

ENGROSSED  
COMMITTEE SUBSTITUTE  
FOR

**Senate Bill No. 411**

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

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

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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.

[ENG. COM. SUB. FOR S. B. NO. 411]

*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- and  
11 medium-sized companies, in industries that cover eighty-five percent of the United States economy;

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

[ENG. COM. SUB. FOR S. B. NO. 411]

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

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

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

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

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

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

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

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

16 **§55-7E-3. Definitions.**

17 For the purpose of this article:

18 (1) "Asbestos action" means a claim for damages or other civil or equitable relief presented in  
19 a civil action arising out of, based on or related to the health effects of exposure to asbestos, including  
20 loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury,  
21 costs of medical monitoring or surveillance and any other derivative claim made by or on behalf of a  
22 person exposed to asbestos or a representative, spouse, parent, child or other relative of that person.

[ENG. COM. SUB. FOR S. B. NO. 411]

1 The term does not include a claim for compensatory benefits pursuant to workers' compensation law  
2 or for veterans' benefits, or the Federal Employees Liability Act, 45 U. S. C. §51 *et seq.*

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

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

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

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

19 **§55-7E-4. Required disclosures by plaintiff.**

20 (a) For each asbestos action filed in this state, the plaintiff shall provide all parties with a sworn  
21 statement identifying all asbestos trust claims that have been filed by the plaintiff or by anyone on the  
22 plaintiff's behalf, including claims with respect to asbestos-related conditions other than those that are

[ENG. COM. SUB. FOR S. B. NO. 411]

1 the basis for the asbestos action or that potentially could be filed by the plaintiff against an asbestos  
2 trust. The sworn statement shall be provided no later than one hundred twenty days prior to the date set  
3 for trial for the asbestos claim. For each asbestos trust claim or potential asbestos trust claim identified  
4 in the sworn statement, the statement shall include the name, address and contact information for the  
5 asbestos trust, the amount claimed or to be claimed by the plaintiff, the date the plaintiff filed the claim,  
6 the disposition of the claim and whether there has been a request to defer, delay, suspend or toll the  
7 claim. The sworn statement shall include an attestation from the plaintiff, under penalties of perjury,  
8 that the sworn statement is complete and is based on a good faith investigation of all potential claims  
9 against asbestos trusts.

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

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

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

20 **§55-7E-5. Discovery; use of materials.**

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

[ENG. COM. SUB. FOR S. B. NO. 411]

1 trust governance documents.

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

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

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

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

14 **§55-7E-7. Identification of additional or alternative asbestos trusts by defendant.**

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

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

[ENG. COM. SUB. FOR S. B. NO. 411]

1 responses:

2 (1) File the asbestos trust claim;

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

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

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

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

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

19 **§55-7E-8. Valuation of asbestos trust claims; judicial notice.**

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

22 (b) Trust claim materials that are sufficient to entitle a claim to consideration for payment under

[ENG. COM. SUB. FOR S. B. NO. 411]

1 the applicable trust governance documents may be sufficient to support a jury finding that the plaintiff  
2 may have been exposed to products for which the trust was established to provide compensation and  
3 that such exposure may be a substantial factor in causing the plaintiff's injury that is at issue in the  
4 asbestos action.

5 **§55-7E-9. Setoff; credit.**

6 In any asbestos action in which damages are awarded, a defendant is entitled to a setoff or credit  
7 in the amount of the valuation established under the applicable trust governance documents, including  
8 payment percentages for trust claims pending at trial and any amount the plaintiff has been awarded  
9 from an asbestos trust claim that has been identified at the time of trial. If multiple defendants are found  
10 liable for damages, the court shall distribute the amount of setoff or credit proportionally between the  
11 defendants, according to the liability of each defendant.

12 **§55-7E-10. Failure to provide information; sanctions.**

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

16 **§55-7E-11. Application.**

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

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

20 **§55-7F-1. Short title.**

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

22 **§55-7F-2. Findings and purpose.**



[ENG. COM. SUB. FOR S. B. NO. 411]

1 (a) The West Virginia Legislature finds that:

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

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

7 (3) Exposure to asbestos has been associated with various types of cancer, including  
8 mesothelioma and lung cancer, as well as nonmalignant conditions such as asbestosis and diffuse  
9 pleural thickening;

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

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

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

16 (7) The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598  
17 (1997), described the asbestos litigation as a crisis;

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

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

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

**[ENG. COM. SUB. FOR S. B. NO. 411]**

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

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

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

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

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

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

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

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

[ENG. COM. SUB. FOR S. B. NO. 411]

1 and

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

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

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

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

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

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

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

16 **§55-7F-3. Definitions.**

17 For the purpose of this article:

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

21 (2) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos,  
22 actinolite asbestos, asbestiform winchite, asbestiform richterite, asbestiform amphibole minerals and

[ENG. COM. SUB. FOR S. B. NO. 411]

1 any of these minerals that have been chemically treated or altered, including all minerals defined as  
2 asbestos in 29 CFR §1910 at the time an asbestos action is filed.

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

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

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

17 (6) "Board-certified in occupational medicine" means a physician who is certified in the  
18 subspecialty of occupational medicine by the American Board of Preventive Medicine or the American  
19 Osteopathic Board of Preventive 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 (7) "Board-certified in pathology" means a physician who holds primary certification in  
22 anatomic pathology or clinical pathology from the American Board of Pathology or the American

[ENG. COM. SUB. FOR S. B. NO. 411]

1 Osteopathic Board of Pathology, whose certification was current at the time of the performance of any  
2 examination and rendition of any report required by this Act, and whose professional practice is  
3 principally in the field of pathology and involves regular evaluation of pathology materials obtained  
4 from surgical or postmortem specimens.

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

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

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

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

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

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

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

[ENG. COM. SUB. FOR S. B. NO. 411]

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

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

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

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

14 (19) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist  
15 that more than one representative section of lung tissue uninvolved with any other disease process  
16 demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic  
17 asbestos bodies graded 1(B) or higher under the criteria published in Asbestos-Associated Diseases, 106  
18 Archive of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982), or grade one or  
19 higher in Pathology of Asbestosis, 134 Archive of Pathology and Laboratory Medicine 462-80 (March  
20 2010) (Tables 2 and 3), or as amended at the time of the exam, and there is no other more likely  
21 explanation for the presence of the fibrosis.

22 (20) "Pathological evidence of silicosis" means a statement by a board-certified pathologist that

[ENG. COM. SUB. FOR S. B. NO. 411]

1 more than one representative section of lung tissue uninvolved with any other disease process  
2 demonstrates complicated silicosis with characteristic confluent silicotic nodules or lesions equal to or  
3 greater than one centimeter and birefringent crystals or other demonstration of crystal structures  
4 consistent with silica (well-organized concentric whorls of collagen surrounded by inflammatory cells)  
5 in the lung parenchyma and no other more likely explanation for the presence of the fibrosis exists, or  
6 acute silicosis with characteristic pulmonary edema, interstitial inflammation, and the accumulation  
7 within the alveoli of proteinaceous fluid rich in surfactant.

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

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

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

19 (24) "Pulmonary function test" means spirometry, lung volume testing and diffusion capacity  
20 testing, including appropriate measurements, quality control data and graphs, performed in accordance  
21 with the methods of calibration and techniques provided in the applicable AMA Guides to the  
22 Evaluation of Permanent Impairment and all standards provided in the Official Statements of the

[ENG. COM. SUB. FOR S. B. NO. 411]

1 American Thoracic Society in effect on the day pulmonary function testing of the exposed person was  
2 conducted.

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

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

12 (B) The physician has treated or is treating the exposed person, and has or had a doctor-patient  
13 relationship with the exposed person at the time of the physical examination or, in the case of a  
14 board-certified pathologist, examined tissue samples or pathological slides of the exposed person;

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

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

21 (26) "Radiological evidence of asbestosis" means a quality 1 or 2 chest x-ray under the ILO  
22 system, showing bilateral small, irregular opacities (s, t or u) occurring primarily in the lower lung zones



[ENG. COM. SUB. FOR S. B. NO. 411]

1 graded by a certified B-reader as at least 1/0 on the ILO scale.

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

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

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

12 (30) "Silica action" means a claim for damages or other civil or equitable relief presented in a  
13 civil action arising out of, based on or related to the health effects of exposure to silica, including loss  
14 of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs  
15 of medical monitoring or surveillance and any other derivative claim made by or on behalf of a person  
16 exposed to silica or a representative, spouse, parent, child or other relative of that person. The term  
17 does not include a claim for compensatory benefits pursuant to workers' compensation law or veterans'  
18 benefits, or claims brought by a person as a subrogee by virtue of the payment of benefits under a  
19 workers' compensation law. The term does not include any administrative claim or civil action related  
20 to coal workers' pnuemoconiosis.

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

[ENG. COM. SUB. FOR S. B. NO. 411]

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

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

6 (A) Handled raw asbestos fibers;

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

9 (C) Altered, repaired, or otherwise worked with an asbestos-containing product in a manner that  
10 exposed the person on a regular basis to asbestos; or

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

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

17 (A) Handled silica;

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

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

22 (D) Worked in close proximity to other workers engaged in any of the activities described in

[ENG. COM. SUB. FOR S. B. NO. 411]

1 paragraph (A), (B) or (C) of this subdivision in a manner that exposed the person on a regular basis to  
2 silica.

3 (35) "Supporting test results" means copies of the following documents and images:

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

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

9 (C) Reports of x-ray examinations;

10 (D) Diagnostic imaging of the chest;

11 (E) Pathology reports; and

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

14 (36) "Timed gas dilution" means a method for measuring total lung capacity in which the subject  
15 breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific  
16 time, and the concentration of that inert and insoluble gas in the lung is compared to the concentration  
17 of that type of gas in the spirometer.

18 (37) "Total lung capacity" means the volume of gas contained in the lungs at the end of a  
19 maximal inspiration.

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

22 (39) "Workers' compensation law" means a law relating to a program administered by the United

[ENG. COM. SUB. FOR S. B. NO. 411]

1 States or a state to provide benefits, funded by a responsible employer or its insurance carrier, for  
2 occupational diseases or injuries or for disability or death caused by occupational diseases or injuries.  
3 The term includes the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §§901 *et seq.*,  
4 and the Federal Employees' Compensation Act, Chapter 81 of Title 5 of the United States Code, but  
5 does not include the Federal Employers' Liability Act of April 22, 1908, 45 U. S. C. §§51 *et seq.*

6 **§55-7F-4. Filing claims, establishment of a prima facie case, additional required information for**  
7 **new nonmalignant claims, individual actions to be filed.**

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

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

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

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

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

[ENG. COM. SUB. FOR S. B. NO. 411]

1 is alleged;

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

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

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

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

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

12 **§55-7F-5. Elements of proof for asbestos actions alleging a nonmalignant asbestos-related**  
13 **condition.**

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

19 (1) Radiological or pathological evidence of asbestosis or radiological evidence of diffuse  
20 bilateral pleural thickening or a high-resolution computed tomography scan showing evidence of  
21 asbestosis or diffuse pleural thickening;

22 (2) A detailed occupational and exposure history from the exposed person or, if that person is

[ENG. COM. SUB. FOR S. B. NO. 411]

1 deceased, from the person most knowledgeable about the exposures that form the basis of the action,  
2 including identification of all of the exposed person's principal places of employment and exposures  
3 to airborne contaminants and whether each place of employment involved exposures to airborne  
4 contaminants, including asbestos fibers or other disease causing dusts or fumes, that may cause  
5 pulmonary impairment and the nature, duration, and level of any exposure;

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

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

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

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

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

[ENG. COM. SUB. FOR S. B. NO. 411]

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

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

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

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

18 **§55-7F-6. Elements of proof for silica actions alleging silicosis.**

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

[ENG. COM. SUB. FOR S. B. NO. 411]

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

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

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

14 (5) Evidence based upon a personal medical examination and pulmonary function testing of the  
15 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 the  
18 Evaluation of Permanent Impairment or reported significant changes year to year in lung function for  
19 FVC, FEV1 or DLCO as defined by the American Thoracic Society's Interpretative Strategies for Lung  
20 Function Tests, 26 European Respiratory Journal 948-68, 961-62, Table 12 (2005) and as updated; and

21 (6) The specific conclusion of the qualified physician signing the report that exposure to silica  
22 was a substantial contributing factor to the exposed person's physical impairment and not more probably



[ENG. COM. SUB. FOR S. B. NO. 411]

1 the result of other causes. An opinion stating that the medical findings and impairment are consistent  
2 with or compatible with exposure to silica, or words to that effect, do not satisfy the requirements of  
3 this subdivision.

4 **§55-7F-7. Evidence of physical impairment.**

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

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

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

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

16 **§55-7F-8. Procedures.**

17 (a) Evidence relating to the prima facie showings required under this article shall not create any  
18 presumption that the exposed person has an asbestos-related or silica-related injury or impairment and  
19 shall not be conclusive as to the liability of any defendant.

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

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

[ENG. COM. SUB. FOR S. B. NO. 411]

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

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

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

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

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

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

16 **§55-7F-9. Statute of limitations; two-disease rule.**

17 (a) With respect to an asbestos or silica action not barred by limitations as of this article's  
18 effective date, an exposed person's cause of action shall not accrue, nor shall the running of limitations  
19 commence, prior to the earlier of the date:

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

22 (2) The exposed person discovered facts that would have led a reasonable person to obtain a

[ENG. COM. SUB. FOR S. B. NO. 411]

1 medical diagnosis with respect to the existence of an asbestos-related impairment or silica-related  
2 impairment; or

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

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

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

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

15 **§55-7F-10. Application.**

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