

Senate Bill No. 43

(By Senators Jenkins and Williams)

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

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

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

21 That the Code of West Virginia, 1931, as amended, be amended
22 by adding thereto a new article, designated §55-7E-1, §55-7E-2, §55-
23 7E-3, §55-7E-4 and §55-7E-5, all to read as follows:

24 **ARTICLE 7E. ASBESTOS CLAIMS TRANSPARENCY ACT.**

1 **§55-7E-1. Short title.**

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

4 **§55-7E-2. Definitions.**

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

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

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

18 (A) Loss of consortium;

19 (B) Loss of support;

20 (C) Personal injury or death;

21 (D) Mental or emotional injury;

22 (E) Risk or fear of disease or other injury;

23 (F) The costs of medical monitoring or surveillance; or

24 (G) Any claim made by or on behalf of any person exposed to

1 asbestos, or a representative, spouse, parent, child or other
2 relative of the exposed person.

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

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

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

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

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

21 (7) "Trust governance documents" means documents which
22 determine eligibility and payment levels for the asbestos trusts and
23 include trust distribution procedures, plans of reorganization and
24 related orders.

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

6 **§55-7E-3. Substantive provisions.**

7 (a) *Required Disclosures.* -- Within thirty days of commencing
8 an asbestos action not otherwise barred or deferred under state law,
9 and in no event less than one hundred-eighty days prior to trial of
10 that action, a claimant shall provide to all parties a statement of
11 any and all existing or anticipated claims against asbestos trusts.
12 Such statement shall be in addition to any existing preliminary
13 disclosure requirements otherwise imposed by law or applicable
14 agreement, ruling or judicial order. Furthermore, such statement
15 must include under penalty of perjury an attestation by the claimant
16 that the statement is based on a good faith investigation of all
17 potential claims against asbestos trusts. Counsel must certify that
18 he or she has conducted a good faith investigation of all potential
19 claims against asbestos trusts. The statement shall also disclose
20 when the claim was or will be made and whether there has been any
21 request for deferral, delay, suspension or tolling of the asbestos
22 trust claims process. In the event information obtained subsequent
23 to the submission of the statement supports the filing of additional
24 claims against asbestos trusts, the claimant shall update the

1 statement by amendment filed and served within thirty days of the
2 receipt of the additional information. A claimant shall also
3 produce to all parties within the time period specified in this
4 subsection in such asbestos action the following additional
5 materials:

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

16 (2) As to any claims that a claimant has not yet asserted
17 against the asbestos trusts but has disclosed pursuant to the
18 requirements of subdivision (1) regarding potential claims, all
19 materials described in subdivision (1) shall be produced, including,
20 at the time of its filing, the final executed proof of claim.

21 (3) Claimant's asbestos action shall be stayed in its entirety
22 until such time as the claimant certifies that all anticipated
23 claims against asbestos trusts have been filed and that claimant has
24 satisfied the requirements of subsection (a) subdivision (2), above.

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

3 (1) Any defendant may proceed by Order to Show Cause ("OSC")
4 in the court hearing such asbestos action setting forth the names
5 of additional asbestos trusts against which the plaintiff has not
6 made, but which the defendant in good faith believes the claimant
7 can make a successful claim. The OSC shall set forth the factual
8 basis for the claim describing the evidence sufficient to meet the
9 asbestos trust distribution procedure requirements to file valid
10 claims against such asbestos trust and the amount of money the trust
11 should pay for the claim. In response, within ten days thereafter,
12 the claimant shall:

13 (A) File the claim with the asbestos trust as set forth by the
14 defendant's notice which will be dispositive as to the OSC as to
15 that trust; or

16 (B) Show cause before the court hearing such asbestos action
17 for a determination that: (i) The proof of claim should be modified
18 and then submitted; or (ii) that there is insufficient evidence to
19 permit the claim to be filed in good faith under the applicable
20 asbestos trust distribution procedures. The court hearing the
21 asbestos action shall decide the issue on the basis of declarations,
22 deposition excerpts, interrogatory responses and such other evidence
23 as the court deems appropriate. The claimant shall have the burden
24 of proving that the claim should be modified and then submitted or

1 should not be filed because it does not meet the asbestos trust
2 distribution procedure requirements. If the court hearing the
3 asbestos action determines that there is a good faith basis for
4 filing the claim, the claimant shall promptly file the claim with
5 the asbestos trust as it was submitted by the defendant or as
6 modified by the court hearing the asbestos action. The claimant's
7 asbestos action shall be stayed until such time as the claimant
8 certifies that claimant has complied with the court's order and has
9 disclosed the materials required to be disclosed by subsection (a),
10 section four of this article.

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

24 (c) *Treatment of trust claims and claims material.* -- Trust

1 claims and claims material (as well as related discovery materials)
2 are presumptively relevant to and discoverable in an asbestos action
3 and shall be presumed by the court to be authentic. Notwithstanding
4 any other provision of law or agreement, no claims of privilege
5 shall apply to trust claims and claims materials, and such trust
6 claims and claims materials may be used by the parties in the
7 asbestos action to prove, without limitation, alternative causation
8 for the claimant's asbestos exposure as well as serve as a basis to
9 allocate responsibility for the claimant's claim.

10 (d) *Discovery of other materials.* -- In addition to the
11 mandatory disclosure requirements of this chapter, additional
12 disclosure and discovery of information relevant to the asbestos
13 action may be sought by any mechanism provided by the applicable
14 Rules of Civil Procedure. Defendants in an asbestos action may also
15 seek discovery from the asbestos trusts. The claimant shall assist
16 in any discovery from the asbestos trusts and provide whatever
17 consent or expression of permission may be required by the asbestos
18 trusts for release of such information and materials. Claims of
19 privilege and/or confidentiality by claimants will not preclude
20 discovery by defendants under this chapter.

21 (e) *Asbestos trust claim values.* -- In the event a matter
22 proceeds to trial before the claimant has received a decision from
23 an asbestos trust or trusts, as to each such claim, there shall be
24 a rebuttable presumption that the claimant will receive the

1 compensation specified for his or her claimed disease or injury in
2 the relevant trust governance documents. The court shall take
3 judicial notice of these documents and the payment amounts specified
4 therein. For each such pending claim, the court shall establish an
5 attributed value that will be used for purposes of calculation of
6 verdict or settlement set-offs or credits, subject to the adjustment
7 specified in subsection (h) below.

8 (f) *Sanctions for noncompliance.* -- Failure by a claimant to
9 comply with the discovery requirements outlined in this chapter
10 shall be a basis for sanctions against the claimant, including, at
11 the discretion of the court, upon a finding that the claimant
12 willfully failed to comply with the requirements of this chapter,
13 dismissal of the asbestos action with prejudice.

14 (g) *Set-offs.* -- The defendants will be entitled to set-offs
15 or credits of the full value of the trust claims against any
16 judgment rendered against them in the asbestos action. In the event
17 that a codefendant settles or otherwise resolves the asbestos claims
18 against it prior to verdict, if release(s) are obtained for the
19 benefit of asbestos trusts, the defendants remaining in the asbestos
20 action may pursue those claims by assignment according to whatever
21 rights were held by claimants. To the extent that any applicable
22 law provides broader relief to the defendants than is set forth
23 herein, nothing in this provision shall prohibit any defendant from
24 pursuing such broader relief.

1 (h) *Correction of attributed value of claim.* -- In the event
2 that defendants obtain a credit or reduction in a verdict because
3 of the attributed value of a claim pending but not yet paid against
4 an asbestos trust, and the claim giving rise to that attributed
5 value is rejected, in whole or in part, by the relevant asbestos
6 trust(s), those defendants shall pay to the claimant, on a several
7 basis, their respective share of the discount. The defendants shall
8 make payment within one hundred-eighty days of service of evidence
9 of rejection or reduction of the claim.

10 **§55-7E-4. Severability.**

11 The provisions of this article are severable. If any portion
12 of this article is declared unconstitutional or the application of
13 any part of this article to any person or circumstance is held
14 invalid, the remaining portions of the article and their
15 applicability to any person or circumstance shall remain valid and
16 enforceable.

17 **§55-7E-5. Effective date.**

18 This article applies to all asbestos claims filed on or after
19 the effective date. This article also applies to any pending
20 asbestos claims in which trial has not commenced as of the effective
21 date.

NOTE: The purpose of this bill is to establish a procedure that requires a claimant that files an asbestos case after the effective date of this bill to provide information to all defendants about all

claims filed or anticipated to be filed by that claimant against asbestos bankruptcy trusts, a mechanism for the defendant to challenge those claims, a procedure for sanctions by the court, and for set-offs for those claims.

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