

1 **H. B. 2686**

2
3 (By Delegates Craig, Michael and Azinger)
4 [Introduced January 20, 2011; referred to the
5 Committee on the Judiciary.]
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10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new article, designated §55-7E-1, §55-7E-2,
12 §55-7E-3, §55-7E-4, §55-7E-5, §55-7E-6, §55-7E-7, §55-7E-8,
13 §55-7E-9 and §55-7E-10, all relating to creating the
14 "Asbestos and Silica Compensation Fairness Act of 2011;"
15 providing limitations for certain asbestos claims; judicial
16 actions involving silica and asbestos exposure; and providing
17 for fair and efficient judicial consideration of personal
18 injury and wrongful death arising out of asbestos or silica
19 exposure and ensuring individuals who suffer impairment now or
20 in the future for illnesses caused by exposure to asbestos or
21 silica receiving compensation for their injuries.

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

23 That the Code of West Virginia, 1931, as amended, be amended
24 by adding thereto a new article, designated §55-7E-1, §55-7E-2,

1 §55-7E-3, §55-7E-4, §55-7E-5, §55-7E-6, §55-7E-7, §55-7E-8, §55-7E-
2 9 and §55-7E-10, all to read as follows:

3 **ARTICLE 7E. ASBESTOS AND SILICA COMPENSATION FAIRNESS ACT OF**
4 **2011.**

5 **§55-7E-1. Short title.**

6 This article may be cited as the "Asbestos and Silica
7 Compensation Fairness Act of 2011."

8 **§55-7E-2. Purpose.**

9 It is the purpose of this article to protect the rights of
10 people with asbestos-related and silica-related impairments and
11 injuries to pursue claims for compensation in a fair and efficient
12 manner through the West Virginia Court System, while preventing
13 misdirected scarce judicial and litigant resources by premature
14 individual claims of asbestos or silica exposure but have no
15 functional or physical impairment from asbestos-related or silica-
16 related disease, by:

17 (a) Adopting medically accepted standards for differentiating
18 between nonmalignant asbestos-related or silica-related disease
19 causing functional impairment and no functional impairment, or
20 impairment caused solely by some other cause, such as asthma,
21 emphysema, or smoking;

22 (b) Requiring physical impairment as an essential element of
23 an asbestos claim or a silica claim;

24 (c) Providing the dismissal of lawsuits in which the exposed

1 person has no functional impairment, while protecting a person's
2 right to bring suit on an asbestos-related or silica-related
3 functional impairment or injury; and

4 (d) Creating an extended period before limitations begin to
5 run to bring claims for nonmalignant injuries caused by inhalation
6 or ingestion of asbestos or inhalation of silica, to preserving the
7 right of those who have been exposed to asbestos or silica but not
8 yet impaired to bring a claim later if they develop an asbestos-
9 related or silica-related disease or injury.

10 **§55-7E-3. Definitions.**

11 In this article:

12 (1) "AMA Guides to the Evaluation of Permanent Impairment"
13 means the American Medical Association's Guides to the Evaluation
14 of Permanent Impairment (Fifth Edition 2000) and its revisions by
15 the American Medical Association.

16 (2) "Asbestos" means chrysotile, amosite, crocidolite,
17 tremolite asbestos, anthophyllite asbestos, actinolite asbestos and
18 any of these minerals that have been chemically treated or altered,
19 including, but not limited to, all minerals defined as 'asbestos'
20 in 29 CFR 1910 as amended on the effective date of this article.

21 (3) "Asbestos claim" means any claim for damages, losses, or
22 other civil or otherwise equitable action relating in any way to
23 exposure to asbestos, including any claim for current or future
24 medical monitoring and/or surveillance, indemnification and

1 contribution. "Asbestos claim" includes a claim made by or on
2 behalf of any person exposed to asbestos, or any representative,
3 spouse, parent, child or other relative of that person, including
4 loss of consortium, wrongful death, mental or emotional injury,
5 risk of disease, other injury, or personal injury. The term does
6 not include workers' compensation claims or veterans' benefits
7 program, or claims brought by a subrogee by payment of workers'
8 compensation benefits.

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

11 (5) "Board-certified in internal medicine" means a physician
12 certified by the American Board of Internal Medicine or American
13 Osteopathic Board of Internal Medicine.

14 (6) "Board-certified in occupational medicine" means a
15 physician certified in occupational medicine by the American Board
16 of Preventive Medicine or American Osteopathic Board of Preventive
17 Medicine.

18 (7) "Board-certified in oncology" means a physician certified
19 in medical oncology by the American Board of Internal Medicine or
20 American Osteopathic Board of Internal Medicine.

21 (8) "Board-certified in pathology" means a physician who holds
22 primary certification in anatomic pathology or clinical pathology
23 from the American Board of Pathology or American Osteopathic Board
24 of Internal Medicine and whose professional practice is primarily

1 in pathology, involving regular evaluation of pathology materials
2 obtained from surgical or postmortem specimens.

3 (9) "Board-certified in pulmonary medicine" means a physician
4 certified in pulmonary medicine by the American Board of Internal
5 Medicine or American Osteopathic Board of Internal Medicine.

6 (10) "Certified B-reader" means an individual qualified as a
7 "final" or "B-reader" under 42 CFR 37.51(b) as amended on the
8 effective date of this article, and whose certification was current
9 at the time of any reading required by the article.

10 (11) "Civil actions" means all suits or claims of a civil
11 nature in state or federal court, whether cognizable as cases at
12 law or in equity or in admiralty. The term does not include:

13 (A) Actions relating to any workers' compensation law;

14 (B) Proceedings for benefits under any veterans' benefits
15 program;

16 (C) Actions alleging any claim or demand made against a trust
17 established pursuant to 11 U.S.C. Section 524(9);

18 (D) Actions alleging any claim or demand made against a trust
19 established pursuant to a plan of reorganization confirmed under
20 Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Chapter
21 11.

22 (12) "Bilateral diffuse pleural thickening" means radiological
23 evidence of thickening of the visceral pleura extending up both
24 lateral chest walls in the presence of, and continuity with, an

1 obliterated costophrenic angle.

2 (13) "Exposed person" means any person whose exposure to
3 asbestos, asbestos-containing products, silica or silica-containing
4 products is the basis for a claim.

5 (14) "FEV1" means forced expiratory volume in the first
6 second, the maximal volume of air expelled in one second during
7 performance of simple spirometric tests.

8 (15) "FVC" means forced vital capacity, the maximal volume of
9 air expired with maximum effort from a position of full
10 inspiration.

11 (16) "ILO Scale" means the classification of chest X rays in
12 the International Labour Office's Guidelines for the Use of ILO
13 International Classification of Radiographs of Pneumoconioses
14 (2000) as amended from time to time by the International Labour
15 Office.

16 (17) "Lower limit of normal" means the fifth percentile of
17 healthy populations based on age, height and gender, referenced in
18 the American Medical Association's Guides to the Evaluation of
19 Permanent Impairment, Fifth Edition, as amended by the American
20 Medical Association.

21 (18) "Lung cancer" means a malignant tumor whose primary site
22 of origin is inside the lungs. The term does not include an
23 asbestos claim based upon mesothelioma.

24 (19) "Mesothelioma" means a malignant tumor with a primary

1 site of origin in the pleura or peritoneum, and diagnosed by a
2 board-certified pathologist using standardized and accepted
3 criteria of microscopic morphology and/or appropriate staining
4 techniques.

5 (20) "Nonmalignant condition" means any condition caused or
6 may be caused by asbestos other than a diagnosed cancer.

7 (21) "Nonsmoker" means the exposed person has not smoked
8 cigarettes or used any other tobacco products within the last
9 fifteen years.

10 (22) "Pathological evidence of asbestosis" means a statement
11 by a board-certified pathologist that more than one representative
12 section of lung tissue uninvolved with any other disease process
13 demonstrates a pattern of peribronchiolar or parenchymal scarring
14 in the presence of characteristic asbestos bodies with no other
15 more likely explanation for the presence of the fibrosis.

16 (23) "Physical impairment" means:

17 (A) A nonmalignant asbestos claim meeting the requirements in
18 section four-b of this article;

19 (B) An asbestos related lung cancer claim meeting the
20 requirements in section four-c of this article;

21 (C) An asbestos related other cancer claim that meeting the
22 requirements in section four-d of this article;

23 (D) A silicosis claim meeting the requirements in section
24 four-f of this article;

1 (E) Other silica claims meeting the requirements in section
2 four-g of this article;

3 (24) "Plethysmography" means a test for determining lung
4 volume, also known as "body plethysmography," in which the subject
5 is enclosed in a chamber equipped to measure pressure flow or
6 volume changes.

7 (25) "Predicted lower limit of normal" for any test means the
8 fifth percentile of healthy populations based on age, height and
9 gender, referenced in the AMA Guides to the Evaluation of Permanent
10 Impairment, Fifth Edition, as amended by the American Medical
11 Association.

12 (26) "Qualified physician" means a medical or osteopathic
13 doctor, who:

14 (A) Is a currently board-certified internist, oncologist,
15 pathologist, pulmonary specialist, radiologist or specialist in
16 occupational and environmental medicine as appropriate to the
17 actual diagnosis in question;

18 (B) Has personally, or at his or her supervision, direction
19 and control, conducted a physical examination of the exposed person
20 and took a detailed occupational, exposure, medical, smoking and
21 social history from the exposed person, or if deceased, the person
22 most knowledgeable about such history that forms the basis of the
23 silica or asbestos claim;

24 (C) Is actually treating or has treated the exposed person,

1 and has or had a doctor-patient relationship with such person;

2 (D) Spends no more than ten percent of his or her professional
3 practice time providing expert services in connection with actual
4 or potential civil actions, and whose medical group, professional
5 corporation, clinic or other affiliated group earns not more than
6 twenty percent of their revenues from their expert services;

7 (E) Is currently licensed to practice and actively practices
8 in the state where the plaintiff resides or in West Virginia;

9 (F) Receives or received payment for the treatment of the
10 exposed person from that person's health maintenance organization,
11 other medical provider, the exposed person or a member of the
12 exposed person's family; and

13 (G) As the basis for his or her diagnosis, has not relied, in
14 whole or in part, on any of the following: (i) The opinions of any
15 doctor, clinic, laboratory or testing company that performed an
16 examination, test or screening of the claimant's medical condition
17 in violation of any law, regulation, licensing requirement or
18 medical code of practice of any state the examination, test or
19 screening was conducted; (ii) the reports or opinions of any
20 doctor, clinic, laboratory, or testing company that performed an
21 examination, test or screening of the claimant's medical condition
22 without clearly establishing a doctor-patient relationship with the
23 claimant in the examination, test or screening process, or; (iii)
24 the reports or opinions of any doctor, clinic, laboratory or

1 testing company that performed an examination, test or screening
2 of the claimant's medical condition that required the claimant to
3 agree to retain a law firm who sponsored the examination, testing
4 or screening.

5 (27) "Radiological evidence of asbestosis" means a quality 1
6 chest X ray under the ILO System of classification (in a death case
7 where no pathology is available, the necessary radiological
8 findings may be made with a quality 2 film) showing small,
9 irregular opacities (s, t, or u) graded by a certified B-reader as
10 at least 1/1 on the ILO scale.

11 (28) "Radiological evidence of diffuse pleural thickening"
12 means a quality 1 chest X ray under the ILO System of
13 classification (in a death case where no pathology is available,
14 the necessary radiological findings may be made with a quality 2
15 film) showing bilateral pleural thickening of at least B2 on the
16 ILO scale and blunting of at least one costophrenic angle as
17 classified by a certified B-reader.

18 (29) "Silica" means a respirable crystalline form of silicon
19 dioxide, including, but not limited to, quartz, cristobalite and
20 trydmite.

21 (30) "Silica claim" means any claim for damages, losses, or
22 other civil or otherwise equitable relief related in any way to the
23 health effects of exposure to silica, including any claim for
24 current or future medical monitoring and/or surveillance,

1 indemnification or contribution. "Silica claim" includes a claim
2 made by or on behalf of any person who has been exposed to silica,
3 or any representative, spouse, parent, child or other relative of
4 that person, for injury, including loss of consortium, wrongful
5 death, mental or emotional injury, risk of disease or other injury,
6 or personal injury. This does not include claims for benefits
7 under workers' compensation or veterans' benefits program, or
8 claims brought by any person as subrogee by payment of benefits
9 under workers' compensation.

10 (31) "Silicosis" means:

11 (A) Chronic simple silicosis, which is a nodular fibrosis of
12 the lungs caused by inhalation of silica;

13 (B) Complicated silicosis (also known as progressive massive
14 fibrosis);

15 (C) Accelerated silicosis; and/or

16 (D) Acute silicosis.

17 (32) "Smoker" means a person who has smoked cigarettes or used
18 other tobacco products within the last fifteen years.

19 (33) The term "substantial contributing factor" means:

20 (A) Exposure to asbestos or silica is the predominate cause of
21 the physical impairment alleged in the claim; and

22 (B) A qualified physician has determined with a reasonable
23 degree of medical certainty the exposed person's physical
24 impairment would not have occurred but for the asbestos or silica

1 exposures.

2 (34) "Substantial occupational exposure to asbestos" means
3 employment for a cumulative period of at least five years in an
4 industry and occupation in which the exposed person did any of the
5 following for a substantial portion of a normal work year:

6 (A) Handled raw asbestos fibers;

7 (B) Fabricated asbestos containing products and exposed to raw
8 asbestos products in the fabrication process;

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

12 (D) Worked in close proximity to other workers engaged in any
13 of the activities in this article in a manner that exposed the
14 person on a regular basis to asbestos fibers.

15 (35) "Substantial occupational exposure to silica" means
16 employment for a cumulative period of at least five years in an
17 industry and occupation the exposed person did any of the following
18 for a substantial portion of a normal work year:

19 (A) Handled silica;

20 (B) Fabricated silica-containing products and was exposed to
21 silica in the fabrication process;

22 (C) Altered, repaired, or otherwise worked with a silica-
23 containing product and exposed the person on a regular basis to
24 silica; or

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

4 (36) "Total lung capacity" means the volume of gas contained
5 in the lungs at the end of a maximal inspiration.

6 (37) "Veterans benefit program" means any program for benefits
7 in connection with military service administered by the Veterans'
8 Administration under title 38, United States Code.

9 (38) "Workers' compensation law" means §23-1-1 et seq., of
10 this code as amended, or any program administered by another state
11 or the United States to provide benefits, funded by a responsible
12 employer or its insurance carrier, for occupational diseases or
13 injuries or for disability or death caused by occupational diseases
14 or injuries. This term does not include any cause of action
15 pending or instituted pursuant to section two, article four,
16 chapter twenty-three of this code. The term includes the Longshore
17 and Harbor Workers' Compensation Act (33 U.S.C. 901-944, 948-950),
18 and Chapter 81 of Title 5, United States Code (known as the Federal
19 Employees Compensation Act), but does not include the act of April
20 22, 1908 (45 U.S.C. 51 et seq.) (popularly referred to as the
21 "Federal Employers Liability Act").

22 **§55-7E-4. Physical impairment.**

23 (a) Impairment essential element of claim. -- An essential
24 element of an asbestos or silica claim is to be asbestos or silica

1 exposure as a substantial contributing factor to the physical
2 impairment of the exposed person.

3 (b) Prima facie evidence of physical impairment for asbestos-
4 related nonmalignant disease claims. -- A person may not bring or
5 maintain a civil action alleging an asbestos claim based upon
6 nonmalignant disease in the absence of a prima facie showing of
7 physical impairment that exposure to asbestos was a substantial
8 contributing factor. A prima facie showing shall include all the
9 following requirements:

10 (1) Evidence verifying a qualified physician has taken a
11 detailed occupational and exposure history of the exposed person
12 from the exposed person or, if that person is deceased, from a
13 person who is most knowledgeable about the exposure history of the
14 nonmalignant asbestos claim, including:

15 (A) Identification of all the exposed person's principal
16 places of employment and exposures to airborne contaminants; and

17 (B) Whether each principal place of employment involved
18 exposures to airborne contaminants (including asbestos fibers or
19 other disease causing dusts) that can cause pulmonary impairment
20 and/or cancer, and the nature, duration and level of exposure.

21 (2) Evidence verifying a qualified physician has taken a
22 detailed medical, social and smoking history, including a thorough
23 review of the exposed person's past and present medical problems
24 and their most probable cause.

1 (3) Evidence sufficient to demonstrate at least fifteen years
2 have elapsed between the first exposure to asbestos and the date
3 of diagnosis.

4 (4) A diagnosis by a qualified physician after a personal
5 medical examination and pulmonary function testing of the exposed
6 person, that the exposed person has a permanent respiratory
7 impairment rating of at least Class 2 as defined by the AMA Guides
8 to the Evaluation of Permanent Impairment.

9 (5) A diagnosis report signed by a qualified physician that
10 the exposed person has asbestosis or evidence of diffuse bilateral
11 pleural thickening, based on the following radiological or
12 pathological evidence of asbestosis or radiological evidence of
13 diffuse pleural thickening;

14 (A) Radiological or pathological evidence of asbestosis
15 requires:

16 (i) A radiology report of a quality 1 chest X ray, except as
17 otherwise noted, read by a certified B-reader according to the ILO
18 classification system as showing primarily bilateral small
19 irregular opacities (shapes, s, t, or u) with a profusion
20 classification of 1/1 or higher, or

21 (ii) A pathology report of asbestosis graded 1(B) or higher
22 under the criteria in "Asbestos-Associated Disease," Special issue
23 Archives of Pathology and Laboratory Medicine, Volume 10C, Number
24 11, Appendix 3 (October 8, 1982), as amended from time to time.

1 (B) Radiological evidence of diffuse pleural thickening
2 requires a radiology report of a quality 1 chest X ray, except as
3 otherwise noted, read by a certified B-reader according to the ILO
4 classification system as showing evidence of thickening of the
5 visceral pleura extending up the lateral chest walls graded B2 or
6 higher in the presence of, and in continuity with, an obliterated
7 costophrenic angle.

8 (6) A qualified physician determining that asbestosis or
9 diffuse bilateral pleural thickening (rather than chronic
10 obstructive pulmonary disease) is a substantial contributing factor
11 to the exposed person's physical impairment, as the exposed person
12 has:

13 (A) Total lung capacity, by plethysmography or timed gas
14 dilution, below the predicted lower limit of normal; and

15 (B) Forced vital capacity below the lower limit of normal and
16 a ratio of FEV1 to FVC (actual values) that is equal to or greater
17 than the predicted lower limit of normal; or

18 (C) In lieu of 6(A) and 6(B), a radiology report of a quality
19 1 chest X ray read by a certified B-reader according to the ILO
20 classification system showing bilateral small irregular opacities
21 (shape s, t, or u) with a profusion classification of 2/1 or higher
22 in conjunction with the conclusion of a qualified physician that
23 the exposed person's medical findings verified by the physician
24 were not more probably the result of a condition other than

1 asbestos exposure as revealed by the exposed person's employment,
2 social and medical history.

3 (7) A medical opinion by a qualified physician that the
4 exposed person's medical findings and impairment were not more
5 probably the result of causes other than the asbestos exposure
6 revealed by the exposed person's employment and medical history.

7 An opinion which states the medical findings and impairment are
8 "consistent with" or "compatible with" exposure to asbestos does
9 not meet the requirements of this subsection.

10 (8) Verifies that the exposed person has pulmonary impairment
11 as related to asbestos as demonstrated by pulmonary function
12 testing performed using equipment, methods of calibration and
13 techniques that meet:

14 (A) The criteria incorporated in the AMA's Guides to the
15 Evaluation of Permanent Impairment, Fifth Edition, as amended from
16 time to time; and

17 (B) The interpretative standards of the American Thoracic
18 Society, "Lung Function Testing: Selection of Reference Values and
19 Interpretive Strategies" as amended from time to time."

20 (9) Verifies the doctor signing the detailed narrative medical
21 report and diagnosis concluded that exposure to asbestos was a
22 substantial contributing factor to the exposed person's medical
23 condition and physical impairment and they were not more probably
24 the result of other causes revealed by the exposed person's

1 employment, social, smoking and medical histories.

2 (10) Copies of the B-readings, the pulmonary function tests,
3 including production of the flow volume loops and all other
4 elements required to demonstrate compliance with the equipment,
5 quality, interpretation and reporting standards set forth, and the
6 diagnosing physician's detailed narrative shall be attached to any
7 complaint alleging a nonmalignant asbestos-related condition. All
8 such reports, and other evidence used to establish prima-facie
9 evidence of impairment, must meet objective standards and criteria
10 of generally accepted medical standards and not obtained through
11 testing or examinations that violate applicable laws, regulations,
12 licensing requirements or medical code of practice. Failure to
13 attach the reports will result in the dismissal of the claim or
14 action without prejudice, upon notice of any party.

15 (c) Prima facie evidence of physical impairment for asbestos-
16 related lung cancer claims. -- A person may not bring or maintain
17 a civil action alleging an asbestos claim which is based upon lung
18 cancer, in the absence of a prima-facie showing including all of
19 the following requirements:

20 (1) A signed verified diagnostic report by a qualified
21 physician board-certified in pathology, pulmonary medicine or
22 oncology, stating the exposed person is diagnosed with primary lung
23 cancer, exposure to asbestos was a substantial contributing factor
24 to the condition. If the diagnosis is by a qualified physician

1 board-certified in pulmonary medicine, there shall be a
2 pathological diagnosis of the primary lung cancer the pulmonary
3 physician relied upon;

4 (2) Sufficient evidence that at least fifteen years have
5 elapsed between the first exposure to asbestos and the date of
6 diagnosis of the lung cancer.

7 (3) Depending on whether the exposed person has a history of
8 smoking, the requirements of either (A) or (B) below:

9 (A) When the exposed person is a nonsmoker, either:

10 (i) Radiological evidence of asbestosis or diffuse bilateral
11 pleural thickening from a qualified physician's diagnosis of
12 asbestosis based on a chest X ray graded by a certified B-reader
13 as at least 1/0 on the ILO scale; or pathological evidence of
14 asbestosis; or

15 (ii) Evidence of the exposed person's substantial occupational
16 exposure to asbestos.

17 (B) When the exposed person is a smoker, the criteria
18 contained in both subparagraphs (i) and (ii), paragraph (A) must
19 be met.

20 (C) If the exposed person is deceased, the qualified physician
21 may obtain evidence required in subparagraph (ii), paragraph (A),
22 subdivisions (2) and (3), subsection (c) from the person most
23 knowledgeable about the alleged exposures that form the basis of
24 the asbestos claim.

1 (4) A qualified physician having concluded the exposed
2 person's medical findings were not more probably the result of
3 causes other than asbestos exposure revealed by the exposed
4 person's employment and medical history. A conclusion that the
5 medical findings and impairment are "consistent with" or
6 "compatible with" exposure to asbestos does not meet the
7 requirements of this subsection.

8 (d) Prima facie evidence of asbestos-related other cancer
9 claims. -- A person may not bring or maintain a civil action
10 alleging an asbestos claim based upon cancer of the colon, rectum,
11 larynx, pharynx, esophagus or stomach, in the absence of a prima
12 facie showing which shall include all the following:

13 (1) A diagnosis by a qualified physician board-certified in
14 pathology, oncology, gastroenterology or otolaryngology (as
15 appropriate for the type of cancer claimed) of primary cancer of
16 the colon, rectum, larynx, pharynx or esophagus, and exposure to
17 asbestos was a substantial contributing factor to the condition;

18 (2) Evidence to demonstrate at least fifteen years have
19 elapsed between the date of first exposure to asbestos and the date
20 of diagnosis of the cancer.

21 (3) The requirements of either (A) or (B) below:

22 (A) Radiological evidence of asbestosis from a qualified
23 physician's diagnosis of asbestosis based on a chest X ray graded
24 by a certified B-reader as at least 1/0 on the ILO scale or

1 pathological evidence of asbestosis;

2 (B) Evidence of the exposed person's substantial occupational
3 exposure to asbestos.

4 (4) A conclusion by a qualified physician that the exposed
5 person's medical findings and impairment were not more probably the
6 result of causes other than the asbestos exposure revealed by the
7 exposed person's employment and medical history. A conclusion that
8 the medical findings and impairment are "consistent with" or
9 "compatible with" exposure to asbestos does not meet the
10 requirements of this subsection.

11 (e) *Prima facie* evidence of physical impairment for asbestos-
12 related malignant mesothelioma claims. -- A person may not bring
13 or maintain a civil action alleging an asbestos claim which is
14 based mesothelioma in the absence of a prima facie showing of
15 physical impairment as a result of a medical condition to which
16 exposure to asbestos was a substantial contributing factor. A prima
17 facie showing shall include all the following:

18 (1) A report by a qualified physician board-certified in
19 pathology, pulmonary medicine or oncology stating a diagnosis of
20 the exposed person of a malignant pleural, peritoneal or
21 pericardial mesothelioma and that exposure to asbestos was a
22 substantial contributing factor to the condition. If the diagnosis
23 is by a qualified physician board certified in pulmonary medicine,
24 there is also a pathological diagnosis of mesothelioma on which the

1 pathological diagnosis the pulmonary doctor relied.

2 (2) Evidence that sets out details of the occupational
3 exposure and medical history includes:

4 (A) A thorough review of claimant's past and present medical
5 problems, and their most probable cause;

6 (B) Verification that at least fifteen years have elapsed
7 between the claimant's first exposure to asbestos and the time of
8 diagnosis; and

9 (C) To a reasonable degree of medical probability, exposure to
10 asbestos was a substantial contributing factor in causing the
11 diagnosed mesothelioma.

12 (3) Credible evidence of identifiable exposure to asbestos
13 resulting from:

14 (A) Occupational exposure to asbestos;

15 (B) Exposure to asbestos fibers brought into the home of
16 exposed person by a worker occupationally exposed to asbestos; or

17 (C) Exposure to asbestos fibers resulting from living or
18 working in the proximate vicinity of a factory, shipyard, building
19 demolition site or other operation that regularly released asbestos
20 fibers into the air due to operations involving asbestos at the
21 site.

22 (f) *Prima facie* evidence of physical impairment for silicosis
23 claims. -- A person may not bring or maintain a civil action
24 alleging a silicosis claim in the absence of a prima facie showing

1 of physical impairment as a result of a medical condition to which
2 exposure to silica was a substantial contributing factor. A prima
3 facie showing shall include all the following:

4 (1) Evidence verifying a qualified physician has taken a
5 detailed occupational and exposure history of the exposed person
6 from the exposed person or, if the person is deceased, from a
7 person who is most knowledgeable about the exposures that form the
8 basis of the silicosis claim, including all of the following:

9 (A) Identification of all of the exposed person's principal
10 places of employment and exposures to airborne contaminants; and

11 (B) Whether each place of employment involved exposures to
12 airborne contaminants (including, but not limited to, silica
13 particles or other disease causing dusts) that can cause pulmonary
14 impairment or cancer and the nature, duration and level of any such
15 exposure.

16 (2) Evidence verifying a qualified physician has taken
17 detailed medical, social and smoking history, including a thorough
18 review of the exposed person's past and present medical problems
19 and their most probable cause, and verifying a sufficient latency
20 period for the applicable stage of silicosis.

21 (3) A diagnosis by a qualified physician, on the basis of a
22 personal medical examination and pulmonary function testing of the
23 exposed person, that the exposed person has a permanent respiratory
24 impairment rating of at least Class 2 pursuant to the AMA Guides

1 to the Evaluation of Permanent Impairment.

2 (4) A verified diagnostic report signed by a qualified
3 physician that the exposed person has silicosis based on the
4 following radiological or pathological evidence of silicosis:

5 (A) A quality 1 chest X ray, except as otherwise noted, under
6 the ILO System of classification, with the X ray read by a
7 certified B-reader as showing, according to the ILO System of
8 classification, predominantly bilateral nodular opacities (p, q,
9 or r) occurring primarily in the upper lung fields, graded 1/1 or
10 higher; or

11 (B) A quality 1 chest X ray, except as noted herein, under the
12 ILO System of classification, with the X ray read by a certified
13 B-reader as showing, according to the ILO System of classification,
14 A, B or C sized opacities representing complicated silicosis (also
15 known as progressive massive fibrosis);

16 (C) A pathological demonstration of classic silicotic nodules
17 exceeding one centimeter in diameter as published in 112 *Archive*
18 *of Pathology and Laboratory Medicine* 7 (July 1988); or

19 (D) Acute silicosis.

20 (5) A conclusion by a qualified physician that the exposed
21 person's medical findings and impairment were not more probably the
22 result of causes other than silica exposure revealed by the exposed
23 person's employment and medical history. A conclusion that the
24 medical findings and impairment are "consistent with" or

1 "compatible with" exposure to silica does not meet the requirements
2 of this subsection.

3 (g) Prima facie evidence of physical impairment for other
4 silica-related claims. -- A person may not bring or maintain a
5 civil action alleging any silica claim other than provided in
6 subsection (f) above in the absence of a prima facie showing which
7 shall include the following:

8 (1) A report by a qualified physician board-certified in
9 pulmonary medicine, oncology or pathology, stating a diagnosis of
10 the exposed person of silica-related lung cancer, and to a
11 reasonable degree of medical probability, exposure to silica was
12 a substantial contributing factor to the diagnosed lung cancer.

13 If the diagnosis is by a qualified physician board-certified in
14 pulmonary medicine, there shall also be a diagnosis of lung cancer;

15 (2) Evidence verifying that a qualified physician has taken a
16 detailed occupational and exposure history of the exposed person
17 or, if the person is deceased, from a person who is knowledgeable
18 about the exposures that form the basis of the other silica-related
19 claim, including:

20 (A) Identification of all of the exposed person's principal
21 places of employment and exposures to airborne contaminants; and

22 (B) Whether each place of employment involved exposures to
23 airborne contaminants (including, but not limited to, silica
24 particles or other disease causing dusts) can cause pulmonary

1 impairment and the nature, duration and level of any such exposure.

2 (3) Evidence verifying that a qualified physician has taken a
3 detailed medical and smoking history, including a thorough review
4 of the exposed person's past and present medical problems and their
5 most probable cause;

6 (4) Verification that at least fifteen years have elapsed from
7 the date of the exposed person's first exposure to silica until the
8 date of diagnosis of the exposed person's primary lung cancer;

9 (5) Evidence of the exposed person's substantial occupational
10 exposure to silica;

11 (6) A determination by a qualified physician that the exposed
12 person has:

13 (A) A quality 1 chest X ray, except as noted herein, under the
14 ILO System of classification, and the X ray has been read by a
15 certified B-reader as showing, according to the ILO System of
16 classification, predominantly bilateral nodular opacities (p, q,
17 or r) occurring primarily in the upper lung fields, graded 1/1 or
18 higher; or

19 (B) A quality 1 chest X ray, except as noted herein, under the
20 ILO System of classification, and the X ray has been read by a
21 certified B-reader as showing, according to the ILO System of
22 classification, A, B or C sized opacities representing complicated
23 silicosis (also known as progressive massive fibrosis); or

24 (C) Pathological demonstration of classic silicotic nodules

1 exceeding one centimeter in diameter as published in 112 *Archive*
2 *of Pathology and Laboratory Medicine* 7 (July 1988);

3 (7) A conclusion by a qualified physician that the exposed
4 person's medical findings and impairment were not more probably the
5 result of causes other than silica exposure revealed by the exposed
6 person's employment and medical history. A conclusion that the
7 medical findings and impairment are "consistent with" or
8 "compatible with" exposure to silica does not meet the requirements
9 of this subsection.

10 (h) *Compliance with technical standards.* -- Evidence relating
11 to physical impairment under this section, including pulmonary
12 function testing and diffusing studies, shall:

13 (1) Comply with the technical recommendations for
14 examinations, testing procedures, quality assurance, quality
15 control and equipment of the AMA Guides to the Evaluation of
16 Permanent Impairment, as set forth in 2d C.F.R. Pt, 404, Subpt. P.
17 Appl., Part A, Sec. 3.00 E. and F. effective on the effective date
18 of this article, and the interpretive standards, set forth in the
19 official statement of the American Thoracic Society entitled "Lung
20 Function Testing: Selection of Reference Values and Interpretive
21 Strategies" as published in American Review of Respiratory Disease.
22 1991: 144:1202-1218;

23 (2) Not be obtained through testing or examinations that
24 violate any applicable law, regulation, licensing requirement or

1 medical code of practice; and

2 (3) Not be obtained under the condition that the exposed
3 person retain legal services in exchange for the examination, test
4 or screening.

5 (i) No presumption at trial. -- Presentation of prima facie
6 evidence meeting the requirements of subsection (b), (c), (d), (f)
7 or (g) of this section may not:

8 (1) Result in any presumption at trial that the exposed person
9 is impaired by an asbestos or silica related condition;

10 (2) Be conclusive as to the liability of any defendant;

11 (3) Be admissible at trial;

12 (4) Result in an instruction by the court to the jury with
13 respect to the court's decision as to the prima facie showing, and
14 no counsel for any party, nor any witness shall inform the jury or
15 potential jurors of any such showing, subject to appropriate
16 sanctions.

17 **§55-7E-5. Procedures.**

18 (a) Preliminary proceedings. --

19 (1) The plaintiff in any civil action alleging an asbestos or
20 silica claim shall file, together with the complaint or other
21 initial pleading, a written report and supporting test results
22 constituting prima facie evidence of the exposed person's asbestos
23 or silica related physical impairment meeting the requirements of
24 subsection (b), (c), (d), (e), (f) or (g) of section four of this

1 article, as appropriate. For any asbestos or silica claim pending
2 on the effective date of this article, the plaintiff shall file
3 a written report and supporting test results no later than sixty
4 days following the effective date, or no later than thirty days
5 prior to the commencement of trial, whichever is earlier, which
6 period may be extended for good cause shown. The defendant shall
7 be afforded a reasonable opportunity to challenge the adequacy of
8 the proffered prima facie evidence of asbestos-related or silica-
9 related impairment, provided that for any asbestos or silica claim
10 pending on the effective date of this article, the defendant shall
11 be afforded a reasonable opportunity to challenge the adequacy of
12 the certificate prior to the commencement of the trial.

13 (2) If the defendant elects to challenge the adequacy of the
14 report as provided in subdivision (1) of this subsection, the court
15 shall proceed to determine whether the report meets the minimum
16 requirements of subdivision (b), (c), (d), (e), (f) or (g) of
17 section four of this article, as appropriate. Upon a finding that
18 the report is insufficient:

19 (A) The court shall place the asbestos or silica claim pending
20 on the effective date of this article on an inactive docket and
21 maintain jurisdiction over the claim: *Provided*, That the death of
22 exposed person shall be grounds to reinstate the claim to the
23 active docket. Any plaintiff whose claim has been placed on an
24 inactive docket under this subsection may move to reinstate the

1 claim by filing a motion accompanied by a report meeting the
2 requirements of subsection (b), (c), (d), (e), (f) or (g) of
3 section four of this article, as appropriate; or

4 (B) The court shall dismiss without prejudice an asbestos or
5 silica claim filed on or after the effective date of this article.

6 Any claimant whose claim is dismissed under this paragraph may
7 refile the claim accompanied by a report meeting the requirements
8 of subsection (b), (c), (d), (e), (f) or (g) of section four of
9 this article, as appropriate. A claimant may voluntarily dismiss
10 a presently pending case without prejudice if there is no evidence
11 of impairment.

12 (b) General rules applicable to new filings. --

13 (1) All asbestos claims and silica claims filed in this state
14 on or after the effective date of this article shall include (in
15 addition to the written report described in subsection (4) and the
16 information required by subsection 5(a) herein) a sworn information
17 form containing the following information:

18 (A) The claimant's name, address, date of birth, social
19 security number and marital status;

20 (B) If the claimant alleges exposure to asbestos or silica
21 through the testimony of another person or other than by direct or
22 bystander exposure to a product(s), the name, address, date of
23 birth, social security number, marital status, for each person by
24 which the claimant alleges exposure (hereinafter the "index

1 person") and the claimant's relationship to each person;

2 (C) The specific location of each alleged exposure;

3 (D) The beginning and ending dates of each alleged exposure as
4 to each asbestos product or silica product for each location at
5 which exposure allegedly took place for the plaintiff and each
6 index person;

7 (E) The occupation and name of the employer of the exposed
8 person at the time of each alleged exposure;

9 (F) The specific condition related to asbestos or silica
10 claimed to exist;

11 (G) Any supporting documentation of the condition claimed to
12 exist; and

13 (H) All asbestos and silica claims along with the sworn
14 information must be individually filed in separate civil actions,
15 except claims relating to the exposure to asbestos or silica for
16 the same exposed person whose alleged injury is the basis of the
17 civil action may be joined in a single action. Otherwise, a claim
18 on behalf of a group may not be joined and filed in a single
19 action.

20 (2) Discovery may not be conducted until the court enters an
21 order determining the claimant has established a prima facie case
22 of physical impairment; except for discovery that relates to the
23 establishment or challenge of the prima facie evidence or by the
24 order of the court for good cause shown.

1 **§55-7E-6. Statute of limitations; two-disease rule.**

2 (a) Statute of limitations. -- Notwithstanding any other
3 provision of law, with respect to any asbestos or silica claim not
4 time-barred as of the effective date of this article, the
5 limitations period do not begin to run until the exposed person
6 discovers, or through the exercise of reasonable diligence should
7 have discovered, a physical impairment (as defined by this article)
8 caused by exposure to asbestos or silica. A claim based on a
9 nonmalignant condition that is filed before the cause of action for
10 a bodily injury pursuant to that section arises is preserved for
11 purposes of the period of limitations.

12 (b) Two-disease rule. -- An asbestos or silica claim arising
13 out of a nonmalignant condition shall be a distinct cause of action
14 from an asbestos or silica claim relating to the same exposed
15 person arising out of asbestos or silica related cancer. Damages
16 may not be awarded for fear or risk of cancer in any civil action
17 asserting an asbestos or silica claim for an alleged nonmalignant
18 condition.

19 (c) General releases from liability prohibited. -- Settlement
20 of a nonmalignant asbestos or silica claim concluded after the date
21 of enactment may not require, as a condition of settlement, release
22 of any future claim for asbestos or silica related cancer.

23 **§55-7E-7. Consolidation.**

24 (a) The Legislature finds defendants are often forced to

1 settle unmeritorious claims because they know that they will face
2 trial where the claim of one plaintiff who is truly sick is bundled
3 (or consolidated) with numerous claims from plaintiffs who may not
4 be sick. Plaintiffs' attorneys will often refuse to settle serious
5 claims unless their inventory of unimpaired claimants are also
6 settled. Federal courts have noted when the claims of numerous
7 plaintiffs with dissimilar alleged injuries and factual situations
8 are tried together, "the maelstrom of facts, figures and witnesses"
9 is likely to lead to jury confusion and an unfair trial. (*Malcolm*
10 *v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993))

11 (b) The Legislature of West Virginia acknowledges the Supreme
12 Court's authority in prescribing rules governing practice and
13 procedure in the courts of this state, as provided by Section 3,
14 Article VIII of the West Virginia Constitution.

15 (c) The Legislature of West Virginia hereby requests the
16 Supreme Court to adopt rules to specify procedures for
17 consolidation of asbestos or silica claims, brought pursuant to the
18 provisions of this article.

19 (d) With respect to procedures for consolidation of asbestos
20 or silica claims, the Legislature of West Virginia hereby requests
21 the Supreme Court to adopt a rule that permits consolidation of
22 asbestos or silica claims for trial only with the consent of all
23 parties, or permits a court to consolidate for trial only those
24 asbestos or silica claims that relate to the same exposed person

1 and members of the exposed person's household.

2 **§55-7E-8. Effective date.**

3 This article shall be effective on the date of the enactment
4 of this article and apply to any civil action asserting an asbestos
5 or silica claim in which trial has not commenced as of the date of
6 the enactment of this article.

7 **§55-7E-9. Severability.**

8 If any provision of this article is held invalid, such
9 invalidity shall not affect the other provisions or applications
10 of this article, and to this end, any such provision is deemed
11 severable.

12 **§55-7E-10. Miscellaneous provisions.**

13 Construction with other laws. --

14 This article may not be construed to affect the scope or
15 operation of any workers' compensation law or veterans' benefit
16 program, to affect the exclusive remedy or subrogation provisions
17 of any such law, or to authorize any lawsuit which is barred by any
18 such provision of law.

NOTE: The purpose of this bill is to limit certain asbestos claims, provide for the fair and efficient judicial consideration of personal injury and wrongful death claims arising out of asbestos or silica exposure, to ensure that individuals who suffer impairment, now or in the future, from illnesses caused by exposure to asbestos or silica, receive compensation for their injuries, and for other purposes.

This article is new; therefore, it has been completely underscored.