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Amendments to Assembly Bill 19: Personal Injury Trust Claims Transparency

Assembly Substitute Amendment 1 is intended to address a variety of concerns that were raised about the initial draft legislation without compromising the objective – requiring timely filings of claims with asbestos bankruptcy trusts and full disclosure of those claims materials to all parties in the civil lawsuit over the same injuries. In general, the Substitute Amendment:

- makes the legislation consistent with Wisconsin’s comparative negligence law and practice,
- specifically provides for taking depositions and emergency discovery during any time when a stay of the underlying lawsuit is in place,
- eliminates the need for the judges to issue a variety of orders by making the requirements self-actuating, and
- eliminates the need to file various materials with the court.

Assembly Amendment 1 to Substitute Amendment 19 also made a few minor changes to the bill. In general, the amendment to Substitute Amendment 19:

- clarifies that the bill does not apply to the Wisconsin Patients and Family Compensation Fund,
- deletes the words “exigent circumstances” and therefore provides that the court can schedule the trial within 60 days if “good cause” is shown (which is a lower threshold than “exigent circumstances”).

DISCUSSION

I. The Amendment specifically allows taking a plaintiff’s deposition even if a stay is in place.

A number of people objected to the original bill on the grounds that it could prevent taking the deposition of a dying plaintiff (both the discovery deposition and a subsequent video deposition for trial) if a stay were in place. Although such a situation should not have occurred under the original legislation (because a diligent plaintiff’s attorney would prevent a stay from ever going in to effect), the Amendment (section 4(b)) specifically authorizes taking the deposition of a plaintiff or any witness – plus any associated discovery that is necessary to allow the parties to fully prepare to examine or cross-examine the witness at the deposition, at any time during the pendency of the suit – even when a stay is in effect.

II. The Amendment eliminates the need for the courts to issue a variety of orders.

As initially drafted, the legislation required the judge to issue a variety of orders with respect to filing trust claims and producing claim documents. This Amendment eliminates the need for the court to issue such orders by making the requirements to certify which claims have been or are anticipated to be filed, to file claims and to produce the claim documents statutory. This eliminates the burden on the court of drafting and issuing the orders and ensures that there is no delay in the suit because the press of other business causes a delay in the court being able to issue the required orders.

III. The Amendment eliminates various administrative burdens on the court.

The original legislation required that various trust documents be filed with the court and that the court make certain findings as part of the record. The Amendment eliminates the need to automatically file trust claim documents with the court, thus treating them more as ordinary discovery materials which are not customarily filed with the court unless and until they are needed to support a motion or for evidentiary purposes. Likewise, the original version of this bill required the judge, not less than 30 days before trial, to compile a list of trust claims and make that part of the record. Recognizing that most asbestos litigation is settled before trial, the Amendment (subsection 5(f)) instead puts the responsibility of preparing such a list on the parties in the event that the case goes to trial, thereby eliminating a burden on the court.

IV. The Amendment clarifies that the judge can hold a scheduling conference at any time but must allow at least 180 days for discovery.

A number of objections were made that the original bill would prevent the trial court from even holding a scheduling conference to set a trial date for 180 days after the plaintiff disclosed information about trust claims. The Amendment makes it clear that the trial judge can hold a scheduling conference at any point during the case, but that the court must ordinarily allow at least 180 days between the time the plaintiff discloses the trust claim information and the start of trial. However, the Amendment gives trial judges some flexibility, providing that for good cause, the time can be shortened to not less than 60 days. It was not the intent of this legislation to delay asbestos trials and this change makes that clear.

V. The Amendment eliminates the need to estimate the trust payout.

A number of objections were made that the original bill would force the trial court to engage in speculation as to what payout eventually would be made by each trust. The Amendment eliminates that difficulty by dropping the requirement that the trial judge determine what the future payout will likely be and crediting that amount against the verdict. Instead, whatever percentage of fault is attributed to the entity that created the trust (or the products for which that entity is responsible) will be treated the same as the percentage of fault attributed to any other person or product. This is consistent with Wisconsin comparative negligence law and eliminates the need for the trial court to calculate what payout would likely be received from the trust. This also eliminates the concern about trusts that revise their payouts or impose a temporary moratorium on paying claims – since the judge is not required to estimate the ultimate payment.

VI. The Amendment makes one change to the law of joint and several liability to recognize that defendants in asbestos litigation have no ability to obtain any contribution payments from bankruptcy trusts.

The Amendment (section 7) makes one change to Wisconsin's contributory negligence law, but only in the situation where a defendant is found joint and severally liable. In that instance the defendant does get a credit against its liability in the amount of the percentage of fault found against the bankrupt entities. The reason for this credit is that a defendant found jointly and severally liable for an entire verdict has a claim for contribution against any other defendant whose share of the verdict the jointly and severally liable defendant pays. Further, the plaintiff cannot collect the entire verdict from the jointly and severally liable defendant and then also collect a payment from the other liable defendants.

In the unusual situation where a defendant in an asbestos case were found jointly and severally liable for being 51% or more at fault, the plaintiff could collect the entire judgment from that defendant and still receive payments from the bankruptcy trusts that were found partially at fault for the injury by the jury. However, defendants in asbestos litigation have no way to recover a contribution claim against bankruptcy trusts. To prevent double recovery by plaintiff and to compensate for the loss of a contribution claim the jointly and severally liable defendant would otherwise have, the bill provides that in the limited circumstances where one defendant is found jointly and severally liable, that defendant is entitled to a credit against the verdict of the percentage of fault found against any companies or products that are in bankruptcy.

CONCLUSION

The Amendments addressed a number of concerns raised by opponents of the legislation without in any way detracting from or compromising the objective of the legislation: require asbestos plaintiffs to promptly file claims with asbestos trusts and produce the materials submitted to the trusts to all parties in the litigation.