

SESSION OF 2006

SUPPLEMENTAL NOTE ON SENATE BILL NO. 512

As Amended by House Committee of the Whole

Brief*

SB 512, as amended, would enact new law, the Silica and Asbestos Claims Act.

Definitions

The Act would include a number of definitions. Key definitions that are important to understanding the scope of the act include the following:

“Asbestos” means all minerals defined as asbestos in 29 C.F.R. 1910.

“Asbestosis” means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos.

“Board-certified” means the physician is currently certified by one of the medical specialty boards approved by either the American Board of Medical Specialities or the American Osteopathic Board of Osteopathic Specialties.

“Silica” means a respirable crystalline form of silicon dioxide, including, but not limited to, alpha quartz, cristobalite and trymadite. The term also includes a mixture of dusts composed of silica and one or more other fibrogenic dusts capable of inducing pulmonary fibrosis if inhaled in sufficient quantity.

“Silicosis” means an interstitial lung disease caused by the pulmonary response to inhaled silica.

“Substantial contributing factor” means: (1) exposure to silica or asbestos is the proximate cause of the physical impairment alleged in the silica or asbestos claim; and (2) a competent

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

medical authority has determined, with a reasonable degree of medical probability that the exposure to silica or asbestos is the proximate cause of the physical impairment.

Additionally, a civil action is defined in the bill and would exclude workers compensation and claims or demands made against trusts established pursuant to a plan of reorganization under Chapter 11 of the U.S. Bankruptcy Code.

Silica or Asbestos Claims

The Act would provide for requirements associated with a silica or asbestos claim including:

- Physical impairment of the exposed person is to be an essential element in any civil action alleging a silica or asbestos claim.

Asbestos Claim – Nonmalignant Condition

The Act would provide for requirements associated with an asbestos claim including:

- Physical impairment of the exposed person is to be an essential element of an asbestos claim in which asbestos exposure was a substantial contributing factor. Specifically, no person would be allowed to bring or maintain a civil action alleging a nonmalignant asbestos claim in the absence of a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor.
- The prima facie showing is to include:
 - Evidence confirming that a diagnosing, competent medical authority has taken or has directly supervised the taking of, a medically appropriate occupational, exposure, medical and smoking history from the exposed person or, if that person is deceased, from a person who is knowledgeable about the exposures that form the basis for the claim; and
 - Evidence sufficient to demonstrate that at least ten years have elapsed between the date of first exposure to asbestos and the date of diagnosis.

- Additionally, a determination of a permanent respiratory impairment of at least class 2 and a diagnosis of asbestosis or diffuse pleural thickening based at a minimum on radiological or pathological evidence would be required. A determination that asbestosis or diffuse pleural thickening, rather than chronic obstructive pulmonary lung disease, is required, as well as a competent medical authority's diagnosis that the exposed person's medical findings and impairment were proximately caused by asbestos exposure, as revealed by the exposed person's occupational, exposure, medical and smoking history.

Asbestos Claim – Asbestos-Related Cancers, Mesothelioma

The bill also creates requirements for an individual bringing a civil action alleging an asbestos claim which is based upon an asbestos-related cancer. Evidence similar to that for asbestos claims for nonmalignant conditions is required. The medical authority's diagnosis must indicate that the asbestos related cancer was proximately caused by asbestos exposure, as revealed by the exposed person's occupational, exposure, medical and smoking history. No prima facie showing would be required in a civil action alleging an asbestos claim which is based upon mesothelioma.

Silica Claim – Nonmalignant Condition

Additionally, no person would be allowed to bring or maintain a civil action alleging a silica claim based on a nonmalignant condition in the absence of prima facie evidence that shows:

- The exposed person has a physical impairment;
 - Physical impairment is a result of a medical condition; and
 - The person's exposure is a substantial contributing factor to the medical condition.
- Prima facie evidence is to include:
 - Evidence confirming that a competent medical authority has taken, or has directly supervised the taking of, a medically appropriate occupational, exposure and smoking history of the exposed person. A diagnosis which only states that the findings and impairment are consistent with or compatible

with exposure to silica would not meet the evidence requirements.

Silica Claim – Lung Cancer; Provisions for Smokers

The bill also would create similar, but also additional separate requirements for an individual who is or was a smoker in bringing a civil action alleging that silica caused the person to contract lung cancer. Such individual would be required to demonstrate prior to the civil action that the exposed person has lung cancer and the person's exposure is a substantial contributing factor. The required prima facie evidence would include:

- A diagnosis by a competent medical authority that the exposed person has primary lung cancer and exposure to silica is a contributing factor to that cancer;
- Evidence that is sufficient enough to demonstrate that at least ten years have elapsed from the person's first exposure to silica until the date of the person's diagnosis of primary lung cancer;
- Evidence of the exposed person's substantial occupational exposure to silica; and
- A diagnosis that the exposed person's lung cancer was proximately caused by silica exposure, as revealed by the exposed person's occupational, medical and smoking history.

Silica or Asbestos Claim – Wrongful Death

Prima facie evidence for a silica or asbestos civil action alleging wrongful death of an exposed person must show that the death of the exposed person was the result of a physical impairment; death and physical impairment were the result of a medical condition; and the person's exposure to silica or asbestos was a substantial contributing factor to the medical condition. Demonstration of prima facie evidence is identical to the provisions required for exposed persons who file a silica claim for lung cancer. The bill also has a provision for wrongful death civil actions regarding the death of an exposed person which was due to the death of living with another person who met exposure requirements.

Physical impairment evidence, including pulmonary function

testing and diffusing studies, is to comply with the recommendations incorporated in the AMA Guides to the Evaluation of Permanent Impairment as reported in 20 CFR Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F, as in effect on March 1, 2006.

Findings of the Court

The court's finding and decision on the prima facie showing that demonstrates requirements have been met, would not be permitted by the bill to result in any presumption at trial that the exposed person has a physical impairment that is caused by a silica or asbestos-related condition; be conclusive as to the liability of the defendant in the case; or be admissible at trial. In addition, if the trier of fact is a jury, the court would not be allowed to instruct the jury with respect to the court's findings or decision of the prima facie showing and neither counsel for any party or witness would be allowed to inform the jury or potential jurors of the prima facie showing. A court would be permitted to consolidate for trial any number and type of silica or asbestos claims with the consent of all the parties. Absent such consent, the court is only permitted to consolidate claims relating to the exposed person and members of such person's past or present household.

Evidence Documentation Requirements – Written Report

The bill would provide that within 60 days after the filing of the complaint or initial pleading in any civil action alleging a silica or asbestos claim, the plaintiff is required to file a written report and supporting test results constituting prima facie evidence of the exposed person's physical impairment. The written report is to meet the minimum evidence criteria specified for the appropriate claim. The defendant has 120 days from the date the prima facie evidence is proffered or from the date of the first responsive pleading to challenge the adequacy of such evidence. If the defendant does make the challenge and uses a physician to do so, the physician must meet the requirements set forth in the definition of "competent medical authority."

If the defendant challenges the adequacy of the prima facie evidence, the court is to determine from all of the evidence submitted whether the evidence meets the relevant minimum requirements for the claim established by this bill. The court is to resolve the issue of whether the plaintiff has made the prima facie showing required by applying the standard for resolving a motion for summary judgment.

The court is to dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima facie showing. The court would maintain its jurisdiction over any case dismissed under this division. Any plaintiff whose case has been dismissed without prejudice may move to reinstate the case if the plaintiff makes a prima facie showing that meets the minimum requirements established in the bill for the claim. The plaintiff, for claims filed on or after the effective date of the act, would be required to submit a sworn information form. A separate information form must be filed for each claimant alleging a silica or asbestos claim.

Limitations – Filing of Claim

The bill also would provide that the period of limitations for a nonmalignant condition resulting from silica or asbestos that is not barred as of the effective date of the act would not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that such person has a physical impairment due to a nonmalignant condition resulting from silica or asbestos. Such claim is preserved for purposes of the period of limitations if the claim was filed before the cause of action arises pursuant to the following provisions:

- A silica or asbestos claim for a nonmalignant condition shall not preclude or bar a subsequent claim by the same exposed person for silica-related or asbestos-related cancer. No damages are to be awarded for fear or risk of cancer in any civil action that only asserts a silica or asbestos claim for a nonmalignant condition.
- No settlement of a silica or asbestos claim for a nonmalignant condition that is concluded after the effective date of the act would require the release of any future claim for silica-related cancer or asbestos-related cancer as a condition of settlement.

Civil Actions – Premises Owner

The bill also contains provisions that would apply to all civil actions for silica or asbestos claims brought against a premises owner to recover damages or other relief for exposure to silica or asbestos on the premises owner's property. The provisions allow that:

- No premises owner would be liable for any injury to any individual resulting from silica or asbestos exposure unless such

individual's alleged exposure occurred while the individual was at or near the premises owner's property.

- If the exposure to silica or asbestos is alleged to have occurred before January 1, 1972, it is premised that a premises owner knew that this state had adopted safe levels of exposure for silica or asbestos and that products containing either of these elements were used on its property only at levels below those safe levels of exposure. In order to rebut this presumption, the plaintiff is required to prove by a preponderance of the evidence that the premises owner knew or should have known that the premises were unreasonably dangerous to invitees and the premises owner allowed that condition to persist.
- A premises owner that hired a contractor to perform the type of work at the premises owner's property that the contractor was qualified to perform cannot be liable for any injury to any individual resulting from silica or asbestos exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury or knowingly allowed a dangerous condition caused by the contractor to persist.
- If the exposure to silica or asbestos is alleged to have occurred after January 1, 1972, a premises owner would not be liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes that the premises owner's intentional violation of an established safety standard that was in effect at the time of the exposure and that the alleged violation was in the plaintiff's breathing zone and was the proximate cause of the plaintiff's medical condition.

Exceptions

Nothing in the provisions related to the definitions, claim filing and evidence requirements, report filings and finding of the court, is intended or shall be construed to:

- Apply to or affect the rights of any parties in bankruptcy proceedings;
- Apply to or affect the ability of any person who is able to make a

showing that the person satisfies the claim criteria for compensable claims or demand under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code to make a claim or demand against that trust.

The same provisions related to the definitions, claim filing and evidence requirements, report filings and finding of the court shall not:

- Apply to or affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program; and
- Authorize any lawsuit that is barred by any provision of any workers' compensation law.

Nothing in this act would require the exhumation of bodies in making the prima facie showing or rebutting the presumption as provided by provisions in the bill.

Claims Involving Injury or Loss

In any civil action under this act (silica or asbestos claim), the party with the burden of establishing the claim or affirmative defense must show that the alleged exposure attributable to a given person or party was a substantial factor in causing the injury, loss or damages. In determining whether any given claim was a substantial factor in causing the plaintiff's injury, loss or damages, the court is to consider, without limitation, all of the following:

- The manner in which the plaintiff was exposed;
- The proximity to the plaintiff when the exposure occurred;
- The frequency and length of the plaintiff's exposure; and
- Any factors that mitigated or enhanced the plaintiff's exposure.

This act would apply only to civil actions that allege a silica or asbestos claim that are filed on or after the effective date of the act.

Background

SB 512 was introduced by the Financial Institutions and Insurance Committee at the request of the Kansas Aggregate Producers' Association. Proponents of the bill highlighted that with a Kansas aggregate industry that is comprised of relatively small members, members would not have sufficient net worth to withstand a silicosis claim or pay out awards on potential silica claims. The proponents also indicated that it is difficult to secure liability coverage on such claims that currently do not have established medical criteria. Proponents of the bill included representatives of the Kansas Aggregate Producers' Association; IMA of Kansas, Inc.; Hamm, Inc.; Harshman Construction LLC; the Kansas Chamber; the Kansas Association of Insurance Agents; the Kansas Building Industry Association; and the Kansas Contractors Association, Inc. The Kansas Association of Osteopathic Medicine appeared neutral on the bill at the Committee hearing and offered amendments relating to the definition of "physician."

Opponents of the bill indicated that there is not a tort crisis in Kansas cases and current Kansas law rigorously controls tort cases. The opponents also indicated that the bill was unscientific and unsound and biased against individuals who have valid claims. Opponents appearing before the Committee were the Kansas Trial Lawyers Association and an Overland Park attorney. The Kansas Trial Lawyers Association requested an interim study on the issues associated with the bill.

The Senate Committee on Financial Institutions and Insurance amended the bill to remove immunity provisions for the holder or individual with interest ownership and moved a number of definitions under provisions of the bill to a single section. The amendment also allowed for a 60-day time frame for the plaintiff's submission of a written report and supporting test results. The Committee also made a technical amendment.

The House Committee on Insurance amended the bill to clarify that board-certified specialists are physicians with either medical or osteopathic specialties, rather than medical doctors. A definition for "board certified" also was inserted. The Committee also amended the plaintiff's rebuttal for the presumption that premises owner would not be held liable for any injury to an invitee. A technical amendment also was made to the bill.

The House Committee of the Whole amended the bill to include

definitions, prima facie evidence requirements, findings of the court, and additional requirements associated with civil actions that allege an asbestos claim. The bill previously had addressed only tort actions that allege a silica or mixed dust disease claim. In addition, the House amended the existing definitions relating to silica claims, including the definition of "silica" to include the definition previously associated with "mixed dust" and made a number of amendments to remove and replace references to "mixed dust" throughout the bill. The House Committee of the Whole amendments clarify the evidence requirements for a prima facie showing for the various claims addressed by the bill and makes the language consistent between the claims referenced in the original bill and those added by the House amendments.

The House has introduced an Asbestos and Silica Compensation Fairness Act (2006 HB 2868).

The fiscal note prepared by the Division of the Budget on the introduced version of the bill indicates that passage of the bill would have a fiscal effect, as estimated by the Office of the Judicial Administration. However, since the number of additional cases that would go before the district courts as a result of this bill is unknown, a fiscal effect cannot be estimated.