Asbestos & Silica Compensation Fairness Act - FL
By Alan Fiedel and Guy J. Levasseur

Florida is leading the way in tort reform as to silica and asbestos claims. The Florida Legislature overwhelmingly passed the Asbestos & Silica Compensation Fairness Act of 2005, which establishes medical criteria for plaintiffs claiming injury from asbestos or silica exposure. The new law became effective last July and provides significant limitation on the ability to bring class actions and other lawsuits, unclogging state courts and relieving defendants of the tremendous financial burden of defending or settling claims brought by unimpaired plaintiffs.

Background

The Florida Legislature overwhelmingly passed the Asbestos & Silica Compensation Fairness Act of 2005. This act establishes medical criteria for plaintiffs claiming injury from asbestos or silica exposure and became effective July 1, 2005.

The act is aimed at unclogging the courts and relieving defendants of the tremendous financial burden of defending or settling claims brought by unimpaired plaintiffs. The Legislature intends the act to allow plaintiffs with the most serious injuries to recover fully and promptly, now and in the future.

To file or maintain a civil action for damages or other civil or equitable relief arising out of, based on, or related to the health effects of exposure to asbestos or silica, the act:

- requires plaintiffs to make a \textit{prima facie} showing of actual physical impairment based on certain specified medical criteria in the case of a non-malignant asbestos claim, an asbestos-related lung cancer claim and certain silica-related diseases;

- does not require plaintiffs to make any \textit{prima facie} showing for mesothelioma or non-smoker plaintiff cancer of the esophagus, pharynx and larynx claims.

The act also requires plaintiffs to file a written report and supporting test results constituting \textit{prima facie} evidence of physical impairment. A plaintiff’s claim must be dismissed, but without prejudice, if the required \textit{prima facie} showing is not made. However, a claimant making the required \textit{prima facie} showing will not be presumed, at trial, to be impaired by an asbestos- or silica-related condition or to have conclusively established the liability of any defendant. The presentation of the required \textit{prima facie} evidence under the act will not be admissible at trial.

Issues

Aside from establishing medical criteria, the act provides significant protections for asbestos and silica defendants.

First, the act provides limits on damages, as follows: no punitive damages may be awarded in any asbestos- or silica-related claim, and no damages may be awarded for fear or risk of cancer. However, a plaintiff may bring suit for a malignant asbestos-related claim after having previously settled a non-malignant claim based upon exposure. As such, the settlement of a non-malignant claim may not require, as a condition of settlement, that the plaintiff release any future claim for asbestos-related or silica-related cancer. The act also requires plaintiffs to disclose collateral source payments and requires the court to permit setoffs.

Second, the act seems to eliminate strict liability for defendants who sold, but did not manufacture, asbestos or silica. Under the act, a seller of asbestos or silica will only be liable when its acts or omissions injured the plaintiff. The act sets forth 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 harm; (2) that the product failed to conform to the seller’s express warranty and this non-conformance caused the plaintiff’s injury; or (3) the product seller engaged in intentional wrongdoing.

Comment

This appears to be a fundamental change in Florida law. Previously, all those in the chain of distribution were strictly liable for injuries caused by a defective product, regardless of fault. Liability was based on the defective product, not the conduct of the parties who sold it.

The act’s specific intent is to impose liability on a seller based only on the seller’s conduct, rather than on some other party’s defective product, which was the case previously. The act specifically instructs that a seller’s failure to exercise reasonable care cannot be based only on an alleged failure to inspect, if there was no reasonable opportunity to inspect the product. This is designed to prevent an unreasonable standard of care from being imposed.

Unfortunately, the act does not specifically state whether there can be a claim against a seller based only on the seller’s failure to warn, as is currently the case. Logically, it would appear that if a seller has no opportunity to inspect a product, and this lack of opportunity to inspect cannot be the subject of liability, then it would appear that the seller should not be held liable for a failure to warn as well. However, it is an open question as to whether a seller can be held liable under the new act for failure to warn of a defect it cannot discover.

For any asbestos or silica claim not barred as of July 1, 2005, the act changes when the statute of limitations begins to run. Under the act, 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 is physically impaired by an asbestos-related or silica-related condition.

Thus, under the act, the plaintiff’s physical impairment starts the clock running, not simply the discovery of exposure to silica. The intent of this section was to broaden the statute of limitations to protect claimants’ rights to bring suits — including suits that may be filed decades from now — in return for enacting the bar on litigation for claimants who cannot obtain medical documentation that their particular asbestos-related or silica-related disease was caused by exposure to those substances, and that there is actual injury.

We note that there is an ongoing legal issue with respect to the constitutionality of some of the above provisions and expect that there may be legal challenges to one or more sections of the act. Several Florida court jurisdictions are at odds as to whether the act’s medical criteria requirements apply to cases where trial dates had been set prior to the effective date of the act.

Florida follows 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.

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