

ASBESTOS CLAIMS TRANSPARENCY ACT

Asbestos Claims Transparency Act

Model Policy

Title ___ of the [] Code is amended by adding Chapter ___ to read as follows:

Chapter __. Claims Involving Asbestos Exposure

Section 1. {Short Title}

This chapter may be cited as the “Asbestos Claims Transparency Act.”

Section 2. {Findings and Purposes}

(A) Findings. The legislature finds that:

(1) The United States Supreme Court has described asbestos litigation in this country as a “crisis”;

(2) Asbestos litigation has forced an estimated eighty-five employers into bankruptcy. The rate of asbestos-driven bankruptcies has accelerated in recent years. Between 2000 and 2004, there were more asbestos-related bankruptcy filings than in either of the prior two decades;

(3) Personal injury lawyers have responded to these bankruptcies by expanding their search for solvent defendants. The number of asbestos defendants now includes over 8,500 companies, including many small and medium size companies, in industries that cover eighty-five percent of the U. S. economy;

(4) Asbestos claimants often seek compensation for alleged asbestos-related conditions from both civil defendants that remain solvent and from trusts or claims facilities formed in asbestos bankruptcy proceedings.

(5) There is limited coordination and transparency between these two paths to recovery. This lack of transparency raises a strong potential for fraud and abuse, as plaintiffs may allege facts intended to maximize recoveries against trusts created through the bankruptcy system and differing or even conflicting facts to maximize recoveries against tort system defendants.

(6) It is in the interest of justice that there be transparency with respect to claims made in the bankruptcy system and in civil asbestos litigation to address the potential for fraud and

duplicate payments (whether by trusts or solvent companies).

(7) Presentation of inconsistent or fraudulent claims data may deprive injured claimants of compensation in favor of those who have not been injured by asbestos products.

(8) The current lack of transparency in the tort system may result in businesses in this state being unfairly penalized and deprived of their right to set-off and other equitable and legal rights.

(B) Purposes. The purposes of this Act are:

(1) To provide transparency of claims made against asbestos-related bankruptcy trusts and in the tort system;

(2) To assure that courts and litigants have available to them information as to payments an asbestos claimant has or may receive from asbestos-related bankruptcy trusts;

(3) To facilitate fair and appropriate compensation to claimants with a rational allocation of responsibility to all persons whether current defendants or not;

(4) To preserve the resources of both defendants and asbestos-related bankruptcy trusts to help promote adequate recoveries for deserving claimants; and

(5) To insure that liabilities properly borne by asbestos-related bankruptcy trusts are not imposed upon defendants in the tort system.

Section 3. {Definitions}

(A) As used in this Act, the term –

(1) “Asbestos” means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, asbestiform winchite, asbestiform richterite, asbestiform amphibole minerals, and any of these minerals that have been chemically treated or altered, including all minerals defined as asbestos in 29 CFR 1910 at the time an asbestos claim is made.

(2) “Asbestos claim” means any claim for damages, losses, indemnification, contribution, restitution, or other relief of whatever nature (including punitive damages) arising out of, based on, or in any way related to the alleged health effects associated with the inhalation or ingestion of asbestos, to the extent such claims are recognized under state law including, but not limited to:

(a) Loss of consortium;

(b) Loss of support;

- (c) Personal injury or death;
- (d) Mental or emotional injury;
- (e) Risk or fear of disease or other injury;
- (f) The costs of medical monitoring or surveillance; or
- (g) Any claim made by or on behalf of any person exposed to asbestos, or a representative, spouse, parent, child, or other relative of the exposed person.

The term “asbestos claim” does not include a claim for compensatory benefits pursuant to a workers’ compensation law or a veterans’ benefits program.

(3) “Claimant” means any party asserting an asbestos claim, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff; if a claim is brought through or on behalf of an estate, the term includes the claimant’s decedent; if a claim is brought through or on behalf of a minor or incompetent, the term includes the claimant’s parent or guardian.

(4) “Exposed person” means a person whose claimed exposure to asbestos is the basis for an asbestos claim.

(5) “Asbestos action” means any civil proceeding seeking compensation directly or derivatively as a result, in whole or in part, of

exposure to asbestos.

(6) “Trust Claims and Claims Material” means all documents and information, including but not limited to claim forms and supplementary material, relevant or related to pending or potential claims against Asbestos Trusts.

(7) “Trust Governance Documents” means documents which determine eligibility and payment levels for the Asbestos Trusts and include Trust Distribution Procedures, Plans of Reorganization and related orders.

(8) “Asbestos Trusts” means all trusts or claims facilities, created as a result of bankruptcies or other settlements, including but not limited to all trusts created pursuant to § 524(g) of Title 11, United States Code, intended to provide compensation to claimants alleging claims as a result of asbestos exposure.

Section 4. {Substantive Provisions}

(A) Required Disclosures. Within 30 days of commencing an asbestos action not otherwise barred or deferred under state law, and in no event less than 180 days prior to trial of that action, a claimant shall provide to all parties a statement of any and all existing or anticipated claims against Asbestos Trusts. Such statement shall be in addition to any existing

preliminary disclosure requirements otherwise imposed by law or applicable agreement, ruling or judicial order. Furthermore, such statement must include under penalty of perjury an attestation by the claimant that the statement is based on a good faith investigation of all potential claims against Asbestos Trusts. Counsel must certify that he or she has conducted a good faith investigation of all potential claims against Asbestos Trusts. The statement shall also disclose when the claim was or will be made and whether there has been any request for deferral, delay, suspension or tolling of the Asbestos Trust claims process. In the event information obtained subsequent to the submission of the statement supports the filing of additional claims against Asbestos Trusts, the claimant shall update the statement by amendment filed and served within 30 days of the receipt of the additional information. A claimant shall also produce to all parties within the time period specified in this subsection in such asbestos action the following additional materials:

(1) As to any claims already asserted against Asbestos Trusts, the claimant must produce final executed proofs of claim together with any supporting materials used to support such claim against the Asbestos Trusts. A claimant must also produce all documents or information relevant or related to such claims asserted against the Asbestos Trusts, including, but not limited to work histories, affidavits, depositions and trial testimony of the claimant and others as well as all medical documentation (including but not limited to X-rays, test results, doctors' reports and pathology results).

(2) As to any claims that a claimant has not yet asserted against the Asbestos Trusts but has disclosed pursuant to the requirements of subparagraph 4A.1 regarding potential claims, all materials described in subparagraph 4A.1 shall be produced, including, at the time of its filing, the final executed proof of claim.

(3) Claimant's Asbestos action shall be stayed in its entirety until such time as the claimant certifies that all anticipated claims against Asbestos Trusts have been filed and that claimant has satisfied the requirements of 4A.2.

(B) Defendant's Order to Show Cause regarding Additional Trust Claims; Court Certification and Trust Claims Order.

(1) Any defendant may proceed by Order to Show Cause ("OSC") in the Court hearing such asbestos action setting forth the names of additional Asbestos Trusts against which the plaintiff has not made, but which the defendant in good faith believes the claimant can make a successful claim. The OSC shall set forth the factual basis for the claim describing the evidence sufficient to meet the Asbestos Trust distribution procedure requirements to file valid claims against such Asbestos Trust and the amount of money the trust should pay for the claim. In response, within 10 days thereafter, the claimant shall:

(a) File the claim with the Asbestos Trust as set forth by the defendant's notice which will be dispositive as to the OSC as to that Trust; or

(b) Show cause before the court hearing such asbestos action for a determination that

(i) The proof of claim should be modified and then submitted, or

(ii) That there is insufficient evidence to permit the claim to be filed in good faith under the applicable Asbestos Trust distribution procedures.

The court hearing the asbestos action shall decide the issue on the basis of declarations, deposition excerpts, interrogatory responses, and such other evidence as the court deems appropriate. The claimant shall have the burden of proving that the claim should be modified and then submitted or should not be filed because it does not meet the Asbestos Trust distribution procedure requirements. If the court hearing the asbestos action determines that there is a good faith basis for filing the claim, the claimant shall promptly file the claim with the Asbestos Trust as it was submitted by the defendant or as modified by the court hearing the asbestos action. The claimant's asbestos action shall be stayed until such time as the claimant certifies that claimant has complied with the Court's order and has disclosed the materials required to be disclosed by Section 4A.

(2) Not later than 60 days before the scheduled trial date of an asbestos action, the court hearing such asbestos action must certify in writing that the discovery described in paragraph 4A and subparagraphs 4A.1 and 4A.2 is complete. Furthermore, no trial date may be assigned nor trial commenced absent certification of the completion of discovery and a determination that all additional Asbestos Trust Claims required to be made in response to an OSC have been submitted to the relevant Asbestos Trust(s). A schedule of all Asbestos Trust Claims made shall be reflected in a "Trust Claims Order" which must be entered no later than 30 days prior to trial. The Trust Claims Order shall be deemed to be a final order and may be amended only upon a showing of mistake, inadvertence, surprise, excusable neglect or fraud.

(C) Treatment of Trust Claims and Claims Material. Trust Claims and Claims Material (as well as related discovery materials) are presumptively relevant to and discoverable in an asbestos action and shall be presumed by the court to be authentic. Notwithstanding any other provision of law or agreement, no claims of privilege shall apply to Trust Claims and Claims Materials, and such Trust Claims and Claims Materials may be used by the parties in the asbestos action to prove, without limitation, alternative causation for the claimant's asbestos exposure as well as serve as a basis to allocate responsibility for the claimant's claim.

(D) Discovery of Other Materials. In addition to the mandatory disclosure requirements of this chapter, additional disclosure and discovery of information relevant to the asbestos action may be sought by any mechanism provided by the applicable Rules of Civil Procedure. Defendants in an asbestos action may also seek discovery from the Asbestos Trusts. The claimant shall assist in any discovery from the Asbestos Trusts and provide whatever consent or expression of permission may be required by the Asbestos Trusts for release of such information and materials. Claims of privilege and/or confidentiality by claimants will not preclude discovery by defendants under this chapter.

(E)Asbestos Trust Claim Values. In the event a matter proceeds to trial before the claimant has received a decision from an Asbestos Trust or Trusts, as to each such claim, there shall be a rebuttable presumption that the claimant will receive the compensation specified for his or her claimed disease or injury in the relevant Trust Governance Documents. The court shall take judicial notice of these documents and the payment amounts specified therein. For

each such pending claim, the court shall establish an attributed value that will be used for purposes of calculation of verdict or settlement set-offs or credits, subject to the adjustment specified in paragraph 4H below.

(F) Sanctions for Non-Compliance. Failure by a claimant to comply with the discovery requirements outlined in this chapter shall be a basis for sanctions against the claimant, including, at the discretion of the court, upon a finding that the claimant willfully failed to comply with the requirements of this chapter, dismissal of the asbestos action with prejudice.

(G) Set-Offs. The defendants will be entitled to set-offs or credits of the full value of the Trust Claims against any judgment rendered against them in the asbestos action. In the event that a co-defendant settles or otherwise resolves the asbestos claims against it prior to verdict, if release(s) are obtained for the benefit of Asbestos Trusts, the defendants remaining in the asbestos action may pursue those claims by assignment according to whatever rights were held by claimants. To the extent that any applicable law provides broader relief to the defendants than is set forth herein, nothing in this provision shall prohibit any defendant from pursuing such broader relief.

(H) Correction of Attributed Value of Claim. In the event that defendants obtain a credit or reduction in a verdict because of the attributed value of a claim pending but not yet paid against an Asbestos Trust, and the claim giving rise to that attributed value is rejected in whole or in part by the relevant Asbestos Trust(s), those defendants shall pay to the claimant, on a several basis, their respective share of the discount. The defendants shall make payment within 180 days of service of evidence of rejection or reduction of the claim.

Section 5. {Severability}

The provisions of this Act are severable. If any portion of this Act is declared unconstitutional or the application of any part of this Act to any person or circumstance is held invalid, the remaining portions of the Act and their applicability to any person or circumstance shall remain valid and enforceable.

Section 6. {Effective Date}

This Act shall take effect on its date of enactment. The Act applies to all asbestos claims filed on or after the effective date. This Act also applies to any pending asbestos claims in which trial has not commenced as of the effective date.

Approved by ALEC Board of Directors on August 2007.

Reapproved by ALEC Board of Directors on January 28, 2013.