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Sandbagging Closed Texas Courtrooms with Senate Bill 15: The Texas Legislature's Attempt to Control Frivolous Silicosis Claims without Restricting the Constitutional Rights of Silicosis Sufferers.

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SANDBAGGING CLOSED TEXAS COURTROOMS WITH SENATE BILL 15: THE TEXAS LEGISLATURE'S ATTEMPT TO CONTROL FRIVOLOUS SILICOSIS CLAIMS WITHOUT RESTRICTING THE CONSTITUTIONAL RIGHTS OF SILICOSIS SUFFERERS

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I. INTRODUCTION

Leslie Blevins stumbles out of the bathroom and struggles with the oxygen tube hanging on the door. His hands shake so violently that he has trouble putting the forked tube into his nose. Wide-eyed with desperation, he finally inserts it, then collapses on a nearby couch. His hair is wet, his face flushed, his eyes watering. He coughs and gasps as if he's been punched in the gut. Blevins, 45, has just taken a shower.[1]

1. Gardiner Harris, *Dying at 45, a Former Miner Exists Breath to Breath*, COURIER-J. (Louisville, Ky.), Apr. 19, 1998, at K3, *available at* http://www.courier-journal.com/dust/dust_victims_blevins.html.

Leslie Blevins, a coal-mining veteran, is just one of thousands of people in the United States suffering from silicosis.[2] He developed the disease from a short, three-month period of mining through a sandstone layer to reach a coal seam.[3] Those three months have forever changed his life.

The tragedy is that silicosis is an entirely preventable disease which is known to have been in existence since the sixteenth century, yet it continues to be a considerable problem.[4] Furthermore, silicosis is a virtually incurable lung disease[5] brought on by the inhalation of respirable-sized crystalline silica particles.[6] Fortunately, even though "[s]ilica . . . is the second most common constituent of the earth's crust,"[7] it is generally only found in respirable form when used or encountered in certain occu-

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2. *See* DIV. OF RESPIRATORY DISEASE STUDIES, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUBL'N NO. 2003-111, WORK-RELATED LUNG DISEASE SURVEILLANCE REPORT 2002, at 67 (2003), *available at* http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111.pdf (finding the number of silicosis cases over a ten-year period in Michigan, New Jersey, and Ohio to be 1180).

3. Gardiner Harris, *Dying at 45, a Former Miner Exists Breath to Breath*, COURIER-J. (Louisville, Ky.), Apr. 19, 1998, at K3, *available at* http://www.courier-journal.com/dust/dust_victims_blevins.html.

4. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 570 (S.D. Tex. 2005) (expounding that "[s]ilicosis is one of the oldest recognized occupational diseases, with cases recorded as far back as the 16th century" and is "100 percent preventable"). Silicosis can be prevented by the use of basic safety procedures and equipment, which at a minimum include a properly rated respirator that fits correctly. *Id.* Other methods include ventilation systems, equipment that can be operated from a remote location away from the silica dust, and "wet methods" that prevent silica dust clouds. *Id.*; *see also* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 987-88 (2005) (noting that silicosis is completely preventable and was "recognized as early as 460 B.C.E.").

5. *See In re Silica Prods.*, 398 F. Supp. 2d at 569 (noting that a lung transplant is the only treatment that will cure silicosis); Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 987 (2005) (acknowledging that the only effective cure for silicosis is a lung transplant, which is "an extremely expensive and dangerous procedure").

6. NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUBL'N NO. 93-123, NIOSH ISSUES NATIONWIDE ALERT ON SILICOSIS 1-2 (Nov. 18, 1992), *available at* http://www.cdc.gov/niosh/93-123.html; *see also In re Silica Prods.*, 398 F. Supp. 2d at 569 (exploring the progression of silicosis from its beginnings when respirable-sized silica particles are first inhaled); Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 173-75 (Tex. 2004) (discussing the process by which silica is broken down into respirable-sized particles during the abrasive blasting process, which causes silicosis in the employees working around the silica dust).

7. TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(i), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)]; *cf.* Linda Regis, *From the Sandbox to Sandblasting: Regulation of Crystalline Silica*, 17 PACE ENVTL. L. REV. 207, 207 & nn.1 & 2 (1999) (noting that the International

pations, such as abrasive blasting and mining.[8] However, the number of persons in these occupations that are exposed to silica still produces cause for great concern, considering an estimated two million workers in 1999 alone were exposed to silica-laden dust.[9]

Mere exposure to silica does not result in silicosis, and only a small fraction of those exposed will experience any functional or physical impairment.[10] Silicosis manifests itself in different degrees of severity and "is classified into three types: chronic/classic, accelerated and acute."[11] Symptoms range from slight shortness of breath to total respiratory failure and death.[12] Persons experiencing severe symptoms of acute silicosis, like Leslie Blevins, must expend large amounts of money for medications,

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Agency for Research on Cancer classified silica as the most common mineral known to be a carcinogen in the earth's crust).

8. *See, e.g.*, *In re Silica Prods.*, 398 F. Supp. 2d at 570 (listing the occupations where exposure to respirable silica is the most prevalent "as abrasive blasting . . . , mining, quarrying, and rock drilling").

9. Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 998 (2005).

10. *See* Linda Regis, *From the Sandbox to Sandblasting: Regulation of Crystalline Silica*, 17 PACE ENVTL. L. REV. 207, 235 (1999) (stating that there is not a risk of silicosis "at the low, infrequent levels of exposure within the ambient air"). Silica is so common on the earth's surface that even a small gust of wind stirs some of it into the air. *Id.* at 227; *cf.* 29 C.F.R. § 1910.1000 (2005) (setting forth the standards for air contaminants in which the Occupational Safety and Health Administration has determined that there is a safe amount of silica for a worker to be exposed to in an eight-hour work day); 29 C.F.R. § 1926.55 (2005) (setting forth the standards for gases, vapors, fumes, dusts, and mists in which the Occupational Safety and Health Administration limited the maximum concentration of respirable silica that a worker is to be exposed to). *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(m), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)] (noting that many claimants file lawsuits against silica sand suppliers even though they are not experiencing, and may never experience, any symptoms—just to avoid having the statute of limitations bar their claims).

11. *In re Silica Prods.*, 398 F. Supp. 2d at 569; *see also* OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, PUBL'N NO. 3177, "CRYSTALLINE SILICA EXPOSURE," HEALTH HAZARD INFORMATION FOR CONSTRUCTION EMPLOYEES 1 (2002), *available at* http://www.osha.gov/Publications/osha3177.pdf (enunciating that silicosis is classified into three categories).

12. *See In re Silica Prods.*, 398 F. Supp. 2d at 569 (listing the common symptoms of silicosis as "shortness of breath, fatigue, chest pain, weight loss, fever and/or respiratory failure"); DIV. OF ENVTL. & OCCUPATIONAL HEALTH, N.J. DEP'T OF HEALTH & SENIOR SERVS., WHAT PHYSICIANS NEED TO KNOW ABOUT OCCUPATIONAL SILICOSIS AND SILICA EXPOSURE SOURCES (Aug. 1998), http://www.cdc.gov/elcosh/docs/d0600/d000600/d000600.html (stating that silicosis symptoms range from very little or no effect on the pulmonary function for chronic silicosis to severe impairment of pulmonary function for acute silicosis) (on file with the *St. Mary's Law Journal*).

medical equipment, and transportation to and from doctors' appointments.[13]

In the 1980s, Texas became a focal point for silicosis litigation,[14] in part because of its large jury verdicts[15] and its common law affirmative duty on suppliers of silica sand to warn users of possible hazards.[16] Statutes enacted to limit the liability of employers, such as workers' compensation statutes, were not broad enough to limit the liability of silica sand suppliers.[17] The claims filed against silica sand suppliers were largely predictable until 2001, but have since risen precipitously.[18] The increased

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13. *See* R.G. Dunlop & Gardiner Harris, *Few Miners Now Qualify for Benefits, Kentucky Law's Black-Lung Test Harder to Pass*, COURIER-J. (Louisville, Ky.), Apr. 25, 1998, at K1, *available at* http://www.courier-journal.com/dust/frame_compensation_benefits.html (discussing the plight of a man with black lung disease who is over $6000 in debt just for the equipment he must rent in order to survive); *see also* Gardiner Harris, *Dying at 45, a Former Miner Exists Breath to Breath*, COURIER-J. (Louisville, Ky.), Apr. 19, 1998, at K3, *available at* http://www.courier-journal.com/dust/dust_victims_blevins.html (suggesting that Leslie Blevins is one of the few "lucky ones" who receives a compensation check to help pay for the high cost of his medical bills).

14. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 995-96 (2005) (analyzing the effect of the spread of silicosis that flowed from the "resurgence of the West Texas oil industry" during the 1970s and 1980s, and the litigation that followed).

15. *See* Message of Gov. Perry, Tex. S.B. 15, 79th Leg., R.S. (2005) (noting that many cases are filed in Texas with the hope of receiving the maximum jury verdict possible); AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2005, at 13-15 (2005), *available at* http://www.atra.org (naming certain areas of Texas collectively as the number one "judicial hellhole" in the United States in 2005 as a result of, inter alia, the size of the jury verdicts handed down in the state).

16. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 995 (2005) (recognizing that "Texas common law provided that dangerous product suppliers had an affirmative duty to warn users of the possible hazards"); *see also* Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 192 (Tex. 2004) (discussing six factors that should be taken into account to determine "whether a flint supplier ha[d] a duty to warn abrasive blasting operators' employees . . . that inhaling silica dust could result in disability and death"). The six factors that the Texas Supreme Court in *Humble Sand & Gravel* took into consideration were: (1) "[t]he likelihood of serious injury from a supplier's failure to warn;" (2) "[t]he burden on a supplier of giving a warning;" (3) "[t]he feasibility and effectiveness of a supplier's warning;" (4) "[t]he reliability of operators to warn their own employees;" (5) "[t]he existence and efficacy of other protections;" and (6) "[t]he social utility of requiring, or not requiring, suppliers to warn." *Id.* at 192-94.

17. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 995 (2005) (noting that workers' compensation statutes enacted to limit liability only protected employers and not sand providers or equipment manufacturers).

18. Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 696 (2005) (quoting Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(l), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)).

number of claims, the majority of which are being filed by persons without manifested symptoms,[19] are restricting the ability to receive compensation for those who truly deserve it.[20]

While deaths associated with silicosis have dropped dramatically over the past thirty years—largely from an increase in compliance with existing safety guidelines[21]—the number of claims has risen sharply.[22] One supplier of silica sand had "15,000 new claims filed [against it] in the first six months of 2003 . . . [ten] times the number of claims it had in all of 2001."[23] The crisis has been felt industry-wide, with increased claims filed against all of the major silica sand suppliers.[24] Suppliers are being forced into bankruptcy, leaving those who deserve compensation with large bills and empty pockets.[25]

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19. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(m), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)] (noting that silica claims "often arise when an individual . . . has no functional or physical impairment from any silica-related disease").

20. *See id.* historical note § 1(n) (stating that the purpose of the Act is to allow people who are suffering from an impairing form of silicosis to get compensation through the court system, while preventing those who are not suffering an impairing form of silicosis from wasting judicial and litigant resources); *cf. In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 636 (S.D. Tex. 2005) (discussing the damaging effect that mass over-diagnosing potential silicosis patients has on defendants and plaintiffs whose claims have merit).

21. *See* Div. of Respiratory Disease Studies, Nat'l INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUBL'N NO. 2003-111, WORK-RELATED LUNG DISEASE SURVEILLANCE REPORT 2002, at 53 (2003), *available at* http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111.pdf (reporting that the number of deaths in the United States where silicosis was a contributing cause has dropped from almost 1200 in 1968 to less than 200 in 1998).

22. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(l), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)] (emphasizing the "great public health achievement[ ]" of reducing the number of silicosis cases, but expounding on the increased number of claims filed in recent years); Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 998 (2005) (noting that "[t]he rate of silica lawsuit filings has grown tremendously in recent years," and that "[t]oday, [in 2005,] silica litigation has reached an all time high").

23. TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(l), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)].

24. *See id.* (suggesting that increased numbers of silicosis claims are generally being experienced by suppliers of silica sand); Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 998 (2005) (discussing the increasing number of silicosis claims that several large silica sand suppliers are experiencing).

25. *See* Message of Gov. Perry, Tex. S.B. 15, 78th Leg., R.S. (2005) (claiming that "junk lawsuits . . . have forced dozens of innocent employers into bankruptcy"); Robert D. Chesler, James Stewart & Geoffrey T. Gibson, *Is Silica the Next Asbestos? Silica Litigation Will Present Similar Insurance Issues and Raise Many of the Same Controversies as Asbes-*

Recently enacted Senate Bill 15 (S.B. 15) is the Texas Legislature's answer to problems created by the large amount of frivolous silica-related claims and is the state's latest step in tort reform.[26] The goal of S.B. 15 is, in pertinent part:

> to protect the right of people with impairing . . . silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed to . . . silica but have no functional or physical impairment from . . . silica-related disease.[27]

In addition, S.B. 15 attempts to solve the problems and inefficiencies plaguing asbestos litigation; however, asbestos issues are beyond the scope of this Comment and are utilized only as references.

S.B. 15 codifies many changes affecting silica litigation, and to achieve its goal it employs three basic methods.[28] First, it adopts medically accepted standards "for differentiating between individuals with . . . silica-related disease causing functional impairment and individuals with no functional impairment."[29] Second, it "provides a method to obtain the dismissal of [sometimes frivolous] lawsuits in which the exposed person has no functional impairment, while at the same time protecting a person's right to bring suit on discovering an impairing . . . silica-related injury."[30] Finally, to protect the rights of those who may later develop a functional impairment from their silica exposure, it "creates an extended period of time before limitations begin to run in which to bring [silica exposure] claims."[31]

Proponents of S.B. 15 praise it as being "some of the finest work . . . done . . . by [the Texas Legislature]"[32] because it advances tort reform

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tos Litigation, 176 N.J. L.J. 1236, 1236 (2004) (noting that many asbestos suppliers were forced into bankruptcy from a high volume of claims and suggesting that the same fate could meet silica sand suppliers during the current wave of silica related claims).

26. Tex. S.B. 15, 79th Leg., R.S., 2005 Tex. Sess. Law Serv. 169.

27. TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(n), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)].

28. *See id.* (providing that the goals of S.B. 15 are to be carried out by instituting medical criteria that must be met in order to maintain a suit, providing a method of dismissal for frivolous claims, and extending the period of limitations for those who do not meet the medical criteria).

29. *Id.* historical note § 1 (n)(1).

30. *Id.* historical note § 1 (n)(2).

31. *Id.* historical note § 1 (n)(3).

32. S.J. OF TEX., 79th Leg., R.S. 1382 (2005) (remarks of Sen. John Carona).

and eases the burdens placed on the Texas court system by its elimination of many frivolous claims.[33] S.B. 15's opponents criticize it as propaganda of defense lawyers and have "promised to contest the constitutionality of several parts of the statute" on both state and federal constitutional grounds.[34] The Texas Legislature provided for an accelerated "direct appeal to the [Supreme Court of Texas] from an order, however characterized, of a trial court granting or denying a[n] . . . injunction on the grounds of the . . . validity or invalidity . . . of all or any part of this Act."[35]

This Comment touches on the progression of silicosis litigation and analyzes the constitutional challenges that are expected to be brought against S.B. 15. Part II explores the history of silicosis litigation leading up to the enactment of S.B. 15 and briefly overviews portions of the bill. Part III analyzes the most probable constitutional challenges to S.B. 15 under both the Texas and the federal constitutions. Finally, Part IV concludes that although S.B. 15 will be vigorously attacked by its opponents, it will likely be upheld as constitutional.

II. BACKGROUND

Throughout the twentieth century, there have been at least three distinct waves whereby silicosis has evolved from being an afterthought to one of society's major concerns.[36] As silicosis awareness has increased, so has the number of silicosis claims.[37] The main factors that have played a role in creating these waves are employers' and suppliers' non-disclo-

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33. *See* Message of Gov. Perry, Tex. S.B. 15, 78th Leg., R.S. (2005) (claiming that S.B. 15 will ensure that every sick person gets their day in court by reducing the number of junk lawsuits).

34. *See* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (acknowledging that "[c]ounsel for asbestos and silica claimants have expressed a great deal of dissatisfaction with S.B. 15," and listing the constitutional challenges likely to be brought against it).

35. TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 10, 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)].

36. *See generally* John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (discussing the history of silicosis and silicosis litigation); Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 984-98 (2005) (exploring the history of silicosis and silicosis litigation).

37. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 986-98 (2005) (noting that the number of claims filed has varied over the history of silicosis litigation and discussing several specific incidents when the claims have suddenly increased).

sure of health risks[38] and plaintiff's lawyers looking for a quick settlement.[39] Both of these factors have played a part in each wave of silicosis awareness and litigation, but one factor or the other has taken the leading role in building each wave.[40] Regardless of what has driven the litigation, there have always been persons who are truly suffering and in need of compensation for their injuries.[41]

A. *History of Silicosis Awareness and Litigation*

The first wave of silicosis awareness began in the 1930s.[42] The industrial revolution produced new technologies that were able to more efficiently perform old tasks, such as rock drilling and mining. However, one drawback to the technology was that people were being exposed to respirable silica in ever increasing numbers.[43] The American public noticed that thousands of people were getting sick,[44] and "the national press along with scientific and medical journals published articles that recognized silicosis as a national problem that posed a threat to millions of Americans."[45] Lawsuits against various industries using silica began to stack up and the insurance industry, facing large losses, "began to push

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38. *See, e.g.*, John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (discussing the efforts of industry lobbyists that "led to countless unnecessary exposures to . . . known hazard[s]").

39. *See* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. S.B. 15, 79th Leg., R.S. (2005) (suggesting that the recent rise in the number of silicosis claims filed in Texas is due to mass screenings that are operated by plaintiff law firms); *cf.* Message of Gov. Perry, Tex. S.B. 15, 78th Leg., R.S. (2005) (acknowledging that many lawyers file their claims in Texas, hoping to receive larger jury verdicts than they could get in other states).

40. *See generally* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 986-98 (2005) (dissecting the history of silicosis litigation and stating the causes for each major incident).

41. *See, e.g.*, Gardiner Harris, *Dying at 45, a Former Miner Exists Breath to Breath*, COURIER-J. (Louisville, Ky.), Apr. 19, 1998, at K3, *available at* http://www.courier-journal.com/dust/dust_victims_blevins.html (discussing the plight of Leslie Blevins, who is suffering from acute silicosis and having to expend large amounts of money on medical bills).

42. *See, e.g.*, Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 988 (2005) (noting that "[a]wareness of silicosis grew with the industrial age" and became "nationally recognized as a deadly disease" in the 1930s).

43. *Cf. id.* at 990 (exploring the Hawk's Nest Disaster of the 1930s, in which approximately 700 people died on one job site alone from exposure to silica).

44. *See id.* at 988-89 (pointing to one job site in Vermont where workers began to notice in the early 1900s that "every one of them was dying before the age of fifty").

45. *Id.* at 988.

for the classification of silicosis as a compensable disease under state workers' compensation statutes" to try to limit their liability.[46]

The first wave peaked in the mid-1930s after what has been called "America's worst industrial disaster."[47] Over five thousand workers were employed to drill a tunnel through Gauley Mountain in West Virginia on a project that came to be known as the Hawk's Nest Disaster.[48] The workers encountered over one mile of silica while completing the tunnel, and they were never notified of the dangers of the silica or given safety equipment to protect against it.[49] Estimates are that approximately 400 to 700 people died and 1200 developed silicosis from this disaster.[50] The families of the victims brought more than 500 lawsuits against the employer.[51] The Hawk's Nest Disaster "solidified silicosis as a national problem."[52]

The 1940s continued the fallout from this disaster with a period of intense attentiveness to silicosis.[53] States determined that silicosis was compensable under the workers' compensation statutes,[54] and in 1949 the

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46. John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw).

47. *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 570 (S.D. Tex. 2005); *see also* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 990 (2005) (noting that the "Hawk's Nest Disaster brought silica to the national forefront" in the mid-1930s).

48. *See, e.g., In re Silica Prods.*, 398 F. Supp. 2d at 570 (noting that the "Tennessee Valley Authority built the 'Hawk's Nest Tunnel' through Gauley Mountain in West Virginia" and employed 5000 workers to complete the project).

49. *Id.*

50. *Compare id.* (contending that between 400 and 600 workers died during the construction of the "Hawk's Nest Tunnel," and 1200 developed silicosis), *with* John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (reporting that conservative estimates show that 700 workers died during the construction of the "Hawk's Nest Tunnel" and over 2000 were exposed to silica dust), *and* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 990 (2005) (stating that "700 workers died while working on the project").

51. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 990 (2005) (reporting that Union Carbide had 538 lawsuits filed against it by the workers who worked on the "Hawk's Nest Tunnel").

52. *Id.*

53. *Cf.* Urie v. Thompson, 337 U.S. 163, 179-80 (1949) (holding that employers are expected to know that working around silica dust is injurious to their employees' health). By the 1940s, the foundry industry and medical experts were in agreement that inhaling silica dust is extremely harmful to a person's health. Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 991 (2005).

54. *See* John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (proposing that legislatures around the country

United States Supreme Court stated that "[i]t is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust."[55] However, this trend was short lived, and by the 1950s silicosis had lost the attention that brought the issue into the national spotlight.[56] Many factors played a role in this decline. Notable among these factors included America's focus on World War II during the 1940s[57] and "the efforts of the business and insurance communities to paint the disease as a problem of the past, a 'Depression disease.'"[58]

The second wave of silicosis awareness saw its beginnings in the 1960s after several prominent doctors began to study and publish works concerning asbestos and silica exposure.[59] Industrial workers at the same time gained a political voice and "force[d] the U.S. government and others to take notice of the dangers silicosis posed."[60] In the 1970s, regulatory bodies established limits on silica exposure and monitored corporations for compliance with the new standards.[61] Affected companies came

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were pushed by the industry to encompass silicosis in workers' compensation statutes in order to save it from the silicosis tragedy).

55. *Urie*, 337 U.S. at 180.

56. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 992 (2005) (ascribing the disappearance of silicosis as a national issue in the 1950s to the refocus of the country after World War II); John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (particularizing that silicosis fell as a national issue in the 1950s from the influence of the business and insurance communities).

57. Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 992 (2005).

58. John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw).

59. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 993 (2005) (mentioning that the study of silicosis began in the 1960s by doctors at Tulane University); John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (referencing the study of asbestos exposure published by Dr. Irving J. Selikoff).

60. Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 993 (2005).

61. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 570 (S.D. Tex. 2005) (summarizing the regulatory efforts commenced in the 1970s); Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 993-94 (2005) (documenting the passage of the Occupational Safety and Health Act). The Occupational Safety and Health Act of 1970 created the National Institute of Occupational Safety and Health (NIOSH) and the Occupational Safety and Health Administration (OSHA). *Id.* at 993. These organizations were asked to develop exposure limits to hazardous materials including silica dust. *Id.* A study conducted by NIOSH showed that the majority of those who worked around silica dust were not adequately protected. *Id.*

out against the new measures and formed the Silica Safety Association to combat the new regulatory efforts.[62] The association was effective, and its efforts caused delays in the adoption of proper safety measures that would protect workers from silicosis.[63] Furthermore, the political atmosphere turned against the drive for proper safety guidelines when the economy was not strong enough to support the cost of such measures.[64]

The third wave of silicosis awareness began in the late 1980s and continues to grow in strength today.[65] The awareness started when improperly equipped workers in the Texas oil industry, which was booming during the oil crisis of the 1970s, began to develop silicosis.[66] The combination of an earlier case by the Fifth Circuit, which allowed lawsuits by end-users against asbestos suppliers,[67] and Texas's common law affirmative duty for "dangerous product suppliers . . . to warn users of the possible hazards,"[68] opened the door for these workers to bring suits against the suppliers of the silica sand. In the 1990s, regulatory bodies were revamped and new standards for silica exposure were advanced.[69] Lawsuits

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62. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 994 (2005) (explaining the formation of the Silica Safety Association by companies that would be affected by NIOSH's recommended safety standards).

63. *See id.* (chiding the Silica Safety Association for purposefully hiding known facts about the dangerousness of silica dust so companies would be able to continue their current practices). The Silica Safety Association actions led to the unnecessary exposure of an immeasurable number of workers, and potentially caused many injuries and deaths. *Id.* The silica sand suppliers concealed facts on the dangerousness of their products, despite a Fifth Circuit holding in 1973 that "a seller may be liable to the ultimate consumer or user for failure to give adequate warnings." Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1091 (5th Cir. 1973) (emphasis omitted).

64. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 994 (2005) (blaming President Ronald Reagan's economic policies for causing new regulations to be too costly to implement).

65. *See id.* at 995 (suggesting that in 1988 a silicosis epidemic spreading through Texas began to receive public attention).

66. *See id.* (recounting that workers in the Texas oil industry during the 1970s were not properly equipped with safety equipment when they worked with silica).

67. *Borel*, 493 F.2d at 1103.

68. Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 995 (2005); *see also* Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 173 (Tex. 2004) (outlining the silica sand suppliers' duty to warn).

69. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 996-97 (2005) (maintaining that President Clinton's administration gave "new life to NIOSH and OSHA").

followed these events and were being filed at ever increasing rates as the latency period for the onset of silicosis drew to an end.[70]

B. *The Current Environment Surrounding Silicosis Litigation in Texas*

Shortly after the turn of the century, the number of silicosis claims reigned out of control and increased tenfold without an industrial disaster large enough to account for all of them.[71] One court stated that the claims in one state alone "suggests a silicosis epidemic 20 times worse than the Hawk's Nest incident" of the 1930s.[72] Texas has seen its fair share of the new silicosis claims, receiving eleven percent of all claims filed in the United States from 2002 to 2004.[73]

There is not one particular reason why Texas has seen such a large percentage of the newly filed silicosis claims.[74] If one asks a lawyer who is familiar with silica litigation in Texas for the reasons why, they are likely to receive one of two answers, depending on whether they ask a plaintiff's lawyer or a defense lawyer. The plaintiff's lawyer will attribute "[t]he current rise in claims . . . [to] the latency of pulmonary dust disease and increased awareness among affected workers."[75] The defense lawyer, on the other hand, will argue that plaintiff's lawyers have created a "false bubble" of meritless silicosis claims by using a mass screening pro-

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70. *See* John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (attributing the current increase in the number of silicosis claims filed to the latency period of the disease).

71. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 572 (S.D. Tex. 2005) (stressing that the number of recently filed silicosis claims in Mississippi suggests an incident that is twenty times worse than America's worst industrial disaster on record).

72. *Id.*

73. *See* JOSEPH J. EGAN, NAVIGANT CONSULTING, AN UPDATE ON SILICA CLAIMS 1, 13 (2004), http://www.navigantconsulting.com/A559B1/navigantnew.nsf/vGNCNTByDocKey/PPA1C0761A1528/$FILE/Silicosis%20Article%20113004%20Egan.pdf (last visited Dec. 27, 2005) (compiling statistics indicating that eleven percent of national silica filings from 2002 to 2004 were filed in Texas) (on file with the *St. Mary's Law Journal*).

74. *Compare* John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (asserting that the current rise in silicosis claims is due to the latency period of the disease), *with* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 696 (2005) (citing the newly used mass screening methods as the cause for the latest increase in silicosis claims).

75. John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw).

cess to locate clients[76] and have filed the claims in advance of tort reforms that would limit their ability to file at a later date.[77]

Both sides have credible arguments. The latency period for silicosis, depending on the type, can range from a few weeks to more than ten years.[78] Workers during the Texas oil boom of 1970s, along with workers from various other industries, may just now be developing silicosis from a time when silica dust was not treated as serious a health hazard as it is today.[79] Even so, it is undeniable that plaintiffs' lawyers have converted their skills acquired from trying asbestos cases to their silicosis claims.[80] One of the techniques that has been transferred involves taking x-rays of thousands of potential clients during a mass screening process and having a few doctors review them without ever seeing the clients face-to-face.[81]

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76. *See* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 696 (2005) (tracing the current rise in silicosis cases filed in Texas to the use of mass screening methods originally developed for asbestos litigation); *see also* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 1011-13 (2005) (discussing the thoughts of several defense attorneys who agree that methods transferred from asbestos litigation to silica litigation have contributed to the dramatic rise in silica claims). These attorneys believe "the increase in silica claims can be attributed to the constraints that have been placed on asbestos litigation." *Id.* at 1013.

77. Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 1012 (2005) (recognizing that the current rise in silicosis claims might be due in part to the flood of claims that are being filed in an effort to avoid future tort reforms).

78. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 569 (S.D. Tex. 2005) (comparing the latency periods of the three classifications of silicosis). The latency period for acute silicosis ranges from months to a few years. *Id.* Accelerated silicosis typically has a latency period of five to ten years and chronic/classic silicosis characteristically requires fifteen to twenty years at a minimum. *Id.*

79. *Cf.* John M. Black, *Silicosis Still a Problem*, TEX. LAW., Nov. 25, 2002, at 35, *available at* 11/25/2002 TEXLAW 35 (Westlaw) (assessing the rise of silicosis claims in Texas to be due in part to the latency period of the disease). When the latency period of silicosis is taken into account, it becomes clear that many of the current cases likely stem from the early 1980s. At that time, it was not thought of or treated like the serious health hazard it is today. *See* Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 996-98 (2005) (outlining the change in attitude towards silicosis during the 1990s onward).

80. *See In re Silica Prods.*, 398 F. Supp. 2d at 580 (opposing the practice originally developed for asbestos litigation where doctors review many patients' x-rays without ever seeing the patients in person); Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 1012 (2005) (explaining that the asbestos litigation tactic of mass screening for potential claimants is now being used in silica litigation).

81. *See In re Silica Prods.*, 398 F. Supp. 2d at 600 (analyzing the practice of mass screening potential silicosis claimants by doctors who never personally saw the patients and were many times in different states); Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP.

The doctors then make a diagnosis of silicosis from the x-ray alone without ever discussing with the patients their past medical and work histories.[82] In a recent case, it was noted that "over 9,000 plaintiffs . . . were diagnosed with silicosis by only 12 doctors."[83]

C. *The Texas Legislature Responds by Enacting Senate Bill 15*

To address the issues plaguing silica litigation, the Texas Legislature enacted S.B. 15, changing the entire playing field on which to bring a silica-related suit.[84] Although it passed overwhelmingly,[85] it was not without its critics.[86] S.B. 15's relevant provisions notably provide a new procedure for filing silica-related claims[87] and allow for an extended time period in which to bring them.[88] A brief discussion of certain provisions that affect silica-related claims follows.

S.B. 15 begins with legislative findings of fact.[89] In general, the facts are construed to convey the enormity of the problems facing the silica industry.[90] Although the facts in this section of S.B. 15 are accurate, they are limited to telling one side of the story.[91] The uses of silica are listed,[92] followed by a thorough discussion about how silica sand suppliers are

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L. REV. 983, 1012 (2005) (recognizing that the mass screening process is being used in silica litigation).

82. *In re Silica Prods.*, 398 F. Supp. 2d at 600 (presenting many instances where doctors made a diagnosis without discussing their patient's prior work history, but instead got their information from a form supplied by the screening companies).

83. *Id.* at 580.

84. Tex. S.B. 15, 79th Leg., R.S., 2005 Tex. Sess. Law Serv. 169.

85. *See* Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 12 cmt., 2005 Tex. Sess. Law Serv. 169, 182 (Vernon) (verifying that S.B. 15 passed in the Senate unanimously and the House of Representatives "by a non-record vote").

86. *See* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (warning that counsel for silica claimants are very dissatisfied "with S.B. 15 and have promised to contest [its] constitutionality").

87. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.004 (Vernon 2005) (outlining all the reports required to make a claim pertaining to a silica related injury).

88. *See id.* §§ 16.003-.0031 (providing a time period in which to bring claims).

89. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)] (outlining the history of silicosis).

90. *See id.* historical note § 1(l) (reiterating that one company alone had over 15,000 new claims filed against it during a six month period in 2003).

91. *See* S.J. OF TEX., 79th Leg., R.S. 1387 (2005) (remarks of Sen. Rodney Ellis) (voicing concern that S.B. 15's findings of fact were lopsided in favor of the defense).

92. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(j), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)] (noting that silica is used to make common materials such as glass and ceramics).

affected by the increased number of claims in recent years.[93] In the middle of these facts is a short section on the health effects of silicosis.[94] This section, at best, makes the symptoms of silicosis seem at par with the symptoms of cigarette smoking and only briefly mentions that silica is classified as a carcinogen.[95] Senator Ellis commented that it "seems like all of the things listed in [the] preamble were on one side of the equation, and [the writers of the bill] didn't go and list things that would be documented findings on the other side of the equation."[96] He further stated that it is "setting the stage for what I assume others will argue about if this bill ends up in court."[97]

S.B. 15 continues by adding Chapter 90 to Title 4 of the Civil Practice and Remedies Code.[98] Chapter 90 defines the parameters in which silica-related claims must be brought.[99] Tight medical restrictions are put into place to allow only those who are currently experiencing functional impairment, physical impairment, or both, to get into the courtroom on the normal track.[100] Others who do not meet the requirements are sent to a multidistrict litigation court where the plaintiffs' claims will be subject to dismissal unless they can be amended to meet the standards set out or demonstrate, among other things, why "due to unique or extraordinary physical or medical characteristics . . . the medical criteria set forth in [the code] do[es] not adequately assess the exposed person's physical impairment caused by [the] exposure to . . . silica."[101] What standards a particular claim falls under also depends on when the claim was filed.[102] Claims filed before September 1, 2005 are treated differently from subsequent

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93. *See id.* historical note § 1(1) (tracing the history of silicosis in the United States).

94. *See id.* historical note § 1(k) (pointing out that silicosis is a disease of the lung).

95. *See id.* (misleading people to believe that silicosis is merely caused by prolonged exposure to silica dust). There is no mention in the findings of fact that silicosis was part of America's worst industrial disaster or that it can be caused by just a few weeks or months of heavy exposure to silica dust. *Id; see In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 569-70 (S.D. Tex. 2005) (addressing silicosis's extensive history, while touching on the latency period of silicosis and the "Hawk's Nest Disaster").

96. S.J. OF TEX., 79th Leg., R.S. 1387 (2005) (remarks of Sen. Rodney Ellis).

97. *Id.* at 1388.

98. TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001-.011 (Vernon Supp. 2005).

99. *See id.* (providing the requirements to maintain an asbestos or silicosis claim, including a detailed report that must contain a variety of facts).

100. *See id.* § 90.006(a) (requiring a report that satisfies TEX. CIV. PRAC. & REM. CODE ANN. § 90.004 to be filed as a condition precedent to maintaining a silicosis claim).

101. *Id.* § 90.010(f)(2)(B).

102. *See generally id.* (identifying different requirements for asbestos and silicosis claims filed before and after the statute took effect).

claims.[103] For example, claims filed before September 1, 2005 are not subject to dismissal for failure to serve a sufficient medical report on the defendant, whereas claims filed after that date may be dismissed under the same circumstances if a timely motion is filed by the defendant.[104]

The precise medical standards advanced by S.B. 15 are beyond the scope of this Comment; however, it is helpful to mention some of the standards and discuss the process in which the medical standards are to be determined. A claimant is required to serve on the defendant a report prepared by a doctor who meets certain standards, "verifying that the doctor or . . . [his subordinate] performed a physical examination, took a detailed occupational and exposure history, and took a detailed medical and smoking history that includes a thorough review of the exposed person's past and present medical conditions and their most probable causes."[105] In addition, the report must also contain a verification that the claimant has one of four recognized silica-related conditions described in the statute.[106] At a minimum, a claimant must have a 1/1 chest x-ray (slight scarring of the lungs is apparent) for a claim filed after May 1, 2005, and a 1/0 chest x-ray (slight scarring of the lungs may or may not be present) for a claim filed before that date.[107]

S.B. 15 also amends section 16.003 and adds section 16.0031 to the Civil Practice and Remedies Code.[108] The claimant takes from this amendment and addition almost total control of when the cause of action of a silica-related injury accrues for the purposes of the statute of limitations.[109] Instead of the traditional discovery rule,[110] a silica-related claim

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103. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.003-.004, .006-.007, .010 (Vernon Supp. 2005) (advancing different requirements for asbestos and silicosis claims filed after the bill took effect (Sept. 1, 2005) and claims filed previously).

104. *Id.* § 90.007.

105. Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 698 (2005); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 90.004 (Vernon Supp. 2005) (setting out what is necessary to satisfy the required medical report).

106. TEX. CIV. PRAC. & REM. CODE ANN. § 90.004 (Vernon Supp. 2005); *see also* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 698 (2005) (providing a condensed and simplified version of the detailed medical criteria required by the statute).

107. TEX. CIV. PRAC. & REM. CODE ANN. § 90.004(a)(3)(A) (Vernon Supp. 2005). In addition to the requirements set forth in the text of this Comment, the statute requires many more details to be present in the medical report. *Id.* § 90.004 (listing the requirements necessary for a satisfactory report).

108. *Id.* §§ 16.003-.0031.

109. *See id.* (allowing the claimant to determine when to serve the report on the defendant). Section 16.003 requires a person to bring suit within two years of the accrual of the cause of action. *Id.* § 16.003. Section 16.0031(b) was added in order provide the claimant the power to determine when the cause of action will accrue in a silica-related claim. *Id.* § 16.0031(b).

does not accrue until they serve on the defendant a report that complies with the statute or until the claimant passes away.[111] Therefore, even if a claimant has a report complying with the statute in their hand, it is up to the claimant to determine when to serve it on the defendant and begin the running of the two-year period of statute of limitations.[112] This provision is one of the only, and undoubtedly the most, plaintiff-friendly provision in the bill.

Finally, with S.B. 15, the Texas Legislature provided for an accelerated "direct appeal to the [S]upreme [C]ourt [of Texas] from an order, however characterized, of a trial court granting or denying a[n] . . . injunction on the grounds of the . . . validity or invalidity . . . of all or any part of this Act."[113] The Texas Legislature clearly expected constitutional challenges to the statute and wanted to provide a method to get a final determination quickly. The remainder of this Comment analyzes the possible constitutional challenges that are likely to be raised.

III. ANALYSIS

Constitutional challenges to S.B. 15 are almost a certainty.[114] Most of the thousands of silica-related claims currently pending in Texas are adversely affected by the bill, and the majority of those claims will effec-

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110. *See generally* Youngblood v. U.S. Silica Co., 130 S.W.3d 461 (Tex. App.—Texarkana 2004, pet. denied) (evaluating whether the plaintiff had enough information to qualify as "knowing" that he had silicosis—for purposes of the traditional discovery rule—from the time he saw a doctor who said that silicosis might be his ailment). The traditional discovery rule generally provides for a two year statute of limitations, and provides that a cause of action accrues—for purposes of starting that period—when a person knows or should have known about their injury. *Id.* at 464-65.

111. TEX. CIV. PRAC. & REM. CODE ANN. § 16.0031(b) (Vernon Supp. 2005); *see also* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (interpreting the new statute of limitation for silicosis claims as allowing a claimant to "receive a report and prevent the cause of action from accruing by simply not serving the report on a defendant").

112. *See* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (discussing the claimant's discretion on service of the required report). *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003-.0031 (Vernon Supp. 2005) (advancing the legal framework that allows a claimant to withhold serving a report on a defendant for the purposes of preventing the statute of limitations from beginning to run).

113. TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 10, 2005 Tex. Sess. Law Serv. 169, 169-70 (Vernon)].

114. *See generally* S.J. OF TEX., 79th Leg., R.S. 1388 (2005) (remarks of Sen. Rodney Ellis) (identifying the probability that S.B. 15 will be contested in court).

tively be brought to a standstill.[115] However, considering the current political environment in Texas favoring tort reform,[116] it will most likely be an uphill battle for those challenging S.B. 15. The last round of tort reform enacted in Texas by the 75th Legislature has survived all the challenges brought against it,[117] and several legal professionals are predicting the same fate for the challenges brought against S.B. 15.[118] The most probable grounds for challenges against S.B. 15 under the Texas Constitution are "the due course of law, equal protection, open courts, and no retroactive legislation clauses."[119]

A. *Texas Constitutional Challenges*

1. Due Course of Law Clause

Under the Texas Constitution, "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."[120] This language has been extended to encompass a matured cause of action on the theory that the cause of action has vested in the injured person.[121] Therefore, the Texas Constitution protects a vested right in a matured

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115. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Sess. Law Serv. 169, 169-70 (Vernon)] (asserting that silicosis claims often arise from individuals who have no functional or physical impairment); *see also* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 696 (2005) (suggesting that many silicosis claimants do not have any physical or functional impairment from the disease).

116. *See generally* Miriam Rozen, *Paradise Lost: Plaintiffs Bar Bemoans End of an Era as Tort Reformers Target Asbestos*, TEX. LAW., Feb. 28, 2005, at 1, 17, *available at* 2/28/2005 TEXLAW 1 (Westlaw) (framing the current political environment in Texas favoring tort reform by using asbestos reforms as a case-in-point).

117. Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005). *See generally* Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999) (striking down challenges brought against tort reforms enacted in 1997 that affected asbestos litigation).

118. *See, e.g.*, Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (predicting, "the courts should again find that the [Texas] Legislature has acted within the sphere of its powers to provide a measured and reasoned response to a well-defined and well-recognized problem").

119. *Id.*

120. TEX. CONST. art. I, § 19.

121. *See* Spellmon v. Sweeney, 819 S.W.2d 206, 210 (Tex. App.—Waco 1991, no writ) (noting that matured causes of action are protected by the Texas Constitution's Due Course of Law Clause); Coulter v. Melady, 489 S.W.2d 156, 159 (Tex. Civ. App.—Texarkana 1872, writ ref'd n.r.e.) (acknowledging that the Texas Constitution protects matured causes of action); *see also* Middleton v. Tex. Power & Light Co., 108 Tex. 96, 185 S.W. 556, 561 (1916) (advancing the right of the legislature to make classifications when no vested rights are impaired).

cause of action from being abrogated without due course of law.[122] This affords the claimant the right to be heard at a "meaningful time and in a meaningful manner."[123] Furthermore, it "requires a judicial examination of every issue that, according to established procedure, may effect [sic] the attainment of a legal trial, and in such a trial to determine the cause according to law."[124] However, a mere expectancy or hope that a claim will vest is not protected, and no rights or guarantees flow from it.[125]

The analysis of S.B. 15, under this provision, ends as soon as it begins with an initial determination of whether a claimant asserting a silica-related injury, who does not meet the medical criteria now set out in the Texas Civil Practice and Remedies Code, has a vested right in their cause of action. A right in a cause of action does not vest until it accrues,[126] and S.B. 15, as previously discussed, changed the point in time at which a claimant's silica-related injury cause of action accrues.[127] The accrual of the cause of action is made specifically contingent upon either (1) actually serving the defendants with a medical report that complies with the extensive requirements, or (2) the exposed person's death.[128] Therefore, until one of these two triggering events occur, the claimant's cause of action will not accrue and therefore will not become vested.[129] Because the right to the cause of action is not vested, the Due Course of Law

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122. *See Spellmon*, 819 S.W.2d at 210 (asserting that, because matured causes of action become a vested right, they will receive protection from the Texas Constitution's Due Course of Law Clause); *Coulter*, 489 S.W.2d at 159 (emphasizing that matured causes of action are vested rights and will receive constitutional protection); *see also Middleton*, 185 S.W. at 561 (allowing the legislature to formulate classifications when no vested rights are impaired).

123. Galindo v. State, 535 S.W.2d 923, 927 (Tex. Civ. App.—Corpus Christi 1976, no writ).

124. *In re* B.M.N., 570 S.W.2d 493, 502 (Tex. Civ. App.—Texarkana 1978, no writ).

125. *See* Dallas v. Trammell, 129 Tex. 150, 101 S.W.2d 1009, 1014-15 (1937) (adopting the notion that to have constitutional protection, a right must be more than a mere expectancy); *Coulter*, 489 S.W.2d at 159 (holding that "[a] mere expectancy is not protected by the mentioned provisions of the [Texas] Constitution" (citing *Trammell*)).

126. *See Middleton*, 185 S.W. at 561 (implying that accrued causes of action are vested property rights and may not be abrogated by the legislature, while a mere rule of law may not be a vested property right and may be abrogated by the legislature); *see also* Galveston, H. & H. R. Co. v. Anderson, 229 S.W. 998, 1004 (Tex. Civ. App.—Galveston 1920, writ ref'd) (insisting a party's claim for negligence that has accrued is a vested right).

127. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003-.0031 (Vernon Supp. 2005) (establishing a statute of limitations for asbestos and silicosis claims).

128. *See id.* § 16.0031(b) (establishing the accrual date for a silicosis claim as the earlier of "the date of the exposed person's death" or "the date that the claimant serves on a defendant a report").

129. *See id.* (setting forth the dates for which a silicosis claim accrues).

Clause in the Texas Constitution will not provide the claimant with any protection.[130]

2. Equal Protection Clause

The Texas Constitution provides that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive . . . privileges."[131] This language seemingly indicates that the Texas Legislature is limited to enacting legislation that applies to all men equally and not legislation that differentiates on a particular person's or group of persons' unique characteristics; however, this is not entirely true.[132] The legislature is afforded wide discretion in discriminating among different classes of persons, except in the rare instance where the classification is based on race, alienage, national origin, or another "suspect class."[133]

An Equal Protection Clause analysis under the Texas Constitution involves the same requirements as the corresponding challenge under the federal constitution.[134] Case law indicates classifications and exemptions to laws may be made by the legislature as long as they are not arbitrary and unreasonable.[135] In the area of simple social or economic legislation

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130. *See Trammell*, 101 S.W.2d at 1014 (stating that the Texas Constitution will not protect an unvested right); *see also Coulter*, 489 S.W.2d at 159 (expressing that a mere expectancy that a claim will vest does not provide for constitutional protection under the Texas Constitution's Due Course of Law Clause).

131. TEX. CONST. art. I, § 3.

132. *See, e.g.*, Richards v. Tex. A & M Univ. Sys., 131 S.W.3d 550, 557 (Tex. App.—Waco 2004, pet. denied) (holding that the legislature can classify different groups and only exempt certain parties from particular laws if the legislature has a rational basis for doing so).

133. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (pointing out that a statute that classifies persons by their national origin, race, or alienage "will be sustained only if they are suitably tailored to serve a compelling state interest"); *see also* Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 464 (Tex. 1997) (describing the legislature's broad discretion in enacting social and economic legislation that does not classify persons based on race or impinge on fundamental rights); Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985) (reiterating that the standard of review is the rational basis test for a state regulatory scheme that does not infringe upon fundamental rights and does not burden a suspect class).

134. Reid v. Rolling Fork Pub. Util. Dist., 979 F.2d 1084, 1089 (5th Cir. 1992); Bell v. Low Income Women of Tex., 95 S.W.3d 253, 266 (Tex. 2002); Rose v. Doctors Hosp., 801 S.W.2d 841, 846 (Tex. 1990); Garay v. State, 940 S.W.2d 211, 216 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd).

135. Anguiano v. Jim Walter Homes, Inc., 561 S.W.2d 249, 254 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Bullock v. ABC Interstate Theatres, Inc., 557 S.W.2d 337, 341 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); Am. Transfer & Storage Co. v. Bullock, 525 S.W.2d 918, 924 (Tex. Civ. App.—Austin 1975, writ ref'd); Ground Water Conservation Dist. No. 2 v. Hawley, 304 S.W.2d 764, 767 (Tex. Civ. App.—Amarillo 1957, writ

that does not classify by race, alienage, national origin, or other suspect class, the legislation must only be rationally related to a legitimate state interest.[136] A challenge against a statute will fail under this analysis "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[137] The rational basis standard sets a low bar for the legislation to pass and it is highly unlikely that purely social or economic legislation will ever be struck down under the Equal Protection Clause's power.[138] If, however, it is determined that the legislation does involve a fundamental right or a suspect class, the legislation will be subjected to "strict scrutiny."[139] A middle, "quasi-suspect" class is also recognized, and legislation affecting it is subject to a less rigorous "intermediate scrutiny" test.[140]

Challenges against S.B. 15 under the Equal Protection Clause are likely to be on the basis that the bill prevents claimants of silica-related injuries who do not meet the medical standards from going to trial, while allowing those who do meet the medical standards to proceed to trial. The first step in the analysis of S.B. 15 is to determine whether it classifies according to race, religion, or national origin or otherwise affects a "suspect

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ref'd n.r.e.); Watts v. Mann, 187 S.W.2d 917, 924 (Tex. Civ. App.—Austin 1945, writ ref'd); Berry v. McDonald, 123 S.W.2d 388, 389 (Tex. Civ. App.—San Antonio 1938, no writ).

136. *See* Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 127-28 (1999) (stating that a classification not involving fundamental rights only requires a rational relationship to a governmental purpose); Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) (holding that unless a statute burdens a suspect class, the test to be used is the rational basis test); *Lewellen*, 952 S.W.2d at 464 (stating that absent a suspect class, legislation is valid as long as it is "rationally related to a legitimate state interest).

137. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

138. *See* Vance v. Bradley, 440 U.S. 93, 97 (1979) (warning that "[t]he [United States] Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted" (footnote omitted)). The Court further stated that "we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Id.*

139. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (stating that gender, race, alienage, and national origin require heightened scrutiny); *see also* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (declaring that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny"); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (describing racial classifications as "constitutionally suspect").

140. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (providing that "[t]he burden [required by the intermediate scrutiny test] is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'" (quoting Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142, 150 (1980))).

class."[141] Only an extreme minority of courts have analyzed a tort cause with heightened scrutiny.[142] In addition, the classifications based on "discrete and insular" minorities that are recognized by the United States Supreme Court as suspect classes deserving of strict scrutiny are those based on race, alienage, or national origin.[143] Classes based on gender have been recognized as "quasi-suspect" for which the Court has applied the less rigorous intermediate scrutiny test.[144] All other classifications, including those based upon medical criteria—as utilized by S.B. 15—are subject to the traditional rational basis analysis.[145]

Because neither a fundamental right nor a suspect class is affected by S.B. 15, the courts will likely apply a simple rational basis test to determine the bill's validity under the Equal Protection Clause.[146] As discussed, the bill must be only rationally related to a legitimate state interest.[147] S.B. 15 has been touted as removing the frivolous silicosis claims that are wasting judicial resources and preventing those who are truly sick from receiving compensation.[148] Case law indicates that this is

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141. *Cf. City of Cleburne*, 473 U.S. at 440 (stating that different standards of review are utilized when it is determined that particular classes are affected; therefore, it must first be determined what the class is that is being affected); Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985) (advancing different standards of review for classifications of different classes).

142. *See, e.g.*, Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978) (focusing the inquiry into the validity of a tort cause of action under the Equal Protection Clause on whether there is "a close correspondence between statutory classification and legislative goals").

143. *See City of Cleburne*, 473 U.S. at 440-46 (refusing to extend strict scrutiny analysis to classifications based on age, gender or mental retardation); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (announcing that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

144. *See, e.g.*, *Miss. Univ. for Women*, 458 U.S. at 724 (utilizing the intermediate scrutiny test to determine whether there was an exceedingly persuasive justification for the gender classification at issue in the case).

145. *Cf. City of Cleburne*, 473 U.S. at 440-42 (condensing the recognized classifications that receive heightened scrutiny; notably absent from the list is any classification based on medical criteria).

146. *See id.* (interpreting the established case law as providing that classifications which do not involve race, alienage, national origin, or gender warrant only a rational basis review).

147. *See id.* at 441 (recounting that social and economic legislation must simply be "rationally related to a legitimate state interest").

148. *See* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. S.B. 15, 79th Leg., R.S. (2005) (predicting S.B. 15 will allow the severe silicosis cases to be heard in a more efficient manner and save companies from wasting large sums of money on frivolous claims); Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (advocating that S.B. 15 will result in a more efficient court

quite clearly a legitimate state interest.[149] Furthermore, the bill does not permanently eliminate a claimant's ability to bring a cause of action.[150] S.B. 15 simply provides that the claimant must wait until he meets certain medical criteria to bring the lawsuit.[151] It is clear the criteria used is rationally related to the legislature's legitimate state interest.[152] Therefore, it is improbable that a challenge to S.B. 15 under the Texas Constitution's Equal Protection Clause will succeed.

3. Open Courts Clause

The Texas Constitution's Open Courts Clause states that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[153] It extends to "prevent[ ] the Legislature from, among other things, abrogating the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigant's constitutional right of redress."[154] Courts apply a two part test to determine if there is an open courts violation.[155] The first part of the test requires the plaintiff to show he "has a well-recognized common-law cause of action that is being restricted."[156] If this is established, then the second part of the test re-

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system for Texas because the courts will not waste their limited resources on frivolous silicosis cases).

149. *See, e.g.*, Owens Corning v. Carter, 997 S.W.2d 560, 574 (Tex. 1999) (considering saving judicial resources to be an important state interest).

150. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003-.0031 (Vernon Supp. 2005) (providing for a new accrual date for a silicosis cause of action where the statute of limitations does not begin to run on a silicosis claimant's claim until he serves a report on the defendant or passes away).

151. *See id.* § 90.004 (requiring that a silicosis claimant serve a medical report on a defendant as a condition precedent to proceeding with a silicosis claim).

152. *Cf. Owens Corning*, 997 S.W.2d at 574 (considering judicial economy to be an important state interest). Since S.B. 15 will prevent substantial amounts of judicial resources from being wasted, it should satisfy the rational basis test it will be subjected to under the Texas Constitution's Equal Protection Clause.

153. TEX. CONST. art. I, § 13.

154. Medina v. Herrera, 927 S.W.2d 597, 605 (Tex. 1996); *accord* Earle v. Ratliff, 998 S.W.2d 882, 889 (Tex. 1999) (admonishing that restrictions on cognizable causes of action may not be unreasonably and arbitrarily restricted by a statute when viewed in light of the statute's purpose).

155. *See* Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983) (referring to the two criterion that are examined when determining whether there is a due course of law violation as (1) whether there is a "cognizable common law cause of action that is being restricted," and (2) the character of the restriction).

156. Gagnier v. Wichelhaus, 17 S.W.3d 739, 744 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *see also Sax*, 648 S.W.2d at 666 (setting out the first part of the inquiry into the validity of a statute under the Texas Constitution's Open Courts Clause as whether there is a "cognizable common law cause of action that is being restricted").

quires the plaintiff to show that "the restriction is unreasonable or arbitrary when balanced against the purpose of the statute [restricting the common law cause of action]."[157]

The silica-related claims that are, or will be, affected by S.B. 15 are brought under the common law theories of negligence and products liability.[158] S.B. 15 restricts many of the claimant's lawsuits from proceeding by requiring them to do something they cannot—serve reports on the defendants certifying that they have met the medical requirements set forth in the bill.[159] Therefore, the first part of the test is satisfied.

The second part of the test imposes a much tougher burden on the claimant; it requires a silicosis claimant to show that S.B. 15 achieves its goal by means which are "unreasonable or arbitrary when balanced against [its] purpose."[160] The means challenged are the medical standards set forth in the bill, which keeps claimants who are not experiencing physical manifestations of silicosis out of the courtroom.[161] However, the claimants are not forever banished from bringing their cases at a later date when they do become sick.[162] It must be remembered that there is not a cure for silicosis as of yet and nothing can be done to prevent the disease's progression.[163] Furthermore, the claimants who do not meet

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157. *Gagnier*, 17 S.W.3d at 744; *see also Sax*, 648 S.W.2d at 666-67 (setting out the second part of the inquiry into the validity of a statute under the Open Courts Clause as reviewing the character of the restriction placed on the cause of action).

158. *See, e.g.*, Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 170 (Tex. 2004) (representing the type of case brought against a silica sand supplier in which a products liability and a negligence cause of action were brought).

159. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(m), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)] (asserting that many silicosis claims arise from those who have no functional or physical impairment and implying that these claimants will not be able to meet the guidelines in S.B. 15, which are designed to keep their type of cases from burdening the court system); Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 700 (2005) (suggesting some learned counsel predict that up to ninety percent of the claims sent into a multidistrict litigation court will not be able to meet the medical criteria set forth in S.B. 15).

160. *Gagnier*, 17 S.W.3d at 744.

161. *See generally* Tex. S.B. 15, 79th Leg., R.S., 2005 Tex. Sess. Law Serv. 169 (establishing medical requirements which must be met before maintaining a suit for silicosis at a level most injured persons, who are not experiencing any physical or functional impairments, will not be able to meet).

162. TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.007(c), 90.008 (Vernon Supp. 2005) (requiring a court to dismiss a silicosis claimant's action without prejudice upon a meritorious motion to dismiss by the defendant after the plaintiff files an unsatisfactory medical report, or upon a voluntary dismissal by the plaintiff before the filing of the medical report).

163. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 569 (S.D. Tex. 2005) (warning that silicosis is only curable by a lung transplant and that "[o]therwise, the disease

the requirements are not experiencing any physical manifestations of the disease and are likely not incurring the large medical bills that those who have an advanced form of the disease are incurring.[164] The longer wait for claimants to bring their claims has little or no practical effect on the claimant.[165] When this is balanced against the state's recognized interest in protecting judicial resources, it is unlikely that a court will find the medical restrictions unreasonable or arbitrary.[166] Therefore, claimants will fail this part of the test and should not be able to prevail in an attack on S.B. 15 under the Texas Constitution's Open Courts Clause.

4. No Retroactive Legislation Clause

The Texas Constitution expressly provides that "[n]o . . . retroactive law . . . shall be made."[167] On its face it appears to bar all retroactive legislation, but that is a false impression.[168] A law may be retroactive in its effect and still be constitutional.[169] A law that is retroactive in effect

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is incurable, progressive, and irreversible"); Melissa Shapiro, *Is Silica the Next Asbestos? An Analysis of Silica Litigation and the Sudden Resurgence of Silica Lawsuit Filings*, 32 PEPP. L. REV. 983, 987-88 (2005) (evaluating the irreversible effects of silicosis and noting that the disease may be cured only by receiving a lung transplant).

164. Since there is no treatment for silicosis, and those who are not experiencing any functional or physical impairment are not going to undergo a risky procedure such as a lung transplant, the only medical bills they will encounter are normal check-ups to determine if the disease has progressed any further.

165. This is not intended to discount the mental and emotional effects of being diagnosed with silicosis; however, the financial burden placed on such a silicosis patient is minimal and their daily routine is not likely to be disrupted.

166. *See* Perry v. Stanley, 83 S.W.3d 819, 825 (Tex. App.—Texarkana 2002, no pet.) (finding that a "statutory requirement of an expert [medical] report is a reasonable restriction directly related to the statute's purpose of discouraging frivolous lawsuits").

167. TEX. CONST. art. I, § 16.

168. *See generally* Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 219-20 (Tex. 2002) (stating that not every retroactive statute is unconstitutional, and that courts must look to see if any vested rights are impeded or impaired); McCain v. Yost, 155 Tex. 174, 284 S.W.2d 898, 900 (1955) (maintaining that a statute is not impermissibly retroactive if it does not take away or impair vested rights); DeCordova v. City of Galveston, 4 Tex. 470, 480 (1849) (asserting that retroactive laws are not unconstitutional if they affect a mere remedy, unless the remedy is taken away completely); State Bd. of Reg. for Prof'l Eng'rs v. Witchita Eng'g Co., 504 S.W.2d 606, 608 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.) (reiterating that "[t]he constitutional rules against . . . retroactive laws are not absolute and must yield to a state's right to safeguard the public safety and welfare").

169. *See* Gen. Dynamics Corp. v. Sharp, 919 S.W.2d 861, 866 (Tex. App.—Austin 1996, writ denied) (capitulating that even though the statute in question did not apply retroactively, it nevertheless would have been constitutionally retroactive because no vested rights would have been impaired); Trahan v. Trahan, 894 S.W.2d 113, 118 (Tex. App.—Austin 1995, writ denied) (referring to the general rule that unless a vested right acquired under existing laws is impaired or taken away, the new law will not be held unconstitutional under the No Retroactive Law Clause in the Texas Constitution); Sw. Bell

will not violate the Texas Constitution if it does not interfere with or destroy vested rights.[170] Further, if the law merely affects a remedy or pro-

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Tel. Co. v. City of Kountze, 543 S.W.2d 871, 875 (Tex. Civ. App.—Beaumont 1976, no writ) (asserting that, as a general rule, a statute is not retroactive unless it impairs or takes away vested rights afforded under existing laws); Harrison v. Cox, 524 S.W.2d 387, 391-92 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.) (holding an amendment to the Texas Family Code did not violate the No Retroactive Law Clause in the Texas Constitution because it affected a mere remedy and did not sufficiently impede it to make it useless); Inman v. R.R. Comm'n, 478 S.W.2d 124, 129 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.) (expressing that only if a statute takes away rights that are vested under current law will the statute be held unconstitutional); Int'l Sec. Life Ins. Co. v. Maas, 458 S.W.2d 484, 490 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.) (noting that a statute does not violate the constitutional provision against retroactive laws unless it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or adopts a new disability in respect to transactions or considerations already passed").

170. *See* Corpus Christi People's Baptist Church, Inc. v. Nueces County Appr. Dist., 904 S.W.2d 621, 626 (Tex. 1995) (refusing to invalidate a new tax law under the constitutional provision prohibiting retroactive laws after a finding that the plaintiff did not have any vested rights under the existing law); *Ex parte* Abell, 613 S.W.2d 255, 262 (Tex. 1981) (failing to find a violation of the prohibition of retroactive laws after ruling that the plaintiffs did not have a vested right in the current statute, and therefore permitting the statute to work retroactively against the plaintiffs); *McCain*, 284 S.W.2d at 900 (reiterating that "[a] statute cannot be said to be a retroactive law prohibited by the [c]onstitution unless it can be shown that the application of the law would take away or impair vested rights acquired under existing law"); *Gen. Dynamics Corp.*, 919 S.W.2d at 866-67 (maintaining that an insurance statute did not violate the constitutional prohibition against retroactive laws because the statute only operated prospectively and did not impair any vested rights); *Trahan*, 894 S.W.2d at 118-19 (analyzing a statute, to determine if it was unconstitutionally retroactive, by looking to see if any vested rights were impaired or destroyed); Durish v. Tex. State Bd. of Ins., 817 S.W.2d 764, 766-67 (Tex. App.—Texarkana 1991, no writ) (holding a statute unconstitutionally retroactive, but recognizing that "[a] statute is not retroactive, however, unless it impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or adopts a new disability with respect to transactions already passed"); French v. Ins. Co. of N. Am., 591 S.W.2d 620, 622 (Tex. Civ. App.—Austin 1979, no writ) (discussing the constitutionality of an insurance statute and noting that a statute can operate retroactively if no rights currently vested under existing law are impaired or destroyed); *Sw. Bell Tel. Co.*, 543 S.W.2d at 875-76 (applying to a regulation the constitutional prohibition against retroactive laws and declaring the regulatory statute valid because no rights were vested under the existing law); *Inman*, 478 S.W.2d at 128-29 (noting that the Texas Constitution forbids retroactive laws, but "only when [the new law] takes away or impairs a vested right acquired under existing laws"); *Int'l Sec. Life Ins.*, 458 S.W.2d at 490 (failing to hold a statute in violation of the constitutional prohibition against retroactive laws after noting that the statute operates prospectively and without impairment or destruction of vested rights); Jenckes v. Mercantile Nat'l Bank at Dallas, 407 S.W.2d 260, 265 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.) (labeling a statute unconstitutional as a retroactive law where the statute impairs rights that were vested under existing law); Kissick v. Garland Indep. Sch. Dist., 330 S.W.2d 708, 711-12 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.) (finding a regulation was unconstitutionally retroactive based on the foundation that the rights impaired were not vested, and, therefore, should be clas-

cedure, it will not be unconstitutional "unless the remedy is entirely taken away or is so incumbered [sic] with conditions as to render it useless."[171] With these concepts in mind, the Supreme Court of Texas has held that "when the [l]egislature shortens an existing statute of limitations or creates one where none had existed, it must provide a reasonable time for plaintiffs to bring suit after the enactment of the new law."[172] One of the main intentions of the no retroactive legislation provision is to protect the public's reasonable expectations arising from the current law.[173] "Considerations of fair notice, reasonable reliance, and settled expectations play a prominent role when a state legislature . . . [disrupts] settled expectations and extinguish[es] accrued causes of action."[174] It is easiest to examine S.B. 15 in this context by using a step-by-step analysis.[175]

To analyze S.B. 15 under this constitutional provision, it must first be determined whether it applies retroactively.[176] A law will be presumed to apply prospectively unless it is stated otherwise in the law, and all doubt will be resolved against retrospective application.[177] S.B. 15 requires

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sified "as contingent or expectant in contrast to a vested right which is an *immediate fixed right* of present or future enjoyment").

171. *Harrison*, 524 S.W.2d at 391.

172. Owens Corning v. Carter, 997 S.W.2d 560, 572 (Tex. 1999).

173. *See id.* (asserting that "[t]he prohibition against retroactive laws derives largely from the sentiment that such laws unfairly deprive people of legitimate expectations"); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (voicing the elementary concept that people should have an idea what the law is so they can behave accordingly and not be in fear that their expectations will be disrupted).

174. *Owens Corning*, 997 S.W.2d at 573.

175. *See id.* at 572-73 (employing a step-by-step analysis to determine whether a statute violates the prohibition against retroactive legislation).

176. *See Ex parte* Abell, 613 S.W.2d 255, 258-59 (Tex. 1981) (implying that a law must first be determined to apply retroactively before continuing an analysis under the constitutional provision against retroactive laws).

177. *See id.* (emphasizing that even though as a general rule a statute is to operate prospectively, it can just as easily operate retrospectively when it is clear that was the intention of the legislature); Merchs. Fast Motor Lines, Inc. v. R.R. Comm'n of Tex., 573 S.W.2d 502, 504 (Tex. 1978) (stating the general rule that statutes should apply prospectively); Coastal Indus. Water Auth. v. Trinity Portland Cement Div., 563 S.W.2d 916, 918 (Tex. 1978) (holding that a final judgment would "not fluctuate with changes that might thereafter be made in the law, unless it clearly appeared that such laws were intended to have such a retroactive effect"); Fed-Mart of Tex., Inc. v. Calvert, 474 S.W.2d 297, 298 (Tex. Civ. App.—Austin 1971, no writ) (asserting that unless clear language from the legislature indicates otherwise, a statute is to operate prospectively); Gov't Pers. Mut. Life Ins. Co. v. Wear, 151 Tex. 454, 251 S.W.2d 525, 529 (1952) (commenting that if the legislature intends to make a statute apply retroactively, it will state so in clear language); Cox v. Robison, 105 Tex. 426, 150 S.W. 1149, 1156 (1912) (stating that "statutes operate prospectively; but the exception is as well established as the rule that they may operate retrospectively when it is apparent that such was the intention"); Piedmont & Arlington Life Ins. Co. v. Ray, 50 Tex. 511, 519 (1878) (agreeing that "[i]t is a well-settled rule that statutes are

claimants asserting silica-related injuries, who had claims pending as of September 1, 2005 and whose trial does not commence within ninety days after that date, to serve reports on defendants demonstrating they meet certain medical requirements.[178] These medical requirements are slightly less stringent than those required for claimants filing suit after May 1, 2005,[179] but it is unquestionable that this requirement works retroactively.

Second, it must be determined whether the claimants affected by S.B. 15 have a vested right in their claims.[180] A right to a claim vests at the time it accrues.[181] Before S.B. 15 was enacted, the time of accrual was calculated by the traditional "discovery rule."[182] The discovery rule provides that a person's claim accrues at the time they discover, or should have discovered their injury.[183] Some claimants, who did not know and should not have known about their injuries before the enactment of S.B.

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always held to operate prospectively, unless a contrary construction is evidently required by their plain and unequivocal language").

178. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.006 (Vernon Supp. 2005) (asserting that silicosis claimants with cases pending on September 1, 2005 must serve reports on the defendants if their cases do not commence within ninety days of September 1, 2005 or if "a mistrial, new trial, or retrial is subsequently granted or ordered").

179. *See id.* (advancing different medical requirements for cases filed prior to May 1, 2005 and those filed subsequent to that date). The medical requirements diverge in the profusion grading (amount of scarring) required to be present in the claimant's chest x-ray. *Id.* A claimant who filed their cause of action before May 1, 2005 must document that the claimant has a 1/0 profusion grading on their chest x-ray (slight to no scarring of the lungs). *Id.* A claimant who filed their cause of action on or after May 1, 2005 must verify that the claimant has a 1/1 profusion grading on their chest x-ray (slight scarring of the lungs). *Id.*

180. *Cf.* Corpus Christi People's Baptist Church, Inc. v. Nueces County Appr. Dist., 904 S.W.2d 621, 626 (Tex. 1995) (finding it necessary for there to be a vested right that is currently being impaired before there can be a violation of the Texas Constitution's prohibition against retroactive laws).

181. *See* Middleton v. Tex. Power & Light Co., 108 Tex. 96, 185 S.W. 556, 561 (1916) (implying that accrued causes of action are vested property rights and may not be abrogated by the legislature, while also stating that a mere rule of law may not be a vested property right and may be abrogated by the legislature); Galveston, H. & H. R. Co. v. Anderson, 229 S.W. 998, 1004 (Tex. Civ. App.—Galveston 1920, writ ref'd) (Graves, J., dissenting) (insisting that a party's claim for negligence which has accrued is a vested right).

182. *See* Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967) (adopting the discovery rule in Texas for the first time); Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 700-01 (2005) (citing Childs v. Haussecker, 974 S.W.2d 31, 37 (Tex. 1998)) (proposing that prior to the enactment of S.B. 15, latent injury cases were governed by the traditional discovery rule, which provides that the date of a claim's accrual "is the date the defendant knew or should have known of the injury").

183. *See Gaddis*, 417 S.W.2d at 580 (setting the precedent in which causes of action should accrue according to the discovery rule); *see also Childs*, 974 S.W.2d at 37 (noting the adoption of the discovery rule in *Gaddis* and recognizing that the discovery rule provides

15, did not have their claims accrue.[184] These claimants lack the vested right necessary to satisfy the second part of the analysis and will not receive protection from the constitutional prohibition of retroactive legislation. Many other claimants have filed a cause of action after receiving some form of notice of their injuries.[185] A claimant who is not experiencing any symptoms can get notice of their possible injuries when they visit a doctor for any particular reason and the doctor informs the claimant that it is possible they have some form of lung disease.[186] These claimants filed their causes of action to prevent their suits from being barred by the statute of limitations.[187] Their claims, having accrued under the discovery rule, became vested rights and therefore satisfy the second part of the analysis.[188]

The next step is to determine whether S.B. 15 impairs or destroys the vested rights.[189] Before the bill's enactment, there was no procedural requirement for a claimant to serve a medical report on a defendant or any kind of requirement as to how sick a claimant must be to file.[190] As pre-

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the date of a claim's accrual, which is the earlier date of when the claimant discovers or should have discovered the injury that is the basis of the complaint).

184. *Cf. Gaddis*, 417 S.W.2d at 580 (outlining the requirements under the discovery rule for when a claim is to accrue as being the earlier of either the date when the individual discovers his injury or the date the individual should have known of his injury).

185. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 636 (S.D. Tex. 2005) (reviewing the current situation surrounding silicosis litigation and finding that many silicosis claimants have filed their causes of action after receiving notice of their injuries by a doctor who never saw the claimant in person). The court mocked the current state of affairs in silicosis litigation by stating: "As is apparent simply by a reading of this Order, it is difficult for a court to devote attention to a single case when it is part of a wave of 10,000 other cases—many of which are meritless." *Id.*

186. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1, 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)] (concluding that "[s]ilica claims, like asbestos claims, often arise when an individual is identified as having markings on the individual's lungs that are possibly consistent with silica exposure").

187. *See id.* historical note § 1(i) (indicating that many claimants of silicosis injuries "file lawsuits under the theory that they must do so to avoid having their claims barred by [the statute of] limitations even though they have no current impairment and may never have impairment").

188. *Cf.* Corpus Christi People's Baptist Church, Inc. v. Nueces County Appr. Dist., 904 S.W.2d 621, 626 (Tex. 1995) (discussing the necessity for there to be a vested right that is being impaired in order for there to be a violation of the constitutional prohibition of retroactive laws).

189. *See, e.g.*, McCain v. Yost, 155 Tex. 174, 284 S.W.2d 898, 900 (1955) (enforcing the requirement that there be a vested right being destroyed or impaired in order to find a violation of the Texas Constitution's prohibition of retroactive laws).

190. *See* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 699 (2005) (discussing the effect of the new medical criteria set forth in S.B. 15 on silica litigation in Texas). It is suggested that "[o]ut of the thousands of pending

viously discussed, S.B. 15 now imposes a strict requirement that a satisfactory report must be served on all defendants for a portion of the cases pending at the time the bill became effective.[191] Without touching on whether some of these claims have a chance of ever seeing the courtroom, it is simple enough to say that this requirement impairs some claimants' vested rights. Under this analysis alone, the courts would consider S.B. 15 unconstitutional.[192]

However, the analysis must continue in order to determine whether S.B. 15 merely affects a remedy or procedure.[193] One might argue that by requiring a certain level of ill health in order to maintain a suit, the bill goes beyond affecting a mere remedy or procedure and instead redefines the injury. The counterargument to this is that S.B. 15 affects only the claimants' remedy by providing for a shorter period of limitations for which the claims must be brought before the new standard applies, and that the amount of time is reasonable. The courts are more likely accept the latter argument for the reasons discussed below.

In *City of Tyler v. Likes*,[194] the Supreme Court of Texas held a statute which made a certain city function become protected by government immunity, where it previously had not been, affected only the remedy for a claimant who had a vested right under the prestatute law to bring suit against the city.[195] In reaching its decision the court stated:

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claims, there is a feeling among attorneys practicing in this area that only a very small percentage of the claims involve claimants with an X-ray classification of 1/1 or higher, and a similarly small percentage involve claimants with any degree of impairment." *Id.*

191. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.006 (Vernon Supp. 2005) (establishing that some silicosis claimants whose cases are pending as of September 1, 2005 must serve on a defendant a medical report which meets minimum requirements). The only cases excepted from the report requirement are those cases pending on September 1, 2005 "in which the trial, or any new trial or retrial following motion, appeal, or otherwise, commences on or before the 90th day after [September 1, 2005]" and that do have "a mistrial, new trial, or retrial . . . subsequently granted or ordered." *Id.*

192. *Cf.* City of Tyler v. Likes, 962 S.W.2d 489, 502 (Tex. 1997) (noting that "[a] statute is retroactive [and unconstitutional] if it takes away or impairs vested rights acquired under existing law," but recognizing that "laws affecting a remedy are not unconstitutionally retroactive unless the remedy is entirely taken away").

193. *See id.* (explaining how a law, which retroactively affects a mere remedy, is not unconstitutional unless it destroys the remedy all together); Harrison v. Cox, 524 S.W.2d 387, 391 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.) (accepting that "[i]t is settled that laws which affect only the remedy or procedure are not within the scope of the constitutional prohibition against retroactive laws, unless the remedy is entirely taken away or is so incumbered [sic] with conditions as to render it useless").

194. 962 S.W.2d 489 (Tex. 1997).

195. *See* City of Tyler v. Likes, 962 S.W.2d 489, 502 (Tex. 1997) (reviewing a case in which a homeowner brought suit when her personal property was damaged by a city-owned drainage channel that flooded).

> [L]aws affecting a remedy are not unconstitutionally retroactive unless the remedy is taken away. Like a statute of limitations, a statute defining a municipality's sovereign immunity affects a plaintiff's remedy. The legislature can affect a remedy by providing a shorter limitations period for an accrued cause of action without violating the retroactivity provision of the [c]onstitution *if it affords a reasonable time or fair opportunity to preserve a claimant's rights under the former law*, or if the amendment does not bar all remedy.[196]

The court continued to hold that the plaintiff had a reasonable amount of time to preserve her rights because she had seventeen months prior to the statute in which to bring her claim before it was barred, and she was on notice of the effect of the statute two months before it took effect.[197]

Although the time of filing will vary for claimants under S.B. 15, the bill provides the claimant with more than double the actual notice than did the statute in *City of Tyler*.[198] Governor Rick Perry signed S.B. 15 into law over three months before it was to take effect. The courts will likely hold that this timeframe constitutes reasonable notice to a claimant of the need to preserve his claim, considering the *City of Tyler* court held two months to be reasonable.[199] Because the courts are likely to hold that S.B. 15 affects only a remedy or procedure and reasonable notice has been given, a challenge to the bill under the Texas Constitution's prohibition of retroactive laws will likely fail.[200]

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196. *Id.* (emphasis added).

197. *Id.*

198. *Compare id.* (pointing out that the plaintiff had two months between the time the change was made in the statute and the time the change took effect), *with* Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 12 cmt., 2005 Tex. Sess. Law Serv. 169, 182 (Vernon) (allowing for over three months between the time S.B. 15 was signed into law by Governor Perry and the time it was to take effect). Governor Perry signed S.B. 15 into law on May 19, 2005 and it took effect on September 1, 2005. *See id.* (stating the effective date of S.B. 15); Message of Gov. Perry, Tex. S.B. 15, 78th Leg., R.S. (2005) (noting the date on which Governor Perry signed S.B. 15 into law).

199. *See City of Tyler*, 962 S.W.2d at 502 (finding the statute was not unconstitutional). *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 90.006 (Vernon Supp. 2005) (evidencing the amount of time a silicosis claimant had to avoid the requirement to serve a medical report on each defendant). In addition to the over three months of actual notice a silicosis claimant received of the changes made by S.B. 15, the silicosis claimant has another ninety days, as discussed previously, in which if the claimant's trial commences, he can avoid the procedural requirement of serving a medical report on a defendant. *Id.*

200. *See, e.g.*, *City of Tyler*, 962 S.W.2d at 502 (acknowledging that "[t]he [l]egislature can affect a remedy by providing a shorter limitations period for an accrued cause of action without violating the retroactivity provision of the [c]onstitution if it affords a reasonable time or fair opportunity to preserve a claimant's rights under the former law").

B. *United States Constitutional Challenges*

The likely constitutional challenges against S.B. 15 under the United States Constitution are the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[201] Similar challenges have previously been brought against various tort reforms across the United States with mixed results.[202] As is the case with the constitutional challenges brought under the Texas Constitution, the challenges brought under the federal constitution have a slim chance of succeeding.

1. Due Process Clause

Silicosis claimants who do not meet the medical standards set out in S.B. 15 are likely to argue that the bill denies them property rights in their claims without due process of law.[203] The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[204] The central issues are whether a silicosis claimant has a property right in his claim against silica sand providers, and if he does, has it been taken away without due process of law.[205]

The first step in the analysis of a due process challenge is to determine whether an individual is being deprived of a protected property right.[206] To qualify as a property right for purposes of Due Process Clause analy-

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201. *See* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (listing both the Due Process Clause and the Equal Protection Clause of the United States Constitution as the most likely grounds for federal challenges to S.B. 15).

202. *Compare, e.g.*, Smith v. Botsford Gen. Hosp., 419 F.3d 513, 519-20 (6th Cir. 2005) (upholding Michigan's medical malpractice damage caps in light of the federal constitutional challenges brought against the damage caps), *with* Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 491 (Wis. 2005) (invalidating Wisconsin's medical malpractice damage cap using a rational basis review under the Wisconsin Constitution's Equal Protection Clause for which the analysis was similar to what would be expected from the same challenge under the federal constitution's Equal Protection Clause).

203. *See* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (noting that the Due Process Clause of the United States Constitution is a likely challenge to S.B. 15).

204. U.S. CONST. amend. XIV, § 1.

205. *See* Mehta v. Surles, 905 F.2d 595, 598 (2d Cir. 1990) (explaining what is necessary to succeed in a Due Process Clause challenge). First, the plaintiff must " establish that the state has deprived him of property without due process, [and] he must first identify [the] property right." *Id.* Next, he must "show that the state has deprived him of *that* right." *Id.* Lastly, he must demonstrate "the deprivation was effected without due process." *Id.*

206. *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) (construing the first step in the due process analysis as inquiring "whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty' "). Only after there has been a determina-

sis, the interest the claimant has in his cause of action must be vested.[207] As noted earlier, the vesting of a tort cause of action does not occur until the claim accrues.[208] S.B. 15 effectively made this issue moot by making the claimants' cause of action accrue on the date when they could serve a report which meets the medical standards set out in the bill.[209] Once the claimants reach the point where they meet the medical standards, they are afforded all of the privileges of the judicial system that they would have had before the bill's enactment—meaning the want of due process would not be an issue.[210] Since silicosis claims are provided with due process once they have accrued, a due process challenge under the U.S. Constitution should fail.

2. Equal Protection Clause

Another likely federal constitutional challenge against S.B. 15 is under the Equal Protection Clause of the Fourteenth Amendment.[211] The Equal Protection Clause states that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[212] The foundation of this challenge would be that S.B. 15's classification of persons

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tion that there has been a deprivation of a protected interest will the Due Process Clause analysis proceed. *Id.*

207. *See* Coulter v. Melady, 489 S.W.2d 156, 159 (Tex. Civ. App.—Texarkana 1872, writ ref'd n.r.e.) (noting that a matured cause of action becomes a vested right and affords the holder with constitutional protections).

208. *See* Middleton v. Tex. Power & Light Co., 108 Tex. 96, 185 S.W. 556, 560 (1916) (implying that accrued causes of action are vested property rights and may not be abrogated by the legislature, while a mere rule of law may not be a vested property right and may be abrogated by the legislature); Galveston, H. & H. R. Co. v. Anderson, 229 S.W. 998, 1004 (Tex. Civ. App.—Galveston 1920, writ ref'd) (Graves, J., dissenting) (insisting a party's claim for negligence that has accrued is a vested right).

209. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.003-.0031 (Vernon Supp. 2005) (advancing a new accrual date and statute of limitations for silicosis and asbestos claims). The new statute provides for an exception to the traditional two-year statute of limitations for personal injury causes of action that were previously governed by the discovery rule. *Id.* The claimant's cause of action under the new exception does not accrue for the purposes of starting the statute of limitations until the claimant serves on a defendant a report that complies with the medical criteria set forth in S.B. 15. *Id.* This exception creates a unique situation where the claimant retains total control over when to bring his cause of action. Potentially, this could result in a situation where claimants wait to serve the medical report on a defendant until the judicial or political climate is more likely to produce better results for their cases.

210. *See id.* (allowing cases to proceed to trial in which the claimant has served on a defendant a medical report meeting all the requirements set forth in S.B. 15).

211. *See* Kevin Risley, *S.B. 15: A New Day for Asbestos and Silica Litigation in Texas*, 68 TEX. B.J. 696, 701 (2005) (contending that a likely ground for challenge against S.B. 15 is the Equal Protection Clause of the United States Constitution).

212. U.S. CONST. amend. XIV, § 1.

with varying degrees of silica-related injuries is not justified by a sufficient governmental purpose. An analysis under the clause involves the same or fewer requirements as a challenge under the Equal Protection Clause of the Texas Constitution.[213]

Since it is likely that S.B. 15 will be classified as social or economic legislation that does not involve a suspect class or fundamental rights,[214] a mere rational basis test will be applied.[215] There need only be a legiti-

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213. *See* Reid v. Rolling Fork Pub. Util. Dist., 979 F.2d 1084, 1089 (5th Cir. 1992) (claiming, "[t]here is ample support in Texas case law for the . . . contention that the same requirements are applied to equal protection challenges under the Texas Constitution as to those under the United States Constitution"); Rose v. Doctors Hosp., 801 S.W.2d 841, 846 (Tex. 1990) (noting that Texas cases demonstrate that the requirements for a Texas equal protection analysis of the constitutionality of the statute echoes the requirements for the same analysis under the United States Constitution); *In re* McLean, 725 S.W.2d 696, 697 (Tex. 1987) (concluding that the Texas Constitution's guarantee of equal protection would be meaningless if challenges brought under it were subject to the same standards as challenges brought under the Equal Protection Clause of the United States Constitution); Richards v. Tex. A & M Univ. Sys., 131 S.W.3d 550, 556 (Tex. App.—Waco 2004, pet. denied) (noting that the Texas and United States Constitutions utilize the same analysis); Sanders v. Palunsky, 36 S.W.3d 222, 224 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (following precedent in acknowledging that, in an equal protection analysis, "[t]he same requirements are applied under the Texas Constitution as under the United States Constitution"); Garay v. State, 940 S.W.2d 211, 216 (Tex. App.—Houston [1st Dist.] 1997, writ ref'd) (pronouncing that the " Texas equal protection provision traditionally corresponds to the federal provision," and ruling that "[b]ecause appellants do not argue or cite authority to establish their protection is greater under the state constitution, their arguments will be addressed under the United States Constitution"); Hogan v. Hallman, 889 S.W.2d 332, 338 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (acknowledging that both the Texas Constitution's Equal Protection Clause and the United States Constitution's Equal Protection Clause employ the same requirements in their analysis).

214. *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-42 (1985) (listing the classifications that are subject to heightened scrutiny, and notably absent are classifications based on medical criterion).

215. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (attempting to reconcile the principles behind the Equal Protection Clause of the United States Constitution with the feasibility of its implementation, and concluding that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"); FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (holding that "[i]n the areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (emphasizing that "[t]his Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest"); Hodel v. Indiana, 452 U.S. 314, 331 (1981) (reiterating that "[s]ocial and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legis-

mate state interest to which the bill is rationally related. Any reasonable interpretation of the facts that can be justified as a rational basis for the classification will be sufficient to pass this test.[216] The bill easily meets this standard, for it places medical restrictions on how sick a claimant must be to bring a lawsuit so as to protect the ability of those who are severely suffering to have their day in court and receive adequate compensation for their injuries.[217] As the equal protection challenge under the Texas Constitution should fail, the same will likely be the case under the federal constitution.

IV. CONCLUSION

Practicing law is becoming more of a business venture with sights on generating revenue to cover costs and produce profits. This turn away

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lative means are rationally related to a legitimate governmental purpose"); Owens Corning v. Carter, 997 S.W.2d 560, 580 (Tex. 1999) (indicating that the general rule requires only a rational basis test when neither fundamental rights nor suspect classes are affected by the classification); Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 464 (Tex. 1997) (stating that the "[Texas] Legislature has broad discretion in enacting social or economic legislation that does not classify on suspect categories, such as race, or impinge on fundamental rights," and that such legislation will be analyzed using a rational basis test); Richards v. League of United Latin Am. Citizens (LULAC), 868 S.W.2d 306, 311 (Tex. 1993) (identifying the "multi-tiered" system for analyzing an equal protection challenge in which the general rule is to apply a rational basis test, unless "the classification impinges on the exercise of a fundamental right, or . . . the classification distinguishes between people, in terms of any right, on a 'suspect' basis such as race or national origin"); Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 559 (Tex. 1985) (agreeing that under an equal protection challenge it must first be determined if there are any fundamental rights or suspect classes that are affected by the classification); Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981) (recognizing that a "state cannot function without classifying its citizens for various purposes and treating some differently than others," and that most legislation will receive mere rational basis scrutiny).

216. *See, e.g.*, *FCC*, 508 U.S. at 313 (identifying the rational basis test used to analyze social and economic legislation under the United States Constitution's Equal Protection Clause).

217. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.001 historical notes (Vernon Supp. 2005) [Act of May 19, 2005, 79th Leg., R.S., ch. 97, § 1(n), 2005 Tex. Sess. Law Serv. 169, 170 (Vernon)] (establishing the goals of S.B. 15 and noting the means used to achieve those goals). One of the main goals of S.B. 15 is "to protect the right of people with impairing asbestos-related and silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system." *Id.* To achieve this goal, S.B. 15 "adopts medically accepted standards for differentiating between individuals with nonmalignant asbestos-related or silica-related disease causing functional impairment and individuals with no functional impairment," and requires the claimant to serve a report demonstrating he has met the criteria. *Id. See generally* Perry v. Stanley, 83 S.W.3d 819, 825 (Tex. App.—Texarkana 2002, no pet.) (reiterating that Texas courts have previously recognized that requiring a medical report is a reasonable restriction on a claimant's ability to file suit in light of the state's interest in discouraging frivolous lawsuits).

from the simple and noble goal of helping society function within the laws of our state and nation has created many problems and will create many more. S.B. 15 is in part a reaction to the latest methods of screening for mass numbers of cases which, in return, drudge up many frivolous lawsuits in the process of locating a few serious cases. It attempts to strike an even balance between preserving a silicosis claimant's ability to bring suit to receive compensation for his injury and eliminating the many frivolous lawsuits that place a substantial burden on the court system, defendants, and legitimate claimants alike.

The focus in the analysis of S.B. 15 and the debate over the proper methods of curing the problems concerning silicosis litigation need to be centered around those like Leslie Blevins, who are sick and dying from forces beyond their control. To that end, S.B. 15 does a superb job. The true debate concerning the bill concerns the borderline cases, some of which are legitimate claims of those who will progressively become sicker and are deserving of compensation. The majority of the borderline cases, however, are filed by those who will never experience any functional or physical impairment from silica exposure. The extent of protection that the law should provide these claims is effectively decided in S.B. 15.

Of the six probable state and federal constitutional challenges that S.B. 15 is likely to face, it is not likely that any will pose more than a small speed bump on the fast track to the final determination of the bill's validity by the Texas Supreme Court. Although certain challenges demand more inquiry than others, the end result is the same. The threat of permanently destroying a claimant's cause of action is effectively offset by providing the claimant the discretion of when to begin the accrual of his cause of action. The fact that the plaintiff has to meet certain medical criteria in order to have the privilege of deciding the accrual date of his cause of action is simply another measure to ensure that the claimant receives the compensation he deserves by preventing that compensation from being spent on those undeserving of it.

In all fairness, S.B. 15 does not harm those who do not meet its medical requirements, for there is no treatment or any amount of money that could stop the progression of the disease. Those who do not meet the requirements in the bill are not suffering from any illness that prevents them from leading ordinary lives. Upon becoming ill to the point where their lives are affected, they can then bring suit and be compensated for their injury. The burden of the delay in compensation for some is more than offset by the preservation of the ability of those who are truly suffering to receive the resources they need to live satisfactory lives.

There will be a day when new medical procedures will signal the end of S.B. 15. Once it becomes feasible to treat silicosis at an early stage so as to prevent its progression or to cure it altogether, the foundation of sup-

port for S.B. 15 will crack. In that case, it will be necessary to provide greater access to finders of fact and protection of claimants who do not meet the current medical standards in S.B. 15 and claim that they are suffering from the early stages of silicosis. Claimants might be deserving of compensation to prevent their health from steadily decreasing and the justifications of saving the resources for those who it will truly help under the bill's guidelines will no longer have merit.

For now, there are no such medical procedures that can aid silicosis sufferers, and S.B. 15 is a comprehensive, sensible approach to eliminating the roadblocks facing those who are truly sick and are in the process of obtaining compensation for their medical bills and suffering. There are many issues facing silicosis litigation, and while there is not one answer to all of them, S.B. 15 *constitutionally* solves many of the problems. As such, the Texas Supreme Court should rule accordingly when the bill reaches its courtroom.