

SENATE BILL No. 592

By Committee on Ways and Means

3-16

10 AN ACT enacting the asbestos compensation fairness act; concerning
11 asbestos claims.

12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. This act shall be known and may be cited as the asbestos
15 compensation fairness act.

16 Sec. 2. As used in this act:

17 (a) “AMA guides to the evaluation of permanent impairment” means
18 the American Medical Association’s Guides to the Evaluation of Perma-
19 nent Impairment (fifth edition 2000) as ~~modified by the American med-~~
20 ~~ical association~~ **in effect on July 1, 2006.**

21 (b) “Asbestos” means all minerals defined as asbestos in 29 C.F.R. ~~§~~
22 1910, as ~~amended~~ **in effect on July 1, 2006.**

23 (c) “Asbestos claim” means any claim for damages or other civil or
24 equitable relief presented in a civil action arising out of, based on or
25 related to the health effects of exposure to asbestos, including loss of
26 consortium, wrongful death and any other derivative claim made by or
27 on behalf of any exposed person or any representative, spouse, parent,
28 child or other relative of any exposed person. The term does not include
29 claims for benefits under a workers’ compensation law or veterans’ ben-
30 efits program or claims brought by any person as a subrogee by virtue of
31 the payment of benefits under a workers’ compensation law.

32 (d) “Asbestosis” means bilateral diffuse interstitial fibrosis of the
33 lungs caused by inhalation of asbestos fibers.

34 (e) “Bankruptcy proceeding” means a case brought under Title 11,
35 U.S.C., or any related proceeding as provided in section 157 of Title 28,
36 U.S.C.

37 (f) “Board-certified in internal medicine” means certified by the
38 American board of internal medicine or the American osteopathic board
39 of internal medicine.

40 (g) “Board-certified in occupational medicine” means certified in the
41 subspecialty of occupational medicine by the American board of preven-
42 tive medicine or the American osteopathic board of preventive medicine.

43 (h) “Board-certified in oncology” means certified in the subspecialty

1 of medical oncology by the American board of internal medicine or the
2 American osteopathic board of internal medicine.

3 (i) “Board-certified in pathology” means holding primary certification
4 in anatomic pathology or clinical pathology from the American board of
5 pathology or the American osteopathic board of internal medicine and
6 with professional practice:

7 (1) Principally in the field of pathology.

8 (2) Involving regular evaluation of pathology materials obtained from
9 surgical or postmortem specimens.

10 (j) “Board-certified in pulmonary medicine” means certified in the
11 subspecialty of pulmonary medicine by the American board of internal
12 medicine or the American osteopathic board of internal medicine.

13 (k) “Certified B-reader” means an individual qualified as a final or B-
14 reader under 42 C.F.R. ~~§~~ 37.51(b), as ~~amended~~ **in effect on July 1,**
15 **2006.**

16 (l) “Civil action” means all suits or claims of a civil nature in court,
17 whether cognizable as cases at law or in equity or in admiralty. The term
18 does not include an action relating to any workers’ compensation law or
19 a proceeding for benefits under any veterans’ benefits program.

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

22 (n) “Exposure years” means:

23 (1) Each single year of exposure prior to 1972 to be counted as one
24 year.

25 (2) Each single year of exposure from 1972 through 1979 to be
26 counted as one-half year.

27 (3) Exposure after 1979 not to be counted, except that each year from
28 1972 forward for which the plaintiff can establish exposure exceeding the
29 occupational safety and health administration limit for 8-hour, time-
30 weighted average airborne concentration for a substantial portion of the
31 year to be counted as one year.

32 (o) “FEV1” means forced expiratory volume in the first second,
33 which is the maximal volume of air expelled in one second during per-
34 formance of simple spirometric tests.

35 (p) “FVC” means forced vital capacity which is the maximal volume
36 of air expired with maximum effort from a position of full inspiration.

37 (q) “ILO scale” means the system for the classification of chest x-rays
38 set forth in the international labor office’s guidelines for the use of ILO
39 international classification of radiographs of pneumoconioses (1980) ~~as~~
40 ~~amended~~ **published** by the international labor office **and in effect on**
41 **July 1, 2006.**

42 (r) “Lung cancer” means a malignant tumor in which the primary site
43 of origin of the cancer is located inside of the lungs, but such term does

- 1 not include an asbestos claim based upon mesothelioma.
- 2 (s) “Mesothelioma” means a malignant tumor with a primary site in
3 the pleura or the peritoneum which has been diagnosed by a board-cer-
4 tified pathologist using standardized and accepted criteria of microscopic
5 morphology or appropriate staining techniques.
- 6 (t) “Nonmalignant condition” means any condition that is caused or
7 may be caused by asbestos other than a diagnosed cancer.
- 8 (u) “Nonsmoker” means an exposed person who has not smoked cig-
9 arettes or used any other tobacco products within the last 15 years.
- 10 (v) “Pathological evidence of asbestosis” means a statement by a
11 board-certified pathologist that more than one representative section of
12 lung tissue uninvolved with any other disease process demonstrates a
13 pattern of peribronchiolar or parenchymal scarring in the presence of
14 characteristic asbestos bodies and that there is no other more likely ex-
15 planation for the presence of the fibrosis.
- 16 (w) “Predicted lower limit of normal” for any test means the fifth
17 percentile of healthy populations based on age, height, and gender, as
18 referenced in the AMA guides to the evaluation of permanent
19 impairment.
- 20 (x) “Qualified physician” means a medical doctor who:
- 21 (1) Is currently a board-certified internist, oncologist, pathologist,
22 pulmonary specialist or radiologist or specialist in occupational and en-
23 vironmental medicine.
- 24 (2) Has conducted a physical examination of the exposed person.
- 25 (3) Is actually treating or treated the exposed person and has or had
26 a doctor-patient relationship with such person.
- 27 (4) Spends no more than 10% of professional practice time in pro-
28 viding consulting or expert services in connection with actual or potential
29 civil actions and whose medical group, professional corporation, clinic or
30 other affiliated group earns not more than 20% of its revenues from pro-
31 viding such services.
- 32 (5) Is currently licensed to practice and actively practices in the state
33 in which the plaintiff resides or in which the plaintiff’s civil action was
34 filed.
- 35 (6) Receives or received payment for the treatment of the exposed
36 person from that person’s health maintenance organization or other med-
37 ical provider or from the exposed person or a member of the exposed
38 person’s family.
- 39 (y) “Radiological evidence of asbestosis” means a quality one chest x-
40 ray under the ILO system of classification showing small, irregular opac-
41 ities of s, t or u, graded by a certified B-reader as at least $\frac{1}{4}$ on the ILO
42 scale. In a death case for which no pathology is available, the necessary
43 radiologic findings may be made with a quality two film if a quality one

1 film is not available.

2 (z) “Radiological evidence of diffuse pleural thickening” means a
3 quality one chest x-ray under the ILO system of classification showing
4 bilateral pleural thickening of at least B2 on the ILO scale and blunting
5 of at least one costophrenic angle. In a death case for which no pathology
6 is available, the necessary radiologic findings may be made with a quality
7 two film if a quality one film is not available.

8 (aa) “Smoker” means a person who has smoked cigarettes or used
9 other tobacco products within the last 15 years.

10 (bb) “State” means any state of the United States, the District of
11 Columbia, the Commonwealth of Puerto Rico, the Northern Mariana
12 Islands, the Virgin Islands, Guam, American Samoa and any other terri-
13 tory or possession of the United States or any political subdivision of any
14 of such governments.

15 (cc) “Substantial contributing factor” means:

16 (1) Exposure to asbestos is the predominant cause of the physical
17 impairment alleged in the claim.

18 (2) The exposure to asbestos took place on a regular basis over an
19 extended period of time and in close proximity to the exposed person.

20 (3) A qualified physician has determined with a reasonable degree of
21 medical certainty that the physical impairment of the exposed person
22 would not have occurred but for the asbestos exposure.

23 (dd) “Veterans’ benefits program” means any program for benefits in
24 connection with military service administered by the Veterans’ Adminis-
25 tration under Title 38, U.S.C.

26 (ee) “Workers’ compensation law” means a law respecting a program
27 administered by a state or the United States to provide benefits, funded
28 by a responsible employer or its insurance carrier, for occupational dis-
29 eases or injuries or for disability or death caused by occupational diseases
30 or injuries. The term includes the longshore and harbor workers’ com-
31 pensation act, 33 U.S.C. 901-944, 948-950, and chapter 81 of Title 5,
32 U.S.C., the federal employees compensation act, but does not include the
33 act of April 22, 1908, 45 U.S.C. 51 et seq., popularly referred to as the
34 “Federal Employers’ Liability Act.”

35 Sec. 3. (a) Physical impairment of the exposed person, to which as-
36 bestos exposure was a substantial contributing factor, shall be an essential
37 element of an asbestos claim.

38 (b) No person shall bring or maintain a civil action alleging a non-
39 malignant asbestos claim in the absence of a prima facie showing of phys-
40 ical impairment as a result of a medical condition to which exposure to
41 asbestos was a substantial contributing factor. Such a prima facie showing
42 shall include:

43 (1) Evidence verifying that a qualified physician has taken a detailed

- 1 occupational and exposure history of the exposed person or, if such person
2 is deceased, from a person who is knowledgeable about the exposures
3 that form the basis of the nonmalignant asbestos claim, including:
- 4 (A) Identification of all of the exposed person's principal places of
5 employment and exposures to airborne contaminants.
- 6 (B) Whether each place of employment involved exposures to air-
7 borne contaminants, including, but not limited to, asbestos fibers or other
8 disease-causing dusts, that can cause pulmonary impairment and the na-
9 ture, duration and level of any such exposure.
- 10 (2) Evidence sufficient to demonstrate that at least 10 years have
11 elapsed between the date of first exposure to asbestos and the date of
12 diagnosis.
- 13 (3) Evidence verifying that a qualified physician has taken detailed
14 medical and smoking history, including a thorough review of the exposed
15 person's past and present medical problems and their most probable
16 cause.
- 17 (4) A determination by a qualified physician, on the basis of a medical
18 examination and pulmonary function testing, that the exposed person has
19 a permanent respiratory impairment rating of at least class 2 as defined
20 by and evaluated pursuant to the AMA guides to the evaluation of per-
21 manent impairment.
- 22 (5) A diagnosis by a qualified physician of asbestosis or diffuse pleural
23 thickening, based at a minimum on radiological or pathological evidence
24 of asbestosis or radiological evidence of diffuse pleural thickening.
- 25 (6) A determination by a qualified physician that asbestosis or diffuse
26 pleural thickening, rather than chronic obstructive pulmonary disease, is
27 a substantial contributing factor to the exposed person's physical impair-
28 ment, based at a minimum on a determination that the exposed person
29 has:
- 30 (A) Total lung capacity, by plethysmography or timed gas dilution,
31 below the predicted lower limit of normal;
- 32 (B) forced vital capacity below the lower limit of normal and a ratio
33 of FEV1 to FVC that is equal to or greater than the predicted lower limit
34 of normal; or
- 35 (C) a chest x-ray showing small, irregular opacities of s, t or u, graded
36 by a certified B-reader at least $\frac{2}{1}$ on the ILO scale.
- 37 (7) A conclusion by a qualified physician that the exposed person's
38 medical findings and impairment were not more probably the result of
39 causes other than the asbestos exposure revealed by the exposed person's
40 employment and medical history. A conclusion which states that the med-
41 ical findings and impairment are consistent with or compatible with ex-
42 posure to asbestos does not meet the requirements of this paragraph.
- 43 (c) No person shall bring or maintain a civil action alleging an asbestos

- 1 claim which is based upon lung cancer in the absence of a prima facie
2 showing which shall include all of the following minimum requirements:
- 3 (1) A diagnosis by a qualified physician, who is board certified in
4 pathology, pulmonary medicine or oncology, of a primary lung cancer and
5 that exposure to asbestos was a substantial contributing factor to the
6 condition.
- 7 (2) Evidence sufficient to demonstrate that at least 10 years have
8 elapsed between the date of first exposure to asbestos and the date of
9 diagnosis of the lung cancer.
- 10 (3) Depending on whether the exposed person has a history of smok-
11 ing, the requirements of subparagraph (A) or (B):
- 12 (A) In the case of an exposed person who is a nonsmoker:
- 13 (i) Radiological or pathological evidence of asbestosis; or
14 (ii) evidence of occupational exposure to asbestos for the following
15 minimum exposure periods in the specified occupations:
- 16 (I) Five exposure years for insulators, shipyard workers, workers in
17 manufacturing plants handling raw asbestos, boilermakers, shipfitters,
18 steamfitters or other trades performing similar functions;
- 19 (II) ten exposure years for utility and powerhouse workers, secondary
20 manufacturing workers or other trades performing similar functions; or
21 (III) fifteen exposure years for general construction, maintenance
22 workers, chemical and refinery workers, marine engine room personnel
23 and other personnel on vessels, stationary engineers and firemen, railroad
24 engine repair workers or other trades performing similar functions.
- 25 (B) In the case of an exposed person who is a smoker, the criteria
26 contained in sub-subparagraphs (A)(i) and (A)(ii) must be met.
- 27 (4) A conclusion by a qualified physician that the exposed person's
28 medical findings and impairment were not more probably the result of
29 causes other than the asbestos exposure revealed by the exposed person's
30 employment and medical history. A conclusion that the medical findings
31 and impairment are consistent with or compatible with exposure to as-
32 bestos does not meet the requirements of this subsection.
- 33 If the exposed person is deceased, the qualified physician may obtain
34 the evidence required in paragraph (b) and subparagraph (3)(A)(ii) from
35 the person most knowledgeable about the alleged exposures that form
36 the basis of the asbestos claim.
- 37 (d) No person shall bring or maintain a civil action alleging an asbes-
38 tos claim which is based upon cancer of the colon, rectum, larynx, phar-
39 ynx, esophagus or stomach in the absence of a prima facie showing which
40 shall include all of the following minimum requirements:
- 41 (1) A diagnosis by a qualified physician who is board certified in pa-
42 thology, pulmonary medicine or oncology, as appropriate for the type of
43 cancer claimed, of primary cancer of the colon, rectum, larynx, pharynx,

1 esophagus or stomach and that exposure to asbestos was a substantial
2 contributing factor to the condition.

3 (2) Evidence sufficient to demonstrate that at least 10 years have
4 elapsed between the date of first exposure to asbestos and the date of
5 diagnosis of the cancer.

6 (3) The requirement of:

7 (A) Radiological or pathological evidence of asbestosis; or

8 (B) evidence of occupational exposure to asbestos for the following
9 minimum exposure periods in the specified occupations:

10 (i) Five exposure years for insulators, shipyard workers, workers in
11 manufacturing plants handling raw asbestos, boilermakers, shipfitters,
12 steamfitters or other trades performing similar functions;

13 (ii) ten exposure years for utility and powerhouse workers, secondary
14 manufacturing workers or other trades performing similar functions; or

15 (iii) fifteen exposure years for general construction, maintenance
16 workers, chemical and refinery workers, marine engine room personnel
17 and other personnel on vessels, stationary engineers and firemen, railroad
18 engine repair workers or other trades performing similar functions.

19 (4) A conclusion by a qualified physician that the exposed person's
20 medical findings and impairment were not more probably the result of
21 causes other than the asbestos exposure revealed by the exposed person's
22 employment and medical history. A conclusion that the medical findings
23 and impairment are consistent with or compatible with exposure to as-
24 bestos does not meet the requirements of this paragraph.

25 If the exposed person is deceased, the qualified physician may obtain
26 the evidence required in paragraph (2) and subparagraph (3)(B) from the
27 person most knowledgeable about the alleged exposures that form the
28 basis of the asbestos claim.

29 ***(e) In a civil action alleging an asbestos claim based upon mes-***
30 ***othelioma, no prima facie showing is required.***

31 ***(f) Evidence relating to physical impairment under this section,***
32 ***including pulmonary function testing and diffusing studies, shall:***

33 ***(1) Comply with the technical recommendations for examina-***
34 ***tions, testing procedures, quality assurance, quality control and***
35 ***equipment of the AMA guides to the evaluation of permanent im-***
36 ***pairment, as set forth in 2d C.F.R. Pt. 404, Subpt. P. Appl., Part A,***
37 ***Sec. 3.00 E. and F., and the interpretive standards set forth in the***
38 ***official statement of the American Thoracic Society entitled "Lung***
39 ***function testing: selection of reference values and interpretive strat-***
40 ***egies" as published in American Review of Respiratory Disease,***
41 ***1991, 144:1202-1218.***

42 ***(2) Not be obtained through testing or examinations that violate***
43 ***any applicable law, regulation, licensing requirement, or medical***

1 *code of practice.*

2 **(3) Not be obtained under the condition that the exposed person**
3 **retain legal services in exchange for the examination, test or**
4 **screening.**

5 **(g) Presentation of prima facie evidence meeting the require-**
6 **ments of section 3, and amendments thereto, shall not:**

7 **(A) Result in any presumption at trial that the exposed person**
8 **is impaired by an asbestos-related condition.**

9 **(B) Be conclusive as to the liability of any defendant.**

10 **(C) Be admissible at trial.**

11 Sec. 4. (a) A court may consolidate for trial any number and type of
12 asbestos claims with consent of all the parties. In the absence of such
13 consent, the court may consolidate for trial only asbestos claims relating
14 to the same exposed person and members of such person's household.

15 (b) A civil action alleging an asbestos claim may only be brought in
16 the courts of this state if the plaintiff is domiciled in this state or the
17 exposure to asbestos that is a substantial contributing factor to the physical
18 impairment on which the claim is based occurred in this state.

19 (c) The plaintiff in any civil action alleging an asbestos claim shall file
20 together with the complaint or other initial pleading a written report and
21 supporting test results constituting prima facie evidence of the exposed
22 person's asbestos-related physical impairment meeting the requirements
23 of subsections (b) through ~~(g)~~ (e) of section 3, and amendments thereto.
24 For any asbestos claim pending on the effective date of this act, the plain-
25 tiff shall file such a written report and supporting test results no later
26 than 60 days after the effective date or no later than 30 days prior to the
27 commencement of trial. The defendant shall be afforded a reasonable
28 opportunity to challenge the adequacy of the proffered prima facie evi-
29 dence of asbestos-related impairment. The plaintiff's claim shall be dis-
30 missed without prejudice upon a finding of failure to make the required
31 prima facie showing.

32 (d) All asbestos claims filed in this state on or after the effective date
33 of this act shall include, in addition to the report required in subsection
34 (3) and the information required in subsection (2) of section 7, a sworn
35 information form containing the following information:

36 (1) The claimant's name, address, date of birth, social security num-
37 ber and marital status.

38 (2) If the claimant alleges exposure to asbestos through the testimony
39 of another person or other than by direct or bystander exposure to any
40 product, the name, address, date of birth, social security number and
41 marital status for each person by which such claimant alleges exposure,
42 hereafter the "index person," and the claimant's relationship to each
43 person.

- 1 (3) The specific location of each alleged exposure.
- 2 (4) The beginning and ending dates of each alleged exposure as to
3 each asbestos product for each location at which the exposure allegedly
4 took place for plaintiff and for each index person.
- 5 (5) The occupation and name of employer of the exposed person at
6 the time of each alleged exposure.
- 7 (6) The specific condition related to asbestos claimed to exist.
- 8 (7) Any supporting documentation of the condition claimed to exist.
- 9 Sec. 5. (a) Notwithstanding any other provision of law, with respect
10 to any asbestos claim not barred as of the effective date of this act, the
11 limitations period shall not begin to run until the exposed person discov-
12 ers, or through the exercise of reasonable diligence should have discov-
13 ered, that the exposed person is physically impaired by an asbestos-related
14 condition, as defined in section 4, and amendments thereto.
- 15 (b) An asbestos claim arising out of a nonmalignant condition shall
16 be a distinct cause of action from an asbestos claim relating to the same
17 exposed person arising out of asbestos-related cancer. No damages shall
18 be awarded for fear or risk of cancer in any civil action asserting an as-
19 bestos claim.
- 20 (c) No settlement of a nonmalignant asbestos claim concluded after
21 the date of enactment shall require, as a condition of settlement, release
22 of any future claim for asbestos-related cancer.
- 23 Sec. 6. (a) No punitive damages shall be awarded in any civil action
24 alleging an asbestos claim.
- 25 (b) At the time a complaint is filed in a civil action alleging an asbestos
26 claim, the plaintiff must file a verified written report with the court that
27 discloses the total amount of any collateral source payments received,
28 including payments which the plaintiff will receive in the future, as a
29 result of settlements or judgments based upon the same claim. For any
30 asbestos claim pending on the date of enactment of this act, the plaintiff
31 shall file such verified written report no later than 60 days after the date
32 of enactment or no later than 30 days prior to trial. Further, the plaintiff
33 shall be required to update such reports on a regular basis during the
34 course of the proceeding until a final judgment is entered in the case.
35 The court shall ensure that the information contained in the initial and
36 updated reports is treated as privileged and confidential and that the
37 contents of the verified written reports shall not be disclosed to anyone
38 except the other parties to the action. The court shall permit setoff, based
39 on the collateral source payment information provided, in accordance
40 with the laws of this state as of the effective date of this act.
- 41 Sec. 7. (a) (1) In any civil action alleging an asbestos claim, a product
42 seller other than a manufacturer shall be liable to a plaintiff only if the
43 plaintiff establishes that:

- 1 (A) (i) The product that allegedly caused the harm that is the subject
2 of the complaint was sold, rented, or leased by the product seller;
- 3 (ii) the product seller failed to exercise reasonable care with respect
4 to the product; and
- 5 (iii) the failure to exercise reasonable care was a proximate cause of
6 the harm to the exposed person;
- 7 (B) (i) the product seller made an express warranty applicable to the
8 product that allegedly caused the harm that is the subject of the com-
9 plaint, independent of any express warranty made by the manufacturer
10 as to the same product;
- 11 (ii) the product failed to conform to the warranty; and
- 12 (iii) the failure of the product to conform to the warranty caused the
13 harm to the exposed person; or
- 14 (C) (i) the product seller engaged in intentional wrongdoing, as de-
15 termined under applicable state law; and
- 16 (ii) the intentional wrongdoing caused the harm that is the subject of
17 the complaint.
- 18 (2) For the purposes of subparagraph (a)(1), a product seller shall not
19 be considered to have failed to exercise reasonable care with respect to
20 a product based upon an alleged failure to inspect the product, if:
- 21 (A) The failure occurred because there was no reasonable opportu-
22 nity to inspect the product; or
- 23 (B) the inspection, in the exercise of reasonable care, would not have
24 revealed the aspect of the product that allegedly caused the exposed per-
25 son's impairment.
- 26 (b) In any civil action alleging an asbestos claim, a person engaged in
27 the business of renting or leasing a product shall not be liable for the
28 tortious act of another solely by reason of ownership of that product.
- 29 Sec. 8. (a) This act shall not be construed to affect the scope or op-
30 eration of the workers' compensation law or veterans' benefit program,
31 to affect the exclusive remedy or subrogation provisions of any such law,
32 or to authorize any lawsuit which is barred by any such provision of law.
- 33 (b) This act expressly preserves the right of all injured persons to
34 recover full compensatory damages for their loss and therefore does not
35 impair vested rights. In addition, this act enhances the ability of the most
36 seriously ill to receive a prompt recovery and therefore is remedial in
37 nature.
- 38 (c) If any provision of this act or the application thereof to any person
39 or circumstance is held invalid, the invalidity does not affect other pro-
40 visions or application of the act which can be given effect without the
41 invalid provision or application, and to this end the provisions of this act
42 are declared severable.
- 43 Sec. 9. This act shall apply to any civil action asserting an asbestos

1 claim in which trial has not commenced as of the effective date of this
2 act.

3 Sec. 10. This act shall take effect and be in force from and after its
4 publication in the statute book.