

OHIO GENERAL ASSEMBLY PASSES TORT REFORM MEASURES

On December 9, 2004, the Ohio General Assembly passed and sent to Governor Taft new tort reform legislation, Amended Substitute Senate Bill 80. Governor Taft will most likely sign the bill by year's end. The legislation will be effective ninety days after signing.

This legislation makes drastic changes in Ohio's Civil Justice System in the areas of recovery of non-economic damages and punitive damages, collateral sources, products liability, and civil immunity.

Non-Economic Damages

Regarding recovery of non-economic damages, the Ohio General Assembly amended Ohio Revised Code §2315.18 as follows:

- § The legislation limits the amount of non-economic (pain and suffering, loss of consortium, etc.) damages for non-catastrophic injuries (injuries involving permanent and substantial physical deformity, loss of use of a limb or permanent physical functional injury). The cap will be the greater of \$250,000 or three times the amount of economic damages up to \$350,000 per plaintiff and \$500,000 per occurrence.
- § In determining the amount of non-economic damages, the trier of fact will be prohibited from using evidence of the defendant's alleged wrongdoing or guilt, evidence of the defendant's wealth or financial resources, or any other evidence offered for the purpose of punishing the defendant.
- § The trier of fact must specify, through interrogatories, how much of the plaintiff's award was for economic loss and how much was for non-economic loss.

The new legislation also amends O.R.C. §2315.19 to provide for a post-judgment challenge in the trial court that the award of compensatory damages for non-economic loss is excessive. The trial court must state its reasons in writing for upholding the award. The section also provides for a *de novo* review by the appellate court of an appeal on an award for economic damages, whether it is inadequate or excessive.

Punitive Damages

The legislation has drastically changed Ohio Revised Code §2315.21 regarding punitive damage. The statute has been revised to

- § Limit the amount of punitive damages recoverable from certain employers. For large employers, the limit is to two times the amount of compensatory damages. For small employers or individuals, the limit is the lesser of two times compensatory damages, ten percent of the employer or individual's net worth, or \$350,000. The legislation defines "small employer" as an employer who has not more than 100 full-

time, permanent employees. For manufacturing employers, a small employer is one who employs not more than 500 full-time permanent employees.

- \$ Eliminate "oppression," "insult" as a basis for a punitive damage award.
- \$ Allow for the bifurcation of a trial where the plaintiff has claims for compensatory damages and punitive damages.
- \$ Prohibit prejudgment interest on punitive damage awards.
- \$ Permit an unlimited punitive damage award where the defendant has been convicted or pled guilty to a felony involving intent or knowledge as an element of that criminal offense.

Product Liability/Statute Of Repose

The tort reform legislation has established statutes of repose in the following areas:

- \$ For product liability claims, O.R.C. §2305.10 establishes a ten-year statute of repose for claims against manufacturers or suppliers of products.
- \$ The tort reform legislation enacts a new section, O.R.C. §2305.131, which establishes a ten-year statute of repose for construction-related claims starting from the date of a project's substantial completion.

The legislature has amended O.R.C. §2307.75 regarding design defect causes of action as follows:

- \$ Eliminates the "consumer expectation test" as the stand alone test for design defect. This is now integrated into a list of factors to be considered in a "risk-utility test" for design defect.
- \$ Eliminates the "unreasonableness" exception to the "no feasible alternative design or formulation" defense, thereby strengthening the defense.

For standard product liability causes of action, the legislature has enacted the following changes:

- \$ Provides for the assertion of an affirmative defense of express or implied assumption of risk in §2307.711.
- \$ Specifically supercedes the holding of the Ohio Supreme Court in *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, and abrogates all common law product liability causes of action, by specifically amending §2307.71 to define a product liability claim as a claim brought in a civil action pursuant to the Revised Code.

Collateral Sources

Evidence of collateral source payments will now be permitted. The legislation has amended O.R.C. §2315.20 to allow defendants to introduce this evidence; however, the evidence will not be permitted if the source of the benefits is a mandatory federal right of subrogation, a contractual right of subrogation, a statutory right of subrogation, or if the source is life insurance or disability insurance. Life insurance or disability insurance may be admissible, if the plaintiff's employer paid for the policy and the employer is a defendant in the action. The plaintiff will be permitted to introduce evidence as to the amount the plaintiff paid or contributed to secure these collateral source benefits.

Seatbelt Use

Am. Sub. Senate Bill 80 amends O.R.C. §4513.263 to allow for the admission of evidence on the failure to wear a seatbelt, as long as that evidence shows the failure contributed to the harm alleged. This evidence may be used to reduce recovery for compensatory damages that could have been recovered, but for the plaintiff's failure to wear a seatbelt.

Immunity Provisions

The Ohio General Assembly amended various sections of the Ohio Revised Code to provide immunity for certain individuals or companies as follows:

- \$ Amends O.R.C. §2305.36 to provide immunity from civil damages for food manufacturers, sellers and trade associations for claims resulting from obesity, weight gain, or any health condition related to obesity or weight gain.
- \$ Provides immunity for owners, lessees or renters of premises open to the public for access to growing agricultural produce.
- \$ Provides immunity for state and private property owners for injuries suffered by recreational users in O.R.C. §1533.18, and also provides these owners owe no duty to users to keep recreational trails safe.
- \$ Modified civil immunity for health care professionals and health care workers.

Subrogation Rights

The General Assembly has created the "Ohio Subrogation Rights Committee" to investigate problems posed by the Supreme Court's decision in *Northern Buckeye Edu. Counsel Group Health Benefits Plan v. Lawson* (2004), 103 Ohio St.3d 188, which set aside the "made-whole rule" in Ohio. The Commission will complete and submit a report of its findings to the General Assembly by September 1, 2005.

Intentional Torts

The Ohio General Assembly also passed and sent to Governor Taft employer intentional tort legislation in a separate measure, Amended House Bill 498. This bill tracks the common law requirement that employers must have committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur. "Substantially certain to occur" means that an employer acts with deliberate intent. The deliberate removal by the employer of a safety guard or misrepresentation of toxic or hazardous substance creates a rebuttal presumption that removal or misrepresentation was committed with intent to injure the worker.

Many similar provisions in Am. Sub. Senate Bill 80 have been enacted previously and the Ohio Supreme Court ruled them unconstitutional. It remains to be seen whether the new composition of the court will rule the same. It is anticipated that some sections of the legislation might be ruled unconstitutional, such as the caps on non-economic damages and possibly the ten-year statute of repose, because they may bar a claim before it arises.

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