

PRODUCT LIABILITY

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This article provides an overview of West Virginia's Asbestos Bankruptcy Trust Claims Transparency Act and Asbestos and Silica Claims Priorities Act. Although these Acts have not significantly altered West Virginia's asbestos litigation landscape in the over three years since their enactment, they have served their purpose in providing a much-needed vehicle for defendants in combating potential fraud in the filing of asbestos claims and in discovering alternative sources of asbestos exposure.

A Three Year Retrospection on West Virginia's 2015 Asbestos Litigation Reform

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Introduction

In June 2015, West Virginia enacted two key civil justice reforms relating to asbestos litigation. The Asbestos Bankruptcy Trust Claims Transparency Act helps ensure greater transparency in civil asbestos personal injury cases with respect to plaintiffs' trust-related asbestos exposures. The Asbestos and Silica Claims Priorities Act focuses asbestos and silica litigation on significant claims by suspending the claims of unimpaired plaintiffs. The laws were the product of negotiations between representatives of the asbestos plaintiffs' bar and the business community. Three years later, it is now clear that neither Act has negatively impacted the ability or extended the time for serious cases to reach trial.

I. Asbestos Bankruptcy Trust Claims Transparency Act

The Asbestos Bankruptcy Trust Claims Transparency Act, codified at W.Va. Code § 55-7F-1 *et seq.* (hereinafter "the Transparency Act") requires that, at least 120 days before trial, plaintiffs in asbestos actions must provide all parties with a sworn statement disclosing all bankruptcy trust claims that have been filed or could be filed on their behalf.¹ This disclosure statement must also provide the amount claimed or to be claimed, the date the claim was filed, the disposition of the claim, and whether there

has been a request to defer, delay, suspend, or toll the claim.² The sworn statement must include an attestation from the plaintiff, under penalty of perjury, that the statement is complete and is based on a good faith investigation of all potential asbestos trust claims.³ Plaintiffs also must provide all parties with all trust claims materials (e.g., proofs of claim and supporting documentation) for any asbestos-related disease.⁴ There is a continuing duty to supplement the sworn statement and materials.⁵

Trust claim forms often contain details of a plaintiff's exposures to asbestos that are not easily accessible through traditional methods of discovery. Examination of these trust claims forms can aid in the identification of entities that are not defendants to the lawsuit but who may be responsible for the plaintiff's injury. This is especially important under West Virginia's modified comparative fault standard, which permits the placement of potentially at fault non-parties on the verdict form.⁶ Evidence of a plaintiff's trust-related exposures is highly relevant as it provides the jury with a complete picture of all of the plaintiff's exposures to asbestos and the entities at fault.

Under the Transparency Act, trust claim materials are presumed to be "relevant and

¹ W. Va. Code § 55-7F-4(a).

² *Id.*

³ *Id.*

⁴ §§ 55-7F-4(b)(1) and 55-7F-3(4).

⁵ § 55-7F-4(c).

⁶ § 55-7-13a(b).

authentic and are admissible in evidence.”⁷ Further, defendants may seek discovery from trusts; plaintiffs may not block such discovery by claiming privilege or confidentiality.⁸ In fact, a plaintiff must cooperate with a defendant seeking discovery from a bankruptcy trust and provide any authorizations or other permissions necessary to that defendant.

If a plaintiff identifies a potential trust claim, the trial judge has discretion to stay the action until the plaintiff files the trust claim and provides all parties with all trust claims materials for the claim.⁹ If a defendant identifies a potential trust claim not previously identified by the plaintiff, the defendant may move the court for an order compelling the plaintiff to file the trust claim.¹⁰ As the majority of bankruptcy trusts have pre-approved worksite lists, the identification of potential claims is relatively simple. Once a defendant has filed the appropriate motion, a plaintiff may file the trust claim or file a response with the court addressing why a claim is not feasible.¹¹ Should the court determine that there is a sufficient basis for the plaintiff to file a claim, “the court shall order the plaintiff to file the asbestos trust claim and shall stay the asbestos action until the plaintiff files the asbestos trust claim.”¹²

Prior to the passage of the Transparency Act, if a plaintiff chose not to file trust claims defendants were powerless to compel filings. As a result, plaintiffs would often wait until their tort claims were resolved to pursue recoveries from bankruptcy trusts, thereby robbing defendants of potential setoffs against a jury verdict and allowing for double recoveries by plaintiffs.¹³

In addition to the disclosure requirements, a provision in the Transparency Act provides judgment defendants with a verdict setoff or credit in the amount of the plaintiff’s trust claims.¹⁴ Subsequent to the enactment of the Transparency Act, West Virginia abolished joint and several liability and provided for the inclusion of non-parties on the verdict form for purposes of apportionment of fault. Courts have not yet had to resolve the tension between the Transparency Act’s setoff provision and the “fair share” liability approach of the modified comparative fault standard. Courts could interpret the fair share liability law and allocation of fault to non-parties as superseding the Transparency Act’s setoff provision. What does seem clear is that defendants are not likely to obtain the benefit of both setoffs and fault allocations. As for enforcement, the court must extend a trial date as a result of a plaintiff’s non-

⁷ W.Va. Code § 55-7F-5(a).

⁸ § 55-7F-5(b).

⁹ § 55-7F-6(b).

¹⁰ § 55-7F-7(a).

¹¹ § 55-7F-7(b)(1)-(3).

¹² § 55-7F-7(c).

¹³ See generally, U.S. Chamber Institute for Legal Reform, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* (Dec. 2015), available at

https://www.instituteforlegalreform.com/uploads/sites/1/TheWaitingGame_Pages.pdf.

¹⁴ W. Va. Code § 55-7F-9.

compliance with the Transparency Act.¹⁵ Additionally, the court may sanction any plaintiff who fails to comply with the statute; this can include any available sanction under the West Virginia Rules of Civil Procedure.¹⁶

Pre-enactment criticisms of the Transparency Act by opponents centered on whether the Act would result in delays or prevent plaintiffs from having their day in court. Those concerns have proven to be unfounded. Over the past three years, we have not seen a single delay of a mesothelioma case reaching trial because of the Transparency Act. In the instances where trust claim information has not been provided, a simple referral to the Act typically spurs compliance. An added benefit of the legislation is that parties in West Virginia know that the system will not change as a result of new Case Management Orders or in the event that new judges are assigned to the West Virginia asbestos docket.

II. Asbestos and Silica Claims Priorities Act

West Virginia's Asbestos and Silica Claims Priorities Act (hereinafter "the Priorities Act") sets forth requirements for plaintiffs in asbestos or silica actions alleging non-malignant conditions to give priority to more serious claims.

Within ninety days of commencing an asbestos action involving a non-malignant condition or a silica action involving silicosis, a plaintiff must file a detailed narrative medical report and diagnosis, signed by a qualified physician and accompanied by supporting test results, constituting prima facie evidence that the exposed person has an impairment due to exposure to asbestos or silica.¹⁷

The medical report must establish that the plaintiff has sufficient impairment to proceed with a claim involving a non-malignant asbestos-related condition. This is done through radiological or pathological evidence of asbestosis or diffuse bilateral pleural thickening;¹⁸ a detailed occupational exposure history;¹⁹ a detailed medical and smoking history;²⁰ evidence verifying that at least fifteen years have elapsed from the date of first exposure;²¹ pulmonary function testing establishing a permanent respiratory impairment;²² evidence that asbestosis or diffuse bilateral pleural thickening rather than chronic obstructive pulmonary disease is a substantial factor in the impairment;²³ and a specific conclusion by the physician signing the report that asbestos exposure was a substantial contributing factor in causing the person's impairment.²⁴

With regard to the above-mentioned medical documentation, all testing must be obtained and comply with the requirements

¹⁵ §§ 55-7F-4(d) and 55-7F-6(a).

¹⁶ § 55-7F-10.

¹⁷ § 55-7G-4(a).

¹⁸ § 55-7G-5(a)(1).

¹⁹ W.Va. Code § 55-7G-5(a)(2).

²⁰ § 55-7G-5(a)(3).

²¹ § 55-7G-5(a)(4).

²² § 55-7G-5(a)(5).

²³ § 55-7G-5(a)(6).

²⁴ § 55-7G-5(a)(7).

of the American Medical Association's Guides to the Evaluation of Permanent Impairment and the Official Statements of the American Thoracic Society.²⁵ Further, the testing may not be obtained under the condition that a plaintiff retains the legal services of an attorney or law firm which sponsors the testing.²⁶ Evidence relating to the foregoing *prima facie* requirements do not create any presumption that the plaintiff has an asbestos related disease and are not conclusive as to liability.²⁷

The Priorities Act also sets forth several important provisions as to the statute of limitations and accrual of claims.²⁸ The statute of limitations will not begin to run until the earlier of the following events: the plaintiff receives a medical diagnosis or an asbestos-related impairment; the plaintiff discovers facts under which a reasonable person would be led to obtain a medical diagnosis; or the date of death of the person having the impairment.²⁹ Further, the Priorities Act formally established a two-disease rule for asbestos non-malignant and malignant claims.³⁰ Under that provision, non-malignancy claims are distinct causes of action from any subsequent malignancy claim.³¹ Therefore, a malignancy claim filed several years after an asbestosis claim would not be barred by the statute of limitations or *res judicata*. It is also noteworthy that the

Priorities Act states that it does not adversely "affect, impair, limit, modify, or nullify any settlement or other agreements with respect to an asbestos or silica action entered into prior to the effective date of this article."³² Accordingly, full-liability releases entered into in non-malignancy cases prior to the act remain valid and effective as to any future action for malignancy. Finally, the Priorities Act precludes the award of damages for "fear or increased risk of future disease."³³

As the Priorities Act includes very few provisions applicable to asbestos-related malignancies, there has been no impact on the number of mesothelioma or lung cancer claims filed or the ability of plaintiffs with these malignancies to obtain trial dates. In fact, recent data indicates that since 2015, asbestos filings in Kanawha County (the Charleston area) have increased by almost 25%.³⁴

The Priorities Act has benefitted litigants in a number of ways. It sets forth a clear formula for calculating the statute of limitations. Further, while codifying a two-disease rule it also maintains the validity of existing release agreements. Though defendants undoubtedly would have preferred a statute which included *prima facie* exposure and medical evidence requirements for

²⁵ W.Va. Code § 55-7G-7(1).

²⁶ § 55-7G-7(3).

²⁷ § 55-7G-8(a).

²⁸ § 55-7G-9.

²⁹ § 55-7G-9(a)(1)-(3).

³⁰ § 55-7G-9(d).

³¹ *Id.*

³² W.Va. Code § 55-7G-9(c).

³³ § 55-7G-9(d).

³⁴ Chris Dickerson, *Kanawha Sees 24 Percent Increase in Asbestos Filings*, W. VA. RECORD, Mar. 22, 2018, available at <https://wvrecord.com/stories/511368344-kanawha-sees-24-percent-increase-in-asbestos-filings>.



malignant conditions, the elimination of non-malignant asbestos-related claims unsupported by evidence of impairment is a welcome change to the litigation.

The Priorities Act's heightened requirements for asbestosis claimants has essentially eliminated those claims where plaintiffs exhibit no impairment, the same claims that swamped West Virginia courts for decades. The primary result of the Priorities Act has been that asbestos litigation in West Virginia will stay focused on the more significant malignancy claims going forward.

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