

## HOUSE Substitute for SENATE BILL No. 422

By Committee on Insurance

3-22

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9 AN ACT enacting the asbestos compensation fairness act; concerning  
10 asbestos claims.

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12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. This act shall be known and may be cited as the asbestos  
14 compensation fairness act.

15 Sec. 2. As used in this act:

16 (a) "AMA guides to the evaluation of permanent impairment" means  
17 the American Medical Association's Guides to the Evaluation of Perma-  
18 nent Impairment (fifth edition 2000) as modified by the American med-  
19 ical association.

20 (b) "Asbestos" means all minerals defined as asbestos in 29 C.F.R. s.  
21 1910, as amended.

22 (c) "Asbestos claim" means any claim for damages or other civil or  
23 equitable relief presented in a civil action arising out of, based on or  
24 related to the health effects of exposure to asbestos, including loss of  
25 consortium, wrongful death and any other derivative claim made by or  
26 on behalf of any exposed person or any representative, spouse, parent,  
27 child or other relative of any exposed person. The term does not include  
28 claims for benefits under a workers' compensation law or veterans' ben-  
29 efits program or claims brought by any person as a subrogee by virtue of  
30 the payment of benefits under a workers' compensation law.

31 (d) "Asbestosis" means bilateral diffuse interstitial fibrosis of the  
32 lungs caused by inhalation of asbestos fibers.

33 (e) "Bankruptcy proceeding" means a case brought under Title 11,  
34 U.S.C., or any related proceeding as provided in section 157 of Title 28,  
35 U.S.C.

36 (f) "Board-certified in internal medicine" means certified by the  
37 American board of internal medicine or the American osteopathic board  
38 of internal medicine.

39 (g) "Board-certified in occupational medicine" means certified in the  
40 subspecialty of occupational medicine by the American board of preven-  
41 tive medicine or the American osteopathic board of preventive medicine.

42 (h) "Board-certified in oncology" means certified in the subspecialty  
43 of medical oncology by the American board of internal medicine or the

- 1 American osteopathic board of internal medicine.
- 2 (i) “Board-certified in pathology” means holding primary certification  
3 in anatomic pathology or clinical pathology from the American board of  
4 pathology or the American osteopathic board of internal medicine and  
5 with professional practice:
- 6 (1) Principally in the field of pathology.
- 7 (2) Involving regular evaluation of pathology materials obtained from  
8 surgical or postmortem specimens.
- 9 (j) “Board-certified in pulmonary medicine” means certified in the  
10 subspecialty of pulmonary medicine by the American board of internal  
11 medicine or the American osteopathic board of internal medicine.
- 12 (k) “Certified B-reader” means an individual qualified as a final or B-  
13 reader under 42 C.F.R. s. 37.51(b), as amended.
- 14 (l) “Civil action” means all suits or claims of a civil nature in court,  
15 whether cognizable as cases at law or in equity or in admiralty. The term  
16 does not include an action relating to any workers’ compensation law or  
17 a proceeding for benefits under any veterans’ benefits program.
- 18 (m) “Exposed person” means any person whose exposure to asbestos  
19 or asbestos-containing products is the basis for an asbestos claim.
- 20 (n) “Exposure years” means:
- 21 (1) Each single year of exposure prior to 1972 to be counted as one  
22 year.
- 23 (2) Each single year of exposure from 1972 through 1979 to be  
24 counted as one-half year.
- 25 (3) Exposure after 1979 not to be counted, except that each year from  
26 1972 forward for which the plaintiff can establish exposure exceeding the  
27 occupational safety and health administration limit for 8-hour, time-  
28 weighted average airborne concentration for a substantial portion of the  
29 year to be counted as one year.
- 30 (o) “FEV1” means forced expiratory volume in the first second,  
31 which is the maximal volume of air expelled in one second during per-  
32 formance of simple spirometric tests.
- 33 (p) “FVC” means forced vital capacity which is the maximal volume  
34 of air expired with maximum effort from a position of full inspiration.
- 35 (q) “ILO scale” means the system for the classification of chest x-rays  
36 set forth in the international labor office’s guidelines for the use of ILO  
37 international classification of radiographs of pneumoconioses (1980) as  
38 amended by the international labor office.
- 39 (r) “Lung cancer” means a malignant tumor in which the primary site  
40 of origin of the cancer is located inside of the lungs, but such term does  
41 not include an asbestos claim based upon mesothelioma.
- 42 (s) “Mesothelioma” means a malignant tumor with a primary site in  
43 the pleura or the peritoneum which has been diagnosed by a board-cer-

- 1   tified pathologist using standardized and accepted criteria of microscopic  
2   morphology or appropriate staining techniques.
- 3   (t) “Nonmalignant condition” means any condition that is caused or  
4   may be caused by asbestos other than a diagnosed cancer.
- 5   (u) “Nonsmoker” means an exposed person who has not smoked cig-  
6   arettes or used any other tobacco products within the last 15 years.
- 7   (v) “Pathological evidence of asbestosis” means a statement by a  
8   board-certified pathologist that more than one representative section of  
9   lung tissue uninvolved with any other disease process demonstrates a  
10   pattern of peribronchiolar or parenchymal scarring in the presence of  
11   characteristic asbestos bodies and that there is no other more likely ex-  
12   planation for the presence of the fibrosis.
- 13   (w) “Predicted lower limit of normal” for any test means the fifth  
14   percentile of healthy populations based on age, height, and gender, as  
15   referenced in the AMA guides to the evaluation of permanent  
16   impairment.
- 17   (x) “Qualified physician” means a medical doctor who:
- 18   (1) Is currently a board-certified internist, oncologist, pathologist,  
19   pulmonary specialist or radiologist or specialist in occupational and en-  
20   vironmental medicine.
- 21   (2) Has conducted a physical examination of the exposed person.
- 22   (3) Is actually treating or treated the exposed person and has or had  
23   a doctor-patient relationship with such person.
- 24   (4) Spends no more than 10% of professional practice time in pro-  
25   viding consulting or expert services in connection with actual or potential  
26   civil actions and whose medical group, professional corporation, clinic or  
27   other affiliated group earns not more than 20% of its revenues from pro-  
28   viding such services.
- 29   (5) Is currently licensed to practice and actively practices in the state  
30   in which the plaintiff resides or in which the plaintiff’s civil action was  
31   filed.
- 32   (6) Receives or received payment for the treatment of the exposed  
33   person from that person’s health maintenance organization or other med-  
34   ical provider or from the exposed person or a member of the exposed  
35   person’s family.
- 36   (y) “Radiological evidence of asbestosis” means a quality one chest x-  
37   ray under the ILO system of classification showing small, irregular opac-  
38   ities of s, t or u, graded by a certified B-reader as at least  $\frac{1}{4}$  on the ILO  
39   scale. In a death case for which no pathology is available, the necessary  
40   radiologic findings may be made with a quality two film if a quality one  
41   film is not available.
- 42   (z) “Radiological evidence of diffuse pleural thickening” means a  
43   quality one chest x-ray under the ILO system of classification showing

1 bilateral pleural thickening of at least B2 on the ILO scale and blunting  
2 of at least one costophrenic angle. In a death case for which no pathology  
3 is available, the necessary radiologic findings may be made with a quality  
4 two film if a quality one film is not available.

5 (aa) "Smoker" means a person who has smoked cigarettes or used  
6 other tobacco products within the last 15 years.

7 (bb) "State" means any state of the United States, the District of  
8 Columbia, the Commonwealth of Puerto Rico, the Northern Mariana  
9 Islands, the Virgin Islands, Guam, American Samoa and any other terri-  
10 tory or possession of the United States or any political subdivision of any  
11 of such governments.

12 (cc) "Substantial contributing factor" means:

13 (1) Exposure to asbestos is the predominant cause of the physical  
14 impairment alleged in the claim.

15 (2) The exposure to asbestos took place on a regular basis over an  
16 extended period of time and in close proximity to the exposed person.

17 (3) A qualified physician has determined with a reasonable degree of  
18 medical certainty that the physical impairment of the exposed person  
19 would not have occurred but for the asbestos exposure.

20 (dd) "Veterans' benefits program" means any program for benefits in  
21 connection with military service administered by the Veterans' Adminis-  
22 tration under Title 38, U.S.C.

23 (ee) "Workers' compensation law" means a law respecting a program  
24 administered by a state or the United States to provide benefits, funded  
25 by a responsible employer or its insurance carrier, for occupational dis-  
26 eases or injuries or for disability or death caused by occupational diseases  
27 or injuries. The term includes the longshore and harbor workers' com-  
28 pensation act, 33 U.S.C. 901-944, 948-950, and chapter 81 of Title 5,  
29 U.S.C., the federal employees compensation act, but does not include the  
30 act of April 22, 1908, 45 U.S.C. 51 et seq., popularly referred to as the  
31 "Federal Employers' Liability Act."

32 Sec. 3. (a) Physical impairment of the exposed person, to which as-  
33 bestos exposure was a substantial contributing factor, shall be an essential  
34 element of an asbestos claim.

35 (b) No person shall bring or maintain a civil action alleging a non-  
36 malignant asbestos claim in the absence of a prima facie showing of phys-  
37 ical impairment as a result of a medical condition to which exposure to  
38 asbestos was a substantial contributing factor. Such a prima facie showing  
39 shall include:

40 (1) Evidence verifying that a qualified physician has taken a detailed  
41 occupational and exposure history of the exposed person or, if such person  
42 is deceased, from a person who is knowledgeable about the exposures  
43 that form the basis of the nonmalignant asbestos claim, including:

- 1 (A) Identification of all of the exposed person's principal places of  
2 employment and exposures to airborne contaminants.
- 3 (B) Whether each place of employment involved exposures to air-  
4 borne contaminants, including, but not limited to, asbestos fibers or other  
5 disease-causing dusts, that can cause pulmonary impairment and the na-  
6 ture, duration and level of any such exposure.
- 7 (2) Evidence sufficient to demonstrate that at least 10 years have  
8 elapsed between the date of first exposure to asbestos and the date of  
9 diagnosis.
- 10 (3) Evidence verifying that a qualified physician has taken detailed  
11 medical and smoking history, including a thorough review of the exposed  
12 person's past and present medical problems and their most probable  
13 cause.
- 14 (4) A determination by a qualified physician, on the basis of a medical  
15 examination and pulmonary function testing, that the exposed person has  
16 a permanent respiratory impairment rating of at least class 2 as defined  
17 by and evaluated pursuant to the AMA guides to the evaluation of per-  
18 manent impairment.
- 19 (5) A diagnosis by a qualified physician of asbestosis or diffuse pleural  
20 thickening, based at a minimum on radiological or pathological evidence  
21 of asbestosis or radiological evidence of diffuse pleural thickening.
- 22 (6) A determination by a qualified physician that asbestosis or diffuse  
23 pleural thickening, rather than chronic obstructive pulmonary disease, is  
24 a substantial contributing factor to the exposed person's physical impair-  
25 ment, based at a minimum on a determination that the exposed person  
26 has:
- 27 (A) Total lung capacity, by plethysmography or timed gas dilution,  
28 below the predicted lower limit of normal;
- 29 (B) forced vital capacity below the lower limit of normal and a ratio  
30 of FEV1 to FVC that is equal to or greater than the predicted lower limit  
31 of normal; or
- 32 (C) a chest x-ray showing small, irregular opacities of s, t or u, graded  
33 by a certified B-reader at least  $\frac{3}{4}$  on the ILO scale.
- 34 (7) A conclusion by a qualified physician that the exposed person's  
35 medical findings and impairment were not more probably the result of  
36 causes other than the asbestos exposure revealed by the exposed person's  
37 employment and medical history. A conclusion which states that the med-  
38 ical findings and impairment are consistent with or compatible with ex-  
39 posure to asbestos does not meet the requirements of this paragraph.
- 40 (c) No person shall bring or maintain a civil action alleging an asbestos  
41 claim which is based upon lung cancer in the absence of a prima facie  
42 showing which shall include all of the following minimum requirements:  
43 (1) A diagnosis by a qualified physician, who is board certified in

- 1 pathology, pulmonary medicine or oncology, of a primary lung cancer and  
2 that exposure to asbestos was a substantial contributing factor to the  
3 condition.
- 4 (2) Evidence sufficient to demonstrate that at least 10 years have  
5 elapsed between the date of 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 smok-  
8 ing, the requirements of subparagraph (A) or (B):
- 9 (A) In the case of an exposed person who is a nonsmoker:
- 10 (i) Radiological or pathological evidence of asbestosis; or  
11 (ii) evidence of occupational exposure to asbestos for the following  
12 minimum exposure periods in the specified occupations:
- 13 (I) Five exposure years for insulators, shipyard workers, workers in  
14 manufacturing plants handling raw asbestos, boilermakers, shipfitters,  
15 steamfitters or other trades performing similar functions;
- 16 (II) ten exposure years for utility and powerhouse workers, secondary  
17 manufacturing workers or other trades performing similar functions; or  
18 (III) fifteen exposure years for general construction, maintenance  
19 workers, chemical and refinery workers, marine engine room personnel  
20 and other personnel on vessels, stationary engineers and firemen, railroad  
21 engine repair workers or other trades performing similar functions.
- 22 (B) In the case of an exposed person who is a smoker, the criteria  
23 contained in sub-subparagraphs (A)(i) and (A)(ii) must be met.
- 24 (4) A conclusion by a qualified physician that the exposed person's  
25 medical findings and impairment were not more probably the result of  
26 causes other than the asbestos exposure revealed by the exposed person's  
27 employment and medical history. A conclusion that the medical findings  
28 and impairment are consistent with or compatible with exposure to as-  
29 bestos does not meet the requirements of this subsection.
- 30 If the exposed person is deceased, the qualified physician may obtain  
31 the evidence required in paragraph (b) and subparagraph (3)(A)(ii) from  
32 the person most knowledgeable about the alleged exposures that form  
33 the basis of the asbestos claim.
- 34 (d) No person shall bring or maintain a civil action alleging an asbes-  
35 tos claim which is based upon cancer of the colon, rectum, larynx, phar-  
36 ynx, esophagus or stomach in the absence of a prima facie showing which  
37 shall include all of the following minimum requirements:
- 38 (1) A diagnosis by a qualified physician who is board certified in pa-  
39 thology, pulmonary medicine or oncology, as appropriate for the type of  
40 cancer claimed, of primary cancer of the colon, rectum, larynx, pharynx,  
41 esophagus or stomach and that exposure to asbestos was a substantial  
42 contributing factor to the condition.
- 43 (2) Evidence sufficient to demonstrate that at least 10 years have

1 elapsed between the date of first exposure to asbestos and the date of  
2 diagnosis of the cancer.

3 (3) The requirement of:

4 (A) Radiological or pathological evidence of asbestosis; or

5 (B) evidence of occupational exposure to asbestos for the following  
6 minimum exposure periods in the specified occupations:

7 (i) Five exposure years for insulators, shipyard workers, workers in  
8 manufacturing plants handling raw asbestos, boilermakers, shipfitters,  
9 steamfitters or other trades performing similar functions;

10 (ii) ten exposure years for utility and powerhouse workers, secondary  
11 manufacturing workers or other trades performing similar functions; or

12 (iii) fifteen exposure years for general construction, maintenance  
13 workers, chemical and refinery workers, marine engine room personnel  
14 and other personnel on vessels, stationary engineers and firemen, railroad  
15 engine repair workers or other trades performing similar functions.

16 (4) A conclusion by a qualified physician that the exposed person's  
17 medical findings and impairment were not more probably the result of  
18 causes other than the asbestos exposure revealed by the exposed person's  
19 employment and medical history. A conclusion that the medical findings  
20 and impairment are consistent with or compatible with exposure to as-  
21 bestos does not meet the requirements of this paragraph.

22 If the exposed person is deceased, the qualified physician may obtain  
23 the evidence required in paragraph (2) and subparagraph (3)(B) from the  
24 person most knowledgeable about the alleged exposures that form the  
25 basis of the asbestos claim.

26 (e) In a civil action alleging an asbestos claim based upon mesothe-  
27 lioma, no prima facie showing is required.

28 (f) Evidence relating to physical impairment under this section, in-  
29 cluding pulmonary function testing and diffusing studies, shall:

30 (1) Comply with the technical recommendations for examinations,  
31 testing procedures, quality assurance, quality control and equipment of  
32 the AMA guides to the evaluation of permanent impairment, as set forth  
33 in 2d C.F.R. Pt. 404, Subpt. P. Appl., Part A, Sec. 3.00 E. and F., and  
34 the interpretive standards set forth in the official statement of the Amer-  
35 ican Thoracic Society entitled "Lung function testing: selection of refer-  
36 ence values and interpretive strategies" as published in American Review  
37 of Respiratory Disease, 1991, 144:1202-1218.

38 (2) Not be obtained through testing or examinations that violate any  
39 applicable law, regulation, licensing requirement, or medical code of  
40 practice.

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

43 (g) Presentation of prima facie evidence meeting the requirements

1 of subsection (2), subsection (3), subsection (4), subsection (6) or sub-  
2 section (7) shall not:

3 (A) Result in any presumption at trial that the exposed person is im-  
4 paired by an asbestos-related condition.

5 (B) Be conclusive as to the liability of any defendant.

6 (C) Be admissible at trial.

7 Sec. 4. (a) A court may consolidate for trial any number and type of  
8 asbestos claims with consent of all the parties. In the absence of such  
9 consent, the court may consolidate for trial only asbestos claims relating  
10 to the same exposed person and members of such person's household.

11 (b) A civil action alleging an asbestos claim may only be brought in  
12 the courts of this state if the plaintiff is domiciled in this state or the  
13 exposure to asbestos that is a substantial contributing factor to the physical  
14 impairment on which the claim is based occurred in this state.

15 (c) The plaintiff in any civil action alleging an asbestos claim shall file  
16 together with the complaint or other initial pleading a written report and  
17 supporting test results constituting prima facie evidence of the exposed  
18 person's asbestos-related physical impairment meeting the requirements  
19 of subsections (b) through (e) of section 3, and amendments thereto. For  
20 any asbestos claim pending on the effective date of this act, the plaintiff  
21 shall file such a written report and supporting test results no later than  
22 60 days after the effective date or no later than 30 days prior to the  
23 commencement of trial. The defendant shall be afforded a reasonable  
24 opportunity to challenge the adequacy of the proffered prima facie evi-  
25 dence of asbestos-related impairment. The plaintiff's claim shall be dis-  
26 missed without prejudice upon a finding of failure to make the required  
27 prima facie showing.

28 (d) All asbestos claims filed in this state on or after the effective date  
29 of this act shall include, in addition to the report required in subsection  
30 (3) and the information required in subsection (2) of section 7, a sworn  
31 information form containing the following information:

32 (1) The claimant's name, address, date of birth, social security num-  
33 ber and marital status.

34 (2) If the claimant alleges exposure to asbestos through the testimony  
35 of another person or other than by direct or bystander exposure to any  
36 product, the name, address, date of birth, social security number and  
37 marital status for each person by which such claimant alleges exposure,  
38 hereafter the "index person," and the claimant's relationship to each  
39 person.

40 (3) The specific location of each alleged exposure.

41 (4) The beginning and ending dates of each alleged exposure as to  
42 each asbestos product for each location at which the exposure allegedly  
43 took place for plaintiff and for each index person.



- 1 (5) The occupation and name of employer of the exposed person at  
2 the time of each alleged exposure.
- 3 (6) The specific condition related to asbestos claimed to exist.
- 4 (7) Any supporting documentation of the condition claimed to exist.
- 5 Sec. 5. (a) Notwithstanding any other provision of law, with respect  
6 to any asbestos claim not barred as of the effective date of this act, the  
7 limitations period shall not begin to run until the exposed person discov-  
8 ers, or through the exercise of reasonable diligence should have discov-  
9 ered, that the exposed person is physically impaired by an asbestos-related  
10 condition, as defined in section 4, and amendments thereto.
- 11 (b) An asbestos claim arising out of a nonmalignant condition shall  
12 be a distinct cause of action from an asbestos claim relating to the same  
13 exposed person arising out of asbestos-related cancer. No damages shall  
14 be awarded for fear or risk of cancer in any civil action asserting an as-  
15 bestos claim.
- 16 (c) No settlement of a nonmalignant asbestos claim concluded after  
17 the date of enactment shall require, as a condition of settlement, release  
18 of any future claim for asbestos-related cancer.
- 19 Sec. 6. (a) No punitive damages shall be awarded in any civil action  
20 alleging an asbestos claim.
- 21 (b) At the time a complaint is filed in a civil action alleging an asbestos  
22 claim, the plaintiff must file a verified written report with the court that  
23 discloses the total amount of any collateral source payments received,  
24 including payments which the plaintiff will receive in the future, as a  
25 result of settlements or judgments based upon the same claim. For any  
26 asbestos claim pending on the date of enactment of this act, the plaintiff  
27 shall file such verified written report no later than 60 days after the date  
28 of enactment or no later than 30 days prior to trial. Further, the plaintiff  
29 shall be required to update such reports on a regular basis during the  
30 course of the proceeding until a final judgment is entered in the case.  
31 The court shall ensure that the information contained in the initial and  
32 updated reports is treated as privileged and confidential and that the  
33 contents of the verified written reports shall not be disclosed to anyone  
34 except the other parties to the action. The court shall permit setoff, based  
35 on the collateral source payment information provided, in accordance  
36 with the laws of this state as of the effective date of this act.
- 37 Sec. 7. (a) (1) In any civil action alleging an asbestos claim, a product  
38 seller other than a manufacturer shall be liable to a plaintiff only if the  
39 plaintiff establishes that:
- 40 (A) (i) The product that allegedly caused the harm that is the subject  
41 of the complaint was sold, rented, or leased by the product seller;
- 42 (ii) the product seller failed to exercise reasonable care with respect  
43 to the product; and

- 1 (iii) the failure to exercise reasonable care was a proximate cause of  
2 the harm to the exposed person;
- 3 (B) (i) the product seller made an express warranty applicable to the  
4 product that allegedly caused the harm that is the subject of the com-  
5 plaint, independent of any express warranty made by the manufacturer  
6 as to the same product;
- 7 (ii) the product failed to conform to the warranty; and
- 8 (iii) the failure of the product to conform to the warranty caused the  
9 harm to the exposed person; or
- 10 (C) (i) the product seller engaged in intentional wrongdoing, as de-  
11 termined under applicable state law; and
- 12 (ii) the intentional wrongdoing caused the harm that is the subject of  
13 the complaint.
- 14 (2) For the purposes of subparagraph (a)(1), a product seller shall not  
15 be considered to have failed to exercise reasonable care with respect to  
16 a product based upon an alleged failure to inspect the product, if:
- 17 (A) The failure occurred because there was no reasonable opportu-  
18 nity to inspect the product; or
- 19 (B) the inspection, in the exercise of reasonable care, would not have  
20 revealed the aspect of the product that allegedly caused the exposed per-  
21 son's impairment.
- 22 (b) In any civil action alleging an asbestos claim, a person engaged in  
23 the business of renting or leasing a product shall not be liable for the  
24 tortious act of another solely by reason of ownership of that product.
- 25 Sec. 8. (a) This act shall not be construed to affect the scope or op-  
26 eration of the workers' compensation law or veterans' benefit program,  
27 to affect the exclusive remedy or subrogation provisions of any such law,  
28 or to authorize any lawsuit which is barred by any such provision of law.
- 29 (b) This act expressly preserves the right of all injured persons to  
30 recover full compensatory damages for their loss and therefore does not  
31 impair vested rights. In addition, this act enhances the ability of the most  
32 seriously ill to receive a prompt recovery and therefore is remedial in  
33 nature.
- 34 (c) If any provision of this act or the application thereof to any person  
35 or circumstance is held invalid, the invalidity does not affect other pro-  
36 visions or application of the act which can be given effect without the  
37 invalid provision or application, and to this end the provisions of this act  
38 are declared severable.
- 39 Sec. 9. This act shall apply to any civil action asserting an asbestos  
40 claim in which trial has not commenced as of the effective date of this  
41 act.
- 42 Sec. 10. This act shall take effect and be in force from and after its  
43 publication in the statute book.