

Senate Bill No. 411

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

[Introduced February 4, 2015; referred to the Committee on the Judiciary.]

**FISCAL
NOTE**

9 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
10 designated §55-7E-1, §55-7E-2, §55-7E-3, §55-7E-4, §55-7E-5, §55-7E-6, §55-7E-7,
11 §55-7E-8, §55-7E-9, §55-7E-10 and §55-7E-11; and that said code be amended by adding
12 thereto a new article, designated §55-7F-1, §55-7F-2, §55-7F-3, §55-7F-4, §55-7F-5,
13 §55-7F-6, §55-7F-7, §55-7F-8, §55-7F-9, §55-7F-10, §55-7F-11, §55-7F-12, §55-7F-13,
14 §55-7F-14, §55-7F-15, §55-7F-16 and §55-7F-17, all relating to procedures for determining
15 liability for exposures to asbestos or silica; setting forth findings and purposes; setting forth
16 definitions; requiring disclosures of existing and potential asbestos bankruptcy trust claims;
17 establishing legal standards and procedures for the handling of asbestos claims; providing
18 for sanctions; establishing procedures for set offs and credits; establishing medical criteria
19 procedures for asbestos and silica claims; providing for statute of limitations standards and
20 other limitations on liability; and providing for applicability to existing and future asbestos
21 and silica claims.

1 *Be it enacted by the Legislature of West Virginia:*

2 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
3 article, designated §55-7E-1, §55-7E-2, §55-7E-3, §55-7E-4, §55-7E-5, §55-7E-6, §55-7E-7,
4 §55-7E-8, §55-7E-9, §55-7E-10 and §55-7E-11; and that said code be amended by adding thereto
5 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,
6 §55-7F-8, §55-7F-9, §55-7F-10, §55-7F-11, §55-7F-12, §55-7F-13, §55-7F-14, §55-7F-15,
7 §55-7F-16 and §55-7F-17, all to read as follows:

8 **ARTICLE 7E. ASBESTOS BANKRUPTCY TRUST CLAIMS TRANSPARENCY ACT.**

9 **§55-7E-1. Short title.**

10 This article shall be known and may be cited as the "Asbestos Bankruptcy Trust Claims
11 Transparency Act."

12 **§55-7E-2. Findings and purpose.**

13 (a) The West Virginia Legislature finds that:

14 (1) The United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598
15 (1997) described the asbestos litigation as a "crisis";

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

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

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

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

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

8 (7) An absence of transparency between the asbestos bankruptcy trust claim system and the
9 civil court systems has resulted in the suppression of evidence in asbestos actions and potential
10 fraud. *See, e.g.,* In re Garlock Sealing Techs., LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2014);

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

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

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

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

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

20 **§55-7E-3. Definitions.**

21 For the purpose of this article:

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

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

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 conditions other than those that are the basis
7 for the asbestos action, or that potentially could be filed by the plaintiff against an asbestos trust. For
8 an asbestos action that has been filed prior to the effective date of this article, the plaintiff shall
9 provide the sworn statement within thirty days of the effective date of this article. For an action filed
10 on or after the effective date of this article, the sworn statement shall be provided within thirty days
11 of filing the action. For each asbestos trust claim or potential asbestos trust claim identified in the
12 sworn statement, the statement shall include the name, address, and contact information for the
13 asbestos trust, the amount claimed or to be claimed by the plaintiff, the date the plaintiff filed the
14 claim, the disposition of the claim, and whether there has been a request to defer, delay, suspend, or
15 toll the claim. The sworn statement shall include an attestation from the plaintiff, under penalties
16 of perjury, that the sworn statement is complete and is based on an investigation of all potential
17 claims against asbestos trusts.

18 (b) The plaintiff shall provide to all parties all trust claims materials for each trust claim that
19 has been filed by the plaintiff or by anyone on the plaintiff's behalf against an asbestos trust,
20 including with respect to conditions other than those that are the basis for the asbestos action.

21 (c) The plaintiff shall supplement the information and materials provided pursuant to this

1 section within thirty days after the plaintiff files an additional asbestos trust claim, supplements an
2 existing trust claim, or receives additional information or materials related to any claim or potential
3 claim against an asbestos trust.

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

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

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

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

15 **§55-7E-6. Scheduling trial; stay of action.**

16 (a) A court may not schedule an asbestos action for trial until at least one hundred eighty days
17 after the plaintiff makes the disclosures required under section four of this article.

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

1 **§55-7E-7. Identification of additional or alternative asbestos trusts by defendant.**

2 (a) Not less than seventy-five days before trial, if a defendant identifies an asbestos trust
3 claim not previously identified by the plaintiff that the defendant reasonably believes the plaintiff
4 can file, the defendant may move the court for an order to require the plaintiff to file the asbestos
5 trust claim. The defendant shall produce or describe the documentation it possesses or is aware of
6 in support of the motion.

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

10 (1) File the asbestos trust claim;

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

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

16 (c) (1) If the court determines that there is a sufficient basis for the plaintiff to file the trust
17 claim identified by a defendant, the court shall order the plaintiff to file the trust claim and shall stay
18 the asbestos action until the plaintiff files the trust claim and provides all parties with all trust claims
19 materials.

20 (2) If the court determines that the plaintiff's expenses or attorney's fees and expenses to
21 prepare and file the trust claim identified in the defendant's motion exceed the plaintiff's reasonably

1 anticipated recovery from the trust, the court shall stay the asbestos action until the plaintiff files
2 with the court and provides all parties with a verified statement of the plaintiff's history of exposure,
3 usage, or other connection to asbestos covered by the trust.

4 (d) Not less than sixty days after the plaintiff provides the documentation required under this
5 section, the court may schedule the plaintiff's asbestos action for trial.

6 (e) 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, there is a rebuttable presumption that the plaintiff is entitled to, and will receive, the
12 compensation specified in the trust governance document applicable to his or her claim at the time
13 of trial. The court shall take judicial notice that the trust governance document specifies
14 compensation amounts and payment percentages and shall establish an attributed value to the
15 plaintiff's asbestos trust claims.

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

21 **§55-7E-9. Setoff; credit.**

1 In any asbestos action in which damages are awarded, a defendant is entitled to a setoff or
2 credit in the amount of the valuation established under section eight of this article and any amount
3 the plaintiff has been awarded from an asbestos trust identified in subsection (e) of section seven of
4 this article. If multiple defendants are found liable for damages, the court shall distribute the amount
5 of setoff or credit proportionally between the defendants, according to the liability of each defendant.

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

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

10 **§55-7E-11. Application.**

11 The provisions of this article apply to all asbestos actions filed on or after the effective date
12 of this article and to any pending asbestos actions in which trial has not commenced as of the
13 effective date of this article.

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

15 **§55-7F-1. Short title.**

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

18 **§55-7F-2. Findings and purpose.**

19 (a) The West Virginia Legislature finds that:

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

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

4 (3) Long-term exposure to asbestos has been associated with various types of cancer,
5 including mesothelioma and lung cancer, as well as nonmalignant conditions such as asbestosis and
6 diffuse pleural thickening;

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

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

12 (6) Over the years, West Virginia courts have been "deluged with asbestos lawsuits." State
13 ex rel. Allman v. MacQueen, 209 W. Va. 726, 731, 551 S.E.2d 369, 374 (2001).

14 (7) The United States Supreme Court in Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598
15 (1997), described the asbestos litigation as a "crisis";

16 (8) Lawyer-sponsored X-ray screenings have been used to amass large numbers of claims by
17 unimpaired plaintiffs;

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

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

21 (11) These bankruptcies have resulted in a search for more solvent companies, resulting in

1 over eight thousand five hundred companies being named as asbestos defendants, including many
2 small- and medium-sized companies, in industries that cover eighty-five percent of the United States
3 economy;

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

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

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

11 (15) Silica screening processes have been found subject to substantial abuse and potential
12 fraud. See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005);

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

17 (17) Concerns about statutes of limitations and available funds can prompt unimpaired
18 asbestos 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

1 to plaintiffs and defendants, and encourage the filing of cases by unimpaired asbestos and silica
2 plaintiffs; and

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

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

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

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

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

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

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

17 **§55-7F-3. Definitions.**

18 For the purpose of this article:

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

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

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

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

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

19 (6) "Board-certified in occupational medicine" means a physician who is certified in the
20 subspecialty of occupational medicine by the American Board of Preventive Medicine or the
21 American Osteopathic Board of Preventive Medicine and whose certification was current at the time

1 of the performance of any examination and rendition of any report required by this article.

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

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

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

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

21 (11) "Certified industrial hygienist" means an industrial hygienist having attained the status

1 of diplomat of the American Academy of Industrial Hygiene subject to compliance with
2 requirements established by the American Board of Industrial Hygiene.

3 (12) "Certified safety professional" means a person who meets all requirements established
4 by the Board of Certified Safety Professionals and is authorized to use the Certified Safety
5 Professional title or the CSP designation.

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

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

10 (15) "Exposed person" means a person whose exposure to asbestos or silica or to
11 asbestos-containing or silica-containing products is the basis for an asbestos or silica action.

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

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

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

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

21 (20) "Lung cancer" means a malignant tumor, diagnosed by a board-certified pathologist or

1 oncologist, in which the primary site of origin is inside the lungs.

2 (21) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura,
3 peritoneum, or pericardium which has been diagnosed by a board-certified pathologist or oncologist
4 using standardized and accepted criteria of microscopic morphology or appropriate
5 immunohistochemical staining techniques.

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

8 (23) "Nonsmoker" means a person who has not smoked cigarettes or used any tobacco
9 products on a consistent and frequent basis within the last fifteen years preceding the day of
10 diagnosis of an asbestos-related or silica-related disease through the present date.

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

17 (25) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist
18 that more than one representative section of lung tissue uninvolved with any other disease process
19 demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic
20 asbestos bodies graded 1(B) or higher under the criteria published in Asbestos-Associated Diseases,
21 106 Archive of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982), or grade one

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

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

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

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

18 (29) "Premises owner" means a person, firm, or organization that owns, in whole or in part,
19 leases, rents, maintains, or controls privately owned lands or waters, or any buildings and structures
20 on those lands or waters, and all privately owned or state-owned lands or waters leased to a private
21 person, firm, or organization, including any buildings and structures on those lands or waters.

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

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

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

17 (A) The physician has conducted a physical examination of the exposed person and has taken
18 or has directed to be taken under his or her supervision, direction and control, a detailed
19 occupational, exposure, medical, smoking and social history from the exposed person, or if the
20 exposed person is deceased, the physician has reviewed the pathology material and has taken or has
21 directed to be taken under his or her supervision, direction and control, a detailed history from the

1 person most knowledgeable about the information forming the basis of the asbestos or silica action;

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

6 (C) The physician spends no more than ten percent of his or her professional practice time
7 providing consulting or expert services in actual or potential civil actions, and whose medical group,
8 professional corporation, clinic, or other affiliated group earns not more than twenty percent of its
9 revenue providing such services;

10 (D) The physician was licensed to practice on the date any examination or pulmonary
11 function testing was conducted, and actively practices or practiced in the state where the exposed
12 person resided at the time of the examination;

13 (E) The physician received or is receiving payment for the treatment of the exposed person
14 from the exposed person, a member of the exposed person's family, or the exposed person's health
15 care plan and not the exposed person's lawyer or law firm;

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

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

1 that was conducted without establishing a doctor-patient relationship with the exposed person or
2 medical personnel involved in the examination, test, or screening process, or that required the
3 exposed person to agree to retain the legal service of a law firm.

4 (33) "Radiological evidence of asbestosis" means a quality 1 chest x-ray under the ILO
5 system, or a quality 2 chest x-ray in a death case when no pathology or quality 1 chest x-ray is
6 available, showing bilateral small, irregular opacities (s, t, or u) occurring primarily in the lower lung
7 zones graded by a certified B-reader as at least 1/1 on the ILO scale.

8 (34) "Radiological evidence of diffuse bilateral pleural thickening" means a quality 1 chest
9 x-ray under the ILO system, or a quality 2 chest x-ray in a death case when no pathology or quality
10 1 chest x-ray is available, showing diffuse bilateral pleural thickening of at least b2 on the ILO scale
11 and blunting of at least one costophrenic angle as classified by a certified B-reader.

12 (35) "Radiological evidence of silicosis" means a quality 1 chest x-ray under the ILO system,
13 or a quality 2 chest x-ray in a death case when no pathology or quality 1 chest x-ray is available,
14 showing bilateral predominantly nodular or rounded opacities (p, q, or r) occurring primarily in the
15 upper lung fields graded by a certified B-reader as at least 1/1 on the ILO scale or A, B, or C sized
16 opacities representing complicated silicosis or acute silicosis with characteristic pulmonary edema,
17 interstitial inflammation, and the accumulation within the alveoli of proteinaceous fluid rich in
18 surfactant.

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

21 (37) "Silica action" means a claim for damages or other civil or equitable relief presented in

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

8 (38) "Silicosis" means simple silicosis, acute silicosis, accelerated silicosis, or chronic
9 silicosis caused by the inhalation of respirable silica.

10 (39) "Smoker" means a person who has smoked cigarettes or used any tobacco products on
11 a consistent and frequent basis during the fifteen years preceding the day of diagnosis through the
12 present date.

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

15 (41) "Substantial occupational exposure to asbestos" means employment of a cumulative
16 period of ten years or more in an industry and occupation in which, for a substantial portion of a
17 normal work year for that industry and occupation, 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

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 clauses (A), (B) or (C) of this subdivision in a manner that exposed the person on a regular basis
4 to asbestos.

5 (42) "Substantial occupational exposure to silica" means employment of a cumulative period
6 of five years or more in an industry and occupation in which, for a substantial portion of a normal
7 work year for that industry and occupation, 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 clauses (A), (B) or (C) of this subdivision in a manner that exposed the person on a regular basis
15 to silica.

16 (43) "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;

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

12 (46) "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 (47) "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.C.
20 §§ 51 et seq.

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

1 **new claims, individual actions to be filed.**

2 (a) A plaintiff in an asbestos or silica action shall file with the complaint or other initial
3 pleading a detailed narrative medical report and diagnosis, signed under oath by a qualified physician
4 and accompanied by supporting test results, constituting prima facie evidence that the exposed
5 person meets the requirements of this article. The report shall not be prepared by a lawyer or person
6 working for or on behalf of a lawyer or law firm. For an asbestos or silica action pending on the
7 effective date of this article, the detailed narrative medical report and diagnosis and supporting test
8 results shall be provided to all parties not later than ninety days after the effective date of this article
9 or not later than ninety days before trial, whichever is earlier.

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

14 (c) A plaintiff in an asbestos or silica action filed on or after the effective date of this article
15 shall also include a sworn information form containing all of the following:

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

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

20 (3) The specific location and manner of each alleged exposure, including the specific location
21 and manner of exposure for any person through which the exposed person alleges exposure; the

1 beginning and ending dates of each alleged exposure; and the identity of the manufacturer of the
2 specific asbestos or silica product for each exposure;

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

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

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

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

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

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

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

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

1 exposures to airborne contaminants and whether each place of employment involved exposures to
2 airborne contaminants, including asbestos fibers or other disease causing dusts or fumes, that may
3 cause pulmonary impairment and the nature, duration, and level of any exposure;

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

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

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

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

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

21 (B) Total lung capacity, by plethysmography or timed gas dilution, below the predicted lower

1 limit of normal; or

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

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

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

16 **§55-7F-6. Elements of proof for asbestos actions alleging asbestos-related lung cancer.**

17 No asbestos action related to alleged asbestos-related lung cancer may be brought or
18 maintained in the absence of prima facie evidence that the exposed person has a primary lung cancer
19 for which exposure to asbestos was a substantial contributing factor. The plaintiff shall make a
20 prima facie showing of claim for each defendant and include a detailed narrative medical report and
21 diagnosis signed under oath by a qualified physician, who is board-certified in pathology, pulmonary

1 medicine or oncology, that includes all of the following:

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

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

11 (3) Evidence verifying that the exposed person has a primary lung cancer, including
12 pathological evidence of the presence of a primary lung cancer if the diagnosis is made by a qualified
13 physician who is board-certified in pulmonary medicine;

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

16 (5) (A) If the exposed person is a nonsmoker, radiological or pathological evidence of
17 asbestosis or radiological evidence of diffuse bilateral pleural thickening or a high-resolution
18 computed tomography scan showing evidence of asbestosis or diffuse bilateral pleural thickening
19 or substantial occupational exposure to asbestos or exposure to asbestos at least equal to twenty-five
20 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically
21 valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified

1 safety professional based upon all reasonably available quantitative air monitoring data and all other
2 reasonably available information concerning occupational and exposure history;

3 (B) If the exposed person is a smoker, radiological or pathological evidence of asbestosis or
4 radiological evidence of diffuse bilateral pleural thickening or a high-resolution computed
5 tomography scan showing evidence of asbestosis or diffuse bilateral pleural thickening and
6 substantial occupational exposure to asbestos or exposure to asbestos at least equal to twenty-five
7 fiber per cc years as determined to a reasonable degree of scientific probability by a scientifically
8 valid retrospective exposure reconstruction conducted by a certified industrial hygienist or certified
9 safety professional based upon all reasonably available quantitative air monitoring data and all other
10 reasonably available information concerning occupational and exposure history; or

11 (C) If the alleged asbestos-related lung cancer is a result of the plaintiff living with or having
12 extended contact with another exposed person, the exposed person shall confirm radiological or
13 pathological evidence of asbestosis or radiological evidence of diffuse bilateral pleural thickening
14 or a high-resolution computed tomography scan showing evidence of asbestosis or diffuse bilateral
15 pleural thickening and substantial occupational exposure to asbestos by the other exposed person
16 during the relevant time period or exposure to asbestos at least equal to twenty-five fiber per cc years
17 as determined to a reasonable degree of scientific probability by a scientifically valid retrospective
18 exposure reconstruction conducted by a certified industrial hygienist or certified safety professional
19 based upon all reasonably available quantitative air monitoring data and all other reasonably
20 available information concerning occupational and exposure history; and

21 (6) The specific conclusion of the qualified physician signing the report that exposure to

1 asbestos was a substantial contributing factor to the lung cancer of the exposed person and not more
2 probably the result of other causes. An opinion stating that the medical findings and lung cancer are
3 "consistent with" or "compatible with" exposure to asbestos, or words to that effect, do not satisfy
4 the requirements of this subdivision.

5 **§55-7F-7. Elements of proof for asbestos actions alleging asbestos-related cancer of the**
6 **larynx, pharynx or esophagus.**

7 No asbestos action related to an alleged asbestos-related cancer of the larynx, pharynx, or
8 esophagus may be brought or maintained in the absence of prima facie evidence that the exposed
9 person has a primary cancer of the larynx, pharynx, or esophagus for which exposure to asbestos was
10 a substantial contributing factor. The plaintiff shall make a prima facie showing of claim for each
11 defendant and include a detailed narrative medical report and diagnosis signed under oath by a
12 qualified physician, who is board-certified in pathology or oncology, gastroenterology or
13 otolaryngology, as appropriate for the type of cancer claimed, that includes all of the following:

14 (1) A detailed occupational and exposure history from the exposed person or, if that person
15 is deceased, from the person most knowledgeable about the exposures that form the basis of the
16 action, including identification of all of the principal places of employment and exposures to
17 airborne contaminants and whether each place of employment involved exposures to airborne
18 contaminants, including asbestos fibers or other disease causing dusts or fumes, that may cause
19 cancer and the nature, duration, and level of any exposure;

20 (2) A detailed medical, social, and smoking history from the exposed person or, if that person
21 is deceased, from the person most knowledgeable, including a thorough review of the past and

1 present medical problems of the exposed person and their most probable cause;

2 (3) Evidence verifying that the exposed person has a primary cancer of the larynx, pharynx
3 or esophagus;

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

6 (5) Radiological or pathological evidence of asbestosis or radiological evidence of diffuse
7 bilateral pleural thickening or a high-resolution computed tomography scan showing evidence of
8 asbestosis or diffuse bilateral pleural thickening and substantial occupational exposure or exposure
9 to asbestos at least equal to twenty-five fiber per cc years as determined to a reasonable degree of
10 scientific probability by a scientifically valid retrospective exposure reconstruction conducted by a
11 certified industrial hygienist or certified safety professional based upon all reasonably available
12 quantitative air monitoring data and all other reasonably available information concerning the
13 occupational and exposure history of the exposed person;

14 (6) If the alleged asbestos-related cancer of the larynx, pharynx, or esophagus is a result of
15 the exposed person living with or having extended contact with another exposed person, the exposed
16 person shall confirm substantial occupational exposure to asbestos by the other exposed person
17 during the relevant time period or exposure to asbestos at least equal to twenty-five fiber per cc years
18 as determined to a reasonable degree of scientific probability by a scientifically valid retrospective
19 exposure reconstruction conducted by a certified industrial hygienist or certified safety professional
20 based upon all reasonably available quantitative air monitoring data and all other reasonably
21 available information concerning occupational and exposure history; and

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

6 **§55-7F-8. Elements of proof for asbestos actions alleging mesothelioma.**

7 No asbestos action related to alleged mesothelioma may be brought or maintained in the
8 absence of prima facie evidence that the exposed person has mesothelioma for which exposure to
9 asbestos was a substantial contributing factor. The plaintiff shall make a prima facie showing of
10 claim for each defendant and shall include a medical report and diagnosis signed under oath by a
11 qualified physician, who is board-certified in pathology, pulmonary medicine or oncology, that
12 includes all of the following:

13 (1) Evidence verifying that the exposed person has mesothelioma, including pathological
14 evidence of the presence of a mesothelioma if the diagnosis is made by a qualified physician who
15 is board-certified in pulmonary medicine; and

16 (2) Evidence of substantial occupational exposure to asbestos or exposure to asbestos from
17 living with or having extended contact with a person with substantial occupational exposure to
18 asbestos during the relevant time period.

19 **§55-7F-9. Elements of proof for other asbestos actions.**

20 No asbestos action other than an asbestos-related nonmalignant condition, asbestos-related
21 lung cancer, asbestos-related cancer of the larynx, pharynx or esophagus, or mesothelioma, may be

1 brought or maintained in the absence of prima facie evidence that the exposed person has a primary
2 cancer for which exposure to asbestos was a substantial contributing factor. The plaintiff shall make
3 a prima facie showing of claim for each defendant and include a detailed narrative medical report
4 and diagnosis signed under oath by a qualified physician that includes all of the following:

5 (1) A diagnosis of an asbestos-related cancer other than cancer of the lung, larynx, pharynx,
6 or esophagus, or mesothelioma and substantial occupational exposure to asbestos or exposure to
7 asbestos from living with or having extended contact with another exposed person that had
8 substantial occupational exposure to asbestos during the relevant time period; and

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

14 The court shall hold an evidentiary hearing and determine if the exposed person has
15 established a prima facie showing of the existence of cancer to which exposure to asbestos was a
16 substantial contributing factor.

17 **§55-7F-10. Elements of proof for silica actions alleging silicosis.**

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

1 of the following:

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

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

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

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

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

1 updated; and

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

7 **§55-7F-11. Elements of proof for silica actions alleging silica-related lung cancer.**

8 No silica action related to an alleged silica-related lung cancer may be brought or maintained
9 in the absence of prima facie evidence that the exposed person has a primary lung cancer for which
10 exposure to silica was a substantial contributing factor. The plaintiff shall make a prima facie
11 showing of claim for each defendant and include a detailed narrative medical report and diagnosis
12 signed under oath by a qualified physician, who is board-certified in pathology, pulmonary medicine
13 or oncology, that includes all of the following:

14 (1) A detailed occupational and exposure history from the exposed person or, if the exposed
15 person is deceased, from the person most knowledgeable about the exposures that form the basis of
16 the action, including identification of all principal places of employment and exposures to airborne
17 contaminants and whether each place of employment involved exposures to airborne contaminants,
18 including disease causing dusts or fumes, that may cause cancer and the nature, duration and level
19 of any exposure;

20 (2) A detailed medical, social, and smoking history from the exposed person or, if that person
21 is deceased, from the person most knowledgeable, including a thorough review of the past and

1 present medical problems and their most probable cause;

2 (3) Evidence verifying that the exposed person has a primary lung cancer, including
3 pathological evidence of the presence of a primary lung cancer if the diagnosis is made by a qualified
4 physician who is board-certified in pulmonary medicine;

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

7 (5) (A) If the exposed person is a nonsmoker, radiological or pathological evidence of
8 silicosis or a computed tomography or high-resolution computed tomography scan showing evidence
9 of silicosis or substantial occupational exposure to silica; or

10 (B) If the exposed person is a smoker, radiological or pathological evidence of silicosis or
11 a high-resolution computed tomography scan showing evidence of silicosis and substantial
12 occupational exposure to silica; and

13 (6) The specific conclusion of the qualified physician signing the report that exposure to
14 silica was a substantial contributing factor to the exposed person's lung cancer and not more probably
15 the result of other causes. An opinion stating that the medical findings and lung cancer are
16 "consistent with" or "compatible with" exposure to silica, or words to that effect, do not satisfy the
17 requirements of this subdivision.

18 **§55-7F-12. Elements of proof for silica actions alleging silica-related conditions other than**
19 **silicosis or lung cancer.**

20 No silica action related to an alleged silica-related condition, other than silicosis or
21 silica-related lung cancer, may be brought or maintained in the absence of prima facie evidence that

1 the exposed person has a physical impairment as a result of a medical condition for which exposure
2 to silica was a substantial contributing factor. The plaintiff shall make a prima facie showing of
3 claim for each defendant and include a detailed narrative medical report and diagnosis signed under
4 oath by a qualified physician that includes all of the following:

5 (1) A diagnosis of a silica-related disease and credible evidence of substantial exposure to
6 silica; and

7 (2) The specific conclusion of the qualified physician signing the report that exposure to
8 silica was a substantial contributing factor to the medical findings and impairment and not more
9 probably the result of other causes. An opinion stating that the medical findings and impairment are
10 "consistent with" or "compatible with" exposure to silica, or words to that effect, do not satisfy the
11 requirements of this subsection.

12 The court shall hold an evidentiary hearing and determine if the exposed person has
13 established a prima facie showing of physical impairment to which exposure to silica was a
14 substantial contributing factor.

15 **§55-7F-13. Evidence of physical impairment.**

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

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

1 article;

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

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

7 **§55-7F-14. Procedures.**

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

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

12 (1) The grant or denial of a motion to dismiss an asbestos or silica action under the provisions
13 of this article, or

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

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

20 (d) Consolidation of cases.

21 (1) A court may consolidate for trial any number and type of asbestos or silica actions with

1 the consent of all the parties. In the absence of such consent, the court may consolidate for trial only
2 asbestos or silica actions relating to the exposed person and members of that person's household.

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

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

7 **§55-7F-15. Limitations on liability in asbestos and silica actions.**

8 (a) A premises owner, or any entity performing any operations on a premises, shall not be
9 liable in an asbestos or silica action for exposures that do not occur on the premises.

10 (b) A defendant in an asbestos or silica action shall not be liable for exposures from a product
11 or component part made or sold by a third party, even if the third party is insolvent or otherwise not
12 amendable to suit.

13 (c) Punitive damages may not be awarded in an asbestos or silica action.

14 **§55-7F-16. Statute of limitations; two-disease rule.**

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

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

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

1 impairment; or

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

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

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

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

14 **§55-7F-17. Application.**

15 This article shall apply to all asbestos actions and silica actions filed on or after the effective
16 date of this article. The article shall also apply to any pending asbestos actions and silica actions in
17 which trial has not commenced as of the effective date of this article.

NOTE: The purpose of this bill is to establish procedures for the handling of asbestos and silica litigation and to enhance the ability of the judicial system to manage such litigation.

Both articles in this bill are new; therefore, strike-throughs and underscoring have been omitted.