

# The State Factor

*Jeffersonian Principles in Action*

## *The Asbestos Litigation Crisis in a Nutshell*

By Mark A. Behrens & Phil S. Goldberg

July 2004

### A Letter from the National Chairman

The American Legislative Exchange Council (ALEC) has developed the *Asbestos and Silica Claims Priorities Act*, model legislation to help provide timely compensation to people who have developed a physical impairment as a result of asbestos or silica exposure. The model legislation also includes a number of reforms to promote fairness and sound public policy in asbestos and silica litigation.

Asbestos litigation has reached crisis proportions. In one recent year, more than 100,000 new cases were filed. At least 300,000 asbestos claims are now pending – more than double the number of a decade ago. Recent studies have shown that up to ninety percent of the claimants who file asbestos claims today are not sick. They have no medically evident injury or impairment.

The presence of unimpaired claimants on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from claimants with severe asbestos-related disabilities. Sick claimants may face a depleted pool of assets in the future unless action is taken now to prioritize the treatment of claims.

Already, asbestos lawsuits have bankrupted over seventy companies. As a consequence, more companies have become ensnared in the litigation as plaintiff attorneys look for new “deep pockets.” Today, over 8,500 defendants have been named in asbestos-related actions. The litigation now touches firms in industries engaged in almost every form of economic activity.

As the *Wall Street Journal* has reported, “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”

Before it ends, the litigation may cost upwards of \$200 billion. Recent reports indicate that some asbestos personal injury lawyers are now using their litigation-generating mechanisms to recruit plaintiffs to file claims alleging exposure to silica. Silica, commonly known as quartz, is an ubiquitous mineral that covers beaches and fills children’s sandboxes. All soil contains silica; it is the major portion of rocks, sands, and clays.

Under the *Asbestos and Silica Claims Priorities Act*, sick claimants would receive trial priority. No longer would they be forced to wait in line behind the unimpaired to have their cases heard. Individuals who cannot demonstrate actual impairment under objective medical criteria would have their claims suspended and preserved on an inactive docket until such time that they may become sick from asbestos or silica exposure. In addition, the model legislation would curb forum shopping and stop improper joinder of “apples and oranges” claims.

We look forward to working with you to create a fair and expedient process for addressing the asbestos and silica litigation environments in your state.

Sincerely,

Mississippi Senator Billy Hewes  
ALEC 2004 National Chairman

## The Asbestos Litigation Crisis in a Nutshell

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be dealing with what the U.S. Supreme Court has called an “asbestos-litigation crisis.” Many believed that asbestos litigation would be a serious but diminishing problem in the years to come. Instead of declining, however, “the crisis is worsening at a much more rapid pace than even the most pessimistic projections,” according to former U.S. Attorney General Griffin Bell

The number of asbestos cases pending nationwide doubled between 1993 and 1999, from 100,000 cases to more than 200,000 cases. In 2003, more than 105,000 new claims were filed. The RAND Institute for Civil Justice (“RAND”) predicts that as many as one million additional claims may be filed.

RAND recently estimated that \$70 billion had already been spent in asbestos litigation through year-end 2002. Tillinghast-Towers Perrin estimates that the litigation will cost an additional \$130 billion. To put these costs in perspective, total asbestos litigation costs may be ten times greater than the \$20 billion in property damage caused by the massive 6.7 magnitude earthquake that hit Los Angeles in 1994. The litigation may cost almost seven times more than Hurricane Andrew, which pounded Florida and Louisiana in 1992, one of the most expensive natural disasters in U.S. history, with a cost of about \$30 billion. Attorney General Bell has said that asbestos litigation costs will exceed the cost of “all Superfund sites combined, Hurricane Andrew, or the September 11<sup>th</sup> terrorist attacks.”

Present trends in asbestos litigation have set off a chain reaction. Payments to individuals with little or no physical impairment have encouraged more lawsuits. Recent reports indicate that as much as ninety percent of new asbestos-related claims are filed by the non-sick. These filings have forced scores of so-called “traditional” asbestos defendants into bankruptcy, costing workers and communities billions of dollars in direct and indirect costs.

These bankruptcies, in turn, have created ripple effects throughout the entire business community. Companies with only a peripheral connection to asbestos increasingly are being named as defendants. The downward spiral will continue to play out on a broad scale for many more years unless something is done.

The current asbestos litigation system is not working

for anyone. Changes are needed, but federal legislation to solve the problem remains speculative. Therefore, state legislatures and courts are now reevaluating the way they handle asbestos claims and working to make improvements. ALEC developed the *Asbestos and Silica Claims Priorities Act* to provide legislators with a sound model to improve the way asbestos and silica cases are handled by state courts. The reforms in the model have received the support of the National Association of Insurance Commissioners and National Conference of Insurance Legislators.

## Inactive Asbestos Docket — Giving Trial Priority to the Sick

### A. The History of Asbestos Use

For much of the 20<sup>th</sup> Century, asbestos was a staple of construction because of its resistance to heat and fire. For example, the Navy and other government agencies required the use of asbestos in ships after uncontrollable fires added to the devastation of the Pearl Harbor attack in World War II. Asbestos also was widely used in factories, commercial buildings, homes and some everyday products, including insulation, pipe wrapping, spackle, plastics and roofing tiles.

### B. The History of Asbestos Litigation

Because of the widespread use of asbestos, the U.S. Supreme Court warned of a looming asbestos litigation problem as early as 1991. Many of the early lawsuits were brought on behalf of plaintiffs with actual disease against companies that made and sold asbestos-containing products. Today, the asbestos litigation environment is radically different.

### C. The Current Asbestos Litigation Crisis

#### 1. The Explosion in Filings by “Unimpaired Claimants”

In the past, workers who developed disease from asbestos exposure filed most asbestos claims. The most debilitating form of disease was mesothelioma, a type of cancer. That is no longer the case.

Today, as much as ninety percent of new asbestos claims are filed by unimpaired claimants — people who have been exposed to asbestos, and who often have some marker of exposure, but who are not impaired by an asbestos-related disease and likely never will be.

Various factors are driving the avalanche of filings by

unimpaired claimants. One explanation for the “file now” trend is that many claimants may feel compelled to file for remedial compensation because of fears that state statutes of limitations will bar their claims if they do not file soon after the first markers of exposure become detectable. Another reason may be that plaintiffs are aware that many asbestos defendants are going bankrupt, and may seek compensation now out of fear that it will not be available later. Some plaintiffs and their lawyers also may be aware that other unimpaired plaintiffs are obtaining settlements. They may question, “why wait for an injury to manifest itself if I can receive compensation now?”

## 2. *Lawyers in Search of Plaintiffs*

Mass screenings conducted by entrepreneurial plaintiffs’ law firms and their agents are fueling the number of filings by unimpaired claimants. The lawyers and the screening firms recruit plaintiffs through exaggerated claims, such as “Find out if YOU have MILLION DOLLAR LUNGS!” Often, the screenings take place in areas with high concentrations of workers who may have been exposed to asbestos. Attorney General Bell has pointed out, “These screenings often do not comply with federal or state health or safety law. There often is no medical purpose for these screenings and claimants receive no medical follow-up.”

Several federal judges have described this phenomenon. The manager of the federal asbestos docket, Senior U.S. District Judge Charles Weiner of the Eastern District of Pennsylvania, has said: “Oftentimes, [asbestos] suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.” Similarly, Senior U.S. District Court Judge Jack Weinstein and Bankruptcy Court Judge Burton Lifland have explained: “Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media.”

Professor Lester Brickman of Cardozo Law School in New York recently wrote that the number of construction and plant workers that have undergone attorney-sponsored screenings over the past seventeen years “undoubtedly exceeds 1,000,000. Currently,

hundreds of thousands of potential litigants are screened each year.”

## D. *The Impact of “Unimpaired Claimants” on Asbestos Litigation*

### 1. *The Truly Sick*

Mass filings by unimpaired claimants have created judicial backlogs and are exhausting scarce resources that should go to the sick and the dying, their widows and survivors. As Steven Hantler, assistant general counsel for DaimlerChrysler Corp., has explained: “The tragedy is that as plaintiffs’ lawyers enroll the healthy into their lawsuits in order to line their own pockets, less money is available for those who are actually sick and dying.”

Cancer victims have a well-founded fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed. For example, consider Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company’s bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990, and did not resume again until 1995. According to the Manville trustees, a “disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.” As a result, the Trust is now paying out just *five cents on the dollar* to asbestos claimants. Consider also:

- ✓ The widow of one man in Washington State who died from mesothelioma has been told that she should expect to receive only fifteen percent of the \$1 million she might have received if her husband had filed suit before the companies he sued went bankrupt.
- ✓ The widow of a mechanic in Ohio will recover at most \$150,000 of the \$4.4 million dollar award that she received for her husband’s death.

Lawyers representing sick and dying plaintiffs have endorsed mechanisms to give trial priority to the truly sick. Here is what some of them have said:

- ✓ Richard Scruggs, renowned Mississippi plaintiffs’ lawyer: “Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy.”

- ✓ Matthew Bergman, Seattle plaintiff's lawyer: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system ... the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."
  - ✓ Peter Kraus, Dallas plaintiffs' lawyer: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."
  - ✓ Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.
  - ✓ Randy Bono, a prominent Madison County, Illinois, asbestos plaintiffs' attorney: "I welcome change. Getting people who aren't sick out of the system, that's a good idea."
  - ✓ Terrence Lavin, Chicago personal injury lawyer: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an x-ray."
- liability defendants. They are named in litigation because they provide fresh "deep pockets." As plaintiffs' attorney Richard Scruggs has remarked, the litigation has turned into the "endless search for a solvent bystander."
- The spread of asbestos cases can be charted simply by looking at the number of defendants brought into the litigation.
- ✓ More than 8,500 defendants have been named in asbestos cases – up from 300 in 1982.
  - ✓ RAND recently found that asbestos litigation "has spread to touch firms in industries engaged in almost every form of economic activity that takes place in the American economy."
  - ✓ Former Attorney General Griffin Bell speculates that half of the companies in the Dow Jones Index may soon be affected.
  - ✓ Senior U.S. District Court Judge Jack Weinstein has said that "[i]f the acceleration and expansion of asbestos lawsuits continues unaddressed, it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy."
  - ✓ Some "peripheral defendants" have themselves begun to collapse under the great weight of claims against them.

## 2. Defendants and Their Employees

Over seventy companies have been driven into bankruptcy due to asbestos litigation. The large number of major employers that have declared bankruptcy as a result of asbestos litigation reinforces the concern that, unless something is done, sick claimants may face a depleted pool of assets in the future.

Moreover, when "traditional" asbestos defendants, the makers and sellers of asbestos-containing products, seek the protection of the bankruptcy courts to deal with mounting numbers of claims, experience shows that the plaintiffs' personal injury bar simply will cast its litigation net wider and bring in "peripheral defendants." These defendants are diverse, ranging from oil companies, to automobile manufacturers, to utilities, to hospitals and colleges. Many newer asbestos defendants are household names. Many others are small businesses facing potentially devastating liability. Some may have participated in the chain of distribution of the sale of an asbestos-containing product; others are premises

## 3. Workers, Retirees and Communities

As the Enron collapse illustrated, bankruptcies represent more than the demise of a business. They can cost employees their jobs and ordinary citizens their retirement savings, as well as have a deep impact on entire communities.

- ✓ Joseph Stiglitz, a Nobel Prize-winning economist, and two colleagues found that bankruptcies from asbestos litigation put 52,000 to 60,000 people (many of them union laborers) out of work between 1997 and 2000. Those workers and their families lost \$175 million to \$200 million in wages, and roughly twenty-five percent of their retirement assets.

- ✓ Professor Stiglitz and his colleagues estimated the aggregate direct costs of bankruptcies on the bankrupt firms to be between \$325-\$625 million.
- ✓ National Economic Research Associates (NERA) has estimated that workers, communities, and taxpayers will bear as much as \$2 billion in additional costs, due to indirect and induced impacts of company closings related to asbestos.
- ✓ NERA also found that for every ten jobs lost directly, communities tend to lose eight additional jobs, leading to a decline in per capita income, real estate values, and lower tax receipts. Additional costs brought upon workers and communities include up to \$76 million in worker retraining, \$30 million in increased healthcare costs and \$80 million in payment of unemployment benefits.
- ✓ Goldman Sachs Managing Director Scott Kapnick has testified that “the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their shareholders and employees, and the economy as a whole.”

### **Inactive Silica Litigation Docket**

ALEC’s *Asbestos and Silica Claims Priorities Act* includes an inactive silica docket to address the dramatic recent increase in the number of lawsuits arising out of the use of industrial sand. It appears that plaintiffs’ lawyers filing cases on behalf of people who may have breathed in silica dust are trying to use the same litigation generating techniques used in asbestos litigation. In many instances, plaintiffs’ lawyers file claims against both asbestos and silica manufacturers.

#### **A. The History of Silica in the Workplace**

The dangers of working with silica have been known for centuries. The health risk of industrial sand lies in its use in certain industries, such as in sandblasting, where tiny dust particles are produced that can be hazardous when inhaled. According to the National Institute for Occupational Safety and Health (NIOSH), silica currently is found in nearly all mining operations. Those inhaling silica can get silicosis, a respiratory disease.

#### **B. The Use of Protective Measures**

The American Foundrymen’s Society has distributed literature to its members on foundry hazards, including silica exposure, for more than 100 years. In 1908, the U.S. Bureau of Labor recognized the health risks of dust for hard-rock miners, stonecutters, potters, glass workers, sandblasters, and foundry workers. By the 1930’s, the federal government launched a silica awareness campaign after investigating, testing, and certifying respiratory protection equipment for abrasive blasting. Over the next several decades, awareness of the potential hazards of silica exposure and greater protection of workers largely led silica to fade from the national spotlight.

#### **C. A Sudden Rise in Silica Litigation**

After years of relatively manageable dockets, the number of silica cases has jumped. One large insurance company has seen a tenfold rise from August of 2002, and is now handling more than 25,000 silica claims. U.S. Silica Company, one of America’s largest suppliers of industrial sand, was hit with more than 15,000 new claims during the first six months of 2003 – up from 5,000 claims for all of 2002 and 1,400 claims in 2001. One company that makes masks designed to protect people from silica dust now has over 17,000 suits against it.

Tellingly, the same lawyers and law firms who for years specialized in asbestos cases are bringing many of the new silica suits. The tactics these lawyers have used to generate asbestos claims are now being applied to the industrial sand context, such as plaintiff recruitment through Internet websites, mobile x-ray vans, and mass screenings. Law firm-sponsored screenings of potential silica plaintiffs have increased “immeasurably” in recent years. Some have speculated that asbestos personal injury lawyers are developing silica cases as a way to “diversify” out of asbestos in the event there is legislation on that issue.

#### **D. Rise in Lawsuits, But Not Mortality**

The view that much of the new silica litigation appears to be lawyer-driven is supported by the lack of evidence of a burgeoning silica medical crisis. In fact, NIOSH reports that over the past thirty years, the annual number of silica-related deaths has dropped nearly eighty-four percent, from 1,157 in 1968, to 308 in 1990, to 187 in 1999. To put the NIOSH figures in

context, the U.S. Centers for Disease Control and Prevention report that, on average, 400 people in the United States die each year from extreme heat. The federal Bureau of Labor Statistics reports that 155 workers die annually in falls from rooftops. Findings of silicosis cases today are so rare that one specialist remarked that “[s]ilicosis is becoming more of a radiology curiosity.”

### *E. Forum Shopping*

One might expect that a medical crisis would also reveal a national pattern of lawsuit filings in large and populous states, such as California, Michigan, New York and Illinois, or in states with the highest silica-related mortality rates (*i.e.*, West Virginia, Vermont, Colorado and Pennsylvania). But, just as with asbestos cases, most silica cases are clustered in states such as Texas and Mississippi – so-called “magic jurisdictions” where plaintiffs hope to obtain a favorable recovery.

### *F. ALEC’s “Asbestos and Silica Claims Priorities Act” Inactive Silica Docket*

ALEC’s model *Asbestos and Silica Claims Priorities Act* would establish a statewide inactive silica docket. Under the model bill, trial priority would be given to individuals who demonstrate a silica-related impairment based upon objective medical criteria. The claims of the unimpaired would be suspended and placed on an “inactive” docket. While on the inactive docket, the claims of the unimpaired would be preserved, because otherwise applicable statutes of limitations would be tolled. Discovery would be stayed with respect to inactive docket claimants, reducing legal transaction costs. A plaintiff could petition to have his or her case removed to the active docket, and set for trial, by presenting credible medical evidence that an impairing condition has developed. A filing fee would only be charged once a claim moves to the active docket.

### **The Need to End Forum Shopping**

Forum shopping is a problem in asbestos and silica litigation because different states, and different jurisdictions within states, treat claims in different ways. Rather than file cases where there is a logical connection to an injury, plaintiff lawyers often strategically file cases in certain “magic jurisdictions” with a reputation for producing large settlements and verdicts. Mississippi trial lawyer Richard Scruggs has explained:

*What I call the “magic jurisdiction,” . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they’re State Court judges; they’re popul[ists]. They’ve got large populations of voters who are in on the deal, they’re getting their [piece] in many cases. And so, it’s a political force in their jurisdiction, and it’s almost impossible to get a fair trial if you’re a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. . . . These cases are not won in the courtroom. They’re won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or law is.*

The American Tort Reform Association (ATRA) appropriately labels these jurisdictions “judicial hellholes,” because court procedures and laws are routinely applied in an unfair manner against civil defendants.

Walter Dellinger, the U.S. Solicitor General under President Clinton, has described the impact of forum shopping on asbestos cases. Between 1998 and 2000, five states handled 66% of all asbestos filings – Mississippi, New York, West Virginia, Ohio and Texas. One of the most egregious examples was Jefferson County, Mississippi, where 21,000 plaintiffs filed asbestos claims from 1995-2000, despite the fact that the County only has 9,700 residents! Most silica cases are filed in the same states, especially Texas and Mississippi.

One jurisdiction, in particular, has allowed itself to become a Mecca for asbestos suits – Madison County, Illinois. Plaintiffs from all over the country file claims in Madison County even though many have no connection to the forum. For example, in March 2003, an Indiana plaintiff, who had worked for decades at a U.S. Steel facility in Indiana and had no significant connection to Illinois, filed suit in Madison County and obtained a \$250 million verdict. The case later settled for a amount believed to be in the millions of dollars. Attorney General Bell has explained that “plaintiffs file claims in Madison County because they know that multiple trial

settings and lack of due process will make it virtually impossible for defendants to prepare for trial and will force settlements far higher than a plaintiff could recover at home.”

The filing of cases in jurisdictions that have no meaningful connection to the claim or the claimant creates judicial inefficiencies, clogs the courts for local people trying to resolve local issues, and often results in unfair procedures that raise serious due process issues. State legislatures are starting to take their courts back from out-of-state forum shoppers. For example, West Virginia enacted meaningful venue reform legislation in 2003. Mississippi enacted strong venue reform legislation in June 2004.

ALEC’s model *Asbestos and Silica Claims Priorities Act* would curb forum shopping abuse by requiring asbestos or silica-related claims to be filed in the *state* and *county* with the most logical connection to the claim – where the plaintiff lives or was exposed. If the plaintiff was exposed to asbestos or silica in multiple jurisdictions, the trial court would determine the most appropriate forum for the claim. The model legislation also addresses potential concerns by plaintiffs whose lawyers may have filed the suit in the “wrong” state. The model legislation provides that a claim could not be deemed time-barred while the suit was pending in the “wrong” state. So, if the claim was filed within the time permitted under the statute of limitations of the state where the case should have been brought, the suit will be considered timely and could be re-filed in that state.

### **Shutting Down the Consolidation Cuisinart™**

Some courts that have been inundated with asbestos and silica claims have tried judicial shortcuts to move the dockets at a faster pace. One technique particularly unfair to the litigants is to join disparate claims for trial, either in mass consolidations or in clusters.

People with serious illnesses, such as mesothelioma or lung cancer, are often lumped together with claimants having different alleged harms, or no illness at all – apples are joined with oranges. Defendants have no real ability to defend the cases, and are forced to settle, regardless of the merits of the individual claims.

For example, a mass trial in West Virginia in 2002 involved claims by approximately 8,000 individuals against 259 defendants. The plaintiffs worked at hundreds of different job sites located in a number of states over a period that spanned the better part of

six decades. They allegedly dozens of different circumstances of exposure and several different diseases. It is apparent that the West Virginia courts assumed that the mass trial process, coupled with potentially massive punitive damages liability, would force the defendants to settle. In that regard, the plan worked as the court appeared to intend. Eventually, all but one of the defendants settled for reportedly huge sums of money.

A smaller, yet no less troubling consolidation occurred that same year in Virginia. There, a trial court judge ordered the consolidation of 1,300 asbestos claims, even though the same judge found “that consolidation of all of the cases would adversely affect the rights of the parties to a fair trial.”

Ironically, even well-intended consolidations have turned out to be fools’ gold. Instead of clearing dockets, mass consolidations actually invite the filing of more claims. As mass tort expert Francis McGovern of Duke Law School has explained:

*Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.*

Indeed, RAND recently concluded “it is highly likely that steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved.” One West Virginia trial court judge involved in that state’s litigation ruefully acknowledged this fact. He said: “I will admit that we thought that [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn’t consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.”

Under the ALEC model legislation, consolidation of asbestos or silica claims would only be allowed at trial upon the consent of all parties, unless the claims relate to the same exposed person and members of his or her household. This way, the parties could choose to consolidate claims if they believe the procedure would offer them an efficient way to resolve filings by claimants with similar illnesses that may have arisen out

of similar circumstances. Individuals and their families would not have to be subject to multiple court proceedings.

### Miscellaneous

- *Severable*: The provisions of the bill are severable, so that if any portion of the bill is ruled invalid or unconstitutional, the rest of the legislation would remain in effect.
- *Pending Claims*: The legislation would apply to all asbestos or silica claims filed on or after the effective date, as well as to any pending asbestos or silica claims in which trial has not commenced as of the legislation's effective date.

### Asbestos and Silica Claims Priorities Act Section-By-Section Breakdown

#### Purposes of Model Bill

- ✓ Give trial priority to people who have developed a physical impairment from asbestos or silica exposure;
- ✓ Suspend and preserve the claims of those who are not sick now, but may develop an impairing condition in the future;
- ✓ Give courts the tools they need to administer justice in a fair and efficient manner;
- ✓ Curb forum shopping abuse in asbestos and silica cases; and
- ✓ Prevent improper joinder of dissimilar asbestos and silica claims.

#### TITLE I: Inactive Asbestos and Silica Docket

- ✓ Plaintiffs would have their cases heard if and when they develop impairment resulting from asbestos or silica exposure.
- ✓ Claimants who are not presently impaired would have their claims placed on an "inactive docket," and otherwise applicable statutes of limitations would be tolled, so that their right to sue would be preserved should they become sick at a later date.

- ✓ Discovery would be stayed for cases on the inactive docket so that resources are focused on compensating the truly sick, now and in the future.

#### TITLE II: Forum Shopping Abuse Reform

- ✓ An asbestos or silica-related claim could only be filed in the *state* and *county* with the most logical connection to the claim – where the plaintiff lives or was exposed.

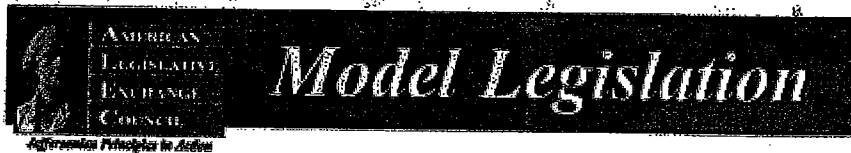
#### TITLE III: Prohibition Against Unfair Consolidation of Dissimilar Claims At Trial

- ✓ Consolidation of asbestos or silica claims would only be allowed at trial upon the consent of all parties, unless the claims relate to the same exposed person and members of his or her household.

### About the Authors

Mark A. Behrens is a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. Phil S. Goldberg is an associate in the firm and a former aide to several Democratic members of Congress.





## ASBESTOS AND SILICA CLAIMS PRIORITIES ACT

Title \_\_ of the [ ] Code is amended by adding Chapter \_\_ to read as follows:  
**CHAPTER \_\_. CLAIMS INVOLVING EXPOSURE TO ASBESTOS OR TO SILICA**

### **TITLE I. SHORT TITLE, FINDINGS AND PURPOSES, APPLICABILITY, AND DEFINITIONS**

**SECTION 1. SHORT TITLE.** This chapter may be cited as the “Asbestos and Silica Claims Priorities Act.”

**SECTION 2. FINDINGS AND PURPOSES.**

- (a) **FINDINGS.** The legislature finds that:
- (1) asbestos is a mineral that was widely used prior to the 1980s for insulation, fire-proofing, and other purposes;
  - (2) many American workers were exposed to asbestos, especially during the Second World War;
  - (3) exposure to asbestos has been causally associated with mesothelioma and lung cancer, as well as such non-malignant conditions, such as asbestosis, pleural plaques, and diffuse pleural thickening;
  - (4) the United States Supreme Court in *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997), stated that this country is in the midst of an “asbestos-litigation crisis.”
  - (5) the vast majority of new asbestos claims are filed by individuals who allege exposure to asbestos but have only minimal or no physical evidence of exposure, and who suffer no present asbestos-related impairment. In *Amchem*, United States Supreme Court Justice Breyer observed that “up to one half of asbestos claims are now filed by people who have little or no physical impairment.” That number may be conservative. Recent reports indicate that as much as ninety percent of new asbestos-related claims are filed by plaintiffs with no impairment;
  - (6) concerns about statutes of limitations can force claimants who have been exposed to asbestos but who have no current injury to bring premature lawsuits in order to protect against losing their rights to future compensation should they become impaired;
  - (7) X-ray screenings of workers at occupational locations are used to amass large numbers of claimants. Frequently, a complaint is filed on behalf of anyone who shows any evidence of asbestos or silica exposure, even though most claimants are functionally asymptomatic when suit is filed;
  - (8) these screenings and mass filings have contributed to the bankruptcy of over seventy companies, including nearly all manufacturers of asbestos textile and insulation products. The rate of asbestos-driven bankruptcies is accelerating;
  - (9) bankruptcies resulting from asbestos litigation have led plaintiffs and their lawyers to expand their search for new solvent defendants, including many defendants with only an attenuated connection to asbestos. The number of asbestos defendants now includes over 8,500 companies, touching firms in industries that span eighty-five percent of the U.S. economy. Some of these defendants are large companies, but others are firms with as few as twenty employees and just a few millions dollars in annual revenues;
  - (10) the cost of compensating exposed individuals who are not sick, and legal costs spent on their claims, jeopardize recoveries by people with cancer or other serious asbestos-related injuries; threaten the savings, retirement benefits, and jobs of current and retired employees of the defendants; and adversely affect the communities in which the defendants operate;
  - (11) several jurisdictions have adopted “inactive dockets” (also called “pleural registries” or “deferred dockets”) or issued case management orders to control the unlimited filing of asbestos claims by persons who are not impaired; other courts have decided that only sick claimants are entitled to compensation;
  - (12) reports indicate that efforts to improve the asbestos litigation environment may lead to a proliferation in silica-related claims as personal injury attorneys seek to build new “inventories” of claimants and find new defendants to target in lawsuits;

(13) sound public policy requires deferring the claims of persons exposed to asbestos or silica and who are not presently impaired in order to give priority to those cases that involve claims of actual and current conditions of impairment; preserve compensation for people with cancer and other serious injuries; and safeguard the jobs, benefits and savings of workers.

(b) **PURPOSES.** It is the purpose of this Act to:

- (1) give priority to claimants who can demonstrate actual physical harm or illness caused by asbestos or silica dust;
- (2) preserve the rights of claimants who were exposed to asbestos or to silica dust to pursue compensation should they become sick in the future;
- (3) enhance the ability of the courts to supervise and control asbestos litigation and silica litigation; and
- (4) conserve resources to allow compensation of current cancer victims and others who are impaired as a result of exposure to asbestos or silica dust while securing the right to similar compensation for those who may suffer impairment in the future.

### **SECTION 3. APPLICABILITY.**

This chapter applies to any claim defined in this Act as an asbestos claim or as a silica claim.

### **SECTION 4. DEFINITIONS.**

- (1) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.
- (2) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos, including:
  - (A) the health effects of exposure to asbestos, including any claim for:
    - (i) personal injury or death;
    - (ii) mental or emotional injury;
    - (iii) risk of disease or other injury; or
    - (iv) the costs of medical monitoring or surveillance, to the extent such claims are recognized under state law;
  - (B) and any claim made by or on behalf of any person exposed to asbestos, or a representative, spouse, parent, child, or other relative of the person.
- (3) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.
- (4) "Board-certified internist" means a physician licensed to practice medicine in this State, that has treated or is treating the claimant or has or had a doctor-patient relationship with the claimant, and who is currently certified by the American Board of Internal Medicine.
- (5) "Board-certified pathologist" means a physician licensed to practice medicine in this State and who holds primary certification in anatomic pathology or combined anatomic or clinical pathology from the American Board of Pathology, and whose professional practice is principally in the field of pathology and involves regular evaluation of pathology materials obtained from surgical or post-mortem specimens.
- (6) "Board-certified pulmonologist" means a physician licensed to practice medicine in this State, that has treated or is treating the claimant or has or had a doctor-patient relationship with the claimant, and who is currently certified by the American Board of Internal Medicine in the Subspecialty of Pulmonary Medicine.
- (7) "Certified B-reader" means a person who has successfully passed the B-reader certification examination for X-ray interpretation sponsored by the National Institute for Occupational Safety and Health, and whose certification was current at the time of any readings required by this Act.
- (8) "Chest X-rays" means films taken in two views (PA and Lateral) and graded quality 1 for reading in accordance with the radiological standards established by the International Labor Office, as interpreted by a certified B-reader.
- (9) "Claimant" means a party seeking recovery of damages for a claim, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff; if a claim is brought through or on behalf of an estate, the term includes the claimant's decedent; if a claim is brought through or on behalf of a minor or incompetent, the term includes the claimant's parent or guardian.
- (10) "FEV-1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.
- (11) "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration.
- (12) "ILO system" means the radiological ratings of the International Labor Office set forth in *Guide*

lines for the Use of ILO International Classification of Radiographs of Pneumoconioses (1980) and (revised ed. 2002), as amended from time to time by the International Labor Office.

(13) “Lower limit of normal” means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2000).

(14) In the context of an asbestos claim, “minimum criteria for activation” means –

- (A) that a Board-certified pathologist has made a diagnosis of pleural or peritoneal mesothelioma, or a diagnosis of cancer demonstrated by a medical report showing the diagnosis as a primary cancer, and has signed a report certifying to a reasonable degree of medical certainty that the diagnosed cancer was caused by exposure to asbestos fibers; or
- (B) that a Board-certified internist, pulmonologist, or pathologist has signed a detailed narrative Medical Report and Diagnosis stating that the claimant suffers from a non-malignant disease related to asbestos, and that:

- (i) Verifies that the doctor or a medical professional employed by and under the direct supervision and control of the diagnosing doctor has taken:

- a. A detailed occupational and exposure history from the person whose alleged injury forms the basis for the action or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis for the action. The history shall include all of the principal employments, the claimant’s exposures to airborne contaminants (including, but not limited to, asbestos fibers, silica, and other disease-causing dusts) that can cause pulmonary impairment, and the nature, duration, and level of any such exposure; and
    - b. A detailed medical and smoking history that includes a thorough review of the claimant’s past and present medical problems, and their most probable cause.

- (C) Sets out the details of the occupational, medical, and smoking history, and verifies that at least 15 years have elapsed between the claimant’s first exposure to asbestos and the time of diagnosis.

- (D) Verifies that the claimant has:

- (i) An ILO quality 1 chest X-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the X-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/1 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or
    - (ii) Pathological asbestosis graded 1(B) or higher under the criteria published in the *Asbestos-Associated Diseases*, Special Issue of the Archives of Pathological and Laboratory Medicine, Volume 106, Number 11, Appendix 3 (October 8, 1982).

- (E) Verifies that the claimant has pulmonary impairment related to asbestos as demonstrated by Pulmonary Function Testing, performed using equipment, methods of calibration and technique that meet the criteria incorporated in the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2000) and reported as set forth in 20 CFR 404, Subpt. P, App 1, Part (A)§3.00 (E) and (F), and the interpretative standards of the American Thoracic Society, *Lung Function Testing: Selection of Reference Values and Interpretive Strategies*, 144 Am. Rev. Resp. Dis. 1202-1218 (1991), that shows:

- (i) Forced Vital Capacity (FVC) below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or
      - (ii) Total Lung Capacity (TLC), by plethysmography or timed gas dilution, below the lower limit of normal.

- (F) Verifies that the doctor has concluded that the claimant’s medical findings and impairment were not more probably the result of other causes revealed by claimant’s employment and medical history.

- (G) Copies of the B-reading, the pulmonary function tests (including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation and reporting standards set forth herein) and the diagnosing physician’s detailed narrative Medical Report and Diagnosis shall be attached to any complaint alleging non-malignant disease related to exposure to asbestos. All such reports must meet objective criteria f

