



This Bill Analysis reflects the contents of the bill as it was presented in committee.

SENATE BILL 470: Personal Injury Bankruptcy Trust Claims.

2017-2018 General Assembly

Committee:	House Judiciary II	Date:	May 23, 2017
Introduced by:	Sens. Lee, Brown, B. Jackson	Prepared by:	Susan Sitze
Analysis of:	PCS to Second Edition S470-CSBK-25		Jessica Sammons Committee Co-Counsel

OVERVIEW: *The proposed committee substitute (PCS) to Senate Bill 470 would (i) require the plaintiff to disclose information concerning bankruptcy trust claims in asbestos-related personal injury actions, (ii) include the amount of monies awarded or reasonably expected to be awarded from a bankruptcy trust as consideration paid for a release or covenant not to sue, (iii) create a rebuttable presumption that bankruptcy trust materials are admissible, and (iv) allow the court to enter an order to stay an action upon defendant's reasonable belief that plaintiff can file additional bankruptcy trust claims until the plaintiff files such claims.*

The PCS removes the requirement that the stay on the civil action remain until the bankruptcy trust claim is addressed by the bankruptcy trust.

CURRENT LAW: Rule 26(b) of the North Carolina Rules of Civil Procedure sets forth the scope of discovery applicable to all civil actions and proceedings for which a different procedure is not prescribed by statute.

G.S. 1B-4 provides that when a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons jointly liable in tort for the same injury or wrongful death, that release or covenant does not discharge any of the other tortfeasors from their liability for the injury or wrongful death, but it reduces the claim against the others by the greater of the amount stated in the release or the covenant or the consideration paid for it, whichever is greater.

BILL ANALYSIS:

Section 1 of the PCS would add a new subdivision to Rule 26(b) to amend the scope of discovery in a civil action asserting personal injury based upon exposure to asbestos. In such cases, the plaintiff would be required to make certain disclosures to all parties to the civil action, including:

- Within 30 days of filing the action, a sworn statement provided to all parties that the plaintiff has conducted an investigation of all bankruptcy trust claims and that all such claims that can be made by the plaintiff have been filed.
- The identity of all bankruptcy trust claims made and all materials submitted to or received from the bankruptcy trust.
- Supplemental information and materials within 30 days of filing an additional bankruptcy trust claim, supplementing an existing bankruptcy trust claim, or receiving additional information or materials related to any such claim.

Upon a reasonable belief that the plaintiff can file additional bankruptcy trust claims, the defendant would be permitted to seek a stay in the civil action until the plaintiff files the claim.

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In these cases, the defendant would be authorized to seek discovery from the bankruptcy trust, and the plaintiff would be unable to claim privilege or confidentiality to bar discovery. The plaintiff would also be required to provide any required consent to release information and materials sought by the defendant.

Section 2 of the PCS would amend G.S. 1B-4 to provide that the amount of consideration paid for a release or covenant not to sue includes any monies awarded or reasonably expected to be awarded from a bankruptcy trust.

Section 3 of the PCS would enact a new rule of evidence providing that in any civil action asserting personal injury claiming disease based on exposure to asbestos, there is a rebuttable presumption that bankruptcy trust claims materials are relevant, authentic, and admissible in evidence.

Section 4 of the PCS would provide that in any civil action asserting personal injury claiming disease based on exposure to asbestos, if a defendant has a reasonable belief that the plaintiff can file additional bankruptcy claims, the court, on motion of the defendant, can stay the action until the plaintiff files the bankruptcy trust claim.

EFFECTIVE DATE: This act would be effective when it becomes law and applies to actions filed or pending on or after that date.

BACKGROUND: Under federal bankruptcy law, as a part of a reorganization plan under Chapter 11 of the Bankruptcy Code, a debtor with outstanding liability in personal injury, wrongful death, or property-damage actions allegedly caused by the presence of or exposure to asbestos may establish a trust that will fund present and future settlements of claims and lawsuits. 11 U.S.C. 524(g). Once a company emerges from bankruptcy protection having established a bankruptcy trust, all liabilities for asbestos exposure are assigned to the trust.

Most settlements between an injured party and a bankruptcy trust contain a confidentiality provision. Further, many bankruptcy trusts allow an injured party to delay claims against the bankruptcy trust until they have recovered from solvent defendants in the tort system. As a result of asbestos manufacturers filing for bankruptcy and creating bankruptcy trusts, there are fewer available defendants for an injured party to pursue, and because of confidentiality provisions and delayed claims, it is difficult for solvent defendants to prove inconsistencies in the claims of an injured party.¹

In a recent bankruptcy proceeding, the court ordered the debtor and representatives of potential claimants to estimate the liability of the debtor for purposes of establishing a bankruptcy trust. *In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (W.D.N.C. 2014). Using different approaches, the two groups estimated the liability at very different amounts; the debtor estimated liability at \$125 million while the representatives of potential claimants estimated liability to be as much as \$1.3 billion. In ordering the trust be funded with the lesser amount, the judge noted that plaintiffs in prior lawsuits had failed numerous times to disclose claims of plaintiffs against other defendants and bankruptcy trusts, which had resulted in the plaintiff recovering more than the value of the injury and the debtor paying more than its share of the recovery.

Bill Patterson, Staff Attorney in the Legislative Analysis Division, substantially contributed to this summary.

¹ Ziffer, Bankruptcy Trusts and Asbestos Litigation.