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Expert Analysis

Florida's Asbestos and Silica Compensation Fairness Act

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In 2005, the Florida Legislature over-whelmingly passed the Asbestos and Silica Compensation Fairness Act. The act's stated purpose was to "[g]ive priority to the true victims of asbestos and silica, claimants who can demonstrate actual physical impairment caused by exposure to asbestos or silica."[1]

Florida's legislation sought to achieve this purpose by defining physical impairment and making proof of such impairment a requirement for maintaining or filing certain types of asbestos- or silica-related claims. By postponing claims made by unimpaired plaintiffs, the act would relieve defendants and the courts of the burden of litigating such claims.

To address the numerous asbestos cases already pending in Florida courts, the state Legislature made the act apply retroactively. The Florida Supreme Court, however, struck down the retroactive application of the act in *American Optical Corp. v. Spiewak*, 73 So. 3d 120 (Fla. 2011). This article highlights the significant portions of the act, the protections it offers defendants and the impact of the Florida Supreme Court's decision.

PRIMA FACIE EVIDENCE OF PHYSICAL IMPAIRMENT

The most significant protection offered by the act to asbestos and silica defendants is that "physical impairment" is now an essential element of a civil action based on asbestos or silica exposure.[2] Plaintiffs who allege certain types of asbestos- or silica-related conditions must meet specific medical criteria and present *prima facie* evidence of physical impairment caused, at least in part, by exposure to asbestos or silica.

The act provides different medical criteria for asbestos and silica claimants that depend upon the severity of the alleged injury. Under the act, asbestos claimants must satisfy increasingly stringent medical criteria for nonmalignant asbestos-related injuries such as asbestosis or pleural thickening,[3] cancer[4] and mesothelioma.

For less serious claims such as nonmalignant asbestos-related injuries, any case in which the plaintiff was a smoker and alleges cancer of the lung, larynx, pharynx or esophagus or any case in which the claimant alleges asbestos-related cancer of the colon, rectum or stomach, the act requires a claimant to present *prima facie* evidence

of physical impairment with the complaint in the form of medical reports. Certain claimants also have to provide *prima facie* evidence linking their condition to asbestos exposure.[5]

The act offers further protection to asbestos defendants from claimants with nonmalignant asbestos-related injuries. Significantly, a diagnosis of asbestosis may not be based solely on a chest X-ray film graded a 1/0 on the International Labor Organization scale by a certified B-reader (usually a licensed physician).[6] 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 that the B-reader detected. For example, the first "1" required under the act means that the B-reader determined that slight abnormalities are present. The second number indicates whether the B-reader considered assigning a different grade to the X-ray film.

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Thus, the 1/1 required by the act for a chest X-ray film indicates that the B-reader determined that abnormalities are present and that the B-reader never considered labeling these abnormalities as anything other than a 1. Before the act, plaintiffs often filed cases in Florida based on a chest X-ray film graded 1/0 and testimony from a medical expert that the plaintiff's condition was "consistent with asbestosis." However, a 1/0 chest X-ray film does not necessarily prove that 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."[7]

Before the act, Florida courts could be burdened with hearing asbestos lawsuits brought by plaintiffs with some other type of fibrosis. By requiring more than just a 1/0 X-ray film reading for new cases, the act attempts to eliminate the filing of these cases.

In addition to a diagnosis of asbestosis or pleural thickening and a finding of physical impairment, the act mandates that a qualified physician must 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.[8]

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.[9] To the contrary, the examination report required to meet the act's medical criteria must contain a determination by a qualified physician that the plaintiff has a permanent respiratory-impairment rating of at least class 2 under the American Medical Association guidelines (10 percent to 25 percent mild impairment of the whole person)[10] and that this impairment was not more probably caused by something other than exposure to asbestos.[11] This classification must be made on the basis of a medical examination and pulmonary-function testing.[12]

Finally, because asbestosis and other asbestos-related diseases have long latency periods, the act requires that the report also show that at least 10 years have elapsed between the date of the plaintiff's first exposure to asbestos and the diagnosis.[13]

For silica claimants, the act creates a similar medical criteria scheme; a plaintiff must submit a report that contains the diagnosis from a qualified physician of a permanent respiratory- impairment rating of at least class 2 (under AMA guidelines).[14] The diagnosis must be supported by a quality chest X-ray film meeting certain standards or evidence of class silicotic nodules (small round collections of tissue in the upper lung) exceeding 1 cm in diameter.[15] The physician also must determine that the impairment was not more probably caused by something other than exposure to silica.[16]

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.[17]

Second, this testing may not be conditioned on the plaintiff's agreement to retain legal services.[18] Third, the meaning of the test results (for example, 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."[19]

In addition to the physician's findings and opinions, the report in both asbestosis and silica cases must establish that a detailed occupational, medical, smoking and asbestos exposure history has been taken from the plaintiff.[20] The occupational and exposure history must include and identify all of the plaintiff's principal places of employment and exposures to airborne contaminants.[21] 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.[22]

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 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.[23]

Once the 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."[24] The act does not elaborate on this mandate, but it does explain that, if the required showing is not made, a plaintiff's claim will be dismissed without prejudice.[25]

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OTHER PROTECTIONS FOR DEFENDANTS

In addition to the *prima facie* showing required for certain injuries, the act has other noteworthy protections for asbestos and silica defendants. First, it prohibits the award of punitive damages[26] as well as the award of damages for the fear or risk of the development of cancer.[27]

Second, although not expressly stated, the act abolishes strict liability for defendants who sold, but did not manufacture, asbestos or silica. This is a fundamental change in Florida product liability law. Previously, everyone in the chain of distribution was strictly liable for injuries caused by a defective product, regardless of fault.[28] Liability was premised on the defective product, not the conduct of the parties that sold it.

Under the act, however, a seller of asbestos or silica is only liable when *its* action 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 three conditions:

- The defendant failed to exercise reasonable care with respect to the product, and this failure proximately caused the plaintiff harm.
- The product failed to conform to the defendant's express warranty (separate and distinct from the manufacturer's warranty) and this nonconformance caused the plaintiff's injury.
- The defendant engaged in intentional wrongdoing.[29]

The act's intent to impose liability on a seller based on the seller's conduct — rather than on another company's defective product — is further illustrated by the manner in which the plaintiff must prove a failure to exercise reasonable care. 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.[30]

Notably absent from the act 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.

Third, the act requires that all asbestos and silica claims filed on or after July 1, 2005 be accompanied by certain disclosures. Specifically, a plaintiff must provide a sworn report with his or her complaint that includes the plaintiff's (and/or any exposure witness's) name, address, date of birth and marital status.[31]

This sworn report must identify the specific asbestos- or silica-related condition from which the plaintiff allegedly suffers,[32] as well as where and when the plaintiff was exposed to asbestos or silica.[33] For each exposure, the plaintiff must identify his or her occupation and employer at the time.[34] The act also requires that this sworn report contain "[a]ny supporting documentation of the condition claimed to exist."[35]

A plaintiff in an asbestos or silica claim must also file with his or her complaint a verified report that discloses all known collateral source payments the plaintiff has received or will receive in the future.[36] This report must be updated regularly during the course of the litigation.[37] The act instructs Florida courts to permit a set-off based on these collateral source payments.[38]

THE UNCONSTITUTIONAL RETROACTIVE APPLICATION OF THE ACT

The act originally purported to apply not only to cases filed after its effective date of July 1, 2005, but also to pending cases.[39] However, in 2011, the Florida Supreme Court held that the act was unconstitutional as applied to plaintiffs who had been diagnosed with asbestos-related diseases before it was passed.[40] In *American Optical Corp.*, the court reasoned that "prior to the Act, a *diagnosis of asbestos-related disease* triggered the accrual of a cause of action."[41]

The court held that when plaintiffs were diagnosed with asbestos-related diseases, they acquired vested property interests in their accrued causes of action.[42] Applying the rule that a statute cannot apply retroactively if it impairs a vested right,[43] the court held that "[r]etroactive application of the act here would operate to completely abolish the appellees' vested rights in accrued causes of action for asbestos-related injury. For this reason, we conclude that the act cannot be constitutionally applied to them."[44]

As a result of this decision, Florida courts must use pre-act standards to adjudicate claims brought by plaintiffs diagnosed before July 1, 2005 (the effective date of the act). Practically speaking, this means that some pre-act asbestos litigation will continue in Florida for the foreseeable future.

NOTES

[1] Fla. Stat. § 774.202(1) (2012).
[2] Fla. Stat. § 774.204(1) (2012).
[3] Fla. Stat. § 774.204(2) (2012).
[4] Fla. Stat. § 774.204(3) (2012).
[5] Fla. Stat. § 774.204(2)(h) (2012) (nonmalignant asbestos-related claims); Fla. Stat. § 774.204(3)(f) (2012) (smoker with cancer of the lung, larynx, pharynx or esophagus).
[6] Fla. Stat. §§ 774.203(24), 774.204(2)(e) (2012).
[7] Lester Brickman, On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality, 31 Pepperdine L. Rev. 33, 49 (2004).
[8] Fla. Stat. § 774.204(2)(f) (2012). This conclusion must be based either on total lung capacity or forced vital capacity below the lower limit of normal or a chest X-ray film showing small, irregular opacities graded at least a 2/1 by a certified B-reader on the ILO scale. *Id.* A 2/1 means that a

certified B-reader detected numerous abnormalities but considered categorizing these abnormalities as slight or few (a category 1).

[9] Fla. Stat. § 774.204(2)(h) (2012).
[10] Fla. Stat. § 774.204(2)(d) (2012).
[11] Fla. Stat. § 774.204(2)(h) (2012).
[12] Fla. Stat. § 774.204(2)(d) (2012).
[13] Fla. Stat. § 774.204(2)(c) (2012).
[14] Fla. Stat. § 774.204(7)(c) (2012).
[15] Fla. Stat. § 774.204(7)(d) (2012).
[16] Fla. Stat. § 774.204(7)(e) (2012).
[17] Fla. Stat. § 774.204(9)(a) (2012). 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 years.
[18] Fla. Stat. § 774.204(9)(c) (2012).
[19] Fla. Stat. § 774.204(9)(a) (2012).
[20] Fla. Stat. §§ 774.204(2)(a), 774.204(7)(a) (2012).
[21] Fla. Stat. §§ 774.204(2)(a)(1), 774.204(7)(a)(1) (2012).
[22] Fla. Stat. §§ 774.204(2)(a)(2), 774.204(7)(a)(2) (2012).
[23] Fla. Stat. § 774.204(10)(a)-(c) (2012).
[24] Fla. Stat. § 774.205(2) (2012).
[25] *Id.*
[26] Fla. Stat. § 774.207(1) (2012).
[27] Fla. Stat. § 774.206(2) (2012).
[28] Samuel Friedland Family Enters. v. Amoroso, 630 So. 2d 1067, 1068 (Fla. 1994).
[29] Fla. Stat. § 774.208 (2012).
[30] Fla. Stat. § 774.208(1)(b) (2012).
[31] Fla. Stat. § 774.205(3)(a)-(b) (2012).
[32] Fla. Stat. § 774.205(3)(f) (2012).
[33] Fla. Stat. § 774.205(3)(c)-(d) (2012).
[34] Fla. Stat. § 774.205(3)(e) (2012).
[35] Fla. Stat. § 774.205(3)(g) (2012).
[36] Fla. Stat. § 774.207(2) (2012).
[37] *Id.*
[38] Id.
[39] Fla. Stat. § 774.205(2) (2012). For pending cases in which a trial had not commenced by the effective date, the act provided that the *prima facie* showing of physical impairment had to be made 30 days before setting a date for trial.
[40] *Am. Optical Corp.*, 73 So. 3d at 133.
[41] *Id.* at 127 (emphasis in original).
[42] *Id.* at 130.
[43] *Id.* at 131.
[44] *Id.* at 133.

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