

ENROLLED
COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 411

(Senators Takubo, Carmichael,
Ferns, Gaunch and Mullins, *original sponsors*)

[Passed March 11, 2015; in effect ninety days from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §55-7E-1, §55-7E-2, §55-7E-3, §55-7E-4, §55-7E-5, §55-7E-6, §55-7E-7, §55-7E-8, §55-7E-9, §55-7E-10 and §55-7E-11; and that said code be amended by adding thereto a new article, designated §55-7F-1, §55-7F-2, §55-7F-3, §55-7F-4, §55-7F-5, §55-7F-6, §55-7F-7, §55-7F-8, §55-7F-9 and §55-7F-10, all relating to procedures for determining liability for exposures to asbestos or silica; setting forth findings and purposes; setting forth definitions; requiring disclosures of existing and potential asbestos bankruptcy trust claims; establishing legal standards and procedures for the handling of certain asbestos and silica claims; providing for sanctions; establishing procedures for set offs and credits; establishing medical criteria procedures for certain asbestos and silica claims; providing for statute of limitations standards and other limitations on liability; and providing for applicability future asbestos and silica claims.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new

article, designated §55-7E-1, §55-7E-2, §55-7E-3, §55-7E-4, §55-7E-5, §55-7E-6, §55-7E-7, §55-7E-8, §55-7E-9, §55-7E-10 and §55-7E-11; and that said code be amended by adding thereto a new article, designated §55-7F-1, §55-7F-2, §55-7F-3, §55-7F-4, §55-7F-5, §55-7F-6, §55-7F-7, §55-7F-8, §55-7F-9 and §55-7F-10, all to read as follows:

ARTICLE 7E. ASBESTOS BANKRUPTCY TRUST CLAIMS TRANSPARENCY ACT.

§55-7E-1. Short title.

1 This article shall be known and may be cited as the Asbestos Bankruptcy Trust Claims
2 Transparency Act.

3 **§55-7E-2. Findings and purpose.**

4 (a) The West Virginia Legislature finds that:

5 (1) The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598
6 (1997) described the asbestos litigation as a crisis;

7 (2) Approximately one hundred employers have declared bankruptcy at least partially due to
8 asbestos-related liability;

9 (3) These bankruptcies have resulted in a search for more solvent companies, resulting in over
10 eight thousand five hundred companies being named as asbestos defendants, including many small-
11 and medium-sized companies, in industries that cover eighty-five percent of the United States
12 economy;

13 (4) Scores of trusts have been established in asbestos-related bankruptcy proceedings to form
14 a multibillion dollar asbestos bankruptcy trust compensation system outside of the tort system, and
15 new asbestos trusts continue to be formed;

16 (5) Asbestos claimants often seek compensation for alleged asbestos-related conditions from
17 solvent defendants in civil actions and from trusts or claims facilities formed in asbestos bankruptcy

1 proceedings;

2 (6) There is limited coordination and transparency between these two paths to recovery;

3 (7) An absence of transparency between the asbestos bankruptcy trust claim system and the
4 civil court systems has resulted in the suppression of evidence in asbestos actions and potential fraud;

5 (8) West Virginia's Mass Litigation Panel has previously entered cases management orders that
6 apply substantive transparency provisions requiring plaintiffs to disclose, among other things, any
7 claims that may exist against asbestos bankruptcy trusts; and

8 (9) It is in the interest of justice that there be transparency for claims made in the asbestos
9 bankruptcy trust claim system and for claims made in civil asbestos litigation.

10 (b) It is the purpose of this article to:

11 (1) Provide transparency for claims made in the asbestos bankruptcy trust claim system and
12 for claims made in civil asbestos litigation; and

13 (2) Reduce the opportunity for fraud or suppression of evidence in asbestos actions.

14 **§55-7E-3. Definitions.**

15 For the purpose of this article:

16 (1) "Asbestos action" means a claim for damages or other civil or equitable relief presented
17 in a civil action arising out of, based on or related to the health effects of exposure to asbestos,
18 including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or
19 other injury, costs of medical monitoring or surveillance and any other derivative claim made by or
20 on behalf of a person exposed to asbestos or a representative, spouse, parent, child or other relative
21 of that person. The term does not include a claim for compensatory benefits pursuant to workers'
22 compensation law or for veterans' benefits as defined by article seven-f of this chapter.

23 (2) "Asbestos trust" means a government-approved or court-approved trust, qualified

1 settlement fund, compensation fund or claims facility created as a result of an administrative or legal
2 action, a court-approved bankruptcy, or pursuant to 11 U. S. C. §524(g) or 11 U. S. C. §1121(a) or
3 other applicable provision of law, that is intended to provide compensation to claimants arising out
4 of, based on or related to the health effects of exposure to asbestos.

5 (3) "Plaintiff" means a person asserting an asbestos action, a decedent if the action is brought
6 through or on behalf of an estate, or a parent or guardian if the action is brought through or on behalf
7 of a minor or incompetent.

8 (4) "Trust claims materials" means a final executed proof of claim and all other documents and
9 information related to a claim against an asbestos trust, including claims forms and supplementary
10 materials, affidavits, depositions and trial testimony, work history, medical and health records,
11 documents reflecting the status of a claim against an asbestos trust, and if the asbestos trust claim has
12 settled, all documents relating to the settlement of the asbestos trust claim.

13 (5) "Trust governance documents" means all documents that relate to eligibility and payment
14 levels, including claims payment matrices, trust distribution procedures or plans for reorganization,
15 for an asbestos trust.

16 **§55-7E-4. Required disclosures by plaintiff.**

17 (a) For each asbestos action filed in this state, the plaintiff shall provide all parties with a
18 sworn statement identifying all asbestos trust claims that have been filed by the plaintiff or by anyone
19 on the plaintiff's behalf, including claims with respect to asbestos-related conditions other than those
20 that are the basis for the asbestos action or that potentially could be filed by the plaintiff against an
21 asbestos trust. The sworn statement shall be provided no later than one hundred twenty days prior to
22 the date set for trial for the asbestos action. For each asbestos trust claim or potential asbestos trust
23 claim identified in the sworn statement, the statement shall include the name, address and contact

1 information for the asbestos trust, the amount claimed or to be claimed by the plaintiff, the date the
2 plaintiff filed the claim, the disposition of the claim and whether there has been a request to defer,
3 delay, suspend or toll the claim. The sworn statement shall include an attestation from the plaintiff,
4 under penalties of perjury, that the sworn statement is complete and is based on a good faith
5 investigation of all potential claims against asbestos trusts.

6 (b) The plaintiff shall make available to all parties all trust claims materials for each asbestos
7 trust claim that has been filed by the plaintiff or by anyone on the plaintiff's behalf against an asbestos
8 trust, including any asbestos-related disease.

9 (c) The plaintiff shall supplement the information and materials provided pursuant to this
10 section within ninety days after the plaintiff files an additional asbestos trust claim, supplements an
11 existing asbestos trust claim or receives additional information or materials related to any claim or
12 potential claim against an asbestos trust.

13 (d) Failure by the plaintiff to make available to all parties all trust claims materials as required
14 by this article shall constitute grounds for the court to extend the trial date in an asbestos action.

15 **§55-7E-5. Discovery; use of materials.**

16 (a) Trust claims materials and trust governance documents are presumed to be relevant and
17 authentic and are admissible in evidence. No claims of privilege apply to any trust claims materials
18 or trust governance documents.

19 (b) A defendant in an asbestos action may seek discovery from an asbestos trust. The plaintiff
20 may not claim privilege or confidentiality to bar discovery and shall provide consent or other
21 expression of permission that may be required by the asbestos trust to release information and
22 materials sought by a defendant.

23 **§55-7E-6. Scheduling trial; stay of action.**

1 (a) A court shall stay an asbestos action if the court finds that the plaintiff has failed to make
2 the disclosures required under section four of this article within one hundred twenty days prior to the
3 trial date.

4 (b) If, in the disclosures required by section four of this article, a plaintiff identifies a potential
5 asbestos trust claim, the judge shall have the discretion to stay the asbestos action until the plaintiff
6 files the asbestos trust claim and provides all parties with all trust claims materials for the claim. The
7 plaintiff shall also state whether there has been a request to defer, delay, suspend or toll the claim
8 against the asbestos trust.

9 **§55-7E-7. Identification of additional or alternative asbestos trusts by defendant.**

10 (a) Not less than ninety days before trial, if a defendant identifies an asbestos trust claim not
11 previously identified by the plaintiff that the defendant reasonably believes the plaintiff can file, the
12 defendant shall meet and confer with plaintiff to discuss why defendant believes plaintiff has an
13 additional asbestos trust claim, and thereafter the defendant may move the court for an order to require
14 the plaintiff to file the asbestos trust claim. The defendant shall produce or describe the
15 documentation it possesses or is aware of in support of the motion.

16 (b) Within ten days of receiving the defendant's motion under subsection (a) of this section,
17 the plaintiff shall, for each asbestos trust claim identified by the defendant, make one of the following
18 responses:

19 (1) File the asbestos trust claim;

20 (2) File a written response with the court setting forth the reasons why there is insufficient
21 evidence for the plaintiff to file the asbestos trust claim; or

22 (3) File a written response with the court requesting a determination that the plaintiff's
23 expenses or attorney's fees and expenses to prepare and file the asbestos trust claim identified in the

1 defendant's motion exceed the plaintiff's reasonably anticipated recovery from the trust.

2 (c) (1) If the court determines that there is a sufficient basis for the plaintiff to file the asbestos
3 trust claim identified by a defendant, the court shall order the plaintiff to file the asbestos trust claim
4 and shall stay the asbestos action until the plaintiff files the asbestos trust claim and provides all
5 parties with all trust claims materials no later than thirty days before trial.

6 (2) If the court determines that the plaintiff's expenses or attorney's fees and expenses to
7 prepare and file the asbestos trust claim identified in the defendant's motion exceed the plaintiff's
8 reasonably anticipated recovery from the asbestos trust, the court shall stay the asbestos action until
9 the plaintiff files with the court and provides all parties with a verified statement of the plaintiff's
10 history of exposure, usage or other connection to asbestos covered by the asbestos trust.

11 (d) Not less than thirty days prior to trial in an asbestos action, the court shall enter into the
12 record a trust claims document that identifies each claim the plaintiff has made against an asbestos
13 trust.

14 **§55-7E-8. Valuation of asbestos trust claims; judicial notice.**

15 (a) If a plaintiff proceeds to trial in an asbestos action before an asbestos trust claim is
16 resolved, the filing of the asbestos trust claim may be considered as relevant and admissible evidence.

17 (b) Trust claim materials that are sufficient to entitle a claim to consideration for payment
18 under the applicable trust governance documents may be sufficient to support a jury finding that the
19 plaintiff may have been exposed to products for which the asbestos trust was established to provide
20 compensation and that such exposure may be a substantial factor in causing the plaintiff's injury that
21 is at issue in the asbestos action.

22 **§55-7E-9. Setoff; credit.**

23 In any asbestos action in which damages are awarded, a defendant is entitled to a setoff or

1 credit in the amount of the valuation established under the applicable trust governance documents,
2 including payment percentages for asbestos trust claims pending at trial and any amount the plaintiff
3 has been awarded from an asbestos trust claim that has been identified at the time of trial. If multiple
4 defendants are found liable for damages, the court shall distribute the amount of setoff or credit
5 proportionally between the defendants, according to the liability of each defendant.

6 **§55-7E-10. Failure to provide information; sanctions.**

7 A plaintiff who fails to provide all of the information required under this article is subject to
8 sanctions as provided in the West Virginia Rules of Civil Procedure and any other relief for the
9 defendants that the court considers just and proper.

10 **§55-7E-11. Application.**

11 The provisions of this article apply to all asbestos actions filed on or after the effective date
12 of this article.

13 **ARTICLE 7F. ASBESTOS AND SILICA CLAIMS PRIORITIES ACT.**

14 **§55-7F-1. Short title.**

15 This article shall be known and may be cited as the Asbestos and Silica Claims Priorities Act.

16 **§55-7F-2. Findings and purpose.**

17 (a) The West Virginia Legislature finds that:

18 (1) Asbestos is a mineral that was widely used prior to the 1980s for insulation, fireproofing
19 and other purposes;

20 (2) Millions of American workers and others were exposed to asbestos, especially during and
21 after World War II and prior to the promulgation of regulations by the Occupational Safety and Health
22 Administration in the early 1970s;

23 (3) Exposure to asbestos has been associated with various types of cancer, including

1 mesothelioma and lung cancer, as well as nonmalignant conditions such as asbestosis and diffuse
2 pleural thickening;

3 (4) Diseases caused by asbestos often have long latency periods;

4 (5) Although the use of asbestos has dramatically declined since the 1970s and workplace
5 exposures have been regulated since 1971 by the Occupational Safety and Health Administration, past
6 exposures will continue to result in significant claims of death and disability as a result of such
7 exposure;

8 (6) Over the years, West Virginia courts have been deluged with asbestos lawsuits;

9 (7) The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598
10 (1997), described the asbestos litigation as a crisis;

11 (8) Lawyer-sponsored x-ray screenings have been used to amass large numbers of claims by
12 unimpaired plaintiffs;

13 (9) One of the country's most prolific B-readers was a doctor from West Virginia;

14 (10) Approximately one hundred employers have declared bankruptcy at least partially due to
15 asbestos-related liability;

16 (11) These bankruptcies have resulted in a search for more solvent companies, resulting in over
17 eight thousand five hundred companies being named as asbestos defendants nationally and many in
18 West Virginia, including many small- and medium-sized companies, in industries that cover
19 eighty-five percent of the United States economy;

20 (12) Silica is a naturally occurring mineral as the earth's crust is over ninety percent silica, and
21 crystalline silica dust is the basic component of sand, quartz and granite;

22 (13) Silica-related illness, including silicosis, can develop from the prolonged inhalation of
23 respirable silica particles;

1 (14) Silica claims, like asbestos claims, have involved individuals with no demonstrable
2 physical impairment, and plaintiffs have been identified through the use of for-profit, screening
3 companies;

4 (15) Silica screening processes have been found subject to substantial abuse and potential
5 fraud;

6 (16) The cost of compensating plaintiffs who have no present asbestos-related or silica-related
7 physical impairment, and the cost of litigating their claims, jeopardizes the ability of defendants to
8 compensate people with cancer and other serious asbestos-related diseases and adversely affects
9 defendant companies;

10 (17) Concerns about statutes of limitations and available funds can prompt unimpaired
11 asbestos and silica claimants to bring lawsuits in order to protect against losing their rights to future
12 compensation should they become impaired;

13 (18) Trial consolidations, joinders and similar trial procedures used by some courts to handle
14 asbestos and silica cases can undermine the appropriate functioning of the courts, deny due process
15 to plaintiffs and defendants and encourage the filing of cases by unimpaired asbestos and silica
16 plaintiffs; and

17 (19) The public interest requires giving priority to the claims of exposed individuals who are
18 sick in order to help preserve, now and for the future, defendants' ability to compensate people who
19 develop cancer and other serious asbestos-related diseases, as well as silica-related injuries, and to
20 safeguard the jobs, benefits and savings of workers in West Virginia and the well-being of the West
21 Virginia economy.

22 (b) It is the purpose of this article to:

23 (1) Give priority to asbestos and silica claimants who can demonstrate actual physical

1 impairment caused by exposure to asbestos or silica;

2 (2) Toll the running of the statutes of limitations for persons who have been exposed to
3 asbestos or to silica but who have no present physical impairment caused by such exposure;

4 (3) Enhance the ability of the courts to supervise and manage asbestos and silica cases;

5 (4) Reduce the opportunity for fraud in asbestos and silica litigation; and

6 (5) Conserve the defendants' resources to allow compensation to present and future claimants
7 with physical impairment caused by exposure to asbestos or silica.

8 **§55-7F-3. Definitions.**

9 For the purpose of this article:

10 (1) "AMA Guides to the Evaluation of Permanent Impairment" means the American Medical
11 Association's Guides to the Evaluation of Permanent Impairment in effect at the time of the
12 performance of any examination or test on the exposed person required under this article.

13 (2) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite
14 asbestos, actinolite asbestos, asbestiform winchite, asbestiform richterite, asbestiform amphibole
15 minerals and any of these minerals that have been chemically treated or altered, including all minerals
16 defined as asbestos in 29 C. F. R. §1910 at the time an asbestos action is filed.

17 (3) "Asbestos action" means a claim for damages or other civil or equitable relief presented
18 in a civil action arising out of, based on or related to the health effects of exposure to asbestos,
19 including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or
20 other injury, costs of medical monitoring or surveillance and any other derivative claim made by or
21 on behalf of a person exposed to asbestos or a representative, spouse, parent, child or other relative
22 of that person. The term does not include a claim for compensatory benefits pursuant to workers'
23 compensation law or for veterans' benefits.

1 (4) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation
2 of asbestos fibers.

3 (5) "Board-certified in internal medicine" means a physician who is certified by the American
4 Board of Internal Medicine or the American Osteopathic Board of Internal Medicine and whose
5 certification was current at the time of the performance of any examination and rendition of any report
6 required by this article.

7 (6) "Board-certified in occupational medicine" means a physician who is certified in the
8 subspecialty of occupational medicine by the American Board of Preventive Medicine or the
9 American Osteopathic Board of Preventive Medicine and whose certification was current at the time
10 of the performance of any examination and rendition of any report required by this article.

11 (7) "Board-certified in pathology" means a physician who holds primary certification in
12 anatomic pathology or clinical pathology from the American Board of Pathology or the American
13 Osteopathic Board of Pathology, whose certification was current at the time of the performance of any
14 examination and rendition of any report required by this act, and whose professional practice is
15 principally in the field of pathology and involves regular evaluation of pathology materials obtained
16 from surgical or postmortem specimens.

17 (8) "Board-certified in pulmonary medicine" means a physician who is certified in the
18 subspecialty of pulmonary medicine by the American Board of Internal Medicine or the American
19 Osteopathic Board of Internal Medicine and whose certification was current at the time of the
20 performance of any examination and rendition of any report required by this article.

21 (9) "Certified B-reader" means an individual who has qualified as a National Institute for
22 Occupational Safety and Health (NIOSH) "final" or "B-reader" of x-rays under 42 C. F. R. §37.51(b),
23 whose certification was current at the time of any readings required under this article, and whose

1 B-reads comply with the NIOSH B-Reader's Code of Ethics, Issues in Classification of Chest
2 Radiographs and Classification of Chest Radiographs in Contested Proceedings.

3 (10) "Chest x-ray" means chest films taken in accordance with all applicable state and federal
4 regulatory standards and taken in the posterior-anterior view.

5 (11) "DLCO" means diffusing capacity of the lung for carbon monoxide, which is the
6 measurement of carbon monoxide transfer from inspired gas to pulmonary capillary blood.

7 (12) "Exposed person" means a person whose exposure to asbestos or silica or to
8 asbestos-containing or silica-containing products is the basis for an asbestos or silica action.

9 (13) "FEV1" means forced expiratory volume in the first second, which is the maximal volume
10 of air expelled in one second during performance of simple spirometric tests.

11 (14) "FEV1/FVC" means the ratio between the actual values for FEV1 over FVC.

12 (15) "FVC" means forced vital capacity, which is the maximal volume of air expired with
13 maximum effort from a position of full inspiration.

14 (16) "ILO" system and "ILO scale" mean the radiological ratings and system for the
15 classification of chest x-rays of the International Labor Office provided in Guidelines for the Use of
16 ILO International Classification of Radiographs of Pneumoconioses in effect on the day any x-rays
17 of the exposed person were reviewed by a certified B-reader.

18 (17) "Nonmalignant condition" means any condition that can be caused by asbestos or silica
19 other than a diagnosed cancer.

20 (18) "Official statements of the American Thoracic Society" means lung function testing
21 standards set forth in statements from the American Thoracic Society including standardizations of
22 spirometry, standardizations of lung volume testing, standardizations of diffusion capacity testing or
23 single-breath determination of carbon monoxide uptake in the lung and interpretive strategies for lung

1 function tests, which are in effect on the day of the pulmonary function testing of the exposed person.

2 (19) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist
3 that more than one representative section of lung tissue uninvolved with any other disease process
4 demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic
5 asbestos bodies graded 1(B) or higher under the criteria published in Asbestos-Associated Diseases,
6 106 Archive of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982), or grade one
7 or higher in Pathology of Asbestosis, 134 Archive of Pathology and Laboratory Medicine 462-80
8 (March 2010) (Tables 2 and 3), or as amended at the time of the exam, and there is no other more
9 likely explanation for the presence of the fibrosis.

10 (20) "Pathological evidence of silicosis" means a statement by a board-certified pathologist
11 that more than one representative section of lung tissue uninvolved with any other disease process
12 demonstrates complicated silicosis with characteristic confluent silicotic nodules or lesions equal to
13 or greater than one centimeter and birefringent crystals or other demonstration of crystal structures
14 consistent with silica (well-organized concentric whorls of collagen surrounded by inflammatory cells)
15 in the lung parenchyma and no other more likely explanation for the presence of the fibrosis exists,
16 or acute silicosis with characteristic pulmonary edema, interstitial inflammation, and the accumulation
17 within the alveoli of proteinaceous fluid rich in surfactant.

18 (21) "Plaintiff" means a person asserting an asbestos or silica action, a decedent if the action
19 is brought through or on behalf of an estate, and a parent or guardian if the action is brought through
20 or on behalf of a minor or incompetent.

21 (22) "Plethysmography or body (BOX) plethysmography" means the test for determining lung
22 volume in which the exposed person is enclosed in a chamber equipped to measure pressure, flow or
23 volume change.

1 (23) "Predicted lower limit of normal" means any test value is the calculated standard
2 convention lying at the fifth percentile, below the upper ninety-five percent of the reference
3 population, based on age, height and gender, according to the recommendations by the American
4 Thoracic Society and as referenced in the applicable AMA Guides to the Evaluation of Permanent
5 Impairment, primarily National Health and Nutrition Examination Survey (NHANES) predicted
6 values, or as amended.

7 (24) "Pulmonary function test" means spirometry, lung volume testing and diffusion capacity
8 testing, including appropriate measurements, quality control data and graphs, performed in accordance
9 with the methods of calibration and techniques provided in the applicable AMA Guides to the
10 Evaluation of Permanent Impairment and all standards provided in the Official Statements of the
11 American Thoracic Society in effect on the day pulmonary function testing of the exposed person was
12 conducted.

13 (25) "Qualified physician" means a board-certified internist, pathologist, pulmonary specialist
14 or specialist in occupational and environmental medicine, as may be appropriate to the actual
15 diagnostic specialty in question, that meets all of the following requirements:

16 (A) The physician has conducted a physical examination of the exposed person and has taken
17 or has directed to be taken under his or her supervision, direction and control, a detailed occupational,
18 exposure, medical, smoking and social history from the exposed person, or the physician has reviewed
19 the pathology material and has taken or has directed to be taken under his or her supervision, direction
20 and control, a detailed history from the person most knowledgeable about the information forming the
21 basis of the asbestos or silica action;

22 (B) The physician has treated or is treating the exposed person, and has or had a doctor-patient
23 relationship with the exposed person at the time of the physical examination or, in the case of a

1 board-certified pathologist, examined tissue samples or pathological slides of the exposed person;

2 (C) The physician prepared or directly supervised the preparation and final review of any
3 medical report under this article; and

4 (D) The physician has not relied on any examinations, tests, radiographs, reports or opinions
5 of any doctor, clinic, laboratory or testing company that performed an examination, test, radiograph
6 or screening of the exposed person in violation of any law, regulation, licensing requirement or
7 medical code of practice of the state in which the examination, test or screening.

8 (26) "Radiological evidence of asbestosis" means a quality 1 or 2 chest x-ray under the ILO
9 system, showing bilateral small, irregular opacities (s, t or u) occurring primarily in the lower lung
10 zones graded by a certified B-reader as at least 1/0 on the ILO scale.

11 (27) "Radiological evidence of diffuse bilateral pleural thickening" means a quality 1 or 2 chest
12 x-ray under the ILO system, showing diffuse bilateral pleural thickening of at least b2 on the ILO scale
13 and blunting of at least one costophrenic angle as classified by a certified B-reader.

14 (28) "Radiological evidence of silicosis" means a quality 1 or 2 chest x-ray under the ILO
15 system, showing bilateral predominantly nodular or rounded opacities (p, q or r) occurring in the lung
16 fields graded by a certified B-reader as at least 1/0 on the ILO scale or A, B or C sized opacities
17 representing complicated silicosis or acute silicosis with characteristic pulmonary edema, interstitial
18 inflammation, and the accumulation within the alveoli of proteinaceous fluid rich in surfactant.

19 (29) "Silica" means a respirable crystalline form of silicon dioxide, including quartz,
20 cristobalite and tridymite.

21 (30) "Silica action" means a claim for damages or other civil or equitable relief presented in
22 a civil action arising out of, based on or related to the health effects of exposure to silica, including
23 loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury,

1 costs of medical monitoring or surveillance and any other derivative claim made by or on behalf of
2 a person exposed to silica or a representative, spouse, parent, child or other relative of that person.
3 The term does not include a claim for compensatory benefits pursuant to workers' compensation law,
4 veterans' benefits or claims brought by a person as a subrogee by virtue of the payment of benefits
5 under a workers' compensation law. The term does not include any administrative claim or civil
6 action related to coal workers' pnuemoconiosis.

7 (31) "Silicosis" means simple silicosis, acute silicosis, accelerated silicosis or chronic silicosis
8 caused by the inhalation of respirable silica. "Silicosis" does not mean coal workers' pnuemoconiosis.

9 (32) "Spirometry" means a test of air capacity of the lung through a spirometer to measure the
10 volume of air inspired and expired.

11

12 (33) "Supporting test results" means copies of the following documents and images:

13 (A) Pulmonary function tests, including printouts of the flow volume loops, volume time
14 curves, DLCO graphs, lung volume tests and graphs, quality control data and other pertinent data for
15 all trials and all other elements required to demonstrate compliance with the equipment, quality,
16 interpretation and reporting standards set forth herein;

17 (B) B-reading and B-reader reports;

18 (C) Reports of x-ray examinations;

19 (D) Diagnostic imaging of the chest;

20 (E) Pathology reports; and

21 (F) All other tests reviewed by the diagnosing physician or a qualified physician in reaching
22 the physician's conclusions.

23 (34) "Timed gas dilution" means a method for measuring total lung capacity in which the

1 subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for
2 a specific time, and the concentration of that inert and insoluble gas in the lung is compared to the
3 concentration of that type of gas in the spirometer.

4 (35) "Total lung capacity" means the volume of gas contained in the lungs at the end of a
5 maximal inspiration.

6 (36) "Veterans' benefits" means a program for benefits in connection with military service
7 administered by the Veterans' Administration under Title 38 of the United States Code.

8 (37) "Workers' compensation law" means a law relating to a program administered by the
9 United States or a state to provide benefits, funded by a responsible employer or its insurance carrier,
10 for occupational diseases or injuries or for disability or death caused by occupational diseases or
11 injuries. The term includes the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §§901
12 *et seq.*, and the Federal Employees' Compensation Act, Chapter 81 of Title 5 of the United States
13 Code, but does not include the Federal Employers' Liability Act of April 22, 1908, 45 U. S. C. §§51
14 *et seq.*

15 **§55-7F-4. Filing claims; establishment of a prima facie case; additional required information**
16 **for new nonmalignant claims; individual actions to be filed.**

17 (a) A plaintiff in an asbestos or silica action alleging a nonmalignant condition shall file within
18 ninety days of filing the complaint or other initial pleading a detailed narrative medical report and
19 diagnosis, signed by a qualified physician and accompanied by supporting test results, constituting
20 prima facie evidence that the exposed person meets the requirements of this article. The report shall
21 not be prepared by a lawyer or person working for or on behalf of a lawyer or law firm.

22 (b) A defendant in an asbestos or silica action shall be afforded a reasonable opportunity before
23 trial to challenge the adequacy of the prima facie evidence that the exposed person meets the

1 requirements of this article. An asbestos or silica action shall be dismissed without prejudice upon a
2 finding that the exposed person has failed to make the prima facie showing required by this article.

3 (c) A plaintiff in an asbestos or silica action filed on or after the effective date of this article
4 shall also include an information form with the complaint for nonmalignant conditions containing all
5 of the following:

6 (1) The name, address, date of birth, social security number, marital status, occupation and
7 employer of the exposed person and any person through which the exposed person alleges exposure;

8 (2) The plaintiff's relationship to the exposed person or the person through which the exposure
9 is alleged;

10 (3) To the best of the plaintiff's ability, the location and manner of each alleged exposure,
11 including the specific location and manner of exposure for any person through which the exposed
12 person alleges exposure, the beginning and ending dates of each alleged exposure and the identity of
13 the manufacturer of the specific asbestos or silica product for each exposure when this information
14 is reasonably available;

15 (4) The identity of the defendant or defendants against whom the plaintiff asserts a claim;

16 (5) The specific asbestos-related or silica-related disease claimed to exist; and

17 (6) Any supporting documentation relating to subdivisions (3), (4) and (5) of this subsection.

18 (d) Asbestos and silica actions must be individually filed. No asbestos or silica action filed
19 on or after the effective date of this article shall be permitted on behalf of a group or class of plaintiffs.

20 **§55-7F-5. Elements of proof for asbestos actions alleging a nonmalignant asbestos-related**
21 **condition.**

22 (a) No asbestos action related to an alleged nonmalignant asbestos-related condition may be
23 brought or maintained in the absence of prima facie evidence that the exposed person has a physical

1 impairment for which asbestos exposure was a substantial contributing factor. The plaintiff shall
2 make a prima facie showing of claim for each defendant and include a detailed narrative medical
3 report and diagnosis signed under oath by a qualified physician that includes all of the following:

4 (1) Radiological or pathological evidence of asbestosis or radiological evidence of diffuse
5 bilateral pleural thickening or a high-resolution computed tomography scan showing evidence of
6 asbestosis or diffuse pleural thickening;

7 (2) A detailed occupational and exposure history from the exposed person or, if that person
8 is deceased, from the person most knowledgeable about the exposures that form the basis of the
9 action, including identification of all of the exposed person's principal places of employment and
10 exposures to airborne contaminants and whether each place of employment involved exposures to
11 airborne contaminants, including asbestos fibers or other disease causing dusts or fumes, that may
12 cause pulmonary impairment and the nature, duration, and level of any exposure;

13 (3) A detailed medical, social and smoking history from the exposed person or, if that person
14 is deceased, from the person most knowledgeable, including a thorough review of the past and present
15 medical problems of the exposed person and their most probable cause;

16 (4) Evidence verifying that at least fifteen years have elapsed between the exposed person's
17 date of first exposure to asbestos and the date of diagnosis;

18 (5) Evidence from a personal medical examination and pulmonary function testing of the
19 exposed person or, if the exposed person is deceased, from the person's medical records, that the
20 exposed person has or the deceased person had a permanent respiratory impairment rating of at least
21 Class 2 as defined by and evaluated pursuant to the AMA's Guides to the Evaluation of Permanent
22 Impairment or reported significant changes year to year in lung function for FVC, FEV1 or DLCO as
23 defined by the American Thoracic Society's Interpretative Strategies for Lung Function Tests, 26

1 European Respiratory Journal 948-68, 961-62, Table 12 (2005) and as updated;

2 (6) Evidence that asbestosis or diffuse bilateral pleural thickening, rather than chronic
3 obstructive pulmonary disease, is a substantial factor to the exposed person's physical impairment,
4 based on a determination the exposed person has:

5 (A) Forced vital capacity below the predicted lower limit of normal and FEV1/FVC ratio
6 (using actual values) at or above the predicted lower limit of normal;

7 (B) Total lung capacity, by plethysmography or timed gas dilution, below the predicted lower
8 limit of normal; or

9 (C) A chest x-ray showing bilateral small, irregular opacities (s, t or u) graded by a certified
10 B-reader as at least 2/1 on the ILO scale; and

11 (7) The specific conclusion of the qualified physician signing the report that exposure to
12 asbestos was a substantial contributing factor to the exposed person's physical impairment and not
13 more probably the result of other causes. An opinion that the medical findings and impairment are
14 consistent with or compatible with exposure to asbestos, or words to that effect, do not satisfy the
15 requirements of this subdivision.

16 (b) If the alleged nonmalignant asbestos-related condition is a result of an exposed person
17 living with or having extended contact with another exposed person who, if the asbestos action had
18 been filed by the other exposed person would have met the requirements of subdivision (2), subsection
19 (a) of this section, and the exposed person alleges extended contact with the other exposed person
20 during the relevant time period, the detailed narrative medical report and diagnosis shall include all
21 of the information required by subsection (a) of this section, except that the exposure history required
22 under subdivision (2), subsection (a) of this section shall describe the exposed person's history of
23 exposure to the other exposed person.

1 **§55-7F-6. Elements of proof for silica actions alleging silicosis.**

2 No silica action related to alleged silicosis may be brought or maintained in the absence of
3 prima facie evidence that the exposed person has a physical impairment as a result of silicosis. The
4 plaintiff shall make a prima facie showing of claim for each defendant and include a detailed narrative
5 medical report and diagnosis signed under oath by a qualified physician that includes all of the
6 following:

7 (1) Radiological or pathological evidence of silicosis or a high-resolution computed
8 tomography scan showing evidence of silicosis;

9 (2) A detailed occupational and exposure history from the exposed person or, if that person
10 is deceased, from the person most knowledgeable about the exposures that form the basis of the
11 action, including identification of all principal places of employment and exposures to airborne
12 contaminants and whether each place of employment involved exposures to airborne contaminants,
13 including silica or other disease causing dusts or fumes, that may cause pulmonary impairment and
14 the nature, duration and level of any exposure;

15 (3) A detailed medical, social and smoking history from the exposed person or, if that person
16 is deceased, from the person most knowledgeable, including a thorough review of the past and present
17 medical problems and their most probable cause;

18 (4) Evidence that a sufficient latency period has elapsed between the exposed person's date of
19 first exposure to silica and the day of diagnosis;

20 (5) Evidence based upon a personal medical examination and pulmonary function testing of
21 the exposed person or, if the exposed person is deceased, based upon the person's medical records,
22 demonstrating that the exposed person has or the deceased person had a permanent respiratory
23 impairment rating of at least Class 2 as defined by and evaluated pursuant to the AMA's Guides to the

1 Evaluation of Permanent Impairment or reported significant changes year to year in lung function for
2 FVC, FEV1 or DLCO as defined by the American Thoracic Society's Interpretative Strategies for Lung
3 Function Tests, 26 European Respiratory Journal 948-68, 961-62, Table 12 (2005) and as updated;
4 and

5 (6) The specific conclusion of the qualified physician signing the report that exposure to silica
6 was a substantial contributing factor to the exposed person's physical impairment and not more
7 probably the result of other causes. An opinion stating that the medical findings and impairment are
8 consistent with or compatible with exposure to silica, or words to that effect, do not satisfy the
9 requirements of this subdivision.

10 **§55-7F-7. Evidence of physical impairment.**

11 Evidence relating to physical impairment, including pulmonary function testing and diffusing
12 studies, offered in any action governed by this article or article seven-e of this chapter, shall:

13 (1) Comply with the quality controls, equipment requirements, methods of calibration and
14 techniques set forth in the AMA's Guides to the Evaluation of Permanent Impairment and all standards
15 set forth in the Official Statements of the American Thoracic Society which are in effect on the date
16 of any examination or pulmonary function testing of the exposed person required by this article;

17 (2) Not be obtained and may not be based on testing or examinations that violate any law,
18 regulation, licensing requirement, or medical code of practice of the state in which the examination,
19 test, or screening was conducted, or of this state; and

20 (3) Not be obtained under the condition that the plaintiff or exposed person retains the legal
21 services of the attorney or law firm sponsoring the examination, test or screening.

22 **§55-7F-8. Procedures.**

23 (a) Evidence relating to the prima facie showings required under this article shall not create

1 any presumption that the exposed person has an asbestos-related or silica-related injury or impairment
2 and shall not be conclusive as to the liability of any defendant.

3 (b) No evidence shall be offered at trial, and the jury shall not be informed of:

4 (1) The grant or denial of a motion to dismiss an asbestos or silica action under the provisions
5 of this article; or

6 (2) The provisions of this article with respect to what constitutes a prima facie showing of
7 asbestos or silica-related impairment.

8 (c) Until a court enters an order determining that the exposed person has established prima
9 facie evidence of impairment, no asbestos or silica action shall be subject to discovery, except
10 discovery related to establishing or challenging the prima facie evidence or by order of the trial court
11 upon motion of one of the parties and for good cause shown.

12 (d) *Consolidation of cases.* --

13 (1) A court may consolidate for trial any number and type of nonmalignant asbestos or silica
14 actions with the consent of all the parties. In the absence of such consent, the court may consolidate
15 for trial only asbestos or silica actions relating to the exposed person and members of that person's
16 household.

17 (2) No class action or any other form of mass aggregation relating to more than one exposed
18 person and members of that person's household shall be permitted.

19 (3) The provisions of this subsection do not preclude consolidation of cases by court order for
20 pretrial or discovery purposes.

21 **§55-7F-9. Statute of limitations; two-disease rule.**

22 (a) With respect to an asbestos or silica action not barred by limitations as of this article's
23 effective date, an exposed person's cause of action shall not accrue, nor shall the running of limitations

1 commence, prior to the earlier of the date:

2 (1) The exposed person received a medical diagnosis of an asbestos-related impairment or
3 silica-related impairment;

4 (2) The exposed person discovered facts that would have led a reasonable person to obtain a
5 medical diagnosis with respect to the existence of an asbestos-related impairment or silica-related
6 impairment; or

7 (3) The date of death of the exposed person having an asbestos-related or silica-related
8 impairment.

9 (b) Nothing in this section shall be construed to revive or extend limitations with respect to
10 any claim for asbestos-related impairment or silica-related impairment that was otherwise time-barred
11 on the effective date of this article.

12 (c) Nothing in this section shall be construed so as to adversely affect, impair, limit, modify,
13 or nullify any settlement or other agreements with respect to an asbestos or silica action entered into
14 prior to the effective date of this article.

15 (d) An asbestos or silica action arising out of a nonmalignant condition shall be a distinct cause
16 of action from an action for an asbestos-related or silica-related cancer. Where otherwise permitted
17 under state law, no damages shall be awarded for fear or increased risk of future disease in an asbestos
18 or silica action.

19 **§55-7F-10. Application.**

20 This article shall apply to all asbestos actions and silica actions filed on or after the effective
21 date of this article.

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