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## H.B. 716: Cause of Action for Chromium and Asbestos Injury upon Discovery of Injury

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## LEGISLATION NOTES

### **H.B. 716: CAUSE OF ACTION FOR CHROMIUM AND ASBESTOS INJURY ARISES UPON DISCOVERY OF INJURY**

#### INTRODUCTION

Diseases caused by inhalation of asbestos or chromium are very serious and often result in death.<sup>1</sup> These diseases are most often suffered by those who work with these chemicals on a daily basis.<sup>2</sup> Due to the nature of the diseases and the existing statute of limitations, many afflicted workers have received no compensation for their injuries.

However, in 1980 the Ohio General Assembly passed House Bill 716 which amended the statute of limitation for personal injury caused by asbestos or chromium.<sup>3</sup> In enacting the legislation, the Ohio legislature recognized that a long latency period exists between the time of exposure and the discovery of the resultant disease.<sup>4</sup> The legislature also recognized that the general two-year statute of limitation, therefore, often precluded recovery. To remedy this situation, the legislature adopted a discovery rule which provides that the statute of limitation does not begin to run until the disease is discovered.

#### ANALYSIS

##### *A. History of the Legislation*

H.B. 716 became effective on June 12, 1980.<sup>5</sup> It amends Ohio Revised Code section 2305.10, which had previously stated: "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."<sup>6</sup> The Ohio legislature retained that language and added the following paragraph:

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on

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1. See 4A GORDY-GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ch. 205C (3d ed. 1981); 4 GORDY-GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ch. 132 pp. 173-80 (3d ed. 1981).

2. *Id.*

3. OHIO REV. CODE ANN. § 2305.10 (Page Supp. 1981).

4. See note 1 *supra*.

5. OHIO REV. CODE ANN. § 2305.10 (Page Supp. 1981).

6. *Id.* § 2305.10 (Page 1954).

which, by the exercise of reasonable diligence, he should have become aware that he has been injured by the exposure, whichever date occurs first.<sup>7</sup>

H.B. 716 passed the Ohio House of Representatives by a ninety-two to two vote<sup>8</sup> and the Ohio Senate by a thirty-one to zero vote.<sup>9</sup>

### *B. Physical Effects of Asbestos or Chromium Inhalation*

A central reason for the overwhelming support of this bill stems from the nature of the diseases caused by contact with asbestos and chromium. Inhalation of asbestos or chromium does not result in any immediate physical damage.<sup>10</sup> There is a latency period of fifteen to twenty-one years before symptoms of lung cancer caused by asbestos become evident, with the average latency period being eighteen years.<sup>11</sup> Similarly, the latency period for lung cancer caused by chromium ranges from five to forty-seven years, with the average latency period being fifteen years.<sup>12</sup> Therefore, in most cases the two-year statute of limitation for personal injury would expire long before the worker became aware of his injury.

Asbestosis,<sup>13</sup> caused by the inhalation of asbestos, was discovered in England during the first decade of this century<sup>14</sup> when manufacturers and shipbuilders began using large quantities of asbestos for insulation.<sup>15</sup> A quality of asbestos which makes it very useful in industry is that it easily divides into fibers that can be woven into cloth.<sup>16</sup> These same tiny fibers, however, can become airborne and can be inhaled by anyone in the area.<sup>17</sup> Asbestosis can occur only if these fibers are inhaled.<sup>18</sup> Once inhaled, these fibers become imbedded in the lower lung and tiny "dumb bell" shaped structures form around the fibers.<sup>19</sup>

7. *Id.* § 2305.10 (Page Supp. 1981).

8. OHIO HOUSE JOURNAL, 113th General Assembly 1646 (1979).

9. OHIO SENATE JOURNAL, 113th General Assembly 1498 (1979).

10. *See* 5B LAWYERS' MEDICAL CYCLOPEDIA § 38.46h (rev. ed. 1972).

11. *Id.*

12. *Id.*

13. Asbestosis is defined as "a fibrotic process produced in the lung due to exposure to asbestos fibers." 4A GORDY-GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 205C.00 (3d ed. 1981).

14. 4A GORDY-GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 205C.01 (3d ed. 1981).

15. *See id.* at ¶ 205C.10. For a table of occupations that use asbestos *see id.* at ¶ 205C.11.

16. *See* note 14 *supra* at ¶ 205C.03.

17. *Id.* at ¶ 205C.20.

18. *Id.*

19. *Id.* at ¶ 205C.21.

Chronic fibrous pleuritis also develops in a large number of cases of asbestosis.<sup>20</sup>

The symptoms of asbestosis are shortness of breath, chronic cough, sputum production, decreased expansion of the chest, rapid breathing, a dry crackling sound when the chest is listened to through a stethoscope, blueness of nailbeds and lips, swelling of fingers and toes, loss of appetite, and the appearance of fibrous "dumb bell" shaped structures on an X-ray.<sup>21</sup> The most common causes of death are suffocation, minor respiratory infection and anorexia.<sup>22</sup>

At the present time, the only treatment for asbestosis is to prevent further inhalation of asbestos fibers, protect against other infections and administer therapeutic oxygen as needed.<sup>23</sup>

A high rate of lung cancer exists among those who work with asbestos.<sup>24</sup> The symptoms of lung cancer do not begin to manifest themselves until about fifteen years after the body is first exposed to asbestos, and the cancer does not become life-threatening until about twenty to twenty-five years after the first exposure.<sup>25</sup> The risk of a non-smoking asbestos worker developing lung cancer is equal to the risk of a smoker who does not work with asbestos contracting lung cancer.<sup>26</sup>

Mesothelioma is also prominent in asbestos workers.<sup>27</sup> Mesothelioma is cancer of the lining of the chest and is not related to cigarette smoking.<sup>28</sup> Eighty-five percent of the cases of mesothelioma occur among people who have worked with asbestos.<sup>29</sup> The life expectancy of a mesothelioma victim is ordinarily about one year after diagnosis.<sup>30</sup>

A greater incidence of cancer of the colon, rectum, stomach, and gastrointestinal tract also appears to occur among asbestos workers<sup>31</sup> because the fibers can be ingested as well as inhaled.<sup>32</sup> Families of

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20. *Id.* at ¶ 205C.22.

21. *Id.* at ¶ 205C.30.

22. *Id.*

23. *Id.* at ¶ 205C.50.

24. *Id.* at ¶ 205C.71.

25. *See* note 13 *supra* at ¶ 205C.71.

26. *Id.*

27. *Id.* at ¶ 205C.72.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at ¶ 205C.73.

32. *See id.*

asbestos workers are also susceptible to all of these diseases<sup>33</sup> because asbestos fibers can be carried home on the worker's clothing.<sup>34</sup>

The effects of chromium inhalation have not been examined as extensively as those of asbestos inhalation. Some industrial uses of chromium and its chemical compounds are in photography, tanning leather, rustproofing metals and electric batteries.<sup>35</sup>

Chromium related cancer has been found in the sinuses, nasal cavity and lungs of chromate workers.<sup>36</sup> Many chromate workers develop a perforated nasal septum which is a hole in the inside center wall of the nose.<sup>37</sup> The perforated nasal septum occurs long before any more serious injury results.<sup>38</sup> The average time between first exposure and contracting lung cancer is fifteen years.<sup>39</sup> As with asbestos, there is evidence that chromium ingestion can cause damage to the gastrointestinal tract.<sup>40</sup> The treatment for chromium caused cancer is to prevent further exposure to chromium and treat any ulcerations that have developed on the skin or nasal passages.<sup>41</sup>

### C. *Extent of Exposure*

Many Ohioans have been exposed to asbestos or chromium.<sup>42</sup> The Diamond Shamrock chromate plant in Lake County represented an example of exposure to a large group of people.<sup>43</sup> The Diamond Shamrock Corporation employed nearly five hundred workers in its chromate plant before it began closing down its operation in 1969.<sup>44</sup> The Ohio plant was completely closed in 1976 when the corporation moved to Texas.<sup>45</sup> There is a high probability that many Lake County residents may contract cancer in the future because of their work in the chromate plant.<sup>46</sup>

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33. See note 14 *supra* at ¶ 205C.15.

34. *Id.*

35. 4 GORDY-GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ch. 132, p. 173 (3d ed. 1981).

36. See note 10 *supra* at § 38.46d.

37. See note 35 *supra* at p. 174.

38. See *id.*

39. See note 25 *supra*.

40. See note 35 *supra*.

41. *Id.* at 176.

42. See Almond, *The Cleveland Press*, Sept. 7, 1979 through Sept. 9, 1979 (Series of Articles by Peter Almond discussing chromium exposure in Ohio).

43. *Id.*

44. See Almond, *The Cleveland Press*, Sept. 4, 1979.

45. *Id.*

46. See Lens, *Dead on the Job*, *THE PROGRESSIVE*, Nov., 1979 at 50 and *Columbus Dispatch*, Jan. 14, 1980 at A-7.

#### D. Policy Concerns of Statutes of Limitation

The policies underlying a statute of limitation are adequately met by H.B. 716. The purposes of a statute of limitation are: (1) to prevent the plaintiff from bringing suit when the evidence is too stale for the defendant to form an adequate defense; (2) to provide personal certainty to a potential defendant that he will not be sued after a certain time; and (3) to prevent a potential plaintiff from delay in the assertion of his rights.<sup>47</sup>

In cases dealing with asbestos or chromium injury, the defendant is almost always a corporation.<sup>48</sup> The corporation will be aware of its use of cancer-causing agents and will keep records of its activities, especially if the records could possibly aid in defending a charge at a later time.<sup>49</sup> There is little chance of the defendant being harmed by stale evidence when the evidence is in the control of the defendant corporation.<sup>50</sup>

The second policy of personal certainty to a potential defendant is not a major issue in asbestos and chromium cases. Most corporations carry insurance which covers many injuries which workers may sustain on the job.<sup>51</sup> Even though the extent of future liability is uncertain, the insurance protects the corporation from payment of unexpected claims.<sup>52</sup> Therefore, allowing recovery for asbestos or chromium injuries after discovery of the injury will not place the corporation in a position of uncertainty as to the extent of its future liabilities.<sup>53</sup>

Finally, the policy of preventing a plaintiff from delaying in the assertion of his rights cannot apply unless the plaintiff is aware of his right to sue. In asbestos and chromium cases the plaintiff is not aware that he has a right to sue until he is aware that there has been an injury.<sup>54</sup> It is often fifteen to twenty years after the plaintiff has been exposed when he discovers his injury.<sup>55</sup> H.B. 716 recognizes that a great deal of time can elapse between exposure and the discovery of injury

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47. 51 AM. JUR. *Limitation of Actions* § 17 (1970).

48. Peters, *Occupational Carcinogenesis and Statutes of Limitation: Resolving Relevant Policy Goals*, 10 ENV'T'L L. 113 (1979).

49. *Id.* at 123.

50. *See id.*

51. *See* note 48 *supra* at 124.

52. *See id.*

53. This may not be true if the corporation has changed insurance companies since the employee was first exposed. *See id.* at 124 n. 50.

54. *See* *Urie v. Thompson*, 337 U.S. 163 (1949). The case dealt with an employee who contracted silicosis. The Court stated "Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation." *Id.* at 169.

55. *See* note 25 *supra*.

but does not allow the plaintiff to delay in assertion of his rights once the injury is discovered.

### *E. Opposition to H.B. 716*

H.B. 716 encountered some opposition prior to its passage.<sup>56</sup> The main reason for opposition was that the bill does not specify in what context the exposure must occur for a suit to be brought.<sup>57</sup> The bill appears to allow anyone who can show a relationship between his disease and the asbestos or chromium in a certain area to sue the manufacturer of the asbestos or chromium, the builder who used the asbestos, the corporation that used chromium for production, or anyone else who could be responsible for the asbestos or chromium being in that area. However, the problem of proving causation may limit the number of potential defendants.

The opponents also feared that the amended statute of limitation would interfere with workers' compensation laws.<sup>58</sup> Under Ohio's workers' compensation laws<sup>59</sup> an employee who suffers from an occupational disease<sup>60</sup> must file a claim within two years after the disability began or six months after diagnosis by a licensed physician or two years after death due to the occupational disease.<sup>61</sup> This statute utilizes a discovery approach in which the statute of limitation does not begin to run until the disease has been diagnosed. It is important to note that there is nothing in the workers' compensation statutes or in section 2305.10 which would indicate that either of the statutes has any effect on the other.<sup>62</sup> A worker is free to file a claim under workers' compensation regardless of whether the statute of limitation has already run for a personal injury suit.

Finally, the opponents argued that the law was sufficient to deal with asbestos and chromium injuries without the amendment provided by H.B. 716.<sup>63</sup> As a practical matter, however, many who have been injured by these materials have not been compensated for their in-

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56. Letter from Charles A. Pagnotto to Ohio Rep. J. Leonard Camera (Sept. 13, 1979) (on file with U. DAY. L. REV.).

57. *Id.*

58. *Id.*

59. OHIO REV. CODE ANN. § 4123.85 (Page 1980).

60. Under OHIO REV. CODE ANN. § 4123.68(AA) (Page 1980), asbestos is considered to be an occupational disease and under § 4123.68(S), chrome ulceration of the skin or nasal passages is considered to be an occupational disease.

61. OHIO REV. CODE ANN. § 4123.85 (Page 1980).

62. Letter from Ohio Rep. J. Leonard Camera to Charles A. Pagnotto (Sept. 17, 1979) (on file with U. DAY. L. REV.).

63. See Letter from Charles A. Pagnotto to Ohio Rep. J. Leonard Camera (Sept. 13, 1979) (on file with U. DAY. L. REV.).

juries.<sup>64</sup> Arguably, these workers would have been compensated if the original law was sufficiently responsive to their needs.

#### PRACTICAL IMPACT

H.B. 716 is easily applied to straightforward cases of asbestos or chromium injury. For example, a hypothetical case might be considered where a worker was employed by a construction company which routinely used asbestos insulation. The worker came in contact with asbestos almost daily for ten years, but then left the construction company for other employment which did not involve working with asbestos. Eight years after leaving the construction company (eighteen years after first exposure), the worker was diagnosed as having asbestosis. Under the amended section 2305.10, the worker would now have two years in which to sue the construction company for personal injury. If the worker wanted to sue the manufacturer of the asbestos insulation used by the construction company, the same statute of limitation would probably apply.

Problems arise with H.B. 716 when the facts of the case are not so straightforward as in the hypothetical. If a person works in an office building which has asbestos insulation and the insulation begins to deteriorate with asbestos fibers becoming airborne, it is uncertain whether the person has a cause of action for lung disease when it develops.<sup>65</sup> If the manufacturer of the insulation or the construction company is held liable, massive liability could occur for which the company is not insured, and then builders might be discouraged from using one of the more effective insulating materials.<sup>66</sup>

Another aspect of H.B. 716 which may be troublesome for the plaintiff is the phrase “. . . should have become aware that he had been injured.”<sup>67</sup> It is a general rule that a cause of action accrues as soon as some type of injury occurs, no matter how minor.<sup>68</sup> The chromium worker is aware that he has been injured when he develops a perforated nasal septum. According to the general rule, the statute of

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64. For a table of the number of cases and amount of compensation for occupational diseases see Sweeney & Castleman, *Asbestos Disease and Compensation*, 330 ANNALS OF THE N.Y. ACAD. OF SCI. 273 (1979).

65. A similar problem occurred when the insulation began to deteriorate in twenty-three school buildings in Montgomery County, Ohio. See Dayton Daily News, Oct. 30, 1979 at 1, 5, 17.

66. However, because of the problem of proving a causal connection between the injury and the asbestos in a certain area, the liability of the company may not be as great as it initially appears.

67. OHIO REV. CODE ANN. § 2305.10 (Page Supp. 1980).

68. 34 O. JUR. 2d *Limitation of Actions* § 58 (1958).

limitation should begin to run at that point, even though the more serious injury will not manifest itself for many years. Therefore, under a strict application of amended section 2305.10 the chromate worker will remain uncompensated for his most serious injuries.<sup>69</sup>

### RETROACTIVITY

An issue which was not addressed in H.B. 716 is whether the chromium and asbestos provisions are retroactive. Under the Ohio Constitution,<sup>70</sup> a law affecting a substantive right cannot be applied retroactively but a law affecting only a remedial right can be retroactive.<sup>71</sup> In most cases a statute of limitation is considered to be a remedial right.<sup>72</sup>

Assuming that this legislation is remedial in nature and could constitutionally be applied retroactively, there are other problems which may block retroactive application. The court in *Wade v. Lynn*<sup>73</sup> held that if the legislation does not specifically state it is retroactive, it is not retroactive. But, in *Wade* the previous statute of limitation had already expired. It is a well established rule of interpretation that if the previous statute of limitation has run before the new statute becomes effective, the new legislation cannot revive the cause of action.<sup>74</sup> Since the *Wade* court used general language in its prohibition of retroactive legislation, it is not clear whether the prohibition applies to all statutes of limitation or only when the previous statute of limitation has expired. In either case it is certain that anyone who has not been exposed to asbestos or chromium since June 12, 1978<sup>75</sup> could not recover in a personal injury suit under amended section 2305.10.

However, in a recent decision<sup>76</sup> the U.S. Court of Appeals for the Sixth Circuit held that under its interpretation of Ohio law, the statute of limitation for asbestos injury begins to run when the disease

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69. The plaintiff will be unable to sue for more serious injuries at the time that he develops a perforated nasal septum because of his inability to prove that more serious injury will later result. If the plaintiff sues when he develops the perforated nasal septum and tries to bring another suit later when more serious injuries develop, the second claim will probably be barred by *res judicata* principles.

70. OHIO CONST. art. II, § 28.

71. *Payne v. Keller*, 18 Ohio App. 2d 66 (1969).

72. 34 O. JUR. 2d *Limitation of Action* § 7 (1958). However, an argument could be made that this statute is not remedial since, as a practical matter, someone injured by asbestos or chromium could not bring a suit for personal injury prior to the amendment.

73. 181 F. Supp. 361, 364 (N.D. Ohio 1960).

74. 34 O. JUR. 2d *Limitation of Action* § 8 (1958).

75. This includes all those who worked at the Diamond Shamrock chromate plant in Lake County, Ohio.

76. *Clutter v. Johns-Manville*, 646 F.2d 1151 (1981).

manifests itself.<sup>77</sup> The court also held that section 2305.10 was not to be applied retroactively.<sup>78</sup> The manifestation rule may allow recovery in most cases where the worker has asserted his right to sue soon after the disease becomes apparent.

#### CONCLUSION

H.B. 716 changes the statute of limitation in asbestos and chromium injury cases to two years after the discovery of the injury. This approach seems to be most responsive to the needs of those injured by asbestos or chromium considering the nature of the disease and at the same time is responsive to the policies underlying a statute of limitation.

There are some unanswered issues regarding the application of H.B. 716 to different fact situations which will have to be resolved by the courts. However, these issues may not be litigated for some time since H.B. 716 does not appear to be retroactive in application.

*Ruth Antinone*

Code Sections Affected: § 2305.10.

Effective Date: June 12, 1980.

Date Signed: March 13, 1980.

Sponsor: Camera (H).

Committees: Judiciary (S & H).

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77. The court did not attempt to answer the question of when the disease manifests itself and remanded the case for testimony on this issue. *Id.*

78. *Id.* at 1153.

