Approved: 3-1-06
Date

MINUTES OF THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

The meeting was called to order by Chairman Ruth Teichman at 9:30 A.M. on February 22, 2006 in Room 234-N of the Capitol.

All members were present.

Committee staff present:
Melissa Calderwood, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Ken Wilke, Office of Revisor of Statutes
Bev Beam, Committee Secretary

Conferees appearing before the committee:
Clint Patty, Attorney, Kansas Aggregate Producers Association
Callie Denton, Kansas Trial Lawyers

Others attending:
See attached list.

The Chair called the meeting to order.

Final Action

(SB 512) - An act enacting the silicosis claims act

Following discussion on **(SB 512)**, Senator Barone asked that in addition to silicosis, a list stating what other product liability exclusions there are be provided to the committee as soon as possible.

The Chair gave the proponents and opponents three minutes each to state their case.

Clint Patty, Attorney, appeared on behalf of the Kansas Aggregate Producers Association representing them both as an attorney and as an advocate. Mr. Patty said the main crisis at hand is the inability to obtain insurance coverage. Mr. Patty said the other benefit that is realized from this is the prevention of the kind of frivolous litigation seen in other states from making its way to Kansas. I don't know if there is any data about how many silica cases have actually been filed in Kansas. There may have been quite a few, actually, but you just haven't seen them appealed so you don't get a published opinion to show you proof of it, he said. In fact, I would venture to say there probably have been some silica exposure cases although, certainly, no one is going to argue that there has been the kind of litigation you see in Texas and Florida. It is our contention, however, that this may only be a matter of time and this is kind of a preventive to keep that from happening while at the same time really having a very minimal effect on the way these claims would actually be filed.

I think the balloon that has been offered addresses many of the issues that were initially raised. What I want to emphasize is, I think we get the immediate benefit as far as the ability to obtain insurance coverage and the long term benefit and that is good public policy that would provide both a long term and short term gain. There is nothing unique about this, we have seen four other states enact this kind of policy. It is entirely constitutional. The expanded deadlines provide claimants more time, greater ease of obtaining merely a medical opinion saying they have a diagnosis. That is all they need. The ultimate protection in this case is, if they can't get it in 60 days, we address what happens next, and that is it is dismissed without prejudice. They can come back, the court maintains jurisdiction, and nobody is harmed. As long as they can eventually get that diagnosis, they are going to get into court and then it is simply a matter of being able to prove your case, Mr. Patty said. (Attachment 1)

The Chair called on Callie Denton, Kansas Trial Lawyers Association. I want to emphasize how very complicated this bill is, she said. In looking at this large global policy question on behalf of some people having trouble getting insurance coverage, this is not the answer. This is a very complicated and convoluted bill that will have a negative impact on the state. I appreciate that there may be some problems getting insurance, but I have talked with some of our members who have indicated that a number of these policies

for years have had these environmental exclusions. They have never covered silica and now what is happening, people are sort of figuring it out and the insurance companies are saying we are not going to cover that and you need to get it fixed by taking immunity or putting up barriers for people that could bring this type of claim. Then we might try and write the coverage, maybe. But what I heard Mr. Moses say is, there is no guarantee. In Ohio they are not writing it, they are saying they might. I think it is impossible to say what a business is going to do as a result of this type of legislation. In the meantime, you are cutting off the rights of people who could have legitimately been injured and have a legitimate claim. We are interpreting this bill as pretty much closing the door on anybody ever being able to bring a claim just because of the medical authority required to make the diagnosis.

I want to encourage this committee that there is not a tort problem in this state in general or specifically related to silicosis. Only two percent of the cases brought in this state were court actions and that's the kind of cases you would be filing if you had product liability or exposure to silica, only 2%. That's all the court action. There is no litigation crisis, no silicosis crisis. This bill is just a house of cards with a lot of catch 21's in it. I think we have time to look at the experience of other states. I urge you to delay action on this bill and give it more attention, she said. (Attachment 2)

Senator Brownlee moved **(SB 512)** with the balloon be passed with the correction. Senator Barnett seconded. Motion passed. Senator Wilson abstained.

Senator Brownlee moved for favorable passage of **(SB 512)**. Senator Barnett seconded. Senator Steineger said he would rather wait for an interim study.

Senator Barone and Senator Steineger voted against passage of the bill. Senator Wilson abstained.

Motion passed.

Chair called for action on (**SB 547**) - An act enacting the pharmacy benefits manager registration act. The Chair said one of the things agreed on was to take out new Section (6a) which would leave only Section (6).

Senator Schmidt asked if the chair had talked to the Insurance Commissioner. The Chair responded that she talked to the Insurance Department representative, Jarrod Forbes. The Chair asked Mr. Forbes to make a statement on the Insurance Department's position. He said he would simply say that they have no objection to this bill.

Senator Schmidt moved to move out **(SB 547)** favorably for passage. Senator Brungardt seconded. Motion passed.

Meeting adjourned at 10:15 a.m. The next meeting of this Committee is scheduled for February 28, 2006.

FINANCIAL INSTITUTIONS & INSURANCE COMMITTEE GUEST LIST

DATE: February 22, 2006

NAME	REPRESENTING
Brad Smart	AIA
Alex Kotoyantz	PIA
[illegible]	KID
John Kiefhaber	Ks. Pharmacists Assoc.
Callie J Denton	KTLA
Bill Sneed	Express Scripts
Sandy Braden	Ks Pharma Corp
Larrie Ann Brower	KAHP
LARRY MAGILL	KAIA

LAW OFFICES OF
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A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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TESTIMONY
By
Clinton E. Patty

Before the
Senate Committee on Financial Institutions and Insurance
Regarding SB 512

February 15, 2006

Chair Teichman, members of the committee, my name is Clint Patty. I am an attorney with the law firm of Frieden, Haynes and Forbes in Topeka, Kansas, and am here representing my client, the Kansas Aggregate Producers Association (the "Association") both as counsel and a member of the Association. I have been asked to provide rebuttal testimony to statements made on behalf of the Kansas Trial Lawyers Association, and to provide further testimony in support of SB 512.

While opponents have concentrated on a few sections of SB 512, the Association believes this committee should not lose sight of the bill's primary purposes: 1) to help resolve the insurance liability dilemma faced by Kansas businesses regarding potential silica claims; and 2) to prevent the kind of wide spread legal abuse that can result from silicosis litigation ***before*** it arrives in Kansas. SB 512 accomplishes these goals while insuring that legitimately harmed claimants will have an opportunity to fully pursue litigation.

The KTLA begins its opposition by citing a lack of silica litigation in Kansas as support for rejecting SB 512 as a, "fix looking for a problem". This view overlooks one of the primary concerns addressed by the bill, the inability of Kansas business to obtain liability coverage for silica claims. It also assumes the Legislature should have no role in taking preventive steps before a potential problem becomes a crisis. SB 512 represents good public policy because it addresses a current problem (lack of insurance coverage for silica claims) and prevents future litigation abuse.

The KTLA next criticizes portions of SB 512 that it argues will raise constitutional and/or procedural problems for potential silica claimants. However, the Association is unaware of any successful Constitutional challenges to similar legislation in other states. Notwithstanding, the

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specific concerns raised by the KTLA are fully addressed when viewing the bill as a whole. Contrary to the KTLA's position, there is no concern regarding a claimant's difficulty in obtaining employer records, because SB 512 does not require such records to demonstrate a physical impairment. The bill merely requires that a "competent medical authority" take a detailed occupational and exposure history "***from the exposed person***", not the employer. Sec. 2(b)(2)(A). Therefore, to meet the initial requirements, a medical opinion need only rely on information supplied by the claimant. Significantly, even if a claimant is unable to meet the initial requirements under the law, a judge is only permitted to administratively dismiss the lawsuit *without prejudice*, and the Court retains jurisdiction to reinstate a case when the requirements are met. Sec. 4(c). This protection insures that potential claimants will have other opportunities to pursue their claims even if they can not meet the initial requirements within 30 days of filing a lawsuit.

The Association also believes Section 1(i) of SB 512 has been grossly misrepresented. Opponents claim this section prohibits a treating physician from relying on any other report or medical opinion in diagnosing a potential claimant. However, Section 1(i) only prevents reliance on another report or opinion if:

1. a testing or screening that generated the opinion or report violated the law, regulation, requirement or medical code;
2. it was conducted without a clearly established Dr.-patient relationship with the claimant; or,
3. the report or opinion required the claimant to agree to legal representation prior providing the report or opinion.

This section is designed to prevent the abusive "screening panels" that were exposed by Judge Jack in Texas. Contrary to the KTLA's opinion, nothing prevents a competent medical authority from relying on another medical professional's findings or report so long as it does not violate the above provisions.

Finally, contrary to the KTLA's opinion, there is no "blanket immunity" for owners and holders in due course under the bill. SB 512 simply clarifies common law principals regarding "piercing of the corporate veil", and allows for individual owner liability if a three part test is met. Sec. 9. Therefore, SB 512 is not a radical departure from common law principals, and does not amount to "blanket immunity" for owners and holders in due course.

I hope this testimony provides some clarification on the issues raised in opposition to SB 512. The Association urges passage of SB 512 as a responsible, preventative response to the concerns raised by Kansas businesses who cannot obtain liability coverage for silica based claims.

Thank you once again for allowing me the opportunity to provide my client's position on this important matter.

Supplemental Bullet Points – SB 512
Clint Patty, Attorney at Law
Frieden, Haynes & Forbes
Topeka, Kansas

PRIMARY PURPOSE OF THE PROPOSED SUBSTITUTE TO SB 512

- resolve the insurance liability dilemma faced by Kansas businesses regarding potential silica claims
- to prevent the kind of wide spread legal abuse that can result from silicosis litigation ***before*** it arrives in Kansas.
- Only requires AMA medical diagnosis prior to bringing claim (THE ADMINISTRATIVE GATE).

NO CONSTITUTIONAL ISSUES

- legislation similar to bills in 4 other states, no other known challenges.
- Medical professional does not need records to make diagnosis, merely requires that a "competent medical authority" take a detailed occupational and exposure history "***from the exposed person***", not the employer. Sec. 2(b)(2)(A).
- even if a claimant is unable to meet the initial requirements under the law, a judge is only permitted to administratively dismiss the lawsuit *without prejudice*, and the Court retains jurisdiction to reinstate a case when the requirements are met. Sec. 4(c).
- 60 days, not 30 to provide diagnosis

NO REAL LIMITATION ON EXPERT OPINIONS

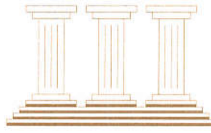
- Bill only prevents reliance on another report or opinion if:
    1. a testing or screening that generated the opinion or report violated the law, regulation, requirement or medical code;
    2. it was conducted without a clearly established Dr.-patient relationship with the claimant; or,
    3. the report or opinion required the claimant to agree to legal representation prior providing the report or opinion.

(OVER)

- This section is designed to prevent the abusive “screening panels” that were exposed by Judge Jack in Texas.

SECTION 9 HAS BEEN ELIMINATED

- No change in law on piercing the corporate veil with the proposed substitute



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

MEMORANDUM

To: Senator Ruth Teichman, Chair
Members of the Senate Financial Institutions and Insurance Committee

From: Terry Humphrey, Executive Director
Callie Jill Denton, Director of Public Affairs

Date: February 21, 2006

RE: SB 512 Silicosis Claims Act: Response to Proponents' Balloon Amendments

KTLA is responding to the balloon amendment submitted by proponents of SB 512 on February 21, 2006. Unfortunately, the amendments don't even touch the surface of the problems with SB 512. Concern remains with the following:

Section 1 Definitions.

- In the definition of "AMA guides to the evaluation of permanent impairment", the delegation of authority to the American Medical Association is not constitutional under Kansas law.
- The definition of "competent medical authority" requires a physician that is a board-certified internist, board-certified oncologist, board-certified occupational medicine specialist, board-certified pathologist, or board-certified pulmonary specialist. We question whether Kansans in the more rural parts of the state have access to these types of health care providers. Because "competent medical authority" also requires that the physician be treating the injured person or have a doctor-patient relationship, Kansans could be forced to go outside their home towns or outside the state to be seen by a doctor that meets the requirements of the bill. However, Kansans would be precluded from using a true asbestos expert since such an expert may not meet the requirement that they not spend more than 25% of their practice on consulting. The requirement that "competent medical authorities" also not earn more than 20% from consulting would require lengthy and inappropriate review of the physician's financial records. This standard is

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Terry Humphrey, Executive Director

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- The new definition of "employee" in the proponents' balloon appears to have erroneously excluded listing of the 10 criteria referred to in the definition.
- The proponents have not shown that the definitions of "pathological evidence of mixed dust pneumoconiosis", "pathological evidence of silicosis", "radiological evidence of mixed dust pneumoconiosis" and radiological evidence of silicosis" reflect generally accepted standards; we are concerned that they do not.
- The definition of "physical impairment" distinguishes between smokers and non-smokers. The bill later defines a "smoker" by a very low threshold, punishing those that smoked for a short period of time, have quit, or perhaps have been exposed to passive smoke. Further, the proponents have not demonstrated why the distinction between smokers and nonsmokers is important for purposes of developing silicosis or mixed dust disease.
- The definition of "smoker" appears to contain an error. We do not know what "the equivalent one pack year" is. It appears that anyone who has smoked the equivalent of one pack of cigarettes anytime in the preceding fifteen years would be considered a "smoker". We believe this definition is unfairly broad, especially since the bill treats "smokers" and nonsmokers differently. A separate consequence is that the bill could affect those exposed to passive smoke if such exposure is equivalent to "one pack year".
- The definition of "substantial contributing factor" is problematic because it is in conflict with Kansas' comparative negligence system. Kansas' comparative negligence law (K.S.A. 60-258a) requires that juries divide damages between the plaintiff and negligent defendants according to relative fault. For example, if the jury determines that a defendant is 70% at fault and a plaintiff is 30% at fault, the defendant would be accountable only for 70% of the damages. The "substantial contributing factor" requirements moves away from our current system of apportioning accountability. In addition, the definition of "substantial contributing factor" includes requirements for a "competent medical authority". As noted, we are concerned that injured persons will be unable to find a "competent medical authority" as required by the definition of the bill, and therefore would also have trouble establishing that silica or mixed dust disease was a "substantial contributing factor" in their physical impairment. "Substantial contributing factor" also relies on the term "physical impairment". As previously noted, the definition of "physical impairment" places unreasonable standards of the injured person, particularly relating to whether or not they might be considered a smoker.
- The definitions of "substantial occupational exposure to silica" and "substantial occupational exposure to mixed dust" both require a cumulative five-year exposure period. However, since acute silicosis can result from exposure of less than five years to large amounts of silica, the bill appears to preclude recovery for any acute silicosis injuries.

Section 2.

- Subsections (a), (b), (c), and (d) rely on defective and questionable definitions of "physical impairment", "substantial contributing factor" "competent medical

authority" "radiological or pathological evidence", "smoker", and "substantial occupational exposure to silica".

- The bill requires a "competent medical authority" to provide a detailed occupational and exposure history that requires inclusion of information that is in the defendant's control and normally would not be available to the injured party absent a discovery process. This information includes the general nature, duration, and general levels of exposure and all of the airborne contaminants the injured person was exposed to. Since "competent medical authority" and the exposed person likely do not have this information, the exposed person will be unable to make the bill's required "prima facie showing".
- The bill requires a "competent medical authority" to provide a detailed medical and smoking history of the exposed person's past and present medical problems, as well as the most probably causes of the medical problems. This information is excessive and unnecessary for what should be a minimal, "prima facie showing".
- The bill requires that a "competent medical authority" perform pulmonary function testing. We question whether this type of testing is available in medically underserved areas.
- The bill prohibits "smokers" as defined by the bill from making a prima facie showing unless it has been at least 10 years since their first exposure to silica. "Smoker" is so broadly defined as to include people who have quit smoking, have smoked very little, or who have been subjected to passive smoking. The 10 year requirement is inconsistent with silicosis diseases, since acute silicosis can develop in less than five years, and accelerated silicosis can develop in as little as 5 years.
- The bill requires that injured persons defined as "smokers" under the bill who develop lung cancer and those that allege wrongful death as a result of exposure to silica demonstrate that they have had "substantial occupational exposure" to silica. Again, the definition of "substantial occupational exposure" is arbitrary and appears to defy medical science. Further, we are not clear on why "smokers" that develop lung cancer and the families of the deceased are required to demonstrate "substantial occupational exposure" while an individual with nonmalignant silicosis is not. The effect of the distinction appears to be to discourage claims by requiring greater standards for those with malignancies or wrongful death cases.
- Despite requiring injured parties to substantially prepare and present their cases at the time their cases is filed, the bill prohibits the information in the prima-facie showing from being admissible at trial, and the jury is not permitted to be informed of the prima-facie showing. We question whether the injured party would be required to develop an entirely new analysis, witnesses, and demonstration of the critical parts of their case as a result of these prohibitions, which would be an unfair burden.

Section 3. Our concerns are similar to those expressed with regard to Section 2.

Section 4.

- The proponents have extended the injured person's deadline for filing the "prima facie showing" from 30 days after filing the complaint or initial pleading to 60 days. Given the burdens created for the injured person in SB 512, 60 days is still woefully inadequate to develop the required information.
- The bill permits the court to "administratively dismiss" the plaintiff's claim for failure to make a prima facie showing. In Kansas Civil Procedure, there is no process for "administratively dismissing".

Section 5.

The bill appears to establish separate statutes of limitations for mixed dust disease and silica claims and cuts off the recovery of potential future injuries, which is permitted under current law.

Section 6.

- The bill gives complete immunity to "premises owners" unless the individual's exposure occurred on the premises owner's property. As a result, the bill cuts off claims from landowners adjoining the premises owner's property who may suffer the effects of silica and mixed dust air pollution caused by the premises owner. Such "neighbors" would have no cause of action against the "premises owner" under SB 512.
- The bill, in (c) (3), refers to "plaintiff's breathing zone". Proponents have not provided any standards for this term, or its definition.
- The bill limits the liability of a premises owner for injury caused by contractor's employees or agents except when the premises owner's acts are intentional. This standard is too high and shields the premises owner from accountability.
- Deletions at (d) appear to be without substantive effect since these definitions were moved elsewhere in the bill.

Section 9.

We support the deletion of the provisions in this section.

We believe the above problems and others were identified in the analysis by conferee John Klamann at the February 13 hearings (attached). Again, the February 21 balloon amendments from proponents do not fully, or even partially, address the major concerns raised by the bill, and therefore we continue to ask that SB 512 not be permitted to advance.

SENATE BILL NO. SB 512

February 13, 2006

Senators and Committee Members:

My name is John Klamann. I am an attorney with the law firm of Klamann and Hubbard from Overland Park, Kansas. For the past twenty-seven (27) years, I have had the privilege of representing the victims, and the families of victims, of diseases caused by exposure to "mixed dusts" containing asbestos.

Two weeks ago, we buried Mike Allen, a 58 year-old former automobile mechanic from Olathe, Kansas who died of the unique and invariably fatal form of cancer known as "Mesothelioma." Mesothelioma attacks the lining of the lungs. It causes excruciating pain as the victim fights for breath against a tumor that encases the lung, literally squeezing the life out of the patient's lungs as if a boa constrictor snake was wrapped around them. There is no cure and there are very few treatments for Mesothelioma. When a person is diagnosed with Mesothelioma, he has received a death sentence from which there will be no clemency or reprieve no matter how innocent he or she may be. I am here in memory of Mike Allen, his wife Jennifer, and those like him in the State of Kansas who deserve better — much better — than what Senate Bill No. SB 512 would provide. If Mike were here, I have no doubt that he would have used what little air he could muster to speak out against this proposed law.

Senate Bill No. SB 512 is unsound legislation. It is unscientific. It overwhelmingly biased and heavily weighted against the interests of those helpless, frequently disabled, often terminal Kansas residents who have had the misfortune of working with asbestos in their lifetimes and been made ill by it. I believe that SB 512 is deeply flawed and will create confusion and injustice and violate the due process rights of some of Kansas' most vulnerable citizens at a time when they need your help the most. It will impose an unnecessary, additional burden upon our Courts.

SB 512 creates an emergency and a crisis where none currently exists. The number of asbestos and silicosis cases filed in Kansas is de minimus. There is no need for the Draconian measures which this Bill would impose. I am completely mystified as to why Kansas would need such a Bill, and it is my hope that special interests are not taking advantage of our conservative orientation in Kansas thinking our conservatism equates with heartlessness and scientific ignorance. I hope that these special interests are not using Kansas as a springboard for a larger agenda which they hope to put in place elsewhere, but I assure you that there is no crisis in Kansas of a magnitude which warrants this kind of legislation.

I have outlined some of the key features of the proposed Bill below. I would like to take a few minutes to go over these provisions and share with you what I think are the most serious problems with the Bill and why I think its enactment would be irresponsible.

Section 1 – Words and Phrases:

"Competent Medical Authority" – meets the following requirements:

— Board certified Internist, pulmonary specialist, oncologist, pathologist or occupational medicine specialist

Radiologist excluded?

— Treater; physician-patient relationship

Excludes true experts, such as members of the North American Mesothelioma Panel, while legislating a preference for "treating" physicians who lack expertise in specialized medicine

— Has not relied upon report of any other doctor, lab, etc. that examined without physician-patient relationship

Treaters cannot rely upon specialists like the North American Meso Panel: Physicians Reference Lab, etc.

— No more than 25% of time in consultation/expert services in tort actions and earns no more than 20% of income from same

Potential to exclude retired experts (Kerby from KU) and others on both sides – many of whom are world renowned authorities – Sam Hammar, John Craighead, Ron Dodson, Victor Roggli — arbitrary legislative standard about objectivity and credibility

"Mixed dust"

— Mixture of dusts composed of silica and other fibrogenic dusts

Includes asbestos in Thermal Systems Insulation, plasters and drywall compounds in houses, etc.

"Pathological evidence of mixed dust pneumoconiosis"

— statement by board certified pathologist that > one section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchial and parenchymal star-shaped nodular scarring and that there is no other likely explanation for the presence of the fibrosis

Excludes needle biopsies, cytology, etc. — "star-shaped" nodular scarring is not present in asbestosis and other forms of asbestos-related pneumoconiosis – contrary to generally accepted, 1982 pathology standards for diagnosis of non-malignant asbestosis (Craighead and Abraham) --- mixed fibrosis (emphuysema and asbestosis) or even two types of asbestos disease (plaques and fibrosis) which are nevertheless district and distinguishable

"Radiological evidence of mixed dust pneumoconiosis"

— CXR showing bilateral rounded or irregular opacities in the <u>upper</u> lungs field graded by a certified B-reader as a least 1/1 on the ILO scale

Omits other valuable forms of radiology (CT) – upper lungs is scientifically unsound for asbestosis – an example of flaws when trying to legislate medicine and science – Mis-applies "B" reading (what about "A" readers; board certified radiologists and pulomonologists, etc.) – few if any "B" readers in Kansas (Kerby not a "B" reader) – 1/1 is not the standard for most scietntists (Murphy scandal at the ATS) => 1/0 is most likely asbestosis — 1/0 used in most epidemiological studies of asbestosis

"Smoker"

— Smoked 1 pack-year during the last 15 years

Overbroad – some (Surgeon General?) say no risk until 5-7 pack years – what if one pack year and heavy occupational exposure to asbestos

"Substantial contributing factor"

— ". . . mixed dust is the predominant cause of the physical impairment alleged in the claim, and Dr. says to reasonable degree of medical certainty, without the exposure the impairment would not have occurred

What does "predominant cause" mean? — Art Elmore – 50-50 asbestosis and COPD, Rheumatoid arthritis, etc.: what if mild COPD manifests first, but asbestosis rages later and kills – almost all laborers and blue collar workers in the 1960s were smokers – these diseases have up to a 60 year latency, or more

"Substantial occupational exposure to mixed dust"

— employment for a cumulative period of at least five years in an industry and an occupation in which for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

Abraham peer reviewed and published asbestosis case diagnosed with all of above crieria, except: one **Summer of exposure – Roggli says 15 days for Meso – what is the basis and reason for drawing this line? – even most conservative defense experts say 25 fiber-years which you can get in less than 5 years – what is a "substantial portion" — excludes exposures where "non-substantial portion of the work year involves asbestos exposure (e.g., Norma Sullivan) – years of exposure is irrelevant – dose is the issue**

(1) Handled mixed dust
(2) Fabricated mixed dust-containing products so exposed to same
(3) Worked with . . . so exposed on a regular basis
(4) Worked in close proximity to others engaged in (1), (2), or (3)

What is "regular basis" and "close proximity" — these are scientific, medical and industrial hygiene issues which will create confusion for the Courts and expose the Courts to varying standards

Section 3: Mixed Dust Exposures:

(a) Physical impairment shall be an essential element of a mixed dust disease claim in any tort action in which the dust exposure is a substantial contributing factor

Other legislation requires "injury" not defined as impairment, based upon the current edition of AMA impairment standards — changes in the state-of-the-art require changes in the law? — does diagnosis trigger these other statutes of limitation (S of L)

(b) (1) Non-malignant cases – prima facie showing required:

(A) Physical impairment
(B) impairment the result of a medical condition

(C) exposure a substantial contributing factor to the medical condition

Mixed causes => no case

(2) Prima facie showing shall include:

(A) competent medical authority has taken a detailed occupational and exposure history from the victim, or if deceased, the person most knowledgeable of the exposures, including:

By definition has to be a treater – No treater takes a "detailed occupational history" – when deceased, no single witness can testify thoroughly to all of below => requires mixture of witnesses, which treaters are <u>not</u> going to interview

(i) *all* of the person's *principal* places of employment *and exposures to airborne contaminants*

(ii) whether each such place involved exposures to airborne contaminants, including but not limited to mixed dusts, that can cause pulmonary impairment and if that type of exposure is involved, the nature, duration and level of exposure

What are "airborne contaminants and what is relevance? — what about respiratory impairments that are different and distinguishable? – what treater is going to take this kind of histry and where is he/she going to get it? — what if incomplete – what recourse back on the doctor?

(B) A competent medical authority has taken a detailed medical and smoking history, including a thorough review of past and present medical problems and the most probable causes of those problems

What is the relevance of the long list of problems in an aging victim — Irrelevant and wasteful review of non-relevant conditions for what purpose?

(C) A diagnosis by a competent medical authority based on examination and PFT that:

PFTs are not always available to every treater and certainly not always done (exercise testing better) — diagnosis oftern based upon symptoms and CXR or CT

(i) victim has a permanent respiratory impairment rating of "2"
(ii) The person has mixed dust pneumoconiosis based upon minimal radiological or pathological evidence of mixed dust pneumoconiosis

Definitions above are unsound

(c) (1) No action for lung cancer caused by mixed dust exposure if is/was a smoker, in the absence of:

Does this include Mesothelioma?

(A) physical impairment
(B) physical impairment resulting from a medical condition
(C) exposure was a substantial contributing factor

Eliminates synergistic effect of tobacco and asbestos – all trades were 90%+ smokers – cannot exclude either tobacco or asbestos but asbestos gets a pass?

(2) Prima facie showing shall include:

(A) Diagnosis by competent medical authority that:
(i) has primary lung cancer
(ii) mixed dust was a substantial contributing cause

(B) Evidence that is sufficient to demonstrate that at least 10 years have elapsed from the date of first exposure until the date of diagnosis – 10 year latency is a rebuttable presumption which the plaintiff must rebut

(C) Both of the following:

(i) Radiological or pathological evidence of mixed dust pneumoconiosis;

Very controversial snd not scientifically established that asbestosis (ILO: 1/1) must be present to establish causation

(ii) Substantial occupational exposure to mixed dust

5 years cumulative exposure is way too much – Selikoff's Paterson NJ study => 3 months

(D) (1) No wrongful death action for mixed dust disease (Meso?) in absence of prima facie showing that:

(A) Death was the result of a physical impairment
(B) death and impairment the result of a medical condition; and
(C) exposure was a substantial contributing factor to the medical condition

Again, passes over synergistic effect

(2) The prima facie showing shall include:

(A) Diagnosis by competent medical authority that exposure to mixed dust was a substantial contributing factor to the death

Frequently, the treaters are not experts on causation

(B) At least 10 years have elapsed from the first exposure until the date of diagnosis or death (rebuttable presumption)

(C) Both of the following:

(i) Radiological or pathological evidence of mixed dust pneumoconiosis

Legislating an outcome of a scientific debate re necessity of underlying asbestosis, especially asbestosis requiring 1/1 ILO rating

(ii) Substantial occupational exposure to mixed dust

No safe level for Meso; 5 years is unnecessary for lung cancer – years of exposure says nothing about <u>amount</u> of exposure (e.g., Mrs. Bates – 2 weeks)

(3) If a "household" claim, spouse must satisfy elements of the section (d)(1)(C) and victim must have lived with that person for prescribed time

Cf. Mesothelioma

Section 4:

(a) W/in 30 days after filing the complaint, plaintiff shall file a written report and supporting test results constituting prima facie evidence of impairment – upon defendant's motion, defendant shall get a reasonable opportunity (120 days) to challenge the adequacy of the proffered prima facie evidence for failure to comply with sections (b), (c), or (d) of section 3

Totally unfair – creating work for the District Court – what if the S of L is about to run — what is to be gained by this, except an extra step of litigation – clearly a defense bill, given 120 days (too long – delays equivalent to Federal Court standard total discovery period) to decide whether to challenge

(b) If a defendant challenges the adequacy of the prima facie evidence of impairment, court shall determine whether the proffered prima facie evidence meets the requirements of (b), (c), or (d) of section 3, applying an SJ standard (****will happen in every case – bog down Courts)

Already shown how these provisions are unfair and unscientific

(c) Court shall administratively dismiss without prejudice if fail to make prima facie showing – plaintiff may move to reinstate once makes showing (S of L?)

Section 5:

(a) No S of L until discovers or should have discovered impairment from non-malignant condition

(b) Cancer and non-malignant conditions give rise to distinct causes of action – no c/a for fear of cancer in non-malignant case

(c) Settlement of non-malignant claim may not require release of future claims for cancer

Section 6:

(a) No premises liability unless the alleged exposure occurred while on the owner's premises

(b) Presumption of safe levels if exposure occurred before 1-1-72 – rebutted if plaintiff proves knew or should have known that levels exceeded State's TLV and

owner allowed that condition to exist

Giving premises owners a pass – I lectured for EPA on liabilities of premises owners => ordinary negligence standard is sufficient to protect them – some premises owners are truly negligent – ironic to presume that owners knew about dangerous levels and took steps to make safe – presumption of due care — if owner did not measure dust levels, it gets a pass

(c) (1) No premises liability to invitees working on mixed dust products if worker held self out as qualified for such work unless rebut presumption that worker had superior knowledge to that of owner

Cf. Worker may be "experienced" but may not know of presence of asbestos – why presumption and tilt against working men and women – what basis?

(1) No premises liability to contractors before 1-1-72, unless owner directed the activity or denied permission for critical acts

I.e., owner gets a pass for allowing dangerous conditions to exist?

(2) No premises liability after 1-1-72 unless owner intentionally violates a safety standard (MAC)

Section 8:

(a) If multiple defendants, must prove substantial contributing cause of injury/loss by each defendant

(b) Plaintiff had Prod id burden along with substantial contributing cause

Strained definition of substantial contributing cause – without the exposure would not have occurred => cannot say that in Meso or lung cancer and certainly cannot say that with asbestosis where each exposure contributes to the disease – unscientific