Aida S. Montano *Legislative Service Commission*

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125th General Assembly
(As Introduced)

Rep. Widener

BILL SUMMARY

- Provides the minimum requirements that are medical in nature required for a silica claim or a mixed dust disease claim based on a nonmalignant condition or based on lung cancer of an exposed person who is a smoker.

- In a tort action in which a silica claim or a mixed dust disease claim is alleged, requires the filing of a written report and supporting test results constituting prima-facie evidence of an exposed person's physical impairment that meets the minimum requirements for the particular claim.

- Provides procedures for the defendant in the case to challenge the adequacy of the plaintiff's prima-facie evidence and for the court to resolve the issue of whether the plaintiff has made a prima-facie showing.

- Requires the court, upon a finding of a plaintiff's failure to make a prima-facie showing, to administratively dismiss the plaintiff's claim without prejudice and to maintain its jurisdiction over the case, and permits a plaintiff whose case has been administratively dismissed to reinstate the case.

- Provides that the period of limitations with respect to a silica claim or a mixed dust disease claim based on a nonmalignant condition does not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, a physical impairment due to a nonmalignant condition.

- Generally provides that a premises owner is not liable for any injury to any individual resulting from silica or mixed dust exposure, subject to certain exceptions and presumptions.

- Specifies that the provisions regarding silica and mixed dust litigation and premises liability are not intended or interpreted to affect the rights of any party under bankruptcy proceedings or the ability to make a claim or demand against a trust established pursuant to a plan of reorganization under a Chapter 11 bankruptcy.

- Specifies that the provisions regarding silica and mixed dust litigation and premises liability do not affect the scope or operation of any workers' compensation law or veterans' benefit program.

- Codifies the elements of the common law cause of action for piercing the corporate veil and specifies the elements that have to be proven with respect to the liability of a shareholder in a silica claim or a mixed dust disease claim under the doctrine of piercing the corporate veil.

- Specifies that any such liability of the shareholder is exclusive and preempts any other obligation or liability imposed upon that shareholder for that obligation or liability under common law or otherwise.

- States that the bill's provisions regarding piercing the corporate veil are intended to codify the elements of the common law cause of action for piercing the corporate veil and to abrogate the common law cause of action and remedies relating to piercing the corporate veil in silica and mixed dust disease claims.

- Provides that the bill's provisions regarding piercing the corporate veil apply to all silica claims or mixed dust disease claims commenced on or after the provisions' effective date or commenced prior to and pending on that effective date.

- Specifically requests the Supreme Court to adopt certain rules related to silica claims and mixed dust disease claims.

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CONTENT AND OPERATION

Silica litigation--minimum requirements

The bill specifies minimum requirements to establish a prima-facie showing regarding a person's exposure to silica for purposes of a tort action that alleges a silica claim.

Medical criteria for a silica claim based on a nonmalignant condition

Under the bill, physical impairment[1] of the exposed person,[2] to which the person's exposure to silica[3] is a substantial contributing factor,[4] must be an

[1] *"Physical impairment" means any of the following, whichever is applicable: (a) a nonmalignant condition that meets the minimum requirements of R.C. 2307.85(B) or lung cancer of an exposed person who is a smoker that meets the minimum requirements of R.C. 2307.85(C) or (b) a nonmalignant condition that meets the minimum requirements of R.C. 2307.86(B) or lung cancer of an exposed person who is a smoker that meets the minimum requirements of R.C. 2307.86(C). (R.C. 2307.84(R).)*

[2] *"Exposed person" means either of the following, whichever is applicable: (a) a person whose exposure to silica is the basis for a silica claim under R.C. 2307.85 or (b) a person whose exposure to mixed dust is the basis for a mixed dust disease claim under R.C. 2307.86 (R.C. 2307.84(H)).*

[3] *"Silica" means a group of naturally occurring crystalline forms of silicon dioxide, including, but not limited to, quartz and sand (R.C. 2307.84(Z)).*

essential element of a silica claim[5] in any tort action.[6] The bill prohibits any person from bringing or maintaining a tort action alleging a silica claim based on a nonmalignant condition[7] in the absence of a prima-facie showing, in the manner described below in "***Silica or mixed dust litigation--required filings***," that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to silica is a substantial contributing factor to the medical condition. (R.C. 2307.85(A) and (B).) (See **COMMENT**.) That prima-facie showing must include all of the following minimum requirements (R.C. 2307.85(B)):

(1) Evidence verifying that a qualified physician[8] has taken a detailed occupational and exposure history of the exposed person from the exposed person

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[4] *"Substantial contributing factor" means that: (a) exposure to silica or mixed dust is the predominate cause of the physical impairment alleged in the silica claim or mixed dust disease claim, whichever is applicable and (b) a qualified physician has determined with a reasonable degree of medical certainty that the physical impairment of the exposed person would not have occurred but for the silica or mixed dust exposures (R.C. 2307.84(EE)).*

[5] *"Silica claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to silica. "Silica claim" includes a claim made by or on behalf of any person who has been exposed to silica, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to silica. (R.C. 2307.84(AA).)*

[6] *"Tort action" means a civil action for damages for injury, death, or loss to person. "Tort action" includes a product liability claim that is subject to R.C. 2307.71 to 2307.80 or a silica claim or mixed dust claim that is subject to R.C. 2307.84 to 2307.88 in the bill. "Tort action" does not include: (a) a civil action for damages for a breach of contract or another agreement between persons, (b) a civil action relating to any workers' compensation law, (c) a civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. 524(g), or (d) a civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under Chapter 11 of the United States Bankruptcy Code. (R.C. 2307.84(II).)*

[7] *"Nonmalignant condition" means a condition, other than a diagnosed cancer, that is caused or may be caused by either of the following, whichever is applicable: (a) silica, as provided in R.C. 2307.85 or (b) mixed dust, as provided in R.C. 2307.86 (R.C. 2307.84(O)).*

[8] *"Qualified physician" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the requirements specified in R.C. 2307.85 or 2307.86, whichever*

or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the silica claim for a nonmalignant condition, including all of the exposed person's principal places of employment and exposures to airborne contaminants and whether each place of employment involved exposures to airborne contaminants, including, but not limited to, silica or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the nature, duration, and level of the exposure;

(2) Evidence verifying that a qualified physician has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a qualified physician, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA Guides to the Evaluation of Permanent Impairment.[9]

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is applicable, and who meets the following requirements: (a) the medical doctor is a board-certified internist, pulmonary specialist, oncologist, pathologist, or occupational medicine specialist, (b) the medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person, and (c) the medical doctor spends not more than 25% of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than 20% of its revenues from providing those services. (R.C. 2307.84(V).)

"Board-certified internist" means a medical doctor who is currently certified by the American Board of Internal Medicine. "Board-certified occupational medicine specialist" means a medical doctor who is currently certified by the American Board of Internal Medicine or the American Board of Preventive Medicine in the specialty of occupational medicine. "Board-certified oncologist" means a medical doctor who is currently certified by the American Board of Internal Medicine in the subspecialty of medical oncology. "Board-certified pathologist" means a medical doctor who is currently certified by the American Board of Pathology. "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American Board of Internal Medicine in the subspecialty of pulmonary medicine. (R.C. 2307.84(B) to (F).)

[9] *"AMA Guides to the Evaluation of Permanent Impairment" means the American Medical Association's Guides to the Evaluation of Permanent Impairment (fifth edition 2000) as may be modified by the American Medical Association (R.C. 2307.84(A)).*

(b) The exposed person has silicosis[10] based at a minimum on radiological or pathological evidence of silicosis.[11] In the case of death of an exposed person, if no pulmonary function testing results are available, the pathological or radiological evidence of silicosis and evidence from a qualified physician who treated the exposed person showing that the silicosis was a substantial contributing factor of the exposed person's physical impairment prior to death or a substantial contributing factor of the exposed person's death are sufficient to satisfy the minimum requirements for a prima-facie showing.

(c) The silicosis described in paragraph (3)(b), above, is a substantial contributing factor to the exposed person's physical impairment or death, based at a minimum on a determination that the exposed person has: (i) a forced vital capacity[12] below the predicted lower limit of normal,[13] (ii) a total lung capacity, by plethysmography or timed gas dilution,[14] below the predicted lower limit of

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[10] *"Silicosis" means an interstitial lung disease caused by the pulmonary response to inhaled silica (R.C. 2307.84(BB)).*

[11] *"Radiological evidence of silicosis" means a chest x-ray showing small rounded opacities in the upper lung fields graded by a certified B-reader as at least 1/1 on the ILO scale (R.C. 2307.84(X)).*

"Pathological evidence of silicosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of round silica nodules (well-organized concentric whorls of collagen surrounded by inflammatory cells) in the lung parenchyma and that there is no other more likely explanation for the presence of the fibrosis (R.C. 2307.84(Q)).

[12] *"Forced vital capacity" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration (R.C. 2307.84(I)).*

[13] *"Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA Guides to the Evaluation of Permanent Impairment (R.C. 2307.84(T)).*

[14] *"Total lung capacity" means the volume of air contained in the lungs at the end of a maximal inspiration (R.C. 2307.84(JJ)).*

"Plethysmography" means a test for determining lung volume, also known as "body plethysmography," in which the subject of the test is enclosed in a chamber that is equipped to measure pressure, flow, or volume changes (R.C. 2307.84(S)).

"Timed gas dilution" means a method for measuring total lung capacity in which the subject breathes into a spirometer containing a known concentration of an inert and insoluble gas for a specific time, and the concentration of the inert and insoluble gas in

normal, or (iii) a chest x-ray showing small, rounded opacities in the upper lung fields graded by a certified B-reader[15] at least 1/1 on the ILO scale.[16]

Medical criteria for a silica claim based upon lung cancer of a smoker

The bill prohibits any person from bringing or maintaining a tort action alleging a silica claim based upon lung cancer[17] of an exposed person who is a smoker[18] in the absence of a prima-facie showing, in the manner described below in "***Silica or mixed dust litigation--required filings***," of all of the following minimum requirements (R.C. 2307.85(C)(1)):

(1) A diagnosis by a board-certified pathologist, board-certified pulmonary specialist, or board-certified oncologist (see footnote 8) that the exposed person has primary lung cancer and that exposure to silica is a substantial contributing factor to that cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to silica until the date of diagnosis of the exposed person's primary lung cancer. This ten-year latency period is a rebuttable presumption, and the plaintiff has the burden of proof to rebut the presumption.

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the lung is then compared to the concentration of that type of gas in the spirometer (R.C. 2307.84(HH)).

"Spirometry" means the measurement of volume of air inhaled or exhaled by the lung (R.C. 2307.84(DD)).

[15] *"Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended (R.C. 2307.84(G)).*

[16] *"ILO scale" means the system for the classification of chest x-rays set forth in the International Labour Office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (1980), as amended (R.C. 2307.84(J)).*

[17] *"Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs (R.C. 2307.84(K)).*

[18] *"Smoker" means a person who has smoked the equivalent of one-pack year, as specified in the written report of a qualified physician pursuant to R.C. 2307.85 or 2307.86 and R.C. 2307.87, during the last 15 years (R.C. 2307.84(CC)).*

(3) Both of the following: (a) radiological or pathological evidence of silicosis and (b) evidence of the exposed person's substantial occupational exposure to silica.[19]

If a plaintiff files a tort action that alleges a silica claim based upon lung cancer of an exposed person who is a smoker and further alleges in the action that the plaintiff's exposure to silica was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements described above in paragraph (3) and that the plaintiff lived with the other person for the period of time specified in R.C. 2307.84(FF) (see footnote 19), the plaintiff is considered as having satisfied those requirements (R.C. 2307.85(C)(2)).

Mixed dust litigation--minimum requirements

The bill specifies minimum requirements to establish a prima-facie showing regarding a person's exposure to mixed dust in a tort action that alleges a mixed dust disease claim.

Medical criteria for a mixed dust disease claim based on a nonmalignant condition

Under the bill, physical impairment of the exposed person, to which the person's exposure to mixed dust[20] is a substantial contributing factor, must be an essential element of a mixed dust disease claim[21] in any tort action. The bill

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[19] *"Substantial occupational exposure to silica" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following: (a) handled silica, (b) fabricated silica-containing products so that the person was exposed to silica in the fabrication process, (c) altered, repaired, or otherwise worked with a silica-containing product in a manner that exposed the person on a regular basis to silica, or (d) worked in close proximity to other workers engaged in any of the activities described in (a), (b), or (c) in this paragraph in a manner that exposed the person on a regular basis to silica. (R.C. 2307.84(FF).) "Regular basis" means on a frequent or recurring basis (R.C. 2307.84(Y)).*

[20] *"Mixed dust" means a mixture of dusts composed of silica or asbestos or one or more other dusts (R.C. 2307.84(L)).*

[21] *"Mixed dust disease claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to mixed dust pneumoconiosis. "Mixed dust disease claim" includes a claim made by or on behalf of any person who has been exposed to mixed dust, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or*

prohibits a person from bringing or maintaining a tort action alleging a mixed dust disease claim based on a nonmalignant condition in the absence of a prima-facie showing, in the manner described below in "***Silica or mixed dust litigation--required filings***," that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to mixed dust is a substantial contributing factor to the medical condition. (R.C. 2307.86(A) and (B).) That prima-facie showing must include all of the following minimum requirements (R.C. 2307.86(B)):

(1) Evidence verifying that a qualified physician has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the mixed dust disease claim for a nonmalignant condition, including all of the exposed person's principal places of employment and exposures to airborne contaminants and whether each place of employment involved exposures to airborne contaminants, including, but not limited to, mixed dust, that can cause pulmonary impairment and, if that type of exposure is involved, the nature, duration, and level of the exposure;

(2) Evidence verifying that a qualified physician has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a qualified physician, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA Guides to the Evaluation of Permanent Impairment.

(b) The exposed person has mixed dust pneumoconiosis,[22] based at a minimum on radiological or pathological evidence of mixed dust pneumoconiosis.[23] In the case of death of an exposed person, if no pulmonary

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surveillance, or any other effects on the person's health that are caused by the person's exposure to mixed dust. (R.C. 2307.84(M).)

[22] *"Mixed dust pneumoconiosis" means the interstitial lung disease caused by the pulmonary response to inhaled mixed dusts (R.C. 2307.84(N)).*

[23] *"Radiological evidence of mixed dust pneumoconiosis" means a chest x-ray showing irregular opacities in the upper lung fields graded by a certified B-reader as at least 1/1 on the ILO scale (R.C. 2307.84(W)). "Pathological evidence of mixed dust*

function testing results are available, the pathological or radiological evidence of mixed dust pneumoconiosis and evidence from a qualified physician who treated the exposed person showing that the mixed dust pneumoconiosis was a substantial contributing factor of the exposed person's physical impairment prior to death or a substantial contributing factor of the exposed person's death are sufficient to satisfy the minimum requirements for a prima-facie showing.

(c) The mixed dust pneumoconiosis described in paragraph (3)(b), above, is a substantial contributing factor to the exposed person's physical impairment or death, based at a minimum on a determination that the exposed person has: (i) a forced vital capacity below the predicted lower limit of normal, (ii) a total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal, or (iii) a chest x-ray showing irregular stellate (star-shaped) opacities in the upper lung field graded by a certified B-reader at least 1/1 on the ILO scale.

Medical criteria for a mixed dust disease claim based upon lung cancer of a smoker

The bill prohibits any person from bringing or maintaining a tort action alleging a mixed dust disease claim based upon lung cancer of an exposed person who is a smoker in the absence of a prima-facie showing, in the manner described below in "***Silica or mixed dust litigation--required filings***," of all of the following minimum requirements (R.C. 2307.86(C)(1)):

(1) A diagnosis by a board-certified pathologist, board-certified pulmonary specialist, or board-certified oncologist that the exposed person has primary lung cancer and that exposure to mixed dust is a substantial contributing factor to that cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed from the date of the exposed person's first exposure to mixed dust until the date of diagnosis of the exposed person's primary lung cancer. This ten-year latency period is a rebuttable presumption and the plaintiff has the burden of proof to rebut the presumption.

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pneumoconiosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar and parenchymal stellate (star-shaped) nodular scarring and that there is no other more likely explanation for the presence of the fibrosis (R.C. 2307.84(P)).

(3) Both of the following: (a) radiological or pathological evidence of mixed dust pneumoconiosis and (b) evidence of the exposed person's substantial occupational exposure to mixed dust.[24]

If a plaintiff files a tort action that alleges a mixed dust disease claim based upon lung cancer of an exposed person who is a smoker and further alleges in the action that the plaintiff's exposure to mixed dust was the result of living with another person who, if the tort action had been filed by the other person, would have met the requirements described above in paragraph (3) and that the plaintiff lived with the other person for the period of time specified in R.C. 2307.84(GG) (see footnote 24), the plaintiff is considered as having satisfied those requirements (R.C. 2307.86(C)(2)).

Other provisions regarding silica or mixed dust disease claims

The bill provides that evidence relating to physical impairment, including pulmonary function testing and diffusing studies, must comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA Guides to the Evaluation of Permanent Impairment and reported as set forth in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and the interpretative standards set forth in the official statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values and Interpretative Strategies" as published in American Review of Respiratory Disease, 1991:144:1202-1218. (R.C. 2307.85(D) and 2307.86(D).)

All of the following apply to the presentation of prima-facie evidence that meets the requirements described above in "***Medical criteria for a silica claim based upon a nonmalignant condition***," "***Medical criteria for a silica claim based upon lung cancer of a smoker***," "***Medical criteria for a mixed dust disease claim based upon a nonmalignant condition***," or "***Medical criteria for a mixed dust disease claim based upon lung cancer of a smoker***," whichever is applicable (R.C. 2307.85(E) and 2307.86(E)):

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[24] *"Substantial occupational exposure to mixed dust" means employment for a cumulative period of at least five years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following: (a) handled mixed dust, (b) fabricated mixed dust-containing products so that the person was exposed to mixed dust in the fabrication process, (c) altered, repaired, or otherwise worked with a mixed dust-containing product in a manner that exposed the person on a regular basis to mixed dust, or (d) worked in close proximity to other workers engaged in any of the activities described in (a), (b), or (c) in this paragraph in a manner that exposed the person on a regular basis to mixed dust. (R.C. 2307.84(GG).)*

(1) It does not result in any presumption at trial that the exposed person has a physical impairment that is caused by a silica-related condition or a mixed dust-related condition, as the case may be.

(2) It is not conclusive as to the liability of any defendant in the case.

(3) It is not admissible at trial.

Silica or mixed dust litigation--required filings

The bill provides that the plaintiff in any tort action who alleges a silica claim or a mixed dust disease claim must file, within 30 days after filing the complaint or other initial pleading, a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements described above in "***Medical criteria for a silica claim based upon a nonmalignant condition***," "***Medical criteria for a silica claim based upon lung cancer of an exposed person***," "***Medical criteria for a mixed dust disease claim based upon a nonmalignant condition***," or "***Medical criteria for a mixed dust disease claim based upon lung cancer of an exposed person***," whichever is applicable. With respect to any silica claim or mixed dust disease claim that is pending on the effective date of this provision, the plaintiff must file the written report and supporting test results within 120 days following that effective date. The defendant in the case must be afforded a reasonable opportunity, upon the defendant's motion, to challenge the adequacy of the proffered prima-facie evidence of the physical impairment for failure to comply with the applicable minimum requirements. The defendant has 120 days from the date the prima-facie evidence of the exposed person's physical impairment is proffered to challenge the adequacy of that prima-facie evidence. If the defendant makes that challenge and uses a physician to do so, the physician must meet the requirements specified in R.C. 2307.84(V)(1) and (3) (see footnote 8 at (a) and (c)). (R.C. 2307.87(A).)

If the defendant challenges the adequacy of the prima-facie evidence of the exposed person's physical impairment as described in the preceding paragraph, the court must determine from all of the evidence submitted whether the proffered prima-facie evidence meets the applicable minimum requirements. The court must resolve the issue of whether the plaintiff has made the prima-facie showing required by the applicable provisions in the bill, by applying the standard for resolving a motion for summary judgment. (R.C. 2307.87(B).)

The court must administratively dismiss the plaintiff's claim without prejudice upon a finding of failure to make the required prima-facie showing. The court must maintain its jurisdiction over any case that is administratively dismissed under this provision. Any plaintiff whose case has been

administratively dismissed may move to reinstate the plaintiff's case if the plaintiff makes a prima-facie showing that meets the minimum requirements specified in the applicable provisions in the bill. (R.C. 2307.87(C).)

Silica or mixed dust litigation--statute of repose

The bill provides that notwithstanding any other provision of the Revised Code, with respect to any silica claim or mixed dust disease claim based upon a nonmalignant condition that is not barred as of the effective date of this provision, the period of limitations does not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment due to a nonmalignant condition. A silica claim or a mixed dust disease claim that arises out of a nonmalignant condition is a distinct cause of action from a silica claim or a mixed dust disease claim, as the case may be, relating to the same exposed person that arises out of silica-related cancer or mixed dust-related cancer. No damages can be awarded for fear or risk of cancer in any tort action asserting only a silica claim or a mixed dust disease claim for a nonmalignant condition. No settlement of a silica claim or a mixed dust disease claim for a nonmalignant condition that is concluded after the effective date of this provision may require, as a condition of settlement, the release of any future claim for silica-related cancer or mixed dust-related cancer. (R.C. 2307.88.)

Premises liability regarding silica or mixed dust disease claims

The bill generally provides that a premises owner is not liable for any injury to any individual resulting from silica or mixed dust exposure, subject to certain exceptions and presumptions.

Silica or mixed dust disease claims against premises owner

Under the bill, the following apply to all tort actions for silica or mixed dust disease claims brought against a premises owner[25] to recover damages or other relief for exposure to silica or mixed dust on the premises owner's property (R.C. 2307.89(A), (B), and (C)):

[25] *"Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters (R.C. 2307.84(U)).*

(1) A premises owner is not liable for any injury to any individual resulting from silica or mixed dust exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property.

(2) If exposure to silica or mixed dust is alleged to have occurred before January 1, 1972, it is presumed that a premises owner knew that Ohio had adopted safe levels of exposure for silica or mixed dust and that products containing silica or mixed dust were used on its property only at levels below those safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner knew or should have known that the levels of silica or mixed dust in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values[26] adopted by Ohio and that the premises owner allowed that condition to persist.

(3)(a) A premises owner is presumed to be not liable for any injury to any invitee who is engaged to work with, install, or remove products containing silica or mixed dust on the premises owner's property if the invitee's employer holds itself out as qualified to perform the work. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the premises owner has actual knowledge of the potential dangers of the products containing silica or mixed dust that is superior to the knowledge of both the invitee and the invitee's employer.

(b) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was

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[26] *"Threshold limit values" means that, for the years 1946 through 1971, the concentration of silica or mixed dust in the worker's breathing zone did not exceed the following maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration (R.C. 2307.89(D)(1)):*

(a) Silica, free or uncombined, over 40%: 5 million particles per cubic foot. For purposes of the maximum allowable concentrations for silica, the free silica content is the per cent of free silica in the fraction of the airborne dust in the breathing zone of the worker that is smaller than 5 microns in maximum diameter.

(b) Silica, free or uncombined, between 20% *and* 40%*:* 10 *million particles per cubic foot. For purposes of the maximum allowable concentrations for silica, the free silica content is the per cent of free silica in the fraction of the airborne dust in the breathing zone of the worker that is smaller than* 5 *microns in maximum diameter.*

(c) Silica, free or uncombined, between 10% and 20%: 20 million particles per cubic foot. For purposes of the maximum allowable concentrations for silica, the free silica content is the per cent of free silica in the fraction of the airborne dust in the breathing zone of the worker that is smaller than 5 microns in maximum diameter.

qualified to perform cannot be liable for any injury to any individual resulting from silica or mixed dust exposure caused by any of the contractor's employees[27] or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or gave or denied permission for the critical acts that led to the individual's injury.

(c) If exposure to silica or mixed dust is alleged to have occurred after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property unless the plaintiff establishes the premises owner's intentional violation of an established safety standard[28] that is in effect at the time

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[27] *"Employee" means an individual who performs labor or provides construction services pursuant to a construction contract as defined in R.C. 4123.79, or a remodeling or repair contract, whether written or oral, if at least ten of the following 20 criteria apply: (a) the individual is required to comply with instructions from the other contracting party regarding the manner or method of performing services, (b) the individual is required by the other contracting party to have particular training, (c) the individual's services are integrated into the regular functioning of the other contracting party, (d) the individual is required to perform the work personally, (e) the individual is hired, supervised, or paid by the other contracting party, (f) a continuing relationship exists between the individual and the other contracting party that contemplates continuing or recurring work even if the work is not full time, (g) the individual's hours of work are established by the other contracting party, (h) the individual is required to devote full time to the business of the other contracting party, (i) the person is required to perform the work on the premises of the other contracting party, (j) the individual is required to follow the order of work set by the other contracting party, (k) the individual is required to make oral or written reports of progress to the other contracting party, (l) the individual is paid for services on a regular basis, including hourly, weekly, or monthly, (m) the individual's expenses are paid for by the other contracting party, (n) the individual's tools and materials are furnished by the other contracting party, (o) the individual is provided with the facilities used to perform services, (p) the individual does not realize a profit or suffer a loss as a result of the services provided, (q) the individual is not performing services for a number of employers at the same time, (r) the individual does not make the same services available to the general public, (s) the other contracting party has a right to discharge the individual, or (t) the individual has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement. (R.C. 2307.89(D)(3).)*

[28] *"Established safety standard" means that, for the years after 1971, the concentration of silica or mixed dust in the breathing zone of the worker does not exceed the maximum allowable exposure limits for the eight-hour time-weighted average airborne concentration as promulgated by the Occupational Safety and Health Administration (OSHA) in effect at the time of the alleged exposure (R.C. 2307.89(D)(2)).*

of the exposure and that the alleged violation was in the plaintiff's breathing zone and was the proximate cause of the plaintiff's medical condition.

Scope or operation

The bill provides that nothing in the above-described provisions regarding silica and mixed dust litigation and premises liability is intended or interpreted to affect the rights of any party in bankruptcy proceedings or the ability of any person who is able to make a showing that the person satisfies the claim criteria for compensable claims or demands under a trust established pursuant to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code to make a claim or demand against that trust. The bill further provides that those provisions do not affect the scope or operation of any workers' compensation law or veterans' benefit program[29] or the exclusive remedy of subrogation under the provisions of that law or program and may not authorize any lawsuit that is barred by any provision of any workers' compensation law. (R.C. 2307.90.)

Piercing the corporate veil doctrine

The bill codifies the elements of the common law cause of action for piercing the corporate veil and specifies the elements that have to be proven with respect to the liability of a shareholder in a silica claim or a mixed dust disease claim under the doctrine of piercing the corporate veil.

Definitions

The bill provides the following definitions, unless the context otherwise requires, for purposes of its provisions dealing with shareholder liability in a silica claim or mixed dust disease claim under the doctrine of piercing the corporate veil (R.C. 2307.901(H)):

(1) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, is under common control with, or acts in concert with, a specified person (by reference to R.C. 1704.01(C)(1)).

(2) "Beneficial owner" of shares means a person who, with respect to particular shares, meets any of specified conditions: (a) the person directly or

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[29] *"Workers' compensation law" means R.C. Chapters 4121., 4123., 4127., and 4131. (R.C. 2307.84(LL)).*

"Veterans' benefit program" means any program for benefits in connection with military service administered by the Veterans' Administration under Title 38 of the United States Code (R.C. 2307.84(KK)).

indirectly, alone or with others, including affiliates or associates of that person, beneficially owns the shares, (b) the person directly or indirectly, alone or with others, including affiliates or associates of that person, has the right, whether exercisable immediately or only after the passage of time, conditionally, unconditionally, or otherwise, to acquire the shares pursuant to a written or unwritten agreement, arrangement, or understanding or upon the exercise of conversion rights, exchange rights, warrants, calls, options, or otherwise, (c) the person directly or indirectly, alone or with others, including affiliates or associates of that person, has the right to vote or direct the voting of the shares pursuant to a written or unwritten agreement, arrangement, or understanding, or (d) the person has a written or unwritten agreement, arrangement, or understanding with another person who is directly or indirectly a beneficial owner, or whose affiliates or associates are direct or indirect beneficial owners, of the shares, if the agreement, arrangement, or understanding is for the purpose of the first person's or the other person's acquiring, holding, disposing of, voting, or directing the voting of the shares to or for the benefit of the first person. A bank, broker, nominee, trustee, or other person who acquires shares for the benefit of others in the ordinary course of business in good faith and not for the purpose of circumventing the provisions of R.C. Chapter 1704., however, is deemed to be the beneficial owner only of shares in respect of which that person, without further instruction from others, holds voting power. (By reference to R.C. 1704.01(C)(4).)

(3) "Covered entity" means a corporation, limited liability company, limited partnership, or any other entity organized under the laws of any jurisdiction, domestic or foreign, in which the shareholders, owners, or members are generally not responsible for the debts and obligations of the entity. Nothing in the bill's provisions limits or otherwise affects the liabilities imposed on a general partner of a limited partnership.

(4) "Holder" means a person who is the holder, beneficial owner, or subscriber of shares or any other ownership interest of a covered entity, a member of a covered entity, or an affiliate of any person who is the holder, beneficial owner, or subscriber of shares or any other ownership interest of a covered entity.

(5) "Piercing the corporate veil" means any and all common law doctrines by which a holder may be liable for an obligation or liability of a covered entity on the basis that the holder controlled the covered entity, the holder is or was the alter ego of the covered entity, or the covered entity has been used for the purpose of actual or constructive fraud or as a sham to perpetrate a fraud or any other common law doctrine by which the covered entity is disregarded for purposes of imposing liability on a holder for the debts or obligations of that covered entity.

(6) "Person" includes, without limitation, a natural person, a corporation, whether nonprofit or for profit, a partnership, a limited liability company, an

unincorporated society or association, and two or more persons having a joint or common interest (by reference to R.C. 1701.01(G)).

Elements of doctrine

Under the bill, a holder has no obligation to, and has no liability to, the covered entity or to any person with respect to any obligation or liability of the covered entity in a silica claim or a mixed dust disease claim under the doctrine of piercing the corporate veil unless the person seeking to pierce the corporate veil demonstrates all of the following (R.C. 2307.901(A)):

(1) The holder exerted such control over the covered entity that the covered entity had no separate mind, will, or existence of its own.

(2) The holder caused the covered entity to be used for the purpose of perpetrating, and the covered entity perpetrated, an actual fraud on the person seeking to pierce the corporate veil primarily for the direct pecuniary benefit of the holder.

(3) The person seeking to pierce the corporate veil sustained an injury or unjust loss as a direct result of the control described in (1), above, and the fraud described in (2), above.

The bill precludes a court from finding that the holder exerted such control over the covered entity that the covered entity did not have a separate mind, will, or existence of its own or to have caused the covered entity to be used for the purpose of perpetrating a fraud solely as a result of any of the following actions, events, or relationships (R.C. 2307.901(B)):

(1) The holder is an affiliate of the covered entity and provides legal, accounting, treasury, cash management, human resources, administrative, or other similar services to the covered entity, leases assets to the covered entity, or makes its employees available to the covered entity.

(2) The holder loans funds to the covered entity or guarantees the obligations of the covered entity.

(3) The officers and directors of the holder are also officers and directors of the covered entity.

(4) The covered entity makes payments of dividends or other distributions to the holder or repays loans owed to the holder.

(5) In the case of a covered entity that is a limited liability company, the holder or its employees or agents serve as the manager of the covered entity.

Burden of proof; nature of liability; legislative intent

The bill provides that the person seeking to pierce the corporate veil has the burden of proof on each and every element of the person's claim and must prove each element by a preponderance of the evidence. Any liability of the holder described in "***Elements of doctrine***," above, for an obligation or liability that is limited by that provision is exclusive and preempts any other obligation or liability imposed upon that holder for that obligation or liability under common law or otherwise.

The bill states that its provisions regarding the doctrine of piercing the corporate veil are intended to codify the elements of the common law cause of action for piercing the corporate veil and to abrogate the common law cause of action and remedies relating to piercing the corporate veil in silica claims and mixed dust disease claims. Nothing in those provisions are to be construed as creating a right or cause of action that did not exist under the common law as it existed on the effective date of the provisions. (R.C. 2307.901(C), (D), and (E).)

Applicability

The bill provides that the provisions regarding piercing the corporate veil apply to all silica claims and mixed dust disease claims commenced on or after the effective date of the provisions or commenced prior to and pending on their effective date. The bill states that those provisions apply to all actions asserting the doctrine of piercing the corporate veil brought against a holder if any of the following apply: (1) the holder is an individual and resides in Ohio, (2) the holder is a corporation organized under the laws of Ohio, (3) the holder is a corporation with its principal place of business in Ohio, (4) the holder is a foreign corporation that is authorized to conduct or has conducted business in Ohio, (5) the holder is a foreign corporation the parent corporation of which is authorized to conduct business in Ohio, or (6) the person seeking to pierce the corporate veil is a resident of Ohio. (R.C. 2307.901(F) and (G).)

Uncodified provisions

The bill provides the following in uncodified law (Section 2):

(1) The General Assembly acknowledges the Court's authority in prescribing rules governing practice and procedure in the courts of Ohio, as provided by Section 5 of Article IV of the Ohio Constitution.

(2) The General Assembly requests the Supreme Court to adopt rules to specify procedures for venue and consolidation of silica claims or mixed dust disease claims brought pursuant to R.C. 2307.84 to 2307.90 in the bill. With

respect to procedures for venue in regard to silica claims or mixed dust disease claims, the General Assembly requests the Supreme Court to adopt a rule that requires that a silica claim or a mixed dust disease claim meet specific nexus requirements, including the requirement that the plaintiff be domiciled in Ohio or that Ohio is the state in which the plaintiff's exposure to silica or mixed dust is a substantial contributing factor. With respect to procedures for consolidation of silica claims or mixed dust disease claims, the General Assembly requests the Supreme Court to adopt a rule that permits consolidation of those types of claims only with the consent of all parties and, in the absence of that consent, permits a court to consolidate for trial only those silica claims or mixed dust disease claims that relate to the same exposed person and members of the exposed person's household.

As used in the above uncodified provisions, "exposed person," "mixed dust," "mixed dust disease claims," "silica," "silica claim," and "substantial contributing factor" have the same meanings as in R.C. 2307.84 of the bill.

Severability

The bill includes the following severability clauses (Sections 3 and 4).

If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given affect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

COMMENT

The definitions of "physical impairment," "exposed person," "substantial contributing factor," and "nonmalignant condition" in footnotes 1, 2, 4, and 7 apply to the minimum requirements for a prima-facie showing of a mixed dust disease claim discussed later in the analysis, insofar as those terms apply to those types of claims.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	12-03-03	p. 1242

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