

Senate Bill No. 56

(By Senators Jenkins, Barnes, Sybolt and Williams)

[Introduced January 12, 2011; referred to the Committee on the Judiciary; and then to the Committee on Finance.]

10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §55-7E-1, §55-7E-2,
12 §55-7E-3, §55-7E-4 and §55-7E-5, all relating to filing of
13 claims for asbestos; disclosures regarding existing and
14 anticipated claims involving asbestos bankruptcy trusts;
15 defendants' rights in asbestos action to require claimant to
16 show cause regarding additional bankruptcy trust claims;
17 certification of cause of action by court; discovery of
18 materials from bankruptcy trusts; value of trust claims;
19 sanctions for noncompliance; and rights of setoff.

20 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 and §55-7E-5, all to read as follows:

24 ARTICLE 7E. ASBESTOS CLAIMS TRANSPARENCY ACT.

1 **§55-7E-1. Short title.**

2 This article may be cited as the "Asbestos Claims Transparency
3 Act."

4 **§55-7E-2. Definitions.**

5 As used in this article terms will have the following
6 meanings:

7 (1) "Asbestos" means chrysotile, amosite, crocidolite,
8 tremolite asbestos, anthophyllite asbestos, actinolite asbestos,
9 asbestiform winchite, asbestiform richterite, asbestiform amphibole
10 minerals and any of these minerals that have been chemically
11 treated or altered, including all minerals defined as asbestos in
12 29 C.F.R. §1910 at the time an asbestos claim is made.

13 (2) "Asbestos claim" means any claim for damages, losses,
14 indemnification, contribution, restitution or other relief of
15 whatever nature, including punitive damages, arising out of, based
16 on or in any way related to the alleged health effects associated
17 with the inhalation or ingestion of asbestos, to the extent those
18 claims are recognized under state law including, but not limited
19 to:

- 20 (A) Loss of consortium;
- 21 (B) Loss of support;
- 22 (C) Personal injury or death;
- 23 (D) Mental or emotional injury;
- 24 (E) Risk or fear of disease or other injury;

1 (F) The costs of medical monitoring or surveillance; or
2 (G) Any claim made by or on behalf of any person exposed to
3 asbestos, or a representative, spouse, parent, child or other
4 relative of the exposed person.

5 The term "asbestos claim" does not include a claim for
6 compensatory benefits pursuant to a workers' compensation law or a
7 veterans' benefits program.

8 (3) "Claimant" means any party asserting an asbestos claim,
9 including a plaintiff, counterclaimant, cross-claimant or third-
10 party plaintiff; if a claim is brought through or on behalf of an
11 estate, the term includes the claimant's decedent; if a claim is
12 brought through or on behalf of a minor or incompetent, the term
13 includes the claimant's parent or guardian.

14 (4) "Exposed person" means a person whose claimed exposure to
15 asbestos is the basis for an asbestos claim.

16 (5) "Asbestos action" means any civil proceeding seeking
17 compensation directly or derivatively as a result, in whole or in
18 part, of exposure to asbestos.

19 (6) "Trust claims and claims material" means all documents and
20 information, including, but not limited to, claim forms and
21 supplementary material, relevant or related to pending or potential
22 claims against asbestos trusts.

23 (7) "Trust governance documents" means documents which
24 determine eligibility and payment levels for the asbestos trusts

1 and include trust distribution procedures, plans of reorganization
2 and related orders.

3 (8) "Asbestos trusts" means all trusts or claims facilities,
4 created as a result of bankruptcies or other settlements,
5 including, but not limited to, all trusts created pursuant to 11
6 U.S.C. §524(g), intended to provide compensation to claimants
7 alleging claims as a result of asbestos exposure.

8 **§55-7E-3. Substantive provisions.**

9 (a) *Required Disclosures.* -- For any asbestos action either
10 currently pending or filed after the effective date of this Act, no
11 later than two hundred ten days before the date set for trial for
12 the asbestos action, a claimant shall provide to all parties a
13 statement verified by his or her counsel of any and all existing or
14 anticipated claims against asbestos trusts. The statement shall
15 be in addition to any existing preliminary disclosure requirements
16 otherwise imposed by law or applicable agreement, ruling or
17 judicial order. Furthermore, the statement must include under
18 penalty of perjury an attestation by the claimant that the
19 statement is based on a good faith investigation of all potential
20 claims against asbestos trusts. Counsel must certify that he or
21 she has conducted a good faith investigation of all potential
22 claims against asbestos trusts. The statement shall also disclose
23 when the claim was or will be made and whether there has been any
24 request for deferral, delay, suspension or tolling of the asbestos

1 trust claims process. If information obtained subsequent to the
2 submission of the statement supports the filing of additional
3 claims against asbestos trusts, the claimant shall update the
4 statement by amendment filed and served within thirty days of the
5 receipt of the additional information but in no event later than
6 the date of commencement of the trial. A claimant shall also
7 produce to all parties within the time period specified in this
8 subsection in the asbestos action the following additional
9 materials:

10 (1) As to any claims already asserted against asbestos trusts,
11 the claimant must produce final executed proofs of claim together
12 with any supporting materials used to support the claim against the
13 asbestos trusts. A claimant must also produce all documents or
14 information relevant or related to the claims asserted against the
15 asbestos trusts, including, but not limited to, work histories,
16 affidavits, depositions and trial testimony of the claimant and
17 others as well as all medical documentation including, but not
18 limited to, x-rays, test results, doctors' reports and pathology
19 results.

20 (2) As to any claims that a claimant has not yet asserted
21 against the asbestos trusts but has disclosed pursuant to the
22 requirements of subdivision one regarding potential claims, all
23 materials described in subdivision one shall be produced,
24 including, at the time of its filing, the final executed proof of

1 claim.

2 (3) Claimant's asbestos action is stayed in its entirety until
3 the claimant certifies that all anticipated claims against asbestos
4 trusts have been filed and that claimant has satisfied the
5 requirements of subdivision(2), subsection (a) of this section.
6 *Provided,* That a claimant has satisfied the requirements of that
7 subdivision if an asbestos trust is not yet accepting claims and
8 the claimant so responds or if the reasonably anticipated recovery
9 from the asbestos trust claim will be exceeded by the costs of
10 filing the claim. The claimant shall provide to the defendants the
11 information necessary to support the assertion that the anticipated
12 recovery does not exceed the costs of filing the claim as part of
13 the requirements of subdivision(2), subsection (a) of this section.

14 (b) *Defendant's order to show cause regarding additional trust*
15 *claims; court certification and trust claims order.* --

16 (1) Any defendant after thirty days of receipt of the statement
17 from the claimant pursuant to subsection (a) of this section or at
18 a later date may proceed by order to show cause in the court hearing
19 the asbestos action setting forth the names of additional asbestos
20 trusts against which the plaintiff has not made, but which the
21 defendant in good faith believes the claimant can make a successful
22 claim. The order to show cause shall set forth the factual basis
23 for the claim describing the evidence sufficient to meet the
24 asbestos trust distribution procedure requirements to file valid

1 claims against the asbestos trust and the amount of money the trust
2 should pay for the claim. In response, within ten days thereafter,
3 the claimant shall:

4 (A) File the claim with the asbestos trust as set forth by the
5 defendant's notice which will be dispositive as to the order to show
6 cause as to that trust; or

7 (B) Show cause before the court hearing the asbestos action for
8 a determination that:

9 (i) The proof of claim should be modified and then submitted;

10 (ii) There is insufficient evidence to permit the claim to be
11 filed in good faith under the applicable asbestos trust distribution
12 procedures;

13 (iii) A trust is not yet receiving claims; or

14 (iv) The reasonably anticipated recovery from the asbestos
15 trust will be exceeded by the costs of filing the claim.

16 The court hearing the asbestos action shall decide the issue
17 on the basis of declarations, deposition excerpts, interrogatory
18 responses and other evidence or additional discovery as the court
19 deems appropriate. The claimant has the burden of proving that the
20 claim should be modified and then submitted or should not be filed
21 because it does not meet the asbestos trust distribution procedure
22 requirements. If the court hearing the asbestos action determines
23 that there is a good faith basis for filing the claim, the claimant
24 shall promptly file the claim with the asbestos trust as it was

1 submitted by the defendant or as modified by the court hearing the
2 asbestos action. The claimant's asbestos action is stayed until the
3 time as the claimant certifies that claimant has complied with the
4 court's order and has disclosed the materials required to be
5 disclosed by subsection (a), section four of this article. *Provided,*
6 That the court may allow an asbestos action to proceed based on the
7 rapidly deteriorating physical health of the claimant or other
8 exigent circumstances and a showing that the health or exigent
9 circumstances or conditions existed at the time the asbestos action
10 was filed and that the circumstances or conditions have made it
11 impossible for the claimant to comply with the requirements of
12 subsection (a) of this section in a timely manner.

13 (2) Not later than sixty days before the scheduled trial date
14 of an asbestos action, the court hearing the asbestos action must
15 certify in writing that the discovery described in subsection (a),
16 subdivisions(1) and (2) are complete. Furthermore, no trial date
17 may be assigned nor trial commenced absent certification of the
18 completion of discovery and a determination that all additional
19 asbestos trust claims required to be made in response to an order
20 to show cause have been submitted to the relevant asbestos trust or
21 trusts. A schedule of all asbestos trust claims made shall be
22 reflected in a "trust claims order" which must be entered no later
23 than thirty days before trial. The trust claims order is a final
24 order and may be amended only upon a showing of mistake,

1 inadvertence, surprise, excusable neglect or fraud.

2 (c) *Treatment of trust claims and claims material.* -- Trust
3 claims and claims material, as well as related discovery materials,
4 are presumptively relevant to and discoverable in an asbestos action
5 and are presumed by the court to be authentic. Notwithstanding any
6 other provision of law or agreement, trust claims and claims
7 materials are presumed to not be privileged, and the trust claims
8 and claims materials may be used by the parties in the asbestos
9 action to prove, without limitation, alternative causation for the
10 claimant's asbestos exposure as well as serve as a basis to allocate
11 responsibility for the claimant's claim. Further, any materials
12 relevant to trusts not yet accepting claims or trusts for which the
13 reasonably anticipated recovery is deemed to be exceeded by the
14 costs of filing the claim, including all information relating to the
15 exposure to the products or on premises of the bankrupt entities,
16 are discoverable and shall be made available to defendants and may
17 be used in the asbestos action to prove alternate causation for the
18 claimant's exposure as well as serve as a basis to allocate
19 responsibility for the claimants' claim.

20 (d) *Discovery of other materials.* -- In addition to the
21 mandatory disclosure requirements of this article, additional
22 disclosure and discovery of information relevant to the asbestos
23 action may be sought by any mechanism provided by the applicable
24 Rules of Civil Procedure. Defendants in an asbestos action may also

1 seek discovery from the asbestos trusts. The claimant shall assist
2 in any discovery from the asbestos trusts and provide whatever
3 consent or expression of permission may be required by the asbestos
4 trusts for release of the information and materials. Claims of
5 privilege or confidentiality, or both, by claimants will not
6 preclude discovery by defendants under this article.

7 (e) *Asbestos trust claim values.* -- If a matter proceeds to
8 trial before the claimant has received a decision from an asbestos
9 trust or trusts, the court shall establish an attributed value for
10 purposes of calculation of verdict or settlement or credits for each
11 of the claim or claims, subject to the adjustment specified in
12 subsection (h) of this section, and subject to a finding by the
13 court of the following:

14 (1) The trust is liable to the claimant for damages arising
15 out of the claimant's exposure to asbestos;

16 (2) The damages, to a reasonable degree of certainty, will be
17 paid to the claimant; and

18 (3) The amount of damages to be paid by the trust to the
19 claimant is readily reducible to a sum certain.

20 (f) *Sanctions for noncompliance.* -- Failure by a claimant to
21 comply with the discovery requirements outlined in this article is
22 a basis for sanctions against the claimant, including, at the
23 discretion of the court, upon a finding that the claimant willfully
24 failed to comply with the requirements of this article, dismissal

1 of the asbestos action with prejudice.

2 (g) Set-offs and Assignments. -- The defendants will be
3 entitled to set-offs or credits of the full value of the trust
4 claims against any judgment rendered against them in the asbestos
5 action. If a judgment is rendered in an asbestos action before a
6 claimant has received a decision from an asbestos trust or trusts
7 and the attributed value of the claim cannot be established in
8 accordance with subsection (e) of this section, the claimant shall
9 assign to all defendants against whom the judgment is rendered his
10 or her rights to all the claims and the claimant shall cooperate
11 with and assist the defendants in obtaining damages due and owing
12 to claimant from each asbestos trust. It shall be the intention of
13 the claimant and of the court that any defendant's claim filed with
14 any asbestos trust will be treated exactly as if the claimant had
15 submitted the claim for any and all purposes under the terms,
16 conditions and provisions of the trust claim procedures. If a
17 codefendant settles or otherwise resolves the asbestos claims
18 against it before a verdict is rendered, and if a release or
19 releases are obtained for the benefit of asbestos trusts, the
20 defendants remaining in the asbestos action may pursue those claims
21 by assignment according to whatever rights were held by claimants.
22 To the extent that any applicable law provides broader relief to the
23 defendants than is set forth herein, nothing in this provision
24 prohibits any defendant from pursuing that broader relief.

1 **§55-7E-4. Severability.**

2 The provisions of this article are severable. If any portion
3 of this article is declared unconstitutional or the application of
4 any part of this article to any person or circumstance is held
5 invalid, the remaining portions of the article and their
6 applicability to any person or circumstance remain valid and
7 enforceable.

8 **§55-7E-5. Effective date.**

9 This article applies to all asbestos claims filed on or after
10 the effective date. This article also applies to any pending
11 asbestos claims in which trial has not commenced as of the effective
12 date.

NOTE: The purpose of this bill is to establish a procedure that requires a claimant that files an asbestos case after the effective date of this bill to provide information to all defendants about all claims filed or anticipated to be filed by that claimant against asbestos bankruptcy trusts, a mechanism for the defendant to challenge those claims, a procedure for sanctions by the court, and for set-offs for those claims.

This article is new; therefore, strike-throughs and underscoring have been omitted.