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## ONCE AGAIN... OHIO LEGISLATORS APPROVE COMPREHENSIVE TORT REFORM

by

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In September 2004, Ohio became the first state in the nation to enact asbestos reform legislation. House Bill 292, which establishes medical criteria for non-malignant and certain lung cancer claims resulting from exposure to asbestos, is now being used as a model by tort reform proponents in other state legislatures in their attempt to reform judicial systems across the country. On the heels of this sweeping reform measure, the Ohio General Assembly recently approved a comprehensive tort reform package in order to restore fairness and balance to Ohio's civil justice system and financial vitality to Ohio's economy. Senate Bill 80, which was signed by Governor Bob Taft in January, becomes effective on April 7, 2005.

*The History of Tort Reform in Ohio.* Over the past four decades, the Ohio General Assembly has made numerous attempts to reform the state's tort liability system. However, a power struggle between the legislature and the judiciary on public policy and judicial authority has led to the invalidation of many of these measures by Ohio's Supreme Court.

This power struggle on tort reform issues dates back to 1975 when the Ohio Legislature enacted the Ohio Medical Malpractice Act ("Act"). The Legislature approved this Act in response to the medical malpractice crisis that swept the entire country in the early 1970s. After the Act became law, the Ohio Supreme Court spent the next fifteen years examining the constitutionality of various provisions included in the Act and invalidating significant portions of this reform measure. Eventually, in 1991, the Court struck down the cornerstone of the Act, the \$200,000 cap on general damages, in *Morris v. Savoy*, 61 Ohio St.3d 684 (1991). The *Morris* Court invalidated the cap on due process grounds. The Court,

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however, stopped short of striking the statute down on equal protection grounds because the case did not involve a fundamental right or suspect classification.

In 1987, the General Assembly enacted House Bill 1, legislation that made significant changes to Ohio punitive damage, product liability and insurance law. By the mid-1990s, the Ohio Supreme Court once again invalidated many of these provisions.

In 1995, a third attempt was made to reform Ohio's tort liability system. House Bill 350, an omnibus tort reform package that included, among other things, limitations on punitive and noneconomic damages, statutes of repose, and modifications to joint and several liability, was approved by the General Assembly in September 1996, and became effective in January 1997.

On August 16, 1999, approximately two and a half years after its effective date, a 4-3 majority of the Ohio Supreme Court dealt House Bill 350 a deadly blow in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999). In this unique decision, known as much for its hostile tone as for its demise of tort reform in Ohio, the 4-3 majority found House Bill 350 unconstitutional *in toto*. What made this decision particularly troubling was the manner in which it came before the Ohio Supreme Court. *Sheward* was not a typical tort case involving an injured plaintiff who filed a lawsuit against a defendant accused of causing the plaintiff's harm. There was no tort victim in *Sheward* and there was no allegation that the respondent engaged in any wrongdoing. Rather, the case was brought as an original action in the Ohio Supreme Court by the Ohio Academy of Trial Lawyers, its executive director, the Ohio AFL-CIO and its president, against six Ohio common pleas court judges.

The *Sheward* majority held that: (1) the suit could proceed in the Ohio Supreme Court as a public action, (2) House Bill 350 violated the doctrine of Separation of Powers by usurping judicial authority, and (3) House Bill 350 violated the single-subject rule of the Ohio Constitution.

Following the Supreme Court's decision in this 1999 case, the General Assembly approved tort reform measures that addressed narrower issues. Over a period of time, the Legislature enacted the following individual pieces of legislation:

- House Bill 412 established limitations on the liability of residential care and nursing home facilities with respect to punitive damages and employee conduct. (Effective November 7, 2002)
- Senate Bill 120 modified the rule of joint and several liability, replacing it with proportionate liability in most cases. (Effective April 9, 2003)
- Senate Bill 179 reformed Ohio's peer review process and provided protection to health care facilities for conduct within the scope of peer review committees. (Effective April 9, 2003)
- Senate Bill 106 reformed Ohio's political subdivision sovereign immunity law and created reasonable liability protections for political subdivisions such as schools, municipalities, counties and townships. (Effective April 9, 2003)
- Senate Bill 281 implemented limitations on noneconomic damages that resulted from medical malpractice claims, provided a three-year statute of repose of medical malpractice actions, and modified Ohio's collateral source rule for medical malpractice claims. (Effective April 11, 2003)

- House Bill 292 required the filing of medical criteria in asbestos cases involving non-malignancy claims and required the filing of exposure criteria in asbestos cases involving wrongful death claims and certain lung cancer claims. (Effective September 2, 2004)

**Senate Bill 80.** Despite many tort reform successes that occurred between 2001 and 2003, significant portions of tort reform remained unfinished in Ohio. Reforms limiting punitive and noneconomic damages for non-medical malpractice claims, modifying the collateral source rule, and implementing statutes of repose for both products and construction had not been enacted while other state legislatures across the country had implemented many of these meaningful tort reform measures. Senate Bill 80 was introduced in May 2003 and signed by Governor Taft on January 6, 2005. The bill became effective on April 7, 2005. A brief description of each of the bill's key provisions follows:

**Punitive Damages (Sections 2307.80 and 2315.21)** – S.B. 80 limits the recovery of punitive damages and prohibits multiple punitive damages for the same act or course of conduct. The limitation for individuals and small employers is the lesser of two times compensatory damages, 10% net worth, or \$350,000. For large employers, punitive damages are limited to two times compensatory damages. The punitive damage caps do not apply to defendants who have been convicted of certain crimes. The law requires a bifurcated trial upon motion of any party, with the compensatory damages phase of the trial proceeding before the punitive damages phase. Also, S.B. 80 expands protection from punitive damages to manufacturers that have complied with applicable government regulations.

**Noneconomic Damages (Sections 2315.18 and 2315.19)** – S.B. 80 provides limitations on noneconomic damages for non-catastrophic injuries — the greater of \$250,000 or three times the amount of economic damages up to \$350,000 per plaintiff, and \$500,000 per occurrence (as statutorily defined). There is no limitation on noneconomic damages for catastrophic injuries. The law provides a post-judgment motion procedure for challenging an award of noneconomic damages as excessive, and an appellate court is required to consider an award of noneconomic damages *de novo*.

**Statutes of Repose (Sections 2305.10 & 2305.131)** – S.B. 80 creates a ten-year statute of repose for product liability claims against manufacturers and suppliers of products. Similarly, it provides a ten-year statute of repose for construction-related claims, with the ten-year period beginning ten years from the date of substantial completion of the project.

**Collateral Sources (Section 2315.20)** – S.B. 80 provides that defendants are permitted to introduce evidence of certain benefits that are payable to the plaintiff as a result of damages that resulted from the injury or loss that is the subject of the pending claim; however, such evidence is not permitted if the source of the 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 is from life insurance or disability. However, evidence of a life or disability payment may be introduced if the plaintiff's employer paid for the policy and the employer is a defendant in the action.

**Product Liability (Sections 2307.75 and 2307.71)** – Under S.B. 80, the consumer expectation test is eliminated as a stand-alone test for design defect causes of action. Instead, the consumer expectation test is incorporated as one of five factors that must be considered in applying

the risk-utility test. Additionally, a product is not defective in design or formulation, unless the plaintiff proves the existence of a “reasonable alternative design.” S.B. 80 also eliminates common law product liability actions by abrogating *Carrel v. Allied Products Corporation*, 78 Ohio St.3d 284 (1997).

**Limited Immunity for Certain Property Owners (Sections 901.52, 1519.07 and 1533.18)** – S.B. 80 provides immunity to property owners who open their land to the public for direct access to agricultural produce — “pick your own” farms. They are protected from liability for injuries resulting from the natural condition of the property’s terrain unless the property owners engage in willful, wanton or intentionally tortious conduct. Also, the law provides that property owners with land adjacent to recreational trails are relieved of any duty to users of recreational trails to keep trails safe, and are provided immunity from liability for injuries caused by users of recreational trails.

**Immunity from Obesity-related Claims (Section 2305.36)** – Under S.B. 80, food manufacturers, sellers, and trade associations are provided immunity from civil damages for claims resulting from a person's obesity or weight gain or any health condition related to obesity, weight gain, or cumulative consumption, with certain exceptions, such as where a manufacturer misbranded a product.

#### **Miscellaneous Issues:**

- Evidence of non-use of a seat belt in tort actions is permitted for the purpose of reducing noneconomic damage awards. (Section 4513.263)
- S.B. 90 creates a “borrowing statute,” providing that a claimant is barred from bringing a claim in Ohio if he or she is time barred in his or her own state. (Section 2305.03)
- Jury instructions regarding the tax implications of compensatory and punitive damage awards are required.
- Courts, on their own initiative, are permitted to impose sanctions for frivolous conduct. (Section 2323.51)
- Ohio’s final appealable order statute is expanded to include constitutional challenges related to wrongful death claims, the 10-year statute of repose for products and construction, the limitations on noneconomic damages for non-catastrophic claims, and the limitations on punitive damages. (Section 2505.02)

**Conclusion.** Plaintiffs’ lawyers are likely to challenge many, if not all, of the bill’s provisions in the courts. As a result, efforts are underway to implement a defense strategy to protect these provisions and the important reforms they implement.