HB 4601 (HAVEMAN)

MICHIGAN SHOULD ENACT SUCCESSOR ASBESTOS-RELATED LIABILITY REFORM LEGISLATION

The current rule of successor liability provides that when a predecessor merges with another corporation, the successor can be held liable without limit for the torts of the dissolved predecessor, even if the successor did nothing wrong and the activity of the predecessor that created the liability was terminated before the merger. In some circumstances, the rule can cause a tremendous injustice, as in the case of Crown Cork & Seal, a company founded in 1892 by the inventor of the bottle cap and now one of the nation's leading can manufacturers. Crown has been named in asbestos-related claims even though the company never manufactured, sold or installed any asbestos-containing products in its 100-year history. Crown has been swept into the litigation because of its brief association with a division of a bottle-cap competitor almost half a century ago.

In November 1963, Crown Cork & Seal purchased a majority of the stock of Mundet Cork Co., a small family-owned manufacturer that made bottle caps, just as Crown did. Before the acquisition, Mundet had a side business making and installing asbestos and other insulation. By the time of Crown's stock purchase, however, Mundet had already closed its asbestos manufacturing operations. Approximately ninety days after Crown obtained its initial stock ownership interest in Mundet, what was left of the Mundet insulation division—idle machinery, leftover inventory, and customer lists—was sold off by Mundet to an insulation company. Crown itself never operated the insulation division. Crown subsequently acquired all of Mundet's stock, and Mundet, now having only bottle-cap operations, was merged into Crown in January 1966. The cost of the Mundet stock was approximately $7 million.

This brief relationship with Mundet has cost Crown over $700 million in asbestos-related expenses. Moreover, Crown's credit rating has been reduced to junk status, and the company has consequently been forced to pay higher than prevailing interest rates on its borrowing, resulting in a $1 billion interest penalty.

To remedy such instances of grossly disproportionate liability caused by application of outdated successor liability law, fifteen states –Pennsylvania (2001), Texas (2003), Mississippi (2004), Ohio (2004), Florida (2005), South Carolina (2006), Georgia (2007), North Dakota (2009), Indiana (2009), Oklahoma (2009), Wisconsin (2009), Nebraska (2010), South Dakota (2010), Wyoming (2011) and Alabama (2011) – have enacted laws to more fairly balance the scales. These laws fairly limit payments that a company as a successor by merger must pay as a result of asbestos claims, reducing the jeopardy to innocent successor companies by fairly narrowing remedies available to asbestos plaintiffs. The laws are based on a model Successor Asbestos-Related Liability Fairness Act developed by ALEC. In December 2006, the Council of State Governments (CSG) voted to approve the Florida and South Carolina laws as Suggested State Legislation.

Michigan should enact the same type of legislation to insure fairness to innocent successors while still providing plaintiffs allegedly harmed by a predecessor the right to collect from the successor what they could have collected if no merger had occurred – the amount equal to 100% of the predecessor's total gross assets at the time of the merger, plus an upward adjustment to reflect what those assets would be worth today (after inflation). Any successor that independently commits a tort, whether before or after a merger, could still be held liable to the full extent of its own assets for any harm it causes. Further, the protection of the statute would not apply to a merger successor that continued the asbestos-related business of the acquired company after the merger.

This legislation only applies to mergers that occurred prior to 1972, when OSHA asbestos regulations were adopted making the danger of asbestos publicly known for the first time. Had the

dangers of asbestos been publicly known prior to this date (e.g., when Crown Cork & Seal merged with Mundet in 1966), an acquiring company would simply have kept an asbestos-tainted acquired company as a subsidiary and never merged with it. When the asbestos personal injury litigation that commenced in 1973 thereafter grew into the mass tort that the U.S. Supreme Court has labeled "elephantine," the asbestos-tainted subsidiary would simply have been given up to the claimants in a bankruptcy proceeding. The parent company could then move on with what was left of its business in a healthy and productive way. The successor asbestos-related liability reform legislation simply allows innocent successor companies that acquired and merged with asbestos-tainted companies prior to the promulgation of the 1972 OSHA asbestos regulations to be treated no worse than those companies that acquired asbestos-tainted companies after 1972 forewarned as to what they were getting into and on notice to protect themselves from unfairly disproportionate liability by maintaining the acquired company as a subsidiary.

Enactment of the ALEC/CSG model is essential as a matter of fundamental business fairness in Michigan and would protect Crown Cork & Seal's employees and retirees living in Michigan who rely on Crown for paychecks, pensions and health care benefits as well as the employees and retirees of other companies similarly affected.

Successor Asbestos-Related Liability Reform