

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Health Care Committee

BILL: SB 2562

SPONSOR: Senator Webster

SUBJECT: Asbestos and Silica Claims

DATE: April 10, 2005

REVISED: 04/13/05

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HE	Fav/1 amendment
2.			CM	
3.			JU	
4.				
5.				
6.				

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

The bill creates the “Asbestos and Silica Compensation Fairness Act.” The bill specifies a legislative purpose, provides definitions, and imposes requirements on litigants who wish to file an asbestos or silica claim. The bill requires plaintiffs to make a prima facie showing that actual physical impairment has occurred based on criteria specified in the bill for a nonmalignant asbestos claim; asbestos-related lung cancer claim; asbestos-related cancer claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach; silicosis claim; or other silica-related disease claim. The bill provides that no prima facie showing of physical impairment is required for mesothelioma cases.

Such plaintiffs must file a written report and supporting tests to support their prima facie evidence of physical impairment with a court. A plaintiff may bring a claim in Florida only if domiciled in this state or if exposure was in Florida. 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. The claim must be dismissed without prejudice if a finding is made of failure to make the required prima facie showing. Notwithstanding any other law, with respect to any asbestos or silica claim not barred as of the effective date of this act, the statute of limitations does not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that he or she is physically impaired by an asbestos-related condition. Damages may not be awarded for fear or

risk of cancer in a civil action asserting an asbestos or silica claim. A settlement of a nonmalignant asbestos or silica claim concluded after the effective date may not require, as a condition of settlement, release of any future claim for asbestos-related or silica-related cancer.

The bill establishes the rules for liability for product sellers, renters, and lessors of asbestos or silica products in a civil action. A court may not award any punitive damages in any civil action alleging an asbestos or silica claim. The bill provides an effective date of July 1, 2005, and specifies that because the act expressly preserves the right of all injured persons to recover full compensatory damages for their loss, it does not impair vested rights. The act applies to any civil action asserting an asbestos or silica claim in which trial has not commenced as of the effective date of this act.

This bill creates nine undesignated sections of law.

II. Present Situation:

Asbestos and Silica

Asbestos is a naturally occurring mineral in the silicate family. Asbestos separates into long flexible fibers that have been used as a non-combustible, non-conducting, and chemically resistant material. Asbestos has many commercial and industrial uses. Before its potential dangers were appreciated, asbestos was used in construction for fire-proofing, sound-deadening, decoration, roofing, and flooring. Asbestos was mixed with various building materials and may be found in most every home, school, and factory. In the United States, asbestos had been used in numerous household and commercial products such as vinyl flooring and tiles, ceilings, wall insulation, patching compounds, pipe insulation, adhesives and cements, asbestos paint, brake linings, carpet underlays, and asbestos blankets. At various times workers potentially worked with or around asbestos-containing products in the following occupations: aircraft manufacturing workers, boilermakers, brake and clutch manufacturing and assembly workers, cement plant workers, longshoremen, machinists, pipefitters, sheetmetal workers, railroad workers, insulators, and warehouse workers.

Asbestos may become dangerous when it is airborne and friable (breathable). Asbestos is known to be hazardous, based on studies of high levels of exposure to asbestos workers and laboratory animals. The risks associated with low-level, nonoccupational exposure are not well established.¹ The U.S. Environmental Protection Agency concludes that there is no safe level of exposure to asbestos.² The U.S. Occupational Safety and Health Administration (OSHA) established asbestos exposure and use limits in 1970.³ Since 1970, OSHA has periodically decreased the permissible exposure level to asbestos in the workplace as part of recognition of the potentially adverse consequences of asbestos exposure.

Asbestos fibers may be inhaled and swallowed and are capable of causing asbestos-related disease because the sharp fibers may become embedded and collect in human lung tissue. Asbestos may cause asbestosis, mesothelioma, and cancer. Asbestosis is a chronic disease of the

¹ See Asbestos at <<http://www.dehs.umn.edu/ihsd/asbestos/healtheffect.html>>.

² Id.

³ See Lippy & Boggs, Measuring Airborne Asbestos, 52 Journal of Environmental Health 157 (1989).

lungs caused by the inhalation of asbestos fibers and its symptoms include shortness of breath and dry cough.⁴ Asbestosis is unique and distinguished from other lung diseases due to the actual presence of asbestos fibers in the affected lung tissue. Asbestosis has a long latency period, which ranges from 10 to 25 or more years. Mesothelioma is an almost always-fatal cancer of the membranes that line the lungs and chest or abdomen, caused by the inhalation of asbestos fibers.⁵ Symptoms of mesothelioma include chest pain, shortness of breath, and cough. Mesothelioma has a long latency period of 30 to 40 years.⁶ Asbestos-related lung cancer is a usually fatal cancer of the lung caused by the inhalation of asbestos fibers. Asbestos-related lung cancer has occurred in asbestos-exposed persons in the absence of radiologic evidence of asbestosis.⁷ Asbestos-related cancer has a long latency period between exposure to asbestos and the onset of the cancer, which can range from 20 to 30 years. A diagnosis of asbestos-related disease is sometimes based on an interpretation of an individual's radiographs (x-ray) by a physician who is a pulmonary specialist or a certified B-reader. A physician who has been certified to read such radiographs is designated a "B-Reader" by the U.S. National Institute of Occupational Safety (NIOSH). B-Readers "read" X-rays, making use of an ILO (International Labor Office) classification scheme.

Asbestos may also cause other asbestos-related cancers. Asbestos-related cancer of the gastrointestinal system may result from the inhalation and particularly the swallowing of asbestos fibers.⁸ The cancer is often fatal and tumors associated with fiber exposure may develop in the pharynx, larynx, esophagus, stomach, small and large intestine, and the rectum.⁹

Asbestos-related diseases have a long latency period following the initial injurious exposure to asbestos fibers. Smoking may make a person more susceptible to asbestos-related disease and increases the chances of a disease.¹⁰ Smoke also has a synergistic effect with the combined risks from both for cancer.¹¹

Silica is a sand-like material which when breathed may cause lung disease and cancer. Exposure to silica or dust does not automatically result in injury but repeated exposure over long periods of time may be harmful. Silicosis is a form of lung disease resulting from occupational exposure to silica dust over a period of years. Silicosis causes a slowly progressive fibrosis of the lungs, impairment of lung function, and a tendency to tuberculosis of the lungs.

Legal Theories for Asbestos Claims

To seek redress from asbestos exposure or injury, claimants may use various legal theories to show liability, such as negligence, strict liability, breach of implied warranties, fraudulent misrepresentation, fear of future disease, and increased risk of future disease.¹² Under

⁴ See Castleman, *Asbestos: Medical and Legal Aspects* 1990.

⁵ See Peters & Peters, *Sourcebook on Asbestos Disease: Medical, Legal, and Engineering Aspects* (1980).

⁶ See Asbestos at <<http://www.dehs.umn.edu/ihsd/asbestos/healtheffect.html>>.

⁷ *Id.*

⁸ See Cook, *Review of Published Studies on Gut Penetration by Ingested Asbestos Fibers*, 53 *Environmental Health Perspectives* 121 (1983).

⁹ *Id.*

¹⁰ See Hammond et al, *Asbestos Exposure, Cigarette Smoking and Death Rates*, 330 *Ann NY Acad Sci* 473 (1979).

¹¹ *Id.*

¹² See Penofsky, Daniel J., *Asbestos Injury Litigation*, 60 *Am.Jur. Trials* 73 (June 2004).

negligence, cause of action the claimant will focus on the lack of reasonable care on the part of the manufacturer of an asbestos-containing product, asbestos supplier, or other defendant who caused the claimant to suffer an asbestos-related injury. Under a strict liability action the claimant does not need to show negligent conduct and liability arises from the sale of any product in a defective condition unreasonably dangerous to the user or consumer and therefore the seller is liable for any physical harm caused to the ultimate user or consumer. Successful claims of strict liability have been brought against an asbestos supplier or asbestos product manufacturer for its failure to warn the claimant of dangers attending asbestos-fiber exposure.¹³ In a breach of implied warranty action, the claimant does not have the burden to prove failure to exercise due care but only that the asbestos-containing product is not fit for the ordinary purpose for which such goods are used or sold.¹⁴

A claimant may bring an action for fraudulent misrepresentation in an asbestos injury claim where:

- A defendant product manufacturer or asbestos supplier makes a representation as to a past or existing material fact;
- The representation is false;
- The defendant knew the representation was false at the time it was made, or the defendant made the representation recklessly, without knowing whether it was true or false;
- The defendant makes the representation with the intent to defraud the plaintiff, for the purpose of inducing the plaintiff to rely upon it;
- The claimant is unaware of the falsity of the representation, has acted in reliance upon the truth of the representation, and has been justified in relying upon the representation; and
- The claimant sustains damages as a result of reliance upon the truth of the representation.¹⁵

Fear of future disease and increased risk of future disease claims involve an assertion that the fear of asbestos exposure may ultimately lead to an asbestos-related disease or cancer.¹⁶

Joint and Several Liability

Under the doctrine of joint and several liability, all defendants are responsible for the plaintiff's damages regardless of the extent of each defendant's fault in causing the plaintiff's damages.¹⁷ Under the doctrine of contributory negligence, any fault on the part of the plaintiff bars recovery. Various methods of apportioning damages have been used in Florida. Under the doctrine of comparative fault, each party is responsible to the extent of its proportion of fault and the court enters a judgment in a negligence case based on each party's proportion of liability. Until recently, the doctrine of joint and several liability applied to joint tortfeasors such that the court entered a judgment with respect to the economic damages against the party holding him or her responsible for those damages for all parties until the plaintiff recovered all damages completely. However, in 1999, Florida law was amended to abolish the doctrine of joint and several liability

¹³ *Id.* and See also, *Baione v. Owens-Illinois, Inc.*, 599 So.2d 1377, (2nd DCA Fla. 1992).

¹⁴ See Penofsky, Daniel J., *Asbestos Injury Litigation*, 60 Am.Jur. Trials 73 (June 2004).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Fabre v. Marin*, 623 So.2d 1182, 1184 (Fla. 1993).

for non-economic damages, and to limit its applications as to economic damages. See ch. 99-225, L.O.F.; s. 768.81, F.S. As to economic damages, it established new limitations and maximum liability amounts, which increase with a defendant's share of fault and dependent on whether the plaintiff was at fault or not. Section 768.81, F.S., requires the court to enter judgment based on fault of the parties rather than joint and several liability in negligence cases. Section 768.81(3), F.S., provides a formula to be used by the courts to apportion damages when the plaintiff is found to be at fault.

Setoff of Settlement Proceeds

Section 46.015, F.S., provides that if any person at trial shows that a plaintiff has delivered a written release or covenant not to sue to any person in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of the rendering of judgment. Similarly, for personal injury or wrongful death claims, s. 768.041, F.S., provides that at trial, if any defendant shows the court that the plaintiff, or any person lawfully on her or his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled. The Florida Supreme Court has addressed whether a non-settling defendant is entitled to setoff or a reductions of damages based on payments by settling defendants in excess of their liability as apportioned by the jury. The court held that the setoff statutes apply to economic damages as found by the jury but not to noneconomic damages.¹⁸

III. Effect of Proposed Changes:

Section 1. Specifies a short title for the act, which is the “Asbestos and Silica Compensation Fairness Act.”

Section 2. States the purpose of the act regarding asbestos and silica litigation. The purpose of the act is to: give priority to true victims of asbestos and silica, claimants who can demonstrate actual physical impairment caused by exposure to asbestos or silica; fully preserve the rights of claimants who were exposed to asbestos or silica to pursue compensation if they become impaired in the future as a result of asbestos exposure; enhance the ability of the judicial system to supervise and control asbestos and silica litigation; and conserve the scarce resources of defendants to allow compensation to cancer victims and others who are physically impaired by exposure to asbestos or silica while securing the right to similar compensation for those who may suffer physical impairment in the future.

Section 3. Creates an undesignated section of law to provide definitions for terms used in the act. The section defines the following terms: AMA Guides to the Evaluation of Permanent Impairment, asbestos, asbestos claim, asbestosis, board-certified in internal medicine, board-certified in occupational medicine, board-certified in oncology, board-certified in

¹⁸ See *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So.2d 249 (Fla. 1995). See also *Gouty v. Schnepel*, 795 So.2d 959 (Fla. 2001) in which the Florida Supreme Court held the setoff statutes do not apply to reduce a non-settling defendant's payment for liability. See *D'Angelo v. Fitzmaurice*, 832 So.2d 135, (2nd DCA 2002), in which the Second District Court of Appeals extended *Gouty* and held that setoff was not appropriate when a settling party was not placed on the jury verdict form.

pathology, board-certified in pulmonary medicine, bankruptcy proceeding, certified B-reader, civil action, exposed person, exposure-years, FEV1, FVC, ILO Scale, Lung cancer, mesothelioma, nonmalignant condition, nonsmoker, pathological evidence of asbestosis, predicted lower limit of normal, qualified physician, radiological evidence of asbestosis, radiological evidence of diffuse pleural thickening, silica, silica claim, silicosis, smoker, substantial contributing factor, veterans benefits program, and workers' compensation law."

"Asbestos claim" and "silica claim" are respectively defined to mean a claim for damages or other relief in a civil action, arising out of, based on, or related to the health effects of exposure to asbestos or silica, as applicable, including loss of consortium, wrongful death, and any other derivative claim made by or on behalf of an exposed person or representative, spouse, parent, child, or other relative of an exposed person. The terms do not include claims for benefits under a workers' compensation law or veterans' benefits program, or claims brought by a person as a subrogee by virtue of the payment of benefits under a workers' compensation law.

"Asbestosis" is defined to mean bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers. "Lung cancer" is defined as a malignant tumor in which the primary site of origin of the cancer is inside of the lungs, but the term does not include an asbestos claim based upon mesothelioma. "Mesothelioma" is defined as a malignant tumor with a primary site in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology or appropriate staining techniques. "Nonmalignant condition" is defined to mean any condition that can be caused by asbestos other than diagnosed cancer.

"Exposed person" is defined to mean a person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim. "Exposure-years" is defined so that each single year of exposure before 1972 will be counted as one year; each single year of exposure from 1972 through 1979 will be counted as one-half year; exposure after 1979 will not be counted, except that each year from 1972 forward for which the plaintiff can establish exposure exceeding the OSHA limit for 8-hour time-weighted average airborne concentration for a substantial portion of the year will count as one year.

"Qualified physician" is defined to mean a medical doctor who: is currently a board-certified internist, oncologist, pathologist, pulmonary specialist, or radiologist, or specialist in occupational and environmental medicine; has conducted a physical examination of the exposed person; is actually treating or treated the exposed person, and has or had a doctor-patient relationship with the person; spends no more than 10 percent of his or her professional practice time in providing consulting or expert services in connection with actual or potential civil actions and whose medical group, professional corporation, clinic, or other affiliated group earns not more than 20 percent of its revenues from providing such services; is currently licensed to practice and actively practices in the state in which the plaintiff resides or in which the plaintiff's civil action was filed; and receives or received payment for the treatment of the exposed person from that person's health maintenance organization or other medical provider or from the exposed person or a member of the exposed person's family.

Section 4. Provides requirements for a plaintiff to show physical impairment when making an asbestos or silica claim. Physical impairment of the exposed person is an essential element of

such a claim under the bill for any: nonmalignant asbestos claim; asbestos-related lung cancer claim; an asbestos-related cancer claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach; silicosis claim; and other silica-related disease claim. The section provides that no prima facie showing of physical impairment is required for mesothelioma cases.

Additionally, any evidence reviewed for prima facie showing of physical impairment 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 retains legal services in exchange for the examination, test, or screening. This section provides that: there is no presumption of impairment at trial based upon the prima facie evidence; prima facie evidence of physical impairment may not be conclusive as to the liability of any defendant; and prima facie evidence of physical impairment may not be admissible at trial.

Nonmalignant asbestos claims

For a nonmalignant asbestos claim, the plaintiff must present evidence verifying that a qualified physician has taken a detailed occupational and exposure history of the exposed person, which includes an identification of all of the exposed person's principal places of employment and exposures to airborne contaminants, and whether each place of employment involved exposure to airborne contaminants. A qualified physician must have taken a medical and smoking history, including past and present medical problems and their most probable cause. As part of a prima facie case for a nonmalignant asbestos claim, the plaintiff must:

- Present evidence to demonstrate that at least 10 years have elapsed between the date of the first exposure to asbestos and the date the diagnosis was made;
- Obtain a determination by a qualified physician which is based on a medical examination and pulmonary function testing that the exposed person has a permanent respiratory impairment rating of at least Class 2 as defined by and evaluated under the AMA Guides to the Evaluation of Permanent Impairment;
- Obtain a diagnosis from a qualified physician of asbestosis or diffuse pleural thickening based on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening;
- Obtain a determination by a qualified physician that asbestosis or thickening, rather than chronic obstructive pulmonary disease is a substantial contributing factor to the exposed person's physical impairment which is based on specified lung capacity tests or a chest X-ray that is read by a certified B-reader which meet specified guidelines for the diagnosis; and
- Obtain a conclusion by a qualified physician that the exposed person's medical finding and impairment were not more probably the result of causes other than asbestos exposure as revealed by the detailed history of the person's employment and medical history. A conclusion that the impairment is consistent with or compatible with exposure to asbestos would not qualify to show the physical impairment of the exposed person for purposes of a nonmalignant claim of asbestos.

Asbestos claims based on lung cancer

For an asbestos claim based on lung cancer, the plaintiff must present evidence that a diagnosis by a qualified physician who is board-certified in pathology, pulmonary medicine, or oncology

of a primary lung cancer and that exposure to asbestos was a substantial contributing factor to the condition. As part of a prima facie case for an asbestos claim based on lung cancer, the plaintiff must:

- Present evidence to demonstrate that at least 10 years have elapsed between the date of the first exposure to asbestos and the date the diagnosis of lung cancer was made;
- Show, if the exposed person is a nonsmoker, radiological or pathological evidence of asbestosis, or evidence of occupational exposure to asbestos for the following minimum periods in the specified occupations:
 - Five exposure-years for insulators, shipyard workers, workers in manufacturing plants handling raw asbestos, boilermakers, shipfitters, steamfitters, or other trades performing similar functions;
 - Ten exposure-years for utility and power house workers, secondary manufacturing workers, or other trades performing similar functions;
 - Fifteen exposure-years for general construction, maintenance workers, chemical and refinery workers, marine engine room personnel and other personnel on vessels, stationary engineers and fireman, railroad engine repair workers, or other trades performing similar functions.
- Show, if the exposed person is a smoker, radiological or pathological evidence of asbestosis and the person must meet the appropriate exposure years for that person's trade.
- Obtain a conclusion by a qualified physician that the impairment was not more probably the result of causes other than asbestos exposure. A conclusion that the impairment is consistent with or compatible with exposure to asbestos would not qualify to show the physical impairment of the exposed person for purposes of an asbestos claim based on lung cancer.

Asbestos claim based on cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach

For an asbestos claim based on cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach, the plaintiff must present the following evidence:

- A diagnosis by a qualified physician, who is board certified in certain specialties for the appropriate type of cancer claimed, that exposure to asbestos was a substantial contributing factor to the condition.
- Evidence sufficient to demonstrate that at least 10 years have elapsed between the date of first exposure to asbestos and the date of diagnosis.
- Radiological or pathological evidence of asbestosis, or evidence of occupational exposure to asbestos for the following minimum periods in the specified occupations:
 - Five exposure-years for insulators, shipyard workers, workers in manufacturing plants handling raw asbestos, boilermakers, shipfitters, steamfitters, or other trades performing similar functions;
 - Ten exposure-years for utility and power house workers, secondary manufacturing workers, or other trades performing similar functions;
 - Fifteen exposure-years for general construction, maintenance workers, chemical and refinery workers, marine engine room personnel and other personnel on vessels,

stationary engineers and fireman, railroad engine repair workers, or other trades performing similar functions.

Additionally, the claimant must obtain a conclusion by a qualified physician that the exposed person's medical finding and impairment were not more probably the result of causes other than asbestos exposure as revealed by the detailed history of the person's employment and medical history. A conclusion that the impairment is consistent with or compatible with exposure to asbestos would not qualify to show the physical impairment of the exposed person for purposes of a claim of asbestos based on cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach.

Silicosis claim

For a silicosis claim, the plaintiff must present evidence verifying that a qualified physician has taken a detailed occupational and exposure history of the exposed person, which includes an identification of all of the exposed person's principal places of employment and exposures to airborne contaminants and whether each place of employment involved exposure to airborne contaminants. A qualified physician must have taken a medical and smoking history, including past and present medical problems and their most probable cause, and verify a sufficient latency period for the applicable stage of silicosis. As part of a prima facie case for a silicosis claim, the plaintiff must:

- Obtain a determination by a qualified physician, which is based on a medical examination and pulmonary function testing that the exposed person has a permanent respiratory impairment rating of at least Class 2 as defined by and evaluated under the AMA Guides to the Evaluation of Permanent Impairment;
- Obtain a determination by a qualified physician that the exposed person has:
 - A quality 1 chest x-ray under the ILO system of classification and that the x-ray has been read by a certified B-reader as showing bilateral nodular opacities occurring in the upper lung and that it is graded 1/1 or higher; or
 - Pathological demonstration of classic silicotic nodules exceeding the standard specified in the section. If death has occurred and no pathology is available, the necessary radiologic finding may be made with certain radiographic film.

Additionally, the claimant must obtain a conclusion by a qualified physician that the exposed person's medical finding and impairment were not more probably the result of causes other than silica exposure as revealed by the detailed history of the person's employment and medical history. A conclusion that the impairment is consistent with or compatible with exposure to silica would not qualify to show the physical impairment of the exposed person for purposes of a claim of silicosis.

Silica claim other than silicosis

As part of a silica claim other than silicosis, a plaintiff must present the following evidence:

- A report by a qualified physician who is board-certified in pulmonary medicine, internal medicine, oncology, or pathology stating a diagnosis of the exposed person of silica-related lung cancer and that, to a reasonable degree of medical probability, exposure to silica was a substantial contributing factor to the diagnosed lung cancer; or
- A report by a qualified physician who is board-certified in pulmonary medicine, internal medicine, or pathology stating a diagnosis of the exposed person of silica-related progressive massive fibrosis or acute silicoproteinosis, or silicosis complicated by documented tuberculosis.

The claimant must also present evidence verifying that a qualified physician has taken a detailed occupational and exposure history of the exposed person, which includes an identification of all of the exposed person's principal places of employment and exposures to airborne contaminants, and whether each place of employment involved exposure to airborne contaminants. A qualified physician must have taken a medical and smoking history, including past and present medical problems and their most probable cause. The claimant must obtain a determination by a qualified physician that the exposed person has:

- A quality 1 chest x-ray under the ILO system of classification and that the x-ray has been read by a certified B-reader as showing bilateral nodular opacities occurring in the upper lung and that it is graded 1/1 or higher; or
- Pathological demonstration of classic silicotic nodules exceeding the standard specified in the section. If death has occurred and no pathology is available, the necessary radiologic finding may be made with certain radiographic film.

Additionally the claimant must obtain a conclusion by a qualified physician that the exposed person's medical finding and impairment were not more probably the result of causes other than silica exposure as revealed by the detailed history of the person's employment and medical history. A conclusion that the impairment is consistent with or compatible with exposure to silica would not qualify to show the physical impairment of the exposed person for purposes of a silica claim.

Section 5. Describes the circumstances under which a court may consolidate cases. A plaintiff may bring a claim in Florida only if domiciled in this state or if exposure was in Florida. A plaintiff must file a written report and supporting test as part of his or her prima facie evidence with the court. 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. 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. Provides that, notwithstanding any other law, with respect to any asbestos or silica claim not barred as of the effective date of this act, the statute of limitations does not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that he or she is physically impaired by an asbestos-related condition. An asbestos or silica claim arising out of a nonmalignant condition is a distinct cause of action from an asbestos

or silica claim arising out of an asbestos-related or silica-related cancer. Damages may not be awarded for fear or risk of cancer in a civil action asserting an asbestos or silica claim. A settlement of a nonmalignant asbestos or silica claim concluded after the effective date may not require, as a condition of settlement, release of any future claim for asbestos-related or silica-related cancer.

Section 7. Prohibits a court from awarding any punitive damages in any civil action alleging an asbestos or silica claim. At the time that a complaint is filed in a civil action alleging an asbestos or silica claim, the plaintiff must file a verified written report with the court disclosing 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.

For any asbestos or silica claim pending on the effective date of the act, the plaintiff must file a verified written report within 60 days after the effective date of this act, or no later than 30 days before trial. Further, the plaintiff must update the reports on a regular basis during the course of the proceeding until a final judgment is entered. The court must ensure that the information contained in the initial, updated report is treated as privileged and confidential, and that the contents of the verified written reports may not be disclosed to anyone except the other parties to the action. The court must permit setoff, based on the collateral source payment information provided, in accordance with the laws of Florida as of the effective date of the act.

Section 8. Establishes the rules for liability for product sellers, renters, and lessors of asbestos or silica products in a civil action. In a civil action alleging an asbestos or silica claim, a product seller other than the manufacturer is liable to the plaintiff only if the plaintiff establishes that:

- The product that allegedly caused the harm that is the subject of the complaint was sold, rented, or leased by the product seller;
- The product seller failed to exercise reasonable care with respect to the product and the failure to exercise reasonable care was a proximate cause of the harm to the exposed person;
- The product seller made an express warranty applicable to the product that allegedly caused the harm that is the subject of the complaint, independent of any express warranty made by the manufacturer as to the same product;
- The product failed to conform to the warranty and the failure of the product to conform to the warranty caused the harm to the exposed person; or
- The product seller engaged in intentional wrongdoing, and the intentional wrongdoing caused the harm that is the subject of the complaint.

A product seller may not be considered to have failed to exercise reasonable care with respect to a product based upon an alleged failure to inspect the product if:

- The failure occurred because there was no reasonable opportunity to inspect the product; or
- The inspection, in the exercise of reasonable care, would not have revealed the aspect of the product which allegedly caused the exposed person's impairment.

In a civil action alleging an asbestos or silica claim, a person engaged in the business of renting or leasing a product is not liable for the tortious act of another solely by reason of ownership of that product.

Section 9. Provides that the act does not affect any worker's compensation law or veteran's benefit program. Legislative intent is specified that nothing in this act should be construed as any effort to impinge upon the constitutional prerogatives of the judicial branch and if the Florida Supreme Court finds that any provision of the act improperly encroaches on the authority of the court to adopt rules of practice and procedure that the Legislature intends that any such provision be construed as a legislative request for a rule change under Section 2, Article V, of the State Constitution and not as a mandatory legislative directive. This section provides a severability clause.

Section 10. Provides an effective date of July 1, 2005, and specifies that because the act expressly preserves the right of all injured persons to recover full compensatory damages for their loss, it does not impair vested rights. The bill specifies that because it enhances the ability of the most seriously ill to receive a prompt recovery, it is remedial in nature. The act 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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

On page 20, line 28 through page 21, line 1, the bill, which requires a plaintiff to file a report disclosing all collateral source payments received, provides that the court must "ensure that the information contained in the initial and updated report is treated as privileged and confidential and that the contents of the verified written reports may not be disclosed to anyone except the other parties to the action." To the extent, this requirement in the bill creates a public records exemption it must meet the requirements of Section 24, Article I of the State Constitution, which requires legislation that creates an exemption to the public records requirements to be created in a bill that only relates to that subject.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Section 5 of the bill requires any plaintiff with a civil action alleging an asbestos or silica claim pending on or after the effective date of the bill to 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. In addition, the substantive provisions of the bill apply to cases pending but that have not yet gone to trial as of the effective date of the bill. A bill may provide that its provisions apply retroactively if there is no constitutional proscription against making them retroactive; the act overcomes the presumption that it applies only prospectively by explicitly providing for retroactive application; and its title conveys notice of this retroactive application.¹⁹ There is no express constitutional prohibition against retroactive noncriminal statutes; however, retroactive application of statutes that impair the obligations of contracts or vested rights is invalid.

The bill's revision to the requirements to bring a cause of action to allege an asbestos claim or silica claim raises questions about possible infringements on the right of access to the courts. For example, the bill defines "qualified physician" to exclude any claimant who receives free care from the qualified physician. "Qualified physician" is defined to mean a medical doctor who: is currently a board-certified internist, oncologist, pathologist, pulmonary specialist, or radiologist, or specialist in occupational and environmental medicine; has conducted a physical examination of the exposed person; is actually treating or treated the exposed person, and has or had a doctor-patient relationship with the person; spends no more than 10 percent of his or her professional practice time in providing consulting or expert services in connection with actual or potential civil actions and whose medical group, professional corporation, clinic, or other affiliated group earns not more than 20 percent of its revenues from providing such services; is currently licensed to practice and actively practices in the state in which the plaintiff resides or in which the plaintiff's civil action was filed; *and receives or received payment for the treatment of the exposed person from that person's health maintenance organization or other medical provider or from the exposed person or a member of the exposed person's family.*

Section 21, Article I of the State Constitution provides that the courts shall be open to all redress for an injury. To impose a barrier or limitation on litigants right to file certain actions it would have to meet the test announced by the Florida Supreme Court in *Kluger v. White*²⁰. Under the constitutional test established by the Florida Supreme Court in *Kluger v. White*, the Legislature would have to: (1) provide a reasonable alternative remedy or commensurate benefit, or (2) make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

¹⁹ See *Dewberry v. Auto-Owners Ins. Co.*, 363 So.2d 1077 (Fla. 1978) and *Chiapetta v. Jordan*, 16 So.2d 241 (Fla.1943) as cited in *The Florida Senate Manual for Drafting General Bills*, Fifth Edition, 1999

²⁰ See *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

B. Private Sector Impact:

Some businesses that face liability from asbestos or silica claims may have a reduction in the number of civil suits filed against them. Plaintiffs asserting asbestos or silica claims may incur additional costs to meet the prima facie evidentiary requirements outlined in the bill.

C. Government Sector Impact:

Courts that hear asbestos or silica claims may incur additional costs to hear the evidentiary claims of litigants asserting such claims as outlined in the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In section 4 of the bill, to demonstrate physical impairment as part of a prima facie case, a claimant for asbestos or silica claims, as applicable, must demonstrate exposure to asbestos or silica for a minimum period and when employed in specific trades. The bill sets up a classification based on minimum years of exposure for each group of occupations or trades. By implication, the bill excludes asbestos exposure claims that are not the result of occupational exposure as provided in the bill. It is not clear that a janitor exposed to asbestos and working near the trades listed in the bill would be able to demonstrate physical impairment as an essential element of an asbestos or silica claim.

VIII. Summary of Amendments:

Barcode 415990 by Health Care:

The amendment deletes a requirement that an asbestos claimant, for a claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach, must make a prima facie showing of physical impairment. Under the amendment, such claimants do not have to make a prima facie showing of physical impairment for an asbestos claim. (WITH TITLE AMENDMENT)

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
