



SENATE BILL 470: Personal Injury Bankruptcy Trust Claims.

2017-2018 General Assembly

Committee:	Senate Rules and Operations of the Senate	Date:	April 25, 2017
Introduced by:	Sens. Lee, Brown, B. Jackson	Prepared by:	Bill Patterson
Analysis of:	Second Edition		Committee Co-Counsel

OVERVIEW: *Senate Bill 470 would provide that in any personal injury action claiming disease based upon exposure to asbestos:*

- *The plaintiff must provide all parties with a sworn statement that the plaintiff has investigated all bankruptcy trust claims and has filed all bankruptcy trust claims that can be made;*
- *The plaintiff must provide all parties with the identity of all bankruptcy trust claims made and all materials submitted to or received from a bankruptcy trust;*
- *The amount by which a release or covenant not to sue or not to enforce judgment given by the plaintiff to one of several persons jointly liable to the plaintiff reduces the plaintiff's claim against the other persons includes the amount awarded in a bankruptcy trust claim or, for a case not stayed pending the plaintiff's filing of a bankruptcy trust claim, the amount reasonably expected to be awarded from a bankruptcy trust claim.*
- *There is a rebuttable presumption that bankruptcy trust claims materials are relevant, authentic, and admissible in the action; and*
- *If a defendant has a reasonable belief that plaintiff can file additional bankruptcy trust claims, the court may grant the defendant's motion to stay the action until the plaintiff files the claim.*

CURRENT LAW: The North Carolina Rules of Civil Procedure set forth requirements for discovery in all civil actions and proceedings for which a different procedure is not prescribed by statute. The North Carolina Rules of Evidence govern the admissibility of evidence in civil actions.

Under G.S. 1B-4, when one of two or more persons who are jointly liable in tort for the same injury or wrongful death settles with the plaintiff in exchange for a release of liability, that release does not discharge any of the other persons from their liability for the injury or wrongful death, but it reduces the claim against the others by the amount stated in the release or the consideration paid for it, whichever is greater.

Under G.S. 1-75.12, a court is authorized to stay proceedings in any action pending in any court of this State upon a finding that trying the action in this State would work substantial injustice, if the moving party consents to suit in another jurisdiction found by the court to provide a convenient, reasonable, and fair place of trial.

Currently, none of the foregoing provisions of law contain special requirements applicable only to personal injury actions claiming disease based upon exposure to asbestos.

Karen Cochrane-Brown
Director



Legislative Analysis
Division
919-733-2578

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BILL ANALYSIS: **Section 1** of the bill would amend Rule 26(b) by adding a new subdivision (b)(2a) applicable in a civil action asserting personal injury based upon exposure to asbestos, which would require requiring the plaintiff to make certain disclosures to all parties to the action relating to bankruptcy trust claims made by the plaintiff, including:

- A sworn statement provided within 30 days of filing the action that the plaintiff has conducted an investigation of all bankruptcy trust claims and that all claims that can be made have been made.
- The identity of all bankruptcy trust claims made and all materials submitted to or received from a bankruptcy court, updated when additional claims or supplements to an existing claim are made or when additional information or materials related to any such claim are received.

The new subdivision would permit a defendant to seek a stay in the civil action until the plaintiff files a bankruptcy trust claim based on the defendant's reasonable belief that additional such claims exist. In addition, it would permit a defendant to seek discovery from a bankruptcy trust, and

Section 2 would amend G.S. 1B-4 to provide that the amount by which a release or covenant not to sue or not to enforce judgment would reduce the claim against the other jointly liable persons would include any monies awarded from a bankruptcy trust or, for a case not stayed under G.S. 1-75.12, reasonably expected to be awarded from a bankruptcy trust.

Section 3 would enact a new rule of evidence providing that in a 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 would amend G.S. 1-75.12 to provide that in a civil action asserting personal injury claiming disease based on exposure to asbestos to seek a stay of the litigation, if the defendant has a reasonable belief that the plaintiff can file additional bankruptcy claims, the court on motion of the defendant can stay the civil action until the plaintiff has filed the bankruptcy trust claim and it is addressed by the bankruptcy court.

EFFECTIVE DATE: The act is effective when it becomes law and applies to actions 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

¹ Ziffer, Bankruptcy Trusts and Asbestos Litigation.

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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.