SUBJECT: Civil claims involving exposure to asbestos and silica

COMMITTEE: Civil Practices — favorable, without amendment

VOTE: 9 ayes — Nixon, Rose, P. King, Madden, Martinez Fischer, Raymond, Strama, Talton, Woolley

0 nays

SENATE VOTE: On final passage, April 27 — 30-0

WITNESSES: No public hearing

BACKGROUND: Millions of workers in the United States have been exposed to asbestos and silica. Under current law, claims for injuries arising from exposure to asbestos or silica are treated similar to other personal injury claims. The statute of limitations for such claims, as established in Civil Practice and Remedies Code, sec. 16.003, is two years and begins to run as soon as the exposed person has knowledge of a possible asbestos or silica-related disease or symptom. Currently, thousands of asbestos and silica-related injury cases are pending in Texas courts.

Asbestos. Asbestos fibers can be woven into a heat-resistant material that has been used as an insulator for a wide range of manufactured goods, including building materials, friction products such as automobile brakes, heat resistant fabrics, and household consumer goods. During the manufacturing and installation process, asbestos fibers can become airborne in a fine dust that settles in the lungs. This dust can irritate the lining of the lungs and lead to scarring or other serious lung conditions. Asbestos-related diseases can have a long latency period, taking as long as 40 years to develop, and generally are dependent on the length of exposure to the fibers. However, smoking and other lifestyle habits also may have a significant effect on susceptibility to asbestos-related ailments.

Scarring of the lining of the lungs is called pleural plaque and may be diagnosed with an x-ray. Asbestos exposure also may cause lung cancer, including mesothelioma, an aggressive form of cancer that affects the membranes lining the abdomen and chest.

Some asbestos manufacturers were aware of the dangers of prolonged exposure to the fibers before the 1960s. More than 27 million workers in the manufacturing, shipbuilding, and construction industries were exposed to asbestos between 1940 and 1979. Between 1982 and 2003, the number of claimants climbed from 21,000 to 600,000, and the number of defendants grew from 300 to 6,000. The number of bankruptcies attributed to asbestos liability was 60 by 2002, including most of the original manufacturers of asbestos. The total ultimate cost, including transaction costs, settlements, and awards, has been estimated at between $145 billion and $210 billion, with other projections as high as $275 billion.

Silica. Silica is also a naturally occurring mineral. Hundreds of thousands — potentially millions — of workers have been exposed to silica dust. Long-term extensive inhalation of silica dust can lead to lung impairments, including silicosis and cancer. This fact has been widely known since the 1930s. Once the particles are inside the lungs, they become trapped and cause areas of swelling around them. Over time, these swollen areas grow larger, breathing becomes increasingly difficult, and death may result from lung failure. The smaller the particles that are inhaled, the greater the risk of harm. Tissue damage in the lungs caused by inhalation of silica can continue even after exposure has ceased. Damage in the lungs may be seen on an x-ray even while the patient exhibits no physical symptoms. There is a latency period of several years between exposure and the onset of symptoms.

Silica, unlike asbestos, is still commonly used in the production of many goods, most notably glass.

DIGEST:

SB 15 would require persons who claimed an asbestos- or silica-related injury to file a report proving that they met certain medical criteria before they could proceed with their action in court. The bill also would establish a pretrial multidistrict litigation process and would change the statute of limitations for bringing an action for personal injury or death related to asbestos or silica.

Asbestos claims. In accordance with Civil Practice and Remedies Code, sec. 90.003, created by this bill, a plaintiff claiming an asbestos-related injury would be required to serve on each defendant a report prepared by a doctor board certified in pulmonary medicine, occupational medicine, internal medicine, oncology, or pathology. The report would have to establish that the plaintiff had been diagnosed with mesothelioma or

another asbestos-related cancer and that the plaintiff's exposure to asbestos was a likely cause of his illness.

A separate report could establish that the plaintiff had been diagnosed with a less serious health condition as a result of exposure to asbestos. This report would have to be prepared by a doctor board certified in pulmonary medicine, internal medicine, or occupational medicine confirming that the doctor had performed a physical examination of the plaintiff or, if the plaintiff were deceased, that the doctor had reviewed the available medical records. The doctor must have taken a detailed work and exposure history from the plaintiff or, if the plaintiff were deceased, have taken such a history from a person who was knowledgeable about the plaintiff's exposures. Those histories would have to describe the plaintiff's main jobs and whether the plaintiff was exposed to airborne contaminants that could cause pulmonary impairment, along with the nature, duration, and frequency of such exposure. The doctor would have to set out the nature and probable causes of past and present medical problems and the details of the plaintiff's work, exposure, and smoking history. The doctor would have to verify that at least 10 years had elapsed between the plaintiff's first exposure to asbestos and the date of the diagnosis.

In the report, the doctor would have to verify that the plaintiff had a quality 1 or 2 chest x-ray that was read by a certified B-reader and that the x-ray showed bilateral small irregular capacities with a profusion grading of 1/1 or higher for an action filed on or after May 1, 2005, or a profusion grading of 1/0 for an action filed before May 1, 2005. The B-reader also would have to confirm that the chest x-ray showed bilateral diffuse pleural thickening graded b2 or higher, including blunting of the costophrenic angle, or showed pathological asbestosis graded 1(B) or higher. The doctor would have to verify that the plaintiff had asbestos-related pulmonary impairment established by a pulmonary test that showed forced vital capacity below the lower limit of normal or below 80 percent of predicted and FEV1/FVC ratio at or above the lower limit of normal or at or above 65 percent. Alternatively, the pulmonary test would have to show that total lung capacity was below the lower limit of normal or below 80 percent of predicted.

In the report, the doctor would have to conclude that the plaintiff's impairment probably was caused by asbestos exposure, rather than some other cause, as revealed through the plaintiff's work, exposure, medical, or smoking history. The report would have to include numerous medical

reports, including the pulmonary function tests and lung volume tests, that the doctor reviewed to reach the conclusions.

If the plaintiff's pulmonary function tests did not meet the established requirements, but the plaintiff's chest x-ray was a quality 1 or 2 and showed a profusion grading of 2/1 or higher, the plaintiff could submit a report with all of the requirements other than the minimum pulmonary function requirements to each defendant. A doctor who prepared such a report would have to have had a doctor-patient relationship with the plaintiff and would have to have concluded that the plaintiff had restrictive impairment from asbestosis.

If the plaintiff's x-ray findings did not meet the established requirements, the plaintiff still would meet the minimum standards if the pulmonary test showed that:

- the plaintiff met the established requirements for forced vital capacity;
- the plaintiff met the established requirements for total lung capacity or FEV1/FVC ratio;
- the pulmonary test showed that the plaintiff had a diffusing capacity of carbon monoxide below the lower limit or normal or below 80 percent of predicted; and
- the plaintiff had bilateral pleural disease or bilateral parenchymal disease consistent with asbestos exposure.

A doctor who prepared such a report would have to have had a doctor-patient relationship with the plaintiff and would have to have concluded that the plaintiff had asbestos-related pulmonary impairment.

Silica claims. In accordance with sec. 90.004, a plaintiff claiming a silica-related injury would be required to serve on each defendant a report prepared by a doctor board certified in pulmonary medicine, internal medicine, oncology, pathology, or, if the claim were for silicosis, occupational medicine. The report would have to confirm that the doctor had performed a physical examination of the plaintiff, or if the plaintiff were deceased, had reviewed the available medical records. The doctor also would have to have taken a detailed work and exposure history from the plaintiff, or if the plaintiff were deceased, taken such a history from a person who was knowledgeable about the plaintiff's exposures. The doctor would have to have taken a detailed medical and smoking history that

thoroughly reviewed the plaintiff's past and present medical problems and the most likely cause of those problems.

In the report, the doctor would have to set out the details of the plaintiff's work, exposure, medical, and smoking history. The doctor would have to verify that the plaintiff had one or more of the following:

- a quality 1 or 2 chest x-ray read by a certified B-reader that showed bilateral predominantly nodular opacities occurring primarily in the upper lung fields with a profusion grading of 1/1 or higher for an action filed on or after May 1, 2005, or a profusion grading of 1/0 or higher for an action filed before May 1, 2005;
- pathological demonstration of classic silicotic nodules exceeding one centimeter in diameter; or
- acute silicosis.

The report would be required to include numerous medical reports, including the pulmonary function tests and lung volume tests, that the doctor reviewed to reach the conclusions. If the plaintiff were asserting a claim for silicosis, the report also would have to verify that there had been a sufficient latency period for the applicable type of silicosis, that the plaintiff had at least class 2 or higher impairment due to silicosis, and that the doctor had concluded that the plaintiff's condition probably was caused by silica exposure as revealed in the plaintiff's work, exposure, medical, and smoking history. If the plaintiff was asserting a claim for silica-related lung cancer, the report would have to include a diagnosis that the plaintiff had primary lung cancer, that inhalation of silica substantially contributed to the cancer, and that at least 15 years had elapsed from the date of the plaintiff's first exposure to silica until the diagnosis.

Multidistrict litigation. SB 15 would establish multidistrict litigation (MDL) proceedings for asbestos and silica claims. MDL rules would apply to any action pending on the date the bill became law unless:

- the trial already had begun or was set to begin, and did begin, within 90 days of the enactment of the bill;
- the action was filed before September 1, 2003, and the plaintiff served a report that complied with sec. 90.003 or 90.004 on or before the 90th day after the bill became law; or

- the action was filed on or before September 1, 2003, and the plaintiff had malignant mesothelioma or a malignant asbestos or silica-related cancer.

If the plaintiff did not file a report complying with sec. 90.003 or sec. 90.004 before the 90th day after the bill became law, the defendant could file a notice to transfer the case to the MDL pretrial court.

If a case were transferred to an MDL pretrial court and the plaintiff had malignant mesothelioma, a malignant asbestos or silica-related cancer, or acute silicosis, the court would be required to expedite the action and attempt to bring the case to trial within six months from the date the case was transferred.

Certain special conditions would apply to a case that was pending when the bill became law. For a case that was pending when the bill became law and in which the plaintiff had not served a report in compliance with sec. 90.003 or sec. 90.004 within the required 90 days, the MDL court could not dismiss the case, but neither could it remand the case for trial until the plaintiff filed such a report or filed a report specified by sec. 90.010 (f)(1) — a report complying with many of the requirements of sec. 90.003 or sec. 90.004.

To comply with sec. 90.010 (f)(1), the plaintiff would be required to file a report by a doctor that verified that the doctor had taken a detailed work and exposure history from the plaintiff and had taken a detailed medical and smoking history that included a thorough review of the plaintiff's past and present medical problems and the most likely cause of the plaintiff's illness. The report must have set out the details of the plaintiff's work, exposure, medical, and smoking history and, if it were an asbestos claim, verify that at least 10 years had elapsed between the plaintiff's first exposure to asbestos an the date of diagnosis. The doctor must have concluded that the plaintiff's condition probably had been caused by exposure to asbestos or silica, as revealed in the plaintiff's work, medical, exposure, or smoking history. The report would have to include copies of numerous medical reports that had helped the doctor reach his conclusions.

The doctor making such a report would have to have had a doctor-patient relationship with the plaintiff. The doctor must have conducted a pulmonary function test on the plaintiff and interpreted the results himself.

The doctor would have to have concluded that the plaintiff had radiographic, pathologic, or computed tomography evidence establishing bilateral pleural disease or bilateral parenchymal disease caused by exposure to asbestos or silica. The doctor have to have concluded that the plaintiff had physical impairment comparable to the impairment a person would have if the plaintiff met the criteria established in sec. 90.003 or sec. 90.004.

In an action filed on or after the effective date of the bill, and in which the case was before the MDL pretrial court and the plaintiff had not filed a report in compliance with sec. 90.003 or sec. 90.004 and the plaintiff sought to have the case remanded for trial or the defendant sought to have the case dismissed, the plaintiff would be required to file a report that complied with sec. 90.010 (f)(1). Additionally, in order to either dismiss the case or remand it for trial without a report in compliance with either sec. 90.003 or sec. 90.004, the MDL court would be required to determine:

- that the sec. (f)(1) report and medical opinions offered by the plaintiff were reliable and credible;
- that due to unique or extraordinary physical or medical characteristics of the plaintiff, the medical criteria established in sec. 90.003 or sec. 90.004 did not adequately assess the plaintiff's impairment; and
- that the claimant had produced sufficient credible evidence for a finder of fact to find that the plaintiff was physically impaired as the result of exposure to asbestos or silica to a degree comparable to that of a person who met the requirements of sec. 90.003 or sec. 90.004.

By September 1, 2010, each MDL pretrial court established in this bill would be required to submit a report to the governor, the lieutenant governor, and the speaker of the House stating the number of cases on its docket as of August 1, 2010, the number of such cases that did not meet the criteria of sec. 90.003 or sec. 90.004, an evaluation of the effectiveness of the medical criteria established in secs. 90.003 and 90.004, and a recommendation as to how medical criteria should be applied to cases on the court's docket as of August 1, 2010.

Statute of limitations and other provisions. The bill would amend the Civil Practice and Remedies Code to change the date on which the two-year statute of limitations would begin to run for asbestos and silica-

related injuries. The period would begin to run either on the exposed person's death or when the plaintiff served the defendant a report complying with sec. 90.003 or sec. 90.004. The change in the statute of limitations would apply only to an action that commenced or was pending on or after the effective date of the bill.

In an action pending on the date the bill became law and in which the trial began on or before the 90th day after the date this bill became law, the plaintiff would not be required to serve a report on any defendant unless a mistrial, new trial, or retrial subsequently was granted. If the trial began on or after the 90th day the bill became law, the plaintiff would be required to serve a report on each defendant within a specified time frame. If a plaintiff failed to timely serve a required report on a defendant, the defendant could file a motion to dismiss the plaintiff's claim within 30 days after the due date for the report to have been served. A plaintiff would have 15 days after the motion to dismiss was filed to serve the required report on the defendant. A dismissal would be without prejudice such that the plaintiff in the future could attempt to re-assert the claim. Unless all parties agreed, multiple plaintiffs could not be joined for a single trial if the case were brought on or after the effective date of the bill.

The bill would allow a defendant to appeal a court's decision not to dismiss the plaintiff's asbestos or silica case when the defendant claimed that the plaintiff had failed to serve a report in compliance with sec. 90.003 or sec. 90.004 on the defendant in a timely manner. The bill would amend the Government Code to add actions in which the plaintiff had been diagnosed with malignant mesothelioma, malignant asbestos or silica-related cancer, or acute silicosis to the list of cases that courts are instructed to give preference to in setting trials.

The bill would amend the Insurance Code to prevent an entity that offered a health benefit plan or an annuity or life insurance policy from rejecting, denying, limiting, canceling, refusing to renew, or increasing the premiums for the coverage based on the fact that a person had been exposed to asbestos or silica or had filed a claim under Civil Practices and Remedies Code, ch. 90. This provision would apply only to a health benefit plan or an annuity or life insurance policy delivered or renewed on or after the effective date of this bill.

The bill also includes a section on findings and purpose, laying out the history of asbestos and silica cases in the U.S. and Texas, and stating that the bill is needed to address problems caused by the number of cases being filed.

The changes in law made by the bill would not apply to a trial that already had commenced when the bill took effect. The bill would provide for a direct, accelerated appeal to the Supreme Court from an order of a trial court relating to the constitutionality of any part of the bill. The bill would include a section stating that the changes made to sections of the Civil Practice and Remedies Code by this bill were not severable, that none of these sections could be enacted without the others, and that if any of those sections were held invalid, all sections would be invalid.

The bill would take effect September 1, 2005.

SUPPORTERS SAY:

SB 15 would establish a fair compromise between the interests of those who have been exposed to asbestos and silica and companies that may be sued for such exposure. The bill would ensure that only those who were already ill from exposure to asbestos or silica could bring a case in Texas. It also would protect those people who had been exposed to asbestos or silica but had not become ill by changing the way the statute of limitations applies to their claims.

Exposure to asbestos or silica does not necessarily mean that a person will become ill. Under current law, however, persons who believe they might have an asbestos- or silica-related disease must file a claim for damages within two years or lose the ability to file a claim at all. This results in thousands of people filing claims each year simply so they will not lose the ability to file a claim later should they develop an illness. SB 15 would address this problem by changing the statute of limitations as it applies to asbestos and silica-related illnesses such that the two-year period would not begin to run until a plaintiff served a defendant with a medical report establishing that the plaintiff had an asbestos- or silica-related impairment. This alone would clear thousands of cases from Texas courts, allowing cases involving plaintiffs who already are gravely ill to be heard much more quickly.

The bill also would require plaintiffs to meet certain minimum medical criteria to establish the they truly are ill. This would save millions of dollars for businesses who might have exposed their workers to asbestos

or silica because people who were not sick could not file claims, and these businesses, as a result, would not have to pay attorney's fees and damage awards to people who were not, and might never become, ill.

By establishing a pretrial MDL process, SB 15 dramatically would decrease forum shopping in Texas. While asbestos cases may be filed in either state or federal court, the percentage of cases filed in federal court has fallen to less than 20 percent since the early 1990s when the federal court system began transferring cases to a single judge for multidistrict litigation. At that time, Texas saw a sharp increase in the number of asbestos cases filed in state court. Texas has about half of all asbestos claims filed in the nation. Claimants frequently "forum shop" and often wind up in Texas courts because the laws governing punitive damages and the juries in Texas are favorable to plaintiffs. By routing cases through MDL proceedings, rather than allowing them to go straight to trial before a jury, SB 15 would reduce the number of asbestos and silica cases filed in Texas.

OPPONENTS SAY:

SB 15 unfairly would limit Texans' access to courts, rationing justice by limiting those who could pursue their claims. Many people who have asbestos- or silica-related illnesses would be precluded by the minimum medical criteria from seeking justice through the courts. Many workers would not be qualified to bring a case even if they were too ill to work. Under the current system, juries decide whether a claimant is impaired as part of their deliberations about liability. SB 15 would take that power away from juries and give it the Legislature. Texas relies on juries to make decisions in highly complex cases, including life and death decisions in capital murder cases, and they are sufficiently qualified to evaluate asbestos and silica cases as well. Additionally, only 6 percent of personal injury suits filed in Texas do not involve auto accidents, and asbestos and silica cases are only a small portion of those non-auto cases. Texas courts are not overwhelmed by asbestos and silica cases.

The implication that healthy individuals are filing claims is false. Asbestos cases are very difficult and costly to pursue, so lawyers have an economic interest only in taking cases in which an actual injury occurred. Texas may have a larger proportion of asbestos cases than other states because it has a significant industrial base, a large resident retiree population that was exposed to asbestos years before, a transitory industrial workforce that has temporary residency, and a history of product liability litigation with specialized legal practices. Changes in the venue laws in the mid-1990s

required that plaintiffs plead and prove sufficient facts to show that a Texas venue was proper in filing such cases. The new venue rules authorize judges to remove cases that do not belong in the state. Because cases take years to resolve, there may be cases in the system that were filed under old venue rules, which may have inflated Texas' numbers.

The recent resurgence in the number of cases filed in Texas is due to a one-time underlying factor — mass screening. During the late 1990s, some plaintiff law firms offered free x-ray screening for members of certain unions whose work might have exposed them to asbestos. That screening caught a number of cases that otherwise would have gone undetected for many more years. It created a false "bubble" in filings because workers who otherwise would not have filed until a disease was diagnosed proceeded with a claim while the statute of limitations still applied.

Applying SB 15 retroactively to certain claimants who already have cases pending would be fundamentally unfair. These cases should be governed by the law in effect when they were filed.