

SESSION OF 2006

SUPPLEMENTAL NOTE ON SENATE BILL NO. 592

As Amended by Senate Committee on
Financial Institutions and Insurance

Brief*

SB 592 would enact new law, the Asbestos Compensation Fairness 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. s.1910, as amended.

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

“Exposed person” means any person whose exposure to asbestos or asbestos-containing products is the basis for an asbestos claim.

“Substantial contributing factor” means: (1) exposure to asbestos is the predominate cause of the physical impairment alleged in the claim; (2) the exposure to asbestos took place on a regular basis over an extended period of time and in close proximity to the exposed person; and (3) a qualified physician has determined with a reasonable degree of medical certain[t]y that the physical impairment of the exposed person would not have occurred but for the asbestos exposure.

Additionally, a civil action is defined in the bill and would exclude any actions related to any workers compensation law or proceedings for benefits under any veterans' benefits program.

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 verifying that a qualified physician has taken a detailed occupational and exposure history of the exposed person or, if such person is deceased, from a person who is knowledgeable about the exposures that form the basis of nonmalignant asbestos claim including: identification of all of the exposed person's principal places of employment and exposures to airborne contaminants; and whether each place of employment involved exposures to airborne contaminants, including but not limited to, asbestos fibers or other disease-causing dusts, that can cause pulmonary impairment and the nature, duration and level of any such exposure;
 - Evidence sufficient to demonstrate that at least ten years have elapsed between the date of first exposure to asbestos and the date of diagnosis; and
 - Evidence verifying that a qualified physician has taken a detailed medical and smoking history, including a thorough review of the exposed person's past and present medical problems and their most probable cause.
- Additionally, a determination of a permanent respiratory impairment of at least class 2 and a diagnosis of asbestosis or diffuse plural 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

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

Asbestos Claim – Lung Cancer; Provisions for Smokers

The bill also would create similar, but also additional separate requirements for an individual bringing a civil action alleging an asbestos claim which is based upon lung cancer who is either a smoker or non-smoker. Such individual would be required to demonstrate a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor.

Additionally, the required prima facie evidence would include:

- A diagnosis by a qualified physician that the exposed person has primary lung cancer and exposure was a substantial 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 asbestos and the date of the person's diagnosis of lung cancer; and
- Both of the following for a smoker and one of the following for a non-smoker: radiological or pathological evidence of asbestosis and evidence of the exposed person's substantial occupational exposure to asbestos.

Asbestos Claim – Other Cancers, Mesothelioma

The bill also creates similar requirements to those of non-smokers making an asbestos claim with lung cancer for an individual bringing a civil action alleging an asbestos claim which is based upon cancer of the colon, rectum, larynx, pharynx, esophagus or stomach. Exposure periods vary as to the type of occupation of the exposed person. No prima facie showing would be required in a civil action alleging an asbestos claim which is based upon mesothelioma.

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.

Findings of the Court; Consolidation of Asbestos Claims

The court's finding and decision on the prima facie evidence 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-related condition; be conclusive as to the liability of the defendant in the case; or be admissible at trial.

In addition, the court would be permitted to consolidate for trial any number and type of asbestos claims with the consent of all parties. In the absence of consent, the court would be permitted to only consolidate claims relating to the same exposed person and members of the person's household. A civil action alleging a claim may only be brought in the courts of Kansas if the plaintiff is domiciled in this state or the exposure to asbestos on which this claim is based occurred in Kansas.

Evidence Documentation Requirements – Written Report

Plaintiffs in any civil action alleging an asbestos claim would be required to submit a written report and supporting test results constituting prima facie evidence of the exposed person's physical impairment. For claims pending on the effective date of this act, the plaintiff would be required to file such written report and supporting results no later than 60 days after the effective date of the act or no later than 30 days prior to the commencement of the trial. The defendant is to be afforded a reasonable opportunity to challenge the adequacy of the proffered evidence of asbestos-related impairment. The plaintiff's claim is to be dismissed without prejudice upon a finding of failure to make the required prima facie showing. The bill also would require that for claims filed after the effective date of the act, a sworn information form must be completed with the required information as outlined.

Limitations – Filing of Claim

The bill also would provide that the limitations period for any asbestos claim 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 an asbestos-related condition. An asbestos claim, arising out of a nonmalignant condition, would be considered a distinct cause of action from an asbestos claim relating to the same exposed person, arising out of asbestos-related cancer.

Punitive Damages; Collateral Source Disclosure

No punitive damages are to be awarded in any civil action alleging an asbestos claim. In addition, at the time of the filing in a civil action, the plaintiff must file a verified written report with the court that discloses the total amount of any collateral source payments received, including payments that the plaintiff will receive in the future, as a result of settlements or judgments based upon the same claim. The plaintiff would be required to update the reports until a final judgment is entered in the case. The court is to permit setoff, in accordance with Kansas law, as of the effective date of this act.

Product Seller Liability

A plaintiff would be required to establish, in order to demonstrate that a product seller, other than the manufacturer, is liable that:

- The product that allegedly caused harm was sold, rented, or leased by the product seller;
- The product seller made an express warranty applicable to the product that allegedly caused harm, independent of any express warranty made by the manufacturer as to the same product; and
- The product seller is engaged in intentional wrongdoing, as determined under applicable state law.

A product seller would not be considered to have failed to exercise reasonable care based upon an alleged failure to inspect the product if either the failure occurred because there was no reasonable opportunity to inspect the product; or if the inspection, in the exercise of reasonable care, would not have revealed the aspect of the product that allegedly caused the exposed person's impairment. In addition, a person engaged in the business of renting or leasing a product would not be held liable in a civil action alleging an asbestos claim, for the tortious acts of another solely by reason of ownership of that product.

Exceptions

Nothing in the provisions in this act is to be construed to affect the scope or operation of the workers compensation law or veterans' benefit program, to affect the exclusive remedy or subrogation provisions of any such law, or to authorize any lawsuit which is barred by any such provision of law.

This act is to expressly preserve the right of all injured persons to recover full compensatory damages for their loss and therefore would not impair vested rights. The bill also states that this act enhances the ability of the most seriously ill to receive prompt recovery and therefore is remedial in nature. Finally, the act contains provisions regarding any holding of invalidity and effect on the person or circumstance. The act would apply to any civil action asserting an asbestos claim in which trial has not commenced as of the effective date of this act. If any provision of this act or application thereof to any person or circumstance is held to be preempted by federal law, the preemption would not affect other provisions or applications of the act which can be given effect.

Background

SB 592 was introduced by the Senate Committee on Ways and Means with the provisions of the bill representing the language of 2006 HB 2868. Proponents of the bill indicated that now is opportune time for the Legislature to act to put in place clear and fair standards to prevent Kansas from becoming a venue for cases such as those seen in Texas, Mississippi, and Ohio and also indicated that the bill would not cut off any litigation where the injured party truly is suffering an injury. Proponents of the bill included an Austin, Texas attorney speaking on behalf of the Kansas Chamber and the Kansas Chamber.

Opponents of the bill indicated that there is no asbestos litigation crisis in Kansas, nor has there even been one or will ever be one. Opponents appearing before the Committee were the Kansas Trial Lawyers Association (KTLA) and an Overland Park attorney speaking on behalf of KTLA. The Kansas Trial Lawyers Association requested consideration of an interim study or a study by the Kansas Judicial Council on the issues associated with the bill.

The Senate Committee on Financial Institutions and Insurance amended the bill to allow publications referenced in the definitions section of the bill to be adopted as of a date certain, publication in the statute book. The Committee also inserted language from 2006 HB 2868 that had been inadvertently stricken from the bill and made a technical amendment to the bill.

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 the potential for increasing litigation in the courts. If such increase occurs, the Office of Judicial Administration indicates that there would be a fiscal effect on the operations of the court system. However, it is not possible to predict the number of additional court cases that would arise or how complex or time-consuming they would be. In any case, it is anticipated that the fiscal effect would most likely be accommodated within the existing schedule of court cases and would not require additional resources.