

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1019 CS Asbestos and Silica Claims
SPONSOR(S): Pickens and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2562

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>5 Y, 2 N, w/CS</u>	<u>Kruse</u>	<u>Billmeier</u>
2) <u>Judiciary Committee</u>	<u>9 Y, 1 N, w/CS</u>	<u>Hogge</u>	<u>Hogge</u>
3) <u>Justice Council</u>	<u>7 Y, 3 N, w/CS</u>	<u>Kruse</u>	<u>De La Paz</u>
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

This bill creates the “Asbestos and Silica Compensation Fairness Act of 2005.”

To file or maintain a civil action for damages or other civil or equitable relief arising out of, based on, or related to the health effects of exposure to asbestos or silica, the bill:

- requires plaintiffs to make a prima facie showing of actual physical impairment based on certain specified medical criteria in the case of a nonmalignant asbestos claim, an asbestos-related lung cancer claim, and certain silica-related diseases; and
- does not require plaintiffs to make any prima facie showing for mesothelioma claims.

The bill also requires plaintiffs to file a written report and supporting test results constituting prima facie evidence of physical impairment. This requirement will apply to actions pending on the effective date of this bill. A plaintiff’s claim must be dismissed, but without prejudice, if the required prima facie showing is not made. However, a claimant making the required prima facie showing will not be presumed, at trial, to be impaired by an asbestos-or silica-related condition or to have conclusively established the liability of any defendant. The presentation of the required prima facie evidence under the bill will not be admissible at trial.

For new claims, those filed on or after the effective date of this bill, plaintiffs must submit a sworn form containing certain information such as the specific location of each alleged exposure, beginning and ending dates of each alleged exposure, and the specific condition.

For claims not barred as of the effective date of the act, the bill provides that the statute of limitations does not begin to run until the exposed person discovers or should have discovered the physical impairment. The bill also provides a “two-disease rule”—that a claim arising out of a nonmalignant condition and one arising out of cancer are distinct causes of action.

The bill provides limits on damages, as follows: no punitive damages may be awarded in any asbestos- or silica-related claim, and no damages may be awarded for fear or risk of cancer. The bill also requires plaintiffs to disclose collateral source payments and requires the court to permit setoffs.

Finally, the bill limits the circumstances in which a product seller other than the manufacturer can be held liable for an asbestos- or silica-related claim, and specifies the circumstances in which a product seller will not be considered to have failed to exercise reasonable care based upon an alleged failure to inspect.

The fiscal impact on state and local governments is uncertain.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House principles.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

A Brief History of Asbestos Use and Exposure

- Asbestos has been used in products for centuries. It was woven into fabrics to be used as cloaks, curtains, tablecloths and other fire-resistant products. More modern uses have included fireproofing for ships, home insulation, drinking water pipes, roofing and flooring, and children's toys. Asbestos fibers have long been prized for their ability to resist fire as well as their softness and flexibility. Their utility has been so great throughout history that at one time asbestos was known as the "miracle fiber".
- Because of its abundance, low price and versatility, over 30 million tons of asbestos have been mined and used in production since the early part of the 20th Century. U.S. production peaked at 750,000 metric tons in 1974. The main industrial uses of asbestos through which workers were exposed are primary manufacturing (friction products, pipes, textiles, and construction materials), secondary manufacturing (heating equipment, furnaces and house wares), shipbuilding, and repair and construction.
- Asbestos is a general term that refers to six different fibrous, silicate minerals that contain silicon and oxygen. It is found in two-thirds of the rocks on earth and becomes airborne through earthquakes and landslides. Through this process, the average person inhales from 10,000 to 15,000 fibers per day. There are two main types of asbestos, chrysotile (or serpentine) and amphibole. Amphibole is the truly dangerous type, having small, needlelike fibers that are likely to stay in the lungs longer (even permanently), thus having a high level of toxicity.
- Even though asbestos has long been known to have potentially harmful effects – Pliny the Elder wrote about it – the effects were not widely known nor well understood. Thus, widespread exposure to asbestos continued up to the 1970s. Nicholson, Perkel and Selikoff (1982) estimated that over 27 million industrial workers were exposed to asbestos.
- The initial responses in the U.S. to the dangers of asbestos came largely through the regulatory system. Occupational safety and product safety regulations gradually developed from the 1930s to the 1960s, but were largely ineffective. Some of this was because the rules were voluntary or poorly enforced. But some producers, such as Johns-Manville, sought to hide information about the risks, refusing to notify its workers when they were diagnosed as having asbestosis by company physicians. Legislative failure also played a role, as elected officials responded positively to industry efforts to relax regulatory measures.
- Workers' compensation was one of the administrative measures used to address asbestos-related illnesses, but with limited success. The statute of limitations on filings for benefits caused many workers who became ill many years later (asbestos-related illnesses can take forty years and longer to manifest themselves) to be ineligible to file for benefits. And other workers were unable to

access courts to pursue their claims because workers' compensation was often their sole legal remedy.

- It wasn't until the 1960s that information about the problems with asbestos began to be widely disseminated. The pioneering work on illnesses related to asbestos exposure was done by Dr. Irving Selikoff at the Mount Sinai School of Medicine in New York beginning in 1962. His work is still the standard reference used by litigators, but much more research has been done in the last forty years.
- These studies have identified various illnesses that can be associated with asbestos exposure, but the two main ones are asbestosis and mesothelioma. Research strongly supports a relationship between asbestos exposure and these two diseases – they are known as “signature diseases” that are uniquely associated with asbestos exposure.
- Asbestosis is scarring of the lungs that reduces breathing capacity; its effects range from nondisabling to (rarely) producing fatality. Pleural thickening or plaques is the mildest form of scarring that can occur. It is a scarring of the pleura, the membrane that lines the inside of the chest wall and covers the outside of the lung. Plaques may appear with no indications of diminished pulmonary function and may never develop into any functional impairment. Mesothelioma is cancer of the pleural lining around the chest and abdomen and is almost always fatal, usually within one to two years of diagnosis.
- Only one type of asbestos, chrysotile, is used in manufacturing today. This is the least toxic fiber in the asbestos family. In addition, today only non-friable products are manufactured with the fibers encapsulated in a matrix of either cement or resin. Nonfriable products, which are considered safe for use, include chrysotile-cement building materials, friction materials, gaskets and certain plastics.¹

Silica

Silica dust can be found at any facility that uses and processes sand, gravel, rock, and mineral ores, or where abrasive, grinding, and finishing supplies are used, like mines, foundries and construction sites. While exposure to silica or mixed dust does not automatically cause an injury, repeated exposure over time may be harmful. As long as sand, stone, cement, masonry and glass are used in manufacturing processes and in construction, silica and mixed dust exposure will remain an issue.²

Efforts at Reform

Congress passed the Bankruptcy Reform Act of 1994 which allows companies with asbestos liability to seek bankruptcy protection from future liability if they can show that future liability exceeds the assets of the companies. In 2004, Congress worked on a bill, S2290, which would have established a no-fault fund called the Asbestos Injury Claims Resolution Fund. The purpose of the bill was to:

- (1) create a privately funded, publicly administered fund to provide the necessary resources for a fair and efficient system to resolve asbestos injury claims that will provide compensation for legitimate present and future claimants of asbestos exposure;

¹ Bulleted points excerpted from: Byron Schlomach, Ph.D., William Peacock, III - Texas Public Policy Foundation and Craig Schulman, Ph.D. - LECG, Inc., *A Review of Asbestos Litigation*, February 2005, available at <http://www.texaspolicy.com/pdf/2005-02-asbestos-I.pdf> (last visited March 15, 2005).

² Ohio Business for Legal Reform, *Silica/mixed dust lawsuit reform*, available at <http://www.ohiochamber.com/OBLR/silica.asp> (last visited March 15, 2005).

- (2) provide compensation to those present and future victims based on the severity of their injuries, while establishing a system flexible enough to accommodate individuals whose conditions worsens;
- (3) relieve the Federal and State courts of the burden of the asbestos litigation; and
- (4) increase economic stability by resolving the asbestos litigation crisis that has bankrupted companies with asbestos liability, diverted resources from the truly sick, and endangered jobs and pensions.

However, Congress has been unable to make any progress in passage of this legislation.

In February 2003, the American Bar Association passed a resolution that supported restricting nonmalignant claims to those meeting strict medical criteria and to prevent statutes of limitations from running out on those who might become sick later.³

In June of 2003, the Governor of Ohio signed into law HB 292, an asbestos litigation reform bill which became effective in September of 2003. The Governor also signed HB 342 into law in June 2003 which “requires individuals exposed to silica or mixed dust to meet minimum medical criteria showing that their injury was caused by such exposure before pursuing a personal injury claim. The medical criteria are similar to those established in the House-passed asbestos bill. The bill also provides limited liability protections for premises owners where silica or mixed dust exposure may exist.”⁴ HB 342 also took effect in September of 2003. The provisions in HB 292 and HB 342 are very similar to the provisions of HB 1019.

Asbestos and Silica Litigation in Florida

According to the Office of State Courts Administrator, several jurisdictions in the state, Broward, Duval, Hillsborough, Miami-Dade, and Palm Beach, have established special procedures to handle asbestos claims. In 1991, Miami-Dade established a self-executing, standing Omnibus Case Management Order⁵ that is designed to streamline the administration of asbestos cases and permits only two causes of action, negligent failure to warn and strict product liability. In 2003, Broward and Palm Beach joined with Miami-Dade in the Fourth Amended Omnibus Order. The Order, among other things, requires a plaintiff to file and serve “exposure sheets,” and dismisses any defense motions for a more definite statement. Additionally, the order strikes any counts for punitive damages and instead requires a separate pleading and proffer. In Broward, the judge responsible for asbestos claims also hears other types of claims. It was reported that in Miami-Dade, the chief judge handles all asbestos litigation claims, only hears asbestos litigation claims, and has 1,500 claims pending.⁶ Additionally, it was reported that in Miami-Dade the other 23 judges are responsible for adjudicating similar numbers of claims, but those are of all types, not one particular type of claim. In Palm Beach, one judge is responsible for all asbestos claims, only hears asbestos claims, and has 858 claims pending.⁷ In Hillsborough it was reported that the chief judge is responsible for all asbestos litigation claims, only hears asbestos litigation claims, and currently has 1,617 claims pending. In Duval, one judge is responsible for all pre-trial matters and then assigns any claim that is proceeding to trial to another judge. Escambia has not established special procedures, but it was reported that 920 claims are pending.⁸ It was estimated that around 6,000 asbestos claims are pending in the state.⁹ It was reported that very few claims go to trial, as most settle, but it was reported that in Miami-Dade the average dollar

³ American Bar Association, Recommendation of Commission on Asbestos Litigation “ABA Standard For Non-Malignant Asbestos-Related Disease Claims,” adopted February 2003 (Recommendation on file with House Civil Justice Committee).

⁴ Ohio Business for Legal Reform, *Silica/mixed dust lawsuit reform*, available at <http://www.ohiochamber.com/OBLR/silica.asp> (last visited March 15, 2005).

⁵ Order of Chief Judge Farina, Circuit Court for Miami-Dade County, *Cummings v. A.W. Chesterton*, Case No. 04-16238 CA 42 (Jan. 19, 2005).

⁶ Cases pending information provided by Office of State Courts Administrator.

⁷ Information provided by clerk of court office, Palm Beach County.

⁸ Information provided by clerk of court office, Escambia County.

⁹ 3/18/05 Conversation with defense attorney who coordinates cases for defendants in Florida.

figure per claimant in settlements was not especially high, although the actual dollar figure could not be revealed. It was also reported that the average jury trial for an asbestos claim is two weeks.¹⁰ Regarding silica claims in this state, it was reported that very few claims have been filed at this time.

Proposed Changes

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C. SECTION DIRECTORY:

Section 1. This section provides a popular name for the bill, which is the “Asbestos and Silica Compensation Fairness Act of 2005.”

Section 2. This section provides 21 legislative findings regarding asbestos and silica litigation.

Section 3. This section provides 34 definitions.

¹⁰ 3/15/05 Conversation with chief judge, Miami-Dade.
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Section 4. This section provides that a plaintiff must make a prima facie showing of a physical impairment for the following: nonmalignant asbestos claims; asbestos-related lung cancer claims; other types of asbestos-related cancer claims; silica claims; other silica-related disease claims. This section allows a person to file a nonmalignant asbestos claim under certain circumstances when that person's exposure is alleged to be from extended contact with another exposed person. This section also states that no prima facie evidence is required for mesothelioma cases. Additionally, any evidence reviewed for prima facie showing must meet certain technical standards, including the AMA Guides to the Evaluation of Permanent Impairment, and must not be obtained under the condition that the exposed person retain legal services in exchange for the examination, test, or screening. This section provides that there is no presumption of impairment at trial based upon prima facie evidence.

Section 5. This section describes the circumstances under which a court may consolidate cases. Additionally, this section provides that a plaintiff is required to file a written report of his or her prima facie evidence with the court. Further, any plaintiff with a claim pending on or after the effective date of the bill must file the written report with the court no later than 60 days after the effective date or no later than 30 days prior to start of trial. A defendant is provided a reasonable opportunity to challenge the prima facie evidence. This section provides that the claim must be dismissed without prejudice if a finding is made of failure to make the required prima facie showing. Additionally, a plaintiff with a claim filed on or after the effective date must file an additional form with the court which includes basic personal information as well as specific information regarding dates and locations of exposure.

Section 6. This section provides for a statute of limitations, provides that an asbestos or silica claim arising out of a nonmalignant condition is a separate cause of action from an asbestos or silica claim arising out of an asbestos-related or silica-related cancer, and precludes the award of damages for fear or risk of cancer. This section also provides that no settlement of a nonmalignant asbestos or silica claim concluded after the effective date may require, as a condition of settlement, release of any future claim for asbestos-related or silica-related cancer.

Section 7. This section provides that punitive damages are not allowed in any civil action alleging an asbestos or silica claim. This section also provides that a plaintiff must file a report of collateral sources and must update the report on a regular basis during the proceeding until a final judgment is issued. This requirement also applies to any claim pending on or after the effective date but not yet in trial.

Section 8. This section establishes the rules for liability for product sellers, renters, and lessors of asbestos or silica products.

Section 9. This section states that the provisions of the bill do not affect worker's compensation laws or veteran's benefits. This section also provides that any change in rules regarding practice and procedure made by the bill which is found by the Florida Supreme Court to improperly encroach upon the court's authority is to be considered a legislative request for a rule change and not a mandatory legislative directive. Additionally, this section provides a severability clause.

Section 10. Provides that the bill shall take effect upon becoming a law, and shall apply to any civil action asserting an asbestos or silica claim in which trial has not commenced as of the effective date of this act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill's requirement that a plaintiff make a prima facie evidence showing in most cases will likely require an evidentiary hearing to determine if the prima facie evidence threshold has been met. The courts may incur costs for holding these hearings, and additional costs may be incurred in the appellate courts if a case is appealed. The amount of such costs is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Potentially, businesses facing asbestos or silica litigation could see a reduction in the number of cases filed against them. A reduction in case load may allow a business to expend fewer resources defending such cases. The bill in effect extends the potential liability of a business over a longer period of time, while possibly relieving the business of some cases the business faces in the present.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Retroactivity: The provisions of the bill apply to cases pending but that have not yet gone to trial as of the effective date of the bill. Florida courts have found that the Legislature has the authority to apply law retroactively as long as the new law does not impair a vested right.¹¹ Courts have used a weighing process to decide whether to sustain the retroactive application of a statute that has three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.¹² Arguably, if a person, who has a case pending as of the effective date of the bill, is tested, does not meet the medical criteria of the bill, and that person's case is then dismissed without prejudice, that person has lost the right he or she had to bring a claim prior to the bill's enactment. However, the bill tolls the statute of limitations so that if the person later exhibits a physical impairment that meet the bill's medical criteria, the bill provides that the person may then file a claim to be fully compensated for the physical impairment. In a procedural sense, the bill changes the point in time in which a claim may be filed. At the point in time the plaintiff still has a case pending, the plaintiff has not been awarded something of value (e.g., a jury award) that the Legislature would be taking away. However, if the plaintiff wishes to file a claim in the future,

¹¹ *Dept. of Transportation v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981). *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 277 (Fla. 1978) (citing *McCord v. Smith*, 43 So. 2d 704, 708-709 (Fla. 1949).

¹² *Supra Knowles* at 1158.

the bill creates an obligation for the plaintiff to meet the medical criteria in the bill that was not required prior to the bill's passage.

Access to Courts: Art. I, s. 21, in the Declaration of Rights in the Florida Constitution, provides that the courts shall be open to all for redress of any injury. The Florida Supreme Court has interpreted this provision to limit the Legislature's ability to cap damages in civil actions or place barriers to a litigant filing certain actions. In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court considered the Legislature's power to abolish causes of action. At issue in *Kluger* was a statute which abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded \$550. *Kluger*, 281 So. 2d at 2-3. The court found that where a right to access to courts for redress of a particular injury predates the adoption of the declaration of rights in the 1968 constitution, the Legislature may not abolish the right without providing a reasonable alternative, unless the Legislature can show (1) an overwhelming public necessity to abolish the right, and (2) no alternative method of meeting such public necessity. Because the right to recover for property damage caused by auto accidents predated the 1968 adoption of the declaration of rights, the court held that the restriction on that cause of action violated the access to courts provision.

It can be argued that the bill's requirement that a plaintiff make a prima facie showing of certain impairments before filing a civil action implicates the access to courts provision. The bill requires a plaintiff to make certain showings, which a plaintiff would not have to make prior to the bill's passage, or have the action dismissed. However, it could also be argued, based on the findings in the bill, that an overwhelming public necessity exists. Additionally, it could be argued that the bill provides a reasonable alternative – tolling the statute of limitations until a person exhibits a physical impairment.

B. RULE-MAKING AUTHORITY:

N/A.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Proponents and opponents disagree over the medical criteria established in the bill. Proponents report that the requirements are reasonable, and will reduce the number of plaintiffs claiming exposure but have not yet developed any sickness, which the proponents state will leave more resources to pay claims for those who are sick. Opponents of the bill report that the medical criteria ignores established medical science, and will "effectively bar filing of nearly all claims, even for persons with terminal disease."¹³ Opponents also state that proving up the medical criteria established in the bill will interfere, at least for Broward, Miami-Dade, and Palm Beach, with the Omnibus Case Management Order that is in place in those jurisdictions by requiring evidentiary hearings that may end up being appealed.¹⁴

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2005, the Civil Justice Committee considered the bill and adopted one amendment. The amendment removed a provision that required a court to keep a collateral source report filed by a plaintiff privileged and confidential. The bill, as amended, was reported favorably as a committee substitute.

On April 6, 2005, the Judiciary Committee adopted sixteen amendments and reported the bill with committee substitute favorably. The Committee Substitute differs from the Civil Justice Committee Substitute in that the Judiciary Committee Substitute:

- removes the definition of "exposure years."
- defines "substantial occupational exposure."

¹³ Position Paper, David M. Lippman and James L. Ferraro, *The Truth About the Asbestos Immunity Bill*, March 18, 2003 (on file with the Civil Justice Committee).

¹⁴ *Id.* at 11.

- adds an additional element to show a prima facie case of physical impairment for nonmalignant asbestos claims for claims made on the basis of exposure by “extended contact with another exposed person.”
- amends the definition of “nonsmoker” to provide that a nonsmoker is a person who has not smoked cigarettes or any other tobacco products “on a consistent and frequent basis” within the past 15 years – rather than a person who has not smoked cigarettes or “used” any other tobacco product at all in the past 15 years.
- amends the definition of “smoker” to provide that a smoker is a person who has smoked cigarettes or any other tobacco products “on a consistent and frequent basis” within the past 15 years – rather than a person who has smoked cigarettes or “used” any other tobacco product at all in the past 15 years.
- provides that the required detailed occupational and exposure history necessary to show a prima facie case of physical impairment for nonmalignant asbestos and silica claims and claims for other silica-related diseases may be taken by “a person working under the direct supervision and control of a qualified physician” – as well as by a qualified physician.
- provides that the required detailed medical and smoking history necessary to show a prima facie case of physical impairment for nonmalignant asbestos and silica claims and claims for other silica-related diseases may be taken by “a person working under the direct supervision and control of a qualified physician” – as well as by a qualified physician.
- provides that evidence showing at least ten years have elapsed between the date of first exposure and the date of diagnosis, and evidence of occupational exposure necessary to show a prima facie case of physical impairment for asbestos-related lung cancer and asbestos-related cancer other than lung cancer may be taken by “a person working under the direct supervision and control of a qualified physician” – as well as by a qualified physician.
- revises one of the alternative elements necessary to show a prima facie case of physical impairment for asbestos-related lung cancer and asbestos-related other cancer claims by nonsmokers; removes provisions related to the minimum exposure periods and inserts provision relating to evidence for claims made alleging exposure by “extended contact with” another exposed person.

On April 14, 2005, the Justice Council considered the bill and adopted 4 amendments.

- Amendment 1 provides two methods for demonstrating physical impairment for nonmalignant asbestos claims. The amendment also allows a person to make a nonmalignant asbestos claim based upon extended exposure to another exposed person under certain circumstances.
- Amendment 2 removes the 5 year time requirement in the definition of substantial occupational exposure and replaces it with “an extended period of time.”
- Amendment 3 allows diffuse pleural thickening as well as asbestosis to qualify under asbestos-related lung cancer and also allows technology other than an X-ray to be used in a diagnosis.
- Amendment 4 allows diffuse pleural thickening as well as asbestosis to qualify under asbestos-related other cancer and also allows technology other than an X-ray to be used in a diagnosis.

The bill passed favorably, as amended.