

IN THE SUPREME COURT OF OHIO

OAKTREE CONDOMINIUM ASSOCIATION, INC. Plaintiff-Appellant
-vs-
THE HALLMARK BUILDING COMPANY, et al. Defendants-Appellees

CASE NO. 2012-1722
On Appeal from the Eleventh District Court of Appeals, Lake County
Court of Appeals Case No. 2012-L-011

MERIT BRIEF OF APPELLEE
THE HALLMARK BUILDING COMPANY

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
LAW AND ARGUMENT	5
ARGUMENT AGAINST PROPOSTION OF LAW I:	
Ohio's construction statute of repose, R.C. 2305.131, is constitutional as Applied to Appellant's claims and does not violate the Ohio Constitution, Article II, Section 28.....	
	5
CONCLUSION.....	15
PROOF OF SERVICE.....	17
APPENDIX	
Ohio's 125 th General Assembly, 2004 Ohio Bill Analysis § 3(B) S.B. 80.....	
	1

TABLE OF AUTHORITIES

Cases

Adams v. Sherk, 4 Ohio St.3d 37, 446 N.E.2d 165 (1983).....5

Cook v. Matvejs, 56 Ohio St. 2d 234, 383 N.E.2d 601 (1978).....5

Gaines v. Preterm-Cleveland, Inc. 33 Ohio St.3d 54, 514 N.E.2d 709 (1987).....13

Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).....5

Groch et al. v. General Motors, Corp., 117 Ohio St.3d 192, 2008 Ohio 546,
883 N.E.2d 377 (2008).....6, 12-14

Harrold v. Collier, 107 Ohio St. 3d 44, 2005 Ohio 5334; 836 N.E.2d 1165 (2005).....6

State ex rel. Bishop v. Board of Education, 139 Ohio St. 427, 40 N.E.2d 913 (1942).....8, 11

Constitutional Provisions

Ohio Constitution, Article II, Section 28.....5, 6

Statutes

R.C. 2305.10 12-14

R.C. 2305.10(C)(4).....12-14

R.C. 2305.10(C)(5).....12-14

R.C. 2305.1316

R.C. 2305.131 (A)(1).....6

R.C. 2305.131(A)(2).....11-14

R.C. 2305.131(A)(3).....11-14

R.C. 2305.131(F).....7

Other References

Ohio’s 125th General Assembly, 2004 Ohio Bill Analysis § 3(B) S.B. 80.....7, 10

STATEMENT OF FACTS

Construction began on seven condominium units known as the Oaktree Condominiums in 1998. Appellee Hallmark Building Company (“Hallmark”) completed construction of the units, and on October 9, 1990, Certificates of Occupancy were issued for all seven units. (T.d 5, T.p. 511; Defendant’s Exhibit 1 of T.p.).

Thirteen (13) years later, in September 2003, Franklin Swanson (“Mr. Swanson”), a unit owner and Treasurer of the condominium board, noticed cracking for the first time in the north garage wall of his condominium. (T.d 5, T.p. 36, 37, 39, 41). Mr. Swanson called his neighbor on the other side of the shared wall, Barbara Artino (“Ms. Artino”), and showed it to her. (“I’ve got a crack on the whole wall on my side of the garage.”). (T.d 5, T.p. 42). Bob Smith (“Mr. Smith”), a contractor, was called out and, within a few days, work began on the foundation and footers of Mr. Swanson’s and Mrs. Artino’s unit. (T.d 5, T.p. 69, 70). Ms. Artino was also a member of the board. (T.d 5, T.p. 69, 70). Ms. Artino had seen cracks in her own unit “beginning in 2000,” or three years before Swanson told her about the crack in the common garage wall. (T.d 5, T.p. 77).

A meeting of the association and unit owners was held on October 27, 2003. (T.d 5, T.p. 82). At that meeting, Daniel Marinucci (“Mr. Marinucci”), Appellant’s expert engineer and a licensed Ohio attorney, addressed the group. (T.d 5, T.p. 82). He introduced himself as both an attorney and engineer and opined that the footers of the condominium building were at an insufficient depth and in violation of the building code. (T.d 5, T.p. 83, 84). He recommended that test digs be done at all of the other condominium units. (T.d 5, T.p. 83, 84). Mr. Marinucci told the attendees at this October 27, 2003, meeting that they had a “strong lawsuit they could file

against the builder of the project.” (T.d 5, T.p. 141, 223). As reflected in the Appellant’s minutes for that meeting, dated October 31, 2003, Mr. Marinucci told the unit owners “that they are now aware of the existence of what is considered a latent defect” and that “‘time starts running’ in terms of bringing a law suit against the builder.” (Appellee Supp. p. 27; T.d. 11, ¶ 59). The minutes also reflect that a retainer was paid to engage Mr. Marinucci as an expert witness and a separate retainer was paid to engage litigation counsel. (Appellee Supp. p. 27).

When the excavations of the foundation and footers occurred, Mr. Marinucci prepared written field notes as to the conditions and measurements of the footers of the various condominium units. (T.d 5, T.p. 113, 114, 235, 260). However, Mr. Marinucci admitted that he intentionally destroyed his field notes in anticipation of Appellant’s litigation against Hallmark. (T.d 5, T.p. 236, 237). Mr. Marinucci testified:

Q. Tell the jury why you throw your notes away?

A. Because of litigation and they get in - - you write - - when I get a telephone call, other jobs, I write on that other notes on the job that’s confidential. I do not want to have anybody else reviewing handwritten notes that don’t apply and muddies the water. So what I did, as a matter of policy, I take all my notes, I put them into the computer, they go into the computer that everybody can use. I produce that data, handwritten notes, then I disregard.

Q. Isn’t it true that the reason you destroy the notes is because of people like me, lawyers that question you?

A. That’s correct exactly. That’s exactly true, sir.

Q. So the point is that you would not want me as a lawyer in a case or Mr. Connick who took your deposition before to see your original field on-site notes as they were prepared when you were taking these measurements; right? You didn’t want them to see it?

A. I didn’t want them to see my handwritten notes; correct.

* * *

Q. Here is the question. The question here is: is it true you intentionally destroy your notes so you will not be questioned about them? Yes or No?

A. I intentionally destroy my notes to protect the privacy aspect of my data and clients that called me during the time that I have put on them.

(T.d 5, T.p. 236, 237).

Q. At your deposition you were asked a question, "just to be clear and hopefully you can answer my question, that is a policy that you adhere to, you intentionally destroy these notes so you don't get questioned on them at a later point in time; correct? Answer: yes." Is that right?

A. Yes.

(T.d 5, T.p. 237).

Further, Hallmark's first notice of a potential problem with the footers and foundations was in 2003 when Ms. Artino called the President of Hallmark, Robert Ruthenberg ("Mr. Ruthenberg"). (T.d 5, T.p. 461). Ms. Artino advised him that she was "having some problem with her home." (T.d 5, T.p. 465). Mr. Ruthenberg volunteered to look at the issue but Ms. Artino *refused* to allow him to do so. Mr. Ruthenberg testified:

Q. . . . Do you remember what you said to her?

A. Yeah. I volunteered to come out and look at whatever the problem was.

Q. What was her response to that?

A. She refused the offer.

(T.d 5, T.p. 465-466). Hallmark was never notified by Appellant of any of the excavations or repair work that subsequently followed. (T.d 5, T.p. 41, 79, 465-466). After being refused an

opportunity to investigate the problem, the next time Mr. Ruthenberg was advised of an issue was when Plaintiff filed the subject lawsuit. (T.d 5, T.p. 465-466).

On December 16, 2005, more than 15 years after the occupancy permits were issued; five years after Ms. Artino saw craws in her unit; more than two years after Appellant retained an engineering expert and retained litigation counsel; and eight months after the effective date of R.C. 2305.131, Appellant filed its initial Complaint against Hallmark, Lake County Common Pleas Court Case No. 05CV002845, asserting various claims for alleged defective construction of the condominium units. (T.d 11, ¶ 60). Throughout the course of this litigation, Hallmark raised the defense and asserted that the construction statute of repose, R.C. 2305.131, barred Appellant's claims. (T.d. 11, ¶ 6-12).

By the time the case proceeded to trial, the incumbent building commissioner had no personal knowledge of the events when the units were built; the building inspectors assigned to the project at the time it was built were both deceased; and the masonry subcontractor who installed the footers and foundations at issue was deceased as well. (T.d 5, T.p. 11-14, 460, 511). The jury returned a verdict in favor of Appellant.

Upon appeal, the Eleventh District Court of Appeals remanded the case to the trial court to determine whether R.C. 2305.131 was constitutional as applied to Appellant's claims after holding that building footers were improvements to real property and subject to R.C. 2305.131. The trial court held that R.C. 2305.131 was constitutional as applied to Appellant's claims and that its claims were time barred. The Eleventh District Court of Appeals affirmed that judgment. The appeal to this Court followed.

LAW AND ARGUMENT

Argument Against Propositions of Law I: Ohio's construction statute of repose, R.C. 2305.131, is constitutional as applied to Appellant's claims and does not violate the Ohio Constitution, Article II, Section 28.

Appellant contends that the retroactive application of R.C. 2305.131 is unconstitutional as applied to its claims because its cause of action against Hallmark accrued on October 27, 2003, 1 ½ years prior to the enactment of R.C. 2305.131, effective April 7, 2005. Although Appellant initially argues that any retroactive application of law to accrued substantive rights is precluded, Appellant thereafter concedes that the Ohio Constitution, Article II, Section 28, is not violated with the retroactive application of a statute provided that the claimant is provided a reasonable timeframe in which to file its claim. (Appellant's Brief, pg. 8). This Court has continually held the same. *See, e.g., Groch et al. v. General Motors, Corp.*, 117 Ohio St.3d 192, 2008 Ohio 546, 883 N.E.2d 377 (2008); *Gregory v. Flowers*, 32 Ohio St. 2d 48, 54, 290 N.E.2d 181 (1972) (the time within which the right may be asserted may be limited to a shorter period "provided such limitation still leaves the claimant a reasonable time within which to enforce the right."); *Adams v. Sherk*, 4 Ohio St.3d 37, 39, 446 N.E.2d 165 (1983); *Cook v. Matvejs*, 56 Ohio St. 2d 234, 383 N.E.2d 601 (1978). Therefore, the issue herein is whether appellant was provided "reasonable time" to bring its claim as applied to the facts of this case.

Appellant argues that the court of appeals determination that a period of two years from the date it learned of its damage was not a reasonable amount of time for Appellant to file its claim. Appellant asserts that it should have been given a four-year period of time from the date it discovered the damage, *i.e.*, the statute of limitations for a construction defect claim. (Appellant Brief, p. 7, ¶ 1). To the contrary, as applied to the facts in this case, with the information and

knowledge Appellant had 1 ½ years prior to the enactment of R.C. 2305.131, the retroactive application of R.C. 2305.131 does not violate the Ohio Constitution, Article II, Section 28. Appellant had more than “reasonable time” to file its claim.

In addition, a two-year timeframe from the date Appellant learned of its damage, as employed by the court of appeals, was a reasonable amount of time for this Appellant to have filed its claim in this case. A period of two years is reasonable because it (1) upholds the intent of The General Assembly in enacting R.C. 2305.131 to promote a greater interest than a four-year statute of limitations for construction claims of R.C. 2305.131, (2) is consistent with the language and scheme of R.C. 2305.131 as well as this Court’s holding in *Groch et al. v. General Motors, Corp.*, 117 Ohio St.3d 192 (2008), and (3) upholds the purpose and policy of R.C. 2305.13. Appellant’s proposition that it should have been given the four-year statute of limitations period as a “reasonable time” contradicts all of the foregoing.

Appellant cannot establish that the application of R.C. 2305.131 to the facts at hand is unconstitutional by clear and convincing evidence, and the judgment of the courts below should be affirmed.¹

A. R.C. 2305.131 and the Legislative Intent and Purpose.

Ohio’s construction statute of repose, R.C. 2305.131, effective April 7, 2005, bars construction defect claims when such claims are not brought within 10 years after substantial completion of the project that improved real property. *Id.* Revised Code 2305.131 (A)(1), provides in part:

¹ Hallmark does not dispute that Appellant challenges the constitutionality of R.C. 2305.131 “as applied” to this particular set of facts and that it is Appellant’s burden to prove the same by clear and convincing evidence. *Harrold v. Collier*, 107 Ohio St. 3d 44, 2005 Ohio 5334; 836 N.E.2d 1165, ¶ 38 (2005).

... *no cause of action to recover damages* for bodily injury, and injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property . . . *shall accrue* against a person who performs services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten (10) years from the date of substantial completion of such improvement.

(Emphasis added). *Id.* The General Assembly specifically delineated that R.C. 2305.131 “shall be applied in a *remedial* manner” to “any civil action commenced on or after the effective date of this section . . . *regardless of when the cause of action accrued.*” R.C. 2305.131(F).

The intent of the General Assembly in enacting Section 2305.131 of the Revised Code is pertinent. The General Assembly expressly stated:

(B) In enacting section 2305.131 of the Revised Code in this act, *it is the intent of the General Assembly to do all of the following:*

(1) To declare that the ten-year statute of repose prescribed by section 2305.131 of the Revised Code, as enacted by this act, *is a specific provision intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2305.09 of the Revised Code, the general two-year statute of limitations prescribed by section 2305.10 of the Revised Code, and other general statutes of limitation prescribed by the Revised Code;*

(2) *to recognize that, subsequent to the completion of the construction of an improvement to real property, all of the following generally apply to the persons who provided services for their improvement or who furnish the design, plan, and supervision of construction, or construction of the improvement: (a) they lack control over the improvement, the ability to make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement. (b) They lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement. (c) They have no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes described in Division (E)(5)(b) of this Section.*

(3) *to recognize that, more than ten years after the completion of the construction of an improvement to real property, the availability of relevant evidence pertaining to the improvement and the availability of witnesses knowledgeable with respect to the improvement is problematic;* (4) to recognize that maintaining

records and other documentation pertaining to services provided for an improvement to real property or the design, planning, supervision of construction, or construction of an improvement to real property for a reasonable period of time is appropriate and to recognize that, because the useful life of an improvement to real property may be substantially longer than ten years after the completion of a construction of the improvement, it is an unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after the completion; (5) to declare that Section 2305.131 of the Revised Code, as enacted by this Act, *strikes a rational balance between the rights of perspective claimants and the rights of design professionals, construction contractors, and the construction subcontractors and to declare that the ten year Statute of Repose prescribed in that Section is a rational period of repose intended to preclude the pitfalls of stale litigation . . .*

(Emphasis added). Ohio's 125th General Assembly, 2004 Ohio Bill Analysis § 3(B) S.B. 80

(Appendix p. 58-59).

The policy or wisdom of The General Assembly should not be questioned by this Court because "the policy or wisdom of a statute . . . is the exclusive concern of the legislative branch of the government." *State ex rel. Bishop v. Board of Education*, 139 Ohio St. 427, 438, 40 N.E.2d 913 (1942). In considering the policy and wisdom of The General Assembly in enacting R.C. 2305.131, it follows that the application of R.C. 2305.131 is constitutional as applied to Appellant's claims.

B. R.C. 2305.131 is Constitutional as Applied to Appellant's Claims

In the case *sub judice*, Appellant discovered the damage and the cause of action accrued, at the latest, in October 2003. Ms. Artino was aware of damage to her unit three (3) years prior thereto. It was at the October 27, 2003, meeting that its expert engineer who testified at trial, Mr. Marinucci, a licensed Ohio attorney, opined to Appellant and the unit owners that the footers were at an insufficient depth and in violation of the building code. (T.d 5, T.p. 82-84). Mr. Marinucci told Appellant that it had a "strong lawsuit they could file against the builder of the

project” and the “‘time starts running’ in terms of bringing a law suit against the builder.” (T.d 5, T.p. 141, 223; Appellee Supp. p. 28; T.d. 11, ¶ 59). At that time, Appellant not only engaged Mr. Marinucci as an expert witness but also engaged litigation counsel. (Appellee Supp. p. 27). It further made repairs to the alleged defective footers and never advised Hallmark of the same. Nonetheless, Appellant did not file its claim until December 16, 2005—15 years after the occupancy permits were issued, more than two years after it was advised of a potential lawsuit and retained an expert and counsel, and more than eight months after R.C. 2305.131 was enacted.

This is exactly the type of case the General Assembly intended to address in enacting R.C. 2305.131. Herein, Hallmark had no control over the maintenance of the condominium units or the foundations and footers for over 15 years before Plaintiff filed its initial action against Hallmark—it had no control over maintaining soil grading at the foundation, prevent erosion measures, control of water run off or infiltration, *etc.* Ohio Bill Analysis § 3(B)(2)(a) S.B. 80. (Appendix p. 58). Hallmark further had no control over any forces or intervening causes, *e.g.*, weather conditions, topography changes, *etc.* *Id.* at § 3(B)(2)(b). (Appendix p. 58). It further had “no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes.” *Id.* at § 3(B)(2)(c). (Appendix p. 58). Beyond that, the building inspectors assigned to the project at the time the condominium units were built were both deceased by the time of trial and the masonry subcontractor, Mr. Whitted, was deceased as well. (T.d. 5, T.p. 460, 511). Thus, any and all pertinent witnesses that Hallmark needed to rely upon in defense of Appellant’s claims were not available at trial. Ohio Bill Analysis § 3(B)(3). (Appendix p. 58). And finally, in 2003 and 2004, Appellant’s contractor did work that substantially changed the conditions post-construction without notifying Hallmark,

and Appellant's expert engineer intentionally destroyed his field notes of that work so they would not be available should he be later asked about them.² (T.d. 5, T.p. 236, 237). These facts embrace the precise reasons why The General Assembly enacted the statute of repose.

At minimum, from October 27, 2003, more than *1 1/2 years prior* to the effective date of R.C. 2305.131, *i.e.*, April 7, 2005, Appellant was in a position to pursue its claim. Appellant had "*reasonable time*" to file its cause of action against Appellant prior to the effective date of R.C. 2305.131, and there is no violation in any substantive right of Appellant in applying the statute of repose. In analyzing whether the retroactive application of R.C. 2305.131 is constitutional as applied Appellant's claims, the court of appeals correctly noted that Appellant was required to prove by clear and convincing evidence that R.C. 2305.131 was unconstitutional under these facts and circumstances and failed to do so.³

C. Appellant's Proposition Conflicts with the Legislative Intent and Policy of R.C. 2305.13

Importantly, Appellant's proposition that the four-year statute of limitations period prescribes the "reasonable" amount of time that it should be afforded to bring its claim is in direct conflict of the intent of The General Assembly to promote an interest greater than the statute of limitations for construction claims. In enacting the Statute of Repose, the General Assembly specifically delineated that R.C. 2305.131 "*is a specific provision intended to promote a greater interest than the interest underlying the general four-year statute of limitation.*" (Emphasis added). Ohio Bill Analysis § 3(B)(1) S.B. 80 (Appendix 58). Appellant's proposition wholly undermines the intent of R.C. 2305.131.

² Hallmark's trial counsel requested a jury instruction on spoliation of evidence. It was denied. (T.d 5, T.p. 489).

³ *Id.* at P16, citing, *Harrold v. Collier*, 107 Ohio St. 3d 44, ¶ 38 (2005).

Further, Appellant's proposition conflicts with the policy behind the statute of repose to preserve evidence, strike a balance between the rights of claimants and defendants, and to preclude parties, such as Hallmark in this case, from having to defend causes of actions years after the work is completed and years after the defendant(s) had any control or responsibility for the structures. *See, State ex rel. Bishop v. Board of Education*, 139 Ohio St. 427, *supra*. Appellant's proposition directly conflicts with the intent and policy of R.C. 2305.131, and there is no basis in the facts at hand that warrant a diversion from the intent and purpose of the statute.

D. Two-Year Timeframe is Consistent with the Statutory Language of R.C. 2305.131 and This Court's Analysis in *Groch*.

A two-year timeframe is a reasonable amount of time and is also consistent with the language and scheme of R.C. 2305.131, which provides a two-year timeframe for certain claimants to file their cause of action for injuries. Revised Code 2305.131(A) provides in part:

(2) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, a claimant who discovers a defective and unsafe condition of an improvement to real property during the ten-year period specified in division (A)(1) of this section but less than two years prior to the expiration of that period *may commence a civil action to recover damages as described in that division within two years from the date of the discovery of that defective and unsafe condition.*

(3) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, if a cause of action that arises out of a defective and unsafe condition of an improvement to real property accrues during the ten-year period specified in division (A)(1) of this section and the plaintiff cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, *the plaintiff may commence a civil action to recover damages as described in that division within two years from the removal of that disability.*

(Emphasis added). *Id.* The General Assembly found that a reasonable amount of time for such claimants to file their claims was within two-years—not the general four-year statute limitations

period for construction defect claims—and Appellant herein should not be afforded anything more.

The application of a two-year period from the date Appellant learned of an injury to file its claim as a “reasonable” timeframe is also consistent with this Court’s analysis and holding in *Groch et al. v. General Motors, Corp.*, 117 Ohio St.3d 192 (2008). Although *Groch* dealt with retroactive application of R.C. 2305.10, the product liability statute of repose which became effective on the same date as the current version of the construction statute of repose, April 7, 2005, that statute contains the same pertinent language as R.C. 2305.131. *Id.* at ¶ 39. Both statutes of repose provide that “no cause of action . . . shall accrue” after a specified ten-year time frame. Further, both R.C. 2305.10 and R.C. 2305.131, have provisions that allow a plaintiff “two years” to (1) commence an action for injuries that occur before the expiration of the ten-year repose period but less than two years prior to the expiration of that period or (2) to commence an action once a disability is removed provided that the cause of action accrues during the ten-year period. *See*, R.C. 2305.10(C)(4) and (5); R.C. 2305.131(A)(2) and (3).

This Court held in *Groch* that if a plaintiff’s injury occurred prior to effective date of the S.B. 80 amendment to R.C. 2305.10, *i.e.*, April 7, 2005, and the cause of action therefore accrued, certain plaintiffs’ substantive rights may be violated if they were provided an “*unreasonably short*” period of time in which to file suit prior to the effective date of the enactment, *i.e.*, April 7, 2005. (Emphasis added). *Id.* at 225. Since the plaintiff in *Groch* was injured on March 3, 2005, he had only *thirty-four (34) days prior to the effective date R.C. 2305.10, i.e., April 7, 2005, to file his cause of action.* *Id.* at 225. This Court held that thirty-

four (34) days was an unreasonable amount of time for plaintiff to file his cause of action and, thus, R.C. 2305.10, could not be constitutionally applied to Groch's cause of action. *Id.* at 227.

Groch held that, in such a situation, the plaintiff should be given "reasonable time" from the date of accrual to commence the action. *Id.* at 226, citing *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E.2d 709 (1987). In determining what a "reasonable time" would be, this Court looked to the other provisions of the statute and held:

To determine what is a reasonable time, we note that R.C. 2305.10(C)(4) provides a two-year limitations period for commencing a suit for injuries occurring before the expiration of the ten-year repose period of R.C. 2305.10(C)(1), "but less than two years prior to the expiration of that period." For example, under R.C. 2305.10(C)(4), if the product was delivered to the end user nine years prior to the injury, the injured plaintiff would still have two years in which to file suit.

Similarly, R.C. 2305.10(C)(5) provides that "(i)f a cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code (i.e., minority or unsound mind), an action based on the product liability claim may be commenced within two years after the disability is removed."

* * *

When we look to the other provisions of R.C. 2305.10 referred to above (R.C. 2305.10(C)(4) and (5)), we determine that a reasonable time to commence a suit in this situation should have been two years from the date of the injury.

(Emphasis added). *Groch*. 225-226. As set forth above, R.C. 2305.131(A)(2) and (3), have the same pertinent language as R.C. 2305.10(C)(4) and (5). This Court should apply the same analysis and two-year timeframe to Appellant herein.

Further, nowhere in *Groch* did this Court hold that a plaintiff whose claim accrued prior to the effective date of the statute of repose had the applicable "statute of limitations" period to file his claim. As set forth above, the *Groch* court clearly stated that:

(w)hen we look to the other provisions of R.C. 2305.10 referred to above, we determine that a reasonable time to commence a suit in this situation should have been two years from the date of the injury.

(Emphasis added). *Id.* 225-226. Thus, the *Groch* court looked to the “two year” provisions in R.C. 2305.10(C)(4) and (5) that are identical in substance to R.C. 2305.131(A)(2) and (3). *Groch*’s reasoning is not based on the statute of limitations but the language of the other provisions of the statute therein.

Appellant’s proposition that a reasonable time for it to have brought its claims would be the four-year statute of limitations period for construction defect claims would effectively abrogate the language of, and The General Assembly’s intent that R.C. 2305.131 be retroactive and that it promotes an interest greater than the general four-year statute of limitations. *Id.*; Ohio Bill Analysis § 3(B)(1) S.B. 80 (Appendix p. 58-59). If The General Assembly intended for a claimant such as Appellant to have the four-year statute of limitations period to file a claim, it would have included a provision providing the same.

The court of appeals followed and applied the criteria previously established by the Court in *Groch*. In applying the same to the facts at hand, the court of appeals found that a reasonable amount of time for Appellant to have filed its cause of action pursuant to R.C. 2305.131 and *Groch* was two years from October 27, 2003—the date that: (1) Appellant’s structural engineering expert, Daniel Marinucci, advised Appellant that it was his opinion the footers were at insufficient depths in violation of the building code; (2) Mr. Marinucci also advised Appellant the time for filing a lawsuit began to run; and (3) Appellant retained its expert and counsel to pursue a lawsuit. As recognized by the court of appeals, *Groch* provides “a bright line rule” that

a “reasonable” time for a plaintiff, whose cause of action had accrued before April 7, 2005, would be two years from the date of the injury based on the same pertinent language found in R.C. 2305.10(C) and R.C. 2305.131. *Id.* at ¶198. There is nothing *unreasonable* or unconstitutional in applying the two-year rule to Appellant herein, especially with all the information and litigation support Appellant had even 1 ½ years prior to the enactment of R.C. 2305.131.

The Court should affirm and follow its sound reasoning set forth in *collier* in determining the “reasonable time” for a claimant such as Appellant to file a claim. This Court has already considered the same pertinent language of the product liability statute of repose and held that a plaintiff whose claim accrues prior to the effective date of the repose statute has a “reasonable time” consisting of “two years” to file his cause of action in conformity with the other provisions of the statute. Thus, two years from the date it learned of its injury is “reasonable” time within which Appellant should have filed its cause of action.

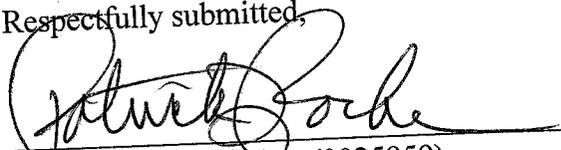
CONCLUSION

The Eleventh District Court of Appeals was correct in holding that a period of two years from the date Appellant learned of its injury is a reasonable amount of time for which Appellant had to file its claim. The two-year limitation upholds the intent of The General Assembly in enacting R.C. 2305.131 to promote a greater interest than a four-year statute of limitations; is consistent with the language and scheme of R.C. 2305.131; is consistent with this Court’s holding in *Groch*; and is more than a reasonable period of time as applied to the facts in this case.

Defendant-Appellee respectfully requests this Court: affirm the judgment of the trial court and the Eleventh District Court of Appeals; hold that a two-year limitation from the date

Appellant knew of the damage is a reasonable amount of time for Appellant to have filed its claim; and hold that Appellant's claim is barred by Ohio's statute of repose, R.C. 2305.131.

Respectfully submitted,



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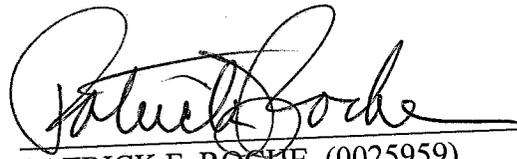
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CERTIFICATE OF SERVICE

A copy of the foregoing has been served by ordinary U.S. Mail, this 29 day of

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Am. Sub. S.B. 80
125th General Assembly
(As Passed by the General Assembly)

Sens. Stivers, Hottinger, Goodman, Wachtmann, Amstutz, Randy Gardner, Austria, Nein, Schuring, Armbruster, Coughlin, Carey, Harris, Mumper, Schuler

Reps. Buehrer, Calvert, Carmichael, Cates, Clancy, Collier, D. Evans, Faber, Flowers, Gibbs, Gilb, Hagan, Hoops, Martin, Raga, Reidelbach, Schaffer, Schmidt, Schneider, Setzer, G. Smith, Taylor, Trakas, Wagner, Webster, White, Widener, Widowfield, Wolpert

Effective date: *

ACT SUMMARY

Immunity in actions related to cumulative consumption, weight gain, or obesity

- Precludes any manufacturer, seller, or supplier of a qualified product (generally, food or drink) and any trade association from being liable for injury, death, or loss to person or property for damages, from being subject to an action for declaratory judgment, injunctive, or declaratory relief, or from being responsible for restitution, damages, or other relief arising out of, resulting from, or related to cumulative consumption, weight gain, obesity, or any health condition that is related to cumulative consumption, weight gain, or obesity.
- Permits a party that prevails on a motion to dismiss an action described in the preceding dot point to recover reasonable attorney's fees and costs that the party incurred in connection with the motion to dismiss.
- Specifies certain exceptions to the immunity from liability pertaining to misbranding, willful violation of federal or state law, or breach of contract or express warranty.

* The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.

Tort actions regarding picking of agricultural products

- Provides that in a tort action, generally, an owner, lessee, renter, or operator of premises that are open to the public for direct access to growing agricultural produce is not imputed to extend any assurance to a person that the premises are safe from naturally occurring hazards merely by the act of giving permission to the person to enter the premises or by receiving consideration for the produce picked or to assume responsibility or liability for injury, death, or loss to person or property allegedly resulting from the natural condition of the terrain of the premises or from the condition of the terrain resulting from cultivation of soil.

Immunity from liability for owner, lessee, or occupant of premises with regard to user of recreational trail or premises

- Provides that an owner, lessee, or occupant of premises does not owe a duty to a user of a recreational trail to keep the premises safe for entry or use by a user of a recreational trail and does not assume, has no responsibility for, does not incur liability for, and is not liable for any injury to person or property caused by any act of a user of a recreational trail.
- Modifies the definitions of "premises" and "recreational user" for the purposes of the existing exceptions from liability to a recreational user of an owner, lessee, or occupant of premises to include privately owned lands, ways, and waters leased to a private person, firm, or organization.

Specific causes of action

- Provides that no civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.
- Requires that generally an action based on a product liability claim and an action for bodily injury or injury to personal property be brought within two years after the cause of action accrues and provides that generally such a cause of action accrues when the injury or loss to person or property occurs.

- Provides that a cause of action for bodily injury that is not caused by exposure to chromium, not incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, not caused by exposure to DES or other nonsteroidal synthetic estrogens, and not caused by exposure to asbestos and is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the earlier of the date competent medical authority informs the plaintiff of the injury that is related to the exposure or the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure.
- Provides that a cause of action for bodily injury incurred by a veteran through the exposure to chemical defoliants or herbicides or other causative agents, including agent orange, accrues upon the earlier of the date on which competent medical authority informs the plaintiff of the injury that is related to the exposure or the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff had an injury that is related to the exposure.
- Provides that a cause of action for bodily injury caused by exposure to DES or other nonsteroidal synthetic estrogens accrues upon the earlier of the date on which competent medical authority informs the plaintiff that the plaintiff has an injury that is related to the exposure or on the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure.

Statutes of repose

- Prohibits the accrual of a wrongful death action involving, or another cause of action based on, a product liability claim against the manufacturer or supplier of a product later than ten years from the date the product was delivered to the first purchaser or first lessee who was not engaged in a business involving the product, but excepts a wrongful death action or another cause of action from this statute of repose if the manufacturer or supplier engaged in fraud in regard to information about the product and the fraud contributed to the harm alleged.
- Specifies that the ten-year statute of repose described in the prior dot point does not bar a civil action for wrongful death or another tort action against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period

longer than ten years and that, at the time of the decedent's death or the accrual of the cause of action, has not expired and permits a wrongful death action or another tort action involving such a product liability claim to be commenced within two years after the death or after the cause of action accrues, if the death occurs or the cause of action accrues less than two years prior to the expiration date of the ten-year statute of repose.

- Provides that if the decedent's death occurs or the claimant's cause of action accrues during the above-described ten-year statute of repose and the claimant cannot commence a civil action during that period due to a disability, a civil action for wrongful death or a tort action based on such a product liability claim may be commenced within two years after the disability is removed.
- Provides that the ten-year statute of repose does not bar a civil action for wrongful death or bodily injury based on a product liability claim against a manufacturer or supplier of a product if the product involved is a hazardous or toxic chemical, ethical drug, ethical medical device, chromium, chemical defoliant or herbicide, other causative agent, DES, or other nonsteroidal synthetic estrogen and the decedent's death or the claimant's bodily injury resulted from exposure to the product during the ten-year period of repose and that the cause of action in such a case accrues upon the earlier of the date on which the claimant is informed by competent medical authority that the death or bodily injury was related to the exposure to the product or the date on which by the exercise of reasonable diligence the claimant should have known that the death or bodily injury was related to the exposure to the product, requires that a civil action for wrongful death or bodily injury based on this type of cause of action be commenced within two years after the cause of action accrues, and prohibits the civil action from commencing more than two years after the cause of action accrues.
- Provides that the ten-year statute of repose does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is asbestos, that the cause of action based on asbestos that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the

exposure to asbestos, whichever date occurs first, and that the civil action for wrongful death must be commenced within two years after the cause of action accrues and may not be commenced more than two years after the cause of action accrues.

- Provides that the ten-year statute of repose does not bar an action based on a product liability claim against a manufacturer or supplier of a product for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.
- Prohibits a cause of action to recover damages for injury or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing later than ten years from the date of substantial completion of the improvement.
- Allows a cause of action to recover damages for injury or wrongful death to be brought within two years from the date of discovery of a defective and unsafe condition of an improvement to real property if that discovery is made during the ten-year statute of repose but less than two years prior to the expiration of that period.
- Specifies that the ten-year statute of repose described in the prior two dot points does not apply to a civil action for injury or wrongful death against the owner of, tenant of, landlord of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement at the time the defective and unsafe condition of the improvement constitutes proximate cause of the injury or wrongful death.
- Prohibits the above-described ten-year statute of repose from being asserted as an affirmative defense by any defendant who engages in fraud with regards to an improvement to real property.

Trial, liability, damages, and judgment

- Requires that the court in all tort actions instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is or is not subject to federal or state income tax.
- Permits the trier of fact to determine based on evidence that the failure to wear a seat belt contributed to the harm alleged in the tort action and to diminish a recovery of compensatory damages that represents noneconomic loss that could have been recovered but for the plaintiff's failure to wear a seat belt.
- Modifies the categories of persons who may be awarded compensatory damages in a civil action for wrongful death to include the decedent's "dependent children" instead of minor children.
- Limits the compensatory damages for noneconomic loss that may be awarded in tort claim to the greater of \$250,000 or an amount equal to three times the plaintiff's economic loss, to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence.
- Provides that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits in the prior dot point.
- Provides that there are no limits on the amount of compensatory damages that represents damages for noneconomic loss if the noneconomic losses of the plaintiff are for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system or permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.
- Prohibits a trier of fact from considering specified evidence when determining an award of compensatory damages for noneconomic loss in a tort action other than a civil action upon a medical, dental, optometric, or chiropractic claim.
- Requires a trial court, upon a post-judgment motion, to review the evidence supporting an award of compensatory damages for noneconomic loss that is challenged as excessive.

- Specifies factors that the trial court must consider when reviewing an award of compensatory damages for noneconomic loss that has been challenged as excessive.
- Requires an appellate court to use a de novo standard of review when considering an appeal of an award of compensatory damages for noneconomic loss on the grounds that the award is inadequate or excessive.
- Requires, upon the motion of any party, the bifurcation of a tort action that is being tried to a jury and involves compensatory damages and punitive or exemplary damages and provides procedures for a bifurcated trial for a tort action that is tried by a jury.
- Modifies the conditions under which punitive or exemplary damages may be awarded.
- Limits the recovery of punitive or exemplary damages to the amount of two times the compensatory damages awarded or, if the defendant is an individual or a small employer, to the lesser of two times the amount of compensatory damages awarded or 10% of the individual's or employer's net worth up to a maximum of \$350,000.
- Provides that the limitation on punitive or exemplary damages does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, had as an element of the offense one or more of the culpable mental states of purposely and knowingly, and is the basis of the tort action.
- Prohibits the award of punitive or exemplary damages if punitive damages have already been awarded or collected based on the same act or course of conduct that is alleged and the aggregate of those damages exceeds the limits described in the prior dot point.
- Permits awarding punitive or exemplary damages in subsequent tort actions involving the same act or courses of conduct for which punitive or exemplary damages have already been awarded if it is determined that the plaintiff will offer new and substantial evidence of previously



undiscovered, additional behavior of the defendant other than the injury or loss for which compensatory damages are sought.

- Permits awarding punitive or exemplary damages in subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded if the total amount of prior punitive or exemplary damages awards was insufficient to punish the defendant's behavior and to deter the defendant and others from similar behavior in the future.
- Prohibits an award of prejudgment interest on punitive or exemplary damages.
- Prohibits the court from instructing the jury with respect to the limits on punitive or exemplary damages, and prohibits counsel for either party or a witness from informing the jury or potential jurors of those limits.
- Prohibits any attorneys fees awarded as a result of a claim for punitive or exemplary damages to be considered for purposes of determining the cap on punitive damages.

Frivolous conduct

- Expands the definition of "conduct" with regards to frivolous conduct actions to include the filing of a pleading, motion, or other paper in a civil action.
- Expands the definition of "frivolous conduct" to include conduct that is for another improper purpose, conduct that cannot be supported by a good faith argument for establishment of new law, conduct that consists of allegations or other factual contentions that have no evidentiary support, or conduct that consists of denials or factual contentions that are not warranted by the evidence.

Product liability actions

- Specifically states that R.C. 2307.71 to 2307.80 (Product Liability Law) are intended to abrogate all common law product liability causes of action.
- Modifies the provision regarding defects in design or formulation of a product by specifying that a product is defective only if, at the time it left

the control of the manufacturer, the foreseeable risks exceeded the benefits associated with the design or formulation.

- Removes the provision that provided that a product is defective in design or formulation if it is more dangerous than expected when used in an intended or reasonably foreseeable manner.
- Provides that the foreseeable risks associated with the design or formulation of a product will be determined by considering, among other specified factors, the extent to which that design or formulation is more dangerous than a reasonably prudent consumer would expect when used in an intended or reasonably foreseeable manner.
- Prohibits the award of punitive or exemplary damages against the manufacturer of an over-the-counter drug marketed pursuant to federal regulations and generally recognized as safe and effective and not misbranded; provides for the forfeiture of that immunity from punitive or exemplary damages if the manufacturer fraudulently and in violation of FDA regulations withheld from the FDA information known to be material and relevant to the harm allegedly suffered or misrepresented to the FDA that type of information.
- Specifies that a manufacturer or supplier is not liable for punitive or exemplary damages if the harm is caused by a product other than a drug or device and if the manufacturer or supplier fully complied with all applicable government safety and performance standards whether or not designated as such by the government with regard to the product's manufacture, construction, design, formulation, warnings, instructions, and representations when it left the manufacturer's or supplier's control and the claimant's injury results from an alleged defect of a product's manufacture or construction, the product's design or formulation, adequate warnings or instructions, and representations for which there is an applicable government safety or performance standard.
- Specifies that the manufacturer or supplier of a product other than a drug or device is subject to punitive or exemplary damages if the claimant establishes, by a preponderance of the evidence, that the manufacturer or supplier of the product other than a drug or device fraudulently withheld from an applicable government agency information known to be material and relevant to the harm that the claimant allegedly suffered or

misrepresented to an applicable government agency information of that type.

- Specifies that the bifurcated trial provisions, the ceiling on recoverable punitive and exemplary damages, and the exclusion of prejudgment interest apply to awards of punitive or exemplary damages awarded under the Product Liability Law.
- Incorporates the product liability contributory fault provisions into the general contributory fault provisions.

Civil immunity for volunteer health care professionals, volunteer health care workers, health care facilities or locations, and nonprofit health care referral organizations

- Modifies the "performance of an operation" and the "delivery of a baby" exceptions to the civil immunity provided to volunteer health care professionals, volunteer health care workers, and nonprofit health care referral organizations and to health care facilities or locations associated with such volunteers or organizations in relation to medical, dental, or health care related services provided by volunteers to indigent and uninsured persons.

Volunteer's certificates for retired dentists

- Requires the Dental Board to issue a volunteer's certificate to retired dental practitioners upon submission of the application and all required attachments.

Advanced practice nurses

- Specifies the types of nurses in specialty practice who may refer to themselves as advanced practice nurses and who may use the initials A.P.N. and provides that in this capacity those nurses are subject to existing law, unchanged by the act, that specify their scopes of practice.

Successor asbestos-related liabilities

- Generally limits the successor asbestos-related liabilities of certain corporations to the fair market value of the acquired stock or assets of the transferor if the corporation is a successor in a stock or asset purchase, or

to the fair market value of the transferor's total gross assets if the corporation is a successor in a merger or consolidation.

- Provides methods by which a corporation may establish the fair market value of assets, stock, or total gross assets under the provisions covered by the preceding dot point and the formula for the annual increase of that fair market value.
- Provides that the act's limitations on successor asbestos-related liabilities apply to all asbestos claims and all litigation involving asbestos claims, including claims and litigation pending on the act's effective date, and that those limitations do not apply to workers' compensation benefits, claims against a successor that do not constitute claims for a successor asbestos-related liability, any obligation arising under the federal "National Labor Relations Act" or under any collective bargaining agreement, or any contractual rights to indemnification.
- Requires courts in Ohio to apply, to the fullest extent permissible under the United States Constitution, Ohio's substantive law, including the act's provisions, to the issue of successor asbestos-related liabilities.
- Provides that for any cause of action that arises before the act's effective date, the provisions described in the preceding four dot points apply unless a court finds that a party's substantive right has been altered and the alteration is otherwise in violation of the Ohio Constitution's Retroactivity Clause.

Miscellaneous

- Permits defendants in tort actions to introduce evidence of the plaintiff's receipt of collateral benefits, except if the source of the benefits has a mandatory self-effectuating federal right of subrogation or a contractual or statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment unless the plaintiff's employer paid for the life insurance or disability policy and the employer is a defendant in the tort action.
- Creates the Ohio Subrogation Rights Commission to investigate problems regarding subrogation and to prepare a report of recommended legislative solutions.

- Provides that an order determining the constitutionality of any changes made by this act, including amendments to specified provisions, are final orders that may be reviewed, affirmed, modified, or reversed, with or without retrial.
- Removes the definition of and references to "negligence claim" from the law dealing with civil actions and trial procedure and replaces the references with "tort claim."
- Provides the General Assembly's findings of fact and intent.
- Specifically requests the Supreme Court to adopt a legal consumer's bill of rights and to amend Ohio Civil Procedure Rule 68 to conform to Federal Rules of Civil Procedure Rule 68.
- Makes other technical changes.

TABLE OF CONTENTS

Immunity in actions related to cumulative consumption, weight gain, or obesity	14
Tort actions regarding picking agricultural produce.....	15
Immunity from liability for an owner, lessee, or occupant of premises with regard to a user of a recreational trail	16
Specific causes of action and general availability of causes of action	17
Persons who may bring a wrongful death action	17
Borrowing statute-foreign period of limitation applies to foreign civil action.....	17
Accrual of certain causes of action	17
Statutes of repose--product liability actions	19
Statutes of repose--improvements to real property	21
Trial, liability, damages, and judgment	22
Instruction to jury regarding taxability of damages awarded.....	22
Seat belts.....	23
Compensatory damages in a wrongful death action	23
Noneconomic damages	24
Jurisdiction.....	24
Limits	24
Procedure.....	24
Definitions	27
Nonapplicability	27
Constitutionality.....	28

General Punitive and Exemplary Damages Law changes.....	28
Bifurcated trial	28
When punitive or exemplary damages may be awarded.....	29
Cap on punitive or exemplary damages	29
Judgment interest.....	31
Frivolous conduct	31
Negligence claim	32
Product liability actions	33
Abrogation of common law product liability causes of action.....	33
Defects in design or formulation	33
Foreseeable risks	33
Manufacturer's unreasonable acts in introduction of products	34
Punitive or exemplary damages.....	34
Product liability contributory fault.....	36
Express or implied assumption of the risk as an affirmative defense.....	38
Civil immunity for volunteer health care professionals, volunteer health care workers, health care facilities or locations, and nonprofit health care referral organizations	38
General civil immunity under continuing law	38
Exceptions to the civil immunity.....	40
Definitions	41
Volunteer's certificates for retired dentists.....	42
Prior and continuing law	42
Operation of the act.....	42
Advanced practice nurses	43
Background	43
Overview of the act.....	44
Nurses Law.....	44
Other changes	45
Uncodified law.....	45
Successor asbestos-related liabilities	46
Definitions for successor asbestos-related liability provisions.....	46
Limitations on liability	47
Establishment of fair market value of assets, stock, or total gross assets	48
Adjustment of fair market value	49
Application of the limitations on liability	49
Disposition of assets	50
Merger or consolidation	50
Uncodified law.....	51
Collateral benefits.....	51
Subrogation	52
Final appealable order.....	53
Continuing law.....	53



Operation of the act.....	53
Contributory fault	53
Statement of findings and intent and other uncodified provisions	54

CONTENT AND OPERATION

Immunity in actions related to cumulative consumption, weight gain, or obesity

The act generally precludes any manufacturer,¹ seller,² or supplier³ of a qualified product⁴ and any trade association⁵ from being liable for injury, death, or loss to person or property for damages, from being subject to an action for declaratory judgment, injunctive, or declaratory relief, or from being responsible for restitution, damages, or other relief arising out of, resulting from, or related to

¹ "Manufacturer" means a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product (R.C. 2305.36(A)(3), by reference to R.C. 2307.71(I)--not in the act).

² "Seller" means, with respect to a qualified product, a person lawfully engaged in the business of marketing, distributing, advertising, or selling the product. "Person engaged in the business" means a person who manufactures, markets, distributes, advertises, or sells a qualified product in the regular course of the person's trade or business. (R.C. 2305.36(A)(2) and (5).)

³ "Supplier" means either of the following: (a) a person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce, or (b) a person that, in the course of a business conducted for the purpose, installs, repairs, or maintains any aspect of a product that allegedly causes harm. "Supplier" does not include any of the following: (a) a manufacturer, (b) a seller of real property, (c) a provider of professional services who, incidental to a professional transaction the essence of which is the furnishing of judgment, skill, or services, sells or uses a product, (d) any person who acts only in a financial capacity with respect to the sale of a product, or who leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor. (R.C. 2305.36(A)(3), by reference to R.C. 2307.71(O)--not in the act.)

⁴ "Qualified product" means all of the following: (a) articles used for food or drink for a human being or other animal, (b) chewing gum, and (c) articles used for components of any article listed in (a) or (b), above (R.C. 2305.36(A)(4)).

⁵ "Trade association" means any association or business organization that is not operated for profit and in which two or more members of the trade association are manufacturers, marketers, distributors, advertisers, or sellers of a qualified product (R.C. 2305.36(A)(6)).

cumulative consumption,⁶ weight gain, obesity, or any health condition that is related to cumulative consumption, weight gain, or obesity (R.C. 2305.36(B)).

The act permits a party that prevails on a motion to dismiss an action described in the preceding paragraph to recover reasonable attorney's fees and costs that the party incurred in connection with the motion to dismiss (R.C. 2305.36(C)).

The act provides that the immunity from liability described in the first paragraph, above, *does not apply* to any of the following if it, alone or in combination with any of the following, was the predominate proximate cause of the claim of injury, death, or loss resulting from cumulative consumption, weight gain, obesity, or any health condition that is related to cumulative consumption, weight gain, or obesity (R.C. 2305.36(D)):

- (1) The misbranding of the qualified product involved;
- (2) Any knowing and willful violation of state or federal law that applies to the qualified product involved;
- (3) Any breach of express contract or breach of express warranty in connection with the purchase of the qualified product involved.

The act provides that the above provisions may not be construed as creating a new cause of action for a claim of injury, death, or loss resulting from a person's cumulative consumption, weight gain, obesity, or any health condition that is related to cumulative consumption, weight gain, or obesity. (R.C. 2305.36(E).)

Tort actions regarding picking agricultural produce

The act provides that, in a tort action, in the absence of willful or wanton misconduct or intentionally tortious conduct, an owner, lessee, renter, or operator of premises that are open to the public for direct access to growing agricultural produce is not imputed to do either of the following (R.C. 901.52(B)):⁷

⁶ "Cumulative consumption" means, with respect to a health condition, any health condition, including, but not limited to, increased cholesterol, heart disease, or high blood pressure, that is caused by successive consumption of a qualified product (R.C. 2305.36(A)(1)).

⁷ "Tort action" is defined by reference to R.C. 2305.35(A)(6) to mean a civil action for damages for injury, death, or loss to person or property, including a product liability claim, but not including an action for damages for a breach of contract or another agreement between persons. (R.C. 901.52(A).)

(1) Extend any assurance to a person that the premises are safe from naturally occurring hazards merely by the act of giving permission to the person to enter the premises or by receiving consideration for the produce picked;

(2) Assume responsibility or liability for injury, death, or loss to person or property allegedly resulting from the natural condition of the terrain of the premises or from the condition of the terrain resulting from cultivation of the soil.

Immunity from liability for an owner, lessee, or occupant of premises with regard to a user of a recreational trail

The act provides that an owner, lessee, or occupant of premises does not owe any duty to a user of a recreational trail to keep the premises safe for entry or use by a user of a recreational trail. An owner, lessee, or occupant of premises does not assume, has no responsibility for, does not incur liability for, and is not liable for any injury to person or property caused by any act of a user of a recreational trail. The act also provides that the above provision does not apply if an intentional tort is involved. (R.C. 1519.07(B)(1) and (2) and (C).)

For the purposes of the above provision (R.C. 1519.07(A)):

(1) "Intentional tort" is defined as an injury to person or property that the tortfeasor intentionally caused, to which the tortfeasor intentionally contributed, or that the tortfeasor knew or believed was substantially certain to result from the tortfeasor's conduct.

(2) "Premises" is defined as a parcel of land together with any waters, buildings, or structures on it that is privately owned and that is directly adjacent to a recreational trail.

(3) "Recreational trail" is defined as a public trail that is used for hiking, bicycling, horseback riding, ski touring, canoeing, or other nonmotorized forms of recreational travel and that interconnects state parks, forests, wildlife areas, nature preserves, scenic rivers, or other places of scenic or historic interest.

(4) "User of a recreational trail" is defined as a person who, in the course of using a recreational trail, enters on premises without first obtaining express permission to be there from the owner, lessee, or occupant of the premises.

The act also modifies the definitions of "premises" and "recreational user" in R.C. 1533.18 that apply to the continuing exceptions from liability of an owner, lessee, or occupant of premises to a recreational user. Under the act, "premises" includes all *privately owned* lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon, and "recreational user" includes a person to whom permission has been granted,



without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, *or a lease payment or fee paid to the owner of privately owned lands*, to enter upon premises to hunt, fish, trap, camp, hike, swim, operate a snowmobile or all-purpose vehicle, or engage in other recreational pursuits. (R.C. 1533.18(A) and (B).)

Specific causes of action and general availability of causes of action

Persons who may bring a wrongful death action

The act modifies the list of persons for whom compensatory damages for loss of society of the decedent and mental anguish may be awarded in a wrongful death action by changing "minor children" to "dependent children" (R.C. 2125.02(B)). The act changes "deceased child" to "deceased minor" in the provision precluding a parent who abandoned the minor from receiving damages in a wrongful death action based on the minor's death (R.C. 2125.02(E)). The act makes various technical changes to the wrongful death statutes such as changing "wrongful death action" to "civil action for wrongful death," "party injured" to "injured person," and "action filed" to "commenced" (R.C. 2125.02 and 2125.04).

See "Statute of repose," below, for discussion of the act's provisions related to product liability claim statutes of repose in wrongful death actions.

Borrowing statute-foreign period of limitation applies to foreign civil action

Continuing law provides that a civil action, unless a different limitation is prescribed by statute, may be commenced only within the period prescribed in R.C. 2305.03 to 2305.22. When interposed by proper plea by a party to an action, lapse of time is a bar to a civil action. The act modifies this provision by providing that no civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired. (R.C. 2305.03.)

Accrual of certain causes of action

Under continuing law, an action for bodily injury or injuring personal property must be brought within two years after the cause of action arose. The act modifies this provision by providing that generally an action based on a product liability claim and an action for bodily injury or injuring personal property must be

brought within two years after the cause of action accrues and that generally such a cause of action accrues when the injury or loss to person or property occurs. (R.C. 2305.10(A).)

The act provides that a cause of action for bodily injury that is not caused by exposure to chromium in any of its chemical forms, that is not incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, that is not caused by exposure to diethylstilbestrol (DES) or other nonsteroidal synthetic estrogens, including exposure before birth, and that is not caused by exposure to asbestos and that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first. (R.C. 2305.10(B)(1).)

The act retains but technically amends the existing provision regarding the accrual of a cause of action for bodily injury caused by exposure to chromium in any of its chemical forms, removes asbestos from this provision, and creates a new similar provision for asbestos that is the same as this existing provision except for technical amendments (R.C. 2305.10(B)(2) and (5)).

The act modifies the prior provision regarding the accrual of a cause of action for bodily injury incurred by a veteran through the exposure to chemical defoliants or herbicides or other causative agents, including agent orange, by stating that the cause of action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, *or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff had an injury that is related to exposure, whichever date occurs first.* (R.C. 2305.10(B)(3).)

The act modifies the prior provision regarding the accrual of a cause of action for bodily injury caused by exposure to DES or other nonsteroidal estrogens by providing that it accrues upon the date on which the plaintiff *is informed by competent medical authority* (replaces "learns from a licensed physician") that the plaintiff has an injury *that is* (replaces "which may be") related to the exposure, or upon the date on which by exercise of reasonable diligence the plaintiff should have *known* (replaces "becomes aware") that the plaintiff has an injury *that is* (replaces "which may be") related to the exposure, whichever date occurs first. (R.C. 2305.10(B)(4).)

Statutes of repose--product liability actions

The act generally prohibits the accrual of a wrongful death action involving, or another cause of action based on, a product liability claim against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product. The act excepts a wrongful death action or another cause of action from the above-described ten-year statute of repose if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product. (R.C. 2125.02(D)(2)(a) and (b) and 2305.10(C)(1) and (2).) (See **COMMENT 1**.)

The act specifies that the above-described ten-year statute of repose does not bar a civil action for wrongful death, or another tort action, involving or based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the decedent's death or the accrual of the cause of action, has not expired in accordance with the warranty's terms. The act permits a wrongful death action, or another cause of action, involving a product liability claim to be commenced within two years after the decedent's death or after the cause of action accrues, if the death occurs or the cause of action accrues less than two years prior to the expiration date of the ten-year period prior to repose. (R.C. 2125.02(D)(2)(c) and (d) and 2305.10(C)(3) and (4).)

The act provides that if the decedent's death occurs, or the claimant's cause of action accrues, during the ten-year period of repose and the claimant cannot commence an action during that ten-year period due to a disability described in the tolling statute, a civil action for wrongful death involving, or an action based on, the product liability claim may be commenced within two years after the disability is removed (R.C. 2125.02(D)(2)(e) and 2305.10(C)(5)).

The act provides that the above-described ten-year statute of repose does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is asbestos. If this provision applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the asbestos or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the asbestos, whichever date occurs first. A civil action for wrongful death based on a cause of action described above must be

commenced within two years after the cause of action accrues and may not be commenced more than two years after the cause of action accrues. (R.C. 2125.02(D)(2)(g).)

The act also provides that the above-described ten year statute of repose does not bar an action for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first (R.C. 2305.10(C)(6)).

The act also provides that the ten-year statute of repose does not bar a civil action for wrongful death or bodily injury based on a product liability claim against a manufacturer or supplier of a product if the product involved is a hazardous or toxic chemical, ethical drug, ethical medical device, chromium, chemical defoliant or herbicide or other causative agent (involving a decedent or claimant who is a veteran), DES, or other nonsteroidal synthetic estrogen and the decedent's death or claimant's bodily injury resulted from exposure to the product during the ten-year period. In such a case, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death or claimant's bodily injury was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death or the claimant's bodily injury was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death or bodily injury based on this cause of action must be commenced within two years after the cause of action accrues and must not be commenced more than two years after the cause of action accrues (R.C. 2125.02(D)(2)(f) and 2305.10(C)(7)).

The act provides that R.C. 2125.02 and 2305.10 (contain the above-described statute of repose provisions) do not create a new cause of action or substantive legal right against any person involving a product liability claim (R.C. 2125.02(F) and 2305.10(D)).

For the purposes of a wrongful death action, the act defines "harm" as death. For the purposes of a tort action for bodily injury arising out of a product liability claim, "harm" means injury, death, or loss to person or property. (R.C. 2125.02(G)(5) and 2305.10(E)(3).)

The act specifies that the above-described provisions dealing with a ten-year statute of repose for wrongful death actions involving a products liability claim (R.C. 2125.02(D) and (G)(5) to (7)) and all provisions contained in R.C. 2305.10 are to be considered purely remedial in operation and are to be applied in

a remedial manner in any civil action commenced on or after the effective date of those provisions, in which those provisions are relevant, regardless of when the cause of action accrued and notwithstanding any other provision of statute or prior rule of law of this state. It also specifies that the above-described provisions dealing with a ten-year statute of repose for wrongful death actions involving a products liability claim and all provisions contained in R.C. 2305.10 are not to be construed to apply to any civil action pending prior to the effective date of those provisions. (R.C. 2125.02(H) and 2305.10(F).) (See **COMMENT 1**.)

Statutes of repose--improvements to real property

The act generally prohibits a cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement. The act defines "substantial completion" as the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

The act permits a claimant who discovers a defective and unsafe condition of an improvement to real property during the above described ten-year period but less than two years prior to the expiration of that ten-year period to commence a civil action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises from that condition within two years from the date of discovery of that defective and unsafe condition. It also provides that if a cause of action that arises out of a defective and unsafe condition of an improvement to real property accrues during that ten-year period and the plaintiff cannot commence an action during that ten-year period due to a disability described in the tolling statute, the plaintiff may commence a civil action to recover damages within two years from the removal of that disability. (R.C. 2305.131(A) and (G).) (See **COMMENT 1**.)

The act specifies that the above described ten-year statute of repose does not apply to a civil action commenced against a person who is an owner of, tenant of, landlord of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement to real property at the time that the defective and unsafe condition of the

improvement to real property constitutes the proximate cause of the bodily injury, injury to real or personal property, or wrongful death that is the subject matter of the civil action. The ten-year statute of repose may not be asserted as an affirmative defense by any defendant who engages in fraud in regard to furnishing the design, planning, supervision of construction, or construction of an improvement to real property or in regard to any relevant fact or other information that pertains to the act or omission constituting the alleged basis of the bodily injury, injury to real or personal property, or wrongful death or to the defective and unsafe condition of the improvement to real property. (R.C. 2305.131(B) and (C).)

The above-described statute of repose does not prohibit the commencement of a civil action for damages against a person who has expressly warranted or guaranteed an improvement to real property for a period longer than the ten-year period described above and whose warranty or guarantee has not expired as of the time of the alleged bodily injury, injury to real or personal property, or wrongful death in accordance with the terms of the warranty or guarantee. The above-described statute of repose does not create a new cause of action or substantive legal right against any person resulting from the design, planning, supervision of construction, or construction of an improvement to real property. Finally, the act specifies that the statute that creates the above-described statute of repose is to be considered purely remedial in operation and is to be applied in a remedial manner in any civil action commenced on or after the effective date of the statute, in which the statute is relevant, regardless of when the cause of action accrued and notwithstanding any other provision of law or prior rule of law of this state. It also specifies that the statute is not to be construed to apply to any civil action pending prior to its effective date. (R.C. 2305.131(D), (E), and (F).) (See **COMMENT 1**.)

Trial, liability, damages, and judgment

Instruction to jury regarding taxability of damages awarded

The act requires the court in all tort actions to instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is or is not subject to taxation under federal or state income tax laws. The act defines "tort action" as a civil action for damages for injury, death, or loss to person or property, including a product liability claim and an asbestos claim but not including a civil action for damages for breach of contract or another agreement between persons. The act specifies that the above provision is to be considered purely remedial in operation and is to be applied in a remedial manner in any civil action commenced on or after the effective date of the provision, in which the provision is relevant, regardless of when the cause of action accrued and notwithstanding any other provision of law or prior rule of law of this state. It also

specifies that the above provision is not to be construed to apply to any civil action pending prior to the effective date of the provision. (R.C. 2315.01(B).)

Seat belts

Under continuing law, generally the failure of a person to wear all of the available elements of a properly adjusted occupant restraining device or to ensure that each passenger of an automobile being operated by the person is wearing all of the available elements of such a device, may not be considered or used as evidence of negligence or contributory negligence, does not diminish recovery for damages in any civil action involving the person arising from the ownership, maintenance, or operation of an automobile, may not be used as a basis for a criminal prosecution other than a prosecution for a violation of the Seat Belt Law, and is not admissible as evidence in any civil or criminal action involving the person other than a prosecution for a violation of the law regulating the use of such devices (Seat Belt Law).

The act modifies the paragraph above such that it refers to ensuring that each *minor* passenger is wearing all of the available elements of a properly adjusted occupant restraining device. It also permits the trier of fact to determine based on evidence admitted consistent with the Ohio Rules of Evidence that the failure of a person to wear all available elements of a properly adjusted occupant restraining device or the failure of a person to ensure that each minor who is a passenger of an automobile being operated by that person contributed to the harm alleged in the tort action and to diminish a recovery of compensatory damages that represents noneconomic loss in a tort action that could have been recovered but for the plaintiff's failure to wear all of the available elements of a properly adjusted occupant restraining device. (R.C. 4513.263(F).)

Compensatory damages in a wrongful death action

The act continues to authorize a trier of fact to award compensatory damages in a civil action for wrongful death for the loss of support from the reasonably expected earning capacity of the decedent, for the loss of services of the decedent, for the loss of society of the decedent (including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by specific individuals), for loss of prospective inheritance to the decedent's heirs, and for the "mental anguish" incurred by specific individuals by reason of the decedent's death. However, the act modifies the categories of those specified individuals to include the decedent's surviving spouse, parents, and next of kin (continuing law, although the act specifies that it is the next of kin of the decedent) and also all of the decedent's dependent children (not the decedent's "minor" children as under current law). (R.C. 2125.02(B).)

Noneconomic damages

Jurisdiction

Under continuing law, the court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of county commissioners. The act specifies that the court of common pleas does not have jurisdiction in any tort action to which the limits apply to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits set forth in the act. (R.C. 2305.01 and 2315.18(F)(1).)

Limits

The act provides that there are no limitations on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action. There also are no limitations on the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action to recover damages for injury or loss to person or property if the noneconomic losses of the plaintiff are for either of the following (R.C. 2315.18(B)(1) and (3)):

(a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

(b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.

However, except as otherwise provided above, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action to recover damages for injury or loss to person or property cannot exceed the greater of \$250,000 or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of \$350,000 for each plaintiff in that tort action or a maximum of \$500,000 for each occurrence that is the basis of that tort action. (R.C. 2315.18(B)(2).)

Procedure

The act sets forth what evidence is to be considered by the trier of fact when determining an award of compensatory damages for noneconomic loss. It also provides that an award for noneconomic loss is subject to post-trial and appellate review. The act specifies that in determining an award of compensatory



damages for noneconomic loss in a tort action, the trier of fact is prohibited from considering any of the following (R.C. 2315.18(C)):

- (1) Evidence of a defendant's alleged wrongdoing, misconduct, or guilt;
- (2) Evidence of the defendant's wealth or financial resources;
- (3) All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

Upon a post-judgment motion, a trial court in a tort action is required to review the evidence supporting an award of compensatory damages for noneconomic loss that is challenged as excessive. That review must include, but is not limited to, the following factors (R.C. 2315.19(A)):

(1) Whether the evidence presented or the arguments of the attorneys resulted in one or more of the following events in the determination of an award of compensatory damages for noneconomic loss:

- (a) It inflamed the passion or prejudice of the trier of fact.
- (b) It resulted in the improper consideration of the wealth of the defendant.
- (c) It resulted in the improper consideration of the misconduct of the defendant so as to punish the defendant improperly or in circumvention of the limitation on punitive or exemplary damages as provided in section 2315.21 of the Revised Code.

(2) Whether the verdict is less than or in excess of verdicts involving comparable injuries to similarly situated plaintiffs;

(3) Whether there were any extraordinary circumstances in the record to account for an award of compensatory damages for noneconomic loss in excess of what was granted by courts to similarly situated plaintiffs, with consideration given to the type of injury, the severity of the injury, and the plaintiff's age at the time of the injury.

The act requires a trial court upholding an award of compensatory damages for noneconomic loss that a party has challenged as inadequate or excessive to set forth in writing its reasons for upholding the award. The act also requires an appellate court to use a de novo standard of review when considering an appeal of an award of compensatory damages for noneconomic loss on the grounds that the award is inadequate or excessive. (R.C. 2315.19(B) and (C).)

The act provides that if a trial is conducted in a tort action to recover damages for injury or loss to person or property and a plaintiff prevails in that action, the court in a nonjury trial must make findings of fact, and the jury in a jury trial must return a general verdict accompanied by answers to interrogatories, that must specify all of the following (R.C. 2315.18(D)):

- (1) The total compensatory damages recoverable by the plaintiff;
- (2) The portion of the total compensatory damages that represents damages for economic loss;
- (3) The portion of the total compensatory damages that represents damages for noneconomic loss.

After the trier of fact in a tort action to recover damages for injury or loss to person or property complies with the above requirements, the court must enter a judgment in favor of the plaintiff for compensatory damages for economic loss in the amount determined pursuant to paragraph (2), above, and a judgment in favor of the plaintiff for compensatory damages for noneconomic loss subject to the provision that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the above-described limits set forth in the act. Except in the occurrence of a catastrophic injury, in no event may a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in the act. These provisions are to be applied in a jury trial only after the jury has made its factual findings and determination as to the damages. (R.C. 2315.18(E)(1).)

Prior to the trial in the tort action, any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination of the damages within the applicable limits. If the trier of fact is a jury, the court must not instruct the jury with respect to the limit on compensatory damages for noneconomic loss set forth in the act, and neither counsel for any party nor a witness shall inform the jury or potential jurors of that limit. (R.C. 2315.18(E)(2) and (F)(2).)

The act provides that with respect to a tort action to which the limits on compensatory damages for noneconomic loss apply, any excess amount of compensatory damages for noneconomic loss that is greater than the applicable amount cannot be reallocated to any other tortfeasor beyond the amount of compensatory damages that the tortfeasor would otherwise be responsible for under the laws of Ohio (R.C. 2315.18(G)).

Definitions

"Economic loss" means any of the following types of pecuniary harm (R.C. 2315.18(A)(2)):

(a) All wages, salaries, or other compensation lost as a result of an injury or loss to person or property that is a subject of a tort action;

(b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations as a result of an injury or loss to person or property that is a subject of a tort action;

(c) Any other expenditures incurred as a result of an injury or loss to person or property that is a subject of a tort action, other than attorney's fees incurred in connection with that action.

"Noneconomic loss" is defined for these provisions as nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss. (R.C. 2315.18(A)(4).)

"Occurrence" means all claims resulting from or arising out of any one person's bodily injury. (R.C. 2315.18(A)(5).)

"Tort action" is defined for these provisions as a civil action for damages for injury or loss to person or property. "Tort action" includes a civil action upon a product liability claim or an asbestos claim. "Tort action" does not include a civil action upon a medical, dental, optometric, or chiropractic claim or a civil action for damages for a breach of contract or other agreement between persons. (R.C. 2315.18(A)(7).)

Nonapplicability

The act provides that the above described provisions do not apply to tort actions that are either: (1) brought against the state in the Court of Claims, including, but not limited to, those actions in which a state university or college is a defendant, or (2) brought against political subdivisions of this state and that are commenced under or are subject to R.C. Chapter 2744. (regulates the liability of political subdivision in tort actions). The provisions also do not apply to wrongful death actions brought pursuant to R.C. Chapter 2125. (R.C. 2315.18(H).)

Constitutionality

The act provides that if the provisions regarding the limits on compensatory damages for noneconomic loss have been determined to be unconstitutional, then the provisions regarding what evidence can be considered by the trier of fact and the provisions regarding the post-trial and appellate review found in R.C. 2315.18(C) and R.C. 2315.19 will govern the determination of an award of compensatory damages for noneconomic loss in a tort action (R.C. 2315.18(I)).

General Punitive and Exemplary Damages Law changes

Bifurcated trial

The act requires, upon the motion of any party, the bifurcation of a tort action that is tried to a jury and in which a plaintiff seeks compensatory damages and punitive or exemplary damages. The initial stage of the trial must relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, all parties are prohibited from presenting, and the court is prohibited from permitting a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant. If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury must be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages from the defendant. (R.C. 2315.21(B)(1).)

In a tort action in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, either of the following applies: (1) if the action is tried to a jury, the court must instruct the jury to return, and the jury must return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant, or (2) if the action is tried to a court, the court must make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, must make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant (R.C. 2315.21(B)(2) and (3)).

When punitive or exemplary damages may be awarded

Under continuing law, generally punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in paragraph (1).

The act removes the references to "oppression" and "insult" from paragraph (1) and replaces paragraph (2) with a prohibition against the recovery of punitive or exemplary damages unless the trier of fact returns a verdict for or makes a determination of the total compensatory damages recoverable by the plaintiff from that defendant. The act provides that the defendant as "principal" or "master" as described in paragraph (1) must have "knowingly" authorized, participated in, or ratified actions or omissions of an agent or servant in order for punitive or exemplary damages to be awarded. (R.C. 2315.21(C) and (E)(1).)

Cap on punitive or exemplary damages

Under continuing law, in a tort action, the trier of fact must determine the liability of any defendant for punitive and exemplary damages and the amount of those damages. The act retains this provision but generally prohibits the court from entering judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant. If the defendant is an individual or a small employer,⁸ the court is prohibited from entering judgment for punitive or exemplary damages in excess of the lesser of the amount of two times the compensatory damages awarded to the

⁸ "Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual must be considered an employer under R.C. 2315.21 only if the subject of the tort action is related to the individual's capacity as an employer. (R.C. 2315.21(A)(4).)

"Small employer" means an employer who employs not more than 100 persons on a full-time permanent basis or, if the employer is classified as being in the manufacturing sector by the North American Industrial Classification System, "small employer" means an employer who employs not more than 500 persons on a full-time permanent basis (R.C. 2315.21(A)(5)).

plaintiff from the defendant or 10% of the employer's or individual's net worth up to a maximum of \$350,000. The act also states that a court of common pleas does not have jurisdiction, in any tort action to which the amounts apply, to award punitive or exemplary damages that exceed these amounts. (R.C. 2315.21(D)(1) and (2) and 2305.01.)

The act generally prohibits the award in any tort action of punitive or exemplary damages against a defendant if the defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and collected, in any state or federal court, against the defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damages exceeds the amount specified in the preceding paragraph (R.C. 2315.21(D)(5)(a)). Notwithstanding this prohibition, the act permits the award of punitive or exemplary damages in either of the following types of tort actions (R.C. 2315.21(D)(5)(b)):

(1) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described above in "When punitive or exemplary damages may be awarded" on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court must make specific findings of fact in the record to support its conclusion. The court must reduce the amount of any punitive or exemplary damages otherwise awardable by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court is prohibited from informing the jury about the court's determination and action.

(2) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish the defendant's behavior and to deter that defendant and others from similar behavior in the future. In that case, the court must make specific findings of fact in the record to support its conclusion. The court must reduce the amount of any punitive or exemplary damages otherwise awardable by the sum of the punitive or exemplary damages previously rendered against that defendant in any state or federal court. The court is prohibited from informing the jury about the court's determination and action. (See COMMENT 2.)

The act provides that the limitation on punitive or exemplary damages does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly, and that is the basis of the tort action. (R.C. 2915.21(D)(6).)

The act prohibits the court from instructing the jury with respect to the limits on punitive or exemplary damages, and neither counsel for any party or a witness are permitted to inform the jury or potential jurors of those limits (R.C. 2315.21(F)).

The act also prohibits any attorneys fees awarded as a result of a claim for punitive or exemplary damages from being considered for purposes of determining the cap on punitive damages (R.C. 2315.21(D)(2)(c)).

Continuing law provides that R.C. 2315.21, which deals with punitive or exemplary damages, does not apply to tort actions against the state in the Court of Claims. The act further provides that R.C. 2315.21 does not apply to tort actions against a state university or college that are subject to R.C. 3345.40(B)(1) or to tort actions against a political subdivision of this state that are commenced under or are subject to R.C. Chapter 2744. (regarding political subdivision tort liability). (R.C. 2515.21(E).)

Judgment interest

The act retains the general judgment interest rate for tort and other civil actions at 10% per annum (R.C. 1343.03--not in the act). The act provides that no award of prejudgment interest is to include any prejudgment interest on punitive or exemplary damages found by the trier of fact (R.C. 2315.21(D)(3)).

Frivolous conduct

The act expands the definition of "conduct" for purposes of the law providing for the recovery of attorney's fees by a party to a civil action who is adversely affected by frivolous conduct to include the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes.

The act also expands the definition of "frivolous conduct" that applies to that law to additionally include conduct that satisfies any of the following:

- (1) Conduct that obviously serves merely to harass or maliciously injure another party to the civil action or appeal (current law) *or is for another improper*

purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation (added by the act).

(2) *It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law (current law), or cannot be supported by a good faith argument for the establishment of new law (added by the act).*

(3) *The conduct 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.*

(4) *The conduct 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.*

The act allows the court on its own initiative to award court costs, reasonable attorney's fees, and other reasonable expenses because of frivolous conduct. (R.C. 2323.51(A)(1)(a) and (2)(a) and (B)(2).)

Under prior law, generally at any time prior to the commencement of the trial in a civil action or within 21 days after the entry of judgment in a civil action or at any time prior to the hearing in an appeal against a government entity or employee that is filed by an inmate or within 21 days after the entry of judgment in an appeal of that nature, the court may award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct. The award may be made against a party, the party's counsel of record, or both. (R.C. 2323.51(B)(1) and (4).) The act modifies this provision by providing that generally, at any time not more than 30 days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, against a party, the party's counsel of record, or both. (R.C. 2323.51(B)(1).)

Negligence claim

Under prior law, for the purposes of the laws regarding civil actions and trial procedure (R.C. Chapters 2307. and 2315.), "negligence claim" means a civil action for damages for injury, death, or loss to person or property to the extent that the damages are sought or recovered based on allegation or proof of negligence

(R.C. 2307.011(E)). The act repeals this definition and removes references to "negligence claim" from R.C. 1775.14, 2307.29, 2315.32, 2315.34, 2315.36, and 4507.07 and replaces it with "tort claim."

Product liability actions

Abrogation of common law product liability causes of action

The act specifically states that R.C. 2307.71 to 2307.80 are intended to abrogate all common law product liability causes of action (R.C. 2307.71(B)). It limits the definition of "product liability claim" to a claim that is asserted in a civil action pursuant to R.C. 2307.71 to 2307.80 (R.C. 2307.01(A)(13)). Consistent with the above statement, the act specifies in several sections that the sections' references to product liability claims refer to such claims under R.C. 2307.71 to 2307.80 (R.C. 2305.25(H), 2307.011(J), and 2307.60(B)).

Defects in design or formulation

Under continuing and prior law, a product is defective in design or formulation if either of the following applies (R.C. 2307.75(A)):

(1) When it left the control of its manufacturer, the foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation.

(2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

The act modifies this provision by specifying that a product is defective in design or formulation *only if, at the time* it left the control of its manufacturer, the foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation and by repealing (2) above (R.C. 2307.75(A)(1) and (2)).

Foreseeable risks

Continuing law provides that the foreseeable risks associated with the design or formulation of a product are to be determined by considering factors including, but not limited to, the following (R.C. 2307.75(B)):

(1) The nature and magnitude of the risks of harm associated with that design or formulation in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product;

(2) The likely awareness of product users, whether based on warnings, general knowledge, or otherwise, of those risks of harm;

(3) The likelihood that that design or formulation would cause harm in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product;

(4) The extent to which that design or formulation conformed to any applicable public or private product standard that was in effect when the product left the control of its manufacturer.

The act adds an additional factor to this list, which is the extent to which that design or formulation is more dangerous than a reasonably prudent consumer would expect when used in an intended or reasonably foreseeable manner (R.C. 2307.75(B)(5)).

Manufacturer's unreasonable acts in introduction of products

Current law provides that a product is not defective in design or formulation if, at the time the product left the control of its manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks compensatory damages without substantially impairing the usefulness or intended purpose of the product, *unless the manufacturer acted unreasonably in introducing the product into trade or commerce.*

The act eliminates the above language in italics; therefore a manufacturer's unreasonable introduction of a product into trade or commerce does not make a product defective. (R.C. 2307.75(F).)

Punitive or exemplary damages

Under continuing law, subject to the provisions of the next paragraph, punitive or exemplary damages are not to be awarded against a manufacturer or supplier in question in connection with a product liability claim unless the claimant establishes, by clear and convincing evidence, that the harm for which the claimant is entitled to recover compensatory damages was the result of misconduct of the manufacturer or supplier in question that manifested a flagrant disregard of the safety of persons who might be harmed by the product in question. The fact by itself that a product is defective does not establish a flagrant disregard of the safety of persons who might be harmed by that product. (R.C. 2307.80(A).)

Continuing law also provides that if a claimant alleges in a product liability claim that a drug caused harm to the claimant, the manufacturer of the drug is not

liable for punitive or exemplary damages in connection with that product liability claim if the drug that allegedly caused the harm was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the Federal Food and Drug Administration (hereafter "FDA") under the "Federal Food, Drug, and Cosmetic Act" or the "Public Health Service Act" unless it is established by a preponderance of the evidence that the manufacturer fraudulently and in violation of applicable FDA regulations withheld from the FDA information known to be material and relevant to the claimant's harm or misrepresented to the FDA information of that type (R.C. 2307.80(C)).

The act modifies the above provisions in several ways. First, it subjects the current general statement of when a manufacturer or supplier is liable for punitive or exemplary damages to another exception discussed in the second paragraph below. It also subjects the drug manufacturer immunity provision discussed in the prior paragraph to that new exception. It includes a "device" in the drug manufacturer immunity provision so that it applies to a manufacturer of a drug or a device and specifies that "device" has the same meaning as in the "Federal Food, Drug, and Cosmetic Act."⁹ The act also provides an additional set of circumstances when the manufacturer of a drug *or device* has immunity from punitive and exemplary damages. Under the act, the manufacturer of a drug or device is not liable for punitive or exemplary damages if the drug or device that allegedly caused the harm that is the basis of the claim for damages was an over-the-counter drug marketed pursuant to federal regulations, was generally recognized as safe and effective and as not being misbranded pursuant to the applicable federal regulations, and satisfied in relevant and material respects each of the conditions contained in the applicable regulations and each of the conditions contained in an applicable monograph. (R.C. 2307.80(A), (C)(1)(b), and (C)(3)(b).)

The act provides for the forfeiture of the proposed new immunity for over-the-counter drugs if a claimant establishes, by a preponderance of the evidence, that the manufacturer fraudulently and in violation of applicable regulations of the

⁹ "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory that is (1) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them, (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (3) intended to affect the structure or any function of the body of man or other animals, and that does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and that is not dependant upon being metabolized for the achievement of its primary intended purposes.

FDA withheld from the FDA information known to be material and relevant to the harm that the claimant allegedly suffered or misrepresented to the FDA information of that type. These same conditions result in the forfeiture of the existing immunity for a drug manufacturer as discussed above. (R.C. 2307.80(C)(2).)

The act specifies that a manufacturer or supplier is not liable for punitive or exemplary damages in connection with a claim if a claimant alleges in a product liability claim that a product other than a drug or device caused harm to the claimant and if the manufacturer or supplier fully complied with all applicable government safety and performance standards whether or not designated as such by the government relative to (1) the product's manufacture or construction, (2) the product's design or formulation, (3) adequate warnings or instructions, and (4) representations when it left the manufacturer's or supplier's control and the claimant's injury results from an alleged defect of a product's manufacture or construction, the product's design or formulation, adequate warnings or instructions, and representations for which there is an applicable government safety or performance standard.

The above provisions do not apply if a claimant establishes by a preponderance of the evidence that the manufacturer or supplier of the product other than a drug or device fraudulently and in violation of applicable government safety and performance standards, whether or not designated as such by the government, withheld from an applicable government agency information known to be material and relevant to the harm that the claimant allegedly suffered or misrepresented to an applicable government agency information of that type. (R.C. 2307.80(D).)

The act specifies that the act's bifurcated trial provisions, the ceiling on recoverable punitive or exemplary damages, and the exclusion of pre-judgment interest described above under "General Punitive and Exemplary Damages Law changes" apply to awards of punitive or exemplary damages awarded under the Product Liability Law (R.C. 2307.80(E)).

Product liability contributory fault

Continuing law, as enacted by Am. Sub. S.B. 120 of the 124th General Assembly, provides that contributory negligence or other contributory tortious conduct may be asserted as an affirmative defense to a product liability claim. Contributory negligence or other contributory tortious conduct of a plaintiff does not bar the plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if that contributory negligence or other contributory tortious conduct was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks

recovery and of all other persons from whom the plaintiff does not seek recovery in this action. If the above applies, the compensatory damages recoverable by the plaintiff must be diminished by an amount that is proportionately equal to the percentage of negligence or other tortious conduct by the plaintiff. (R.C. 2315.43.)

If contributory negligence or other contributory tortious conduct is asserted and established as an affirmative defense to a product liability claim, the court in a nonjury action must make findings of fact, and the jury in a jury trial must return a general verdict accompanied by answers to interrogatories, that specify the following: (1) the total amount of compensatory damages that would have been recoverable on that product liability claim but for that negligence or other tortious conduct, (2) the portion of the compensatory damages that represents economic loss, (3) the portion of compensatory damages that represents noneconomic loss, and (4) the percentage of negligence or other tortious conduct attributable to all persons determined for the purposes of joint and several liability. (R.C. 2315.44.)

After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to the interrogatories, the court must diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of negligence or other tortious conduct that is attributable to the plaintiff. If that percentage of the negligence or other tortious conduct is greater than the sum of percentages of the tortious conduct determined to be attributable to all parties to the action from whom the plaintiff seeks recovery plus all persons from whom the plaintiff does not seek recovery in an action, the court must enter judgment in favor of the defendants. (R.C. 2315.45.)

After it makes findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, a court must enter a judgment that is in favor of the plaintiff and that imposes liability if all of the following apply: (1) contributory negligence or other contributory tortious conduct is asserted as an affirmative defense to a product liability claim, (2) it is determined that the plaintiff was contributory negligent or engaged in other contributory tortious conduct and that contributory negligence or other contributory tortious conduct was a direct and proximate cause of the injury, death, or loss involved, and (3) the plaintiff is entitled to recover compensatory damages from more than one party. (R.C. 2315.46.)

The act repeals these provisions and incorporates them into the general contributory fault provisions in R.C. 2315.32 to 2315.36.

The act removes from R.C. 1775.14, 2307.011, 2307.23, 2307.29, and 4507.07 references to R.C. 2315.41 to R.C. 2315.46.



Express or implied assumption of the risk as an affirmative defense

Continuing law provides that express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim, except that express or implied assumption of the risk may not be asserted as an affirmative defense to an intentional tort claim. If express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim and if it is determined that the plaintiff expressly or impliedly assumed a risk and that express or implied assumption of the risk was a direct and proximate cause of harm for which the plaintiff seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages. (R.C. 2315.42.)

The act provides that, subject to the provisions described below, the general contributory fault provisions under R.C. 2315.32 to 2315.36 apply to a product liability claim that is asserted pursuant to the Product Liability Law under R.C. 2307.71 to 2307.80. The act also generally continues and relocates the assumption of the risk provisions described above. However, it provides that if implied assumption of the risk is asserted as an affirmative defense to a product liability claim against a supplier for compensatory damages based on negligence under R.C. 2307.78(A)(1), the general contributory fault provisions under R.C. 2315.32 to 2315.36 are applicable to that affirmative defense and must be used to determine whether the claimant is entitled to recover compensatory damages based on that claim and the amount of any recoverable compensatory damages. (R.C. 2307.711.)

Civil immunity for volunteer health care professionals, volunteer health care workers, health care facilities or locations, and nonprofit health care referral organizations

General civil immunity under continuing law

Generally, a "health care professional" who is a "volunteer" and who complies with the requirements listed below is not liable in damages to any person or government entity in a tort or other civil action, including an action on a medical, dental, chiropractic, optometric, or other health-related claim, for injury, death, or loss to person or property that allegedly arises from an action or omission of the volunteer in the provision to an "indigent and uninsured person" of medical, dental, or other health-related diagnosis, care, or treatment, unless the action or omission constitutes willful or wanton misconduct. The covered diagnosis, care, or treatment includes the health care professional providing samples of medicine and other medical products to the indigent and uninsured person. (R.C. 2305.234(B)(1).)

In order for the health care professional to qualify for the immunity described above, the professional must do all of the following prior to providing diagnosis, care, or treatment (R.C. 2305.234(B)(2)): (1) determine, in good faith, that the indigent and uninsured person is mentally capable of giving informed consent to the provision of the diagnosis, care, or treatment and is not subject to duress or under undue influence, (2) inform the person of the provisions of R.C. 2305.234, including notifying the person that, by giving informed consent to the provision of the diagnosis, care, or treatment, the person cannot hold the health care professional liable for damages in a tort or other civil action, including an action on a medical, dental, chiropractic, optometric, or other health-related claim, unless the action or omission of the health care professional constitutes willful or wanton misconduct, and (3) obtain the informed consent of the person and a written waiver, signed by the person or by another individual on behalf of and in the presence of the person, that states that the person is mentally competent to give informed consent and, without being subject to duress or under undue influence, gives informed consent to the provision of the diagnosis, care, or treatment subject to the provisions of R.C. 2305.234. The written waiver must state clearly and in conspicuous type that the person or other individual who signs the waiver is signing it with full knowledge that, by giving informed consent to the provision of the diagnosis, care, or treatment, the person cannot bring a tort or other civil action, including an action on a medical, dental, chiropractic, optometric, or other health-related claim, against the health care professional unless the action or omission of the health care professional constitutes willful or wanton misconduct).

Generally, "health care workers" who are volunteers are not liable in damages to any person or government entity in a tort or other civil action, including an action upon a medical, dental, chiropractic, optometric, or other health-related claim, for injury, death, or loss to person or property that allegedly arises from an action or omission of the health care worker in the provision to an indigent and uninsured person of medical, dental, or other health-related diagnosis, care, or treatment, unless the action or omission constitutes willful or wanton misconduct. (R.C. 2305.234(C).) Subject to certain exceptions and qualifications, a "nonprofit health care referral organization" is not liable in damages to any person or government entity in a tort or other civil action, including an action on a medical, dental, chiropractic, optometric, or other health-related claim, for injury, death, or loss to person or property that allegedly arises from an action or omission of the nonprofit health care referral organization in referring indigent and uninsured persons to, or arranging for the provision of, medical, dental, or other health-related diagnosis, care, or treatment by a volunteer health care professional or a volunteer health care worker covered by the immunity, unless the action or omission constitutes willful or wanton misconduct. (R.C. 2305.234(D).)

A health care facility or location associated with a health care professional, a health care worker, or a nonprofit health care referral organization described in the immunity provisions summarized above generally is not liable in damages to any person or government entity in a tort or other civil action, including an action on a medical, dental, chiropractic, optometric, or other health-related claim, for injury, death, or loss to person or property that allegedly arises from an action or omission of the health care professional or worker or nonprofit health care referral organization relative to the medical, dental, or other health-related diagnosis, care, or treatment provided to an indigent and uninsured person on behalf of or at the health care facility or location, unless the action or omission constitutes willful or wanton misconduct. (R.C. 2305.234(E).)

Exceptions to the civil immunity

Continuing and prior law. Generally, the above-described immunities are not available to a health care professional, health care worker, nonprofit health care referral organization, or health care facility or location if, at the time of an alleged injury, death, or loss to person or property, the health care professionals or health care workers involved are providing one of the following (R.C. 2305.234(F)(1)):

(1) Any medical, dental, or other health-related diagnosis, care, or treatment pursuant to a community service work order entered by a court under R.C. 2951.02(B) as a condition of probation or other suspension of a term of imprisonment or imposed by a court as a community control sanction pursuant to R.C. 2929.15 and 2929.17;

(2) Performance of an "operation";¹⁰

(3) Delivery of a baby.

The above-described exceptions do not apply to an individual who provides, or a nonprofit shelter or health care facility at which the individual provides, diagnosis, care, or treatment that is necessary to preserve the life of a person in a medical emergency (R.C. 2305.234(F)(2)).

¹⁰ "Operation" means any procedure that involves cutting or otherwise infiltrating human tissue by mechanical means, including surgery, laser surgery, ionizing radiation, therapeutic ultrasound, or the removal of intraocular foreign bodies. "Operation" does not include: (a) the administration of medication by injection, unless the injection is administered in conjunction with a procedure infiltrating human tissue by mechanical means other than the administration of medicine by injection, or (b) routine dental restorative procedures, the scaling of teeth, or extractions of teeth that are not impacted. (R.C. 2305.234(A)(9); but the definition is not changed by the act.)

Operation of the act. The act modifies the exceptions to the civil immunities described in (2) and (3) above by providing that, under those exceptions, the immunities are not available to a health care professional, health care worker, nonprofit health care referral organization, or health care facility or location, if, at the time of an alleged injury, death, or loss to person or property, the health care professionals or workers involved are providing delivery of a baby or any other purposeful termination of a human pregnancy (R.C. 2305.234(F)(1)(c)) or are providing the performance of an operation to which any one of the following applies (R.C. 2305.234(F)(1)(b)):

(1) The operation requires the administration of "deep sedation" or "general anesthesia" (see "**Definitions**," below).

(2) The operation is a procedure that is not typically performed in an office.

(3) The individual involved is a health care professional, and the operation is beyond the scope of practice or the education, training, and competence, as applicable, of the health care professional.

Definitions

The act includes definitions for the following terms (R.C. 2305.234(A)(13) and (14)):

(1) "Deep sedation" means a drug-induced depression of consciousness during which a patient cannot be easily aroused but responds purposefully following repeated or painful stimulation, a patient's ability to independently maintain ventilatory function may be impaired, a patient may require assistance in maintaining a patent airway and spontaneous ventilation may be inadequate, and cardiovascular function is usually maintained.

(2) "General anesthesia" means a drug-induced loss of consciousness during which a patient is not arousable, even by painful stimulation, the ability to independently maintain ventilatory function is often impaired, a patient often requires assistance in maintaining a patent airway, positive pressure ventilation may be required because of depressed spontaneous ventilation or drug-induced depression of neuromuscular function, and cardiovascular function may be impaired.

Volunteer's certificates for retired dentists

Prior and continuing law

Continuing law provides for the issuance of "volunteer's certificates" to retired dentists so that they may provide their services to indigent and uninsured persons. Prior law stated that the State Dental Board *may* issue, without examination, a volunteer's certificate to a person who is retired from practice so that the person may provide dental services to indigent and uninsured persons. An application for a volunteer's certificate must include all of the following:

(1) A copy of the applicant's degree from dental college or dental hygiene school;

(2) One of the following, as applicable: (a) a copy of the applicant's most recent license to practice dentistry or dental hygiene issued by a jurisdiction in the United States that licenses persons to practice dentistry or dental hygiene, or (b) a copy of the applicant's most recent license equivalent to a license to practice dentistry or dental hygiene in one or more branches of the United States Armed Services that the United States government issued.

(3) Evidence of one of the following, as applicable: (a) the applicant has maintained for at least ten years prior to retirement full licensure in good standing in any jurisdiction in the United States that licenses persons to practice dentistry or dental hygiene, or (b) the applicant has practiced as a dentist or dental hygienist in good standing for at least ten years prior to retirement in one or more branches of the United States Armed Services.

(4) *A notarized statement from the applicant, on a form prescribed by the Board, that the applicant will not accept any form of remuneration for any dental services rendered while in possession of a volunteer's certificate.*

The holder of a volunteer's certificate is prohibited by continuing law from accepting any form of remuneration for providing dental services while in possession of the volunteer's certificate. The holder is subject to the immunity provisions as they apply to health care professionals as described above. (R.C. 4715.42(B), (C), (D), and (E)(4).)

Operation of the act

The act provides that within 30 days after receiving an application for a volunteer's certificate that includes all of the items that must be provided with the application, the State Dental Board *must* (instead of *may*) issue, without examination, a volunteer's certificate to a person who is retired from practice so that the person may provide dental services to indigent and uninsured persons. An

application for a volunteer's certificate must include all of the items described in paragraphs (1), (2), and (3) under "Prior and continuing law," above. The act removes the requirement that an application include a notarized statement from the applicant, on a form prescribed by the Board, that the applicant will not accept any form of remuneration for any dental services rendered while in possession of a volunteer's certificate. (R.C. 4715.42(B) and (C).)

The act further provides that within 90 days after the effective date of this provision, the State Dental Board must make available through its website the application form for a volunteer's certificate, a description of the application process, and a list of all the items required to be submitted with the application as described in paragraphs (1), (2), and (3) under "Prior and continuing law," above (R.C. 4715.42(G)).

Advanced practice nurses

Background

Former R.C. 4723.52 to 4723.60 set forth pilot programs to provide access to health care in underserved areas through the use of advanced practice nurses. The advisory committee of each pilot program was required to develop a standard care arrangement to establish conditions under which an advanced practice nurse was required to refer a patient to a physician and procedures for quality assurance review of advanced practice nurses by the advisory committee. For purposes of the pilot programs, the Board of Nursing could approve certain registered nurses who met specific criteria as advanced practice nurses.¹¹ The Board also could approve an advanced practice nurse to prescribe drugs and therapeutic devices subject to specified requirements. (R.C. 4723.52, 4723.55, and 4723.56--not in the act.) Effective January 17, 2004, R.C. 4723.52 to 4723.60 were repealed as provided in Section 3 of Am. Sub. H.B. 241 of the 123rd General Assembly.

R.C. 4723.41 to 4723.50 authorize the Board of Nursing to issue certificates of authority for registered nurses to practice nursing as certified registered nurse anesthetists, clinical nurse specialists, certified nurse-midwives, or certified nurse practitioners (generally referred to in this part of the analysis as "nurses in specialty practice"). R.C. 4723.48 requires the Board of Nursing to issue certificates to prescribe drugs and therapeutic devices to clinical nurse

¹¹ In addition to other criteria, the applicant had to be either: (1) a nurse-midwife who held a current, valid certificate issued under R.C. 4723.42 and was certified by the American College of Nurse-Midwives or (2) a registered nurse certified as a clinical nurse specialist or nurse practitioner by a national certifying organization recognized by the Board (R.C. 4723.55(B)).

specialists, certified nurse-midwives, or certified nurse practitioners who meet certain specified requirements.

Overview of the act

In view of the repeal of the pilot programs dealing with advanced practice nurses, the act specifies the nurses who may refer to themselves as advanced practice nurses. It generally makes the following changes in the Nurses Law: (1) it redefines "advanced practice nurse" in the Nurses Law to mean any of specified nurses in specialty practice, (2) it authorizes those covered nurses to use the title "advanced practice nurse" or the initials "A.P.N.," and (3) it makes conforming changes in laws that refer to advanced practice nurses and other laws.

Nurses Law

The former Nurses Law defines "advanced practice nurse" as, until three years and eight months after May 17, 2000, a registered nurse who is approved by the Board of Nursing under R.C. 4723.55 to practice as an advanced practice nurse (R.C. 4723.01(O)).

The act modifies the definition of "advanced practice nurse" to mean *a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner*. It specifically authorizes any of the above nurses in specialty practice to use the title "advanced practice nurse" or the initials "A.P.N." (R.C. 4723.01(O) and 4723.03(C)(7).)

Under the continuing Nurses Law, a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner may provide to individuals and groups nursing care that requires knowledge and skill obtained from advanced formal education and clinical experience. The act expands this provision by stating that in this capacity as an advanced practice nurse, a certified nurse-midwife is subject to R.C. 4723.43(A), a certified registered nurse anesthetist is subject to R.C. 4723.43(B), a certified nurse practitioner is subject to R.C. 4723.42(C), and a clinical nurse specialist is subject to R.C. 4723.43(D), all division references dealing with their respective scopes of practice. (R.C. 4723.43, first par.)

The act prohibits any person from doing either of the following unless the person holds a current, valid certificate of authority to practice nursing as a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner issued by the Board of Nursing under the Nurses Law: (1) represent the person as being an advanced practice nurse or (2) use any title or initials implying that the person is an advanced practice nurse (R.C. 4723.44(A)(4) and (5)). The act also prohibits any of those types of nurses

in specialty practice from using the title "advanced practice nurse" or "A.P.N." or any other title or initials implying that the nurse is authorized to practice any specialty other than the specialty designated in the current, valid certificate of authority (R.C. 4723.44(C)(3)).

Other changes

The act revises the definition of "advanced practice nurse" in R.C. 2305.113(E)(16) (actions upon a medical, dental, optometric, or chiropractic claim) to mean any of the nurses in specialty practice who holds a certificate of authority issued by the Board of Nursing under the Nurses Law. It modifies the definition of "standard care arrangement" in the Nurses Law as (the act eliminates ", except as it pertains to an advanced practice nurse,") a written, formal guide for planning and evaluating a patient's health care that is developed by one or more collaborating physicians or podiatrists and a clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner and meets the requirements of R.C. 4723.431 (R.C. 4723.01(N)).

The act removes the references to "advanced practice nurse" from continuing provisions that specify any of the types of nurses in specialty practice that are included in the act's definition of "advanced practice nurse." (R.C. 3719.81(B)(2) (furnishing drug samples), 4713.02(A)(7) (composition of State Board of Cosmetology), 4723.28(B)(24) (grounds for disciplinary actions taken by the Board of Nursing regarding licensees or certificate holders), and 4729.01(I)(2) (definition of "licensed health professional authorized to prescribe drugs" or "prescriber" in the Pharmacists and Dangerous Drug Laws).) The act eliminates the provision in R.C. 4731.22(B)(30), which currently requires the State Medical Board to impose certain sanctions for the failure of a collaborating physician to fulfill the responsibilities agreed to by the physician and an advanced practice nurse participating in a pilot program under R.C. 4723.52.

In continuing laws referring to an advanced practice nurse approved under R.C. 4723.56 to prescribe drugs and therapeutic devices, the act substitutes the term "applicant" or "recipient" for "advanced practice nurse" in R.C. 4723.48(B) (application for a certificate to prescribe drugs or therapeutic devices) and substitutes "person" for "advanced practice nurse" in R.C. 4723.482(A)(1) (contents of application for a certificate to prescribe drugs or therapeutic devices).

Uncodified law

The act provides in uncodified law that this act's amendment of 4713.02(A)(7) (see second preceding paragraph, above) does not affect the term of office of any person serving as a member of the State Board of Cosmetology on the effective date of the act. It also provides that the act's amendment of R.C.

4723.28(B)(24) (see second preceding paragraph, above) does not remove the authority of the Board of Nursing to conduct investigations and take disciplinary actions regarding a person who engaged in the activities specified in that provision while participating in one of the advanced practice nurse pilot programs operated pursuant to R.C. 4723.52 to 4723.60 prior to the January 17, 2004, effective date of the repeal of those sections, as provided in Section 3 of Am. Sub. H.B. 241 of the 123rd General Assembly. The act further provides that the act's amendment of R.C. 4731.22(B)(30) (see second preceding paragraph, above) does not remove the State Medical Board's authority to conduct investigations and take disciplinary actions regarding the failure of a collaborating physician to fulfill the responsibilities agreed to by the physician and an advanced practice nurse participating in one of the pilot programs operated pursuant to R.C. 4723.52 to 4723.60 prior to the January 17, 2004, effective date of the repeal of those sections. (Sections 9, 10, and 11.)

Successor asbestos-related liabilities

The act enacts certain limitations on the successor asbestos-related liabilities of certain corporations.

Definitions for successor asbestos-related liability provisions

The act provides the following definitions for the purposes of the successor asbestos-related liabilities provisions (R.C. 2307.97(A)):

(1) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(2) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes any of the following: (a) a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos, or (b) a claim for damage or loss to property that is caused by the installation, presence, or removal of asbestos.

(3) "Corporation" means a corporation for profit, including: (a) a domestic corporation organized under the laws of Ohio or (b) a foreign corporation organized under laws other than the laws of Ohio that has had a certificate of authority to transact business in Ohio or has done business in Ohio.

(4) "Successor" means a corporation or a subsidiary of a corporation that assumes or incurs, or had assumed or incurred, successor asbestos-related liabilities or had successor asbestos-related liabilities imposed on it by court order.

(5) "Successor asbestos-related liabilities" means any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, if the liabilities are related in any way to asbestos claims and either: (a) the liabilities are assumed or incurred by a successor as a result of or in connection with an asset purchase, stock purchase, merger, consolidation, or agreement providing for an asset purchase, stock purchase, merger, or consolidation, including a plan of merger, or (b) the liabilities were imposed by court order on a successor.

"Successor asbestos-related liabilities" includes any liabilities described in the prior paragraph that, after the effective date of the asset purchase, stock purchase, merger, or consolidation, are paid, otherwise discharged, committed to be paid, or committed to be otherwise discharged by or on behalf of the successor, or by or on behalf of a transferor, in connection with any judgment, settlement, or other discharge of those liabilities in Ohio or another jurisdiction.

(6) "Transferor" means a corporation or its shareholders from which successor asbestos-related liabilities are or were assumed or incurred by a successor or were imposed by court order on a successor.

Applicability of limitations to a corporation. The act provides that the limitations described below in "Limitations on liability" apply to a corporation that is either of the following (R.C. 2307.97(B)):

(1) A successor that became a successor prior to January 1, 1972, if either (a) in the case of a successor in a stock purchase or an asset purchase, the successor paid less than \$15 million for the stock or assets of the transferor or (b) in the case of a successor in a merger or consolidation, the fair market value of the total gross assets of the transferor, at the time of the merger or consolidation, excluding any insurance of the transferor, was less than \$50 million;

(2) Any successor to a prior successor if the prior successor met the requirements of (1)(a) or (b), above, whichever is applicable.

Limitations on liability

The act provides that, except as described in the following paragraph, the cumulative successor asbestos-related liabilities of a corporation are limited to either of the following: (1) in the case of a corporation that is a successor in a stock purchase or an asset purchase, the fair market value of the acquired stock or

assets of the transferor, as determined on the effective date of the stock or asset purchase, or (2) in the case of a corporation that is a successor in a merger or consolidation, the fair market value of the total gross assets of the transferor, as determined on the effective date of the merger or consolidation.

If a transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior purchase of assets or stock involving a prior transferor, the fair market value of the assets or stock purchased from the prior transferor, determined as of the effective date of the prior purchase of the assets or stock, is substituted for the limitation described in clause (1) in the prior paragraph for the purpose of determining the limitation of the liability of a corporation. If a transferor had assumed or incurred successor asbestos-related liabilities in connection with a merger or consolidation involving a prior transferor, the fair market value of the total gross assets of the prior transferor, determined as of the effective date of the prior merger or consolidation, is substituted for the limitation described in clause (2) in the prior paragraph for the purpose of determining the limitation of the liability of a corporation.

A corporation described in either of the two preceding paragraphs has no responsibility for any successor asbestos-related liabilities in excess of the limitation of those liabilities described in the applicable provision. (R.C. 2307.97(C).)

Establishment of fair market value of assets, stock, or total gross assets

Under the act, a corporation may establish the fair market value of assets, stock, or total gross assets under the provisions described in "**Limitations on liability**," above, by means of any method that is reasonable under the circumstances, including by reference to their going-concern value, to the purchase price attributable to or paid for them in an arm's length transaction, or, in the absence of other readily available information from which fair market value can be determined, to their value recorded on a balance sheet. Assets and total gross assets include intangible assets. A showing by the successor of a reasonable determination of the fair market value of assets, stock, or total gross assets is prima-facie evidence of their fair market value.

For purposes of establishing the fair market value of total gross assets under the preceding paragraph, the total gross assets include the aggregate coverage under any applicable liability insurance that was issued to the transferor the assets of which are being valued for purposes of the limitations on liability, if the insurance has been collected or is collectable to cover the successor asbestos-related liabilities involved. Those successor asbestos-related liabilities do not include any compensation for any liabilities arising from the exposure of workers to asbestos solely during the course of their employment by the transferor. Any

settlement of a dispute concerning the insurance coverage described in this provision that is entered into by a transferor or successor with the insurer of the transferor before the provision's effective date is determinative of the aggregate coverage of the liability insurance that is included in the determination of the transferor's total gross assets.

After a successor has established a reasonable determination of the fair market value of assets, stock, or total gross assets under the provisions described above, a claimant that disputes that determination of the fair market value has the burden of establishing a different fair market value. (R.C. 2307.97(D)(1), (2), and (3).)

Adjustment of fair market value

Under the act, subject to the provisions described in the following paragraph, the fair market value of assets, stock, or total gross assets at the time of the asset purchase, stock purchase, merger, or consolidation increases annually, at a rate equal to the sum of: (1) the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the effective date of the asset purchase, stock purchase, merger, or consolidation, or, if the prime rate is not published in that edition of the Wall Street Journal, the prime rate as reasonably determined on the first business day of the year, and (2) 1%.

The rate that is so determined must not be compounded. The adjustment of the fair market value of assets, stock, or total gross assets continues in the manner described in the preceding paragraph until the adjusted fair market value is first exceeded by the cumulative amounts of successor asbestos-related liabilities that are paid or committed to be paid by or on behalf of a successor or prior transferor, or by or on behalf of a transferor, after the time of the asset purchase, stock purchase, merger, or consolidation for which the fair market value of assets, stock, or total gross assets is determined. No adjustment of the fair market value of total gross assets may be applied to any liability insurance that is otherwise included in total gross assets as described in "Establishment of fair market value . . ." above. (R.C. 2307.97(D)(4).)

Application of the limitations on liability

The act provides that the limitations described above in "Limitations on liability" apply to: (1) all asbestos claims, including asbestos claims that are pending on the act's effective date, and all litigation involving asbestos claims, including litigation that is pending on the act's effective date, and (2) successors of a corporation to which the act's provisions apply (R.C. 2307.97(E)(1)).

It provides that the limitations on liability do not apply to any of the following (R.C. 2307.97(E)(2)):

(1) Workers' compensation benefits paid by or on behalf of an employer to an employee pursuant to any provision of the Ohio workers' compensation law (R.C. Chapter 4121., 4123., 4127., or 4131.) or comparable workers' compensation law of another jurisdiction;

(2) Any claim against a successor that does not constitute a claim for a successor asbestos-related liability;

(3) Any obligation arising under the "National Labor Relations Act" or under any collective bargaining agreement;

(4) Any contractual rights to indemnification.

The act requires the courts in Ohio to apply, to the fullest extent permissible under the Constitution of the United States, Ohio's substantive law, including the provisions of the act, to the issue of successor asbestos-related liabilities (R.C. 2307.97(F)).

Disposition of assets

The act provides that the terms and conditions of the following transactions under an existing provision of the General Corporation Law are subject to the limitations on liability discussed in "**Limitations on liability**," above: a lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets, with or without the good will, of a corporation, if not made in the usual and regular course of its business that is authorized (1) by the directors, either before or after authorization by the shareholders or (2) at a meeting of the shareholders held for that purpose, by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on the proposal, or, if the articles so provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of the voting power, and by the affirmative vote of the holders of shares of any particular class that is required by the articles (R.C. 1701.76(F)).

Merger or consolidation

The act provides that, under a continuing provision of the General Corporation Law with regards to when a merger or consolidation becomes effective, all obligations belonging to or due to each constituent entity, the liability of the surviving or new entity for all the obligations of each constituent entity, and all the rights of creditors of each constituent entity that are preserved unimpaired

are subject to the above-discussed limitations under the successor asbestos-related liability provisions of the act (R.C. 1701.82(A)(3), (4), and (5)).

Uncodified law

The act provides that for any cause of action that arises before the effective date of this act, the provisions set forth in sections 1701.76, 1701.82, and 2307.97 of the Revised Code, as amended or enacted in Sections 1 and 2 of this act, are to be applied unless the court that has jurisdiction over the case finds both of the following (Section 14):

- (1) That a substantive right of a party to the case has been altered;
- (2) That the alteration is otherwise in violation of Section 28 of Article II, Ohio Constitution.

Collateral benefits

The act permits a defendant, in a tort action to introduce evidence of any amount payable as a benefit to the plaintiff as a result of damages that result from an injury, death, or loss to person or property that is the subject of the claim, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action. If a defendant introduces evidence of a plaintiff's right to receive collateral benefits, the plaintiff may introduce evidence of any amount the plaintiff has paid or contributed to secure any benefits of which the defendant has introduced evidence. A source of collateral benefits, of which evidence is introduced by the defendant, is prohibited from recovering any amount against the plaintiff and may not be subrogated to the plaintiff's rights against a defendant. (R.C. 2315.20.)

The act defines "tort action" for these provisions as a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a civil action upon a product liability claim and an asbestos claim. "Tort action" does not include a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim or a civil action for damages for a breach of contract or another agreement between persons. (R.C. 2315.20(D)(1).)

Subrogation

The act creates the Ohio Subrogation Rights Commission consisting of six voting members and seven nonvoting members. To be eligible for appointment as a voting member, a person must be a current member of the General Assembly. The President of the Senate and the Speaker of the House of Representatives will jointly appoint six members. The chairman of the Senate committee to which bills pertaining to insurance are referred must be a member of the commission. The chairman of the House committee to which bills pertaining to insurance are referred must be a member of the commission. The chairman and the ranking minority member of the Senate committee to which bills pertaining to civil justice are referred must each be a member of the commission. The chairman and the ranking minority member of the House committee to which bills pertaining to civil justice are referred must each be a member of the commission. Of the six members jointly appointed by the President of the Senate and the Speaker of the House of Representatives, one must represent a health insuring company doing business in the state of Ohio, one must represent a public employees union in Ohio, one must represent the Ohio Academy of Trial Lawyers, one must represent a property and casualty insurance company doing business in Ohio, one must represent the Ohio State Bar Association, and one must represent a sickness and accident insurer doing business in Ohio, and all are required to have expertise in insurance law, including subrogation rights. A member of the Ohio Judicial Conference who is an elected or appointed judge must also be a member of the commission. (R.C. 2323.44(A).)

The commission is required to do all of the following (R.C. 2323.44(B)):

(1) Investigate the problems posed by, and the issues surrounding, the *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson* (2004), 103 Ohio St.3d 188 decision regarding subrogation;

(2) Prepare a report of recommended legislative solutions to the court decision referred to in division (B)(1) of this section;

(3) Submit a report of its findings to the members of the General Assembly not later than September 1, 2005.

Any vacancy in the membership of the commission will be filled in the same manner in which the original appointment was made. The chairpersons of the House and Senate committees to which bills pertaining to insurance are referred must jointly call the first meeting of the commission not later than May 1, 2005. The first meeting is to be organizational, and the members of the commission shall determine the chairperson from among commission members by a majority vote. The Legislative Service Commission must provide any technical,

professional, and clerical employees that are necessary for the commission to perform its duties. (R.C. 2323.44(C), (D), and (E).)

Section 8 of the act mistakenly gives R.C. 2323.44 a delayed effective date of January 1, 2006.

Final appealable order

Continuing law

Continuing law does not classify all court orders, judgments, and decrees as final orders that may be immediately appealed and affirmed, modified, or reversed on appeal. Orders not classified as final orders may not be appealed before the action is complete. Currently, R.C. 2505.02 classifies any court order determining the constitutionality of statutory changes brought about by the enactment of Am. Sub. S.B. 281 of the 124th General Assembly (relating to civil actions for damages arising out of medical malpractice claims) as a final order that may be immediately appealed and affirmed, modified, or reversed. (R.C. 2505.02(B)(6).)

Operation of the act

The act classifies any court order determining the constitutionality of statutory changes made by the enactment of Sub. S.B. 80 of the 125th General Assembly, including the amendment of R.C. 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 as a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial. (R.C. 2505.02(B)(6).)

Contributory fault

Continuing law states that the contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action. This contributory fault provision does not apply to actions brought to recover damages from an employer for personal injuries suffered by the employer's employee or for death resulting to the employee from the personal injuries, while in the employ of the employer, arising from the negligence of the employer. Under the act, the contributory fault provision described above *does* apply to these actions. (R.C. 2315.33.)

Statement of findings and intent and other uncodified provisions

The General Assembly makes the following statement of findings and intent in the act (Section 3):

(A) The General Assembly finds:

(1) The current civil litigation system represents a challenge to the economy of the state of Ohio, which is dependent on business providing essential jobs and creative innovation.

(2) The General Assembly recognizes that a fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued.

(3) This state has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation. The General Assembly bases its findings on this state interest upon the following evidence:

(a) A National Bureau of Economic Research study estimates that states that have adopted abuse reforms have experienced employment growth between 11% and 12%, productivity growth of 7% to 8%, and total output growth between 10% and 20% for liability reducing reforms.

(b) According to a 2002 study from the White House Council of Economic Advisors, the cost of tort litigation is equal to a 2 1/10% wage and salary tax, a 1 3/10% tax on personal consumption, and a 3 1/10% tax on capital investment income.

(c) The 2003 Harris Poll of 928 senior corporate attorneys conducted by the United States Chamber of Commerce's Institute for Legal Reform reports that eight out of ten respondents claim that the litigation environment in a state could affect important business decisions about their company, such as where to locate or do business. In addition, one in four senior attorneys surveyed cited limits on damages as one specific means for state policy makers to improve the litigation environment in their state and promote economic development.

(d) The cost of the United States tort system grew at a record rate in 2001, according to a February 2003 study published by Tillinghast-Towers Perrin. The system, however, failed to return even 50 cents for every dollar to people who were injured. Tillinghast-Towers Perrin also found that 54% of the total cost accounted for attorney's fees, both for plaintiffs and defendants, and



administration. Only 22% of the tort system's cost was used directly to reimburse people for the economic damages associated with injuries and losses they sustain.

(e) The Tillinghast-Towers Perrin study also found that the cost of the United States tort system grew 14 3/10% in 2001, the highest increase since 1986, greatly exceeding overall economic growth of 2 6/10%. As a result, the cost of the United States tort system rose to \$205 billion total or \$721 per citizen, equal to a 5% tax on wages.

(f) As stated in testimony by Ohio Department of Development Director Bruce Johnson, as a percentage of the gross domestic product, United States tort costs have grown from 6/10% to 2% since 1950, about double the percentage that other industrialized nations pay annually. These tort costs put Ohio businesses at a disadvantage vis-a-vis foreign competition and are not helpful to development.

(4)(a) Reform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system.

(b) In prohibiting a court from entering judgment for punitive or exemplary damages in excess of two times the amount of compensatory damages awarded to the plaintiff and, with respect to an individual or an employer that employs not more than 100 persons or if the employer is classified as being in the manufacturing sector not more than 500 persons from entering judgment for punitive or exemplary damages in excess of the lesser of the amount of two times compensatory damages awarded to the plaintiff or 10% of the individual's or employer's net worth up to \$350,000, the General Assembly finds the following:

(i) Punitive or exemplary damages awarded in tort actions are similar in nature to fines and additional court costs imposed in criminal actions, because punitive or exemplary damages, fines, and additional court costs are designed to punish a tortfeasor for certain wrongful actions or omissions.

(ii) The absence of a statutory ceiling upon recoverable punitive or exemplary damages in tort actions has resulted in occasional multiple awards of punitive or exemplary damages that have no rational connection to the wrongful actions or omissions of the tortfeasor.

(iii) The distinction between small employers and other defendants based on the number of full-time permanent employees distinguishes all other defendants including individuals and nonemployers. This distinction is rationally based on size considering both the economic capacity of an employer to maintain that number of employees and to impact the community at large, as exemplified by the North American Industry Classification System and the United States Small Business Administration's Office of Advocacy.

(c) The limits on punitive or exemplary damages as specified in section 2315.21 of the Revised Code, as amended by this act, are based on guidance recently provided by the United States Supreme Court in *State Farm Mutual Insurance v. Campbell* (2003), 123 S.Ct. 1513. In determining whether a \$145 million award of punitive damages was appropriate, the United States Supreme Court referred to the three guideposts for punitive damages articulated in *BMW of North America Inc. v. Gore* (1996), 517 U.S. 599: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. According to the United States Supreme Court, "few awards exceeding a single digit ratio between punitive damages and compensatory damages . . . will satisfy due process." *Id.* at 31.

(d) The limits on punitive or exemplary damages as specified in section 2315.21 of the Revised Code, as amended by this act, are based on testimony asking members of the General Assembly to recognize the economic impact of occasional multiple punitive damages awards and stating that a number of other states have imposed limits on punitive or exemplary damage awards.

(5)(a) Statutes of repose are vital instruments that provide time limits, closure, and peace of mind to potential parties of lawsuits.

(b) Forty-seven other states have adopted statutes of repose to protect architects, engineers, and constructors of improvements to real property from lawsuits arising after a specific number of years after completion of an improvement to real property. The General Assembly recognizes that Kentucky, New York, and Ohio are the only three states that do not have a statute of repose. The General Assembly also acknowledges that Ohio stands by itself, due to the fact that both Kentucky and New York have a rebuttable presumption that exists and only if a plaintiff can overcome that presumption can a claim continue.

(c) As stated in testimony by Jack Pottmeyer, architect and managing principal of MKC Associates, Inc., this unlimited liability forces professionals to maintain records in perpetuity, because those professionals cannot reasonably predict when a record from 15 or 20 years earlier may become the subject of a civil action. Those actions occur despite the fact that, over the course of many years, owners of the property or those responsible for its maintenance could make modifications or other substantial changes that would significantly change the intent or scope of the original design of the property designed by an architectural firm. The problem is compounded by the fact that professional liability insurance for architects and engineers is offered by relatively few insurance carriers and is written on what is known as a "claims made basis," meaning a policy must be in effect when the claim is made, not at the time of the service, in order for the claim

to be paid. Without a statute of repose, professional liability insurance must be maintained forever to ensure coverage of any potential claim on previous services. These minimum annual premiums can add up, averaging between \$3,500 and \$5,000 annually, which is especially burdensome for a retired design professional.

(6)(a) Noneconomic damages include such things as pain and suffering, emotional distress, and loss of consortium or companionship, which do not involve an economic loss and have, therefore, no precise economic value. Punitive damages are intended to punish a defendant for wrongful conduct. Pain and suffering awards are distinct from punitive damages. Pain and suffering awards are intended to compensate a person for the person's loss. They are not intended to punish a defendant for wrongful conduct.

(b) The judicial analysis of compensatory damages representing noneconomic loss, as specified in section 2315.19 of the Revised Code, are based on testimony asking members of the General Assembly to recognize these distinctions.

(c) With respect to noneconomic loss for either: (1) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or (2) permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities, the General Assembly recognizes that evidence that juries may consider in awarding pain and suffering damages for these types of injuries is different from evidence courts may consider for punitive damages. For example, the amount of a plaintiff's pain and suffering is not relevant to a decision on wrongdoing, and the degree of the defendant's wrongdoing is not relevant to the amount of pain and suffering.

(d) While pain and suffering awards are inherently subjective, it is believed that this inflation of noneconomic damages is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages.

(e) Inflated damage awards create an improper resolution of civil justice claims. The increased and improper cost of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services.

(f) Therefore, with respect to the types of injuries articulated in division (A)(6)(c) of this section, the General Assembly finds that courts should provide juries with clear instructions about the purpose of pain and suffering damages. Courts should instruct juries that evidence of misconduct is not to be considered in deciding compensation for noneconomic damages for those types of injuries. Rather, it is to be considered solely for the purpose of deciding punitive damage

awards. In cases in which punitive damages are requested, defendants should have the right to request bifurcation of a trial to ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages. As additional protection, trial and appellate courts should rigorously review pain and suffering awards to ensure that they properly serve compensatory purposes and are not excessive.

(7)(a) The collateral source rule prohibits a defendant from introducing evidence that the plaintiff received any benefits from sources outside the dispute.

(b) Twenty-one states have modified or abolished the collateral source rule.

(B) In enacting section 2305.131 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:

(1) To declare that the ten-year statute of repose prescribed by section 2305.131 of the Revised Code, as enacted by this act, is a specific provision intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2305.09 of the Revised Code, the general two-year statute of limitations prescribed by section 2305.10 of the Revised Code, and other general statutes of limitation prescribed by the Revised Code;

(2) To recognize that, subsequent to the completion of the construction of an improvement to real property, all of the following generally apply to the persons who provided services for the improvement or who furnished the design, planning, supervision of construction, or construction of the improvement:

(a) They lack control over the improvement, the ability to make determinations with respect to the improvement, and the opportunity or responsibility to maintain or undertake the maintenance of the improvement.

(b) They lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement.

(c) They have no right or opportunity to be made aware of, to evaluate the effect of, or to take action to overcome the effect of the forces, uses, and intervening causes described in division (E)(5)(b) of this section.

(3) To recognize that, more than ten years after the completion of the construction of an improvement to real property, the availability of relevant evidence pertaining to the improvement and the availability of witnesses knowledgeable with respect to the improvement is problematic;

(4) To recognize that maintaining records and other documentation pertaining to services provided for an improvement to real property or the design, planning, supervision of construction, or construction of an improvement to real property for a reasonable period of time is appropriate and to recognize that, because the useful life of an improvement to real property may be substantially longer than ten years after the completion of the construction of the improvement, it is an unacceptable burden to require the maintenance of those types of records and other documentation for a period in excess of ten years after that completion;

(5) To declare that section 2305.131 of the Revised Code, as enacted by this act, strikes a rational balance between the rights of prospective claimants and the rights of design professionals, construction contractors, and construction subcontractors and to declare that the ten-year statute of repose prescribed in that section is a rational period of repose intended to preclude the pitfalls of stale litigation but not to affect civil actions against those in actual control and possession of an improvement to real property at the time that a defective and unsafe condition of that improvement causes an injury to real or personal property, bodily injury, or wrongful death.

(C) In enacting division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:

(1) To declare that the ten-year statute of repose prescribed by division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code, as enacted by this act, are specific provisions intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2305.09 of the Revised Code, the general two-year statutes of limitations prescribed by sections 2125.02 and 2305.10 of the Revised Code, and other general statutes of limitations prescribed by the Revised Code;

(2) To declare that, subject to the two-year exceptions prescribed in division (D)(2)(d) of section 2125.02 and in division (C)(4) of section 2305.10 of the Revised Code, the ten-year statutes of repose shall serve as a limitation upon the commencement of a civil action in accordance with an otherwise applicable statute of limitations prescribed by the Revised Code;

(3) To recognize that subsequent to the delivery of a product, the manufacturer or supplier lacks control over the product, over the uses made of the product, and over the conditions under which the product is used;

(4) To recognize that under the circumstances described in division (C)(3) of this section, it is more appropriate for the party or parties who have had control

over the product during the intervening time period to be responsible for any harm caused by the product;

(5) To recognize that, more than ten years after a product has been delivered, it is very difficult for a manufacturer or supplier to locate reliable evidence and witnesses regarding the design, production, or marketing of the product, thus severely disadvantaging manufacturers or suppliers in their efforts to defend actions based on a product liability claim;

(6) To recognize the inappropriateness of applying current legal and technological standards to products manufactured many years prior to the commencement of an action based on a product liability claim;

(7) To recognize that a statute of repose for product liability claims would enhance the competitiveness of Ohio manufacturers by reducing their exposure to disruptive and protracted liability with respect to products long out of their control, by increasing finality in commercial transactions, and by allowing manufacturers to conduct their affairs with increased certainty;

(8) To declare that division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code, as enacted by this act, strike a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers and to declare that the ten-year statutes of repose prescribed in those sections are rational periods of repose intended to preclude the problems of stale litigation but not to affect civil actions against those in actual control and possession of a product at the time that the product causes an injury to real or personal property, bodily injury, or wrongful death;

(D) The General Assembly declares its intent that the amendment to R.C. 2307.71 is intended to supersede the holding of the Ohio Supreme Court in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, that the common law product liability cause of action of negligent design survives the enactment of the Ohio Product Liability Act (R.C. 2307.71 to 2307.80), and to abrogate all common law product liability causes of action.

(E) The Ohio General Assembly respectfully requests the Ohio Supreme Court to uphold this intent in the courts of Ohio, to reconsider its holding on damage caps in *State v. Sheward* (1999), Ohio St. 3d 451, to reconsider its holding on the deductibility of collateral source benefits in *Sorrel v. Thevenir* (1994), 69 Ohio St. 3d 415, and to reconsider its holding on statutes of repose in *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460.

The act also provides the following in uncodified law (Section 4):

(A) The General Assembly acknowledges the Court's authority in prescribing rules governing practice and procedure in the courts of this state, as provided by Section 5 of Article IV of the Ohio Constitution.

(B) The General Assembly requests the Supreme Court to adopt a "Legal Consumer's Bill of Rights" that would substantially conform with the following language:

Each attorney who is licensed to practice law in this state shall append to every written retainer agreement or contract for legal services a legal consumer's bill of rights that shall be substantially in the following form:

"LEGAL CONSUMER'S BILL OF RIGHTS

Consumers of legal services have both rights and responsibilities in the resolution of legal disputes. Lawyers, as well, have duties and rights related to the clients they represent. This listing is designed to provide consumers with an overview of their rights and responsibilities in relating to their lawyers and in the resolution of their legal matters.

Client rights and lawyer duties:

1. COURTESY

You can expect to be treated with courtesy and consideration by your lawyer and by others under the supervision of your lawyer involved in your legal matter.

2. PROFESSIONALISM

You can expect competent and diligent representation by your lawyer, in accord with accepted aspirational standards of professionalism.

3. ATTENTION

You can expect your lawyer's independent professional judgment and loyalty uncompromised by conflicts of interest. Your lawyer will maintain accurate records and protect any funds you provide regarding your legal matter.

4. FEE DISCLOSURE

You can expect your lawyer to fully disclose fee arrangements and other costs at the onset of your relationship, and to provide a written fee agreement or contingency fee contract.



5. RESPONSIVENESS

You can expect to have your questions answered and telephone calls returned by your lawyer in a reasonable time in accordance with professional standards.

6. CONTROL

You can expect your lawyer to keep you informed about the progress of your legal matter, to disclose alternative approaches to resolving your legal matter, and to have you participate meaningfully in the resolution process.

7. RESPECT

You can expect to have your lawyer respect your legitimate objectives and to include you in making settlement decisions regarding your legal dispute.

8. CONFIDENTIALITY

You can expect to have your lawyer honor the attorney-client privilege, protect your right to privacy and preserve your secrets and confidences.

9. ETHICS

You can expect ethical conduct from your lawyer in accord with the Code of Professional Responsibility.

10. NON-DISCRIMINATION

You may not be refused representation based upon race, creed, color, religion, sex, age, national origin or disability.

11. GRIEVANCES

You may file a grievance with the certified grievance committee of your local bar association or the Ohio State Bar Association or with the Board of Commissioners on Grievances and Discipline of the Supreme Court if you are not satisfied with the legal services you have retained. The committee and the board include nonattorneys as members. The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has the authority to discipline and to impose sanctions on attorneys in Ohio.

Client responsibilities:

1. TRUTHFULNESS

Your lawyer can expect you to be truthful and to have you provide a full disclosure of pertinent information needed to handle your legal matter.

2. RESPONSIVENESS

Your lawyer can expect you to provide timely responses to reasonable requests for information, and to be on time for legal proceedings. Your lawyer can expect you to pay your legal bills in a timely manner.

3. COURTESY

Just as you expect to be treated with respect and courtesy, your lawyer can expect you to set appointments in advance to meet with your lawyer, to be responsible for making reasonable requests of your lawyer's time, and to be treated respectfully.

4. COMMUNICATION

Your lawyers can expect you to communicate in a timely manner about your legal matter, or if you are unhappy with the way your matter is being handled. There is a grievance procedure in place to handle disputes with your lawyer that you are not able to resolve on your own.

5. ETHICS

Your lawyer can expect not to be asked to engage in behavior that is unethical, inappropriate, unprofessional, or illegal."

(C) The General Assembly requests the Supreme Court to amend Ohio Rules of Civil Procedure Rule 68 to conform to Federal Rules of Civil Procedure Rule 68.

The act includes severability clauses (Sections 5 and 6).

COMMENT

1. An issue may be raised that a statute of repose infringes upon the "open courts, right-to-remedy, and due course of law" provisions of Section 16 of Article I of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Brenneman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460 (R.C. 2305.131's ten-year statute of repose is

unconstitutional as being violative of Section 16 of Article I of the Ohio Constitution); *Cyrus v. Henes* (1994), 70 Ohio St.3d 640; *Ross v. Tom Reith, Inc.* (1995), 71 Ohio St.3d 563; *Cleveland City School Dist. Bd. of Edn. v. URS Co.* (1995), 72 Ohio St.3d 188; and *State ex rel. Ohio Academy of Trial Lawyers et al. v. Sheward* (1999), 86 Ohio St.3d 451. An issue may also be raised that a statute of repose infringes upon the "equal protection" provision of Section 2 of Article I of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Issues may be raised that the cap provisions on punitive or exemplary damages are unconstitutional as being violative of the "open courts, right-to-remedy, and due course of law" provisions of Section 16 of Article I of the Ohio Constitution, the right to a trial by jury established by Section 5 of Article I of the Ohio Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, and *State ex. Rel. Ohio Academy of Trial Lawyers et al. v. Sheward, supra*.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-01-03	pp. 310-311
Reported, S. Judiciary on Civil Justice	06-11-03	p. 447
Passed Senate (19-13)	06-11-03	pp. 453-469
Reported, H. Judiciary	12-02-04	pp. 2343-2344
Passed House (65-32)	12-08-04	pp. 2416-2481
Senate concurred in House amendments (19-11)	12-08-04	pp. 2756-2757

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