

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 411

(By Senators Takubo, Carmichael,
Ferns, Gaunch and Mullins)

[Originating in the Committee on
the Judiciary;
reported February 24, 2015.]

A BILL 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.

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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
8 to asbestos-related liability;

9 (3) These bankruptcies have resulted in a search for more solvent companies, resulting in
10 over eight thousand five hundred companies being named as asbestos defendants, including many
11 small- 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

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1 a multi-billion dollar asbestos bankruptcy trust compensation system outside of the tort system, and
2 new asbestos trusts continue to be formed;

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

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

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

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

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

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

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

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

19 **§55-7E-3. Definitions.**

20 For the purpose of this article:

21 (1) "Asbestos action" means a claim for damages or other civil or equitable relief presented

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1 in a civil action arising out of, based on or related to the health effects of exposure to asbestos,
2 including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or
3 other injury, costs of medical monitoring or surveillance and any other derivative claim made by or
4 on behalf of a person exposed to asbestos or a representative, spouse, parent, child or other relative
5 of that person. The term does not include a claim for compensatory benefits pursuant to workers'
6 compensation law or for veterans' benefits, or the Federal Employees Liability Act, 45 U. S. C. §51
7 *et seq.*

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

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

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

21 (5) "Trust governance documents" means all documents that relate to eligibility and payment

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1 levels, including claims payment matrices, trust distribution procedures or plans for reorganization,
2 for an asbestos trust.

3 **§55-7E-4. Required disclosures by plaintiff.**

4 (a) For each asbestos action filed in this state, the plaintiff shall provide all parties with a
5 sworn statement identifying all asbestos trust claims that have been filed by the plaintiff or by anyone
6 on the plaintiff's behalf, including claims with respect to asbestos-related conditions other than those
7 that are the basis for the asbestos action or that potentially could be filed by the plaintiff against an
8 asbestos trust. For an action filed on or after the effective date of this article, the sworn statement
9 shall be provided no later than one hundred twenty days prior to the date set for trial for the asbestos
10 claim. For each asbestos trust claim or potential asbestos trust claim identified in the sworn
11 statement, the statement shall include the name, address and contact information for the asbestos
12 trust, the amount claimed or to be claimed by the plaintiff, the date the plaintiff filed the claim, the
13 disposition of the claim and whether there has been a request to defer, delay, suspend or toll the
14 claim. The sworn statement shall include an attestation from the plaintiff, under penalties of perjury,
15 that the sworn statement is complete and is based on a good faith investigation of all potential claims
16 against asbestos trusts.

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

20 (c) The plaintiff shall supplement the information and materials provided pursuant to this
21 section within ninety days after the plaintiff files an additional asbestos trust claim, supplements an

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1 existing trust claim or receives additional information or materials related to any claim or potential
2 claim against an asbestos trust.

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

6 **§55-7E-5. Discovery; use of materials.**

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

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

14 **§55-7E-6. Scheduling trial; stay of action.**

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

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

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1 against the asbestos trust.

2 **§55-7E-7. Identification of additional or alternative asbestos trusts by defendant.**

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

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

12 (1) File the asbestos trust claim;

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

15 (3) File a written response with the court requesting a determination that the plaintiff's
16 expenses or attorney's fees and expenses to prepare and file the trust claim identified in the
17 defendant's motion exceed the plaintiff's reasonably anticipated recovery from the trust.

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

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

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

9 **§55-7E-8. Valuation of asbestos trust claims; judicial notice.**

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

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

18 **§55-7E-9. Setoff; credit.**

19 In any asbestos action in which damages are awarded, a defendant is entitled to a setoff or
20 credit in the amount of the valuation established under the applicable trust governance documents,
21 including payment percentages for trust claims pending at trial and any amount the plaintiff has been

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1 awarded from an asbestos trust claim that has been identified at the time of trial. If multiple
2 defendants are found liable for damages, the court shall distribute the amount of setoff or credit
3 proportionally between the defendants, according to the liability of each defendant.

4 **§55-7E-10. Failure to provide information; sanctions.**

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

8 **§55-7E-11. Application.**

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

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

12 **§55-7F-1. Short title.**

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

14 **§55-7F-2. Findings and purpose.**

15 (a) The West Virginia Legislature finds that:

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

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

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

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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,
6 past 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
15 to asbestos-related liability;

16 (11) These bankruptcies have resulted in a search for more solvent companies, resulting in
17 over eight thousand five hundred companies being named as asbestos defendants nationally and
18 many in 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,
21 and crystalline silica dust is the basic component of sand, quartz and granite;

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

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

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

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

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

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

19 (19) The public interest requires giving priority to the claims of exposed individuals who are
20 sick in order to help preserve, now and for the future, defendants' ability to compensate people who
21 develop cancer and other serious asbestos-related diseases, as well as silica-related injuries, and to

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1 safeguard the jobs, benefits and savings of workers in West Virginia and the well-being of the West
2 Virginia economy.

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

4 (1) Give priority to asbestos and silica claimants who can demonstrate actual physical
5 impairment caused by exposure to asbestos or silica;

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

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

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

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

12 **§55-7F-3. Definitions.**

13 For the purpose of this article:

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

17 (2) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite
18 asbestos, actinolite asbestos, asbestiform winchite, asbestiform richterite, asbestiform amphibole
19 minerals and any of these minerals that have been chemically treated or altered, including all
20 minerals defined as asbestos in 29 CFR §1910 at the time an asbestos action is filed.

21 (3) "Asbestos action" means a claim for damages or other civil or equitable relief presented

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1 in a civil action arising out of, based on or related to the health effects of exposure to asbestos,
2 including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or
3 other injury, costs of medical monitoring or surveillance and any other derivative claim made by or
4 on behalf of a person exposed to asbestos or a representative, spouse, parent, child or other relative
5 of that person. The term does not include a claim for compensatory benefits pursuant to workers'
6 compensation law or veterans' benefits or claims brought by a person as a subrogee by virtue of the
7 payment of benefits under a workers' compensation law.

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

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

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

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

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1 (8) "Board-certified in pathology" means a physician who holds primary certification in
2 anatomic pathology or clinical pathology from the American Board of Pathology or the American
3 Osteopathic Board of Pathology, whose certification was current at the time of the performance of
4 any examination and rendition of any report required by this Act, and whose professional practice
5 is principally in the field of pathology and involves regular evaluation of pathology materials
6 obtained from surgical or postmortem specimens.

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

11 (10) "Certified B-reader" means an individual who has qualified as a National Institute for
12 Occupational Safety and Health (NIOSH) "final" or "B-reader" of x-rays under 42 CFR § 37.51(b),
13 whose certification was current at the time of any readings required under this article, and whose
14 B-reads comply with the NIOSH B-Reader's Code of Ethics, Issues in Classification of Chest
15 Radiographs and Classification of Chest Radiographs in Contested Proceedings.

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

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

20 (13) "Exposed person" means a person whose exposure to asbestos or silica or to
21 asbestos-containing or silica-containing products is the basis for an asbestos or silica action.

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

3 (15) "FEV1/FVC" means the ratio between the actual values for FEV1 over FVC.

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

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

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

12 (19) "Official statements of the American Thoracic Society" means lung function testing
13 standards set forth in statements from the American Thoracic Society including standardizations of
14 spirometry, standardizations of lung volume testing, standardizations of diffusion capacity testing
15 or single-breath determination of carbon monoxide uptake in the lung and interpretive strategies for
16 lung function tests, which are in effect on the day of the pulmonary function testing of the exposed
17 person.

18 (20) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist
19 that more than one representative section of lung tissue uninvolved with any other disease process
20 demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic
21 asbestos bodies graded 1(B) or higher under the criteria published in Asbestos-Associated Diseases,

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1 106 Archive of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982), or grade one
2 or higher in Pathology of Asbestosis, 134 Archive of Pathology and Laboratory Medicine 462-80
3 (March 2010) (Tables 2 and 3), or as amended at the time of the exam, and there is no other more
4 likely explanation for the presence of the fibrosis.

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

13 (22) "Plaintiff" means a person asserting an asbestos or silica action, a decedent if the action
14 is brought through or on behalf of an estate, and a parent or guardian if the action is brought through
15 or on behalf of a minor or incompetent.

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

19 (24) "Predicted lower limit of normal" means any test value is the calculated standard
20 convention lying at the fifth percentile, below the upper ninety-five percent of the reference
21 population, based on age, height and gender, according to the recommendations by the American

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1 Thoracic Society and as referenced in the applicable AMA Guides to the Evaluation of Permanent
2 Impairment, primarily National Health and Nutrition Examination Survey (NHANES) predicted
3 values, or as amended.

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

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

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

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

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

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

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

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

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

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

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

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1 (31) "Silica action" means a claim for damages or other civil or equitable relief presented in
2 a civil action arising out of, based on or related to the health effects of exposure to silica, including
3 loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury,
4 costs of medical monitoring or surveillance and any other derivative claim made by or on behalf of
5 a person exposed to silica or a representative, spouse, parent, child or other relative of that person.
6 The term does not include a claim for compensatory benefits pursuant to workers' compensation law
7 or veterans' benefits, or claims brought by a person as a subrogee by virtue of the payment of benefits
8 under a workers' compensation law. The term does not include any administrative claim or civil
9 action related to coal workers' pnuemonoconiosis.

10 (32) "Silicosis" means simple silicosis, acute silicosis, accelerated silicosis or chronic
11 silicosis caused by the inhalation of respirable silica. "Silicosis" does not mean coal workers'
12 pnuemonoconiosis.

13 (33) "Spirometry" means a test of air capacity of the lung through a spirometer to measure
14 the volume of air inspired and expired.

15 (34) "Substantial occupational exposure to asbestos" means employment in an industry and
16 occupation in which, for a substantial portion of a normal work year for that industry and occupation,
17 the exposed person did any of the following:

18 (A) Handled raw asbestos fibers;

19 (B) Fabricated asbestos-containing products so that the person was exposed to asbestos in
20 the fabrication process;

21 (C) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner

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1 that exposed the person on a regular basis to asbestos; or

2 (D) Worked in close proximity to other workers engaged in any of the activities described
3 in paragraph (A), (B) or (C) of this subdivision in a manner that exposed the person on a regular
4 basis to asbestos.

5 (35) "Substantial occupational exposure to silica" means employment in an industry and
6 occupation in which, for a substantial portion of a normal work year for that industry and occupation,
7 the exposed person did any of the following:

8 (A) Handled silica;

9 (B) Fabricated silica-containing products so that the person was exposed to silica in the
10 fabrication process;

11 (C) Altered, repaired or otherwise worked with a silica-containing product in a manner that
12 exposed the person on a regular basis to silica; or

13 (D) Worked in close proximity to other workers engaged in any of the activities described
14 in paragraph (A), (B) or (C) of this subdivision in a manner that exposed the person on a regular
15 basis to silica.

16 (36) "Supporting test results" means copies of the following documents and images:

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

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

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1 (C) Reports of x-ray examinations;

2 (D) Diagnostic imaging of the chest;

3 (E) Pathology reports; and

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

6 (37) "Timed gas dilution" means a method for measuring total lung capacity in which the
7 subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for
8 a specific time, and the concentration of that inert and insoluble gas in the lung is compared to the
9 concentration of that type of gas in the spirometer.

10 (38) "Total lung capacity" means the volume of gas contained in the lungs at the end of a
11 maximal inspiration.

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

14 (40) "Workers' compensation law" means a law relating to a program administered by the
15 United States or a state to provide benefits, funded by a responsible employer or its insurance carrier,
16 for occupational diseases or injuries or for disability or death caused by occupational diseases or
17 injuries. The term includes the Longshore and Harbor Workers' Compensation Act, 33 U. S. C.
18 §§901 *et seq.*, and the Federal Employees' Compensation Act, Chapter 81 of Title 5 of the United
19 States Code, but does not include the Federal Employers' Liability Act of April 22, 1908, 45 U. S.
20 C. §§51 *et seq.*

21 **§55-7F-4. Filing claims, establishment of prima facie case, additional required information for**

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new claims, individual actions to be filed.

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

(b) A defendant in an asbestos or silica action shall be afforded a reasonable opportunity before trial to challenge the adequacy of the prima facie evidence that the exposed person meets the requirements of this article. An asbestos or silica action shall be dismissed without prejudice upon a finding that the exposed person has failed to make the prima facie showing required by this article.

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

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

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

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

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1 is reasonably available;

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

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

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

5 (d) Asbestos and silica actions must be individually filed. No asbestos or silica action filed

6 on or after the effective date of this article shall be permitted on behalf of a group or class of

7 plaintiffs.

8 **§55-7F-5. Elements of proof for asbestos actions alleging a nonmalignant asbestos-related**
9 **condition.**

10 (a) No asbestos action related to an alleged nonmalignant asbestos-related condition may be
11 brought or maintained in the absence of prima facie evidence that the exposed person has a physical
12 impairment for which asbestos exposure was a substantial contributing factor. The plaintiff shall
13 make a prima facie showing of claim for each defendant and include a detailed narrative medical
14 report and diagnosis signed under oath by a qualified physician that includes all of the following:

15 (1) Radiological or pathological evidence of asbestosis or radiological evidence of diffuse
16 bilateral pleural thickening or a high-resolution computed tomography scan showing evidence of
17 asbestosis or diffuse pleural thickening;

18 (2) A detailed occupational and exposure history from the exposed person or, if that person
19 is deceased, from the person most knowledgeable about the exposures that form the basis of the
20 action, including identification of all of the exposed person's principal places of employment and
21 exposures to airborne contaminants and whether each place of employment involved exposures to

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1 airborne contaminants, including asbestos fibers or other disease causing dusts or fumes, that may
2 cause pulmonary impairment and the nature, duration, and level of any exposure;

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

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

8 (5) Evidence from a personal medical examination and pulmonary function testing of the
9 exposed person or, if the exposed person is deceased, from the person's medical records, that the
10 exposed person has or the deceased person had a permanent respiratory impairment rating of at least
11 Class 2 as defined by and evaluated pursuant to the AMA's Guides to the Evaluation of Permanent
12 Impairment or reported significant changes year to year in lung function for FVC, FEV1 or DLCO
13 as defined by the American Thoracic Society's Interpretative Strategies for Lung Function Tests, 26
14 European Respiratory Journal 948-68, 961-62, Table 12 (2005) and as updated;

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

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

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

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

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

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

16 **§55-7F-6. Elements of proof for silica actions alleging silicosis.**

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

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

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

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

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

14 (5) Evidence based upon a personal medical examination and pulmonary function testing of
15 the exposed person or, if the exposed person is deceased, based upon the person's medical records,
16 demonstrating that the exposed person has or the deceased person had a permanent respiratory
17 impairment rating of at least Class 2 as defined by and evaluated pursuant to the AMA's Guides to
18 the Evaluation of Permanent Impairment or reported significant changes year to year in lung function
19 for FVC, FEV1 or DLCO as defined by the American Thoracic Society's Interpretative Strategies
20 for Lung Function Tests, 26 European Respiratory Journal 948-68, 961-62, Table 12 (2005) and as
21 updated; and

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

6 **§55-7F-7. Evidence of physical impairment.**

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

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

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

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

19 **§55-7F-8. Procedures.**

20 (a) Evidence relating to the prima facie showings required under this article shall not create
21 any presumption that the exposed person has an asbestos-related or silica-related injury or

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1 impairment and shall not be conclusive as to the liability of any defendant.

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

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

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

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

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

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

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

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

20 **§55-7F-9. Statute of limitations; two-disease rule.**

21 (a) With respect to an asbestos or silica action not barred by limitations as of this article's

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1 effective date, an exposed person's cause of action shall not accrue, nor shall the running of
2 limitations commence, prior to the earlier of the date:

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

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

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

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

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

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

20 **§55-7F-10. Application.**

21 This article shall apply to all asbestos actions and silica actions filed on or after the effective

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1 date of this article.