma victims and their families are seeking redress in Ohio courts for massive medical bills, lost wages and income, funeral and burial expenses, and the extreme pain and suffering that all mesothelioma victims and their families endure. Almost all Ohio tort actions involving asbestos are filed in Cuyahoga County. The following charts illustrate the amount asbestos cases filed from 2011 to 2020:

TABLE 3

Cuyahoga County Asbestos Docket
Overall caseloads, 2011 to 2020

Year	New Filings	Pending at End of Year	Cases Terminated
2011	105	6,699	490
2012	102	5,174	1,635
2013	113	5,164	120
2014	85	3,067	2,182
2015	56	1,701	1,427
2016	54	1,307	453
2017	53	834	573
2018	65	501	378
2019	50	497	57
2020	26	512	25





https://www.supremecourt.ohio.gov/docs/Publications/annrep/20OCSR/2020OCS.pdf.

Due to the nature of mesothelioma, most mesothelioma cases are wrongful death cases. The "plaintiff" in a mesothelioma case is often the surviving spouse, a child, or sibling of the decedent. Each asbestos case is unique and involves different products, facts, work/exposure histories, jobsites, circumstances, and evidence. Sadly, despite decades of litigation, unique asbestos cases are discovered often.

Asbestos cases cannot be proven without the benefit of full discovery. For example, a widow of a veteran or civilian who may not have been married or otherwise, known the decedent at the time of his exposure, does not know:

1) the exact brand and trade name of each product,

2) the exact site within a location where the decedent was exposed (including locations within a large Naval vessel or a 90,000 square foot civilian facility),

3) the exact beginning and end dates of the decedent's exposures,

4) the exact frequency and length of the decedent's exposures (e.g. two times a day for four hours vs. any other unit of time), and

5) the exact proximity of the decedent to the products at the times of exposure (e.g., one foot, one hundred feet, or other unit of measurement).

A widow, child, or sibling simply does not possess this level of detail when the case is filed. That is what the discovery process is for.

The same reasoning applies to living mesothelioma victims who are receiving palliative care while they are actively dying. Many living mesothelioma victims are physically incapacitated and under the effects of doctor prescribed chemotherapy and opioids by the time the family reaches out to an attorney.

Even living mesothelioma victims who are in the early stages of the disease struggle to recall the detailed information SB 63 requires. For example, a veteran or civilian suffering from mesothelioma may recall the unique design of a final product, its component parts and how they exposed him to dust. A veteran or civilian also may recall all the details of his exposures from the product and its component parts. However, a veteran or civilian may not know the product and its component parts contained asbestos while he was serving the United States or working in a civilian setting because the manufacturer and supplier of the products did not place a warning on the product. A veteran or civilian also may not recall the manufacturer and suppliers of the product and its component parts. However, defendants often have documents in their possession that fill in the blanks, including corporate memos, engineering records, and sales records relating to the plaintiff's claims.

These are real examples from real cases involving real plaintiffs who satisfied the requirements of R.C. 2307.96 (elements for substantial factor causation) after discovery was completed. However, under SB 63, these valid claims against culpable defendants must be robotically dismissed without the benefit of full discovery.

Prior to filing a lawsuit, plaintiffs' attorneys make sure there are good grounds for the complaint by obtaining as much information they can from the client and other sources (if available and

cooperative). If a plaintiff states prior to suit that he never was around a particular type of asbestos containing product, the manufacturers and suppliers of those products are not sued.

The Bill essentially requires plaintiffs to have all the evidence necessary to prove the case to a jury shortly after the case is filed and before engaging in the discovery process. Portions of the Bill are based upon the misconception that plaintiffs have access to ALL the information and documents to satisfy SB 63's very detailed requirements before discovery is completed. Importantly, the information and documents required under SB 63 are very often in the sole possession of the defendant.

When required by the civil discovery process, defendants disclose information and documents showing: 1) they manufactured the types of products described by the plaintiffs, 2) those products contained asbestos, 3) the identities of the suppliers of asbestos containing products incorporated into defendants' final product, and 4) they sold these products to plaintiff's jobsites or ships during the relevant years. This is not an exclusive list. Defendants disclose a wealth of information and documents through the discovery process. Defendants do not disclose information and documents unless there is a legal mechanism requiring them to do so (e.g. the discovery process). The Proponents of SB 63 flatly refuse to endorse a pre-discovery requirement for defendants to disclose under oath whether defendants have any evidence (including defendants' sales records, prior depositions, etc.) indicating that specific products identified by plaintiffs contained asbestos, the identities of the companies that supplied asbestos-containing products to defendants, and whether defendants' products were used at or sold to the jobsites or ships identified by a plaintiff.

Discovery is an important tool. A particular defendant claimed in court that the asbestos used in its product was not harmful. However, a document produced in discovery showed that the defendant's Director of Purchases callously stated the following in a letter to defendant's asbestos supplier in 1966 "My answer to the problem is: if you've lived a good life working with asbestos why not die from it."

Frivolously naming defendants

OAJ has always supported the outlawing of frivolous lawsuits, including frivolous naming of defendants.

We have supported Ohio Civil Rule 11, which requires the attorney to sign every complaint to convey that the attorney has good grounds for the allegations in the Complaint. Ohio Civil Rule 11 provides that if a complaint is not based upon good grounds, the offending party can be sanctioned including an award of attorney's fees and expenses in defending the matter. In addition, Rule 3.1 of the Rules of Professional Conduct governs the conduct of attorneys and requires that there must be a basis in fact for complaints. Attorneys are subject to discipline for violations of the Rules of Professional Conduct.

Additionally, the Ohio General Assembly already crafted a solution to frivolously including defendants in a lawsuit. Ohio R.C. 2123.51 provides for penalties including court costs, attorney's fees, and expenses for filing a complaint that:

> …serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation. R.C. 2123.51(A)(2)(a)(i).
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> ***
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> …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. R.C. 2123.51(A)(2)(a)(iii).
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> …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. R.C. 2123.51(A)(2)(a)(iii)

These forementioned existing remedies address the alleged over naming in complaints without eliminating valid claims made by Ohio veterans and civilians against culpable defendants.

Veterans

Regarding subsection (H), SB 63's exception for veterans' affairs ("VA") benefit claims filed with the U.S. Government and/or Ohio workers compensation claims, is not relevant. SB 63 is specific to a "tort action." Thus, it cannot affect VA benefit and workers' compensation claims. For example, a veteran's claim in an Ohio product liability lawsuit concerns a manufacturer or supplier's tortious conduct in manufacturing or selling defective products to the Navy; the claim is not made against the Navy itself. If a manufacturer or a supplier sold the Navy a defective product and exposed the veteran to asbestos during his or her service, that manufacturer or supplier may be held liable to the veteran if he or she contracts mesothelioma. Any discussion about VA benefit claims or Ohio workers' compensation claims is irrelevant to any issues surrounding the Bill.

Other Types of Civil Litigation

The Proponents of SB 63 also claim that the affidavit required under the Bill is no different than the affidavit of merit required in an Ohio medical malpractice case. This analogy is misplaced. Before filing a lawsuit, a plaintiff alleging a medical claim has access to the information and documents necessary for a medical professional to sign an affidavit of merit (e.g. his or her medical records, x-rays, etc.). In addition, the degree of specificity required for an affidavit of merit is nowhere near the degree of specificity required for the affidavit under SB 63. Specifically, Ohio Civil Rule 10(D)(2)(a) only sets forth the following requirements for an affidavit of merit:

> (i) A statement that the affiant has reviewed all medical records

> reasonably available to the plaintiff concerning the allegations contained in the complaint;
>
> (ii) A statement that the affiant is familiar with the applicable standard of care;
>
> (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

In addition, R.C. 2323.451(D)(2) gives plaintiffs in medical malpractice cases an additional one hundred eighty days to later name defendants. R.C. 2323.451(C) specifically allows for "…discovery as permitted by the Civil Rules…" to discover additional claims and/or defendants not included or named in the original complaint. OAJ has proposed the use of similar language to prevent over-naming in asbestos cases and to promote under-naming. As stated earlier, this proposal was summarily rejected by the Proponents.

Conclusion

SB 63 in its current form is much more than an attempt to end the alleged problem of over-naming.

Though we oppose the Bill in its current form, OAJ is willing to think creatively about the Proponent's concerns. As previously suggested, the simplest solution is to delete only the most egregious disclosures by providing additional information that may not otherwise be included in a complaint and to give the judge some discretion to determine compliance with the Bill. We have also considered suggesting language to allow, for a period of time, a claim to be revised and defendants added after the complaint is filed, thus allowing initial under-naming on complaints and discouraging over-naming.

Thank you for giving me the opportunity to testify. I would be glad to address any questions from the Committee.