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BILL ANALYSIS

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Senate Bill 1123 (as introduced 3-9-06)
Sponsor: Senator Alan L. Cropsey
Committee: Judiciary

Date Completed: 3-28-06

CONTENT

The bill would add Chapter 30 to the Revised Judicature Act to specify that a person would not be entitled to assert an asbestos claim or a silica claim unless the exposed person had a physical impairment to which asbestos or silica exposure was a substantial contributing factor. The bill also would do all of the following:

- Prohibit a person from bringing or maintaining a civil action alleging certain types of asbestos or silica claims unless he or she made a prima facie showing of certain evidence.
- Establish criteria that prima facie evidence would have to meet in order to be considered evidence of physical impairment.
- Specify that a ruling that a plaintiff had satisfactorily presented prima facie evidence would not be admissible at trial or raise a presumption that a person exposed to asbestos or silica was impaired by an asbestos- or silica-related condition.
- Require that a plaintiff in a civil action alleging an asbestos or silica claim to include with the initial filing a written report and supporting test results constituting the prima facie evidence required by the bill.
- Allow the court to consolidate cases under certain circumstances.
- Specify that a claim arising out of a nonmalignant condition would be a distinct cause of action from a claim arising out of asbestos- or silica-related cancer.

- Establish a cap on noneconomic damages in asbestos- or silica-related claims.
- Prohibit punitive damages and damages for fear or risk of cancer.
- Require a plaintiff in a civil action alleging an asbestos or silica claim to report on collateral source payments received, or to be received, as a result of settlements or judgments based on the same claim.
- Limit to 20% of the settlement or judgment the amount an attorney or representative of an individual could receive for services rendered in an asbestos or silica claim.
- Limit the liability of a product seller, other than a manufacturer.

Chapter 30 would apply to a civil action that included an asbestos or silica claim in which trial had not commenced as of the bill's effective date. It would not affect the scope or operation of any workers' compensation law, veterans' benefit program, or the exclusive remedy or subrogation provisions of any such law nor would it authorize any lawsuit that was barred by such a law.

"Substantial contributing factor" would mean that all of the following apply:

- Exposure to asbestos or silica is the predominate cause of the physical impairment alleged in the claim.
- The exposure to asbestos or silica took place on a regular basis over an extended period of time and in close proximity to the exposed person.
- A qualified physician has determined with a reasonable degree of medical certainty

that the physical impairment of the exposed person would not have occurred but for the exposure to asbestos or silica.

(According to Black's Law Dictionary, "prima facie" means sufficient to establish a fact or raise a presumption unless disproved or rebutted.)

Asbestos Claims

Definitions. "Asbestos claim" would mean a claim for damages or other civil or equitable relief presented in a civil action, arising out of, based on, or related to the health effects of exposure to asbestos, including loss of consortium and any other derivative claim made by or on behalf of an exposed person or a representative, spouse, parent, child, or other relative of an exposed person. It would not include a claim for benefits under a workers' compensation law or veterans' benefits program or claims brought by a person as a subrogee by virtue of the payment of benefits under a workers' compensation law.

"Asbestos" would mean all minerals defined as asbestos under Federal regulations (29 CFR 1910.1001), i.e., chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated and/or altered. "Asbestosis" would mean bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

Based on a Nonmalignant Condition. The bill would prohibit a person from bringing or maintaining a civil action alleging an asbestos claim based on a nonmalignant condition unless the person made a prima facie showing that the exposed person currently or previously had a physical impairment resulting from a medical condition to which exposure to asbestos was a substantial contributing factor. "Nonmalignant condition" would mean any condition that is caused or may be caused by asbestos, other than a diagnosed cancer.

A prima facie showing would have to include evidence verifying that a qualified physician had taken a detailed occupational and exposure history of the exposed person or, if he or she were deceased, from a person who was knowledgeable about the exposures that formed the basis of the claim. This

would include the identification of all of the exposed person's principal places of employment and exposures to airborne contaminants, and whether each place of employment involved exposures to airborne contaminants including asbestos fibers or other disease-causing dusts that can cause pulmonary impairment and the nature, duration, and level of each exposure. A prima facie showing also would have to include at least all of the following:

- Evidence verifying that a qualified physician had taken a detailed medical and smoking history, including a thorough review of the exposed person's past and present medical problems and their most probable cause.
- A determination by a qualified physician on the basis of a medical examination and pulmonary function testing, that the exposed person currently or previously had a permanent respiratory impairment rating of at least Class 2 as defined and evaluated pursuant to "AMA Guides to the Evaluation of Permanent Impairment" ("AMA Guides", below).
- A diagnosis by a qualified physician of asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening.
- A determination by a qualified physician that asbestosis or diffuse pleural thickening, rather than chronic obstructive pulmonary disease, currently or previously was a substantial contributing factor to the exposed person's physical impairment.
- A conclusion by a qualified physician that the exposed person's medical finding and impairment were not more probably the result of causes other than the asbestos exposure revealed by the person's employment and medical history.

The physician's determination that asbestosis or diffuse pleural thickening was a substantial contributing factor to the physical impairment would have to be based at a minimum on a determination that the exposed person currently or previously had one or more of the following: total lung capacity, by plethysmography or timed gas dilution, below the "predicted lower limit of normal"; "FVC" below the lower limit of normal and a ratio of "FEV1" to FVC that was equal to or greater than the predicted

lower limit of normal; or a chest X-ray showing small, irregular opacities (S,T) graded by a "certified "B" reader" at least 2/1 on the "ILO scale".

"AMA guides to the evaluation of permanent impairment" would mean the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (Fifth Edition, 2000). "Predicted lower limit of normal" would mean, with respect to a test, the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA Guides.

"FVC" would mean forced vital capacity, i.e., the maximal volume of air expelled with maximum effort from a position of full inspiration. "FEV1" would mean forced expiratory volume in the first second, i.e., the maximal volume of air expelled in one second during performance of a simple spirometric test.

"Certified "B" reader" would mean an individual qualified as a final or "B" reader under Federal regulations concerning proficiency in the use of systems classifying the pneumoconioses (42 CFR 37.51(b)). "ILO scale" would mean the system for the classification of chest X-rays contained in the International Labour Organization's *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses* (2000).

Based on Lung Cancer. A person could not bring or maintain a civil action alleging an asbestos claim based on lung cancer unless he or she made a prima facie showing that included at least all of the following:

- Diagnosis by a qualified physician who was board-certified in pathology, pulmonary medicine, or oncology of a primary lung cancer and that exposure to asbestos was a substantial contributing factor to the cancer.
- Evidence sufficient to demonstrate that at least 10 years had elapsed between the date of first exposure to asbestos and the date of diagnosis of the lung cancer.
- A conclusion by a qualified physician that the exposed person's medical findings and physical impairment were not more probably the result of causes other than the asbestos exposure revealed by the person's employment and medical history.

If the exposed person were a nonsmoker, he or she also would have to make a prima facie showing of either 1) radiological or pathological evidence of asbestosis, or 2) evidence of occupational exposure to asbestos for one or more of the following exposure periods:

- Five exposure years, if the exposed person were an insulator, shipyard worker, worker in a manufacturing plant handling raw asbestos, boilermaker, shipfitter, or steamfitter, or had worked in another trade performing similar functions.
- 10 exposure years, if the exposed person were a utility or power house worker or secondary manufacturing worker or worked in another trade performing similar functions.
- 15 exposure years, if the exposed person were in general construction, a maintenance worker, a chemical or refinery worker, marine engine room personnel or other personnel on a vessel, a stationary engineer or fireman, or a railroad engine repair worker or had worked in another trade performing similar functions.

If the exposed person were a smoker, he or she also would have to make a prima facie showing of *both* radiological or pathological evidence of asbestosis and evidence of one of the occupational exposure conditions listed above.

The number of exposure years would have to be determined as follows:

- Each single year of exposure before 1972 would have to be counted as one year.
- Each single year of exposure from 1972 through 1979 would have to be counted as one-half of one year, except as described below.
- Exposure after 1979 could not be counted, except as described below.

Each year after 1971 for which the plaintiff could establish exposure exceeding the U.S. Department of Labor Occupational Safety and Health Administration limit for eight-hour time-weighted average airborne concentration for a substantial portion of the year would have to be counted as one year.

"Lung cancer" would mean a malignant tumor located inside a lung and would not include mesothelioma.

"Smoker" would mean a person who has smoked cigarettes or used another tobacco product with the 15 years immediately preceding the diagnosis that the person has a condition or disease that is the basis for an asbestos or silica claim. "Nonsmoker" would mean a person who did not smoke cigarettes or use any other tobacco product within the 15 years immediately preceding the diagnosis that the person has a condition or disease that is the basis for an asbestos or silica claim.

Based on Other Cancers. A person could not bring or maintain a civil action alleging an asbestos claim based on cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach unless the person made a prima facie showing that included at least all of the following:

- A diagnosis by a qualified physician who was board-certified in pathology, pulmonary medicine, or oncology of primary cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach, as applicable, and that exposure to asbestos was a substantial contributing factor to the cancer.
- Evidence sufficient to demonstrate that at least 10 years had elapsed between the date of first exposure to asbestos and the date of diagnosis of the cancer.
- Radiological or pathological evidence of asbestosis and/or evidence of the occupational exposure conditions listed above for a lung cancer claim.
- A conclusion by a qualified physician that the exposed person's medical findings and physical impairment were not more probably the result of causes other than the asbestos exposure revealed by the person's employment and medical history.

Silicosis or Silica Claims

Definitions. "Silica claim" would mean a claim for damages or other civil or equitable relief presented in a civil action, arising out of, based on, or related to the health effects or exposure to silica, including loss of consortium and any other derivative claim made by or on behalf of an exposed person or a representative, spouse, parent, child, or

other relative of an exposed person. Silica claim would not include a claim for benefits under a workers' compensation law or veterans' benefits program or claims brought by a person as a subrogee by virtue of the payment of benefits under a workers' compensation law.

"Silica" would mean a respirable crystalline form of silicon dioxide, including alpha, quartz, cristobalite, and tridymite. "Silicosis" would mean nodular interstitial fibrosis of the lungs caused by inhalation of silica.

Silicosis Claim. A person could not bring or maintain a civil action alleging a silicosis claim unless he or she made a prima facie showing that the exposed person suffered a physical impairment as a result of a medical condition to which exposure to silica was a substantial contributing factor.

A prima facie showing would have to include evidence verifying that a qualified physician had taken a detailed occupational and exposure history of the exposed person or, if he or she were deceased, from a person who was knowledgeable about the exposures that formed the basis of the nonmalignant silica claim. The history would have to include all of the exposed person's principal places of employment and exposures to airborne contaminants as well as whether each place of employment involved exposures to airborne contaminants, including silica particles or other disease-causing dusts that can cause pulmonary impairment and the nature, duration, and level of any such exposure.

The prima facie showing also would have to include at least all of the following:

- Evidence verifying that a qualified physician had taken a detailed medical and smoking history, including a thorough review of the exposed person's past and present medical problems and their most probable cause, and verifying a sufficient latency period for the applicable stage of silicosis.
- A determination by a qualified physician, on the basis of a medical examination and pulmonary function testing, that the exposed person had a permanent respiratory impairment rating of at least Class 2 as defined by and evaluated pursuant to the AMA Guides.

- A conclusion by a qualified physician that the exposed person's medical findings and impairment were not more probably the result of causes other than the silica exposure revealed by the person's employment and medical history.

In addition, the prima facie showing would have to include a determination by a qualified physician that the exposed person had either of the following:

- A Quality 1 chest X-ray under the ILO scale or, if the exposed person were deceased and pathology and Quality 1 X-ray were not available, a Quality 2 chest X-ray, that had been read by a certified "B" reader as showing, according to the ILO scale, bilateral nodular opacities (P, Q, or R) occurring primarily in the upper lung fields, graded 1/1 or higher.
- Pathological demonstration of classic silicotic nodules exceeding one centimeter in diameter as published in *112 Archive of Pathology and Laboratory Medicine* 7 (July 1988).

Silica Claim Other Than Silicosis. A person could not bring or maintain a civil action alleging a silica claim, other than a silicosis claim described above, unless he or she made a prima facie showing that included a report that met either of the following:

- The report was by a physician who was board-certified in pulmonary medicine, internal medicine, oncology, or pathology and stated a diagnosis of silica-related lung cancer and that, to a reasonable degree of medical probability, exposure to silica was a substantial contributing factor to the diagnosed lung cancer.
- The report was by a physician who was board-certified in pulmonary medicine, internal medicine, or pathology and stated a diagnosis of silica-related progressive massive fibrosis or acute silicoproteinosis or of silicosis complicated by documented tuberculosis.

The prima facie showing for a silica claim other than a silicosis claim also would have to include evidence verifying that a qualified physician had taken a detailed occupational and exposure history of the exposed person or, if he or she were deceased, from a person who was knowledgeable about the exposure that formed the basis of the nonmalignant silica claim. The history would

have to include all of the exposed person's principal places of employment and exposures to airborne contaminants and whether each place of employment involved exposures to airborne contaminants, including silica particles or other disease-causing dusts that can cause pulmonary impairment and the nature, duration, and level of the exposure.

The prima facie showing also would have to include both of the following:

- Evidence verifying that a qualified physician had taken a detailed medical and smoking history, including a thorough review of the exposed person's past and present medical problems and their most probable cause.
- A conclusion by a qualified physician that the exposed person's medical findings and impairment were not more probably the result of causes other than the silica exposure revealed by the person's employment and medical history.

In addition, the prima facie showing would have to include a determination by a qualified physician that the exposed person had either of the following:

- A quality 1 chest X-ray under the ILO scale or, if the exposed person were deceased and pathology and quality 1 X-ray were not available, a quality 2 chest X-ray, that had been read by a certified "B" reader as showing, according to the ILO scale, bilateral nodular opacities (P, Q, or R) occurring primarily in the upper lung fields, graded 1/1 or higher.
- Pathological demonstration of classic silicotic nodules exceeding one centimeter in diameter as published in *112 Archive of Pathology and Laboratory Medicine* 7 (July 1988).

Prima Facie Evidence

To qualify for consideration as evidence relating to physical impairment, evidence (including pulmonary functions testing and diffusing studies) would have to comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment of the AMA Guides, as set forth in Federal regulations (20 CFR Part 404, Subpart P, Appendix 1, Part A, Section 3.00 E. and F.) and the interpretive standards of the official

statement of the American Thoracic Society entitled "Lund Function Testing: Selection of Reference Values and Interpretive Strategies", as published in *American Review of Respiratory Disease*, 1991: 144:1202-1218.

The evidence could not be obtained through testing or examinations that violated any applicable law, regulation, licensing requirement, or medical code of practice; and could not be obtained under the condition that the exposed person retain legal services in exchange for the examination, test, or screening.

All of the following would apply to a ruling by a court that a plaintiff had satisfactorily presented prima facie evidence to meet the applicable requirements:

- The ruling would not raise a presumption at trial that the exposed person was impaired by an asbestos- or silica-related condition.
- The ruling would not be conclusive as to the liability of any defendant.
- The ruling would not be admissible at trial.

A prima facie showing would not be required in a civil action alleging an asbestos claim based on mesothelioma. ("Mesothelioma" would mean a malignant tumor with a primary site in the pleura or the peritoneum that has been diagnosed by a physician who is board-certified in pathology using standardized and accepted criteria of microscopic morphology and/or appropriate staining techniques.)

Court Proceedings

Consolidation of Cases. The bill would allow a court to consolidate for trial any number and type of asbestos or silica claims, if all of the parties to the claims consented. If all of the parties did not consent, the court could consolidate for trial only asbestos or silica claims relating to the same exposed person and members of the exposed person's household.

Michigan Court Jurisdiction. A civil action alleging an asbestos or silica claim could be brought in Michigan only if the plaintiff were domiciled in Michigan or the exposure to asbestos or silica that was a substantial contributing factor to the physical

impairment on which the claim was based occurred in Michigan.

Case Filing & Prima Facie Evidence. The plaintiff in a civil action alleging an asbestos or silica claim would have to file with the complaint or other initial pleading a written report and supporting test results that constituted prima facie evidence of the exposed person's asbestos- or silica-related physical impairment that met the applicable prima facie requirements described above. In an asbestos or silica claim pending on the bill's effective date, the plaintiff would have to file a written report and supporting test results that complied with this filing requirement not later than 60 days after the bill's effective date or 30 days before trial of the action began, whichever occurred first.

A court would have to give a defendant in a civil action that included an asbestos or silica claim a reasonable opportunity to challenge the adequacy of prima facie evidence of an asbestos- or silica-related impairment offered under Chapter 30. If a court determined that a plaintiff had failed to make the required prima facie showing, the plaintiff's claim would have to be dismissed without prejudice.

Period of Limitations. The bill specifies that the period of limitations for an asbestos or silica claim that was not barred as of the bill's effective date would accrue when the exposed person discovered, or through the exercise of reasonable diligence should have discovered, that he or she was physically impaired by an asbestos- or silica-related condition.

Distinct Cause of Action. The bill specifies that an asbestos or silica claim arising out of a nonmalignant condition would be a distinct cause of action from an asbestos or silica claim relating to the same exposed person arising out of asbestos- or silica-related cancer.

In addition, the bill specifies that the settlement of a nonmalignant asbestos or silica claim concluded after the bill's effective date could not require, as a condition of the settlement, the release of any future claim for asbestos- or silica-related cancer.

Damages

Noneconomic Caps. Except as provided below, the total amount of damages awarded for noneconomic loss in a civil action that included an asbestos or silica claim could not exceed \$250,000 or three times the amount of economic loss, whichever was greater, regardless of the number of parties against whom the action was brought.

The total amount of damages awarded for noneconomic loss in a civil action that included an asbestos claim based upon mesothelioma could not exceed \$500,000 or three times the amount of economic loss, whichever was greater, regardless of the number of parties against whom the action was brought.

Prohibited Damages. Punitive damages could not be awarded in a civil action that included an asbestos or silica claim. Also, damages for fear or risk of cancer could not be awarded in a civil action asserting an asbestos or silica claim.

Collateral Source Payments

At the time a complaint was filed in a civil action that included an asbestos or silica claim, the plaintiff would have to file with the court a verified written report that disclosed the total amount of any collateral source payments received, including payments the plaintiff would receive in the future, as a result of settlements or judgments based on the same claim. In a civil action alleging an asbestos or silica claim pending on the bill's effective date, the plaintiff would have to file the verified written report not later than 60 days after the bill's effective date or 30 days before the trial began, whichever occurred first.

A plaintiff in a civil action that included an asbestos or silica claim would have to file updated reports disclosing the total amount of collateral source payments received, or to be received in the future, on a regular basis until a final judgment was entered in the action.

A court would have to ensure that information contained in the initial and updated collateral source payment reports was treated as privileged and confidential and that the contents of the reports were

not disclosed to anyone except the other parties to the action.

Attorney Compensation

An attorney or representative of an individual could not receive more than 20% of the amount awarded to the individual by way of settlement or judgment for services rendered in connection with filing, litigating, settling, or otherwise assisting in bringing an asbestos or silica claim governed by Chapter 30.

A representative of an asbestos or silica claimant who violated this limitation would have to be fined, for each violation, not more than \$5,000 or twice the amount received by the representative for services rendered, whichever was greater.

Liability of Product Seller or Lessor

A product seller, other than a manufacturer, would be liable to a plaintiff in a civil action that included an asbestos or silica claim only if the plaintiff established one or more of the following:

- The product that allegedly caused the harm that was the subject of the complaint was sold, rented, or leased by the product seller; the product seller failed to exercise reasonable care with respect to the product; and the failure to exercise reasonable care was a proximate cause of the harm to the exposed person.
- The product seller made an express warranty applicable to the product that allegedly caused the harm that was the subject of the complaint, independent of any express warranty made by the manufacturer as to the same product; the product failed to conform to the warranty; and the failure of the product to conform to the warranty caused the harm to the exposed person.
- The product seller engaged in intentional wrongdoing, as determined under applicable State law, and the intentional wrongdoing caused the harm that was the subject of the complaint.

A product seller's failure to inspect the product would not be a failure to exercise reasonable care with respect to the product, if either of the following applied:

- The failure occurred because there was no reasonable opportunity to inspect the product.
- An inspection of the product, in the exercise of reasonable care, would not have revealed the aspect of the product that allegedly caused the exposed person's impairment.

In a civil action that included an asbestos or silica claim, a person engaged in the business of renting or leasing a product would not be liable for the tortious act of another solely by reason of ownership of the product.

MCL 600.5827 et al.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

To the extent that the bill would limit the number of lawsuits filed in asbestos and silica cases, it would reduce administrative court costs, as well as reduce potential liability in cases in which the State or a local unit of government is a party.

Fiscal Analyst: Stephanie Yu

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.