

ASBESTOS TORT REFORM LEGISLATION

On June 3, 2004, Governor Taft signed legislation for Asbestos Tort Reform, thereby enacting O.R.C. §§2307.91 to 2307.98, which establishes minimum medical requirements for filing certain asbestos claims, and sets forth an asbestos plaintiff's burden of proof in tort actions. The purpose of the statute, according to the non-codified section, is to give priority to those asbestos claimants who can prove an actual physical harm or illness, to preserve the rights of claimants who were exposed to asbestos but are not as yet impaired, to enhance the state and federal judicial systems, to supervise and control litigation, to conserve the scarce resources of the defendants, and to allow compensation for cancer victims and others who are physically impaired, while securing the right to compensation for those who may suffer impairment in the future.

The legislation provides that in non-malignant cases, no person shall bring a tort action without a *prima-facie* showing of a physical impairment as a result of a medical condition of which exposure to asbestos was a substantial contributing factor. A competent medical authority must take an occupational and health history, an exposure history, and a detailed medical and smoking history. The exposed person must have a permanent respiratory impairment of at least Class 2, as defined by AMA guidelines, and have asbestosis or diffuse pleural thickening based upon minimum of forced vital capacity below predicted lower levels, total lung capacity below predicted lower limits, and a chest x-ray showing irregular opacities. The *prima-facie* showing must be based upon "competent medical authority." "Competent medical authority" is defined as a board certified internist, oncologist, pulmonary specialist, industrial hygienist, or pathologist. The physician must be treating or have treated the plaintiff. The "competent medical authority" cannot rely on screenings which are illegal or are predicated on retaining a specific law firm.

The statute provides that no person shall bring a tort action alleging an asbestos claim based upon lung cancer when the person is a smoker, unless the person can establish *prima-facie* evidence as stated above. The *prima-facie* evidence must show primary lung cancer and that exposure to asbestos is a substantial contributing factor.

Next, the legislation established a "latency period" of ten years, which requires a ten-year period between first exposure to asbestos until date of diagnosis of lung cancer. This latency period is a rebuttable presumption which may be overcome by the plaintiff under certain circumstances.

Another section provides for asbestos claims based upon wrongful death. This contains the same requirements as the lung cancer provision, but there must be evidence that the deceased exposed person's exposure to asbestos at least equal to 25 fiber per cc years by a scientifically valid retrospective exposure reconstruction conducted by a certified industrial hygienist or safety personnel.

The legislation provides that there is no requirement of a demonstration of *prima-facie* evidence in mesothelioma cases.

Within 30 days of the filing of a tort action alleging an asbestos claim, the plaintiff must file a written report and supporting test results constituting *prima-facie* evidence of physical impairment

that meets the minimum requirements specified in the legislation. A defendant shall be afforded a reasonable opportunity to challenge the adequacy of the *prima-facie* evidence and has 120 days from the date the *prima-facie* evidence is proffered to challenge the adequacy. If a defendant makes that challenge, the physician must meet the requirements specified in the statute, such as being a board certified internist, occupational medical specialist, oncologist, pathologist, or pulmonary specialist.

For asbestos claims pending on the effective date of the statute, the plaintiff must file a written report and test results within 120 days following the effective date of the statute. For a cause of action that arises before the effective date of the statute, the provisions of the statute shall be applied unless the court finds substantive rights have been impaired or application of the statute would violate Section 28 of Article II of the Ohio Constitution.

In the event the Plaintiff does not provide sufficient evidence of a *prima-facie* case or establish a cause of action based on the law in effect prior to the effective date of this legislation, the court shall administratively dismiss the case without prejudice. A plaintiff whose case has been administratively dismissed may move to reinstate the case if the plaintiff provides sufficient evidence to support plaintiff's cause of action under the law that was in effect when the cause of action arose. In cases filed after the effective date of the statute, whether the *prima-facie* evidence is sufficient, will be decided by the court. If it is insufficient, the court shall administratively dismiss the claim without prejudice and reserve jurisdiction to reinstate the case if the plaintiff establishes a *prima-facie* showing that meets the requirements of the statute in the future.

In non-malignant cases, the statute of limitations shall not begin to run until the exposed person has a cause of action for bodily injury (and a physical impairment). Finally, the statute provides that no damages shall be awarded in non-malignant cases for fear or risk of cancer, and settlement shall not require the release of any future claim for asbestos-related cancer. In other words, a non-malignant case may be settled, but if the plaintiff contracts a malignancy, there is a new cause of action.

The remaining sections of the legislation have to do with premises liability situations and not bodily injury or wrongful death.

The Asbestos Tort Reform Legislation is quite complicated and detailed. Only the highlights have been discussed here. The legislation should go far in streamlining asbestos litigation and either weeding out or delaying litigation involving non-impaired plaintiffs who believe or fear they have an asbestos-related disease.

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