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Florida's Asbestos and Silica Compensation Fairness Act

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Florida's Asbestos and Silica Compensation Fairness Act

May 2005

The Florida legislature overwhelmingly passed the Asbestos and Silica Compensation Fairness Act of 2005 (the Act), HB 1019, before ending its regular session on May 6. This Act, which establishes medical criteria for plaintiffs claiming injury from asbestos or silica exposure, is expected to be signed into law by Governor Bush within the next few days. If so, Florida will follow Ohio, Georgia, and Texas as the fourth state to enact such legislation. Momentum for this type of legislation has been growing across the country. Similar bills are pending in Missouri, West Virginia, and the U.S. House of Representatives.

Florida's legislation is aimed at unclogging its courts and relieving defendants of the tremendous financial burden of defending or settling claims brought by unimpaired plaintiffs. The Legislature hopes that the Act will allow plaintiffs with the most serious injuries to recover fully and promptly, now and in the future.

This paper highlights the significant portions of the Act and how the new criteria will be applied to future cases, as well as the potential impact the Act may have on pending cases.

DEFENDANTS' PROTECTIONS

Aside from establishing medical criteria, the Act provides several significant protections for asbestos and silica defendants. First, it prohibits the award of punitive damages.[1]

Second, although not expressly stated, the Act seems to eliminate strict liability for defendants who sold, but did not manufacture, asbestos or silica. This is a fundamental change in Florida product liability law. Previously, all those in the chain of distribution were strictly liable for injuries caused by a defective product, regardless of fault.[2] Liability was based on the defective product, not the conduct of the parties who sold it.

Under the Act, however, a seller of asbestos or silica will only be liable when its actions or inaction injured the plaintiff. The Act expressly states that a defendant that sold, but did not manufacture, asbestos or silica is liable to the plaintiff **only** if the plaintiff proves one of the following: 1) that the product seller failed to exercise reasonable care with respect to the product and this failure proximately caused the plaintiff harm, (2) that the

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[1] Section 7, subparagraph (1) of HB 1019 (2005).

[2] *Samuel Friedland Family Enterprises v. Amoroso*, 630 So. 2d 1067, 1068 (Fla. 1994).

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product failed to conform to the seller's express warranty (separate from the manufacturer's warranty) and this nonconformance caused the plaintiff's injury, or (3) that the product seller engaged in intentional wrongdoing.[3]

The Act's intent to impose liability on a seller based on the seller's conduct rather than another's defective product is further illustrated by how the failure to exercise reasonable care may be proven. Specifically, the Act instructs that a seller's failure to exercise reasonable care cannot be based on an alleged failure to inspect if there was no reasonable opportunity to inspect or if the inspection would not have revealed the dangerous aspect of the product.[4] This is significant because it protects sellers from being held to an unrealistic standard of care. The Act recognizes that sellers should not be faulted now for failing to do something they could not do before.

Notably absent from this provision is any reference to a claim based on a seller's failure to warn. Logically, however, if a seller had no opportunity to inspect the product or an inspection would not have revealed the dangerous nature of the product, then it follows that the seller should not be held liable for failing to warn a purchaser. Nevertheless, the question of whether a seller can be held liable under the Act for failing to warn of a defect it could not discover, in a product it could not inspect, will have to be resolved by Florida courts.

MEDICAL CRITERIA

Perhaps the most significant portion of the Act is that "physical impairment" is now an essential element of a civil action based on asbestos or silica exposure.[5] Plaintiffs who allege certain types of asbestos- or silica-related conditions must now present prima facie evidence of physical impairment caused, at least in part, by exposure to asbestos or silica.

For cases filed after July 1, 2005 (the effective date of the Act), a plaintiff must present prima facie evidence of physical impairment with the complaint.[6] For existing cases, in which trial has not commenced by July 1, 2005, this prima facie showing must be made 30 days before a date is set for trial.[7] In other words, plaintiffs' counsel must go back and submit evidence satisfying the Act for all pending cases before they may be set for trial. It is unclear what will happen to existing cases that have already been assigned trial dates. This is significant in Florida asbestos litigation because hundreds of cases have already been set for trial through the end of 2005. If the courts require plaintiffs to comply with the Act for these existing trial settings, most of these cases will probably have to be postponed to allow plaintiffs time to present evidence of physical impairment.

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[3] Section 8 of HB 1019 (2005).

[4] Section 8, subparagraph (1)(b) of HB 1019 (2005).

[5] Section 4, subparagraph (1) of HB 1019 (2005).

[6] Section 5, subparagraph (2) of HB 1019 (2005).

[7] Section 5, subparagraph (2) of HB 1019 (2005).

Ultimately, a large percentage of these plaintiffs may be unable to establish impairment and their cases will likely be dismissed.

While the timing for a plaintiff's submission of prima facie evidence of impairment is consistent throughout the Act, the content of that showing differs slightly depending on the type of exposure and resulting injury alleged. This paper will first address the medical criteria assigned to asbestos claimants, followed by those for silica claimants.

ASBESTOS CLAIMANTS

Asbestosis or Pleural Thickening

For nonmalignant asbestos-related injuries, such as asbestosis or pleural thickening, the Act requires that a plaintiff submit a report that includes a diagnosis from a qualified physician of asbestosis or diffuse (widespread, not localized) pleural thickening.[8] This diagnosis must be based on either radiological or pathological evidence.[9]

Under the Act, "pathological evidence of asbestosis" is a statement by a board-certified pathologist that more than one section of the plaintiff's lung tissue demonstrates a pattern of scarring around the bronchioles (tiny branches of air tubes within the lungs) or the lung(s) and that there are asbestos bodies present.[10] And "radiological evidence of asbestosis" means a quality 1 (good) chest X-ray showing small irregular opacities graded at least 1/1 by a certified B-reader on the ILO scale.[11]

However, a plaintiff may also satisfy the diagnostic criterion with a physician's diagnosis based on a chest X-ray graded 1/0, as long as this diagnosis is also based upon high-resolution computed tomography (HRCT).[12] HRCT gives a more detailed and more specific view of the lung(s) than a conventional chest X-ray. Thus, HRCT should clear up the uncertainty present in a chest X-ray graded 1/0.

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[8] Section 4, subparagraph (2)(e) of HB 1019 (2005).

[9] Section 4, subparagraph (2)(e) of HB 1019 (2005).

[10] Section 3, subparagraph (21) of HB 1019 (2005).

[11] Section 3, subparagraph (24) of HB 1019 (2005). The ILO scale runs from 0 to 3. A normal lung is a 0/- or a 0/0, whereas a lung with advanced disease and severe abnormalities is a 3/+ or 3/3. The first number indicates the extent of the lung abnormalities the B-reader found. For example, the first "1" required under the Act means that the B-reader determined that there were slight abnormalities present. The second number indicates whether the B-reader considered giving the X-ray a different grade. Thus, the 1/1 required by the Act indicates that the B-reader determined that there were abnormalities present and that the B-reader never considered labeling those abnormalities as anything other than a 1. A 1/1 means that there was clear evidence of abnormalities on the X-ray. A reading of 1/0, on the other hand, means that the B-reader found slight abnormalities present, but considered describing the lung as normal – a category 0.

[12] Section 4, subparagraph (2)(g) of HB 1019 (2005).

That the Act will not allow a diagnosis of asbestosis to be based solely on a chest X-ray graded 1/0 is significant. Most of the asbestos cases filed in Florida are based upon a chest X-ray graded 1/0 and testimony from a medical expert that the plaintiff's condition is "consistent with asbestosis." But a 1/0 chest X-ray does not necessarily prove a plaintiff has asbestosis. "[T]here are more than 150 causes of fibrosis, other than exposure to asbestos, including obesity and old age, that present similarly to 1/0 asbestosis on X-rays."[13] Thus, before the Act, plaintiffs' lawyers were able to overload Florida courts with suits brought by "1/0 plaintiffs" – plaintiffs who could have been suffering from any of the other 150 types of fibrosis. By requiring more than just a 1/0 reading for new and existing cases, the Act should eliminate a significant amount of these cases.

Further, the Act does not allow a plaintiff to rely on a diagnosis that the plaintiff's condition is "consistent with" or "compatible with" exposure to asbestos.[14] Instead, the report must contain a determination by a qualified physician that the plaintiff has a permanent respiratory impairment rating of at least Class 2 under the AMA guidelines (10-25% mild impairment of the whole person)[15] and that this impairment was not more probably caused by something other than exposure to asbestos.[16] This classification must be made on the basis of a medical examination and pulmonary function testing.[17]

The Act ensures that these tests and their results are valid by establishing strict standards for how this testing may be conducted and how the results may be interpreted. First, the Act requires that evidence relating to physical impairment, such as pulmonary function testing, must be conducted and documented in accordance with the procedures outlined in 20 C.F.R. Part 404, subpart P, appendix 1, part A, section 3.00E and F.[18] Second, this testing may not be conditioned on the plaintiff's agreement to retain legal services.[19] Third, the meaning of the test results (i.e., whether the plaintiff has normal or below-normal lung functioning) must be determined in accordance with the interpretive standards set forth in the official statement of the American Thoracic Society, titled "Lung Function Testing: Selection of Reference Values and Interpretive Strategies."[20]

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[13] Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 49 (2004).

[14] Section 4, subparagraph (2)(h) of HB 1019 (2005).

[15] Section 4, subparagraph (2)(d) of HB 1019 (2005).

[16] Section 4, subparagraph (2)(h) of HB 1019 (2005).

[17] Section 4, subparagraph (2)(d) of HB 1019 (2005).

[18] Section 4, subparagraph (9)(a) of HB 1019 (2005). This portion of Title 20 (Employee's Benefits) of the Code of Federal Regulations sets forth detailed standards for determining respiratory system impairments in people over the age of 18.

[19] Section 4, subparagraph (9)(c) of HB 1019 (2005).

[20] Section 4, subparagraph (9)(a) of HB 1019 (2005).

Besides diagnosing the plaintiff with asbestosis or pleural thickening and finding physical impairment, a qualified physician must also find a nexus between the two. Specifically, the physician must report that asbestosis or pleural thickening, not chronic obstructive pulmonary disease, is a substantial contributing factor to the plaintiff's physical impairment.[21] This conclusion must be based on either total lung capacity or forced vital capacity below the lower limit of normal or a chest X-ray showing small, irregular opacities graded at least 2/1.[22]

In addition to the physician's findings and opinions, the report must reflect that a detailed occupational, medical, smoking, and asbestos-exposure history has been taken from the plaintiff.[23] The occupational and exposure history must include and identify all of the plaintiff's principal places of employment and exposures to airborne contaminants.[24] For each place of employment, the history must specify whether it involved exposure to asbestos or other "disease-causing dusts" and the nature, duration, and level of that exposure.[25]

Finally, because asbestosis and other asbestos-related diseases have long latency periods, the Act requires that the report also show that at least ten years have elapsed between the date of the plaintiff's first exposure to asbestos and the date of the diagnosis.[26]

Cancer of the Lung, Larynx, Pharynx, or Esophagus

The Act treats cancer very differently from asbestosis or pleural thickening. It seems to acknowledge that physical impairment is inherent in a malignant condition. Thus, the Act does not require a plaintiff alleging cancer of the lung, larynx, pharynx, or esophagus to present prima facie evidence of physical impairment.[27]

If, however, the plaintiff is a smoker,[28] the Act requires the plaintiff to submit prima facie evidence linking the plaintiff's cancer to asbestos exposure. Specifically, a smoker must produce a diagnosis from a qualified physician, board certified in pathology, pulmonary medicine, or oncology, that the smoker has cancer of the lung, larynx, pharynx, or

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[21] Section 4, subparagraph (2)(f) of HB 1019 (2005).

[22] Section 4, subparagraphs (2)(f)1-3 of HB 1019 (2005). A 2/1 means that a certified B-reader found numerous abnormalities present, but considered categorizing these abnormalities as slight or few (a category 1).

[23] Section 4, subparagraph (2)(a) of HB 1019 (2005).

[24] Section 4, subparagraph (2)(a)1 of HB 1019 (2005).

[25] Section 4, subparagraph (2)(a)2 of HB 1019 (2005).

[26] Section 4, subparagraph (2)(c) of HB 1019 (2005).

[27] Section 4, subparagraph (4) of HB 1019 (2005).

[28] According to the Act, a smoker is a person who has smoked cigarettes or used other tobacco products on a consistent and frequent basis within the last 15 years.

esophagus and that exposure to asbestos was a substantial contributing factor to the cancer.[29] In addition, a smoker must submit evidence of substantial occupational exposure to asbestos[30] such that a qualified physician determines that the smoker's physical impairment was "not more probably the result of causes other than exposure to asbestos."[31]

There also must be radiological or pathological evidence of asbestosis or diffuse pleural thickening.[32] If the radiological or pathological evidence required by the Act does not exist, a diagnosis based upon a chest X-ray graded by a certified B-reader as at least 1/0 on the ILO scale and HRCT supporting the diagnosis of asbestosis to a reasonable degree of medical certainty will suffice.[33]

Finally, a smoker, like a plaintiff in a nonmalignant case, must present evidence that at least ten years have elapsed between the date of the plaintiff's first exposure to asbestos and diagnosis of the cancer.[34]

Cancer of the Colon, Rectum, or Stomach

Before bringing a claim for asbestos-related cancer of the colon, rectum, or stomach, both smokers and nonsmokers must present prima facie evidence linking their condition to asbestos exposure.[35] Absent this proof, no one can file or maintain a civil action for asbestos-related cancer of the colon, rectum, or stomach.

Similar to a plaintiff with cancer of the lung, larynx, pharynx, or esophagus, a plaintiff with cancer of the colon, rectum, or stomach must produce a diagnosis from a qualified physician, board certified in pathology, pulmonary medicine, or oncology, that the plaintiff has cancer of the colon, rectum, or stomach and that exposure to asbestos was a substantial contributing factor to the development of the condition.[36] A qualified physician must find that the plaintiff's cancer was "not more probably the result of causes other than exposure to asbestos."[37]

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[29] Section 4, subparagraph (3)(d) of HB 1019 (2005).

[30] Section 4, subparagraph (3)(e) of HB 1019 (2005).

[31] Section 4, subparagraphs (3)(d) and (f) of HB 1019 (2005).

[32] Section 4, subparagraph (3)(c) of HB 1019 (2005).

[33] Section 4, subparagraph (3)(c) of HB 1019 (2005).

[34] Section 4, subparagraph (3)(b) of HB 1019 (2005).

[35] Section 4, subparagraphs (5)(a)-(d) of HB 1019 (2005).

[36] Section 4, subparagraph (5)(a) of HB 1019 (2005).

[37] Section 4, subparagraph (5)(d) of HB 1019 (2005).

For smokers, the diagnosis must be coupled with either radiological or pathological evidence of asbestosis or diffuse pleural thickening or a diagnosis of asbestosis by a qualified physician based upon a chest X-ray graded by a certified B-reader as at least 1/0 on the ILO scale and HRCT supporting the diagnosis of asbestosis to a reasonable degree of medical certainty.[38] In addition, a smoker must present evidence of substantial occupational exposure to asbestos.[39]

A nonsmoker, however, has the option to produce radiological or pathological evidence of asbestosis or diffuse pleural thickening, a diagnosis of asbestosis by a qualified physician based upon a chest X-ray graded by a certified B-reader as at least 1/0 on the ILO scale and HRCT supporting the diagnosis of asbestosis to a reasonable degree of medical certainty, or evidence of substantial occupational exposure to asbestos.[40]

Finally, for both a smoker and a nonsmoker, 10 years must have elapsed between the date of the plaintiff's first exposure to asbestos and diagnosis of the cancer.[41]

Mesothelioma

Mesothelioma is a disease in which malignant (cancer) cells are found in the pleura (the thin layer of tissue that lines the chest cavity and covers the lungs) or the peritoneum (the thin layer of tissue that lines the abdomen and covers most of the organs in the abdomen). Because mesothelioma is usually linked to asbestos exposure, there is no required showing of physical impairment for a plaintiff alleging asbestos-related mesothelioma.[42]

SILICA CLAIMANTS

Silicosis

The required prima facie showing of physical impairment for silicosis claims has similar components to the showing required for nonmalignant asbestos cases. A silicosis plaintiff must submit a report that contains a diagnosis from a qualified physician of a permanent respiratory impairment rating of at least Class 2 (under the AMA guidelines).[43] Further, a qualified physician must determine, based on a medical examination and pulmonary function testing, that this impairment was not more probably caused by something other than exposure to silica.[44]

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[38] Section 4, subparagraph (5)(c) of HB 1019 (2005).

[39] Section 4, subparagraph (5)(c)1.b. of HB 1019 (2005).

[40] Section 4, subparagraph (5)(d) of HB 1019 (2005).

[41] Section 4, subparagraph (5)(b) of HB 1019 (2005).

[42] Section 4, subparagraph (4)(6) of HB 1019 (2005).

[43] Section 4, subparagraph (7)(c) of HB 1019 (2005).

[44] Section 4, subparagraph (7)(e) of HB 1019 (2005).

Further, the plaintiff must have a quality 1 chest X-ray, which has been read by a certified B-reader as showing bilateral nodular opacities (round shadows found on both sides of the lungs), primarily in the upper lung fields, of 1/1 or higher.[45] Otherwise, the Act requires a plaintiff to present evidence of a pathological demonstration of classic silicotic nodules (small round collections of tissue in the upper lung) exceeding 1 centimeter in diameter.[46]

In addition to the physician's findings and opinions, the report must reflect that a detailed occupational, medical, smoking, and asbestos-exposure history has been taken from the plaintiff.[47] The occupational and exposure history must include and identify all of the plaintiff's principal places of employment and exposures to airborne contaminants.[48] For each place of employment, the history must specify whether it involved exposure to silica particles or other "disease-causing dusts" and the nature, duration, and level of that exposure.[49]

Other Silica Claims

To file or maintain any other type of silica claim, a plaintiff is faced with similar requirements to those alleging asbestos-related injuries. The plaintiff must present a report from a qualified physician, board certified in pulmonary medicine, internal medicine, oncology, or pathology, that diagnoses the plaintiff with silica-related lung cancer, silica-related progressive massive fibrosis, acute silicoproteinosis, or silicosis complicated by documented tuberculosis.[50] For a diagnosis of lung cancer, the qualified physician must opine that, to a reasonable degree of medical probability, exposure to silica was a substantial contributing factor.[51]

A qualified physician must also determine that the plaintiff has a chest X-ray showing bilateral nodular opacities, primarily in the upper lung fields, graded by a certified B-reader as 1/1 or higher, or a pathological demonstration of classic silicotic nodules exceeding 1 centimeter in diameter.[52]

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[45] Section 4, subparagraph (7)(d)1 of HB 1019 (2005).

[46] Section 4, subparagraph (7)(d)2 of HB 1019 (2005).

[47] Section 4, subparagraphs (7)(a)-(b) of HB 1019 (2005).

[48] Section 4, subparagraph (7)(a)1 of HB 1019 (2005).

[49] Section 4, subparagraph (7)(a)2 of HB 1019 (2005).

[50] Section 4, subparagraphs (8)(a)1-2 of HB 1019 (2005).

[51] Section 4, subparagraph (8)(a)1 of HB 1019 (2005).

[52] Section 4, subparagraphs (8)(d)1-2 of HB 1019 (2005).

Additionally, there must be evidence that a detailed occupational, medical, smoking, and asbestos-exposure history has been taken from the plaintiff.[53] The occupational and exposure history must include and identify all of the plaintiff's principal places of employment and exposures to airborne contaminants.[54] For each place of employment, the history must specify whether it involved exposure to silica particles or other "disease-causing dusts" and the nature, duration, and level of that exposure.[55]

Finally, a plaintiff must present evidence from a qualified physician that the plaintiff's physical impairment was not more probably the result of causes other than the silica exposure detailed in the employment and medical history.[56]

OTHER REPORTING REQUIREMENTS

For asbestos or silica claims filed after July 1, 2005, a plaintiff must, in addition to the medical criteria set forth above, produce a sworn report that includes the plaintiff's (and/or exposure witness(es)) name, address, date of birth, and marital status.[57] This sworn report must identify the specific asbestos- or silica-related condition from which the plaintiff allegedly suffers,[58] as well as where and when the plaintiff was exposed to asbestos.[59] For each exposure, the plaintiff must identify his or her occupation and employer at the time.[60]

Significantly, the Act also requires that this sworn report contain "[a]ny supporting documentation of the condition claimed to exist."[61] Read broadly, this provision could be interpreted to require the plaintiff to produce any medical records or other documentation "of the condition" at the outset of the suit.

Finally, plaintiffs in asbestos or silica claims filed after July 1, 2005 must submit a verified report that identifies all collateral source payments the plaintiff has received, or will receive in the future.[62] This report must be updated regularly during the course of

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[53] Section 4, subparagraph (8)(b) of HB 1019 (2005).

[54] Section 4, subparagraph (8)(b)1 of HB 1019 (2005).

[55] Section 4, subparagraph (8)(b)2 of HB 1019 (2005).

[56] Section 4, subparagraph (8)(e) of HB 1019 (2005).

[57] Section 5, subparagraphs (3)(a)-(b) of HB 1019 (2005).

[58] Section 5, subparagraph (3)(f) of HB 1019 (2005).

[59] Section 5, subparagraphs (3)(c)-(d) of HB 1019 (2005).

[60] Section 5, subparagraph (3)(e) of HB 1019 (2005).

[61] Section 5, subparagraph (3)(g) of HB 1019 (2005).

[62] Section 7, subparagraph (2) of HB 1019 (2005).

the litigation.[63] Courts shall, the Act instructs, permit set-off based on these collateral source payments.[64]

EFFECT OF PRIMA FACIE SHOWING ON LITIGATION

The prima facie showing required by the Act is intended to govern only a plaintiff's ability to file or maintain an asbestos or silica claim. Thus, the fact that a plaintiff has met the prima facie threshold is not admissible at trial; nor will it result in any presumption at trial or be conclusive of any defendant's liability.[65]

PROCEDURE

Once a plaintiff submits the prima facie evidence required by the Act, the defendant must be afforded a "reasonable opportunity to challenge the adequacy of the proffered prima facie evidence of asbestos-related impairment."[66] The Act does not elaborate on this mandate, but does explain that, if the required showing is not made, the plaintiff's claim will be dismissed without prejudice.[67]

STATUTE OF LIMITATIONS

For any asbestos or silica case not barred as of July 1, 2005, the Act changes when the statute of limitations begins to run. Previously, under Florida law, a cause of action for latent injuries such as asbestosis or silicosis accrued "when the accumulated effects of the substance manifest themselves in a way which supplies some evidence of the causal relationship to the manufactured product."[68] Under the Act, however, the limitations period for such a claim does not begin to run until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he or she is "physically impaired by an asbestos-related or silica-related condition."[69] Thus, under the Act, the plaintiff's physical impairment starts the statute of limitations running, not simply discovery of the condition. The effect of this provision is significant in that it will allow plaintiffs who have an asbestos- or silica-related conditions to wait until they are actually physically impaired before filing suit without the risk that their claim will be barred by the statute of limitations.

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[63] Section 7, subparagraph (2) of HB 1019 (2005).

[64] Section 7, subparagraph (2) of HB 1019 (2005).

[65] Section 4, subparagraphs (10)(a)-(c) of HB 1019 (2005).

[66] Section 5, subparagraph (2) of HB 1019 (2005).

[67] Section 5, subparagraph (2) of HB 1019 (2005).

[68] *Celotex Corp. v. Copeland*, 471 So. 2d 533, 539 (Fla. 1985).

[69] Section 6, subparagraph (1) of HB 1019 (2005).

The Act also codifies existing Florida case law,[70] which permitted a plaintiff to bring suit for a malignant asbestos-related condition after having previously settled a nonmalignant claim based on the same exposure.[71] Because plaintiffs may bring a second suit if they develop cancer, the Act does not permit recovery of damages for the fear or risk of developing cancer.[72] Likewise, after July 1, 2005, the settlement of a nonmalignant claim may not require, as a condition of settlement, that the plaintiff release any future claim for asbestos-related or silica-related cancer.[73]

Questions about the Act and its future impact on asbestos and silica litigation in Florida should be directed to:

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[70] *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (3d DCA 1985).

[71] Section 6, subparagraph (2) of HB 1019 (2005).

[72] Section 6, subparagraph (2) of HB 1019 (2005).

[73] Section 6, subparagraph (3) of HB 1019 (2005).