

WEST VIRGINIA LEGISLATURE
EIGHTY-SECOND LEGISLATURE
REGULAR SESSION, 2015



ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 411

(SENATORS TAKUBO, CARMICHAEL, FERNS, GAUNCH
AND MULLINS, *ORIGINAL SPONSORS*)

[PASSED MARCH 11, 2015; IN EFFECT NINETY DAYS FROM PASSAGE.]

E N R O L L E D

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 411

(SENATORS TAKUBO, CARMICHAEL, FERNS, GAUNCH AND
MULLINS, *ORIGINAL SPONSORS*)

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

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

Be it enacted by the Legislature of West Virginia:

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

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

§55-7E-1. Short title.

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

§55-7E-2. Findings and purpose.

- 1 (a) The West Virginia Legislature finds that:

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

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

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

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

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

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

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

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

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

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

37 (1) Provide transparency for claims made in the asbestos
38 bankruptcy trust claim system and for claims made in civil
39 asbestos litigation; and

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

§55-7E-3. Definitions.

1 For the purpose of this article:

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

14 (2) “Asbestos trust” means a government-approved or
15 court-approved trust, qualified settlement fund, compensation
16 fund or claims facility created as a result of an administrative
17 or legal action, a court-approved bankruptcy, or pursuant to
18 11 U. S. C. §524(g) or 11 U. S. C. §1121(a) or other
19 applicable provision of law, that is intended to provide
20 compensation to claimants arising out of, based on or related
21 to the health effects of exposure to asbestos.

22 (3) “Plaintiff” means a person asserting an asbestos
23 action, a decedent if the action is brought through or on
24 behalf of an estate, or a parent or guardian if the action is
25 brought through or on behalf of a minor or incompetent.

26 (4) “Trust claims materials” means a final executed proof
27 of claim and all other documents and information related to

28 a claim against an asbestos trust, including claims forms and
29 supplementary materials, affidavits, depositions and trial
30 testimony, work history, medical and health records,
31 documents reflecting the status of a claim against an asbestos
32 trust, and if the asbestos trust claim has settled, all documents
33 relating to the settlement of the asbestos trust claim.

34 (5) “Trust governance documents” means all documents
35 that relate to eligibility and payment levels, including claims
36 payment matrices, trust distribution procedures or plans for
37 reorganization, for an asbestos trust.

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

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

20 (b) The plaintiff shall make available to all parties all
21 trust claims materials for each asbestos trust claim that has

22 been filed by the plaintiff or by anyone on the plaintiff's
23 behalf against an asbestos trust, including any asbestos-
24 related disease.

25 (c) The plaintiff shall supplement the information and
26 materials provided pursuant to this section within ninety days
27 after the plaintiff files an additional asbestos trust claim,
28 supplements an existing asbestos trust claim or receives
29 additional information or materials related to any claim or
30 potential claim against an asbestos trust.

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

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

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

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

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

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

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

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

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

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

15 (1) File the asbestos trust claim;

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

19 (3) File a written response with the court requesting a
20 determination that the plaintiff's expenses or attorney's fees

21 and expenses to prepare and file the asbestos trust claim
22 identified in the defendant's motion exceed the plaintiff's
23 reasonably anticipated recovery from the trust.

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

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

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

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

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

5 (b) Trust claim materials that are sufficient to entitle a
6 claim to consideration for payment under the applicable trust
7 governance documents may be sufficient to support a jury

8 finding that the plaintiff may have been exposed to products
9 for which the asbestos trust was established to provide
10 compensation and that such exposure may be a substantial
11 factor in causing the plaintiff's injury that is at issue in the
12 asbestos action.

§55-7E-9. Setoff; credit.

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

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

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

§55-7E-11. Application.

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

ARTICLE 7F. ASBESTOS AND SILICA CLAIMS PRIORITIES ACT.

§55-7F-1. Short title.

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

§55-7F-2. Findings and purpose.

1 (a) The West Virginia Legislature finds that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59 (18) Trial consolidations, joinders and similar trial
60 procedures used by some courts to handle asbestos and silica
61 cases can undermine the appropriate functioning of the
62 courts, deny due process to plaintiffs and defendants and
63 encourage the filing of cases by unimpaired asbestos and
64 silica plaintiffs; and

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

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

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

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

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

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

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

§55-7F-3. Definitions.

1 For the purpose of this article:

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

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

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

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

27 (5) “Board-certified in internal medicine” means a
28 physician who is certified by the American Board of Internal
29 Medicine or the American Osteopathic Board of Internal
30 Medicine and whose certification was current at the time of
31 the performance of any examination and rendition of any
32 report required by this article.

33 (6) “Board-certified in occupational medicine” means a
34 physician who is certified in the subspecialty of occupational
35 medicine by the American Board of Preventive Medicine or
36 the American Osteopathic Board of Preventive Medicine and
37 whose certification was current at the time of the performance
38 of any examination and rendition of any report required by
39 this article.

40 (7) “Board-certified in pathology” means a physician who
41 holds primary certification in anatomic pathology or clinical
42 pathology from the American Board of Pathology or the
43 American Osteopathic Board of Pathology, whose
44 certification was current at the time of the performance of any
45 examination and rendition of any report required by this act,
46 and whose professional practice is principally in the field of
47 pathology and involves regular evaluation of pathology
48 materials obtained from surgical or postmortem specimens.

49 (8) “Board-certified in pulmonary medicine” means a
50 physician who is certified in the subspecialty of pulmonary
51 medicine by the American Board of Internal Medicine or the
52 American Osteopathic Board of Internal Medicine and whose
53 certification was current at the time of the performance of any
54 examination and rendition of any report required by this
55 article.

56 (9) “Certified B-reader” means an individual who has
57 qualified as a National Institute for Occupational Safety and
58 Health (NIOSH) “final” or “B-reader” of x-rays under 42 C.

59 F. R. §37.51(b), whose certification was current at the time of
60 any readings required under this article, and whose B-reads
61 comply with the NIOSH B-Reader's Code of Ethics, Issues
62 in Classification of Chest Radiographs and Classification of
63 Chest Radiographs in Contested Proceedings.

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

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

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

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

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

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

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

88 (17) “Nonmalignant condition” means any condition that
89 can be caused by asbestos or silica other than a diagnosed
90 cancer.

91 (18) “Official statements of the American Thoracic
92 Society” means lung function testing standards set forth in
93 statements from the American Thoracic Society including
94 standardizations of spirometry, standardizations of lung
95 volume testing, standardizations of diffusion capacity testing
96 or single-breath determination of carbon monoxide uptake in
97 the lung and interpretive strategies for lung function tests,
98 which are in effect on the day of the pulmonary function
99 testing of the exposed person.

100 (19) “Pathological evidence of asbestosis” means a
101 statement by a board-certified pathologist that more than one
102 representative section of lung tissue uninvolved with any
103 other disease process demonstrates a pattern of
104 peribronchiolar or parenchymal scarring in the presence of
105 characteristic asbestos bodies graded 1(B) or higher under the
106 criteria published in Asbestos-Associated Diseases, 106
107 Archive of Pathology and Laboratory Medicine 11, Appendix
108 3 (October 8, 1982), or grade one or higher in Pathology of
109 Asbestosis, 134 Archive of Pathology and Laboratory
110 Medicine 462-80 (March 2010) (Tables 2 and 3), or as
111 amended at the time of the exam, and there is no other more
112 likely explanation for the presence of the fibrosis.

113 (20) “Pathological evidence of silicosis” means a
114 statement by a board-certified pathologist that more than one
115 representative section of lung tissue uninvolved with any
116 other disease process demonstrates complicated silicosis with
117 characteristic confluent silicotic nodules or lesions equal to
118 or greater than one centimeter and birefringent crystals or
119 other demonstration of crystal structures consistent with silica
120 (well-organized concentric whorls of collagen surrounded by

17

[Enr. Com. Sub. for S. B. No. 411

121 inflammatory cells) in the lung parenchyma and no other
122 more likely explanation for the presence of the fibrosis exists,
123 or acute silicosis with characteristic pulmonary edema,
124 interstitial inflammation, and the accumulation within the
125 alveoli of proteinaceous fluid rich in surfactant.

126 (21) “Plaintiff” means a person asserting an asbestos or
127 silica action, a decedent if the action is brought through or on
128 behalf of an estate, and a parent or guardian if the action is
129 brought through or on behalf of a minor or incompetent.

130 (22) “Plethysmography or body (BOX) plethysmography”
131 means the test for determining lung volume in which the
132 exposed person is enclosed in a chamber equipped to measure
133 pressure, flow or volume change.

134 (23) “Predicted lower limit of normal” means any test
135 value is the calculated standard convention lying at the fifth
136 percentile, below the upper ninety-five percent of the
137 reference population, based on age, height and gender,
138 according to the recommendations by the American Thoracic
139 Society and as referenced in the applicable AMA Guides to
140 the Evaluation of Permanent Impairment, primarily National
141 Health and Nutrition Examination Survey (NHANES)
142 predicted values, or as amended.

143 (24) “Pulmonary function test” means spirometry, lung
144 volume testing and diffusion capacity testing, including
145 appropriate measurements, quality control data and graphs,
146 performed in accordance with the methods of calibration and
147 techniques provided in the applicable AMA Guides to the
148 Evaluation of Permanent Impairment and all standards
149 provided in the Official Statements of the American Thoracic
150 Society in effect on the day pulmonary function testing of the
151 exposed person was conducted.

152 (25) “Qualified physician” means a board-certified
153 internist, pathologist, pulmonary specialist or specialist in
154 occupational and environmental medicine, as may be
155 appropriate to the actual diagnostic specialty in question, that
156 meets all of the following requirements:

157 (A) The physician has conducted a physical examination
158 of the exposed person and has taken or has directed to be
159 taken under his or her supervision, direction and control, a
160 detailed occupational, exposure, medical, smoking and social
161 history from the exposed person, or the physician has
162 reviewed the pathology material and has taken or has directed
163 to be taken under his or her supervision, direction and
164 control, a detailed history from the person most
165 knowledgeable about the information forming the basis of the
166 asbestos or silica action;

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

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

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

182 (26) “Radiological evidence of asbestosis” means a quality
183 1 or 2 chest x-ray under the ILO system, showing bilateral
184 small, irregular opacities (s, t or u) occurring primarily in the
185 lower lung zones graded by a certified B-reader as at least 1/0
186 on the ILO scale.

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

192 (28) “Radiological evidence of silicosis” means a quality
193 1 or 2 chest x-ray under the ILO system, showing bilateral
194 predominantly nodular or rounded opacities (p, q or r)
195 occurring in the lung fields graded by a certified B-reader as
196 at least 1/0 on the ILO scale or A, B or C sized opacities
197 representing complicated silicosis or acute silicosis with
198 characteristic pulmonary edema, interstitial inflammation,
199 and the accumulation within the alveoli of proteinaceous fluid
200 rich in surfactant.

201 (29) “Silica” means a respirable crystalline form of silicon
202 dioxide, including quartz, cristobalite and tridymite.

203 (30) “Silica action” means a claim for damages or other civil
204 or equitable relief presented in a civil action arising out of,
205 based on or related to the health effects of exposure to silica,
206 including loss of consortium, wrongful death, mental or
207 emotional injury, risk or fear of disease or other injury, costs of
208 medical monitoring or surveillance and any other derivative
209 claim made by or on behalf of a person exposed to silica or a
210 representative, spouse, parent, child or other relative of that
211 person. The term does not include a claim for compensatory
212 benefits pursuant to workers’ compensation law, veterans’
213 benefits or claims brought by a person as a subrogee by virtue

214 of the payment of benefits under a workers' compensation law.
215 The term does not include any administrative claim or civil
216 action related to coal workers' pnuemoconiosis.

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

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

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

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

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

233 (C) Reports of x-ray examinations;

234 (D) Diagnostic imaging of the chest;

235 (E) Pathology reports; and

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

238 (34) "Timed gas dilution" means a method for measuring
239 total lung capacity in which the subject breathes into a

240 spirometer containing a known concentration of an inert and
241 insoluble gas for a specific time, and the concentration of that
242 inert and insoluble gas in the lung is compared to the
243 concentration of that type of gas in the spirometer.

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

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

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

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

1 (a) A plaintiff in an asbestos or silica action alleging a
2 nonmalignant condition shall file within ninety days of filing
3 the complaint or other initial pleading a detailed narrative
4 medical report and diagnosis, signed by a qualified physician
5 and accompanied by supporting test results, constituting
6 prima facie evidence that the exposed person meets the
7 requirements of this article. The report shall not be prepared

8 by a lawyer or person working for or on behalf of a lawyer or
9 law firm.

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

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

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

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

27 (3) To the best of the plaintiff's ability, the location and
28 manner of each alleged exposure, including the specific
29 location and manner of exposure for any person through
30 which the exposed person alleges exposure, the beginning
31 and ending dates of each alleged exposure and the identity
32 of the manufacturer of the specific asbestos or silica product
33 for each exposure when this information is reasonably
34 available;

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

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

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

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

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

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

10 (1) Radiological or pathological evidence of asbestosis or
11 radiological evidence of diffuse bilateral pleural thickening
12 or a high-resolution computed tomography scan showing
13 evidence of asbestosis or diffuse pleural thickening;

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

21 including asbestos fibers or other disease causing dusts or
22 fumes, that may cause pulmonary impairment and the nature,
23 duration, and level of any exposure;

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

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

32 (5) Evidence from a personal medical examination and
33 pulmonary function testing of the exposed person or, if the
34 exposed person is deceased, from the person's medical
35 records, that the exposed person has or the deceased person
36 had a permanent respiratory impairment rating of at least
37 Class 2 as defined by and evaluated pursuant to the AMA's
38 Guides to the Evaluation of Permanent Impairment or
39 reported significant changes year to year in lung function for
40 FVC, FEV1 or DLCO as defined by the American Thoracic
41 Society's Interpretative Strategies for Lung Function Tests,
42 26 European Respiratory Journal 948-68, 961-62, Table 12
43 (2005) and as updated;

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

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

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

54 (C) A chest x-ray showing bilateral small, irregular
55 opacities (s, t or u) graded by a certified B-reader as at least
56 2/1 on the ILO scale; and

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

65 (b) If the alleged nonmalignant asbestos-related condition
66 is a result of an exposed person living with or having
67 extended contact with another exposed person who, if the
68 asbestos action had been filed by the other exposed person
69 would have met the requirements of subdivision (2),
70 subsection (a) of this section, and the exposed person alleges
71 extended contact with the other exposed person during the
72 relevant time period, the detailed narrative medical report and
73 diagnosis shall include all of the information required by
74 subsection (a) of this section, except that the exposure history
75 required under subdivision (2), subsection (a) of this section
76 shall describe the exposed person's history of exposure to the
77 other exposed person.

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

1 No silica action related to alleged silicosis may be
2 brought or maintained in the absence of prima facie evidence
3 that the exposed person has a physical impairment as a result
4 of silicosis. The plaintiff shall make a prima facie showing of

5 claim for each defendant and include a detailed narrative
6 medical report and diagnosis signed under oath by a qualified
7 physician that includes all of the following:

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

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

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

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

29 (5) Evidence based upon a personal medical examination
30 and pulmonary function testing of the exposed person or, if
31 the exposed person is deceased, based upon the person's
32 medical records, demonstrating that the exposed person has
33 or the deceased person had a permanent respiratory
34 impairment rating of at least Class 2 as defined by and
35 evaluated pursuant to the AMA's Guides to the Evaluation of

36 Permanent Impairment or reported significant changes year
37 to year in lung function for FVC, FEV1 or DLCO as defined
38 by the American Thoracic Society's Interpretative Strategies
39 for Lung Function Tests, 26 European Respiratory Journal
40 948-68, 961-62, Table 12 (2005) and as updated; and

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

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

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

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

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

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

§55-7F-8. Procedures.

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

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

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

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

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

20 (d) *Consolidation of cases.* –

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

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

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

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

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

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

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

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

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

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

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

§55-7F-10. Application.

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman Senate Committee

.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

.....
Clerk of the Senate

.....
Clerk of the House of Delegates

.....
President of the Senate

.....
Speaker of the House of Delegates

The within this the

Day of, 2015.

.....
Governor