

LEGISLATURE OF NEBRASKA
ONE HUNDRED EIGHTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 95

Introduced by Slama, 1.

Read first time January 06, 2023

Committee: Judiciary

- 1 A BILL FOR AN ACT relating to asbestos; to amend section 25-224, Reissue
- 2 Revised Statutes of Nebraska; to adopt the Asbestos Trust Claims
- 3 Transparency Act and the Asbestos Claims Priorities and Claims
- 4 Legitimacy Act; to change provisions relating to a statute of
- 5 limitations; and to repeal the original section.
- 6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 7 of this act shall be known and may be
2 cited as the Asbestos Trust Claims Transparency Act.

3 Sec. 2. For purposes of the Asbestos Trust Claims Transparency Act:

4 (1)(a) Asbestos action means a claim for damages or other relief
5 presented in a civil action arising out of, based on, or related to the
6 health effects of exposure to asbestos and any derivative claim made by
7 or on behalf of a person exposed to asbestos or a representative, spouse,
8 parent, child, or other relative of such person.

9 (b) Asbestos action does not include a claim for benefits under the
10 Nebraska Workers' Compensation Act;

11 (2) Asbestos trust means a government-approved or court-approved
12 trust, qualified settlement fund, compensation fund, or claims facility
13 that is:

14 (a) Created as a result of an administrative or legal action, a
15 court-approved bankruptcy, or pursuant to 11 U.S.C. 524(g) or 11 U.S.C.
16 1121(a) or other applicable provision of law; and

17 (b) Intended to provide compensation for claims arising out of,
18 based on, or related to the health effects of exposure to asbestos;

19 (3) Trust claim materials means a final executed proof of claim and
20 documents or information submitted to or received from an asbestos trust,
21 including:

22 (a) Claim forms and supplementary materials, proofs of claim,
23 affidavits, depositions, medical and health records, trial testimony,
24 work history, and exposure allegations; and

25 (b) Documents that reflect the status of a claim against an asbestos
26 trust and, if the trust claim has been resolved, documents relating to
27 the resolution of the trust claim; and

28 (4) Trust governance documents means documents that relate to
29 eligibility and payment levels for an asbestos trust, including claims
30 payment matrices, trust distribution procedures, or plans for
31 reorganization.

1 Sec. 3. (1) Within thirty days after filing an asbestos action, the
2 claimant shall submit all available asbestos trust claims, produce all
3 trust claims materials, and file and provide all parties with an
4 affidavit indicating that all asbestos trust claims that can be made by
5 the claimant have been filed and that all trust claims materials produced
6 by the claimant are true and complete. A deferral or placeholder claim
7 that is missing necessary documentation for the asbestos trust to pay the
8 claim does not meet the requirements of this section. The claimant shall
9 produce all trust claims filed by a person other than the claimant if the
10 asbestos action is based on exposure to asbestos through that person and
11 the materials are available to the claimant or claimant's counsel.

12 (2) A claimant shall supplement the information and materials
13 required under subsection (1) of this section after supplementing an
14 asbestos trust claim, receiving additional information or materials
15 related to an asbestos trust claim, or filing an additional trust claim.

16 Sec. 4. (1) Not less than sixty days before trial of an asbestos
17 action, if a defendant believes the claimant has not filed all asbestos
18 trust claims as required by section 3 of this act, the defendant may move
19 the court for an order to require the claimant to file the additional
20 trust claims the defendant believes the claimant is eligible to file.

21 (2) If the court determines there is a sufficient basis for the
22 claimant to file an asbestos trust claim identified by the defendant, the
23 court shall order the claimant to file the asbestos trust claim, produce
24 all related trust claim materials, and produce an affidavit stating that
25 all such materials are true and complete. The court shall not set the
26 asbestos action for trial earlier than ninety days after the claimant
27 complies with this section.

28 Sec. 5. (1) Trust claim materials and trust governance documents
29 are admissible as evidence in an asbestos action and are presumed to be
30 relevant and authentic. No claims of privilege apply to trust claim
31 materials or trust governance documents.

1 (2) A defendant in an asbestos action may seek discovery from an
2 asbestos trust. The claimant may not claim privilege or confidentiality
3 to bar discovery and shall provide consent or other expression of
4 permission that may be required by the asbestos trust to release
5 information and materials sought by a defendant.

6 Sec. 6. In an asbestos action in which damages are awarded and
7 setoffs are permitted under applicable law, a defendant is entitled to a
8 setoff in the amount the claimant has received from an asbestos trust
9 and, for trust claims not yet paid as of the date of entry of judgment,
10 the amount the claimant will receive as specified in the applicable trust
11 governance documents. If multiple defendants are found liable for
12 damages, the court shall distribute the amount of setoff proportionally
13 between the defendants, according to the liability of each defendant.

14 Sec. 7. The Asbestos Trust Claims Transparency Act applies to
15 asbestos actions filed on or after the effective date of this act.

16 Sec. 8. Sections 8 to 18 of this act shall be known and may be
17 cited as the Asbestos Claims Priorities and Claims Legitimacy Act.

18 Sec. 9. For purposes of the Asbestos Claims Priorities and Claims
19 Legitimacy Act:

20 (1) AMA Guides means the sixth edition of the American Medical
21 Association's Guides to the Evaluation of Permanent Impairment;

22 (2)(a) Asbestos action means a claim for damages or other relief
23 presented in a civil action arising out of, based on, or related to the
24 health effects of exposure to asbestos and any derivative claim made by
25 or on behalf of a person exposed to asbestos or a representative, spouse,
26 parent, child, or other relative of such person.

27 (b) Asbestos action does not include a claim for benefits under the
28 Nebraska Workers' Compensation Act;

29 (3) Asbestosis means bilateral diffuse interstitial fibrosis of the
30 lungs caused by inhalation of asbestos fibers;

31 (4) Board-certified in internal medicine means a licensed physician

1 who is certified by the American Board of Internal Medicine or the
2 American Osteopathic Board of Internal Medicine;

3 (5) Board-certified in occupational medicine means a licensed
4 physician who is certified in the specialty of occupational medicine by
5 the American Board of Preventive Medicine or the specialty of
6 occupational/environmental medicine by the American Osteopathic Board of
7 Preventive Medicine;

8 (6) Board-certified in oncology means a licensed physician who is
9 certified in the subspecialty of medical oncology by the American Board
10 of Internal Medicine or the American Osteopathic Board of Internal
11 Medicine;

12 (7) Board-certified in pathology means a licensed physician who
13 holds primary certification in anatomic pathology or clinical pathology
14 from the American Board of Pathology or the American Osteopathic Board of
15 Pathology and whose professional practice is principally in the field of
16 pathology and involves regular evaluation of pathology materials obtained
17 from surgical or postmortem specimens;

18 (8) Board-certified in pulmonary medicine means a licensed physician
19 who is certified in the specialty of pulmonary medicine by the American
20 Board of Internal Medicine or the American Osteopathic Board of Internal
21 Medicine;

22 (9) Certified B Reader means a National Institute for Occupational
23 Safety and Health (NIOSH) certified B Reader of X-rays who complies with
24 the NIOSH B Reader's Code of Ethics, Issues in Classification of Chest
25 Radiographs, and Classification of Chest Radiographs: Contested
26 Proceedings;

27 (10) Chest X-ray means chest films taken in accordance with
28 applicable state and federal regulatory standards and taken in the
29 posterior-anterior view;

30 (11) DLCO means diffusing capacity of the lung for carbon monoxide,
31 which is the measurement of carbon monoxide transfer from inspired gas to

1 pulmonary capillary blood;

2 (12) FEV1 means forced expiratory volume in the first second, which
3 is the maximal volume of air expelled in one second during performance of
4 simple spirometric tests;

5 (13) FEV1/FVC means the ratio between the actual values for FEV1
6 over FVC;

7 (14) FVC means forced vital capacity, which is the maximal volume of
8 air expired with maximum effort from a position of full inspiration;

9 (15) ILO system and ILO scale mean the radiological ratings and
10 system for the classification of chest X-rays of the International Labour
11 Organization provided in Guidelines for the Use of ILO International
12 Classification of Radiographs of Pneumoconioses (2011);

13 (16) Official statements of the American Thoracic Society means the
14 lung function testing standards set forth in the technical standards of
15 the American Thoracic Society, including Standardization of Spirometry
16 (2019), Standardization of the Measurement of Lung Volumes (2005),
17 Standards for Single-breath Carbon Monoxide Uptake in the Lung (2017),
18 and Interpretive Strategies for Lung Function Tests (2005);

19 (17) Pathological evidence of asbestosis means a statement by a
20 board-certified pathologist that more than one representative section of
21 lung tissue uninvolved with any other disease process demonstrates a
22 pattern of peribronchiolar or parenchymal scarring in the presence of
23 characteristic asbestos bodies;

24 (a) That is graded:

25 (i) 1(B) or higher under the criteria published in Asbestos-
26 Associated Diseases, 106 Archive of Pathology and Laboratory Medicine 11,
27 Appendix 3 (October 8, 1982); or

28 (ii) One or higher in pathology of asbestosis, 134 Archive of
29 Pathology and Laboratory Medicine 462-80 (March 2010) (tables 2 and 3);
30 and

31 (b) For which there is no other more likely explanation for the

1 presence of the fibrosis;

2 (18) Plethysmography means the test for determining lung volume in
3 which the exposed person is enclosed in a chamber equipped to measure
4 pressure, flow, or volume change;

5 (19) Predicted lower limit of normal means the test value that is
6 the calculated standard convention lying at the fifth percentile, below
7 the upper ninety-five percent of the reference population, based on age,
8 height, and gender, according to the recommendations by the American
9 Thoracic Society and as referenced in the AMA Guides, primarily National
10 Health and Nutrition Examination Survey predicted values;

11 (20) Pulmonary function test means spirometry, lung volume testing,
12 and diffusion capacity testing, including appropriate measurements,
13 quality control data, and graphs, performed in accordance with the
14 methods of calibration and techniques provided in the AMA Guides and
15 standards provided in the official statements of the American Thoracic
16 Society;

17 (21) Qualified physician means a licensed physician who is board-
18 certified in internal medicine, occupational medicine, oncology,
19 pathology, or pulmonary medicine, as appropriate to the diagnostic
20 specialty in question, and who:

21 (a) Conducted a physical examination of the exposed person and took
22 a detailed occupational, exposure, medical, smoking, and social history
23 or, if the exposed person is deceased, reviewed the pathology material
24 and took a detailed history from the person most knowledgeable about the
25 information forming the basis of the asbestos action;

26 (b) Treated or is treating the exposed person, and has a doctor-
27 patient relationship with the exposed person at the time of the physical
28 examination, or in the case of a board-certified pathologist, examined
29 tissue samples or pathological slides of the exposed person at the
30 request of the treating physician;

31 (c) Has not relied on any examinations, tests, radiographs, reports,

1 or opinions of any doctor, clinic, laboratory, or testing company that
2 performed an examination, test, radiograph, or screening of the exposed
3 person in violation of a law, regulation, licensing requirement, or
4 medical code of practice of the state in which the examination, test, or
5 screening was conducted; and

6 (d) Prepared or directly supervised the preparation and final review
7 of a medical report under the Asbestos Claims Priorities and Claims
8 Legitimacy Act;

9 (22) Radiological evidence of asbestosis means a quality 1 chest X-
10 ray under the ILO system, or a quality 2 chest X-ray in a death case when
11 no pathology or quality 1 chest X-ray is available, showing bilateral
12 small, irregular opacities (s, t, or u) occurring primarily in the lower
13 lung zones graded by a certified B Reader as at least 1/1 on the ILO
14 scale;

15 (23) Radiological evidence of diffuse bilateral pleural thickening
16 means a quality 1 chest X-ray under the ILO system, or a quality 2 chest
17 X-ray in a death case when no pathology or quality 1 chest X-ray is
18 available, showing diffuse bilateral pleural thickening of at least b2 on
19 the ILO scale and blunting of at least one costophrenic angle as
20 classified by a certified B Reader;

21 (24) Spirometry means a test of air capacity of the lung through a
22 spirometer to measure the volume of air inspired and expired;

23 (25) Supporting test results means B-reading and B Reader reports,
24 reports of X-ray examinations, diagnostic imaging of the chest, pathology
25 reports, pulmonary function tests, and other tests reviewed by the
26 diagnosing physician or a qualified physician in reaching the physician's
27 conclusions;

28 (26) Timed gas dilution means a method for measuring total lung
29 capacity in which the subject breathes into a spirometer containing a
30 known concentration of an inert and insoluble gas for a specific time,
31 and the concentration of that inert and insoluble gas in the lung is

1 compared to the concentration of that type of gas in the spirometer; and

2 (27) Total lung capacity means the volume of gas contained in the
3 lungs at the end of a maximal inspiration.

4 Sec. 10. (1) Within thirty days after filing an asbestos action,
5 the claimant shall file and provide all parties with an affidavit signed
6 by the claimant or claimant's counsel specifying the evidence that
7 provides the basis for each claim against each defendant. The affidavit
8 shall include the following with specificity:

9 (a) The name, address, date of birth, marital status, occupation,
10 smoking history, current and past worksites, and current and past
11 employers of the exposed person and any person through whom the exposed
12 person alleges exposure to asbestos;

13 (b) The name and address of each person who is knowledgeable about
14 each exposure and the exposed person's relationship to the person;

15 (c) The specific name of each asbestos-containing product,
16 including, but not limited to, all brand and trade names of that specific
17 asbestos-containing product, to which the exposed person was exposed or
18 the other person was exposed if exposure was through another person;

19 (d) The identity of the manufacturer or seller of the specific
20 asbestos product for each exposure;

21 (e) For each product identified in subdivision (1)(c) of this
22 section, each site and specific location at each site, including the
23 address of each site, where the exposed person was exposed or the other
24 person was exposed if exposure was through another person;

25 (f) The beginning and ending dates of each exposure, the specific
26 manner of each exposure, the frequency and length of each exposure, and
27 the proximity of the asbestos-containing product or its use to the
28 exposed person and each person through whom the exposed person alleges
29 exposure to asbestos;

30 (g) The asbestos-related disease that is alleged; and

31 (h) Any supporting documentation relating to the information

1 required under this section.

2 (2) A claimant has a continuing duty to supplement the information
3 required to be disclosed in subsection (1) of this section.

4 (3) Discovery shall not commence against a defendant in an asbestos
5 action until the defendant's product or premises is specifically
6 identified in the disclosures required by subsection (1) of this section.

7 (4) The court, on motion by a defendant, shall dismiss an asbestos
8 claim without prejudice as to any defendant whose product or premises is
9 not specifically identified in the disclosures required by subsection (1)
10 of this section.

11 (5) The court, on motion by a defendant, shall dismiss an asbestos
12 claim without prejudice as to the moving defendant or as to all
13 defendants, as applicable, if the claimant fails to comply with this
14 section.

15 Sec. 11. (1) In addition to the affidavit required by section 10 of
16 this act, within thirty days after filing an asbestos action, the
17 claimant shall file and provide all parties with a detailed narrative
18 medical report signed by a qualified physician and accompanied by
19 supporting test results which constitute prima facie evidence the exposed
20 person meets the requirements of the Asbestos Claims Priorities and
21 Claims Legitimacy Act. The report shall not be prepared by a lawyer or
22 other person working for or on behalf of a lawyer or law firm.

23 (2) A defendant shall have a reasonable opportunity to challenge the
24 adequacy of the prima facie evidence. The court shall dismiss the action
25 without prejudice if the claimant fails to comply with the requirements
26 of this section or fails to make the prima facie showing required by this
27 section.

28 Sec. 12. An asbestos action related to a nonmalignant asbestos-
29 related condition shall not be brought or maintained in the absence of
30 prima facie evidence the exposed person has a physical impairment for
31 which asbestos exposure was a substantial contributing factor. The prima

1 facie showing must be made as to each defendant and include a detailed
2 narrative medical report signed by a qualified physician with supporting
3 test results that includes the following:

4 (1) Radiological or pathological evidence of asbestosis or
5 radiological evidence of diffuse bilateral pleural thickening or a high-
6 resolution computed tomography scan showing evidence of asbestosis or
7 diffuse pleural thickening;

8 (2) A detailed occupational and exposure history from the exposed
9 person or, if that person is deceased, from the person most knowledgeable
10 about the exposures that form the basis of the action, including
11 identification of the exposed person's places of employment and exposures
12 to airborne contaminants and whether each place of employment involved
13 exposures to airborne contaminants, including asbestos fibers or other
14 disease-causing dusts, that may cause pulmonary impairment, and the
15 nature, duration, and level of any exposure;

16 (3) A detailed medical, social, and smoking history from the exposed
17 person or, if that person is deceased, from the person most
18 knowledgeable, including a thorough review of the past and present
19 medical problems of the exposed person;

20 (4) Evidence verifying that at least fifteen years have elapsed
21 between the exposed person's date of first exposure to asbestos and the
22 date of diagnosis;

23 (5) Evidence from a medical examination and pulmonary function
24 testing of the exposed person or, if the exposed person is deceased,
25 based upon the person's medical records, that the exposed person has, or
26 the deceased person had, a permanent respiratory impairment rating of at
27 least Class 2 as defined by the AMA Guides or reported significant
28 changes year to year in lung function for FVC, FEV1, or DLCO as defined
29 by the American Thoracic Society's Interpretative Strategies for Lung
30 Function Tests, 26 European Respiratory Journal 948-68, 961-62, table 12
31 (2005);

1 (6) Evidence that asbestosis or diffuse bilateral pleural
2 thickening, rather than chronic obstructive pulmonary disease, is a
3 substantial contributing factor to the exposed person's physical
4 impairment, based on a determination the exposed person has any of the
5 following:

6 (a) FVC below the predicted lower limit of normal and FEV1/FVC ratio
7 (using actual values) at or above the predicted lower limit of normal;

8 (b) Total lung capacity, by plethysmography or timed gas dilution,
9 below the predicted lower limit of normal; or

10 (c) A chest X-ray showing bilateral small, irregular opacities (s,
11 t, or u) graded by a certified B Reader as at least 2/1 on the ILO scale;
12 and

13 (7) A statement that the qualified physician signing the detailed
14 narrative medical report has concluded that exposure to asbestos was a
15 substantial contributing factor to the exposed person's physical
16 impairment and that such physical impairment was not more probably the
17 result of other causes. An opinion that the medical findings and
18 impairment are "consistent with exposure to asbestos" or "compatible with
19 exposure to asbestos", or words to that effect, shall not satisfy this
20 section.

21 Sec. 13. (1) An asbestos action related to an alleged asbestos-
22 related malignant condition may not be brought or maintained in the
23 absence of prima facie evidence the exposed person has a malignant
24 condition for which asbestos exposure was a substantial contributing
25 factor. The prima facie showing must be made as to each defendant and
26 include a detailed narrative medical report signed by a qualified
27 physician with supporting test results that includes the following:

28 (a) A diagnosis that the exposed person has a malignant asbestos-
29 related condition; and

30 (b) A statement that exposure to asbestos was a substantial
31 contributing factor to the exposed person's malignant condition and not

1 more probably the result of other causes, and a detailed explanation for
2 that opinion. An opinion that the malignant condition is "consistent with
3 exposure to asbestos" or "compatible with exposure to asbestos", or words
4 to that effect, shall not satisfy this section.

5 (2) The court shall hold an evidentiary hearing and determine if the
6 exposed person has established a prima facie showing of a malignant
7 condition for which exposure to asbestos was a substantial contributing
8 factor.

9 Sec. 14. (1) Evidence relating to the prima facie showings required
10 under the Asbestos Claims Priorities and Claim Legitimacy Act does not
11 create a presumption the exposed person has an asbestos-related
12 impairment and is not conclusive as to the liability of any defendant.

13 (2) Evidence shall not be offered at trial and the jury shall not be
14 informed of:

15 (a) The grant or denial of a motion to dismiss an asbestos action
16 under the act; or

17 (b) The provisions of the act with respect to what constitutes a
18 prima facie showing of asbestos impairment.

19 (3) Evidence relating to physical impairment offered in an asbestos
20 action:

21 (a) Must comply with the quality controls, equipment requirements,
22 methods of calibration, and techniques set forth in the AMA Guides and
23 standards set forth in the official statements of the American Thoracic
24 Society;

25 (b) Shall not be based on testing or examinations that violate a
26 law, regulation, licensing requirement, or medical code of practice of
27 this state or of the state in which the examination or test was
28 conducted; and

29 (c) Shall not be obtained under the condition the exposed person
30 retains the services of an attorney or law firm.

31 Sec. 15. Until a court enters an order determining that the exposed

1 person has established prima facie evidence of impairment, an asbestos
2 action is not subject to discovery, except discovery related to
3 establishing or challenging the prima facie evidence.

4 Sec. 16. A court may consolidate for trial any number and type of
5 asbestos actions with the consent of all parties. In the absence of such
6 consent, the court may consolidate for trial only asbestos actions
7 relating to the exposed person and members of that person's household.

8 Sec. 17. A product liability defendant in an asbestos action shall
9 not be liable for exposures from a later-added asbestos-containing
10 product made or sold by a third party.

11 Sec. 18. The Asbestos Claims Priorities and Claims Legitimacy Act
12 applies to asbestos actions filed on or after the effective date of this
13 act.

14 Sec. 19. Section 25-224, Reissue Revised Statutes of Nebraska, is
15 amended to read:

16 25-224 (1) All product liability actions, except one governed by
17 subsection (5) of this section, shall be commenced within four years next
18 after the date on which the death, injury, or damage complained of
19 occurs.

20 (2)(a) Notwithstanding subsection (1) of this section or any other
21 statutory provision to the contrary, any product liability action, except
22 one governed by section 2-725, Uniform Commercial Code or by subsection
23 (5) of this section, shall be commenced as follows:

24 (i) For products manufactured in Nebraska, within ten years after
25 the date the product which allegedly caused the personal injury, death,
26 or damage was first sold or leased for use or consumption; or

27 (ii) For products manufactured outside Nebraska, within the time
28 allowed by the applicable statute of repose, if any, of the state or
29 country where the product was manufactured, but in no event less than ten
30 years. If the state or country where the product was manufactured does
31 not have an applicable statute of repose, then the only limitation upon

1 the commencement of an action for product liability shall be as set forth
2 in subsection (1) of this section.

3 (b) If the changes made to this subsection by Laws 2001, LB 489, are
4 declared invalid or unconstitutional, this subsection as it existed prior
5 to September 1, 2001, shall be deemed in full force and effect and shall
6 apply to all claims in which a final order has not been entered.

7 (3) The limitations contained in subsection (1), (2), or (5) of this
8 section shall not be applicable to indemnity or contribution actions
9 brought by a manufacturer or seller of a product against a person who is
10 or may be liable to such manufacturer or seller for all or any portion of
11 any judgment rendered against a manufacturer or seller.

12 (4) Notwithstanding the provisions of subsections (1) and (2) of
13 this section, any cause of action or claim which any person may have on
14 July 22, 1978, may be brought not later than two years following such
15 date.

16 (5)(a) ~~(5)~~ Any action to recover damages based on injury allegedly
17 resulting from exposure to asbestos composed of chrysotile, amosite,
18 crocidolite, tremolite, anthrophyllite, actinolite, or any combination
19 thereof, shall be commenced within four years after the injured person
20 has been informed of discovery of the injury by competent medical
21 authority and that such injury was caused by exposure to asbestos as
22 described herein, or within four years after the discovery of facts which
23 would reasonably lead to such discovery, whichever is earlier.

24 (b) No action commenced under this subsection based on the doctrine
25 of strict liability in tort shall be commenced or maintained against any
26 seller of a product which is alleged to contain or possess a defective
27 condition unreasonably dangerous to the buyer, user, or consumer unless
28 such seller is also the manufacturer of such product or the manufacturer
29 of the part thereof claimed to be defective.

30 (c) Nothing in this subsection shall be construed to permit an
31 action to be brought based on an injury described in this subsection

1 discovered more than two years prior to August 30, 1981.

2 (d) The period of limitations for an asbestos action as defined in
3 section 9 of this act for any non-malignant asbestos-related condition
4 that is not barred as of the effective date of this act shall be tolled
5 until the date the exposed person receives or reasonably could have
6 received a diagnosis of asbestos-related impairment sufficient to satisfy
7 the prima facie evidence requirements of the Asbestos Claims Priorities
8 and Claims Legitimacy Act or the exposed person's date of death,
9 whichever is earlier.

10 Sec. 20. Original section 25-224, Reissue Revised Statutes of
11 Nebraska, is repealed.