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BILL ANALYSIS



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House Bill 4601 (as passed by the House)
Sponsor: Representative Joe Haveman
House Committee: Judiciary
Senate Committee: Reforms, Restructuring and Reinventing

Date Completed: 3-5-12

CONTENT

The bill would create Chapter 30 (Limitation of Successor Asbestos-Related Liability) of the Revised Judicature Act, adding Section 3001 to the Act, to establish limits on the asbestos-related liability of a corporation that assumed or incurred the liability as a result of a merger or consolidation with another corporation before 1972. Specifically, the bill would do the following:

- Limit the successor corporation's cumulative asbestos-related liability to the fair market value of the transferring corporation's total gross assets.**
- Describe how fair market value of total gross assets would be established and adjusted.**
- Exclude from the limitation a workers' compensation claim, an obligation under the National Labor Relations Act, and an obligation under a collective bargaining agreement.**
- Provide that the limitation would not apply to a successor that continued in the asbestos business after the merger or consolidation.**

The bill would require Michigan courts to liberally apply the liability limitation in actions that included successor asbestos-related liability, and to retroactively apply procedural provisions of Section 3001 unless that application would unconstitutionally affect a vested right.

Section 3001 would apply to asbestos claims in actions filed on or after the bill's effective date, and in pending actions whose trial had not begun as of that date.

Liability Limitation

Except as provided below, the cumulative "successor asbestos-related liability" of a corporation would be limited to the fair market value of the total gross assets of the transferor, determined at the time of the merger or consolidation, and adjusted as prescribed in the bill. The corporation would not have any responsibility for successor asbestos-related liability in excess of this limitation.

If the transferor assumed or incurred successor asbestos-related liability in connection with a prior merger or consolidation with a prior transferor, the limitation of liability of the successor corporation would be the fair market value of the total assets of the prior transferor, determined at the time of that merger or consolidation, and adjusted as prescribed in the bill.

The limitation would apply to a corporation that became a successor before January 1, 1972, or that was a successor to such a corporation.

The limitation would not apply to any of the following:

- A claim for workers' compensation benefits paid by or on behalf of an employer to an employee under the Worker's Disability Compensation Act or a comparable workers' compensation law of another jurisdiction.
- A claim against a corporation that was not a successor asbestos-related liability.
- An obligation under the National Labor Relations Act or under a collective bargaining agreement.

The limitation also would not apply to a successor that, after the merger or consolidation, continued in the business of mining asbestos, selling or distributing asbestos fibers, or manufacturing, distributing, removing, or installing products that contained asbestos that were the same or substantially the same as the products previously manufactured, distributed, removed, or installed by the transferor.

"Successor asbestos-related liability" would mean a liability, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, that is related in any way to an asbestos claim and that was assumed or incurred by a corporation as a result of, or in connection with, a merger or consolidation or a plan of merger or consolidation with or into another corporation or that is related in any way to an asbestos claim based on the exercise of control or the ownership of stock of the other corporation before the merger or consolidation. The term would include liability that, after a merger or consolidation for which the fair market value of total gross assets, as determined under the bill, is paid or otherwise discharged, or is committed to be paid or otherwise discharged, by or on behalf of the corporation, by a successor of the corporation, or by or on behalf of a transferor, in connection with a settlement, judgment, or other discharge of liability in this State, another state, or a foreign nation.

"Corporation" would mean a corporation organized for profit, whether organized under the laws of this State, another state, or a foreign nation. "Successor" would mean a corporation that assumes or incurs, or has assumed or incurred, a successor asbestos-related liability. "Transferor" would mean a corporation from which a successor asbestos-related liability is assumed or incurred.

"Asbestos claim" would mean a claim for damages, loss, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. The term would include a claim based on the health effects of exposure to asbestos, including a claim for any of the following:

- Personal injury or death.
- Mental or emotional injury.
- Risk of disease or other injury.
- The costs of medical monitoring or surveillance, to the extent such a claim is recognized under State law.

"Asbestos claim" also would include the following:

- A claim made by or on behalf of a person exposed to asbestos, or by or on behalf of a representative, spouse, parent, child, or other relative of the person.
- A claim for damages or loss caused by the installation, presence, or removal of asbestos.

Fair Market Value of Total Gross Assets

The fair market value of total gross assets could be established by any method reasonable under the circumstances, including by reference to any of the following:

- The going concern value of the assets.
- The purchase price attributable to or paid for the assets in an arm's-length transaction.
- The value of the assets recorded on a balance sheet, if there were no other readily available information from which fair market value could be determined.

In determining the fair market value of total gross assets, total gross assets would include both intangible assets and the amount of any liability insurance issued to the transferor that provided coverage for successor asbestos-related liabilities. If the total gross assets included an amount for liability insurance, the following provisions would apply.

Section 3001 would not affect the applicability, assignability, terms, conditions, and limits of the insurance, and would not otherwise affect the rights and obligations of a transferor, successor, or insurer under an insurance contract or related agreements, including rights and obligations under settlements reached before the bill's effective date between a transferor or successor and its insurers resolving liability insurance coverage and the rights of an insurer to seek payment for applicable deductibles, retrospective premiums, or self-insured retentions or to seek contribution from a successor for uninsured or self-insured periods or periods for which insurance was uncollectible or otherwise unavailable.

If a dispute concerning the insurance coverage between the transferor or successor and its insurers were settled before the bill's effective date, the amount of the settlement would be the amount of the liability insurance to be included in the total gross assets.

Adjustment of Fair Market Value

In determining a limit of liability under Section 3001, the fair market value of total gross assets at the time of a merger or consolidation would have to be increased, for each year since the merger or consolidation, by a percentage equal to 1% plus the adjusted prime rate for the six-month period ending March 31 of that calendar year. An increase could not be compounded.

The adjustment would continue until the date the adjusted value was first exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed to be paid by or on behalf of the corporation or a predecessor, or by or on behalf of a transferor, after the time of the merger or consolidation for which the fair market value of total gross assets was determined.

The amount of any liability insurance coverage included in the total gross assets could not be included in the adjustment.

Application of Section 3001

To the fullest extent permissible, a court would have to liberally apply the liability limitation under Section 3001 in an action that included successor asbestos-related liability. A court would have to apply procedural provisions of Section 3001 retroactively. If the application of a provision would unconstitutionally affect a vested right, however, the provision would have to be applied prospectively only.

Section 3001 would apply to an action that included an asbestos claim to which either of the following applied:

- The action was filed on or after the bill's effective date.
- The action was pending but trial of the action had not yet commenced as of the bill's effective date.

Severability

Section 3001 would be severable as provided in Section 5 of Chapter 1 of the Revised Statutes of 1846 (MCL 8.5). (Under that section, if a court finds that any portion of an act or its application to any person or circumstance is invalid, the invalidity does not affect the remaining portions or applications of the act that can be given effect without the invalid portion or application, provided the court does not determine the remaining portions to be inoperable.)

Proposed MCL 600.3001

BACKGROUND

The doctrine of "successor liability" is an exception to the general rule of corporate law that, when one corporation sells assets to another entity, the assets are transferred free and clear of claims except valid liens and security interests. When successor liability is imposed—such as when one corporation is merged into another—a creditor with a claim against the "predecessor corporation" may assert that claim against the "successor corporation". In addition, the successor corporation can be held liable for the torts, or civil wrongs, of the predecessor corporation. In this situation, the amount of damages that may be awarded to parties harmed by the predecessor corporation is not limited to the value of that firm, as it would be if the acquisition had not occurred or if the corporation were operated as a subsidiary. Rather, the maximum amount that plaintiffs might recover is the total value of the successor corporation, even if it did not create the liability and the wrongful activity of the predecessor terminated before the merger took place.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

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

Fiscal Analyst: Dan O'Connor

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