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ASBESTOS LITIGATION

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BEFORE THE

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UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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ASBESTOS LITIGATION

WEDNESDAY, SEPTEMBER 25, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:09 a.m., in room SD–106, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Durbin, Cantwell, Edwards, Hatch, Grassley, Specter, DeWine, Brownback, Carper [ex officio], and Voinovich [ex officio].

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. Today, we are going to hear from experts representing all sides in asbestos litigation. We want to get a better understanding of how asbestos victims, defendants, and others fare in the courts. I hope today this can be the beginning of a bipartisan dialog that will result in a comprehensive review of the complex and competing issues involved in providing fair and efficient compensation to asbestos victims.

I believe for a sense of history we should acknowledge the root cause of this litigation. For many years, many in America's labor force were secretly poisoned. Unbeknownst to the men and women who worked in our Nation's factories, shipyards, mines, and constructionsites, the worksite air was laced with a substance so harmful that they could become critically ill by simply breathing, and they risked contaminating their loved ones from their clothes after a hard day's work.

In 1906, England adopted the first labor regulation warning about the health effects of inhaling asbestos. In 1924, a national insurance company studied the health effects of asbestos exposure of Johns-Manville workers and then hid the results.

In 1949, the American Medical Association Journal editorialized on the harm from asbestos exposure. In 1989, the Environmental Protection Agency banned asbestos in 3,500 products, only to see that overturned in an industry suit later on. Asbestos, a known carcinogen, is still used today in many products.

Corporate America had been on notice that asbestos carried significant health risks for its workers and customers. Some corporate executives ignored these warnings and manufactured, mined, or used asbestos because it was inexpensive and profitable. As a result, the marketplace has punished more than 50 companies that

knew or should have known about the health dangers of asbestos, forcing them into bankruptcy because of asbestos-related liabilities.

Three thousand Americans die every single year from mesothelioma, a horrible cancer caused only by asbestos. In addition, hundreds of thousands of Americans suffer from other injuries caused by asbestos exposure, including lung cancer, throat cancer, and other diseases.

Perhaps the worst part of the asbestos nightmare is that many victims do not know yet that they will get sick. That is because of the long latency period for asbestos-related diseases. Some cancers take 30 to 40 years to develop and it is a ticking time bomb during that time. It is a time bomb ticking in the bodies of thousands of innocent victims.

Approximately 120 million Americans have been or continue to be exposed to asbestos. With the long latency period for most asbestos-related diseases, simple math tells us that some will be suffering for years to come.

Asbestos victims who filed claims with the Manville Trust this year were, on average, first exposed to asbestos in 1961. Since production in the U.S. did not slow until well into the 1980's and asbestos is still being used today, that means we have decades to go before we know who is going to be sick. Many more Americans will be seeking compensation for their asbestos-related injuries for decades.

All this caused Supreme Court Justice Ruth Bader Ginsburg in the Amchem v. Windsor case to call for legislative intervention. I agree with Justice Ginsburg that Congress can provide a secure, fair, and efficient means of compensating victims. I believe that it is in the national interest to encourage fair and expeditious settlement between companies and asbestos victims, and that is why I have convened this hearing. Actually, it is the first full Judiciary Committee hearing since Justice Ginsburg urged congressional action.

But it is not going to be easy. It is going to require a commitment by lawmakers and interested parties to conduct a full and open debate, an honest debate, to identify issues and craft possible solutions.

Industry-related injuries have existed for a long time. Usually, industry eventually wakes up and takes steps to stop it from happening. Both of my grandfathers were stone cutters in Vermont, one emigrating to this country take up that work. Both died of silicosis of the lungs. It was at a time when many, many people knew the dangers, but did not want to spend the slight extra amount more to protect the workers from the dangers. Today, they are protected.

We have to conduct a debate, something Congress has not done. The past failed efforts at legislative solutions were thinly veiled attempts by some to avoid accountability for their asbestos responsibilities through what they euphemistically called "tort reform."

We could have a debate on tort reform, and probably should, but let's not lose sight of what we are talking about here. We are talking about these asbestos cases. If we keep it narrowed to that, we can come up with a legislative solution.

Our first witness, Senator Nelson, talked to me over a year ago about that, or a couple of years ago, I think it was, and urged that why can't we come together for a legislative solution.

We should learn from the past that any compensation plan has to be fair to asbestos victims and their families. I applaud the business leaders who met with me recently for their recognition that victims have to come first in an alternative compensation system.

I know we are going to have an honest and constructive debate. Senator DeWine and I have attempted to prove in our bipartisan asbestos tax legislation that if you encourage fair settlements, it is a win-win situation for businesses and victims. Chairman Baucus and Senator Grassley have included our legislation in their small business tax package to be considered soon by the Finance Committee.

Senator Hatch has written to me that he wishes to work in this same bipartisan spirit on the asbestos litigation issue, on that narrow issue, and not to include a lot of other controversial areas in the debate.

It is going to take full-faith efforts of all the people—the industry, workers, victims—to come to it. We are going to need full participation from the insurance industry. The press reported this month that many insurers have refused to pay claims that were related to the September 11 terrorist attacks, and even threatened to pull business coverage if such claims were filed. But we are going to need their participation and we are going to need cooperation to reach a better solution for asbestos litigation.

I know the insurance industry enjoys a one-of-a-kind statutory exemption from our antitrust laws, but that special privilege has a special responsibility. I hope and expect that they will be up to the task. I hope this hearing will start us forward.

I might add that a solution is not one that adds more corporate bankruptcies or creates artificial immunities or legal fees, but one that actually compensates victims. So I put all on notice on all sides of this issue that this chairman is primarily interested in the victims and that is what we will speak to.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Grassley, I understand you are just going to put a statement in.

Senator GRASSLEY. Yes.

[The prepared statement of Senator Grassley appears as a submissions for the record.]

Chairman LEAHY. Senator DeWine, I know you are going to put a statement in, but you had something you wanted to say.

Senator DEWINE. Yes, Mr. Chairman. Thank you very much. I do have a full statement which I would like to have included as part of the record.

Chairman LEAHY. Without objection.

Senator DEWINE. Let me Mr. Chairman, thank you for holding this hearing. Your comments were very well taken. I look forward to working with you and the other members of this committee in trying to deal with a problem that candidly we as a country have ignored too long, and I think this Congress has ignored too long. We are the only ones at this point in our history that can help pro-

vide a solution, and the courts, as you have pointed out, have made that very, very clear.

Just before I came here today, I was talking to a businessman from Ohio and I told him where I was going and what we were talking about, and he made the point to me—he actually grabbed me and he said, look, you need to understand this. One of the things that we always will have the great ability to make in this country is building material, he said, but that is an industry that is in peril and it is an industry, in all the jobs that it creates, that is in peril because of the asbestos problem, and you need to understand that. The current system, he said, is not fair to the victims and it is not fair to the people who are trying to create jobs.

I must say, Mr. Chairman, that I totally agree. The status quo is just not fair. It is grossly unfair to the victims. What you find is an inconsistency in how victims are treated, a horrible inconsistency that I don't think you will find anyplace else in our country or in our judicial system.

You have a situation or a system today in which the victims are treated differently. Their compensation is certainly not fast and it is not complete. Very rarely is it ever complete. You also have, at the same time, a dwindling number of companies, as you have pointed out, and obviously that means fewer jobs that can be created. Companies go out of business and you lose those jobs.

But it also means, when you have fewer companies, that they have more liability, and when they have more liability, it puts them in danger, as well. It also means that they are in a less good position. When you have fewer companies or fewer people that you can call upon to pay the compensation, then the victims suffer.

So we are in this downward spiral, and candidly only the U.S. Congress can begin to stop that spiral. So I just appreciate very much the fact that you are holding this hearing. I know that the witnesses today will be very, very helpful.

As all of us do, I have other hearings and other obligations. I will be in and out, but I just wanted to thank you for your attention to this matter and holding this very timely hearing.

[The prepared statement of Senator DeWine appears as a submission for the record.]

Chairman LEAHY. The Senator from Ohio has been one also who has encouraged me to do that.

I will go to the first two witnesses by seniority, Senator Baucus and then Senator Nelson.

Senator BAUCUS. Well, I appreciate that, Mr. Chairman, but actually Senator Nelson was here ahead of me and I would be fine to defer to Senator Nelson.

Senator NELSON. Well, since I have some things I would like to get from Senator Baucus before he finishes his work with the Finance Committee, I would be very happy to defer to his seniority.

[Laughter.]

Chairman LEAHY. I will tell you what, guys. You go ahead and start. I am just going to stay out of this one.

[Laughter.]

STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Well, I would be very honored to proceed first, then.

Thank you, Mr. Chairman and distinguished members of the committee. I deeply appreciate, Mr. Chairman, your holding this hearing. I think we can all agree that asbestos litigation in this country is an enormous issue that will impact this Nation for many years to come, and I applaud your leadership in stepping up to address it head-on.

I want the record to reflect my deep concern that we not lose sight of what is really at stake here, and that is making sure that people who are sick or people who are likely to become sick from exposure to asbestos are not denied the ability to fight for their rights against the companies or persons that injured them. That is absolutely the bottom line.

I know you have all heard me talk about Libby, Montana, but Libby represents one of the grossest cases of corporate irresponsibility and down-right criminal negligence that I have ever seen. The extent of asbestos contamination in Libby, the number of people who are sick or who have died from asbestos exposure, is just staggering. The people of Libby suffer from the deadly asbestos-caused cancer, mesothelioma, at a rate 100 times greater than the rest of the Nation. One in 1,000 residents of Libby suffer from the disease. The national average is one out of a million.

Mr. Chairman and Senator Grassley, I wish you were with me when I was in the living room of Les Scramstad. Les Scramstad and others in Libby were talking about coming down from the mine covered with dust from the mine, had no idea that they were affected with a cancer-causing disease. Les would go home, he would meet his wife, he would embrace his wife. His kids would jump into his lap. All of them are now dying from asbestos-related disease.

I mean, just think of it. He is dying. The guilt he has in transferring the disease off to his wife and to his children—it is one of the most heart-wrenching experiences I have ever encountered. And I vowed to myself that day that I was going to do all I can to make sure that justice is given to them.

The company knew what was going on. The company knew that the asbestos dust from tremolite was causing this problem, and yet they did not warn their employees. It is an outrage, and the people of Libby, Montana, desperately need the help of this committee and the Congress.

I might add, Mr. Chairman, that the Agency for Toxic Substances and Disease Registry has found that Libby residents suffer from all asbestos-related diseases at a rate of 40 to 60 times the national average.

Well, how could this happen? Well, a company named W.R. Grace owned and operated a vermiculite mining and milling operation in Libby. It just so happened that vermiculite was contaminated by a deadly form of asbestos called tremolite.

W.R. Grace milling operations belched thousands of pounds of asbestos-contaminated dust into the air each day, dust that settled on the town of Libby, on cars, on homes, gardens, dust that settled on children. Workers brought the dust home on their clothes and

exposed their families, as I mentioned. Hundreds have died and hundreds more are sick.

The very worst part about this story is that W.R. Grace knew exactly what it was doing. It knew that vermiculite dust was contaminated with deadly asbestos. Yet, it told workers and the town that it was harmless.

Now, W.R. Grace has filed for bankruptcy, wringing its hands over escalating asbestos claims involving the vermiculite products its produced, and shielding billions in assets from the bankruptcy proceedings. It is an outrage. Through all this, W.R. Grace has yet to step up and do the right thing in Libby.

It has ungraciously fought any attempts to beg, plead, or cajole the company into living up to its responsibilities to the people of Libby, Montana. It is attempting to drastically scale back a paltry health care fund set up for former workers.

All the while, Grace lawyers have filed for over $30 million in fees accumulated in the past year alone defending Grace in the bankruptcy proceeding. That $30 million would sure go a long way in Libby, Montana, where health care costs are increasingly rapidly, threatening the ability of that town to get back on its economic feet after the blow it took from W.R. Grace.

More worrisome still, many folks who have been diagnosed with asbestos-related disease, some of whom are in their 30's because they were exposed to asbestos as children, are now essentially ininsurable going forward, because the costs of securing private insurance are non-economical.

The costs to the community and State government related to providing health coverage for uninsured sick people are creating significant pressures on the State Medicaid fund, and even causing workers' compensation problems for some private business owners in Libby, like Stimson Lumber and Lincoln County private enterprises already at marginal operations.

In addition, the Federal Government, through the U.S. Environmental Protection Agency, will spend over $100 million to clean up the contamination caused by W.R. Grace's vermiculite mining operation. So everyone—taxpayers, local businesses, the State of Montana, and especially the victims themselves—everyone but W.R. Grace is bearing the burden and suffering the pain caused by W.R. Grace's actions. Granted, we can all agree that the State and Federal Governments should have done more to protect the folks in Libby, but ultimately the buck stops with Grace.

So I apologize if I am skeptical and find it hard to be sympathetic to companies like W.R. Grace who claim they are overburdened by asbestos lawsuits. I would agree, however, that it is also not fair for companies like W.R. Grace to shift the burden of their actions onto other companies that have not filed for bankruptcy and that do not share Grace's liability or responsibility.

But, again, this is where I would ask this committee to be very, very careful in how you address asbestos litigation. It would be so very easy to insulate bad actors like Grace from their fair share of liability and responsibility, and to cutoff rightful claimants like the Libby victims from ever receiving their fair share of compensation for the wrong done to them because, Mr. Chairman, it is a little too easy to say let's cutoff those folks who aren't sick yet.

But we are talking about a disease that a 20- to 40-year latency period. Given the exposure of the folks in Libby and the type of exposure to deadly tremolite asbestos, it is very likely that many more people in Libby will become very sick in the future. We cannot cut them off.

I am sure you remember my opposition, Mr. Chairman, to the Fairness in Asbestos Compensation Act of 2000. I believed very strongly at the time that the administrative procedures set up by that bill, particularly the medical eligibility criteria, would effectively eliminate the legal rights of many residents in Libby.

I wrote you at that time letting you know that I would speak at length to any attempt to attach that legislation to bankruptcy legislation that would be on the floor. I would ask your permission to insert in the record a letter from some Libby representatives that raises similar concerns about what could be contained in revised asbestos litigation legislation that this committee my consider.

Ultimately, Mr. Chairman, because W.R. Grace has filed for bankruptcy, the rightful claims of Libby victims may never be satisfied against W.R. Grace, no matter what this committee chooses to do about asbestos litigation reform.

Perhaps part of this committee's review should include a review of the injustices inherent in corporate bankruptcies, like W.R. Grace's, that are related to asbestos litigation, particularly those injustices associated with the ease with which Grace hid a vast chunk of its assets from the reach of the bankruptcy court and, by extension, from Libby victims. Maybe some of those billions will be returned to the bankruptcy estate. Maybe not, but it is certainly an appropriate piece of the asbestos puzzle for this committee to take a very hard look at.

Mr. Chairman, I have fought for every resource at the disposal of the Federal Government to help the people of Libby, Montana, get a clean bill of health. And despite W.R. Grace's resistance, we have actually been making real progress on the ground in cleaning up the town of Libby, cleaning up contaminated homes and screening more than 8,000 current and former Libby residents for asbestos-related disease or exposure.

I am pursuing all other avenues to address long-term health care costs for those who have been devastated by asbestos-related disease, and screening costs for those who are worried that they may become ill. This includes the possibility of setting up some type of white lung trust fund.

These other avenues have to be pursued because W.R. Grace has side-stepped its responsibilities to the community of Libby. In your search for solutions to the real problems associated with asbestos litigation, Mr. Chairman, I would ask that you not make it easier for companies like W.R. Grace to shift their liability to others. In fact, I believe you should make it more difficult.

The focus here should not be on cutting off the rights of victims, but on holding accountable those who are truly responsible for the pain and suffering of real people like the people of Libby, Montana.

Thank you again, Mr. Chairman, for allowing me to testify.

[The prepared statement of Senator Baucus appears as a submission for the record.]

Chairman LEAHY. Thank you. I appreciate it very much, and I know that the Senator from Montana has been outspoken in his feelings on this for years, and very articulate and very knowledgeable. So I appreciate you coming here. I also know you have another committee meeting you are supposed to be at, so we appreciate that.

Senator BAUCUS. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Nelson first approached me some time ago, actually almost from the time he came here, and said we have got to start looking at this asbestos issue, we have got to try to craft a legislative solution. He has been tireless in working with Senators on both sides of the aisle and I applaud him for that. It is in the best tradition of the Senate.

Ben, we are delighted to have you here.

STATEMENT OF HON. E. BENJAMIN NELSON, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator NELSON. Well, thank you very much, Mr. Chairman and members of the committee. I certainly appreciate, Senator Leahy, the way in which you have characterized the effort in compensating victims and making sure not only that the program that we will be talking about ultimately compensates victims, but making sure that at the end of the day they are, in fact, compensated.

I want to thank you for this opportunity to appear here today. I was a little nervous when I saw Senator Grassley because I figured he would try to get some sort of a bet on the Nebraska-Iowa State game. I am relieved to see that he has now left and I will be able to escape that.

I was also a little bit concerned about your reference to experts, and I was looking at the table and realized that you must be referring to somebody other than Senator Baucus and myself.

I want to thank you, and Senator Hatch as well for his leadership as he walks in the door, for bringing together a group of individuals, I think, today who can share information that may lead to a legislative solution regarding the many issues surrounding asbestos litigation.

These issues are of growing concern to people in my State and I suspect, as we have heard from Senator Baucus and from others, that the members of the committee have seen the same increase in letters and calls from constituents that I have about this issue.

Historically, in the early 1970's, lawsuits against asbestos manufacturers opened the door for victims suffering from asbestos-related diseases to be justly compensated for their injuries. When Johns-Manville, the largest asbestos manufacturer, filed for bankruptcy in 1982, there were less than 20,000 asbestos cases, most on behalf of individuals with severe asbestosis or mesothelioma, a vicious asbestos-related cancer. The system worked. Sick people and their families were given the financial security that they deserved.

But the system doesn't seem to be working anymore. It has been overwhelmed by a flood of cases, some from individuals who are not yet sick but could potentially get sick in the future. We don't want to prevent those individuals from recovering down the road, but we

also need to work toward allowing those who are sick now to recover now.

With the current docket load, that doesn't seem to be happening. Over 90,000 new asbestos lawsuits were filed in 2001, representing an increase of 30,000 from the previous year. However, the American Academy of Actuaries estimates that there are only about 2,000 truly new mesothelioma cases filed each year, another 2,000 to 3,000 cancer cases that are likely attributed to asbestos, and a smaller number of serious asbestosis cases.

As a result, we must work toward finding a way to address the lawsuits of seriously ill individuals immediately, without eliminating the ability for those who may become sick in the future from having their case addressed at the appropriate time.

The unfortunate result of these tens of thousands of lawsuits is that people who are seriously sick and dying from asbestos must wait longer to recover less money than they deserve, if they recover anything at all. After transactions costs and fees for both plaintiff and defense lawyers, only about one-third of the money spent on asbestos litigation actually reaches the claimants. Moreover, as insurance is depleted and an increasing number of asbestos defendants declare bankruptcy, it is inevitable that many asbestos victims who develop cancer in the future will go uncompensated.

One such victim from my State was Val Johns. Mr. Johns was born and lived his whole life in Bloomfield, Nebraska. It is the egg capital of the world. It is in the northwest corner of the State. He and his wife, Sharon, raised their three children there. Two still live in the area and have their own families.

For 19 years before his death, Mr. Johns maintained the town cemetery. He served in the U.S. Navy from 1957 to 1960 as an electrician and he was exposed to asbestos pipe insulation aboard the destroyer USS Charles Ware. Mr. Johns was diagnosed with malignant mesothelioma in January 2000, and unfortunately passed away on November 5, 2001.

He filed a lawsuit to pay his substantial medical bills and to do something for his wife to support her after his death. But all but one of the companies that made the asbestos he was exposed to were already bankrupt. As a result, the settlement for his family was a fraction of what it should have been.

The economic fall-out from this situation, though, extends beyond sick victims. Because every company that manufactured asbestos is now bankrupt, plaintiffs have been forced to seek alternative defendants to take their place. According to the RAND Institute for Civil Justice, 300 firms were listed as defendants in asbestos cases in 1983. By 2002, RAND estimates that more than 6,000 independent entities have been named as asbestos liability defendants.

Many of these new defendants are small businesses located in every community with little or no direct connection to asbestos. I have heard from scores of small businesses in my State—local hardware stores, plumbing contractors, auto parts dealers, lumber yards. None of these businesses manufactured asbestos. None sold or installed asbestos products, but these businesses and the jobs they create are all at stake. They are now afraid that as primary asbestos defendants declare bankruptcy, they will be next in line

for the thousands of cases being filed and their businesses will not survive.

As the number of asbestos claims filed each year has nearly tripled in the last 5 years, the pace of asbestos-related bankruptcies has also accelerated dramatically. Since 1998, more companies have filed for bankruptcy protection than in the previous 20 years combined. And in the first 7 months of 2002, 12 companies facing significant asbestos liability filed for bankruptcy, more than in any other 3-year period before 1999.

Firms declaring bankruptcy since 1998 employed more than 120,000 workers prior to their filing, many of whom were significantly invested in their company's stock, pension, and 401(k) plans. According to Fortune magazine, for example, at the time of Federal-Mogul's bankruptcy filing last year, employees held 16 percent of the company's stock, which had lost 99 percent of its value since January 1999. It was reported that Federal-Mogul employees lost over $800 million in their 401(k)'s. Similarly, about 14 percent of Owens Corning shares, which lost 97 percent of their value in the 2-years before its filing, were owned by employees.

I think we can all agree that those individuals with legal claims who are very sick need to be taken care of in the most timely and equitable manner possible. That should be our No. 1 priority. We must also work to ensure that those who are not sick now but may become sick in the future are not precluded from recovering, and that there are still funds available for such a recovery.

Finally, we must consider the unpredictable economic impact the immense amount of pending litigation could have on secondary businesses and companies. The costs associated with increased bankruptcy filings to business owners, employees, and retirees could be devastating.

In order to prevent future Enron disasters for our older workers nearing retirements, we must address the very real potential threat and adverse impact this type litigation can have on our economy if we don't address these inequities now. We cannot afford to see more 401(k) and pension plans become worthless if there is action that we can take to prevent that.

I am a strong believer that every American has a right to his or her day in court. I believe also that people dying of asbestos-related diseases deserve just compensation for themselves and their families. Achieving the latter does not require a change in our tort system. It requires the restoration of the system's true purpose of providing relief to those who need it most.

So, Mr. Chairman, I plan to work with you and the committee in any way that we possibly can for the remainder of the year and in the next Congress to help resolve these issues in a fair and comprehensive manner. I thank you for the opportunity and your attention to these very important issues today.

Thank you very much.

[The prepared statement of Senator Nelson appears as a submission for the record.]

Senator HATCH. [presiding.] Thank you, Senator Nelson. We appreciate your testimony here today.

We have a vote on, so the chairman has gone over to make the vote and I am supposed to make my statement. I think I only have about 6 minutes left, but let me see what I can do.

If you would go vote and tell them to hold it for me until I get there——

Senator NELSON. I will. Thank you, Mr. Chairman.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thanks, Ben. I appreciate it.

I appreciate the chairman holding this hearing today to examine the extremely important issue of asbestos litigation. I don't think there are any serious doubts that our Nation faces an asbestos litigation crisis. Nor do I believe that it can be seriously disputed that some type of comprehensive solution is necessary.

Over the past decade, a variety of developments have greatly intensified the need and the urgency for a Federal solution. An exponential increase in asbestos claims has resulted in a wave of asbestos-related bankruptcies, and consequently threatens to leave hundreds of thousands of claimants without fair compensation and hundreds of thousands of workers without jobs. Moreover, this crisis is impacting not only the claims of those who are truly sick, but also the jobs and pensions of employees of the defendant companies. The Supreme Court has twice called upon the Congress to act and it is time that we do so.

The current crisis is not going to get any better and it will continue to worsen unless we act. In fact, as all of you are aware, the RAND Institute for Civil Justice today released their study of the asbestos litigation crisis. RAND identifies that the number of claims continues to rise and that, to date, over 600,000 people have filed claims typically against dozens of defendants.

In addition, more than 6,000 companies have been named as defendants in asbestos litigation. RAND also notes that about two-thirds of the claims are now filed by the unimpaired, while in the past they were filed only by the manifestly ill. Former Attorney General Griffin Bell recently denounced this type of "jackpot justice."

Because of this surge in litigation, companies, many of whom never manufactured asbestos nor marketed it, are going bankrupt paying people who are not sick, may never be sick, and who therefore may not need immediate compensation. Let me be clear. I do not advocate denying the deserving claimants timely and appropriate compensation, but I do think that we have to make some choices here about prioritizing who is paid now and who is paid later. If we don't, there won't be a "later" and true victims of asbestos exposure, as well as the companies, employees and pensioners, will pay the price.

An editorial in the Wall Street Journal suggested, quote, "Seeing legislators pull their hair over Enron is a pleasant diversion, but if Washington is really interested in the jobs and livelihood of American citizens it might be better off paying attention to the runaway blob known as asbestos litigation," unquote, in its characteristically interesting language.

Why do the number of claims continue to increase when actual asbestos exposure has decreased over the years? Because the current litigation system has in some instances required that those who are not yet ill file their claims now or risk being barred by the statute of limitations later. This is coupled with a, quote, "enterprising," unquote, trial bar that has orchestrated mass asbestos screenings to identify potential clients.

Don't get me wrong. Legitimate medical screenings can help to identify valid health concerns worthy of compensation. However, frequently these screenings are nothing more than an effort to generate large numbers of potential claimants in an effort to force a defendant to settle a case, regardless of culpability or causal relation to the claimants, rather than incur the costs of litigation.

In a letter to the editor of the American Journal of Industrial Medicine in May of this year, Dr. David Egilman, M.D. relates that for the past several years, he has served as an expert witness in liability cases primarily at the request of plaintiffs' attorneys. Over the past 2 years, he has, quote, "noted that many of these individuals could not (due to inadequate latency or exposure) and did not manifest any evidence of asbestos-related disease," unquote.

And he notes that, quote, "most of these cases are generated by 'screenings' which plaintiff lawyers have sponsored over the past several years to attract new asbestos clients for lawsuits," unquote. He was, quote, "amazed to discover that in some of these screenings, the worker's x-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by at least one of them," unquote. And he points out that a payment plan for the reader is often based on the reading result—a higher price for a higher reading of exposure. Now, I doubt seriously that that encourages objectivity.

In addition, the American Academy of Actuaries reports in its December 2001 Overview of Asbestos Issues and Trends that two recent estimates, quote, "indicate that the ultimate costs arising from U.S. exposure to asbestos could range from $200 to $275 billion," unquote. By some estimates, this amount exceeds the current estimates for all Superfund clean-up sites combined, Hurricane Andrew, or the September 11 terrorist attacks. Now, that is incredible.

As I am sure our chairman is aware, asbestos litigation has already bankrupted over 60 companies, and one-third of those bankruptcies have happened in the last two-and-half years. No one can credibly deny that this is a serious problem.

As Mr. Austern will testify, the number of claims is outstripping the resources of bankruptcy trusts to pay the true value of a sick person's claim. Trusts such as Manville are today only able to pay approximately 5 percent of a claim's liquidated value because of the increased number of claims filed each year that defy all estimated projections.

It is possible that some of these companies may be able to emerge from bankruptcy someday. However, what is the cost of the delay caused by a reorganization and approval of a bankruptcy trust? What about the vastly diminished resources available for deserving claimants? Those that are sick may die before they receive compensation.

Incredibly, there are some who will attempt to claim that there is no crisis at all, even some who are here today. Some will contend that the current system will sort itself out and that therefore there is no need for reform. But the general consensus out there is that there is a real problem, and I refuse to bury my head in the sand.

I am encouraged that there are those among the trial bar that recognize the problem and see the need for reform. I know that Mr. Kazan recognizes this problem, especially because it affects his clients most directly. I look forward to hearing him elaborate on how the current system results in those that are truly ill having their awards reduced.

I am interesting in hearing about how the vast numbers of those who are not ill are draining the limited resources of the defendant companies, often driving them into bankruptcy, where the risk is that there will be little, if any, compensation left for the truly deserving.

I submit for the record a copy of a full-page ad that was placed in Roll Call recently and signed by 20 of Mr. Kazan's colleagues in the asbestos trial bar. The ad urges simple legislative reform to ensure that the truly sick are compensated, while also guaranteeing those who are healthy their day in court, if and when they become ill.

Senator HATCH. I would like the written statements from the American Academy of Actuaries, the Coalition for Asbestos Justice, the National Association of Manufacturers, as well as several letters that I have received, to be submitted for the record.

Without objection, they will be. I think the information they provide is helpful to our analysis and essential to the debate of this issue.

In conclusion, I would like to say that I sincerely hope my colleagues will agree to work together so that we can attempt to resolve this issue in a reasonable and straightforward manner before its crippling effects further endanger our economy and cheat true victims out of compensation and innocent employees out of their jobs and pensions.

I appreciate those who will testify here today and I hope we can shed some light on this issue and I hope that this statement has helped to do that.

With that, we will recess until the chairman gets back.

[The Committee stood in recess from 10:50 a.m. to 11:14 a.m.]

Chairman LEAHY. Many of you, as I look around this room, are very familiar with the Senate and understand why the bells have been buzzing and the votes have been underway, a series of them. The one thing that will get us out of the room, of course, is the votes.

I did say I would recognize Senator Voinovich, who, while not a member of this committee, is a very valued member of the Senate, a former Governor, and one whose views I respect.

Senator you wanted to make a statement.

STATEMENT OF HON. GEORGE V. VOINOVICH, A U.S. SENATOR FROM THE STATE OF OHIO

Senator VOINOVICH. Thank you, Mr. Chairman. I want to thank you and Senator Hatch for holding this hearing and allowing me

to sit in on it. I have had a longstanding interest in this issue since I was Governor of Ohio. I have had great concern about the victims of asbestos.

I think the chairman will recall that I was in the forefront a couple of years ago of getting a worker's compensation bill passed for the victims of the cold war, those people who worked in our uranium enrichment plants and others that had been treated shabbily by our Government. I have also been concerned about this issue. I lost my uncle at the age of 59 from leukemia, which I believe at the time would not have happened if he hadn't been exposed to things where he was doing his maintenance work.

The point is that we have got to strike a balance between the rights of aggrieved parties to bring lawsuits and the right of society to be protected against frivolous lawsuits and judgments that are disproportionate to compensating the injured and made at the expense of society as a whole.

I think, Mr. Chairman, that most would agree that the issue of asbestos litigation is presenting a crisis in our country. More than 50 companies have gone into bankruptcy, and I am really concerned about the companies in Ohio. I think it is hurting the victims and I think it is hurting society.

Owens Corning, headquartered in Toledo, went bankrupt in 2000 and lost 97 percent of the value of its stock; 14 percent of it was owned by the employees. Federal-Mogul was already mentioned by Senator Nelson, and they lost 99 percent of their stock value and 16 percent was held by the employees. Of course, Babcock and Wilcox is also headquartered in Ohio, and another Ohio company, Owen Illinois, of Toledo, is faced with asbestos liability as well. These bankruptcies have had negative impacts on the victims who are really sick and who do not receive compensation. Employees in my State lose their pensions and jobs, and solvent companies face even more financial strain.

The chairman knows that the Government required the use of asbestos in building materials from before World War II until 1986, long after the health risks were known. Consequently, the Government, I believe, has a role to play in making sure that the sick receive compensation without bankrupting all of corporate America.

Again, Mr. Chairman, I thank you very much for allowing me to sit in on this hearing.

Chairman LEAHY. Well, I thank you, and I thank you for your interest in this.

The panel today includes David Austern, who is the President of Claims Resolution Management Corporation. He is General Counsel of the Manville Personal Injury Settlement Trust. The Johns-Manville Trust is the bellwether for national asbestos claims. Mr. Austern has run the Trust since it first began paying asbestos claims in 1988. That was the result of the Johns-Manville bankruptcy. He is highly respected by all parties in the asbestos litigation debate as an independent voice with years of experience.

He is joined by Fred Baron, who is a partner in the law firm of Baron and Budd, in Dallas, Texas. He represented his first claim with an asbestos-related illness in 1973. The National Law Journal named Mr. Baron as one of the most influential lawyers in the United States for his work in protecting the rights of victims of as-

bestos. He has twice represented asbestos victims before the Supreme Court in the *Amchem* v. *Windsor* and *Ortiz* v. *Fibreboard Corporation* cases.

Mr. Walter Dellinger is joining us today. He served as Solicitor General for the 1996–1997 term of the Supreme Court. He is now a partner with O'Melveny and Myers. He is well-known to this committee. He argued nine cases before the Supreme Court as Solicitor General, including physician-assisted suicide, the Brady Act, the Religious Freedom Restoration Act, and the line item veto. This past July, he testified at our hearing on class action litigation on behalf of the Chamber of Commerce, and we welcome him back.

Jonathan Hiatt is the General Counsel of the American Federation of Labor and Congress of Industrial Organizations. The AFL–CIO represents 13 million working men and women, many of them exposed to asbestos at shipyards, constructionsites, and other workplaces. Mr. Hiatt has served as General Counsel at the AFL–CIO since 1995, and committee members have relied on his expertise many, many times.

Finally, Mr. Steven Kazan is a partner at the law firm of Kazan McClain, in Oakland. He represented for the first time an asbestos victim in 1974, if I am correct. He has represented thousands of the most seriously ill asbestos victims, and from 1998 to the year 2000 he served as Co-Chair of the Mealey's National Asbestos Litigation Conference.

I thank you all. Mr. Austern, why don't we begin with you, sir? And, again, I appreciate all of you coming here and I appreciate you taking the time on this hearing.

STATEMENT OF DAVID T. AUSTERN, GENERAL COUNSEL, MANVILLE PERSONAL INJURY SETTLEMENT TRUST, FAIRFAX, VIRGINIA

Mr. AUSTERN. Thank you, Mr. Chairman. As noted, I am president of the corporation which processes claims not only for the Manville Trust, for which I serve as general counsel, but we also handle asbestos claims for three other asbestos trusts.

As reflected in my written submission to the committee, and as noted in the written in the written submissions of some other witnesses today, the Manville Trust has received more asbestos claims than any defendant in the tort system and more asbestos claims than any other asbestos trust. Thus far, we have received almost 600,000 claims.

Our extensive asbestos claims data base has between 25 percent and 30 percent more claims than any other entity. I would like to share with the committee some of what that asbestos claims data base shows.

First, in addition to receiving almost 600,000 claims, we have paid almost 500,000 of these claimants approximately $2.9 billion. From the beginning of the Trust to date, 11 percent of the people we have paid have had cancer claims and 89 percent have had non-cancer claims.

Recently, the cancer versus non-cancer division has changed, so that in the year 2000, 9 percent of the claims we received were cancer claims and 91 percent were non-cancer claims. And in 2001,

cancer claims were 6 percent of the claims filed and non-cancer claims were 94 percent of the claims filed.

We pay claims as directed by our negotiated and court-approved trust distribution process, and we pay non-cancer and cancer claims as directed by that. To date, approximately $2 billion of our $2.9 billion in paid claims has gone to non-cancer claims, and we, of course, have no flexibility in this matter.

With respect to disease progression and how many of the non-cancers will eventually get cancer, of the over 400,000 non-cancer claimants who have been paid by the Trust, 2,947 of them, after they received the non-cancer payment, then developed an asbestos-related cancer, for which they filed a claim. This is substantially less than 1 percent of all the non-cancer claims we have paid.

Recently, there have been amendments to our claims processing system, and while these amendments, in my opinion, at least, are a substantial improvement over the existing system, they certainly don't please everyone. Although in the administration of our claims processing system and indeed in the recent amendments to it we try to be sensitive to the concerns that I know Mr. Baron will speak to, as well as the concerns I know Mr. Kazan will speak to, trying to meet the concerns of all these parties means that inexorably we are not going to please everyone all the time.

But so much for history. Where are we in the life cycle of asbestos claims filings? It is abundantly clear that predicting how many future claims there are going to be is very difficult. It has always in the past been inaccurate and it has always in the past invariably underestimated the number of future claims.

My written submission, which by the way I recently discovered overstates the Tillinghast-Towers Perrin predicted total asbestos liabilities and claims—my written submission presents the dismal history of trying to predict future claims.

However, based on the predictions, first, of the expert asbestos claims forecaster employed by the plaintiffs' bar, we have received only about 45 percent of all the asbestos claims we will receive. Other forecasts of future asbestos claims suggest that we have received only 30 percent or so of the claims we will receive. And some future claims forecasts are even worse; that is, they predict we will receive over 3 million asbestos claims, such that we have received only 20 percent of the claims we will receive. Almost everyone agrees, however, with respect to asbestos claims we are not halfway there and we are looking at 20 years or so of substantial future claims filings, and thereafter even more years with some claim filings.

Therefore, in exploring whether there is an appropriate legislative solution to this problem, I would encourage that the driving public policy consideration, first, not be constrained by the view that the asbestos claims filings are on their way down—they are not—and, second, that it not be constrained by how we or any other system processes asbestos claims. Rather, I would hope that the driving public policy consideration for any legislation and any legislative solution be based on an absolutely clean slate so that new ideas and new solutions can be considered.

Thank you very much.

[The prepared statement of Mr. Austern appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Mr. Baron?

STATEMENT OF FREDERICK M. BARON, BARON AND BUDD, P.C., DALLAS, TEXAS, ON BEHALF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. BARON. Mr. Chairman, good morning. My name is Fred Baron. I am here today to present the views of the Association of Trial Lawyers of America on asbestos litigation, and, because of my own experience as a lawyer for asbestos victims for almost 30 years, offer my own personal observations. We have submitted a comprehensive written statement of our position which summarizes the positions of ATLA on asbestos litigation.

In a nutshell, Senator Leahy, as you have pointed out, the principal problem is the fact that for over 50 years, tens of millions of American workers were unknowingly exposed to asbestos fibers occupationally and hundreds of thousands, if not millions, have suffered injuries that are compensable under the State common laws of all 50 States. ATLA's first and principal interest is to assure that there is a system in place that these victims can use to obtain adequate and expeditious compensation for their injuries.

This morning, I would like to address three issues: first, the issue of the so-called court congestion; second, the issue of unimpaired claims; and, third, offer some suggestions as to what might be done to help asbestos victims.

Let's talk about court congestion first. I filed my first claim for an asbestos victim in 1973. It was a long, hard, expensive litigation. Indeed, the first 10 or 15 years of asbestos litigation involved enormously expensive, costly litigation between the victims and the defendants. But that only matched the long, lengthy, costly litigation between the asbestos defendants and their insurance carriers over whether or not there would be coverage for these claims.

Studies that were undertaken in the 1980's showed correctly that the amount of money that was being spent on asbestos litigation was enormous and the amount of compensation that was being paid to victims was relatively paltry in relation to that number. Over the last decade, after hundreds and hundreds of claims were tried to juries in the 1980's, that has changed.

Senator Leahy, I'd like to refer to a chart regarding asbestos trials. There are about 50,000 asbestos claims filed in the State and Federal courts each year. Of that 50,000, 90 percent of them are filed in the State courts rather than in the Federal courts, and 85 percent of the claims are filed in only 10 States.

As you can see from this chart, the total number of trials involving asbestos claims in the United States during the period January 2000 to December 2000, was only 55 claims, and for last year, 2001, it was only 61 claims. So in terms of court time, only 61 trials were held in all of the State and Federal courts in the United States last year, and I believe that number will be less this year. That is matched against 50,000 asbestos claims being filed in the State and Federal courts and 50,000 asbestos claimants settling their claims.

Second, most of the courts in these impacted jurisdictions, the ten or so States, have developed special litigation processes for asbestos cases. If an individual presents with a significant disease such as mesothelioma, that individual goes to the head of the line.

When a client comes into my office today with mesothelioma, I can assure that client that they will receive their first compensation within 90 days, and the likelihood is strong that their trial will occur in 12 months. As to an asbestosis victim, again because of the enormous number of administrative settlements that we have reached, victims get compensated usually within 6 months and their case is often completed within 24 months.

Next, I would like to visit the issue of the so-called flood of unimpaired claims. First, and most important, is a definitional issue. No State in the United States permits a person who is exposed to asbestos but who has not been diagnosed with an asbestos-related disease to successfully prosecute a claim. There is no such thing as a claim for concern about "I am worried that I'm going to get sick later." None of the 50 States permit such claims to be successfully prosecuted.

Recently, I took the deposition of a claims manager of the largest group of asbestos defendants, and he told me with a straight face under oath that he did not believe he had ever paid a dime to anyone who did not have a diagnosed asbestos-related disease.

There are essentially three forms of asbestos-related disease. First is pleural disease. Pleural disease is a scarring of the lining of the lung. Admittedly, that does not cause disability, but it clearly is a diagnosed injury that is made by a physician.

Second is asbestosis, which represents the largest number of claims. Asbestosis is a scarring of the lining of the lung and the interior of the lung. This is a disease that the medical textbooks say represent a significant problem. Asbestosis, by all accounts, is progressive, it is irreversible, and if it goes on long enough, it can be terminal. Certainly, victims of asbestosis deserve compensation.

Third is cancer. Asbestos does indeed cause cancer. It causes mesothelioma and lung cancer. But in terms of the enormity of the problem, the National Cancer Institute believes there are only about 2,800 mesothelioma deaths a year in the United States. About 1,600 of those individuals file claims. I can tell you today that most victims of mesothelima receive compensation—not all of them—but most of them receive compensation in mid to high seven figures.

As to the pleural claims, I have the numbers from the Manville Trust here on a chart and in terms of the percentage of all claims filed, it has gone from 24 percent, which was pre-1995, down to 14 percent in 2001. And in terms of the dollars paid by the Manville Trust, pre-1995 it was 7 percent, and since then only 4 percent. So all the dollars paid by the Manville Trust, only 4 percent have gone to pleural claims. All other moneys have been paid to individuals who have presented a physician's diagnosis of asbestosis or cancer.

What can be done by Congress to help? It's my opinion the most important thing that needed to be done has been accomplished with the passage of Section 524(g) of the Bankruptcy Code. That provision assures funding for future claimants and permits bank-

rupt defendants to leave bankruptcy as solvent, reorganized companies.

Remember, virtually every one of the asbestos bankruptcies has been a Chapter 11 bankruptcy, not a Chapter 7 bankruptcy. No jobs are lost. The best example is the Johns-Manville Company. When it emerged from bankruptcy in 1987, its assets, $2 billion, were placed into a trust for victims. To date, over $2.9 billion has been paid to victims, and over $2 billion still remains in the trust because of successful asset management. Berkshire Hathaway now owns Johns-Manville and it is a larger, healthier company than it was before it entered bankruptcy.

Certainly, there are some things that can be done to help. Number one is tax relief for 524g trusts. There is no reason why the trusts who are paying money to victims should be taxed at the normal rates.

I understand, Senator Leahy, you have sponsored a bill that would give a tax exemption to the asbestos-related trusts. That would be an excellent idea and a good start to provide more money for victims.

Finally, there have been some suggestions involving the creation of a National compensation fund for asbestos victims. ATLA believes that such proposals are interesting and should be explored. But if this Committee is going to pursue such proposals the first and foremost thing that has to happen is a thorough investigation of the total resources that might be available from all sources.

Again, ATLA believes the principal concern of this Committee should be to assure that victims of this unprecedented industrial tragedy are properly compensated.

Thank you, Senator.

[The prepared statement of Mr. Baron appears as a submission for the record.]

Chairman LEAHY. Mr. Dellinger, you are here representing——

STATEMENT OF WALTER E. DELLINGER, O'MELVENY AND MYERS, LLP, WASHINGTON, D.C.

Mr. DELLINGER. Mr. Chairman, I was invited to appear by Senator Hatch, which I was pleased to accept. But I should also note that the law firm with which I am a partner, O'Melveny and Myers, has among its clients a number of companies who are defendants in asbestos cases.

I further note that I personally filed a petition with the U.S. Supreme Court asking the Court to review the trial plan in West Virginia and a so far unsuccessful application to stay that trial of——

Chairman LEAHY. I mention that because as we let Mr. Baron go over a couple minutes, we will let you go over a couple minutes for balance.

Mr. DELLINGER. Thank you, Mr. Chairman.

I think it is a great benefit to the Congress and to the country that you and Senator Hatch and the other members of the committee have set out to try to define the scope of this problem and to see if there is some bipartisan effort that we could make in order to ameliorate what I think everybody, with the possible exception of Fred Baron, thinks is a quite serious problem; indeed, what the U.S. Supreme Court has called a crisis.

There are really several elements that have produced this as a crisis. Before I went into the Government in 1993, I looked at the asbestos situation and thought by the year 2002 that it would be beyond us. Since heavy use of occupational asbestos ceased in the 1970's, we would be at that time seeing the end of the process. But, in fact, we have a full-blown crisis that has caused 60 bankruptcies and is threatening the viability of claims by people who are seriously impaired.

Here is what has happened. I do think, in spite of Mr. Baron's statistics, that the system is being flooded by people who are not sick, and the RAND study which has been submitted to this committee shows that, as well as other claims.

We know from the Manville Trust figures that we just heard this morning that 94 percent of the 2001 claims were non-cancer claims. Of that, there are no doubt some that are suffering from severe forms of asbestosis which indeed can impair a person. But every estimate—and I look in West Virginia—is that far and away there are claims of people who are not sick.

Let me say precisely what I mean by that. I am using that term, "people who are not sick," as the American Medical Association and the RAND study that term; that is, an individual who experiences no decrease in the ability to perform the activities of daily lives; in other words, as RAND says, an individual who would be assigned a zero impairment rating, according to the American Medical Association's definition.

What has happened and the reason these claims are compensable is that, increasingly, one is able to forum-shop and go to a jurisdiction which will allow cases to be brought, first of all, by people who are not demonstrating that they are sick. The forum-shopping means that the problem is localized in a few States and a few counties which are themselves adopting a national legislative solution, when they are not a legislature and they haven't been chosen by the people of the other 49 States and when the solution is itself flawed.

What happens is that you have a mass-trial proceeding like the one in West Virginia where you set up a trial plan for 8,000 claims to be tried against over 250 defendants in a single proceeding. It is going to be impossible to get a fair trial. That means that settlements are forced, as they have been this week, when no one knows whether those 8,000 claims would indeed show up as being valid claims or impaired claims, or whatever, because so many companies cannot afford to go through that kind of process. When payments are made to people who are not impaired, that then in turn brings another set of cases that will never be examined closely and will go through a mass-trial process.

What are the effects of this? There are adverse effects on the defendant companies, on their employees, on their shareholders and on pension programs. There are adverse effects on plaintiffs who are seriously impaired, and Mr. Kazan will speak to that this morning.

While there are some very strong companies who have now been brought in as defendants in this case, that doesn't help a victim suffering from severe mesothelioma or his or her survivors. Companies that they could sue have gone bankrupt.

If you look at this morning's Washington Post, Mr. Chairman, it notes the case of the widow of electrician Dale Dahlke on the front page of the Business Section. He died of mesothelioma. She has brought suit against 11 companies and all 11 have gone bankrupt. The fact that there are other companies out there in the economy whom she can't sue and against whom she has no claim that could be sued by other people does her no good whatsoever.

I think Mr. Kazan will demonstrate that point quite effectively that people now have claims they cannot get reimbursed against companies that are in bankruptcy, when many of those companies, nearly all of those companies, have made payments to people who are not sick.

The trial process, finally, I think, not only causes a problem for the economy, but it also calls into question that fairness of the civil justice system. As the Committee on the Judiciary, I think that is something about which you ought to be concerned.

As someone who has taught civil procedure for many of the years I was at Duke, I don't see any semblance in a civil procedure book to the kind of trial plan that is going to go on where you have got hundreds of defendants trying to make defenses against thousands of plaintiffs at a single time. This trial plan doesn't exist in the same universe as the Due Process Clause of the United States Constitution. It is a trial plan that was never designed to produce a fair result. It is a trial plan that produces settlements. And I do not take the comfort that Fred Baron takes in the relatively few number of trials. I think the relatively few number of trials we see reflects the fact that the trial process that is anticipated is fundamentally unfair.

Let me conclude, Mr. Chairman, by saying that I am pleased that you and the other members of the committee want to help achieve a solution to this. We know what we have to have—full and timely compensation for those remaining victims and future victims who suffer from serious illnesses. We need to stop the hemorrhaging of hundreds of millions of dollars going to those who are not sick, to protect American jobs, pensions, and shareholders. Finally, we need to ensure that there is no asbestos exception to the United States Constitution, and that we can be confident that our system of justice operates in a manner that is fairly designed to achieve justice.

Thank you.

[The prepared statement of Mr. Dellinger appears as a submission for the record.]

Chairman LEAHY. Thank you, Professor.

Mr. Hiatt, as I noted earlier, the AFL–CIO has thousands of members. It also has a very large number of those members who have asbestos-related illnesses, and so we are glad to have you here and thank you very much.

STATEMENT OF JONATHAN P. HIATT, GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, WASHINGTON, D.C.

Mr. HIATT. Thank you very much, Chairman Leahy and members of the committee. I would like to thank the committee for providing this opportunity to present the Federation's views on the de-

ficiencies of our current litigation-based system of resolving asbestos claims and on the need for Federal legislation that would adequately address the rights of workers suffering from exposure to asbestos.

As you mentioned, Mr. Chairman, the AFL–CIO's member unions represent millions of active and retired workers who have been occupationally exposed to asbestos, hundreds of thousands of whom are living with the deadly consequences. For many, this exposure occurred while working in defense-related industries, in shipyards, for example, or in other public service, also in building and construction, in transportation, other manufacturing industries.

More recently, we have seen an increase in asbestos-related diseases among those working in telecommunications and the service and maintenance trades. For far too many of these workers, the legal system has offered lengthy delays, followed by limited compensation, compensation which often comes much too late.

The exposure of millions of working Americans to asbestos is one of the largest torts in this Nation's history. In the recent very comprehensive study that Senator Hatch alluded to earlier this morning, the RAND Institute estimated that as of the end of the year 2000, over 600,000 claims, as I think he said, have been filed, at a cost of $54 billion, less than half of which had actually been paid to the victims themselves. RAND now projects that up to 2.5 million more claims will be filed, at a potential cost of over $200 billion.

I don't agree with Mr. Baron that there is any evidence that these transaction costs are going down. In fact, on pages 60 and 61 of this RAND Institute study, they address this and say that, of the total cost of every dollar up until the 1990's, about 37 cents was going into the pockets of the victims. And in the 1990's, that had only risen to about 43 cents on the dollar. So I think it is still a major problem.

The labor movement has been actively involved in efforts over the past several years to craft solutions to the tragedy of asbestos. We have sought to work with all the interested parties, with manufacturers, insurers and other defendants, counsel for both plaintiffs and defendants, the Johns-Manville Trust, and congressional leaders of both parties.

In the last major attempt here on the Hill to address this issue, we worked closely with then-Chairman Hyde of the House Judiciary Committee and Ranking Minority Member Conyers, who both sought to forge a consensus among the various parties. And for reasons I have outlined in my written testimony, those efforts didn't succeed, but a lot was learned and we remain willing to participate in these efforts.

We believe that there is a broad and growing recognition by all interested parties that there are serious problems with the way the civil litigation system has ultimately addressed the plight of asbestos victims. In addition to the high transaction costs and excessive delays that I have already alluded to, these problems include inequitable allocation of compensation among victims, caused in part by the so-called bundling of claims in consolidated mass settlements which Mr. Dellinger just talked about and a general climate

of uncertainty that is damaging business far more than it is compensating victims. Also, uncertainty for workers and their families is growing as they lose health insurance and see their companies file for bankruptcy protection.

Meanwhile, we think there is also a growing recognition that some of these problems could be eased by developing alternative methods of resolving the claims of asbestos victims. But we are convinced that any legislative solution to the asbestos crisis has to meet certain basic fairness tests. I have appended to my testimony the AFL–CIO's Executive Council statement on asbestos which lays these out, and I would just like to conclude by saying a few words about some of them.

First, anyone who has been measurably affected by asbestos exposure has suffered a wrong and should receive some amount of monetary compensation for that wrong. We completely agree that those with serious disease—cancer, mesothelioma, advanced-stage asbestosis—are in a completely different category and should be entitled to significantly more compensation than victims with less serious disease.

Where one draws the line—that is, what medical criteria are employed—will be a critical determination. But for those elements of the business community who believe that asbestos reform simply means knocking out of the system victims with less serious forms of impairment, this is a non-starter as far as we are concerned.

Here, I do agree with Mr. Baron and I don't agree with Mr. Dellinger. I don't think there are just two categories, people who are very, very sick and people who are not sick at all. It is not that simple, and I think there is a very large middle category of people who are impaired, who are sick, and who need to have some monetary compensation, even if they should be looked at differently from the most seriously impaired.

Second, while an administrative system may have benefits for some classes of asbestos victims, those with serious asbestos-related medical conditions must have unimpeded access to the courts. Moreover, victims with early stages of asbestos-related disease should not be required or pressured to waive their right to additional compensation if their conditions worsen.

Third, any substitute reform system should be cheaper, speedier, and less adversarial than the present system for plaintiffs as well as defendants, and it can't be a device for re-litigating the broad issues that have effectively been settled in these past many years of litigation.

Fourth, any new system has to provide for affordable testing and monitoring to all those who have been occupationally exposed. This is particularly important since, at present, the trial lawyer bar, as Senator Hatch mentioned, is offering this service at no cost to the workers in numerous locations throughout the country. So any substitute initiative which significantly reduces the need for legal services will remove this critical feature of the current system, leaving potential victims unable to adequately track the status of their medical condition.

Finally, there has to be sufficient funding for any newly legislated system. As the RAND study that I cited earlier acknowledges, we are potentially talking about a very, very large amount of

money that will be necessary to finance a substitute system. If the defendant community is unwilling, first, to provide the relevant financial information necessary to determine costs, which has been a continuing problem, and, second, to subsidize those costs, then it will be impossible to reach any sort of consensus solution.

Of course, we strongly support a contribution from the Federal Government, which after all does bear its own significant share of responsibility for this catastrophe. But even with Government money, that will not remove the need for a major financial investment from the defendant community to fund any comprehensive solution, and that investment cannot be arbitrarily capped in such a way as to place the ultimate risk back on the victims, as we have seen with the Manville Trust experience.

Even so, the goal would be for the costs to be more defined and more predictable than is true at present, and presumably the amounts involved would also be reflective of substantially reduced transaction costs in the asbestos compensation system, leaving more money for victims and for companies.

Thank you, Mr. Chairman, and we are prepared, as I said at the outset, to work closely with you and the committee in trying to fashion a solution to this problem.

[The prepared statement of Mr. Hiatt appears as a submission for the record.]

Chairman LEAHY. Well, we thank you, and we thank you for all the hours you have spent up here with us and other committees in representing your membership.

Mr. Kazan, I am sure I am mispronouncing your name. Please give me the pronunciation.

STATEMENT OF STEVEN KAZAN, KAZAN, MCCLAIN, EDISES, ABRAMS, FERNANDEZ, LYONS AND FARRISE, OAKLAND, CALIFORNIA

Mr. KAZAN. Well, it is Kazan, Mr. Chairman, but I have been called lots worse than Kazan.

Chairman LEAHY. I try very hard to get names right. So, Mr. Kazan, I am delighted you are here and thank you for coming all the way across the country to join us.

Senator HATCH. We all understand that situation of being called worse.

[Laughter.]

Chairman LEAHY. Except for Senator Hatch, whom we all speak reverentially to.

Senator HATCH. I would like to hear a little bit more of that.

[Laughter.]

Mr. KAZAN. Thank you, Mr. Chairman and members of the committee. I am a plaintiffs' lawyer. I represent people who are dying from cancer caused by asbestos exposure. I speak for myself and other members of the asbestos bar who stand up for the interests of asbestos cancer victims. Some of these victims, including Ms. Dahlke, are here with us today.

Asbestos litigation has become a national nightmare, as well as a national disgrace, and cries out for your attention. The legacy of asbestos disease is a tragedy for my clients and their families, made only worse by a legal system that is compounding their

plight. Everyday, we see people who are seriously ill. Many have just a few months to live.

In the past, I could promise a man dying of mesothelioma, a progressively debilitating and incurable cancer that kills within a year or two, that his lawsuit would guarantee his family's financial security after he was gone. Today, in many cases, I can no longer make that promise.

How did we get here? It is a tragic tale that begins with outrageous corporate disregard for the health and safety of American workers and continues today with a betrayal by the justice system that is supposed to protect them.

Industry knew by the 1920's that asbestos could harm the lungs and cause death, but did not begin to warn workers until the mid-1960's. Public concern, the establishment of OSHA, and fears of liability finally led to a drastic reduction in asbestos use after 1973. However, the earlier exposures have left a wake of incubating devastation that will be with us for decades.

The health effects of asbestos exposure vary. It causes some cancers and non-cancer conditions as well. The two principal cancers are lung cancer and mesothelioma. There are 2,000 or more mesothelioma cases expected each year for at least the next 15 years, with significant additional cases well into the 40's of this century. Asbestos also contributes to another 4 to 5,000 lung cancers each year. In my view, any serious look at the asbestos crisis must first focus on the needs of these victims.

Asbestos exposure also causes two non-cancer conditions—asbestosis and pleural changes. Asbestosis is a scarring of the lungs which can lead to disability and even death. Fortunately, such extreme cases are quite rare today. Pleural changes usually take the form of plaques, small thickened areas on the membrane between the lungs and the ribs. Plaques do not, however, cause any symptoms and have no effect on lung function. Neither asbestosis nor pleural plaques turn into lung cancer or mesothelioma.

Asbestos victims began filing suit against manufacturers in the early 1970's, and by the late 1970's seriously ill victims were winning their cases. By the mid-1980's, a disturbing new trend began to emerge. Some of my colleagues began filing thousands of claims for people who just were not sick. Three years ago, this trend accelerated rapidly.

Today, these claimants are often treated like commodities, recruited and bundled by hired-gun operators of mobile x-ray equipment or through websites that proclaim to people "you may have million-dollar lungs."

We have gone from a medical model in which a doctor diagnoses an illness and the patient then hires a lawyer to an entrepreneurial model in which clients are recruited by lawyers, who then file suit even when there is no real illness. These are not patients; they are plaintiffs recruited for profit.

Last year, some 90,000 asbestos claims were filed. Less than 7 percent were for cancer and 75 percent or more were filed by lawyers for people without any asbestos breathing problem whatsoever. The burden of paying people who are not sick has sucked billions of dollars out of the defendant companies, pushing more than 60 in bankruptcy; more than 20 since January of 2000 alone.

I have no sympathy at all for the asbestos defendant companies. The wrongs they did are the cause of this public health catastrophe, but these companies provide the only resources to compensate my clients and other asbestos victims. Bankruptcies delay compensation for years and severely reduce the amounts awarded to the sick.

In 1991, the U.S. Judicial Conference called asbestos litigation a "crisis," saying "the worst is yet to come." If Congress did not act, they said, "all resources for payment will be exhausted in a few years," leaving "many thousands of damaged Americans with no recourse at all."

They were right, and it just keeps getting worse. The U.S. Supreme Court has called on Congress several times to act. As you consider this problem and its potential solutions, I ask you to think about those hurt most by asbestos, people who are seriously and often terminally ill. Think of their husbands or wives and of their children. I urge you to act quickly to fix this broken and abused part of our justice system before the real victims of asbestos lose everything. Only Congress has the power to end this national nightmare.

Thank you.

[The prepared statement of Mr. Kazan appears as a submission for the record.]

Chairman LEAHY. Thank you.

Senator Carper, did you want to add something here before we go to the questions?

Senator CARPER. I simply want to say, Mr. Chairman, my heartfelt thanks to you for scheduling this hearing and for our witnesses that are here. This is a very important issue. There is a reasonable compromise that can be found on this issue that is fair to those who have been harmed and to the businesses. There is a fair compromise and it is just incumbent on us to find that.

I thank you for this hearing.

Chairman LEAHY. I thank you, Senator, and I appreciate the time you have spent with us and the amount of time you have spent at these matters before this committee.

Senator Voinovich, I thank you, too.

Mr. Austern, let me ask you a question because I sort of think of you as the repository of a great deal of information, probably more than you would like to have, on these issues.

We see all the things written about the types of victims filing claims, including these so-called unimpaired victims. As I read this, it almost depends upon who is writing it, what unimpaired means, so if I can ask you some specific questions about the unimpaired, especially as it refers to claims filed with the Manville Trust which is sort of the bellwether here.

Some have claimed that anyone who does not have cancer has not been truly injured by asbestos. On the other hand, we heard what Senator Baucus said earlier about the family in Montana and some of the Libby, Montana, victims.

Does the Trust have victims of asbestos exposure that don't have cancer, but do have serious physical ailments?

Mr. AUSTERN. In aggregate total, from inception to today, 11 percent of all claims were cancer and 89 percent were not. Accepting

Mr. Baron's pleural figures as I do, because they are accurate, of the actual claims filed in total thus far, 18 percent have been pleural.

With respect to the issue of whether the remaining 59 percent suffer from impairment, I am not a medical doctor or a doctor of any sort. Clearly some do not, clearly some do. In our changed trust distribution process that I alluded to, the definition of a serious asbestotic has changed. It now requires that someone have a particular severity of the disease.

We have attempted to model how many people that would be each year based on this new definition of severe asbestos disease. It would be 40 or 50. It is an irrelevant number in terms of how much we will be able to pay and all the others will not have a severe asbestos disease.

Chairman LEAHY. Well, help me a little bit further on this. There is an increase in filings for people with disabling asbestosis. It was about 25 percent in 1999 and it went to 39 percent in 2000, and so on.

What is disabling asbestosis and are these people impaired?

Mr. AUSTERN. The definition of disabling asbestosis in the system that we now have, not the changed system, not the one that goes into effect, requires that a person have an x-ray result that shows that they have an asbestos disease. Candidly, it is a low severity, but nonetheless an asbestos disease. As Mr. Baron said, it is scarring of the lungs.

And, second, for severe asbestosis, they must have had a breathing test and that breathing test must show that at least one of the scores was below 80 percent of what would be expected for their age, their height, their weight, and certain other factors.

Chairman LEAHY. Let me start now at this end of the table and ask you about getting information. Mr. Hiatt had said that manufacturers and their insurers failed to provide full financial information on the funding needed to support an acceptable claims resolution system.

Now, Mr. Kazan, I am going to ask you and Mr. Hiatt and Mr. Baron, could you comment on this and whether you agree that getting complete financial information from the manufacturers and insurers is critical to give any kind of intelligent evaluation of a reform proposal?

Mr. Kazan?

Mr. KAZAN. Well, Mr. Chairman, these are mostly publicly traded companies and my understanding is that they are, in fact, required to publish financial data. We have never had a problem that I know of finding out what their assets, and so on, are.

I can tell you that in many bankruptcies the plaintiffs' committees on which I and Mr. Baron usually serve vigorously investigate and go after hidden assets of the kind that Senator Baucus mentioned in his earlier remarks.

Chairman LEAHY. Are you including insurance companies in this, too?

Mr. KAZAN. Well, the insurance assets or the claims of insurance coverage are also discoverable and we know about them. I did come today, however, Senator, prepared to talk about the problem rather

than the solutions because I thought that was what you had instructed us to do.

Chairman LEAHY. That is fine, but we have got to find solutions. But would you say that in finding those solutions, it is also necessary to know what the financial backgrounds are?

Mr. KAZAN. I think we have that information and I don't think that is a problem.

Chairman LEAHY. Mr. Hiatt?

Mr. HIATT. Well, my concern, Senator, was not so much on a company-by-company basis, and I did not make my statement from the perspective of difficulty we have had in a particular piece of litigation where there are legal obligations that the attorneys can take advantage of to provide the information, but rather in terms of the wholesale scope of this problem and what the business community as a whole and the insurer community as a whole would need in order to subsidize this problem.

Admittedly, that is a very difficult task because nobody does know, as the RAND people acknowledge, what the long-term scope of this is going to be. But we don't want is another Manville situation where we start off thinking that we have a total sum that is a realistic figure, only to have within a few years that fund being able to pay only five cents on the dollar. That is what we are most concerned about.

Chairman LEAHY. That is also my concern. As Justice Ginsburg suggested in her case, if we are going to find a legislative solution, and I would think if we are going to set up a system for victims, we also have to know that the financial wherewithal is there. That is a question I have. I will stop with that, but I will leave it to anybody else to speak—Mr. Baron, you can, or Mr. Dellinger or Mr. Austern—to that question.

I should also note in this that we are using a lot of statistics, a lot of figures, and shorthand on some things. I only want the results of this hearing to educate all of us. Look at your testimony afterwards. I will make sure, and I am sure Senator Hatch will have no objection to this, that the record will stay open so that each one of you can amplify in any way that you wish to on your answers.

Mr. Baron?

Mr. BARON. Well, I think you hit the nail on the head, Mr. Chairman. I think complete financial disclosure is the first and most essential piece to this effort because if a fund is to be created, we need to know what the financial parameters of the fund are.

Indeed, we are here because so many of these companies and their insurance companies claim that they don't have adequate resources to cover the load. You need to look into that issue and identify what resources are available because it is essential that claimants have the ability to access a fund that is going to be adequate to pay fair compensation.

Unfortunately, there have been numerous cases of fraudulent conveyances and years of litigation trying to bring back assets to companies that have been spun off or involved in a shell game essentially to eliminate liability exposure to asbestos claimants. I think that this investigation is going to be a long, tedious process,

but I think it is the first thing that needs to happen before a fund is created.

Chairman LEAHY. Thank you.

Mr. Dellinger?

Mr. DELLINGER. Mr. Chairman, just a personal word, speaking entirely for myself in this instance about the role of the Federal Government which I have reflected on for some years.

In World War II, we faced a critical situation where we were going to lose control, I think, of both the Atlantic and the Pacific Oceans and we had to have ships. We asked shipyards to get ships out into the water to do battle in World War II, and we threw our workers into that situation, shipyard workers, and they got those ships out. There was huge exposure to asbestos. It is the source of some big portion of this claim.

And we all benefited from that. Everybody in this room today benefits from the fact that we got those ships out there. So in terms of the appropriateness of a claim and that those of us in this generation have benefited from those World War II, there is actually a very good argument to be made that we as beneficiaries should contribute at least to that aspect of the problem that was caused by what we absolutely had to do in World War II.

Chairman LEAHY. Thank you.

Mr. AUSTERN. Mr. Chairman, if I could echo Mr. Dellinger's comment, not for a solution today, but I would like to make available to the committee at a future time the very substantial record that the Manville Corporation had in suing the Federal Government for the exact liability that Mr. Dellinger just mentioned. I think it would be of interest to the committee to see just how much the Government, in fact, knew about the very dangers of asbestos that Mr. Baron and Mr. Kazan have just spoken about.

Chairman LEAHY. Thank you.

Senator Hatch?

Senator HATCH. Well, thank you, Mr. Chairman. This is a very interesting hearing to me and I respect all of you greatly. But, Mr. Dellinger, I am having a hard time understanding how the court in West Virginia could consolidate or cojoinder the claims of 8,000 plaintiffs against 250 defendants.

Can you explain to me how this provides due process to any of the parties involved?

Mr. DELLINGER. Senator, that is a good question.

Senator HATCH. Does this compromise the rights of asbestos victims?

Mr. DELLINGER. Here we have thousands of plaintiffs who worked at hundreds of locations all around the country. They worked in different kinds of jobs, they worked in different time periods over six decades. They had different individual health backgrounds. They were exposed to hundreds of different products with different applications, different instructions, different warning labels. They have, among the 8,000, different theories of recovery.

But under the mass tort rule, the liability of hundreds of defendants to those thousands of plaintiffs was going to be resolved in a single mass proceeding where defendants would not have any opportunity to show that the claims against them had no relationship to the claims made against them, or to demonstrate the tremen-

dous difference among defendants. In that setting, it is hard not to assume that the worst is going to happen and that you have to settle.

Now, that has real consequences. If the tort system doesn't operate fairly, it doesn't achieve its goal of providing proper incentives to good conduct. If it is just a random shot as to whether you are found liable or not, so that companies that have little or no relationship to the exposure to asbestos are the ones that actually wind up paying a part of the costs, then the system simply won't work as an incentive to avoid risky behavior because it simply is going to be irrelevant whether you are at risk or not.

Senator HATCH. I understand that the majority of defendants in the West Virginia cases, or mass action should I say, have settled their claims. Do those settlements affect your appeal to the U.S. Supreme Court?

Mr. DELLINGER. We still have our petition pending with the Supreme Court and the two claims we put before the Court are still there. One is that before you have a proceeding like this, you have to make a determination that the claims are sufficiently common, that they can be tried against this group of defendants in a way that allows the defendants to advance their rights without prejudice. West Virginia makes no such determination. They just throw the cases in.

We are asking the Supreme Court to say, look, it could be that you can try cases of more than one plaintiff against more than one defendant, but it has always been the case that you have had to make a determination that could be done fairly. They have just dispensed with that in West Virginia.

And the fact that there are a relatively few defendants left does not change the fact that no such determination was ever made, or the fact, Senator Hatch, that a Justice on the West Virginia Supreme Court estimates that at least 5,000 of the 8,000 cases have no connection to the State of West Virginia, the ones being tried there. So this is a West Virginia solution for the country.

Senator HATCH. Mr. Kazan, where are all these new asbestos cases coming from? I thought that exposures had been reduced down to very low levels 25 years ago or more. How is it possible that we are seeing 90,000 new cases last year?

Mr. KAZAN. It is a function, Senator, of the vigor and strength of the free market system. There is an economic opportunity for my colleagues in the plaintiffs' bar and they are maximizing that opportunity.

Senator HATCH. It sounds like a fairly strong indictment of the claimants' bar.

Mr. KAZAN. Well, it is not an indictment. If it was indictable, we would have a solution to the problem.

[Laughter.]

Senator HATCH. Are you suggesting that this legislation should provide some indictable——

Mr. KAZAN. Even I would not go that far.

Senator HATCH. OK.

Mr. KAZAN. The reality is, Senator, that well over 50 percent of the American adult population, if you took x-rays, would demonstrate changes that meet the requirements today to justify an as-

bestos lawsuit. That doesn't mean they have changes in their lungs that have anything whatsoever to do with asbestos.

The bulk of these cases that are being filed today come out of these screenings where a doctor who gets paid piecework doing volume business reads these films as simply consistent with asbestos disease. That is not a diagnosis. It would never get to a jury as more probable than not.

There are over 150 medical causes that produce these changes in the lungs, and that is why they can only say "consistent with." Nonetheless, those are the very claims that are being filed. They are being recruited. The Manville Trust and others are paying them. These are people who are not, by any rational definition of the word, sick. Their breathing is not affected, their lives are not affected. They simply have an x-ray that some for-hire doctor is prepared to say, in a medical-legal evaluation, not a physician-patient one, that there is a change that could possibly have come from asbestos.

So, Senator, although the Manville Trust talks about 1 or 2 or 3 million future cases, in fact, the number of potential future cases is virtually infinite—50 million, 70 million, 100 million cases.

Senator HATCH. Of these cases, how many are brought by people who are basically unimpaired from asbestos? How much money has gone to these claimants and how does that impact your clients?

Mr. KAZAN. Well, approximately, from what I understand from the Manville Trust, last year 75 percent of the claims filed were for people with no lung function impact of asbestos. There is a whole range of cases of people who have asbestosis that does affect their breathing, and I certainly believe those are legitimate cases. They have real value and they ought to be compensated.

My guess is, based on the Manville data, there are 10 or 12 or 15,000 of those cases a year nationwide, added to the maybe 10,000 cancer nationwide each year, the 20 or 25,000 cases, which is the kind of volume we were getting up until 1997, 1998.

The system worked fine. We were doing well. The courts could handle that without difficulty. We wouldn't need your help if that were the case. The difference is mobile x-ray vans and entrepreneurial lawyers.

Senator HATCH. Yes, Mr. Hiatt?

Mr. HIATT. Senator Hatch, I just wanted to say whatever merit there is to the factors that Mr. Kazan has just described, I think that also leaves out a very important factor that contributes to the increase in claims that are being filed, and that is that there are new sectors where workers who had never before had to worry or thought they had to worry that they had been exposed or that their exposure had been significant enough to possibly result in asbestos-related disease has now become clear.

The Communications Workers of America union had never seen this as a major problem affecting their members, and recently they have done sampling and found extremely high exposure rates among installers, cable splicers, outside plant technicians, and auto mechanics who had been exposed to asbestos. This would be a whole category of workers that would not have known to even get themselves tested in the past. So I think that that is an important factor.

We have just finished reading about the exposure by workers who helped with the clean-up of the World Trade Center disaster, and I am afraid that as long as asbestos is still around there are going to be new sectors and new places that these claims are going to come from.

Senator HATCH. Well, maybe I should get down to real business here. I may be one of the few Members of Congress who really has worked around asbestos, because I worked in the building and construction trade unions for 10 years. Asbestos was used for pipe covering and I was a metal lather putting in suspended ceilings and partitions and corners and all kinds of other things.

Mr. DELLINGER. I would recommend Mr. Baron, Senator.

[Laughter.]

Senator HATCH. That is what I am getting to. I am going to forget about you three.

Mr. KAZAN. You don't want me, Senator. I would just reassure you that you are fine.

Senator HATCH. Mr. Baron, I think maybe I need to retain you because some people have said that I look sick from time to time.

Mr. BARON. Senator, you are obviously in very good health. The issue, though, is a really important one in terms of the number of claims.

There is another factor that hasn't been mentioned. In addition to finding more workers who have been exposed to asbestos over their career that really didn't know they were exposed and therefore adding another group to the litigation mix, there is another factor that we lawyers and some of the statisticians call "propensity to sue."

Harvard has studied propensity to sue in medical malpractice cases and found that maybe 10 or 12 percent of people who have sustained malpractice actually file suit. In automobile accidents, the generally accepted figure is about 15 percent of individuals who have potential claims actually pursue them.

In asbestos litigation, because of the enormous amount of publicity and discussion of the issue in the public, we are seeing that the propensity of individuals who have contracted asbestos-related diseases to sue is high. Indeed, the most telling statistic is the number of mesothelioma cases filed.

Every year in the United States for the past 25 years, between 2,500 to 3,000 people have developed mesothelioma. That disease is caused only by asbestos and it is invariably fatal. Each individual arguably has a cause of action.

Back in the 1980's and into the early 1990's, we would only see maybe 800 claims, 1,000 claims a year. Now, we are seeing 1,600 to 1,800 claims. The propensity to sue among mesothelioma victims is very, very high. It is also getting higher among the victims of asbestosis and that accounts for the large number of filings.

Senator HATCH. Well, my time is up, but let me just turn to Mr. Kazan. Do you have any response to that? I can see why Mr. Baron makes so much money every year. I mean, he is very persuasive. Now, what do you have to say about that?

Mr. KAZAN. Well, aside from the fact that he is wrong, certainly more and more of the cancer victims are coming forward with litigation. Doctors are more aware of this. There is more publicity.

The Internet has made a significant impact, as well, in disseminating knowledge to the public.

At the end of the day, however, it is not people deciding that they want to bring claims. What is fueling the increase in the last 3 years is lawyers going out and advertising for free screenings, sending out mobile vans, recruiting plaintiffs who feel fine, who don't know they have any claim, who never would have thought about it until the lawyer gets the x-ray and has somebody read it as showing that it might possibly have something to do with asbestos.

These are not diagnosed cases of asbestos disease in any sense that any of you would think of when you think about illness, where you go to a doctor and you tell him what is wrong and he orders tests and he evaluates your condition and thinks through the process and reaches a conclusion. These are simply people who have an x-ray that somebody says might be from asbestos. They don't see a doctor in most cases, and when they do it is a for-hire screening doctor.

Our materials include some depositions where there is an osteopath who has confirmed 14,000 consecutive diagnoses of asbestosis in people he has seen and he doesn't even know what the word means. So it is a fiction. That is simply what it is. These are not real illnesses. They are not real cases in large degree. That is not to say there aren't thousands of legitimate, non-cancer cases every year. There are. They deserve to be paid. That is not the problem.

Senator HATCH. Mr. Baron, just one last comment. I have quite a bit of respect for you, but I agree with him; I think you are wrong in this area. I know that you must have been talking tongue-in-cheek when you said in June of this last year at the Mealey's asbestos bankruptcy conference, quote, "I picked up my Wall Street Journal last night and what did I learn? The plaintiffs' bar is all but running the Senate. Now, I really strongly disagree with that, particularly the words 'all but.'"

Mr. BARON. Senator Hatch, that, as you correctly stated, was a comment I made very jokingly when somebody brought to my attention a copy of a Wall Street Journal editorial criticizing me for filing claims for asbestos victims.

Senator HATCH. Look, don't get so defensive. I took it as humor. I thought it was pretty good humor——

Mr. BARON. It was intended to be humorous.

Senator HATCH [continuing]. Except that some of us do feel that the plaintiffs' lawyers and the plaintiffs' bar have an inordinate control in the Congress of the United States. Now, rightly or wrongly, we feel that way and I think we are pretty much right.

I think that the plaintiffs' bar is a very important bar in this country, and I think it is important that the plaintiffs' bar realizes that there are all kinds of viewpoints up here and that we try to find some way of making sure that justice really occurs in this country.

It is one thing to fight for the rights of people, to fight to correct injuries and wrongs. It is something that I applaud all of you for. It is another thing to make this a money-grubbing, political, power-seeking approach which some are criticizing our plaintiffs' bar for.

Mr. BARON. I agree with you, Senator Hatch.

Senator HATCH. I belong to your organization. I was a plaintiffs' lawyer. I started out as a defense lawyer and I found out that was too tough, so I became a plaintiffs' lawyer. I found out that was just like rolling off a log compared to being a defense lawyer.

But to make a long story short, I respect you and I respect the plaintiffs' bar. But I suggest that this is a serious set of problems. We have got to solve these problems, and you and I both know that sometimes problems like these have to be solved by good people getting together and resolving them.

I would like as many good ideas as you can give us as to how we might do this, because I am sure that you recognize that if not all of what Mr. Kazan is saying is true, part of it is. I would like your help in this committee and I would like to have a good relationship in arriving at that, but I want a solution here.

This clearly is not right. It is clearly not working. There are clearly people getting compensation who don't deserve it, while others are not getting compensation or won't get compensation who do deserve it. We have got to find some way out of this and I would like some help from all of you. I think this hearing is very, very important to try and lay this all out.

Thanks to all of you. I wish I had more time.

Mr. BARON. Senator, may I say that ATLA as an institution is absolutely committed to working with this committee to find a solution to these very significant problems. I have to say that sometimes we say things tongue-in-cheek and we are sorry we say them, and I apologize to anyone that was offended by that statement. It was meant jokingly and it was taken out of context.

Senator HATCH. I was having some fun myself.

Mr. BARON. I apologize. But one only needs to look around this room to see that the manufacturers and the insurance carriers are very well represented in this city. And as far as ATLA is concerned, we are a voice for victims and we need to go the extra distance to be sure that voice is heard, and we appreciate the opportunity to provide information to this committee and you have our solemn promise that we will cooperate with the committee in all respects on this matter.

Senator HATCH. I look forward to that. Thank you.

Mr. DELLINGER. Can I make a 10-second comment?

Senator HATCH. Sure.

Mr. DELLINGER. I think it has been apparent what a well-balanced panel you have had today that you have collectively put together.

The first essential question is, is there a serious asbestos litigation problem. Though the panel is well-balanced, I would note that four of the five people here today agree that there is a serious problem that makes a congressional response imperative.

Senator HATCH. I apologize to Senator Cantwell for taking so long, but I felt that this is really a good panel.

Chairman LEAHY. I think it is, and this is, since I have been here, the only time we have ever had a full Judiciary Committee hearing on this matter and I have tried to give extra time to each Senator and each witness.

Mr. Dellinger mentioned the World War II ships and the use of asbestos. The State Adjutant for the Vermont Department of Vet-

erans of Foreign Wars, by coincidence, had an op ed piece in the Rutland Daily Herald, our Pulitzer Prize-winning, highly respected newspaper back home.

He spoke of the insulation which continued even through the 1960's while the Navy knew of the dangers and they still kept on doing it.

His op ed ends by saying, "Many victims of asbestos need his help, particularly veterans who already served their country—veterans who continue to fight battles every day against deadly illness and a system that doesn't seem to care."

I will put Adjutant Gascon's whole op ed piece in the record.

Senator Cantwell, I appreciate you being here and I yield to you for whatever amount of time you would like.

STATEMENT OF HON. MARIA CANTWELL, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman, and I also thank the Ranking Member for his questions and comments. I think it was very important that he get his questions out. And we found out some vital pieces of information that, in fact, Senator Hatch is not sick, and I think that was very important for us to establish.

Mr. Chairman, this hearing is very important to my constituents. I think my State suffers from a disproportionate amount of sufferers from mesothelioma and a large number of cases because of our mill industry and because of our shipyard industry.

Some of my constituents who suffer from this truly awful disease are here today and I want to thank them for making the trip. Brian Harvey, who, if not a medical miracle, I am sure he will be soon, is in his 36th month from diagnosis and serves as an inspiration to others who are undergoing experimental mesothelioma treatment. I would also like to thank Charisse Dahlke, who lost her husband in May, for being here as well and being part of giving input in this process.

I would also like to enter into the record, Mr. Chairman, if I could, testimony from Matthew Bergman, an attorney from my State who has developed an expertise in this area, and I urge my colleagues to read his testimony.

In my opinion, the most astounding part of this situation is that we have yet to ban asbestos. I have a colleague, Senator Murray, from Washington, who has a bill in the HELP Committee. I hope that this hearing today will encourage people to pass that bill out of the committee.

In regard to compensation of those exposed to asbestos, I have reviewed the testimony of the various witnesses and I am convinced it is, in fact, a very complex issue. But I would remind my colleagues, and even those on the panel, there are the victims, and oftentimes those victims lose their lives, and then there are the victim survivors, oftentimes women, oftentimes young children, whose future lives will be determined by what this compensation outcome is. So I think it is very important that we not let the complexity of this issue deter us from getting to some of the specific solutions to the problem.

Mr. Austern, you, I think, probably gave the best statistics that I just want to make sure I am reviewing correctly. Since the expo-

sure to asbestos didn't peak until 1973 and didn't significantly decline until the mid-1980's, am I correct that we are going to continue to see an increasing number of these cases? I think you number you have is until 2013, and that cases aren't likely to decrease in number until 2025.

Is that correct?

Mr. AUSTERN. Based on our years of first exposure—and you can cut this almost any way you want, by industry, by injury—really, all the statistics show that the year of first exposure is rising very, very slowly and we are going to see significant claims filing based on the consumption of asbestos in this country in those previous years for at least 12 or 13 more years and then for a period of time thereafter. It is a very discouraging picture when you look at the amount of asbestos that was used and how we are looking at claims that were only exposed in the 1950's and the 1960's.

Senator CANTWELL. Well, given that, I would like to ask Mr. Baron and Mr. Kazan a question about the fairness of this situation, given the two constituents that I have here today: one, Mr. Harvey, who was successful because the timing of his illness in actually receiving a settlement, and Ms. Dahlke. In both of these cases, some of the same companies now have declared bankruptcy and Ms. Dahlke's ability to get resolution on this issue is mitigated significantly.

So what is the fairness in that? The timing of the illness becomes the determining factor?

Mr. BARON. Senator, I think you make a very, very good point. And might I say before I answer the question that I agree with you completely that it is outrageous that we have not banned the use of asbestos in this country and I think that has to be a priority for this Congress.

But back to your question, it is unfortunate that there are so many victims, and the mismatch here is obviously the number of victims and the amount of money available to be paid. I respectfully submit that the first thing that this committee should do is carefully investigate what resources are available to pay claimants; in other words, how much money is really out there in insurance coverage and how much money the companies who created this problem have available to pay for the damage that they have caused. There is indeed a mismatch and it is unfortunate.

By passing 524(g) of the Bankruptcy Code, Congress has required that when a company goes into bankruptcy it must be required that they set aside assets to pay future victims, not just the present victims. That is a very, very important consideration.

Senator CANTWELL. But won't there be an inherent disadvantage to Ms. Dahlke in the sense of, again, because Mr. Harvey entered into—basically because we found out at a time in this process, he was able to get a settlement. Ms. Dahlke may be 5 percent, so Mr. Dahlke's surviving children will now be disadvantaged in this situation.

I am very glad that my constituent, Mr. Harvey, has done so well, but I also think that we need to realize that there are other victims in this situation of those survivors and that they are going to receive a very, very small amount of what would be available compensation.

Mr. BARON. It is not unlike the drunk driver who causes five or six different accidents and has no insurance. Maybe the first one or two victims will receive his assets, but the others may be left with nothing. Fortunately, it is my experience—and I represent almost 700 victims of mesothelioma—that only a very small number of mesothelima victims are left only with bankruptcy-related claims.

Most mesothelioma victims were exposed to many different types of asbestos products and there are still solvent defendants who can pay these claims. Are they always going to get a hundred cents on the dollar? No, but that is also true of all of the other asbestos victims. They have the same problem to deal with.

Senator CANTWELL. Mr. Kazan, do you agree with that assessment?

Mr. KAZAN. Do I agree with Mr. Baron? No. Again, the problem is—you have put your finger on it—there is a very serious issue here. And the root cause of the fact that Ms. Dahlke is not getting paid now and is likely only to recover pennies in the future is that very bankruptcy provision that Mr. Baron speaks of, 524(g), which requires that when you set up a trust, you treat all claimants, present and future, alike, which means you have to estimate all the future claims so you can assign values to them and allocate their share.

It is the problem that Mr. Austern has and it is the increasing trend in filings that causes revisions in projections which led Mr. Austern's trust last year to cut its payment percentage in half. As long as we leave the system the way it is, there will be more and more claims filed. That, in turn, leads to higher and higher estimates in the bankruptcies, which means a smaller and smaller percentage of payment not only to the currently sick people and all current claimants but to all the future claimants.

We know the numbers of the cancer cases. We are going to have, as Mr. Austern says, 2 to 3,000 a year. We can calculate that. We have been predicting cancer correctly in asbestos for 20 years, and the reason we have done that is it is science. It is based on medicine and epidemiology.

We cannot predict the number of non-malignant, unimpaired, no-functional-change cases because those are not based on medicine. They are based on entrepreneurial zeal. As a result—I hate to say it, especially in front of Ms. Dahlke, who is a lovely person that I have spent some time with—the chance of her getting significant recovery out of any of these bankruptcies is somewhere between slim and none.

The tragedy here gets compounded every day in case after case. Mr. Harvey is an exception to the rule. I see clients all the time and I tell them I have good news and bad news. The good news is that you weren't diagnosed until just now, so you have been healthy for the last 5 years. The bad news is you have been diagnosed now and although you have had those 5 years of good health, you don't get any real compensation. If you had gotten sick 5 years ago, your case would have been worth a great deal of money. Unfortunately, you probably wouldn't be here today.

The real tragedy in this, Senator, is that while most of us sitting up here view this as a serious public health problem and a public

policy issue, I am afraid that some members of the trial bar, including those who have great influence over ATLA's policy—and I am an ATLA member for 30 years and it pains me to say this, but they view this simply as a business opportunity rather than a chance to deal with public policy issues. And I certainly hope this committee focuses on the public health issues.

Senator CANTWELL. Well, I definitely think you have stirred some followup interest and response from some of our panelists and I do want to get to that, but I would like to pose a question to the panel, as well, in making your response to those statements.

I just want a yes or no answer on should people with exposure but no symptoms be compensated at the same level as those that are sick?

Mr. BARON. Of course not, and they aren't in the present system.

Senator CANTWELL. I think that is the fundamental question that we have here. I know that we are talking about a process, but I want to give Mr. Austern a chance and the other panelists because I think what we really need to do is boil it down to what we do agree on and take this process from there.

I think we all think we have a very complex problem, but I would beg to say that what we are failing to recognize is—Mr. Harvey's life is incredibly important, but the future opportunities for Mr. Dahlke's son—maybe it is the difference between whether he will ever get to go to college or not, or whether Ms. Dahlke will be able to support the rest of the family.

I don't think you can treat them unfairly just because of an arbitrary date and time by which they found out that they were ill, when we know that there has got to be a better way to solve this.

Mr. Austern?

Mr. AUSTERN. Senator, if I could make two responses to that, first, as Mr. Baron and Mr. Kazan know, we and virtually every other asbestos trust recognize economic differences in terms of recovery based on disease severity. Mr. Baron is right. We pay those whose symptoms are less severe less than those, to take the highest example, mesothelioma victims. I fear, however, that the devil is in the details and it is the extent of the difference that is probably going to be in dispute.

With respect to the dilemma with the people you recognized in the room, as noted, we have paid 10 percent of Manville's liability, ordinarily recognized as 30 percent of the total liability because of Manville's very large share of the market. We paid 10 percent of that liability up until last year. As Mr. Kazan pointed out, we had to halve it last year, cut in half, based on the number of claim filings.

So let me turn to your constituents. We have paid through the end of last year $336 million to mesothelioma victims, but we have to look at the other side of that. What haven't we paid? Well, the total Manville liability for that is $3,150,000,000. We will never pay that $3,150,000,000 to the people that you represent and to others because we have an asset/liability mismatch, and it is one that, as Mr. Kazan points out, is growing.

Senator CANTWELL. And so your recommendation is keep going in the direction that we are going?

Mr. AUSTERN. Well, I agree that looking at alternative sources of funding—and I was thinking when I said that, and continue to think, to look to the Government of the United States for the liability that might be appropriate for the reasons Mr. Dellinger mentioned. I fear, Senator, that when you look at the total potential victim population by disease and the total potential assets, there is going to continue, however, to be some asset/liability mismatch.

Mr. DELLINGER. Just a brief comment to emphasize what David has just said. When you ask the question, are those who are not sick, not impaired—should they receive as much as those suffering from serious illness like mesothelioma, of course everybody agrees the answer is no and they should not.

That is one notch removed from where the real problem is, which is people who are not impaired are nonetheless getting far too great resources that are depleting resources that ought to go. And on that, you have differences among members of the panel in terms of how you define impairment or "not sick," Senator, but there is a disinterested source.

The RAND study, at page 19, summarizes this point by saying simply it appears that a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily living. That is the RAND conclusion.

Senator CANTWELL. Mr. Hiatt?

Mr. HIATT. Senator, I think a helpful way of looking at the universe of victims who have been occupationally exposed to asbestos at one time or another is to divide them into three broad categories.

On one extreme, you have victims who suffer from cancers, mesotheliomas, very advanced stages of asbestosis. I think leaving aside the problem of what medical criteria you use to place people there, everyone would agree those are people who are seriously ill and should be adequately compensated.

At the other extreme, you have people who can show that they were occupationally exposed. And as earlier testimony showed, those are people who do need to fear that they are sitting on what somebody referred to as a ticking time bomb. And at the very least, those people should be given adequate access to continuing testing and monitoring.

In the middle, you have a category of people who some would blithely say are not sick, but are indeed sick. They simply aren't as impaired as those with cancers and the truly serious forms of disease.

Now, admittedly, within that middle category there are gradations, and I think that is where, if this effort by Senator Leahy and your committee continues, there will have to be some real scrutiny paid. Where do you draw the lines in that middle category?

I don't think that the answer is that they should not be compensated at all. I think that a consensus has to be found for how much should that middle category be compensated. Maybe there are different levels for people within that category, but they are impaired to some extent. It may not be as much as the folks at the top end, but it is certainly more than people in the bottom category.

Too many in the business community, I think, would just like to write that whole category off and say the solution to this problem is just to worry about the people with cancer. That is not an adequate response to this crisis.

Mr. KAZAN. Senator, if I remember the question and your request for a one-word answer, the answer is no, but I can't resist saying a couple of other things, if I might. Mr. Hiatt is right in one sense. You can usefully divide the asbestos claimant population into three groups. I would group them somewhat differently.

One group would be cancers, about which everybody agrees. The second group, in my view, would be people without cancer, the non-cancer claimants who have breathing problems, however you want to describe it, who from a physiologic or medical standpoint have some degree, however slight, of interference in their lives, in their breathing, as a result of asbestos exposure. I think those people also are entitled to compensation that is fair and adequate and reasonable in the light of the circumstances.

My third group would be those who may or may not have some possible evidence of change in their lungs, but have no functional or physiological impairment whatsoever. They are not, by any ordinary definition of the word sick, what we would call sick.

Mr. Austern is exactly right. The problem here is an asset/liability mismatch, if you will. It started out as one in Manville and that is the microcosm. The problem that brings us here is that this is now an industry-wide, America-wide mismatch which has led to all these bankruptcies.

Most of the companies going in say that they have been spending more than half their money on precisely these unimpaired, no-functional-limit cases. And an interesting question that I would like you to consider asking Mr. Austern—you know, he is paying 10 percent, then 5 percent, and he has this $3 billion liability that he acknowledges to mesothelioma victims alone. He has paid them $336 million. An interesting question would be how many dollars has he paid to people who have absolutely no pulmonary function limitation because if the sickest should go first, maybe that is an illustration of where the problem is.

Senator CANTWELL. Well, I am sure that he heard your question and may respond.

Chairman LEAHY. In a similar one-word answer.

Go ahead.

Mr. KAZAN. We are plaintiffs' lawyers, Mr. Chairman.

Senator CANTWELL. I am sure that the committee staff thought about that when they had all of you agree to being up here.

There was a time in which we did have a fundamental agreement about medical impairment being demonstrated before compensation, right?

Mr. BARON. May I speak to that, Senator?

Senator CANTWELL. Yes.

Mr. BARON. The issue of the word "impairment" is the stumbling block. We learned in law school that if someone negligently causes an injury, the injured party is entitled to recover damages. Now, if you jumped across the desk and stabbed me in the arm, I would have probably a very large scar on my arm, but I would not be impaired in any real way. Would that prevent me from filing a claim

for my damages? No, of course it wouldn't, as it would not if you caused scarring of my lungs. I may not have impairment because our lungs fortunately have extra capacity, but I would be just as damaged.

And its true but that individuals who have minor injuries, like someone who breaks their arm in a car wreck, receive significantly less compensation than does someone who is rendered paraplegic in a car wreck or a mesothelioma victim.

Today, a victim of pleural disease will generally recover, in the tort system, somewhere between $20,000 and $40,000. A victim of asbestosis usually recovers somewhere in the $50,000 to $100,000 range. A victim of mesothelioma—and you can go directly to Mr. Kazan's website to verity this—will recover between $5 and $15 million, and occasionally more than $15 million.

Senator CANTWELL. Are you guaranteeing that to Ms. Dahlke?

Mr. BARON. In a case where there is an identifiable defendant that remains solvent, yes, I would almost guarantee to a mesothelioma victim a significant seven-figure recovery. That has been my experience with the hundreds and hundreds of mesothelioma victims or firm has represented.

But, again, someone with pleural disease who comes into the office would be told to expect a $25,000 to $50,000 recovery. Whether those numbers are adequately balanced, I am not the one to say, but suffice it to say that there is an enormous difference.

Anyone who says that the pleural cases are getting as much in the tort system as mesothelioma cases is just not telling the truth. If an identical victim with pleural disease sues the same defendants that the mesothelioma victim sues, the mesothelioma victim will get significanty more money, but it will remain at the same proportion in relation to the value of the claims.

In other words, if the mesothelioma case has a value of $5 million and only has 50 percent of the defendants available to seek recovery from, the case will settle for $2.5 million. If the pleural case has a valve of $25,000 and has the same 50 percent of the defendants involved that case will receive, $12,500. And that is, in my judgment, an appropriate way to deal with it.

Senator CANTWELL. I guess I disagree in this regard. I don't think Ms. Dahlke now is the survivor of a victim that has been struck by mesothelioma. She is a victim of the calendar. She is a victim of an arbitrary date on the calendar by which a bankruptcy was filed.

The difference between Mr. Kazan saying she is going to get pennies and you saying that somebody might get $15 million—I am sure she is more concerned about how to support her family today.

Mr. BARON. I agree with you, Senator, and I think there should be a fund of some sort where people who have only claims against bankrupt defendants can go to receive benefits. My experience is that less than about 10 percent of the mesothelioma victims do not recover significant sums. As more companies go into bankruptcy, though, there may be more people in that position.

Senator CANTWELL. Mr. Chairman, I do think this is a critically important issue for our committee. I think with the talent that is at the table today testifying, obviously if there was an easy solution we would have come up with it by now.

Constituents' lives are playing out before us, and I again just urge people not to forget the victim survivors and the consequences to their lives. Please help us in working on this issue.

Thank you, Mr. Chairman.

Chairman LEAHY. I would hope you may think about some of the other questions which I won't raise here because the time has expired. What has always bothered me is the companies continued using products containing asbestos well into the 1980's. Some even use such products today. They knew the grave dangers caused by this.

The companies' insurers continued to cover them, knowing the liability that was being assessed to the companies who used these products. That is troublesome. The Adjutant General from our VFW and the questions he raised about the Navy are bothersome. He asked the question whether vessels should be banned.

I will put into the record a statement by Senator Brownback, and I will leave it open for anybody else.

[The prepared statement of Senator Brownback appears as a submission for the record.]

Chairman LEAHY. There has been reference to the RAND report that was raised today. I have a lot of respect for RAND. I have read their reports on many matters. I think it is only fair to note, because everybody keeps raising who is representing whom, that according to RAND's annual report last year the following organizations were benefactors of RAND—that means they contributed $50,000 or more; they don't say how much more—Allstate Insurance; State Farm Insurance; Chubb Insurance; Coalition for Asbestos Justice, made up of a group of insurance companies; Farmers Insurance Group; Hartford Financial Services; Liberty Mutual Insurance; Massachusetts Mutual Life Insurance; USAA Insurance; and Alcoa.

I do appreciate, gentlemen, your taking all this time. I appreciate all the lobbyists and their representatives in the audience. Not wanting to cutoff anybody's billable hours, I would point out that it is a very nice day outside and I hope you get a chance to also breathe the air and see the sights of Washington. It may be a little more hectic on the streets of Washington in the next day or so, so enjoy it today.

All of you take my offer to add anything to your testimony or in reference to anybody else's. This hearing is not intended as a "gotcha" hearing. This is trying to find a way through a problem that, if I were given the power the write the solution today and had the whole Congress follow it, I am not sure what I would write. But I hope you understand that I and a number of other members on both sides of the aisle are trying to find an answer.

We stand adjourned.

[Whereupon, at 12:50 p.m., the committee was adjourned.]

[Question and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

DAVID T. AUSTERN
PRESIDENT & GENERAL COUNSEL

October 1, 2002

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
Washington, DC 20510-6275

Dear Mr. Chairman:

Thank you for the opportunity to testify before the Committee on the Judiciary on September 25, 2002 during the hearing entitled "Asbestos Litigation." In response to the Committee's announcement that the record in this matter would remain open, and to address certain questions I was asked but did not have the opportunity to answer, I am supplementing my testimony by submitting this letter for the record.

1. Senator Cantwell invited me to respond to a question suggested by Mr. Kazan, but as the Hearing concluded, I was unable to respond. Essentially, Mr. Kazan suggested I tell the Committee how much the Manville Personal Injury Settlement Trust (the "Trust") had paid claimants who had no pulmonary function impairment.

The Claims Resolution Management Corporation (the "CRMC") maintains records less precisely for pre-1995 Trust claim payments than for payments that were made to claimants with no pulmonary function impairment (although it is possible to estimate). However, since 1995, on behalf of the Trust, the CRMC has made the payments described below to claimants with no pulmonary function impairment. Please note that the witnesses who testified during the Hearing seemed to agree that claimants who are paid for their Pleural Disease (Manville Trust Distribution Process Category I) claims are unimpaired (see, for example, the testimony and statement of Mr. Baron). In addition, by definition, claimants who are paid for their Non-disabling Asbestosis (Manville Trust Distribution Process Category II) claims likewise are unimpaired. From January 1, 1995 through the date of this letter, the CRMC has made the following Trust payments to unimpaired claimants:

8260 WILLOW OAKS CORPORATE DRIVE, SUITE 600 P.O. BOX 10415, FAIRFAX, VIRGINIA 22031
PHONE: 703.204.9300 FAX: 703.205.6249 WWW.CLAIMSRES.COM

Pleural Disease	$ 97,985,974
Non-disabling Asbestosis	359,841,222
Total:	$457,827,196

The largest sum of money, by disease Category, paid to claimants since 1995 has gone to those claimants with Disabling Asbestosis (Manville Trust Distribution Process Category III). As Mr. Hiatt and several other witnesses noted during the Hearing, there is substantial disagreement as to how many of the Category III claimants are impaired, whether measured by the American Medial Association standards described during the Hearing, or pursuant to some other standard. However, I believe everyone agrees that less than one hundred percent of the Category III claimants have pulmonary function impairment. Therefore, please be informed that in addition to the sums reported above, some percentage of the $651,928,344 we have paid to Category III Trust claimants has been paid to claimants who have no pulmonary function impairment.

Prior to 1995, unquestionably some percentage of the slightly over $1 billion the Trust paid to its beneficiaries went to claimants who suffered from no pulmonary function impairment. Therefore, in addition to the over $457 million noted above, and taking into consideration that portion of the Category III claims described above, as well as the pre-1995 payments, I estimate that over $1 billion of the $2.9 billion the Trust has paid to its beneficiaries has gone to claimants with no pulmonary function impairment. This is a very conservative estimate; reasonable estimators might project the payments made to beneficiaries with no pulmonary impairment at $1.5 billion, or more than one-half of total Trust payments.

2. During the Hearing, there was testimony concerning the establishment of a fund to be used to compensate persons suffering from an asbestos-related disease. Thereafter, Mr. Dellinger noted that there was "a very good argument to be made" that the federal government should bear some responsibility for compensating asbestos victims. Mr. Dellinger prefaced his remarks by stating that he was speaking only for himself. I am too.

Prior to the establishment of the Trust, the Trust's grantor, Johns-Manville Corporation (the "Corporation"), brought an action in the United States Claims Court, alleging that the government should compensate the Corporation for settlements, judgments and other damages resulting from personal injury claims against the Corporation brought by workers exposed to the Corporation's asbestos products mandated by the government to be used in government vessels. The Claims Court (Judge Nettesheim) held that the government did not breach an implied warranty of specifications that asbestos-containing products purchased under supply contracts would be safe for use, nor did the government breach a duty to disclose superior knowledge (that it possessed) about the dangers of asbestos. Johns-Manville Corporation, et al v. United States, 13 Cl.Ct. 72 (1987).

The government's use of asbestos – supplied pursuant to government purchase orders by the Johns-Manville Corporation and others – continued through the Korean and Vietnam wars, and beyond. For instance, President Carter issued a memorandum in November 1979 declaring that while the government would accelerate a search for an alternative, the use of asbestos was necessary "for purposes of the national defense."

Through three wars and thereafter, the government determined that asbestos insulation would save ships and lives, and on that basis, the government specified its use. Yet the government has never contributed to compensation for the harm asbestos has caused the workers who installed and repaired it. There is a very long record that establishes the government's knowledge about the dangers of asbestos and the fact that because of national defense, for almost forty years the government chose to use asbestos regardless of the dangers it presented to the workers (over one million of them) who built and repaired both military and merchant marine vessels. I respectfully ask for the opportunity to review with Committee staff and to submit for the record the voluminous record that establishes government responsibility for asbestos exposure and the government's knowledge of the dangers of working with asbestos.

3. During the Hearing, the Committee heard testimony concerning legislation that has been introduced (S.1048 and H.R.1421) that would exempt from taxation the investment income of trusts established for the sole purpose of compensating asbestos victims. While the proposed legislation addresses only a part of the Asbestos Litigation problem, the legislation would significantly increase the amounts available to pay asbestos victims. In the case of the Manville Trust, it is estimated that passage of the legislation would increase the dollars available to pay asbestos victims by approximately $100 million.

While other legislative initiatives may have to await the next Congressional Session, tax relief for asbestos trusts is a pressing and immediate problem. I know that the members of the Judiciary Committee have been active in supporting S.1048 in that the legislation was introduced by Senator DeWine and both you and Senator Hatch are cosponsors. I urge all of you to consider the immediate passage of this legislation as it will be of immediate and direct benefit to all asbestos victims.

4. Because Asbestos Litigation issues are inextricably intertwined with predicting how many future asbestos claims will be filed, I testified during the Hearing that most forecasters have been unsuccessful in predicting future asbestos claims filings. While as noted in my written submission to the Committee, a medical model is frequently used to predict future claims, at least two actuarial firms, Tillinghast-Towers Perrin and Milliman USA predict future asbestos claims filings and liabilities without relying solely on a medical model. So that there will be no confusion with respect to the Tillinghast and Milliman forecasts, they are as follows:

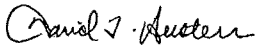
Tillinghast Towers-Perrin:	Total Asbestos Filings – 1,000,000. Total Asbestos Losses -- $200 billion
Milliman USA:	Total Asbestos Filings – 1,100,000 Total Asbestos Losses -- $275 billion

Each firm includes in its total loss calculations a small and essentially negligible sum for asbestos property damage losses.

As noted in my written submission and my testimony, the views expressed (including the views expressed in this letter) are my own and do not necessarily reflect the views of the Trustees of the Trust or the Directors of the CRMC.

Thank you again for the opportunity to testify at the Hearing. I look forward to working with you and the rest of the Committee on this important issue. If I can be of any assistance as the Committee considers asbestos legislation, please let me know.

Yours very truly,



David T. Austern

cc: The Honorable Orrin Hatch
Ranking Republican Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

SUBMISSIONS FOR THE RECORD

AMERICAN ACADEMY *of* ACTUARIES

Committee on the Judiciary
United States Senate

Hearing on
"Asbestos Litigation"

Statement of Jennifer L. Biggs, FCAS, MAAA
Chairperson, Mass Torts Subcommittee
American Academy of Actuaries

September 25, 2002

The American Academy of Actuaries is the public policy organization for actuaries practicing in all specialties within the United States. A major purpose of the Academy is to act as the public information organization for the profession. The Academy is nonpartisan and assists the public policy process through the presentation of clear and objective actuarial analysis. The Academy regularly prepares testimony for Congress, provides information to federal elected officials, comments on proposed federal regulations, and works closely with state officials on issues related to insurance. The Academy also develops and upholds actuarial standards of conduct, qualification and practice and the Code of Professional Conduct for all actuaries practicing in the United States.

1100 Seventeenth Street NW Seventh Floor Washington, DC 20036 Telephone 202 223 8196 Facsimile 202 872 1948 www.actuary.org

Executive Summary

The asbestos problem, initially recognized decades ago, is not going away. Recently, asbestos litigation has been described by the U.S. Supreme Court as an "elephantine mass[1]" and by A.M. Best as a "tidal surge.[2]" Litigation that most thought would decline by the end of the 20th century is accelerating. The number of annual claim filings is increasing. The size of awards made to settle claims is also increasing.

Two recent estimates from actuarial consulting firms long-involved in such work indicate that the ultimate costs arising from U.S. exposure to asbestos could range from $200 to $275 billion. Approximately 2,000 people per year are dying from mesothelioma, a signature disease of asbestos. However, many defendants assert that the majority of claimants filing claims and receiving awards are not impaired. The mass and cost of the litigation are forcing otherwise healthy companies to file for bankruptcy.[3]

As the initial targets in the litigation have become unable to pay their share of damages, plaintiffs attorneys have named additional peripheral defendants (who did not manufacture asbestos and thus contend that they were generally less likely to have known of its dangers to human health) in the lawsuits. Many defendant companies believe they are not getting a fair legal evaluation of their cases in court, and the Supreme Court has twice overturned efforts to resolve the litigation through class action settlements. While Congress has been called upon to act, no major legislative action has yet occurred.

Introduction

On behalf of the American Academy of Actuaries' Mass Torts Subcommittee, I appreciate the opportunity to submit a written statement for this hearing on issues related to asbestos litigation. I hope this information will be helpful to members of the Committee in their deliberations. My statement incorporates the substance of a public policy monograph published by the Academy in December 2001 (*Overview of Asbestos Issues and Trends*). Its purpose was to provide a brief history of personal injury claims arising out of asbestos exposure to aid in understanding current issues arising out of these claims.

This statement is organized into the following sections:

- History of Asbestos Usage
- Health Risks Associated with Asbestos Exposure
- Current Personal Injury Claim Situation
- Concerns of Major Parties Involved in Asbestos (Personal Injury) Litigation
- Prior Efforts to Solve the Asbestos Problem
- Summary and Conclusions

History of Asbestos Usage

Asbestos was once considered a "miracle mineral[4]." This naturally occurring silicate has six varieties[5] and many favorable characteristics, including resistance to fire, heat, and corrosion. It is strong, durable, and flexible - its fibers can be woven into cloth. Asbestos is inexpensive because it is available in abundant quantities. Its versatility has led to its use as a component of numerous products in numerous industries (e.g., building materials such as insulation, roofing, and flooring, brake and boiler linings, wire insulation, gaskets, and ship building - especially during World War II). In fact, asbestos was classified as a strategic material during World War II.[6]

It has been estimated that more than 100 million[7] people in the United States were occupationally exposed to asbestos during the 20th century. This is significantly higher than the 27.5 million Americans previously estimated to be exposed to asbestos between 1940 and 1980 in a 1982 Mt. Sinai School of Medicine study conducted by Dr. William Nicholson, Dr. Irving Selikoff, and George Perkel.[8]

Asbestos use in the United States has been curtailed significantly since its peak of nearly 1 million tons in 1973.[9] After Congress passed the Occupational Safety and Health Act (OSHA) in 1970, increasingly strict standards were imposed to enforce safety precautions in the workplace. However, these workplace safety standards do not protect end-users of asbestos-containing products.

There were approximately 3,500 products in U.S. commerce that contained asbestos when the U.S. Environmental Protection Agency (EPA) attempted to place a complete ban on asbestos in 1989. The EPA's ban was successfully challenged before the 5th U.S. Circuit Court of Appeals in 1991. The case was remanded to the trial court, which left very few portions of the ban intact.[10] Thus, asbestos-containing products are still legal in the United States today. Approximately 600,000 to 700,000 tons of asbestos were imported into the United States during the past ten years and used in various industries; however, the end uses are not tracked effectively, and warning label requirements are vague. Therefore, there remains ongoing exposure to asbestos in the United States today.

Asbestos use continues at significantly higher levels abroad, especially in developing nations. Due to the immediate benefits of some asbestos products (e.g., inexpensive cement pipes to transport clean drinking water or to dispose of sewage), its use is widespread. Unfortunately, in many nations, few safety precautions are being taken, and there is a large number of individuals who may potentially contract future asbestos-related diseases.

Even if asbestos usage in products ceased immediately throughout the world, potential individual exposure to asbestos fibers would continue, perhaps indefinitely. This residual exposure would be caused by:

- Previously manufactured products containing asbestos that have not been replaced or discarded;
- Dust or other waste remaining in the environment from previous use or incomplete disposal of those products;
- Erosion of naturally occurring deposits in asbestos-bearing rocks.[11, 12]

Health Risks Associated With Asbestos Exposure

Several diseases have been linked to asbestos exposure, including mesothelioma, lung cancer, other cancers, asbestosis, and pleural injuries. A long latency period from initial exposure to disease manifestation resulted in delayed recognition of its health hazards. This contributed to the unrestricted (or minimally restricted) use of asbestos until OSHA standards were implemented in the 1970s.

Asbestos Diseases

Disease	Injury[13]	Average[14] Latency
Mesothelioma[15]	■ A malignant tumor arising in the pleura[16] membranes (of the lungs or diaphragm) and pericardial membrane of the heart. ■ Symptoms may be vague, including chest pain, shortness of breath, weakness, and weight loss. Diagnosis may be suspected by chest X-ray, but a full pathologist's microscopic exam is needed. ■ Fatal within 1 - 2 years.	30-40 years
Lung Cancer	■ A malignant tumor of the bronchi[17] covering that grows to surrounding tissue. ■ Symptoms include chest pains, cough, weakness, and shortness of breath. Chest X-rays may detect the cancer, but a pathologist's microscopic exam is needed. ■ Often fatal.	20-30 years
Possibly Other Cancers[18]	■ Tumors of the throat, larynx, esophagus, stomach, colon, lymphoid. ■ X-rays may detect the cancer, but a pathologist's microscopic exam is needed. ■ Often fatal.	20-30 years
Asbestosis	■ A pulmonary insufficiency caused by scarring near alveoli. (As the body tries to dissolve asbestos fibers trapped in lung tissue, it produces an acid that does little damage to the fibers, but may cause severe scarring in the surrounding tissue.[19]) ■ Diagnosis through physical signs, history of exposure, pulmonary functioning test, CT scan/radiological findings. Some appreciable level of exposure over 10 years is likely required before a detectable significant amount of functioning is lost. ■ Slowly progressive, potentially fatal.	10-20 years[20]
Pleural Injuries	■ Generally nonimpairing fibrosis or scarring of pleura tissue over the chest wall or diaphragm. ■ Evidenced by effusion, thickening, plaque, or calcification. ■ Do not appear to be pre-cancerous, but may increase risk of developing lung cancer in the future.	20-30 years

Current Personal Injury Claim Situation

There have been many epidemiological studies regarding the population exposed to asbestos in various industries, the latency and incidence of disease, and the resulting projections of individuals expected to file asbestos-related claims (see Reference List 1). These projections have varied widely. However, by June 2001, Johns-Manville, the most prominent early defendant in asbestos litigation, had already received more than 500,000 personal injury claims. The Manville Trust (finally approved in 1988 after Johns-Manville declared bankruptcy in 1982) now expects that it will eventually receive about 2 million total claims.[21]

It is estimated that there are currently at least 200,000[22] asbestos bodily injury (BI) cases pending in state and federal courts. About 60,000 new claimants filed lawsuits during 2000[23]. This figure is significantly higher than the average of approximately 20,000 per year experienced by several major defendants in the early 1990s. The increase was not expected based on the epidemiological studies performed in the 1980s and 1990s, partly because these studies underestimated the exposed population. Other reasons for the increased filing rate include:

- The greater propensity of claimants to sue in response to the aggressiveness of some plaintiffs attorneys;[24]
- A "catch-up" of filings after an attempted class action settlement[25] was overturned;
- The need to file claims by a certain date in order to get on the creditor list in a bankruptcy, coupled with the recent bankruptcies of several companies that produced asbestos products;
- Expedited action on the part of the claimants anticipating possible legal reform efforts.

A disproportionate percentage of the claims are filed in state courts in perceived pro-plaintiff jurisdictions, clear evidence some say, of "forum shopping" on the part of plaintiffs attorneys. For example, while Mississippi[26] has only 1 percent of the U.S. population, approximately 20 percent of the pending cases were filed in this state. Similar disproportionately large percentages of cases were filed in Texas, with the number decreasing somewhat after the state enacted tort reform in 1997.

There are currently about 2,000 new mesothelioma cases filed each year.[27] There are another 2,000 to 3,000 cancer cases that are likely attributable (at least in part) to asbestos. There are a smaller number of serious asbestosis cases. The remaining cases are either pleural injuries or claimants who do not currently exhibit signs of injury.[28] It is estimated that more than 90 percent (or more than 54,000 claims filed during 2000) are for claimants alleging nonmalignant injuries. There is significant concern that the awards paid for nonmalignant claims will exhaust funds that would otherwise be available to compensate individuals who will suffer from the more serious asbestos-related diseases.

Many workers with asbestos-related injuries were employed in union trades (such as installers and electricians) and worked at a large number of sites with asbestos-containing products over their careers. Some of these job sites had numerous asbestos-containing products. As a result, many of these workers name a large number of defendants in their lawsuits.

Plaintiffs attorneys typically join several plaintiffs in a group to file claims against multiple defendants. The plaintiffs' injuries are often quite dissimilar, ranging from those who are not currently impaired or who have nonmalignant injuries to those suffering from cancer and mesothelioma. This grouping of claims, defendant companies assert, has forced them to make payments on claims of perceived questionable merit in order to avoid facing the mesothelioma cases in court in front of a sympathetic jury with the potential for substantial punitive damages.

The involvement of multiple plaintiffs and multiple defendants results in a more complicated and expensive process for resolving asbestos claims than for typical tort claims (see Exhibit 1).

As a result of asbestos litigation, many companies, including nearly all of the major asbestos manufacturers, have declared bankruptcy (see Reference List 2). As the financial stability of these major players has become impaired and they have been unable to pay their share of damages, the share of awards that must be satisfied by the remaining major defendants has increased, and plaintiffs have named additional peripheral defendants in the lawsuits. While approximately 300 companies were targeted by plaintiffs in the 1980s, more than 2,000 companies have been named as defendants in asbestos litigation today.[29]

The activities that have resulted in asbestos lawsuits include those of the major defendants, such as producers of raw asbestos, installers, and insulators, as well as the activities of the peripheral defendants, who manufactured products where asbestos was encapsulated, were distributors of products containing asbestos, or were owners of premises that contained asbestos. The connection of older peripheral defendants to asbestos is clear (e.g., use of asbestos as an insulating material by boiler manufacturers). However, the connection of some of the newer peripheral defendants to asbestos is not obvious (e.g., Campbell's Soup, Gerber (baby food), and Sears Roebuck.)[30]

The potential culpability of many peripheral defendants is clearly different from that of the major manufacturers (e.g., Johns-Manville), and thus many believe that expecting these peripheral defendants to warn of the dangers of asbestos is unreasonable. Nonetheless, in the current legal system (where the plaintiff's burden of proof as to their injury and its connection to a peripheral defendant's product has sometimes been relaxed for the sake of administrative efficiency), these peripheral defendants are often held jointly and severally liable[31] with the major producers[32]. They are now bearing a substantial portion of the costs of awards relating to decades of asbestos use.

Workers suffering from asbestos-related injuries were originally compensated through the workers' compensation system, subject to statutory benefit limits then in effect. However, in 1973, the plaintiffs in the landmark case of *Borel v. Fibreboard* were successful in holding asbestos manufacturers strictly liable for the failure to warn of an unreasonably dangerous product. Tort theory involved in asbestos litigation has continued to evolve over the years. The sheer number of asbestos claims has severely challenged the court system. Some feel that, in attempting to mitigate this problem, courts often choose not to apply typical negligence-based theories regarding product liability in asbestos cases. Awards for mesothelioma cases typically exceed $1 million, with compensation for cancer and nonmalignant claims being lower. However, a significant portion of the dollars paid by defendants have not reached those who were injured, due to high transaction costs.[33] As the perception of asbestos litigation as a highly lucrative practice area has increased, so has the number of law firms specializing in this work.[34]

Estimates of ultimate personal injury - related costs from exposure of the U.S. population to asbestos range from $200 to $275 billion.[35] Much uncertainty surrounds these estimates due to possible variations in disease emergence and incidence rates and legal costs. There is additional uncertainty as to who will ultimately pay these costs (e.g., whether it is the remaining viable defendants, their insurers, or some other source). Currently it is estimated that $60 to $70 billion of the costs will be borne by the U.S. property/casualty insurance market.[36] As of year-end 2000, U.S. insurers and reinsurers[37] had paid approximately $22 billion and held approximately $10 billion in reserves to pay future claims, as disclosed in their Annual Statements filed with state insurance departments.[38]

Evolving Legal Theory		
Date	**Case**	**Significance**
1973	Borel v. Fibreboard ■ Fifth Circuit U.S. Court of Appeals	■ Shifted asbestos awards from the workers' compensation system to the court system. ■ Six manufacturers held jointly & severally liable using theory of strict liability for failure to warn. • Joint & Several Liability — adopted by several states. Premise: insulation workers were exposed to products of many manufacturers. Not possible to determine source of asbestos fibers causing injury, and typically, none of the manufacturers provided warnings regarding the dangers of asbestos. • Strict Liability — Restatement of Torts, Section 402A — adopted by the American Law Institute in 1965. States: "One who sells any product in a defective condition unreasonably dangerous to the consumer ... is subject to liability for physical harm thereby caused to the ultimate user or consumer." ■ Court said danger of asbestos was recognized in the 1920s, 1930s.
1982	Beshada v. Johns-Manville ■ N.J. Supreme Court 90 N.J. 191, 447 A.2d 539 (1982)	Superstrict Liability — holds asbestos defendents liable due to failure to warn even if the defendant did not know/would not have known of asbestos risk.
1986	Halphen v. Johns-Manville ■ L.A. Supreme Court 484 So. 2d 110 (L.A. 1986) p. 4022 3/28/1986	
1993	Daubert v. Merrell Dow ■ No. 92-102, U.S. Supreme Court	U.S. Supreme Court directed lower federal courts to act as "gatekeepers" to ensure that "new" scientific evidence is relevant and reliable.
1997	Metro North v. Buckley ■ No. 96-320, U.S. Supreme Court	U.S. Supreme Court decided it was inappropriate to render awards for emotional harm and medical monitoring. One of the reasons for the decision was that payments to people who are not ill would facilitate bankruptcy among defendants and would be at the expense of those who have been harmed.

Concerns of Major Parties Involved in Asbestos (Personal Injury) Litigation

There are many groups involved in asbestos litigation. Some of the concerns of these groups are outlined below.

Seriously Injured Claimants This group contains those whose injuries are detectable and indisputable (e.g., mesothelioma, some cancers, serious asbestosis). There is generally agreement that these individuals deserve to be compensated in some form for the injuries they have suffered.

- Due to the short life expectancy of the claimants, this group places high importance on resolving their claims quickly, which often does not take place in the current legal environment.

- Compensation systems with high transaction costs diminish funds available to meet this group's greater needs.
- Those who will develop serious illnesses in future years face another risk - that the companies that made the products that led to their injuries may become bankrupt and therefore will be unable to compensate them.

Nonseriously Injured and Unimpaired Claimants The majority of the claimants in this group are presently unimpaired, although they may have an x-ray that shows some type of thickening or scarring of the lungs.

- One concern of those with a pleural condition is that if they do not proceed with a lawsuit today, a statute of limitations issue may prevent them from being eligible to recover damages for more serious conditions they may develop in the future. This concern has been addressed in some states (e.g., Massachusetts) through an inactive docket/pleural registry.[39]
- Another concern of this group is that if they do not proceed with a lawsuit now, money may not be available if they develop a serious injury later. For example, awards of punitive damages to today's seriously injured claimants may reduce funds available to pay for the same type of injuries that plaintiffs who currently have less serious injuries may develop in the future.
- Additionally, this group faces future health uncertainty, including the need for ongoing medical monitoring.

Plaintiffs Attorneys The issues for the plaintiffs attorneys generally match those of their clients as described above, and also encompass the desire for compensation and reward for the cost of acquiring and developing these cases.

Judges Two main concerns of this group are trial docket pressures and fairness of results. These concerns have been voiced as far back as the 1980s and relate to the volume of asbestos lawsuits. It is felt by some that trial docket pressures force actions which speed up the trial process and produce potentially less equitable results, such as where the claims of those with significantly different injuries are consolidated and the periods of time in which to conduct discovery are shortened.

Major Asbestos Defendants These are the companies that made asbestos-containing products and have been involved in asbestos litigation since the 1980s. Many of them have filed for Chapter 11 protection.

- For the most part, these defendants have stated that they cannot get a fair trial in state court. This is illustrated in the Babcock & Wilcox and W.R. Grace bankruptcy filings, where the companies are attempting to have their liability determined under federal bankruptcy rules, which require objective medical criteria.
- Another related concern is that the grouping of seriously injured and nonseriously injured claimants may, as a consequence of the "piggyback effect" of juror sympathy, result in awards that are too high for the nonseriously injured.
- This group is concerned that it is paying awards that should be funded (at least in part) by other parties.[40] For several asbestos diseases, there is a material synergistic effect between exposure to asbestos and smoking. To date, however, asbestos company suits against the tobacco industry have been unsuccessful.[41]
- This group is concerned that uninjured plaintiffs are being compensated.

- This group is concerned that the current system for compensating asbestos-related injury victims is expensive.
- This group wants to achieve finality - by being able to put the consequences of past business judgments behind them.

Peripheral Defendants An increasing number of these companies (that had asbestos encapsulated in their products or had asbestos on their premises) have been sued in asbestos litigation. There has been an increase in the profile of these defendants largely due to the bankruptcy of the initial asbestos product manufacturers.

- Some members of this group believe that they should not be held liable for asbestos-related injuries, because asbestos in their product was encapsulated and should not have contributed to the injury.
- This group is concerned that it will take on a share of liability that was previously borne by the bankrupt asbestos manufacturers.
- The peripheral defendants say it is unfair to hold them accountable for the same knowledge of health risks as the major defendants in the same lawsuit. This group is also concerned that the vast majority of cases are being brought to trial in venues they perceive to be favorable to plaintiffs. For example, only 2 percent of the original plaintiffs in the Cosey litigation in Mississippi were from the county in which the lawsuit was filed.[42]
- This group also contends that courts too often fail to require the use of objective evidence to evaluate whether claimants are injured. This issue was raised as far back as 1991 when plaintiffs attorney Ron Motley commented "[t]here are gross abuses in our system. We have lawyers who have absolutely no ethical concerns for their own clients that they represent, we have untrammeled screenings of marginally exposed people and the dumping of tens of thousands of cases in our court system, which is wrong [and] should be stopped."[43]
- Another concern of these defendants is that they are held responsible for the liability that should be borne by non-U.S. companies. It can be difficult for plaintiffs attorneys to bring suits against non-U.S. companies, and such suits could ultimately be resolved in federal court. Due to the potential difficulty in bringing suits and since plaintiffs attorneys typically prefer to try cases in state rather than federal court, some U.S. defendants contend that the effort to pursue foreign defendants will rarely be made.
- Defense expenses relative to plaintiffs' awards are considerably higher for peripheral defendants. This is due in part to the fact that a peripheral defendant may be easily named in a suit. However, because discovery often takes place very close to trial, the peripheral defendant may find it nearly impossible to obtain dismissal from the case before incurring significant costs. Peripheral defendants often pay to settle lawsuits even when they do not believe they have liability, because the risk of trying a suit when nearly everyone else has settled is extremely high due to the setoff rules that apply in many states.
- Similar to the major defendants, this group wants to achieve finality and be able to put the consequences of past business judgments behind them.

Insurers and Reinsurers The concerns of this group are generally the same as for their policyholders, the major and peripheral defendants, plus:

- This group is concerned with the interpretation of contracts and the possible liabilities that may be imputed to them, which they never intended to insure.

- There is increased concern among this group regarding settlements with claimants who currently have no clearly-identifiable injury, and with policyholders making (small) payments to claimants who may not be able to establish product identification. This concern has been publicly voiced by Equitas, the UK insurer, which on June 1, 2001, began to require more disclosure of this type of information before settling claims.
- This group wants predictability of financial results and finality with respect to quantifying their ultimate liabilities.

Prior Efforts to Solve the Asbestos Problem

Asbestos defendants and their insurers/reinsurers have attempted to create various solutions to the asbestos problem over the years (see Exhibit 2). These efforts include the Wellington Agreement between asbestos producers and their insurers in 1985, the formation of the Center for Claims Resolution (CCR) in 1988, the CCR Futures Deal in 1993 (i.e., the Georgine Settlement), the Fibreboard Settlement in 1993, and the Owens Corning Fiberglas National Settlement Program in 1998. There have been repeated cries for legislative reform, especially after unsuccessful attempts to settle claims on a class action basis (i.e., Georgine and Fibreboard) (see Exhibit 3).

Congress has also been involved in the search for solutions. A federally administered central fund was proposed as early as 1977. However, none of the bills proposed gained adequate support.

More recently, the Fairness in Compensation Act of 1999 (H.R. 1283) was proposed to establish the Asbestos Resolution Corporation. This bill would have used an alternative dispute resolution (ADR) process to reduce lawsuits in the court system. Claimants would have been required to prove medical eligibility for compensation. Awards for pain and suffering, emotional distress, and loss of consortium would have been allowed, but punitive damage awards would have been barred. The bill would have created a pleural registry (inactive docket) for unimpaired claimants. Costs would have been funded by the defendant companies, rather than through tax revenue.

Currently, retroactive tax relief for asbestos manufacturers is being considered (H.R. 1412). This legislation would allow a company to carry back asbestos losses to the taxable years in which the taxpayer was first involved in the production or distribution of asbestos products to reduce income tax payments made in these prior years.

Summary and Conclusions

Exposure to disease-causing asbestos fibers in the United States and the world has been widespread. Though on the decline, such exposure has not ended and may never totally cease. In the United States, this has resulted in a significant number of personal injury claims against defendants over the past 20 years.

Rather than gradually decreasing over time, the pace of these claim filings has been increasing, for multiple reasons. Several attempts have been made to comprehensively address this situation, but all have failed to date. It has been argued that some attempts to address parts of the problem may have even exacerbated it, by expanding the number of involved parties to include claimants with questionable injuries and minimally or nonliable peripheral defendants.

The size and growth of the problem has led to numerous bankruptcies and calls for a comprehensive legislative response, as many believe that the current legal system is ill-suited to handle asbestos personal injury claims. While several legislative proposals have been discussed over the years, enactment of such solutions does not appear imminent.

Historical Legislative Involvement

Date	Effort	Details	Status
1977	Bill sponsored by Rep. M. Fenwick (R-N.J.) — district included location of Johns-Manville.	The bill would compensate asbestos victims through a federally administered central fund.	Reintroduced in 1981; did not pass.
1980	Asbestos Health Hazards Compensation Act[4] introduced by Senator Gary Hart (D-Co.).	The bill: ■ Barred the victims of asbestos disease from filing suits under the tort system; ■ Left the administration of asbestos-compensation claims with the states; ■ Called for the establishment of federal minimum standards for compensating asbestos workers.	Reintroduced in 1981; did not pass.
1994	Bankruptcy Reform Bill of 1994	■ Sec. 524g enables debtor in Chapter 11 reorganization to establish a "trust toward which the debtor may channel future asbestos related liability ... to provide explicit legislative guidance to ensure the equitable treatment of mass future asbestos claimants." ■ Creditors obtain at least 50 percent of the value of the company if it emerges from bankruptcy. ■ Bankruptcy allows: • a stay on claims; • requirement of medical criteria; • appointment of a representative for future claimants; • estimations/provisions for the liquidation of claims.	Enacted January 25, 1994. The Babcock & Wilcox Chapter 11 Informational Brief stated that "Congress has provided a mechanism for resolution of asbestos mass-tort claims within the bankruptcy system."
1999-2000	H.R. 1283 - Fairness in Compensation Act of 1999	The bill would : ■ establish Asbestos Resolution Corporation; ■ Set up Office of Asbestos Compensation; ■ Create ADR process; ■ Require proof of medical eligibility; ■ Not impose a statute of limitations; ■ Permit full compensatory awards (including pain & suffering, emotional distress, loss of consortium); ■ Bar punitive damages; ■ Receive funding from defendant companies, not through tax revenue.	Passed out of the Judiciary Committee, but never considered by the full House of Representatives; not reintroduced in 107th Congress.
)01	H.R. 1412 - Retroactive Tax Relief	■ Amends Internal Revenue Code 468B(b) to provide that no tax be imposed on any settlement fund to resolve present and future asbestos claims. ■ Amends Section 172(f) to provide that the portion of any specified loss attributable to asbestos may be carried back to the taxable years in which the taxpayer was first involved in the production/distribution of asbestos products to reduce income tax payments in prior years.	Introduced and referred to the Ways and Means Committee; has not moved. Proponents: Say the bill would ensure that victims get just compensation and help prevent further bankruptcies. Opponents: Describe the bill as an "industry bailout" and an asbestos "feeding frenzy" for the bar because attorneys will get most of the $300-$500 million that it will cost taxpayers over the next 10 years.

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The Asbestos Tort Claim Process **Exhibit 1**

	Typical Tort Claim	Asbestos Tort Claim
Plaintiff	One injured party	Blocks of claims: ■ filed by same attorney on same date ■ have common connection (e.g., same labor union, location, or one-time place of employment) ■ involved dissimilar degree of injury/disease suffered
Defendant	One clearly identified party	Multiple defendants and complications including: ■ long latency ■ pervasiveness of use throughout various industries ■ many different asbestos products present at some work sites ■ efficiencies of plaintiffs' bar
Event	Single event causing injury with definable time, location	Multiple years (e.g., each exposure to asbestos fiber is an event, plus fibers are in the lungs causing damage) Multiple locations (e.g., every location over multiple years where asbestos was present)
Claim Filing	Short lag between event and filing (a few months to a few years)	Lag up to 40-50 years
Forum	Clear, undisputed location - where event occurred	Broad discretion for plaintiff to file claim in forum of choice
Discovery	Focused	Complicated/expensive ■ multiple parties claiming injuries ■ dissimilar injuries ■ multiple exposures — name and organizational changes ■ long time lag — lost records
Claim Resolution	Relatively timely (several months to a few years)	Long process due to: ■ multiple plaintiffs with varying levels of exposure and medical conditions ■ multiple defendants with varying levels of exposure and legal strategies ■ "events" over many years at many locations
Who Pays?	The defendant or a single insurance policy	The defendants and multiple insurers/reinsurers on multiple policies due to: ■ multiple contract wordings ■ multiple jurisdictions ■ large limits of coverage ■ multiple reinsurers ■ insolvencies

Pages 13-14 comprise the layout of a single exhibit

Prior Efforts to Solve the Asbestos Problem

Effort	Stakeholders	Purpose
Wellington Agreement signed June 19, 1985	■ 34 asbestos producers ■ 16 insurers	■ Create the Asbestos Claims Facility (ACF) ■ Provide claimants with an efficient and more equitable alternative to the tort system ■ Reduce legal costs for plaintiffs and defendants ■ End disputes over insurance coverage
Center for Claims Resolution (CCR) - Formed October 12, 1988	■ Originally 21 asbestos producers	■ Successor organization to the ACF ■ Resolve claims for a fair value
CCR Futures Deal - 1993	■ 20 asbestos producers	■ CCR's proposed settlement to the Georgine class action[51]
Fibreboard[52] (1993 class action settlement)	■ A single asbestos defendant	■ Global settlement of 186,000 pending plus future personal injury claims
Owens Corning Fiberglas (OCF) National Settlement Program (NSP) - December 1998	■ Initially one asbestos defendant, OCF ■ Later applied to Fibreboard after it was acquired by OCF	■ To resolve OCF (and later Fibreboard) claims

Pages 13-14 comprise the layout of a single exhibit

Exhibit 2

Features/Operation	Outcome
■ Costs shared among the members using a formula based on each producer's previous litigation experience. ■ Each member paid percent share, regardless of whether: • The producer was named in the suit; • The claimant could prove that the injury was caused by that producer's product.[45] ■ Claimants required to show an asbestos-related impairment. ■ Claims evaluated based on employment, medical and compensation history. ■ Claimant could receive a noncash "settlement" if there were no disease (tolled the statute of limitations). ■ Claimant could return to the tort system if not satisfied with the ACF's settlement offer. ■ The ACF did not pay punitive damages.	■ The ACF was dissolved October 3, 1998, after withdrawal of the seven largest producer members. ■ Resulted largely from disputes among producers over their allocated shares of costs. ■ Insurance coverage agreements resolved by the Wellington Agreement remained in place when the ACF was dissolved.
■ CCR was more aggressive than the ACF in settling claims.[46]	■ After the CCR Futures Deal was overturned, the CCR continued to negotiate and settle claims on behalf of its members. It settled 350,000 claims and paid over $5 billion from 1988 to 2000. ■ On February 1, 2001, the CCR announced it was "changing its method of operation to allow members more flexibility and customized representation in handling their individual asbestos liability.[47]" ■ As of August 1, 2001 CCR will stop settling new asbestos claims on behalf of its remaining 14 members.[48] ■ Currently involved in litigation among its remaining members and their insurers relating to settlements agreed to during 2000.[49]
■ Claimant had to provide sworn proof of exposure to an asbestos-containing product of at least one CCR member. ■ Claimant had to satisfy certain medical, exposure, and latency criteria. ■ Case flow caps (maximum annual claim filings) were specified for the next 10 years. ■ Ranges of settlements by disease category were set for the next 10 years, and the increase in average claim amounts for the second 10-year period was limited to 20 percent above the initial levels.	■ Class decertified[51] because the disparity among the claimants' illnesses was found to be greater than their commonality. ■ The Supreme Court observed that "the argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution." ■ The reversal resulted in a flood of new claims against CCR member companies.
■ Class did not allow opt-outs due to its limited fund rationale. ■ There was also a "Trilateral Agreement" back-up plan for $2 billion funded by two of Fibreboard's insurers — Continental Casualty and Pacific Indemnity — in case the global settlement was not approved.	■ Settlement rejected by the U.S. Supreme Court in 1999 because: • It excluded some potential plaintiffs; • There were questions about the fairness of the distribution[53]; • There were conflicting interests within the class; • The Supreme Court held that more consideration should have been given to Fibreboard's financial condition.[54]
■ Initially resolved 90 percent of OCF's pending claims. ■ Established fixed payments for future claims without litigation. ■ Private agreement between OCF and plaintiff's counsel did not require court approval.	■ Originally the NSP was well accepted. ■ OCF underestimated the size of its liability — and the NSP accelerated the timing of payments. ■ OCF filed for bankruptcy protection on October 5, 2000.

Calls for Legislative Action **Exhibit 3**

Date	Source	Comment
1990	U.S. Supreme Court Panel (led by Chief Justice Rehnquist)	1991 report said "situation has reached critical dimensions and is getting worse;" and the courts were "ill-equipped to address the mass of claims in an effective manner."[56]
1996	State v. MacQueen 479 S.E. 2d, 300, 304 (W. Va. 1996)	"Congress, by not creating any legislative solution to these problems, has effectively forced the courts to adopt diverse, innovative, and often nontraditional judicial management techniques to reduce the burden of asbestos litigation that seems to be paralyzing the active dockets."[57]
1997	Amchem v. Windsor U.S. Supreme Court No. 96-270, June 25, 1997	The Court observed that "the argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution."[58]
1999	Ortiz v. Fibreboard U.S. Supreme Court No. 97-1704, June 23, 1999	Supreme Court again calls on Congress, says existing asbestos litigation is an "elephantine mass ... that calls for national legislation."
1999	The Fairness in Compensation Act of 1999: Legislative Hearing on H.R. 1283	"The victims of [the asbestos litigation] crisis are most injured plaintiffs, especially future plaintiffs, who don't get as much as they should; defendants who are bankrupted way out of proportion to harm they caused; jurors and judges whose judgment is skewed by natural human reactions to the cases before them; and society itself, which is paying grotesque sums of money to lawyers and uninjured persons, when that money should be going to the most-injured and to medical research."[59]

Various Epidemiological Studies **Reference List 1**

Year	Source	Study
1980	Higginson	Proportion of Cancers Due to Occupation, Preventive Medicine
1980	Hogan & Hoel	Estimating Cancer Risk Associated with Occupational Asbestos Exposure Risk Analysis
1981	Enterline	Proportion of Cancer Due to Exposure to Asbestos, Banbury Report 9: Quantification of Occupational Cancer
1981	McDonald	Mesothelioma as an Index of Asbestos Impact, Banbury Report 9: Quantification of Occupational Cancer
1981	Peto, Henderson, Pike	Trends in Mesothelioma Incidence in the U.S. and the Forensic Epidemic Due to Asbestos Exposure During World War II, Banbury Report 9: Quantification of Occupational Cancer
1982	Irving Selikoff (Mt. Sinai School of Medicine)	Disability Compensation for Asbestos-Associated Disease in the United States.
1982	William Nicholson, George Perkel, Irving Selikoff	Occupational Exposure to Asbestos: Population at Risk and Projected Mortality — 1980-2030
January 1982	Paul MacAvoy (Yale)	The Economic Consequences of Asbestos-Related Disease
August 2, 1982	Alexander Walker (Statistics and Epidemiology Research Corporation)	Projections of Asbestos-Related Disease 1980-2009
September 1982	Conning & Company	The Potential Impact of Asbestos on the Insurance Industry
July 1983	Kakalik, Ebener, Felstiner, Shanley (RAND — The Institute for Civil Justice)	Costs of Asbestos Litigation
September 15, 1983	Kenneth Manton (Congressional Research Service The Library of Congress)	An Evaluation of Strategies for Forecasting the Implications of Occupational Exposure to Asbestos
June 1986	William Nicholson	Airborne Asbestos Health Assessment Update
1988	British Journal of Industrial Medicine	Projection of Asbestos Related Diseases in the United States, 1985-2009
January 20, 1992	Shearson Lehman Brothers	Charting the Asbestos Minefield: An Investor's Guide

Various Epidemiological Studies **Reference List 1 (cont.)**

Year	Source	Study
July 1992	Federick Dunbar, National Economic Research Associates, Inc. (NERA)	Forecast of Asbestos-Related Personal Injury Claims Against National Gypsum Company: Final Report
July 15, 1992	Mark Peterson (Legal Analysis Systems, Inc.)	Findings Re: Liability of National Gypsum for Pending and Future Asbestos Personal Injury Claims
June 1993	Dunbar & Martin (nee Neuman) (NERA)	Estimating Future Asbestos Claims: Lessons from the National Gypsum Litigation
August 13, 1993 DRAFT	Stallard & Manton (Duke University)	Estimates and Projections of Asbestos Related Diseases and Exposures Among Manville Personal Injury Settlement Trust Claimants, 1990-2049
September 23, 1993	Dan Rourke, The Resource Planning Corporation (RPC)	The Manville Personal Injury Settlement Trust Claims Forecast Model
After 1994	William Blot (International Epidemiology Institute, Ltd.)	Trends in Asbestos-Related Diseases
March 8, 1994 DRAFT	Stallard & Manton (Duke University)	Projections of Asbestos Related Personal Injury Claims Against the Manville Personal Injury Settlement Trust, Males 1990-2049, by Occupation, Date of First Exposure, and Type of Claim
March 4, 1995	The Lancet, Vol. 345, No. 8949	Continuing increase in mesothelioma mortality in Britain
1996	The Cologne Re	Asbestos-Related Claims in the USA and Impact on the Reinsurance Industry
1997	Bertram Price	Analysis of Current Trends in United States Mesothelioma Incidence
2001	Mealey's Asbestos Bankruptcy Conference 2001/David T. Austern	The Manville Trust Experience
August 2001	RAND Documented Briefing (DB-362.0-ICJ)	Asbestos Litigation in the U.S.: A New Look at an Old Issue

Asbestos Defendants Declaring Bankruptcy[1] **Reference List 2**

Company	Year of Bankruptcy	Company	Year of Bankruptcy
1. Amatex Corporation	1982	27. Lykes Brothers Steamship	1995
2. American Shipbuilding	1993	28. M.H. Detrick	1998
3. Armstrong World Industries [2]	2000	29. National Gypsum	1990
4. Atlas Corporation	1998	30. Nicolet	1987
5. Babcock & Wilcox	2000	31. North American Asbestos Corporation	1976
6. Baldwin Ehret Hill	1993	32. Owens Corning Fiberglas	2000
7. Brunswick Fabrications	1998	33. Pacor	1986
8. Burns & Roe Enterprises	2000	34. Pittsburgh Corning	2000
9. Cassiar Mines	1992	35. Powhatan Mining Company	
10. Celotex [3]	1990	36. Prudential Lines	1986
11. Continental Producers Corporation		37. Raytech Corporation [6]	1989
12. Delaware Insulations	1989	38. Rock Wool Manufacturing	1996
13. E.J. Bartells	2000	39. Rutland Fire & Clay	1999
14. Eagle Picher Industries	1991	40. SGL Carbon	1998
15. Eastco Industrial Safety Corporation	2001	41. Skinner Engine Company	2001
16. Federal Mogul	2001	42. Standard Asbestos Manuf. & Insulation	1990
17. Forty-Eight Insulations	1985	43. Standard Insulations Inc.	1986
18. Fuller-Austin Insulation	1998	44. Todd Shipyards	1987
19. G-I Holdings	2001	45. United States Lines [7]	1986
20. Gatke Corp.	1987	46. UNR Industries [8]	1982
21. Hillsborough Holdings	1989	47. U.S. Gypsum	2001
22. H.K. Porter Co. [4]	1991	48. U.S. Mineral	2001
23. Johns-Manville	1982	49. Wallace & Gale	1984
24. Joy Technologies [5]	1999	50. Washington Group International	2001
25. Keene Corp.	1993	51. Waterman Steamship Corp.	1983
26. Kentile Floors	1992	52. W.R. Grace	2001

[1] Most (but potentially not all) of these asbestos defendants filed bankruptcy as a result of asbestos. We have attempted to include each corporation once (rather than counting multiple subsidiaries).
[2] Including subsidiaries Desseaux Corporation and Nitram Liquidators, Inc.
[3] Including Carey Canada, Panacon, Philip Carey Company, and Smith & Kanzler.
[4] Including Southern Asbestos Company and Southern Textile.
[5] Including Harnischfeger and Ecolaire.
[6] Including Raymark Industries and Raymark Corp.
[7] Including McLean Industries and First Colony Farms.
[8] Including Union Asbestos & Rubber (Unarco).

Endnotes

[1] The U.S. Supreme Court referred to asbestos litigation as an "elephantine mass" in *Ortiz v. Fibreboard*, 97 U.S. 1704 (1999).

[2] The insurance rating agency A.M. Best referred to asbestos claims as a "tidal surge" in *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers.* Special Report (7 May 2001), 3.

[3] Fourteen companies filed bankruptcy during 2000 – 2001 as a result of asbestos litigation, including Armstrong World Industries, Babcock & Wilcox, Burns & Roe Enterprises, E.J. Bartells, Eastco Industrial Safety Corp., Federal Mogul, G-I Holdings (GAF), Owens Corning Fiberglas, Pittsburgh Corning, Skinner Engine Co., U.S. Gypsum, U.S. Mineral, Washington Group International, and W.R. Grace.

[4] "Asbestos: A Tiny But Lethal Fiber," at http://www.pilotonline.com/special/asbestos/primer.html (6 May 2001). Also referred to as the "magic mineral" in the *British Journal of Industrial Medicine* 47 (1990), 361.

[5] The six varieties are actinolite, amosite, anthophyllite, crocidolite, tremolite, and chrysotile. According to the July 1977 *Scientific American*, chrysotile once accounted for more than 95 percent of asbestos use worldwide. It has a serpentine structure and is noticeably softer and more flexible than the other types.

[6] "Eliminating Asbestos From Fireproofing Materials," *Chemical Innovation* 30, no. 6 (June 2000), 21-29.

[7] Austern, David, "The Manville Trust Experience," in *Mealey's Asbestos Bankruptcy Conference 2001*, (2001), 118.

[8] Shearson Lehman Brothers, Inc. *Industry Report* (20 January 1992), 6.

[9] Alleman, James E. and Brooke T. Mossman, "Asbestos Revisited," *Scientific American* (July 1997), 74.

[10] Only new product uses, commercial paper, corrugated paper, specialty paper, rollboard, and flooring felt containing asbestos remained banned after the 1991 remand.

[11] "Asbestos," at http://www.epa.gov/ttn/uatw/hlthef/asbestos.html (24 July 2001).

[12] California ambient asbestos white paper at http://www.arb.ca.gov/toxics/asbestos.htm.

[13] Description of the pulmonary function and exposure to asbestos that gives rise to disease: Inhaled air progresses from nose, sinus, pharynx, trachea to the bronchi of air passages within the lungs. Lungs are covered with a thin membrane called pleura. The upper diaphragm (muscle which causes air to be inhaled/exhaled) also has a pleura. Lungs are composed of 200-300 million air sacs, called alveoli, at the ends of bronchi. The gas exchange of oxygen for carbon dioxide happens here. Generally, the body's natural barriers naturally expel most dusts, including asbestos, for years before they become overwhelmed and a clinical problem develops.

[14] Actual latency periods for individuals may be shorter or longer.

[15] Signature disease of asbestos exposure.

[16] The pleural space is the space between the inner and outer lining of the lung. It is normally very thin and lined only with a very small amount of fluid.

[17] Bronchi are one of two primary divisions of the trachea that lead into the right or left lung.

[18] "It is now universally agreed that exposure to asbestos fibers can, in certain circumstances, lead to three diseases: asbestosis, lung cancer and mesothelioma of the lining of the lung (pleura) or stomach (peritoneum). It can also cause a group of benign conditions of the pleura. Controversy remains over whether it may cause a group of other cancers, including cancers of the larynx, gastrointestinal tract and kidney," write Frederick C. Dunbar, Denise Neumann Martin, and Phoebus J. Dhrymes in *Estimating Future Claims, Case Studies from Mass Tort and Product Liability.* (Andrews Professional Books, 1996).

[19] "FAQs, Asbestos Divison," at http://www.okdol.state.ok.us/asbestos/asbestos%20FAQ.htm.

[20] *Ibid.*

[21] Austern, David, "The Manville Trust Experience," in *Mealey's Asbestos Bankruptcy Conference 2001*, (2001), 114.

[22] Babcock & Wilcox Co, *Informational Brief* (2000). See also Christopher Edley Jr., "Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act," prepared for the House Committee on the Judiciary, 106th Cong., 2d sess., 1999, 15.

[23] "Asbestos Companies Report Annual Numbers of Pending Claims, New Filings in 2000," *Mealey's Litigation Report: Asbestos* (18 May 2000), 19-24.

[24] Plaintiff attorney activities include the creation of asbestos litigation specialty firms, union hall x-ray screenings, and Sunday sports page and Internet advertisements. See Richard B. Schmitt, "How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial," *Wall Street Journal* (5 March 2001).

[25] For more information regarding the proposed settlement to the Georgine class action (i.e., the Center for Claims Resolution (CCR) Futures Deal), see Exhibit 2.

[26] "Recently for example, asbestos cases reportedly have "migrat[ed] en masse" to certain counties in Mississippi because of favorable long-arm jurisdictional rules and because '[j]uries in those counties rarely, if ever, rule against plaintiffs in product liability cases, and defendants do not have the right to perform medical exams on any claims.'" Stephen Labaton, "Top Asbestos Makers Agree to Settle 2 Large Lawsuits," *New York Times* (23 January 2000).

[27] Estimate of 2,000 meso cases per year: *Mealey's Asbestos Conference* (1999), Manville table on claims received by year, 47. Bertram Price, "Analysis of Current Trends in United States Mesothelioma Incidence," *American Journal of Epidemiology* 19, no. 3 (1997), 216 (figure 4). Mesothelioma Applied Research Foundation, Legacy http://www.marf.org.

[28] The American Thoracic Society has set a minimum x-ray reading for classifying an individual as "impaired." See Victor E. Schwartz and Leah Lorber, "A Letter to the National's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases," *American Journal of Trial Advocacy* 24, no. 2 (2001), 27. However, there is no broad medical agreement on the definition of pleural plaques.

[29] "Asbestos Continues to Bite Industry," *Business Insurance* (8 January 2001); "Finance and Economics: A Trail of Toxic Torts," *Economist* (27 January 2001). However, a variety of other estimates indicate the number could be much higher than 2,000, perhaps as high as 5,000.

[30] "Still Killing," *Economist* (19 August 2000); *Wall Street Journal* (5 March 2001).

[31] Joint liability imposed on joint tortfeasors that allows enforcement of the entire judgment against any one of the tortfeasors. In some jurisdictions, joint and several liability remains despite adoption of comparative fault, and in others it has been eliminated by comparative fault.

[32] "Companies want to pay what they paid 15 or 20 years ago, and don't want to take into consideration that there might be fewer companies to pay, which means higher shares of liability." Fred Baron, of the Dallas law firm Baron & Budd, as quoted in "Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps," *Wall Street Journal* (12 April 2001).

[33] "[O]f every dollar paid by defendants, over sixty cents goes to the lawyers. Adding the overhead costs of both the judicial and the insurance systems, asbestos litigation consumes two dollars of society's resources in order to deliver a single dollar to people who were exposed." Christopher Edley Jr., "Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act," prepared for the House Committee on the Judiciary, 106th Cong., 2d sess., 1999, 5.

[34] Richard B. Schmitt, "How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial," *Wall Street Journal* (5 March 2001).

[35] Estimates of total ultimate cost from Tillinghast–Towers Perrin and Milliman USA studies.

[36] Estimates of net amount insured by U.S. property/casualty insurers and reinsurers from Tillinghast–Towers Perrin and Milliman USA studies.

[37] A reinsurer provides insurance to direct insurance companies by contracting to accept the transfer, in

whole or in part, of a risk or contingent liability covered under an existing insurance contract.

[38] *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, A.M. Best Special Report (7 May 2001), 1.

[39] "Some courts have adopted mechanisms for separating out claims by individuals who are not sick. For example, in Massachusetts, the judges have an inactive docket which provides a way for plaintiffs with asbestos-related pleural diseases to toll the statute of limitations until such time that they develop asbestosis or some type of malignancy. Cases on the inactive docket are exempt from discovery and can only be removed to the active docket by the filing of a subsequent complaint. A similar inactive docket approach is used by some courts in Maryland." Victor E. Schwartz and Leah Lorber, "A Letter to the National's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases," *American Journal of Trial Advocacy* 24, no. 2 (2001). See also Mark A. Behrens and Monica G. Parham, "Stewardship for the Sick: Preserving Assets for Asbestos Victims through Inactive Docket Programs," *American Journal of Trial Advocacy* 24, no. 2 (2001), 17.

[40] E.g., the tobacco industry and makers of polio vaccines. SV40 (Simian Virus 40) has been found in the cells of certain rare cancers, including mesothelioma. It has been alleged that contamination of early batches of the Salk vaccine and test batches of the Saben vaccine (polio vaccines) cause mesothelioma. However, these findings have not met the Daubert standard for admissibility in court.

[41] The Manville Trust sued the tobacco industry in *Falise*, which ended in a mistrial in January 2001. The suit was later dropped. Additionally, 22 asbestos injury plaintiffs and Owens Corning filed suit against several tobacco companies in 1998, alleging a conspiracy to hide the health risks associated with cigarette smoking and asbestos exposure. The Jefferson County Circuit Court dismissed the suit in May 2001, ruling that Mississippi's law prohibits recovery for an indirect injury. "Updates," *Business Insurance* (28 May 2001).

[42] Henry J. Hyde, "Statement of House Judiciary Committee Chairman Henry J. Hyde, Committee on the Judiciary, Hearing on H.R. 1283, Fairness in Asbestos Compensation Act of 1999," prepared for the House Committee on the Judiciary, 106th Cong., 2d sess., 1999; at http://www.productslaw.com/hr1283.html.

[43] Ronald L. Motley and Susan Nial, " Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?"in *Proceedings of the Administrative Conference of the United States, October 31, 1991 Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims.*

[44] Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (Pantheon, 1985), 195.

[45] "Thus the traditional requirement of product identification and proximate cause was eliminated for the desired common good of reducing litigation expenses, which threatened to exceed the total indemnity paid." *Best's Review* (12 May1993).

[46] As of October 1992 (after four years of operation), the CCR had resolved 115,000 claims and had 55,000 claims pending.

[47] "Today the one-time emissary has been knocked down to clerical assistant, existing, for the most part, to process claims." *Wall Street Journal* (7 February 2001.)

[48] "Updates," *Business Insurance* (25 June 2001).

[49] A Washington state court judge ordered the CCR to pay the full amount of damages agreed to by 17 members during nine different settlement agreements finalized in 2000 prior to the withdrawal of National Gypsum and the bankruptcy of Armstrong World Industries. Remaining CCR members have sued their insurers for failing to pay toward the liabilities of former CCR members, which have subsequently been allocated and billed to the remaining members and then allocated to each insurer.

[50] Also known as *Amchem v. Windsor*, conditional class certification was granted by U.S. District Judge Weiner on February 15, 1993.

[51] The 3rd Circuit U.S. Court of Appeals decertified the class on May 10, 1996, and on June 27, 1996, the

manufacturers' petition for a rehearing was denied. The Supreme Court upheld the lower court's decision (6-2) on June 27, 1997, with Justice Ginsburg stating that the "sprawling class" did not meet the requirements of Rule 23. *Amchem Products, Inc. et al. v. Windsor et al.*, 96 Sup. Ct. 270 (1997).

[52] *Ortiz v. Fibreboard*, also known as Ahearn.

[53] Forty-five thousand pending claims represented by the counsel achieving the class action settlement were settled in a separate agreement for a higher average amount.

[54] Fibreboard was allowed to keep virtually all of its net worth, paying only $500,000, and potential insurance funds were greater than $2 billion.

[55] OCF underestimated the frequency and severity of claims in the National Settlement Program (NSP) as well as the number of opt-outs. "Credit Suisse First Boston," Quarterly Report 28 November 2000, 10.

[56] The six member Rehnquist committee issued its 43-page report, *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2*, at the annual meeting of the Judicial Conference of the United States on March 12, 1991. See *The National Law Journal*. Also see the District of Delaware U.S. Bankruptcy Court. *W.R. Grace Informational Brief* (2001), 15 (footnote 27).

[57] 479 S.E. 2d 300, 304 (W.Va. 1996)

[58] *Amchem Products, Inc. et al. v. Windsor et al.*, 96 Sup. Ct. 270 (1997).

[59] Statement by William N. Eskridge, Jr., as quoted in Babcock & Wilcox Company, *Informational Brief*, (22 February 2000), 37.

Statement of
the American Chemistry Council
Senate Judiciary Committee Hearing on Asbestos Litigation
September 25, 2002
Washington

The American Chemistry Council (ACC)* commends Senator Leahy and the Judiciary Committee for holding this hearing to open debate on the asbestos litigation crisis. The asbestos litigation system is in total disarray. Congress must act to bring about order and fairness.

The number of asbestos claims is skyrocketing beyond all previous estimates. While the number of claims filed by people who were made ill by asbestos exposure is relatively predictable, the lion's share of new claims are filed by claimants with no symptoms of asbestos related injuries. This flood of claims by the unimpaired is overwhelming the court system and draining resources that could otherwise be used to compensate people who suffer from serious asbestos related diseases. Making matters worse, the courts have even at this late date been unable to adequately process the claims, and past attempts to find a judicial solution have failed. Even the Supreme Court has called on Congress to bring order out of chaos.

Our messages to the Committee are:

- Congress needs to act;
- the contortions of the legal system are causing truly needy people to be passed over in favor of those far less needy;
- if the economic consequences of this litigation insanity were not so severe they would be a cartoon of our legal system.

* The American Chemistry Council is a trade association representing companies engaged in the business of chemistry. Its members include more than 150 leading companies accounting for more than 90 percent of the production of basic industrial chemicals within the United States. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports.

Failure to act will have serious consequences. Companies representing 75 of 83 American industries (using the U.S. Department of Commerce's industry classification system) now face asbestos liability.[1] Sixty companies have already been forced into bankruptcy by the crush of asbestos claims. When companies become insolvent, resources for sick victims dwindle, and the outlook for future claimants becomes dire. Bankruptcies threaten jobs and retirement savings for workers. As bankruptcies become more pervasive, plaintiffs' attorneys seek to link a new line of companies to asbestos use with novel legal theories. This approach subjects more businesses to the asbestos gauntlet, and imperils the jobs and retirement savings of more workers. All the while, the wave of bankruptcies threatens the economy and leaves future claimants with no recourse. Congress must fix this broken system to safeguard the rights of people with asbestos related disease, while at the same time bringing rationality and certainty to the system.

Our judicial system is supposed to deliver justice. It is not doing so today in asbestos litigation when the truly injured are passed over in favor of others. And while this is the larger tragedy of asbestos litigation, on behalf of the chemical industry we should be clear about the consequences we face, and through us the public at large.

Economic consequences for us have a broad ripple effect into the economy generally. Chemistry is in everything. Our "value chain" extends into every aspect of people's lives – food, a safe water supply, clothing, shelter, health care, computer technology, transportation – every facet of human life depends upon the business of chemistry.

While the economic impact of the asbestos litigation crisis will first be on individual companies, in our industry, those consequences will flow broadly into the economy.

Skyrocketing Numbers of Claims

The number of asbestos suits is skyrocketing, with no end in sight. The use of asbestos became widespread in the 1920s and peaked in the 1970s. In the late 1960s, victims began to file

suits against asbestos manufacturers and suppliers. After an early influx of cases, there was an expectation that the number of suits would decline. People with the highest levels of occupational exposure had already filed suit, as the heaviest exposure occurred primarily 30 to 70 years ago (latency periods for asbestos related diseases can be 20 to 40 years). Instead, there has been a dramatic increase in the filing of lawsuits. It has become evident that we are not even at the halfway point in terms of the number of claims that will ultimately be filed.

Experts estimated in the 1980s that total asbestos claims would number about 200,000.[2] Instead, that number of claims was pending before courts in 1999 alone.[3] As many as 3 million claims could be filed in total.[4] Claims are predicted for another 40 years.[5]

While there is no national registry of asbestos claims, the Johns-Manville bankruptcy trust is widely considered the most authoritative source of claims information. The Johns-Manville trust has been operating since the 1980s, and has experienced a geometric increase in the number of claims filed against the trust. At inception, the trust anticipated it would receive 83,000 to 100,000 claims in total;[6] instead, it received 91,000 in 2001 alone.[7] The number of claimants was about 20,000 in 1982[8] and has increased to about 600,000 today.[9] In the early 1980s, claimants typically sued about 20 different defendants; by the mid 1990s, the number rose to 60 to 70.[10]

Claims by the Unimpaired. The dramatic increase in asbestos claims is caused primarily by a wave of filings by claimants who are not sick, rather than any unexpected increase in victims who suffer from serious asbestos related injuries. More than 90 percent of all claims filed with the Johns-Manville trust in 2001 were brought by claimants with non-malignant conditions. Less than seven percent of claims were brought by victims who are sick.[11] As a result, much of the funding available to compensate victims goes to those who are not sick. Sixty-three percent of funds paid by the trust have gone toward claims by those with non-malignant conditions, while 37 percent of the monies paid out have gone to compensate those with asbestos related cancers.[12] As a result of the run on the trust by unimpaired claimants, the Johns-Manville trust is now able to pay only five cents on the dollar.[13] Other trusts pay even less.

New York Senior District Judge Jack B. Weinstein, who oversees the Johns-Manville trust, asserted that the flood of new claims, the reduction in amounts paid pro rata by the trust, and the increasing number of bankruptcy filings "suggests that there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos related injuries."[14]

Pending before the Supreme Court is a case where $5.8 million was awarded to six railway workers who do not suffer from asbestos related disease.[15] Instead, they claim emotional distress from fear of future injury. Such cases drain vital resources from the system, leaving less for the truly ill. ACC filed an *amicus* brief asking the Court to "insist that the lower courts return to sound rules of procedure and substance – rules that move valid cases properly through the court, apportion responsibility fairly among defendants, and preserve limited resources for the claimants most in need."[16]

Failures of the Court System. The American court system has failed to fairly and expeditiously mete out justice in asbestos cases. The large number of cases by the unimpaired has flooded the courts, making it difficult for seriously ill victims to get to trial. Huge consolidated cases result in bigger payouts for unimpaired victims and less for the truly ill. Victims face delay and inequitable compensation, while defendants are denied due process.

Consolidations. In *Mobil Corp. v. Adkins*, which has been appealed to the U.S. Supreme Court, 8,000 claims have been aggregated against more than 250 defendants in a West Virginia court.[17] As many as 5,000 of the claims were filed by plaintiffs who do not live in West Virginia and were not exposed to asbestos in that state. Claims by people with varying degrees of exposure and illness were grouped together, such that the serious cases put upward pressure on the verdict or settlement, to the benefit of claims by people who are not sick and may never become sick. ACC filed an *amicus* brief noting that the aggregation of all pending asbestos product-liability cases in West Virginia has resulted in the "lumping together of seriously ill claimants with unimpaired claimants."[18] ACC also noted that aggregation of seriously ill plaintiffs with those who have weaker cases increases the size of the awards for the less serious

cases.[19] In a reply brief, defendants noted that lawyers representing cancer victims have themselves filed an *amicus* brief, arguing that "consolidations force defendants to pay exorbitant sums to settle cases involving no injury, thus inviting the filing of more unimpaired cases, thus causing another round of bankruptcies, and ultimately thus ensuring that cancer claimants are uncompensated."[20]

Furthermore, the more than 250 defendants in the case are grouped together and deprived of a meaningful opportunity to present individual defenses. The defendants are manufacturers, premises owners, and employers, each of which is distinct in terms of potential liability. On September 16, 2002, the U.S. Supreme Court refused to grant a stay in the case, and therefore the trial is now beginning. In a final attempt to stay the case, defendants argued that:

> It is mass consolidations like this one that make the claims of unimpaired persons viable. Without any meaningful opportunity to defend the merits of individual cases, including those brought by the unimpaired, defendants are forced into global settlements – and as a result, limited resources that should be directed at truly ill claimants go instead to claimants with no impairment at all.[21]

Delay. Not only do truly ill victims receive less because they must compete with the unimpaired for precious funds, they also must wait too long for relief. Even as far back as 1991, a panel of senior judges appointed by Chief Justice William Rehnquist noted that it takes almost twice as long to resolve typical asbestos cases as other lawsuits – 31 months as opposed to just 18 months for the typical liability suit.[22] More recently, it can take five years to get to trial. Some claimants die before their court date.

Delays are exacerbated because plaintiffs' attorneys file the bulk of cases in just a few especially sympathetic jurisdictions. Such forum shopping, in Texas, Maryland, Mississippi, West Virginia, Ohio and New York, results in a bottleneck, where a small number of courts must process a huge volume of cases.[23] Two-thirds of cases from 1998 to 2000 were filed in five states.[24] Anecdotal evidence suggests that plaintiffs filing claims in Baltimore are slated for trial as late as 2006.

Inequitable Compensation. For those claimants who get to trial, the compensation they receive is inequitable and unpredictable. For example, current asbestos litigation payouts vary significantly by what state a victim lives in, which court tries their case, and who the judge and jury are that day. In late 1999, attorneys for 18 defendants reached a settlement with lawyers for almost 4,000 plaintiffs regarding two asbestos lawsuits filed in Mississippi state court. Allocation of the $160 million settlement was based on how far plaintiffs lived from the courthouse in Mississippi. The nearly 250 Mississippi residents each received $263,000, while 2,645 plaintiffs from Ohio, Pennsylvania and Indiana, despite having similar injuries, received only $14,000 each. Seven Texas plaintiffs with similar conditions got $43,500 each.[25]

Transaction Costs. Even for those who recover, a significant portion of the money spent by defendants does not benefit victims. Claimants receive only 43 percent of total asbestos litigation spending , the rest goes to attorneys' fees and administrative expenses.[26]

Consequences

The massive number of claims by the unimpaired, coupled with a court system that fails to provide fairness and efficiency, causes serious consequences for victims, American workers, and the economy. Scores of American companies are filing for bankruptcy under the weight of asbestos claims. Bankruptcies threaten the ability of sick victims to be compensated. Bankruptcies also destroy jobs, workers' retirement savings, and the economy. To make matters worse, another round of companies is being targeted, restarting the vicious cycle.

Nearly all American industries have been affected in some way by asbestos litigation. Claims have been brought against more than 6,000 entities.[27] Sixty companies have already filed for bankruptcy, related to asbestos liability.[28] Of those, nearly one-third have occurred within the last two years. As many asbestos-related bankruptcies have been declared since January 2000 as in either of the past two decades.[29] Companies ranging from Fortune 500 firms to small businesses with as few as 20 employees are being targeted.[30] At least five corporations have

reported having over 300,000 claims each at the time of their bankruptcy, with two corporations having at least 500,000 claims.[31]

Most tragically, bankruptcies endanger compensation for the truly ill. Although trusts are often set up for asbestos victims, claimants are not paid during the bankruptcy process, which typically takes more than five years.[32] Many very ill claimants will not live that long. Furthermore, as in the Johns-Manville case, claimants against trusts commonly receive only pennies on the dollar because the trusts have been drained by unimpaired claimants. As companies declare bankruptcy and trusts are diminished, little is left for the truly ill and for future plaintiffs.

Not only do bankruptcies wreak havoc on victims, they also threaten the jobs and retirement savings of American workers. David Austern, administrator for the Manville trust, noted, "The bankruptcies and lost jobs from asbestos far outweigh the effects of Enron or WorldCom…."[33] Compounding the tragedy of losing a job, American workers may also lose their retirement savings in a bankruptcy. Furthermore, jobs are not created when companies must use their resources on legal claims instead of investment. By one estimate, 128,000 to 423,000 jobs could have been created if asbestos defendants had been able to invest funds that were diverted to asbestos litigation.[34]

As corporations with a direct connection to asbestos file for bankruptcy, companies with more tangential connections to asbestos are sought as defendants. These companies are defendants simply because they used products that contained asbestos or, like many chemical companies, had asbestos-containing products on their premises. These "nontraditional" defendants now account for nearly two-thirds of asbestos expenditures. Two decades ago, "traditional" defendants accounted for about three quarters of expenditures.[35] As waves of companies file for bankruptcy, sick plaintiffs will face increasing difficulty in gaining compensation for their injuries. Given that asbestos suits are expected to be filed for another 40 years,[36] bankruptcies will threaten the ability of truly ill victims to be compensated in the future.

Overall, asbestos related costs to the U.S. economy could reach between $200 and $275 billion.[37] Asbestos claims could cost U.S. insurers alone up to $70 billion.[38] This figure is 75 percent higher than one 1997 estimate.[39] Asbestos litigation defendants have spent $20 to $24 billion on asbestos litigation through 2000. Bankrupt corporations have spent $45 million to $5 billion each. At least five defendants' expenditures have topped a billion dollars each."[40]

Efforts to Fix the System Have Failed

Several attempts have been made over the past two decades to bring order to the asbestos litigation system. All have failed. Beginning in the 1980s, judges and lawyers began to consolidate unwieldy asbestos claims for trial. The first formal attempt to solve the crisis was the 1991 Multi-District Litigation (MDL), which consolidated all pending asbestos litigation in a single proceeding.[41] Ultimately, many plaintiffs' attorneys chose to bypass the MDL, seeking fewer constraints and more sympathetic state laws and juries.

In 1993, plaintiffs' attorneys and asbestos defendants negotiated what is known as the *Georgine* class action settlement, which provided a method to resolve claims according to a schedule for asbestos related injuries. In 1997, the U.S. Supreme Court struck down the *Georgine* settlement, on the grounds that it did not meet the requirements for class certification. The class was deemed to be too large and varied, and the interests of some parties were deemed to be inconsistent.[42]

The U.S. Supreme Court also rejected a mass settlement in *Ortiz v. Fibreboard Paper Prods., Inc.*.[43] As part of the settlement, all class members would be bound by the terms of the agreement and could not sue the company separately. The Court ruled that companies could neither curb the amount of money they were willing to pay nor bind plaintiffs who have conflicting interests.

Private attempts to resolve the asbestos litigation crisis also have failed. The first such attempt was the 1985 Asbestos Claims Facility (ACF), a group of 35 companies and their insurance carriers that attempted to settle insurance disputes among members and coordinate

defenses for asbestos liability. Due to internal conflicts about individual members' liability and a dramatic increase in asbestos claims, the group was dissolved after about five years. At about the same time as the ACF was created, a group of 20 former asbestos producers formed the Center for Claims Resolution (CCR) to settle claims. After some of its members filed for bankruptcy, the CCR stopped settling claims in 2001. In 1998, another attempt, the National Settlement Program (NSP), was created when Owens Corning and 80 plaintiffs' law firms agreed to resolve almost 200,000 claims for more than a billion dollars of Owens Corning's and subsidiary Fibreboard Corp.'s asbestos liability. Owens Corning seriously underestimated the size of its liability and ultimately terminated the program. Owens Corning filed for bankruptcy protection on October 5, 2000.

The number of attempts and variety of approaches attest to the necessity of a solution and the willingness of parties to participate. Unfortunately, judicial and private attempts at a solution have proven ineffective.

Conclusion

The number of asbestos suits filed by claimants who are unimpaired is skyrocketing, causing serious consequences for the truly ill, the economy, and workers. Previous attempts to address the system have failed, and now Congress must act. Congress has the latitude to fashion a solution that improves the system for all parties.

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[1] Stephen Carroll at al., *Asbestos Litigation Costs and Compensation: An Interim Report*, RAND, Sept. 2002, 50 (*RAND 2002*).
[2] Deborah Hensler et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue*, RAND, Aug. 2001, 13 (*RAND 2001*).
[3] *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 105th Cong. 3 (1999) (statement of Professor William N. Eskridge, Jr., Yale Law School).
[4] RAND 2002 at 77.
[5] Keith M. Buckley et al., *Asbestos: Impact on the U.S. Insurance Industry*, FITCHRATINGS, July 25, 2002, 4 (*Fitch*).
[6] www.mantrust.org (link to History of the Trust).
[7] www.mantrust.org (link to Year Ended December 31, 2001 Filing).
[8] RAND 2002 at 2, 6.
[9] *Id.* at 40.
[10] *Id.* at 41.
[11] Claims Resolution Management Corporation, Analysis of Manville Personal Injury Trust Claims, at 10 (*CRMC*).
[12] *Id.* at 3.

[13] *Id.* at 19.
[14] *Order, In re Joint E. & S. Dist. Asbestos Litig.*, No. 4000, 82B11656 (BRL), 2001 WL 146436, at *1 (E.D.N.Y. Nov. 7, 2001).
[15] *Norfolk & Western Ry. Co. v. Freeman Ayers et al., cert. granted*, 70 U.S.L.W. 3613 (U.S. Apr. 1, 2002) (No. 01-963).
[16] Brief Amici Curiae of the Coalition for Asbestos Justice, Inc., National Association of Manufacturers, American Tort Reform Association, American Chemistry Council, and American Petroleum Institute in Support of Petitioner, 19, *Norfolk & Western Ry. Co. v. Freeman Ayers et al., cert. granted*, 70 U.S.L.W. 3613 (U.S. Apr. 1, 2002) (No. 01-963).
[17] *In re: Asbestos Litig.*, Civil Action No. 01-C-9000 (Cir. Ct. Kanawha Cty., W. Va.).
[18] Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of the Chamber of Commerce and American Chemistry Council at 8, *Mobil Corp. v. Adkins*, (U.S.) (No. 02-132), at http://www.uschamber.com/nclc/case+list/new+litigation.htm.
[19] *Id.* at 9 (*citing* Prof. William N. Eskridge, Jr., Yale Law School).
[20] Reply Brief for Petitioners at 10, *Mobil Corp. v. Adkins*, (U.S.) (No. 02-132) (*quoting* Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae in Support of Petition for Certiorari by Select Asbestos Claimants at 7, *Mobil Corp. v. Adkins*, (U.S.) (No. 02-132)).
[21] Application to Stay the Mandate of the Supreme Court of Appeals of West Virginia and to Stay the Commencement of Trial Pending this Court's Decision on Petition for Writ of Certiorari Or, in the Alternative, Suggestion to Expedite Decision on the Petition at 11, *Mobil Corp. v. Adkins*, (U.S.) (No. 02-132).
[22] Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States*, 10-11 (March 1991).
[23] *See, e.g.*, RAND 2002 at 32, 34.
[24] RAND 2002 at 32 (the five states were Mississippi, New York, West Virginia, Ohio, and Texas).
[25] "Asbestos Makers Settle 2 Suits," *Charleston Gazette*, January 23, 2000, 4A.
[26] RAND 2002 at 61.
[27] *Id.* at 49.
[28] *Id.* at 81.
[29] *Id.* at 71.
[30] *Id.* at 49.
[31] RAND 2001 at 3.
[32] RAND 2002 at 67-68.
[33] Dan Roberts, *Companies fear asbestos claims, Special Report: The Asbestos Crisis,* Financial Times, Sept. 9, 2002.
[34] RAND 2002 at 74.
[35] *Id.* at 50.
[36] Fitch at 4.
[37] Michael E. Angelina & Jennifer L. Biggs, *Sizing Up Asbestos Exposure*, 3 TILLINGHAST-TOWERS PERRIN 26, 2001; Raji Bhagavatula et al., *Asbestos: A Moving Target*? 102 BEST'S REV. 85, Sept. 2001.
[38] Fitch at 1.
[39] *See* Gerard Altonji et al., *Asbestos Claims Surge Set To Dampen Earnings For Commercial Insurers*, A.M. Best Special Report, May 7, 2001, 1.
[40] RAND 2002 at 55.
[41] *See In re Asbestos Products Liability Litigation* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).
[42] *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).
[43] 527 U.S. 815 (1999).

1007 Cameron Street
Alexandria, VA 22314

telephone
(703) 836-8602
facsimile
(703) 836-8606

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The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Orrin G. Hatch
Ranking Member, Committee on the Judiciary
Unites States Senate
Washington, DC 20510

September 23, 2002

Dear Senators,

On September 25, the Senate Judiciary Committee will hold hearings to determine whether Congress should settle a dispute among trial lawyers involved in asbestos litigation by deciding whether the claims of seriously ill clients should have priority over claims by clients who are not now, and may never be, ill. I ask that this letter be made part of the record of the hearings.

Asbestos, a substance manufactured and widely used in this country beginning in the 1920's, causes severe illness, including cancer and death to some individuals exposed to it. Beginning in the 1960's and up to the present time thousands of lawsuits have been filed at an estimated cost to U.S. companies of billions of dollars.

Claims for asbestos - related injuries were initially brought by individuals who had worked with asbestos and as a result were suffering from grave and crippling illnesses. Most common mesothelioma, a fatal cancer; lung cancer and asbestosis, a disease that in some cases slowly asphyxiates its victims over a period of years.

Claimant's lawyers were very successful in obtaining large compensatory and punitive awards for the seriously ill which, correspondingly, increased the number of claims. Trial testimony of medical experts indicated the time period between asbestos exposure and illness could sometimes be measured in decades.

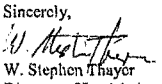
Because of the lengthy latency period, lawyers--concerned that claims made after becoming ill would be dismissed because they were filed outside the statute of limitations-- made claims on behalf of clients who had been exposed to asbestos but were not now ill and in some cases would never become ill.

Lawyers filed their cases in both federal and state courts throughout the country. Some of the judges, faced with hundreds if not thousands of cases, combined numerous claims into one lawsuit. In doing so, claims by individuals exhibiting symptoms of illness and impairment where joined with claims made by others who were asymptomatic but were faced with the possibility of becoming ill. These suits resulted in large verdicts and settlements to all plaintiffs.

After 30 years of litigation, the assets available to satisfy asbestos claims have been steadily depleted. While the claims have increased, the number of defendants has decreased. Over fifty companies have already filed for bankruptcy protection. As a result of verdicts in other cases, some companies with potential liability have had a decline in their net worth and along with it their ability to pay judgments.

All agree that there are insufficient assets to satisfy all present and future claims. The issue before the Senate Judiciary committee is one of prioritization: In the face of increasing numbers of claims and dwindling assets, should government policy give priority to claims of those who are actually ill so as to conserve resources and ensure that as people become ill compensatory monies are available? While the plaintiff's bar fights over the solution, it is clear that the right and moral answer, under those unique circumstances, is an overwhelming yes. Our government must give priority to the seriously ill, before they compensate those who may or may not become ill.

Sincerely,



W. Stephen Thayer
Director of Legislative and Legal Policy

Grover Norquist, President of American Shareholders Association
Written Testimony before the Senate Judiciary Committee

Chairman Leahy and other members of this committee, thank you for the opportunity to address you regarding Asbestos Litigation.

My name is Grover Norquist and I am president and co-founder of the American Shareholders Association (ASA), a non-partisan, not-for-profit organization dedicated to educating U.S. investors on legislation affecting stockholders. I submit my comments to you today with serious concerns regarding asbestos litigations and four guidelines for reform that will significantly help ill individuals, American workers, and shareholders.

To begin, it is vitally important to understand the historical context of asbestos litigation. Most of the original asbestos litigation cases involved individuals who had developed serious and often fatal diseases because the companies they worked for concealed evidence connecting asbestos exposure to major health problems. However, starting in 1982, state supreme courts (New Jersey in 1982 and Louisiana in 1986) ruled that companies were liable for asbestos related injuries, regardless of whether or not the company understood the dangers of asbestos.

As a result of these new court decisions, the number of asbestos lawsuits skyrocketed against companies using asbestos to produce a final good, such as insulation, and companies that merely exposed workers to products containing asbestos, such as automobile brakes and clutches. These new developments greatly expanded the definition of "victim," and subsequently, the rate at which these lawsuits have been filed has nearly doubled every year since 1999. **In fact, almost 94 percent of these cases involved individuals who have not developed any type of cancer or asbestos-related disability.**

The substantial number of new claims by people who are not sick has become the crux of the problem, which ultimately, has placed a severe, deadweight loss on the nation's economy and standard of living. For example, since 1982, due to our nation's broken asbestos litigation system, over 60 U.S. businesses have been forced into bankruptcy by asbestos related lawsuits. At the present rate, U.S. companies will be forced to pay more than $200 billion in asbestos settlements.

This dries up capital investment funding needed for new technologies. New technologies increase the productivity of workers, which increases wages of workers and lowers the prices of goods for consumers. Moreover, stockholders benefit from

increased profits. Yet, the asbestos litigation has drained efficient, productive companies liquidity, which has severely impacted the nation's economy and workers.

Without question, legislative reform is needed, as pointed out by the United States Supreme Court, to ensure that juries award money to those who are legitimate victims and keep it out of the hands of the opportunistic. Accordingly, the American Shareholders Association supports reforms and proposed legislation that will:

- **Work to establish objective medical criteria to determine asbestos-related impairment**. These medical criteria would set the minimum requirements for an "injury" in asbestos lawsuits. The sick - including all cancer victims - could pursue their claims immediately. Those who are not sick would be able to bring their claims when and if they become sick.
- **Statutes of limitations – Liberalize them to remove the incentive for premature filings.** This would help to prevent non-sick claimants from rushing to file suits.
- **Do away with the consolidation of asbestos related claims and instead require individual trials that will focus on the facts of each specific case.**
- **Require lawsuits to be filed in the states where the plaintiff resides or where exposure occurred.**

Enacting these common sense reforms can have significant benefits to the United States economy and increase the standard of living for all Americans. Ultimately, Congress has an opportunity to help American workers, individual shareholders, and genuinely ill individuals by creating the legislative remedy the US Supreme Court has deemed necessary for fixing today's system.

On behalf of American Shareholders Association, I urge your committee to enact these common sense reforms.

Sincerely,

Grover Norquist
President
American Shareholders Association
1920 L Street, NW Suite 200
Washington, DC 20036

Statement of The Asbestos Alliance

Hearing on Asbestos Litigation

Before the Committee on the Judiciary, U.S. Senate

September 25, 2002

The Asbestos Alliance is a coalition led by the National Association of Manufacturers and comprises asbestos defendant companies, trade associations, and third parties seeking congressional legislation to solve America's asbestos litigation crisis. Asbestos litigation is overloading the legal system, delaying the economic recovery, and most critically, hurting those it should be helping the most – the true victims of asbestos disease. The Alliance believes that this hearing is an essential step on the road to reforming the asbestos litigation system, and we are very pleased that Senators Leahy and Hatch have focused the attention of Congress on this critical and growing problem.

The heart of the problem is that asbestos claimants who are not sick today and may never become sick are filing claims and winning millions of dollars. One prime example took place last October in Mississippi when a jury awarded $150 million to six plaintiffs in an asbestos case. None of the six men, who received $25 million each, displayed any symptoms of asbestos-related impairment. In fact, the lawyer who brought the case told reporters, "Most of these guys have not missed a day of work in their lives."

This growth in the filing of non-sick claims is confirmed in a recent report by the RAND Institute for Civil Justice, which noted, "a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not

incurred an injury that affects their ability to perform activities of daily living" (*Asbestos Litigation Costs and Compensation, An Interim Report*, 2002).

While not now sick, these six plaintiffs in the Mississippi case are unlikely to ever develop asbestos disease. In fact, the Manville Trust, which has settled over 400,000 non-cancer asbestos claims, reports that well under 1% of those claimants have subsequently returned to file a cancer claim.

The thousands of questionable claims filed every year and the resulting settlements and jury verdicts are forcing many companies into dire financial straits, even bankruptcy. The scope of this problem is unprecedented in American jurisprudence. An estimated 200,000 asbestos claims are now pending with about 90,000 filed last year alone. More than 6,000 companies have been dragged into asbestos litigation and it is impacting 85% of the economy. Many defendants never even made or used the product. The total costs of the litigation could approach $275 billion, exceeding the liability for the 9/11 attacks and causing a far more severe economic impact than Enron and WorldCom combined. Already, asbestos litigation has caused more than sixty bankruptcies, more than twenty since January 2000. Bankruptcies delay compensation for years to the sick, as companies reorganize. They also result in reduced compensation. For example, the Manville Trust is today only paying 5% of the value of claims, and even with the recent changes in the Manville plan, that figure is unlikely to change. If the present course continues, there may not be any money left to pay the sick.

While victims and their families suffer the most, the asbestos litigation nightmare is leaving thousands of other victims in its wake. Employees of defendant companies building up their savings through Employee Stock Ownership Plans and 401(k) plans

have seen the value of their shares decrease, wiping out nest eggs. One company's ESOP lost 90 percent of its value as the firm moved toward bankruptcy.

Retirees, who often depend on company stock and dividends for income, have experienced immediate impacts. And since more than half of all Americans hold stock, the precipitous drop in stock values that precede asbestos bankruptcies or follow the disclosure that a company has even a modest amount of asbestos litigation impacts millions of people.

The serious problems with the current state of asbestos litigation are readily apparent to most. In fact, The Asbestos Alliance is working closely with a number of plaintiffs' lawyers who represent the truly sick asbestos victims. Considered by many as unlikely allies, we have found common ground in the recognition that something must be done. Absent congressional action, the problems will worsen and the true victims of asbestos disease, along with companies, their employees, retirees and shareholders will continue to lose. And with so many companies being dragged into the litigation, inaction is likely to delay the country's economic recovery. The Alliance looks forward to working with the Committee and key stakeholders to find common ground and develop a fair, just and permanent solution to the asbestos litigation nightmare.

STATEMENT OF DAVID T. AUSTERN, PRESIDENT, CLAIMS RESOLUTION MANAGEMENT CORPORATION AND GENERAL COUNSEL OF THE MANVILLE PERSONAL INJURY SETTLEMENT TRUST BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY CONCERNING ASBESTOS LITIGATION, SEPTEMBER 25, 2002

Mr. Chairman and Members of the Committee: My name is David T. Austern. I am President of the Claims Resolution Management Corporation (the "CRMC") and General Counsel of the Manville Personal Injury Settlement Trust (the "Trust"). The CRMC is a fully-owned subsidiary of the Trust and serves as its claims processing facility. The CRMC also processes asbestos claims and performs services for three other asbestos trusts. On behalf of the Trustees of the Trust and the Directors of the CRMC, thank you for the opportunity to testify at this Hearing and to submit this testimony for the record.[1]

In summary, this statement (and my testimony of the same date) is intended to show that notwithstanding the large number of asbestos-related bankruptcies to date (over 50) and the billions of dollars paid to asbestos claimants, we have seen less than one-half of all the asbestos claims that will be filed. In fact, depending on which future claims forecast you employ, based on claims already filed and future claim forecasts, to date we have seen between 17% and 42% of the total asbestos claims that will be filed. Two leading actuarial firms predict that total losses due to asbestos liability in the United States will be from $250 billion to $275 billion, with a large portion of that total (between $100 billion and $175 billion) not covered by insurance.

The Trust was established following the bankruptcy of the Johns Manville Corporation in 1982. Because of the lengthy bankruptcy proceedings and the appeals that

[1] This statement and testimony are not intended to reflect the views and opinions of the Trustees of the Trust or the Directors of the CRMC.

followed, the Trust did not begin to process asbestos claims until November 1988, when bankruptcy "Consummation" occurred. At that time, the Trustees received in (then) present value dollars Two Billion, Fifty Million ($2,050,000,000), consisting of Johns Manville Corporation stock, debt instruments, insurance collections and cash. From November 1988 through August 31, 2002, the Trust has paid over $2.9 billion to approximately 500,000 claimants.[2] As of August 31, 2002, the Trust had remaining assets of approximately $1.8 billion.[3]

Unfortunately, however, on behalf of the Trust, CRMC pays only a small percentage of each claim's liquidated value. At present, claimants receive a *pro rata* payment of 5% of the claim's liquidated value as determined by the Trust Distribution Process ("TDP"), the claims processing and payment plan approved following a class action filed in the United States District Court for the Eastern District of New York that established a claim payment matrix pursuant to which Trust claims are resolved.

The reason the Trust pays claimants only 5% of liquidated value is because of a substantial Trust asset/liability mismatch. Notwithstanding the Trustees' success described in footnote 3, Trust claim filings, particularly in recent years, have far exceeded the number that would allow the Trust to pay more than a fraction of a claim's liquidated value. Unfortunately, these claim filings also have exceeded, in almost every year since Trust inception, the predictions of the Bankruptcy Court's future claims forecasters and

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[2] This is inclusive of approximately 40 asbestos distributors and codefendants who have received $123,668,152 in contribution and indemnity claim payments.

[3] As these figures suggest, the Trustees have enjoyed substantial success in managing Trust investments and income. In summary form, from Trust inception (November 1988) through June 30, 2002, the Trust has received $1.666 billion in Johns Manville stock sale proceeds; $905 million in debt instrument prepayments and sales; dividends in the amount of $1.077 billion; investment receipts in the amount of $505 million; tax indemnity payments in the amount of $90 million; and profit sharing payments in the amount of $88 million.

future claims forecasters retained by the Trust. During the Johns Manville bankruptcy, the testimony before the Bankruptcy Court was that the Trust could expect to receive between 83,000 and 100,000 claims during the life of the Trust that, because of the long latency period associated with all asbestos-related diseases (10 to 45 years), was expected to run from Trust inception to 2049.

Trust claim filings have far exceeded these "expectations," as follows:

1988	32,473
1989	100,197
1990	21,541
1991	15,309
1992	15,747
1993	14,108
1994	24,444
1995	31,513
1996	51,057
1997	23,674
1998	29,424
1999	31,733
2000	58,041
2001	89,438
Total	**538,699**

Notwithstanding a four-month claim filing moratorium during the first six months of 2002, while the CRMC transitioned to a more efficient and cost-effective electronic

claims submission system, as of August 31, 2002, the CRMC already this year had received approximately 25,000 Trust claims. Thus, with 47 more years during which, according to the best asbestos epidemiological knowledge, Trust claims will be filed, the Trust already has received almost six times the maximum number of claims the Bankruptcy Court experts predicted it would receive.

More alarming still, the current asbestos future claims forecast presents a daunting picture of the number of claims the Trust can expect to receive in the future. Depending on the calibration period used[4], the future claims forecasters predict that from 2001 through 2049 the Trust can expect to receive between 750,000 and 2.7 million additional claims. Other predictions of future claims filings, depending on the calibration period, are 1,030,000; 1,195,000; 1,290,000; 1,418,000; 1,578,000; and 1,615,000.[5] The weighted average of the future claims forecast is 1,422,000.

Thus, when added to the claims already received, the prediction is that total Trust claim filings will be between approximately 1,310,000 and 3,250,000, or between thirteen times and thirty-two times the maximum number of claims predicted during the Johns Manville bankruptcy. The weighted future claims forecast will result in total Trust claims approximately twenty times the maximum number of claims predicted.

In light of the foregoing, one might reasonably speculate as to whether accurate future claims forecasting can be done at all. Indeed, not only did the Bankruptcy Court's experts badly underestimate the Trust's claim filings, the Trust's experts' experience with future claims forecasting has been almost as error prone. Presented below is a summary

[4] The calibration periods are based on diagnosis (of an asbestos-related illness) year and claims-per-year-regression analysis, with various historical claim filing years employed.

[5] These numbers have been rounded to the nearest thousand.

of the future claims forecasts the Trust has received, by forecast year, the future claims forecast, and the percentage increases from forecast to forecast:

Forecast Year	Forecast Claim Filings From 2002 to 2049	Percentage Increase From Prior Forecast
1993	48,600	108%[6]
1995	266,000	447%
1997	333,500	25%
2000	441,000	32%
2001	1,422,000[7]	222%

Among the reasons for the increases described above is that these asbestos future claim forecasts employed a medical model. This type of model assumes that the number of claims is closely tied to the number of people projected by epidemiology to develop each type of asbestos-related disease. A medical model suggests that claimants will first develop an illness, then visit a medical professional, and finally be referred to an attorney after they learn they have an asbestos-related disease. Because there is some evidence that this is not the procedure that is currently being followed, the CRMC is considering an alternative model for the purpose of predicting the number of future asbestos claims filings.

There is additional evidence to support the view that wherever we are in the asbestos claims life cycle, we have not yet received a majority of the asbestos claims that

[6] For 1993, the prior forecast was the one relied upon in the Bankruptcy Court proceeding.

[7] This is the weighted average of multiple forecasts.

will be filed.[8] As the members of this Committee know, while asbestos use in the U.S. has dropped sharply in the last twenty years, asbestos use is not banned. The following chart reflects asbestos consumption in the U.S. between 1961 and 2001.

ASBESTOS STATISTICS			
Year	Production	Imports	Apparent Consumption
1961	47,900.00	560,000.00	604,000.00
1962	48,300.00	613,000.00	659,000.00
1963	60,200.00	605,000.00	657,000.00
1964	91,700.00	670,000.00	738,000.00
1965	107,000.00	653,000.00	721,000.00
1966	114,000.00	659,000.00	731,000.00
1967	112,000.00	585,000.00	654,000.00
1968	109,000.00	669,000.00	741,000.00
1969	114,000.00	630,000.00	712,000.00
1970	114,000.00	589,000.00	665,000.00
1971	119,000.00	618,000.00	699,000.00
1972	120,000.00	668,000.00	747,000.00
1973	126,000.00	718,000.00	803,000.00
1974	103,000.00	695,000.00	765,000.00
1975	99,000.00	490,000.00	552,000.00
1976	105,000.00	595,000.00	659,000.00
1977	92,000.00	551,000.00	610,000.00
1978	93,000.00	570,000.00	619,000.00
1979	93,000.00	513,000.00	564,000.00
1980	80,000.00	327,000.00	356,000.00
1981	76,000.00	338,000.00	349,000.00
1982	64,000.00	242,000.00	247,000.00
1983	70,000.00	196,000.00	217,000.00
1984	57,000.00	210,000.00	225,000.00
1985	57,000.00	142,000.00	162,000.00
1986	51,000.00	108,000.00	120,000.00
1987	51,000.00	94,000.00	84,000.00
1988	18,000.00	85,000.00	71,000.00
1989	17,000.00	55,000.00	55,000.00
1990		41,000.00	41,000.00
1991	20,000.00	35,000.00	35,000.00
1992	16,000.00	32,000.00	33,000.00
1993	14,000.00	31,000.00	32,000.00
1994	10,000.00	26,000.00	27,000.00
1995	9,600.00	22,000.00	22,000.00
1996	10,000.00	22,000.00	22,000.00
1997	7,000.00	21,000.00	21,000.00
1998	6,000.00	16,000.00	16,000.00
1999	7,000	16,000.00	22,000.00
2000	5,000	15,000.00	19,000.00
2001	5,000	13,000.00	22,000.00

[8] As used in this statement, "asbestos claims" refers to personal injury claims. No attempt has been made to estimate asbestos property damage liabilities, which have a potential total liability higher than personal injury liability.

The source for the data on the preceding page is the Minerals Yearbook of the United States Bureau of Mines and the United States Geological Survey. The peak apparent consumption years were 1972 and 1973.[9] The apparent consumption figures are in metric tons, rather than in English tons (2,000 pounds), so you must add approximately 10% to the consumption figures to determine English tons.

As reflected in the chart, asbestos consumption has declined since 1973, but approximately 120,000 metric tons of asbestos were consumed in the United States as recently as 1986, and as recently as last year, approximately 22,000 metric tons were consumed.

The continuing use of asbestos and asbestos-containing products is unfortunate for a number of reasons. The first, obviously, concerns public health, as this known carcinogen that also causes many other injuries continues to be employed in the manufacture of scores of different products.

From a future claims forecast point of view, the continuing use also is unfortunate. Because of the long latency periods between year of first exposure to asbestos and onset of disease (10 to 45 years), the CRMC is currently compensating claimants first exposed to asbestos during the 1950s and very early 1960s – years before asbestos consumption peaked in the United States. Injuries related to continuing use of asbestos will not be seen for decades.

[9] Apparent consumption is defined as production plus imports minus producer exports of asbestos fiber plus adjustments in Government and industry stocks. The asbestos statistics have been recorded since 1900. No apparent consumption year prior to 1961 exceeds the apparent consumption in 1973 and 1974. Apparent consumption between 1940 and 1960 ranged from 238,000 metric tons (1940) to 723,000 metric tons (1951).

The CRMC records data for each claim filed with the Trust, including year of first exposure to asbestos or an asbestos-containing product, by industry and by injury. With respect to year of first exposure by industry, for claims filed during 1990 the year of first exposure among four randomly selected industries was between 1951 and 1956; for claims filed during 2000, the year of first exposure had increased only to between 1958 and 1961. For claims filed during 1990, the year of first exposure by injury[10] -- again, because of the long latency period -- ranged from 1947 to 1953; for claims filed during 2000, the year of first exposure by injury had increased only to between 1952 and 1961.

Thus, whether you measure year of first exposure by industry or injury, based on historic United States asbestos consumption, the CRMC can reasonably expect very substantial future claim filings for the next twelve years, or until the year of first exposure (now only 1961 for both industry and injury) reaches 1973, the most recent "peak year." But note that it was not until 1987 that apparent asbestos consumption in the United States dipped below 100,000 metric tons. It appears that substantial claim filings will continue for at least twenty-six more years, and then will continue, albeit at a reduced rate, for at least two additional decades.

Based on the foregoing, it is apparent that at least in the world of future asbestos claims filings, what is past is not necessarily prologue. Therefore, the Committee should be made aware of the following: employing predictive factors that do not rely heavily on a medical model, Tillinghast-Towers Perrin, an international actuarial firm, has estimated that total United States domestic asbestos claims filings will be 1,636,000, a number greater than the lowest predicted number of future Trust claim filings described on page 4

[10] The five injuries measured are those paid by the Trust: mesothelioma, lung cancer, other cancers, asbestosis, and pleural disease.

above, but only approximately one-half of the highest predicted number of future Trust claim filings. Another well-known international actuarial firm, Milliman, predicts total asbestos claims filings will be 1,049,000.

Both actuarial firms, however, predict very high "ultimate losses and expenses" due to United States asbestos exposure. Tillinghast-Towers Perrin estimates the total losses to be $250 billion, approximately $100 billion of which will not be covered by insurance. Milliman estimates the total losses to be $275 billion, approximately $175 billion of which will not be covered by insurance. Both actuarial firms base their uninsured loss estimates on the assumption that all insurance companies that are liable for the asbestos losses of their insureds, both domestic and foreign, will remain solvent.

In addition, the Committee should know that as of September 1, 2002, the Trust began to operate pursuant to a Trust Distribution Process that substantially alters claim filing requirements.[11] The CRMC is not in a position at this time to determine the extent, if any, to which future claim filings will be reduced because of changes in claim filing criteria. However, it is expected that there will be some reduction in the number of claims that are filed as a result of the criteria changes.

Because the Trust is the largest of the extant asbestos trusts, because the Trust's grantor, the Johns Manville Corporation, was – by far – the largest domestic producer of asbestos and asbestos-containing products, the CRMC and the Trust have always served as the coal mine canary for procedures and practices associated with the processing of asbestos claims. Our claims data, encompassing as it does almost 600,000 asbestos claims, is the largest asbestos data base. It does not necessarily follow from this that our

[11] This new TDP applies to claims, except for certain malignancies, that have a date of diagnosis of an asbestos-related disease after September 1, 2002.

analyses or predictions are infallible – indeed, experience has proven otherwise. However, I believe that data leaves little doubt that the asbestos claims liability problem is far from over. We expect that more claims will be filed in the future than have been filed thus far.

In twenty years, we have learned that time alone has not and will not solve "the asbestos problem."

Statement of

Fred Baron

on behalf of
The Association of Trial Lawyers of America

on Asbestos Litigation

Before the Senate Judiciary Committee

September 25, 2002

Testimony of Fred Baron
On behalf of The Association of Trial Lawyers of America
Regarding "Asbestos Litigation"
Before the Senate Judiciary Committee
September 25, 2002

Mr. Chairman and Members of the Committee, my name is Fred Baron and I am a partner in the law firm of Baron & Budd of Dallas, Texas. I have been involved in asbestos litigation for over twenty-five years. I served as president of the Association of Trial Lawyers of America (ATLA) between July, 2000 – July, 2001. I am pleased to appear today to present ATLA's views on the current state of asbestos litigation.

The asbestos litigation issue has been with us for almost three decades. Over the years, defendants and their insurers have periodically asked Congress to change the tort system to reduce their liability to the victims of the asbestos epidemic. To date, Congress has rejected every industry backed asbestos tort reform effort.

This hearing has been scheduled to review the current state of asbestos litigation, to evaluate claims for relief by certain corporations and insurance companies, and to determine whether a more efficient and equitable system of compensating asbestos victims can be developed. We are extremely skeptical that any proposal put forth by the asbestos defendants and their insurers could or would act to improve the current system of compensation to the benefit of asbestos victims. In summary, ATLA believes that the current state law tort system has proven, over the past decade, that it can deliver benefits in a reasonably short period of time to the hundreds of thousands of asbestos victims who have filed for and received compensation.

The fact that in excess of 50,000 claimants per year receive payments and only a very small number of the cases are tried to verdict, signals that this system is working for the vast majority of injured victims.

Tort Remedies are Essential to Compensate Injured Workers

Over the years, the proponents of change have identified a variety of so-called litigation crises that, in their view, justify federal intervention in state tort law. Although the defendants' reasons for demanding asbestos tort reform have varied, their definition of success has always been, and remains, eliminating the vast majority of claims that are valid under state law. Although they will argue that the only way to pay more to the sickest is by paying less to others, the defendants' real goal is to pay less total asbestos compensation. Recently, their preferred device has been proposed restrictive, mandatory, federal medical criteria that would eliminate tens of thousands of claims which would otherwise be entitled to compensation under state law. Without such restrictive medical criteria, I doubt industry will support any form of federal legislation.

ATLA believes that there is no valid basis for providing legal relief to solvent asbestos defendants or their insurers. Thirty years of actual experience in the state tort law systems, where over 500,000 asbestos victims have sought and obtained compensation for their injuries, is conclusive evidence that there is no more effective mechanism for ensuring that victims get compensation than the tort system. Workers who have been injured by asbestos exposure are entitled to seek compensation under the laws of each of the 50 states. Any proposed legislation should not include medical standards more restrictive than those used by state courts today,

otherwise many injured workers who would otherwise be entitled to benefits will be left without a remedy for the harm they have suffered.

Unimpaired Claims

The lynchpin of the industry argument for restricting asbestos victims' recovery rights is that most new claims are filed by people who, although suffering from asbestos related disease, are not functionally impaired. By seeking to classify all claims filed by asbestos workers with pleural plaques, pleural thickening or pleural calcification, and even many cases of asbestosis as unimpaired, this argument inaccurately suggests that none of these claims are deserving of compensation.

Tort law compensates *injuries*. Tort law has never required functional impairment as a precondition for awarding compensation. The concept that a victim must be impaired before their claim can be heard is an invention of the asbestos defendants designed to limit their liability to those who have been most seriously harmed by exposure. Although a person with less severe asbestos injuries is likely to have less substantial damages and receive a smaller tort award, indeed because asbestos disease is progressive, OSHA requires that all workers exposed to asbestos be provided with regular medical surveillance to detect disease. Certainly, those workers who incur substantially increased medical expenses as a result of the harms caused by asbestos manufacturers should be entitled to recover for those losses.

Let me offer a simple example. If my car is hit in a rear end collision and I am hospitalized, however briefly, the other driver (or the driver's insurer) pays my damages. The

other driver pays these costs regardless of whether or not my injuries cause functional impairment.

What is more, the charge that most claims are filed by those who are not sick and that these so called "unimpaired" cases represent a growing proportion of overall claims is wrong. The most recent data from the Manville Trust, the benchmark for trends in asbestos litigation, show more than 85% of claims have been filed by those diagnosed with cancer, asbestosis or other illnesses. Today, fewer than 15% of claims are classified as pleural, a proportion that has been shrinking since 1995. Thus, the assertion that an explosion of unimpaired claims justifies federal intervention is not supported by the available evidence.

Asbestos Claims Do Not Burden the Courts.

Twenty years ago, thousands of injured claimants had difficulty obtaining relief in the courts because the asbestos industry was involved in a lengthy and complex struggle with plaintiffs over responsibility for the diseases caused by their products. The issues that animated that earlier litigation have long ago been resolved in favor of the claimants. Liability of the defendant companies is no longer seriously disputed. Juries across this country have demonstrated time and again that they will find the defendant companies liable at trial and impose substantial damages for their conduct.

It should be noted that over 90% of all of the cases are filed in state courts, not federal, and that better than 85% of the cases are filed in only 10 states. The relatively small number of courts that have been dealing with these claims over the past two decades are well equipped to handle the pending and future asbestos cases that will require trial. A litigation crisis, as that term is usually understood, does not exist. In 2001, in all state and federal courts in America,

there were only 60 asbestos trials, involving less than 150 individuals. The best information available indicates that more than 50,000 claims settled during the same period. These statistics clearly do not present a case management crisis for asbestos litigation.

As a result, it is simply inaccurate to any longer claim that asbestos litigation is placing an undue, or in fact, any burden on the courts. As the statistics clearly show, claims filed do not translate into cases tried. The vast majority of cases do not take up the time of the courts.

Today, the problems the courts confronted during the last decade have largely been eliminated and the industry and the claimants have, by and large, accommodated themselves to the risk of litigation. We believe that the large volume of cases that are settled every year, providing compensation to victims and their families, settle in a fraction of the time it would take to process claims under any newly devised administrative scheme. Most claimants do not wait years to receive payments. In my experience, my asbestos clients wait an average of less than six months to start receiving payments. And in virtually every jurisdiction, asbestos victims who are classified as "in extremis," typically are given docket priority and can usually access a trial setting in less than 12 months. ATLA believes that any change to the present system of asbestos litigation that alters the risk of litigation, would slow, rather than speed, payment to claimants.

Tort Reform Will Not Fix Problems in Bankruptcy Law

One reason Congress periodically inquires into asbestos litigation is that a significant number of corporations have filed for reorganization because of potential asbestos liabilities. Although nobody encourages bankruptcy filings, anxiety about asbestos defendants filing for reorganization under Chapter 11 of the Bankruptcy Code may be misplaced.

Most, if not all, of the asbestos defendants who have filed for bankruptcy do so to continue operating. Few, if any, jobs are lost as a direct consequence of reorganization. Reorganization is a means to set aside a pool of corporate assets to pay claims. Victims receive compensation from a separate trust which typically owns at least 85% of the bankrupt defendant's stock. Asbestos defendants emerge from reorganization as viable economic entities. As the wealth of these new companies grows, its new shareholders and asbestos claimants both benefit. In adopting section 524(g), Congress preserved the rights of future claimants by prohibiting bankrupt trusts from spending their assets now on current cancer cases rather than preserving those assets for future claims.

The only time Congress has legislated on the issue of asbestos compensation was to codify the innovative settlement reached in the Manville bankruptcy and to adopt section 524(g) to preserve trust assets for future claimants. Congress made the right choice.

Those who argue that under the current system mesothelioma victims do not get their fair share of compensation really want to upset Congress' decision to preserve trust assets for future claimants. For it is only where limited assets are available to pay claims, as in bankruptcy, that mesothelioma claimants receive limited awards. Mesothelioma claims filed against solvent defendants receive substantial awards (usually in excess of several millions of dollars) in their state based tort suits. And, most courts hear these claims on a priority basis so victims receive compensation promptly.

Moreover, section 524 is sufficiently flexible to allow adjustments in the amounts paid for different categories of illness, where fairness so requires. Just a few weeks ago, a federal court approved a change in the payment formula used by the Manville Trust which substantially

increases the total dollars and percentage of dollars paid to those most seriously ill. It is expected that other trusts will follow this precedent.

Administrative Compensation May Create More Problems Than It Solves

Some industry advocates and academics have long sought to substitute an administrative compensation scheme for tort law. Administrative compensation programs have a history of not working as advertised. They may not speed the payment of benefits to injured workers. An administrative agency charged with determining asbestos compensation would take several years to begin operation. It would need a very large staff to process claims. In the early years, thousands of claims, quickly settled each year by the tort system, would get backlogged and it would take several more years for the agency to clear the old cases. If the companies responsible for compensation are permitted to contest claims, a hearing is required, and administrative and judicial review often delay compensation for several more years. This would not represent an improvement.

Moreover, Congress has never before intervened when state law provides an adequate remedy to injured workers, as is the case in asbestos litigation. Congress has never adopted legislation to prevent injured workers from obtaining compensation under state law.

An administrative system for asbestos compensation will almost certainly cost the federal government substantial sums even if Congress imposes a tax on the asbestos defendants to pay claims costs. That is why, before Congress considers asbestos reform legislation, it is essential that a determination be made of the total assets of the defendants and their insurers available to pay claims. We do not presently know how much money is available to pay current and future

claims; moreover no accurate information exists as to whether this pool of assets is adequate to cover anticipated claims.

When federal compensation programs protect the interests of a particular industry, such as under the Black Lung or Vaccine Injury programs, the affected industry is charged the costs of compensation. Often, estimates of how much it will cost industry or how easily those costs will be assessed against industry substantially underestimate costs and the federal government must make up the difference. This is the likely result if an asbestos compensation program is established. Asbestos manufacturers, suppliers or premises owners and their insurers should be responsible for the full costs of any compensation program, including the costs of administration.

Experience with other compensation programs is illustrative. Congress established the Black Lung compensation program because state workers compensation laws did not cover pneumoconiosis. As one academic has observed, however, the program "quickly became a disaster" for several reasons. (Peter Barth "The Tragedy of Black Lung at 42"). First, substantially more claims were filed than had been predicted. "Phenomenal " delays developed in processing claims at the Department of Labor. In 1973 a task force predicted claims would be processed in 90 days. By 1976, a DOL study found actual claims processing time was 630 days on average. Second, coal operators vigorously fought claims. In virtually every instance where a determination was made that an employer should pay compensation, the matter was appealed. Finally, the federal government paid a large proportion of the program, because assessments against coal operators were inadequate to cover claims costs. Today, Black Lung is an extremely cumbersome scheme under which few workers actually receive benefits.

Substantial delays also have plagued the Energy Employees Occupational Illness Compensation Program adopted in 2000. Two years after this law was adopted, the Department of Energy has yet to process a single claim for workers' compensation under Subtitle D. Over 20,000 claims are pending. At the National Institute of Occupational Safety and Health, more than 10,000 claims await radiation dose reconstruction; NIOSH has completed only a handful so far. Both programs provide serve an exposed population substantially smaller than those injured by asbestos exposure.

New Defendants

The most recent alleged abuse in asbestos litigation is that with the growth of bankruptcies among traditional asbestos defendants claims are migrating to companies that "had nothing to do with asbestos." This charge is false. We are prepared to submit to the Committee a brief description of the conduct of some of the most prominent of these so called "uninvolved" defendants. While these companies did not manufacture asbestos, they used, distributed or otherwise sold products to others knowing that their asbestos content was likely to injure downstream users. Other defendants purchased companies, often at a discount, knowing these companies had substantial asbestos liability. While these defendants may have presumed they could avoid paying victims' claims, the courts have found no basis for relieving these companies of asbestos liability. We do not believe Congress should do so either.

Statement of Senator Baucus
Senate Committee on the Judiciary
September 25, 2002
10:00 a.m.

Mr. Chairman, Senator Hatch, and distinguished members of the Judiciary Committee, thank you for holding this very important hearing and allowing me to testify before you today.

Mr. Chairman, I think we can all agree that asbestos litigation in this country is an enormous issue that will impact this nation for many years to come, and I applaud you for your leadership in stepping up to address it head-on.

I just want the record to reflect my deep concern that we not lose sight of what's really at stake here, and that's making sure that people who are sick, or who are likely to become sick, from exposure to asbestos are not denied the ability to fight for their rights against the companies or persons that injured them. That is absolutely the bottom line here.

I know you've all heard me talk about Libby, Montana before, but Libby represents one of the grossest cases of corporate irresponsibility and down-right criminal negligence that I have ever seen.

The extent of asbestos contamination in Libby, the number of people who are sick, who have died from asbestos exposure, is just staggering. The people of Libby suffer from the deadly asbestos-caused cancer, mesothelioma (ME-SO-THEE-LEE-O-MA), at a rate 100 times greater than the rest of the nation. One in 1000 residents of Libby suffer from this disease. The national average is 1 in 1 million. Moreover, the Agency for Toxic Substances and Disease Registry has found that Libby residents suffer from all asbestos-related diseases at a rate of 40 to 60 times the national average.

How could this happen? Well, a company named W.R. Grace owned and operated a vermiculite mining and milling operation in Libby. It just so happened that vermiculite was contaminated by a deadly form of asbestos called tremolite asbestos. WR Grace milling operations belched thousands of pounds of asbestos contaminated dust into the air each day, dust that settled in the town of Libby, on cars, on homes, gardens, dust that settled on children. Workers brought the dust home on their clothes and exposed their families. Hundreds have died, hundreds more are sick.

The very worst part about this story is that W.R. Grace knew exactly what it was doing, it knew the vermiculite dust was contaminated with deadly asbestos, yet it told workers and the town that it was harmless.

Now W.R. Grace has filed for bankruptcy, wringing its hands over escalating asbestos claims involving the vermiculite products it produced, and shielding billions in assets from the bankruptcy proceeding. Through all of this, W.R. Grace has yet to step up and do the right thing in Libby.

It has ungraciously fought any attempts to beg, plead, or cajole the company into living up to its responsibilities to the people of Libby, Montana. It is attempting to drastically scale-back a paltry health-care fund set up for former workers.

All the while, Grace lawyers have filed for over $30 million in fees accumulated in the past year alone defending Grace in the bankruptcy proceeding. $30 million would go a long way in Libby, Montana, where health care costs are increasing rapidly, threatening the ability of that town to get back on its economic feet after the blow it took from W.R. Grace.

More worrisome still, many folks who have been diagnosed with asbestos-related disease – some of whom are in their 30's because they were exposed to asbestos as children – are now essentially uninsurable going forward, because the costs of securing private insurance are non-economical.

The costs to the community and state government related to providing health coverage for uninsured sick people are creating significant pressures on the state Medicaid fund and even causing Worker's Compensation problems for some private business owners in Libby, like the Stimson Lumber Mill and Lincoln County

Additionally, the Federal Government, through the U.S. Environmental Protection Agency will spend well over $100 million to clean-up the contamination caused by W.R. Grace's vermiculite mining operation. So, everyone – taxpayers, local businesses, the State of Montana, and the victims themselves – everyone but W.R. Grace is bearing the burden, suffering and pain caused by W.R. Grace's actions. Granted, we can all agree that the state and federal governments should have done more to protect the folks in Libby, but ultimately, the buck stops with Grace.

So, I apologize if I am skeptical and find it hard to be sympathetic to companies like W.R. Grace who claim they are over-burdened by asbestos lawsuits. I would agree, however, that it's also not fair for companies like W.R. Grace to shift the burden of their actions onto other companies that have not filed for bankruptcy and that do not share W.R. Grace's liability or responsibility.

But, again, this is where I would ask this Committee to be very, very careful in how you address the asbestos litigation issue.

It would be so very easy to insulate bad actors like Grace from their fair share of liability and responsibility, and to cut off rightful claimants like the Libby victims from ever receiving their fair share of compensation for the wrong done to them. Because, Mr. Chairman, it's a little too easy to say lets cut off those folks who aren't sick yet. We're talking about a disease that has a 20-40 year latency period. Given the exposure of the folks in Libby, and the type of exposure – to deadly tremolite asbestos – it's very likely that many more people in Libby will become sick, very sick, in the future. We cannot cut them off.

I'm sure you remember my opposition to the Fairness in Asbestos Compensation Act of 2000. I believed very strongly that the administrative procedures set up by that bill, particularly the medical eligibility criteria, would effectively eliminate the legal rights of many residents of Libby. I wrote you a letter last year letting you know I would filibuster any attempt to attach the Fairness in Asbestos Compensation Act to bankruptcy legislation moving through your committee. I would ask your permission to insert in the record a letter from some Libby representatives that raises similar concerns about what could be contained in revised asbestos litigation legislation that this Committee may consider.

Ultimately, Mr. Chairman, because W.R. Grace has filed for bankruptcy, the rightful claims of Libby victims may never be satisfied against W.R. Grace, no matter what this Committee chooses to do about asbestos litigation reform.

Perhaps part of this Committee's review should include a review of the injustices inherent in corporate bankruptcies like W.R. Grace's that are related to asbestos litigation, particularly those injustices associated with the ease with which Grace hid a vast chunk of its assets from the reach of the bankruptcy court, and by extension, from the Libby victims. Maybe some of those billions will be returned to the bankrupt estate. Maybe not. But, it's certainly an appropriate piece of the asbestos puzzle for this Committee to take a hard look at.

Mr. Chairman, I have fought for every resource at the disposal of the federal government to help the people of Libby, Montana get a clean bill of health, and despite W.R. Grace's resistance, we've actually been making real progress on the ground in cleaning up the town of Libby, cleaning up contaminated homes, and screening more than 8,000 current and former Libby residents for asbestos-related disease or exposure.

I am pursuing all other avenues to address long-term health care costs for those who have been devastated by asbestos-related disease, and screening costs for those who are worried they may become ill. This includes the possibility of setting up some type of White Lung Trust Fund.

But, these other avenues have to be pursued because W.R. Grace has side-stepped its responsibilities to the community of Libby. In your search for solutions to the real problems associated with asbestos litigation, Mr. Chairman, I would ask that you not make it easier for companies like W.R. Grace to shift their liability to others. In fact, you should make it much harder.

The focus here should not be on cutting off the rights of victims, but on holding accountable those who are truly responsible for the pain and suffering of real people like the people of Libby, Montana.

Thank you again Mr. Chairman for allowing me to testify today.

STATEMENT OF MATTHEW P. BERGMAN*

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

SEPTEMBER 25, 2002

I am grateful for the opportunity to discuss the current crisis in asbestos litigation before this honorable Committee.

Let me begin with some personal information. I am a 40-year-old trial lawyer with offices on a small island adjoining Seattle, Washington. My practice consists of representing individuals who are sick with asbestos disease in product liability actions against the manufacturers and distributors of asbestos-containing products. Before I became a plaintiff's lawyer in 1995, I spent four years at a large law firm defending corporations in environmental cases. Before entering private practice, I served two years as a law clerk for the Honorable Bobby R. Baldock on the United States Court of Appeals for the Tenth Circuit. I believe that my experience as a defense lawyer and judicial law clerk tempers the passion that I have as a plaintiffs' attorney with background and perspective on the current crisis in asbestos litigation.

Washington State Courts have been litigating asbestos cases since the late 1970s. The Puget Sound Naval Shipyard in Bremerton, Washington is the largest Naval repair facility on the West Coast. At its heyday, the shipyard employed over 20,000 workers, most of who were exposed to asbestos products

*Partner, Bergman Senn Pageler & Frockt, P.O. Box 2010, Vashon, WA 98070. (206) 463-4408.

on a daily basis. In the mid Twentieth Century, Washington State had over a dozen major shipbuilding and repair facilities as well as numerous pulp and paper mills, refineries, and aluminum smelters. All of these facilities made extensive, daily use of asbestos products. Because of the significant population of workers who sustained high exposures to asbestos in Washington State shipyards and industrial facilities, our state has some of the highest mesothelioma rates in the country.

My clients are all individuals suffering from asbestos related cancer or severe asbestosis and their surviving families. Ninety-Five percent of my cases involve individuals with mesothelioma or asbestos related lung cancer. Five percent of my clients suffer from sever asbestosis that has been diagnosed by the treating physician. All of my clients suffer sever disability or death as a result of exposure to asbestos. None of my clients were diagnosed by screening companies or physicians hired by attorneys.

There is an oft-cited joke among lawyers that law practice would be great if it were not for the clients. Based on my practice of representing asbestos victims, I am unable to join in that view. I have been blessed with wonderful clients who face their terminal illnesses with tremendous dignity and spirituality, inspiring all who they leave behind.

Many of my clients suffering from asbestos cancer are servicemen who were exposed to asbestos while serving on Navy ships during World War II, Korea and Vietnam. These men are truly part of the "Greatest Generation" whose heroic sacrifice is matched only by their modesty and lack of self-

importance. One of my clients, a navy boilerman who died of mesothelioma two weeks ago, joined the Navy on the day of his seventeenth birthday to join his brother who had been injured in the Pearl Harbor attack. Another client was a submariner who shut himself in a flooding compartment in his submarine to save his ship. When asked about this heroic act of self-sacrifice, he commented nonchalantly that he was only doing what he was trained to do. Another one of my clients drove landing craft during the Invasion of Inchon, but never told his family of his sacrifice until the day his deposition was taken. These servicemen bravely stared death in the face in service to their country, never knowing that their death would come not from enemy bullets but from the asbestos fibers they were breathing in the ships on which they were serving.

I have represented over 20 women who were exposed to asbestos while working in the shipyards as part of the war effort. These "Rosie the Riveter" cases involve young women who left their lives as farm workers, cooks and homemakers to work in the shipyards as part of the war effort. Never did they know that the asbestos they were breathing in the ships they were building would cause their demise 40 to 50 years later.

Many of my clients with asbestos cancer worked around asbestos-insulated boilers and furnaces in power plants, aluminum smelters, and papers mills. Other clients were carpenters and electricians exposed to asbestos-containing drywall cement, fireproofing and texture. These men were honest working people and union members who put on their boots every day and

struggled to provide for their families, never knowing that they were being exposed to a deadly carcinogen every day they went to work.

The most tragic cases that I handle involve individuals who never worked around asbestos at all. These were the wives and children of shipyard workers, insulators and drywall contractors who were exposed to asbestos from their father's or husband's work clothes. I have represented women who contracted asbestos cancer by shaking out their husband's dusty overalls that they brought home from the shipyard. I recently had the honor of representing a 53-year-old mesothelioma victim whose father worked in the shipyards during World War II. Every day, she would run down the sidewalk to meet her dad as he stepped off the bus in his overalls and he would pick her up in his arms and carry her back in his arms. How cruelly ironic that this act of parental love would expose her to asbestos fibers that would cause her death five decades later.

I could occupy this Committee with my clients' stories for hours, for their story is the story of what is best in America. My clients are individuals who worked hard and played by the rules and were exposed to asbestos while serving their country or providing for their families. My clients are not "sue happy" people looking for a handout; less than three of the 400 cancer victims I have represented since 1995 had ever filed a lawsuit before. My clients are people who, after working hard, have just begun to reach their "Golden Years" and enjoy the fruits of their labors and are suddenly struck with a terminal and untreatable disease. Most of my clients cannot pronounce mesothelioma and have never heard about it but they know that in most cases they will be dead in

six months. While there are exceptions, most of my clients never live to see their trail date.

The saddest thing about this entire tragedy is that it never had to happen. The hazards of asbestos were documented in the medical literature from the 1930s and manufacturers were aware of these studies from the 1940s. It would have cost a pittance to affix labels to asbestos products warning workers that exposure to these products could cause injury and death. The failure of the asbestos manufacturers to take any substantive steps to protect the public stands as one of the most outrageous cases of corporate misconduct of the Twentieth Century.

As a trial lawyer, I work every day to obtain compensation for my clients against the corporate malefactors who manufactured the asbestos products that my clients were exposed to. But the justice that I can obtain for them in monetary compensation is fleeting and incomplete. I have never had a client that would not give back twice the money I obtained for them simply to have their health back or be reunited with their spouse or parent.

Until two years ago, I was able to reliably secure compensation for most of my clients who where stricken with asbestos related cancer or debilitating asbestosis. While the litigation was hard fought, we were usually successful in obtaining compensation from at least some of the companies who manufactured or distributed the products to which my clients were exposed. This is because Washington State, like most other states, imposes joint and several liability upon

manufacturers whose products were a substantial contributing factor to the plaintiff's disease.

Unfortunately, in the last two years, it has become substantially more difficult for individuals suffering from asbestos cancer and disabling asbestosis to obtain compensation from the responsible parties through the tort system. This is because in the last two years there has been an avalanche of bankruptcies of companies that formally manufactured asbestos products. Since 2000, we have witnessed the bankruptcies of Babcock & Wilcox, Pittsburgh Corning, Armstrong Industries, Owens Corning, Fibreboard, A.P. Green, Harbison Walker, North American Refractories, W.R. Grace, United States Gypsum, Kaiser Aluminum & Chemical, GAF Corporation, Federal Mogul and, just last week, ACandS. Prior to these bankruptcies, all of these companies were defendants from whom my clients were able to seek compensation in appropriate cases. Now, my clients are going to have to wait years until the bankruptcy trusts are established and then receive pennies for each dollar they are legitimately owed.

The recent profusion of asbestos bankruptcies has been particularly detrimental to individuals with mesothelioma and other disabling asbestos diseases who were exposed in shipyards or aboard Naval vessels. These individuals were principally exposed to thermal insulation products that were used to insulate the labyrinth of steam pipes that run throughout a Naval vessel and refractory cements that were used to insulate the boilers. The recent profusion of bankruptcies over the past two years has taken out all but a handful

of these thermal insulation manufacturers, making it exceedingly difficult to obtain any compensation for Navy veterans and shipyards workers.

Two years ago, I could responsibly assure a Navy veteran or shipyard worker suffering from mesothelioma that, while I could not do anything to affect his grim prognosis, he could at least face his terminal disease with the assurance that his wife and family would be cared for after he was gone. This is no longer a promise I am able to make. For while these bankruptcies will eventually result in trusts to pay asbestos victims, the average time from filing to compensation is seven years and the ultimate payments received are five to ten cents on the dollar.

This travesty of justice was driven home to me last Memorial Day as I was visiting a 53-year-old client in the end stages of mesothelioma. My client worked as an electrician at Puget Sound Naval Shipyard from the mid 1960s to the late 1970s where he was exposed to asbestos that caused his mesothelioma. Just six months before, this man had been working full time and was a vibrant and active man who played basketball and bowled once a week and golfed on the weekends. He had a 38-year-old wife, an eight-year-old daughter and three teenage stepchildren. Yet in six short months he had been reduced to a veritable skeleton, bed-ridden, delirious in pain, and on oxygen. As this client's 8-year-old daughter played outside his bedroom (she was scared to see her father in this condition), I tried to give him some reassurance that his family would be provided for after he passed away. Yet these words rang hollow as I thought of all the defendants in Puget Sound Naval Shipyard cases that had gone bankrupt in the

prior two years. I grew angry and frustrated as I struggled to give my client more than an assurance that by the time his eight-year-old daughter was ready for college she would be able to recover cents on the dollar from some bankruptcy trust. As I sat there with my client, it became clear that the civil justice system that had formally functioned in asbestos cases was fundamentally broken. And I recognized that something needed to be done to fix the system before the all the culpable defendants are in bankruptcy and the sick and dying victims of asbestos receive nothing.

In order to determine how to fix the problem of asbestos bankruptcies, we need to know how the problem came into existence. In my experience, as a plaintiffs' lawyer specializing in asbestos cases and as a member of the Unsecured Creditors Committee in five major asbestos bankruptcies, it is clear that these recent bankruptcies have been caused not by an influx of individuals suffering from cancer or debilitating asbestosis, but rather, by an avalanche of cases brought on behalf of individuals who are not sick and probably will not get sick in the future. These cases constitute over 80% of the asbestos cases on file nationwide and drain resources away from the plaintiffs who are sick and dying as a result of asbestos exposure.

To understand the influx in non-impaired asbestos cases, it is necessary to understand a little about the types of asbestos diseases. Asbestos is a carcinogen that can cause mesothelioma and lung cancer in exposed populations. An individual does not need a significant exposure to asbestos to

develop mesothelioma and I have represented numerous plaintiffs with mesothelioma whose total exposure to asbestos did not exceed six months.

Asbestos can also scar the interior of the lungs, restricting a person's ability to breathe resulting in a condition called asbestosis. There is a strong dose response relationship between exposure to asbestos and the development of asbestosis. Therefore, for a person to have a legitimate case of asbestosis, in most cases he or she must have sustained an intensive and long-term exposure to asbestos.

Finally, asbestos can cause markings on the lining of the lungs without causing any impairment whatsoever. This condition, known as pleural plaques, represents a marker of asbestos exposure, which places the individual in a higher risk group for developing cancer in the future. Nevertheless, the vast majority of individuals with pleural plaques are suffering from no impairment whatsoever and lead completely normal lives.

At the time that asbestos litigation became a national phenomenon in the late 1970s, most of the plaintiffs were individuals who worked in the shipyards in World War II or career insulators who had sustained prodigious exposure to asbestos during their career. Many of these individuals suffered from severe and debilitating asbestosis that was sometimes even fatal. This cohort represented the first wave of asbestos litigation and their cases worked through the system by the end of the 1980s.

The subsequent asbestos cases brought since the early 1990s involved individuals who worked in the shipyards or industrial facilities in the 1950s and

1960s when exposure levels were progressively lower. In 1972, OSHA began regulating asbestos exposures in the workplace and in 1973 asbestos was banned in most insulation and refractory products. Thus, with each passing year, the individual exposure levels to asbestos in the workplace declined. As a result, while in the early 1980s it was common to find individuals with severe and disabling asbestosis, today it is extremely rare.

Let me be clear: there are still cases with individuals with sever and debilitating asbestosis and I even have several cases where the plaintiff died of his diagnosis. However, these cases represent a small fraction of the total asbestos cases brought in courts today.

If the overall rates of sever asbestosis are declining and the rates of mesothelioma and asbestos caused lung cancer are remaining static, why are the filing rates of asbestos cases skyrocketing? The answer lies in the type of cases that are being filed. While the number of cancer cases filed each year has remained relatively static, the number of non-cancer cases has skyrocketed from a prodigious 20,000 filed in 1995 to approximately 90,000 in 2001. This burgeoning rate of filing has taken all of the statisticians and epidemiologists by surprise. This is because while epidemiology can accurately predict the number of asbestos cases diagnosed by treating physicians, it cannot develop a model to account for cases resulting from the entrepreneurship of for-profit asbestos screening services and the law firms that employ them.

The sad truth is that the vast majority of asbestos cases filed in the past two years involve individuals who are not sick and will probably never become

sick. Many of these cases arise out of mass screenings by for-profit testing services employed by law firms. There is no doctor-patient relationship between the plaintiff and the testing services. Potential plaintiffs are rounded up and run through a mobile testing van staffed by health personnel who the plaintiff has never seen before and will never seen again. Their chest x-rays are analyzed by a physician in another state hired by a law firm who has no connection to or communication with the individual's treating physician. These chest-rays are subject to a high degree of subjectivity and result in a finding that the x-rays are "consistent with" asbestosis. Yet this finding invariably forms the sole basis for filing a lawsuit. Thus, the vast majority of asbestos lawsuits filed in the past two year are filed without the plaintiff ever being examined by his treating physician, without a comprehensive health and exposure history, and without a diagnosis by a treating physician based on a reasonable degree of medical certainty.

If cases based upon such scanty medical evidence were filed and litigated on a case-by-case basis, the civil justice system could sort out the meritorious cases from the merit-less cases. However, while the civil justice works fairly well in adjudicating asbestos cases individually, when jurisdictions are flooded with thousands of cases arising out of mass screenings, the system breaks down. In an attempt to clear their dockets, Courts adopt massive consolidations such as the 8,000 cases currently being tried together in West Virginia. Settlements are negotiated not on the merits of the case but based on the practical and financial impossibility of preparing thousands of case for trial at the same time. The short-term benefit of cleared dockets merely encourages more screened cases to be

filed in the future. And the payment of thousands of cases involving individuals who are not sick takes resources away from the plaintiffs who truly need assistance.

Any dispassionate analysis of the current asbestos litigation system reveals that the system is broken. By paying tens of thousands of plaintiffs who are not sick, the system deprives individuals suffering severe injury and death as a result of asbestos from receiving the compensation they deserve. On three separate occasions, the United States Supreme Court has urged Congress to enact legislation to fix this problem. Time is running out.

Federal legislation should be enacted that sets forth minimal requirements for the filing of an asbestos case in state court. Before filing a complaint, a plaintiff should be examined by a specialist referred to by his or her treating physician with whom the plaintiff has a doctor-patient relationship. The specialist should take a complete medical and occupational history and conduct a thorough physical along with pulmonary function tests and chest x-rays. If the physician finds asbestos disease that meets the minimal standards adopted by the American Medical Association and promulgated by the Federal Government under the Longshoreman's and Harbor workers Compensation Act, the individual may file an action and attach his or her doctor's report to the Complaint. Finally, to ensure that individuals who do not meet these minimal standards are able to file a case if their condition worsens in the future, any legislation must toll the Statute of Limitations until the individual is diagnosed with a cognizable injury.

Requiring a plaintiff to have a valid diagnosis by a treating physician before filing an action is not a radical concept. Indeed, it is part of the due diligence that lawyers ought to follow in all cases as officers of the court. These simple procedures would help ensure that plaintiffs who are actually injured by asbestos are able to obtain compensation for their injuries and that plaintiffs who become sick in the future can have a palpable chance of obtaining compensation.

As trial lawyers, we are taught to revere the civil justice system and eschew *any* attempts to restrain a plaintiff's ability to seek redress through the tort system, regardless of the merits of the claim. However, Civil Justice is not simply another word for the tort system, but a normative principal of right and equity. The avalanche of asbestos claims brought by individuals who are not sick prevents the tort system from obtaining justice for the people who are sick and dying from asbestos today and the people who will become sick tomorrow. Congress can either enact reasonable legislation to ensure that individuals who are sick and dying from asbestos can receive the compensation they deserve or stand back and do nothing while more and more companies sink into bankruptcy. Congress must act now to ensure that Civil Justice is not just some shibboleth erected by lawyers but a living principal in our law offices, in our courthouses and in our society.

Thank you for your consideration.

Statement of Senator Sam Brownback
Senate Judiciary Committee
September 24, 2002
"Asbestos Litigation"

Thank you Mr. Chairman for holding this hearing. This hearing is important for a number of reasons, but none as important as making sure that deserving victims are adequately compensated.

The magnitude of the asbestos litigation problem can't be underestimated. Since the use of asbestos starting in the early part of this century, millions of Americans have been exposed to asbestos with thousands manifesting symptoms annually. In addition, the number of companies involved are estimated to be almost 50% of the Fortune 500 companies with thousands of employees and retirees whose 401Ks and retirement savings are at risk – even though they might have nothing to do with the causes leading up to the litigation.

But the focus of today's hearing I hope will be on victims and how we can find a way to get industry together with the Congress and other interested parties to come to an accommodation to solve this problem. There are legitimate areas of concern regarding litigation abuse that touch on tort reform and even more difficult medical and scientific questions regarding the causal effect of asbestos exposure to the development of potentially fatal diseases. I hope that we are able to do so at some point.

Rather than trying to tack on a more broader tort reform approach, I would encourage the interested parties to focus more directly on this discrete but mounting and cumulative problem. My hope is that this hearing will bring to light the real, legitimate problems facing victims who are suffering now and what the industry together with Congress can do in a bipartisan way to bring relief to them and their families.

The normal life-span of someone who develops mesothelioma

("me-so-tha-leeoma"), a particularly vicious form of cancer from asbestos exposure, is on average 18 months. In contrast, most asbestos litigation take on average 31 months – nearly 3 years – or more. Those involving bankrupt companies take 9 years or more, if at all, to pay claims to the sick. Therefore it's incumbent upon all interested parties to create a mechanism for getting resources and assistance to those who need it most, especially the families of these victims. This is about doing the right thing, and I hope that interested parties will put aside their differences in the interest of the victims and their families.

Thank you Mr. Chairman. I look forward to the testimonies.

Questions

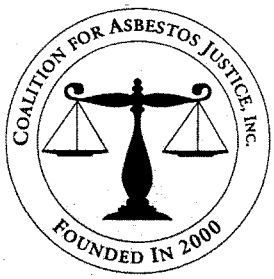
1. Based on press reports and other sources, I get the sense that many parties are eager and willing to find a bipartisan solution, groups we would not normally see working together. Some but perhaps not all of the trial lawyers together with the National Association of Manufacturers and victims groups have expressed a willing to find work out a solution. In the interest of suffering victims and their families, I sincerely hope that will happen. Along those lines, what specific issues stand in the way? What needs to be overcome in order to bring the parties together? What, if anything, can Congress or this Committee do to make that happen?

2. As we have seen recently, bankruptcies benefit no one, not the company, not the employees, not the

shareholders, and certainly not the victims. The effects of these bankruptcies are severe and costly. I understand that nearly 60 companies have declared bankruptcy, and that one third of them have done so in the past two years alone. To what extent are these bankruptcies the direct result of asbestos litigation. If they are, doesn't the flood of the so-called unimpaired cases make recovery all that more difficult for victims who are currently ill and their families?

3. According to a letter sent by the Manville Trust to federal judge Jack Weinstein on December 2, asbestos claimants with cancer or other grave illness are receiving reduced payments because "disproportionate amount of Trust settlement dollars have gone to the leaset injured claimants – many with no discernable asbestos-related physical impairment whatsoever." As I said, this quote is from a letter by the Manville Trust

whose primarily function is to pay claimants. I don't believe they have any agenda other than making sure that there is a fair and equitable distribution of payments. Given this fact, isn't it in everyone's interest to try to come to a resolution? What is holding any of you back from working for a comprehensive resolution?



STATEMENT OF

COALITION FOR ASBESTOS JUSTICE, INC.

OVERSIGHT HEARING BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

ON

"ASBESTOS LITIGATION"

SEPTEMBER 25, 2002

CONGRESS MUST SOLVE THE NATIONAL ASBESTOS CRISIS

The Coalition for Asbestos Justice, Inc (the "Coalition") was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current asbestos litigation civil justice system.[1] We applaud the Chairman's decision to hold this hearing to explore current issues in asbestos litigation.

Matching Perception With Reality

As far back as 1991, the Federal Judicial Conference Ad Hoc Committee on Asbestos Litigation described a looming "disaster of major proportions."[2] Five years ago, the United States Supreme Court in *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 597 (1997), recognized that this country is in the midst of an "asbestos-litigation crisis." Since then, the crisis has worsened. Claims continue to pour in at an extraordinary rate, scores of employers have been forced into bankruptcy, and payments to the sick are threatened.[3]

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1 The Coalition includes the following: ACE-USA, Chubb and Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance company, Everest Reinsurance Company, and the Great American Insurance Company.

**For information about the Coalition contact: Victor Schwartz (202/662-4886, vschwartz@shb.com) or Mark Behrens (202/639-5621, mbehrens@shb.com) of Shook, Hardy & Bacon L.L.P., or Paul Kalish (202/624-2644, pkalish@crowell.com) of Crowell & Moring LLP.

2 Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 2 (Mar. 1991) [hereinafter Judicial Conference Report].

3 *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis,* 71 Miss. L.J. 1 (2001); Mark A. Behrens, *Some Proposals for*

Yet, many knowledgeable people still perceive asbestos liability cases as a relic of the 1980s, much like the Rubik's Cube. The testimony before this Committee will show that this perception does not reflect the reality of the litigation today. As a recent *L.A. Times* article stated, "The wave of new litigation and a surge in the number of people reporting exposure are a blunt reminder that the asbestos problem, a largely forgotten product liability mess of the 1980s, has not gone away."[4] Recent developments in the litigation are attracting national media attention.[5] Through these reports, and by way of events such as this hearing, the public is becoming informed about the extent of the crisis and why it demands congressional action.

The Current Crisis

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing an "asbestos-litigation crisis."[6] Many believed that asbestos litigation would be a serious but diminishing problem in the years to come. Unfortunately, that is not happening.

Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation, 54 Baylor L. Rev. 331 (2002).

4 Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. Times, Dec. 17, 2001, at A1, *available at* 2001 WL 28937452.

5 *See, e.g.*, Michael Freedman, *The Tort Mess*, Forbes, May 13, 2002, at 95; Amity Shlaes, *The Real-Life Tragedy of the Asbestos Theatre*, Fin. Times, May 14, 2002, at 15; Eric Roston, *The Asbestos Pit*, Time, Mar. 11, 2002, Y9, *available at* 2002 WL 8385920; Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff – and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, at 154, *available at* 2002 WL 2190334.

6 *Amchem*, 521 U.S. at 597.

Testimony before this Committee will indicate that "the crisis is worsening at a much more rapid pace than even the most pessimistic projections."[7] In 2001 alone, plaintiffs filed at least 90,000 new claims.[8] More recent projections estimate that up to 700,000 more cases are expected by the year 2050.[9] All told, the number of future claimants could reach as high as 3.5 million.[10] The total cost to the economy is staggering. Ratings agency A.M. Best estimates that asbestos litigation already has cost U.S. companies over $21.6 billion, and may cost another $43.4 billion over the next 20 years. At least one consulting firm has put the total future cost of the litigation at $200 billion.[11] Former U.S. Attorney General Griffin Bell has explained that the cost "exceeds current estimates of the cost of all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks."[12]

The vast majority of new asbestos claimants are functionally unimpaired – "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not

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7 The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph), available at http://www.nlcpi.org.

8 *See* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1, *available at* 2002 WL 18538000.

9 *See Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, 14 Mealey's Litig. Rep.: Asbestos 22 (June 18, 1999).

10 *See* Judicial Conference Report, *supra*, at 5.

11 *See Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, June 13, 2001, available at http://www.towers.com/towers/locations/uk/press%20release/06-13-01.html.

12 Bell, *supra*, at 4.

impaired by an asbestos-related disease and likely never will be."[13] In *Amchem*, Justice Breyer observed that "up to one half of asbestos claims are now filed by people who have little or no physical impairment." That number may be conservative. For instance, Harvard Law School Professor Christopher Edley estimated in 1992 that claims by unimpaired plaintiffs then accounted for 60 to 70 percent of new claims, with the trend toward unimpaired claimants steadily increasing.[14] Some current estimates are as high as 90 percent.[15]

The problem presented by these claims is self-evident: they create judicial backlogs and exhaust scarce resources that should go to "the sick and the dying, their widows and survivors."[16] Payments to the non-sick may make it hard for the truly sick to obtain compensation for their injuries; some already are finding their recoveries delayed and greatly reduced.[17] Indeed, lawyers who represent the truly sick have expressed

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13 *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary,* 106th Cong. at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School). *See also* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (2002).

14 *See id.*

15 *See* Jennifer Biggs *et al., Overview of Asbestos Issues and Trends* 3 (Dec. 2001), available at http://www.actuary.org/mono.htm.

16 *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (quoting *In re Patenaude*, 210 F.3d 135, 139 (3d Cir.), *cert. denied*, 531 U.S. 1011 (2000)); *see also In re Personal Injury and Wrongful Death Asbestos Cases*, Civ. Action No. 24-X-92-344501, at 5-6 (Cir. Ct. Baltimore City, Md. Aug. 15, 2002) (Memorandum Opinion and Order Denying Modification to Inactive Docket Medical Removal Criteria) ("With the number of companies that have declared bankruptcy, it would seem that the resources should be conserved for those who are substantially and demonstrably sick, or who are actually impaired, from exposure to asbestos.").

17 *See* Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1, *available at* 2002 WL-WSJ 3392934; Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6, *available at* 2001 WL-WSJ 29680683.

concern that recoveries by the unimpaired may so deplete available resources that their clients will be left without compensation.[18] As prominent plaintiffs' lawyer Richard Scruggs has noted: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."[19]

Payments to the unimpaired have played a critical role in forcing approximately 60 companies into bankruptcy. Each new bankruptcy puts "mounting and cumulative" financial pressure on the remaining defendants, whose resources are limited,[20] and removes one more source of funds from the pool available to compensate sick claimants.[21]

Bankruptcies also have led plaintiffs and their lawyers to expand their search for new "deep pockets," "from the asbestos makers to companies far removed from the scene

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18 *See* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341 (quoting plaintiffs' lawyer Steve Kazan as stating that weak asbestos cases are taking awards that could go to legitimate claimants, such as mesothelioma victims); Trisha L. Howard, *Plaintiff's Lawyers Seek Limit on Asbestos Lawsuits by People with Nonmalignant Illnesses*, St. Louis Post-Dispatch, Dec. 11, 2001, Metro, *available at* 2001 WL 4499314 (explaining that lawyers representing plaintiffs with malignancies believe steps should be taken to "preserve the integrity of these [defendant] companies and their assets for people who are truly sick.").

19 *"Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39.

20 *See* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993).

21 *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Mealey's Litig. Rep.: Asbestos, Vol. 16, No. 6., Apr. 20, 2001.

of any putative wrongdoing."[22] Defendants now include household names such as Gerber Products Co., Ford Motor Co., Campbell Soup Co., and AT&T Corp., among others.[23] The number of defendants now includes over 6,000 companies, touching firms in industries that span 85 percent of the American economy.[24] Some defendants are large companies, but others are firms with as few as 20 employees and just a few millions dollars in annual revenues.[25]

In addition, the impact of the asbestos crisis is reflected in jobs lost or not created. Wall Street analysts also will tell you that the litigation is having a serious drag on the price of common stock, pension plans and long-term annuities for many leading U.S. companies.[26]

In sum, the combination of forces at work in the asbestos litigation has set off a chain reaction, or domino effect: payments to the unimpaired have encouraged more filings by other unimpaired claimants; this has further depleted the assets of the defendant companies and forced many of them into bankruptcy; as more companies have been driven into bankruptcy, the process has accelerated because more and more liability is

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22 Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14; *see also* Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002, at A22, *available at* 2002 WL-WSJ 3383766.

23 *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *available at* 2000 WL-WSJ 3025073; Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1, *available at* 2001 WL-WSJ 2856111.

24 *See* Christopher Bowe & Dan Roberts, *Asbestos Lawsuits "Affect 85% of the US Economy*," Fin. Times, Sept. 10, 2002, at 1, *available at* 2002 WL 26143482.

25 *See* Raymond J. Keating, *The Asbestos Threat*, Analysis #8, May 2002 (Small Business Survival Committee Report).

26 *See* Amy Ridenour, *Asbestos Lawsuits: Putting Retirements at Risk*, Nat'l Pol'y Anaylsis #404, Apr. 2002 (Nat'l Center for Pub. Pol'y Research Report).

pushed over onto fewer and fewer companies; to make up for the shares of those companies, defendants with increasingly attenuated connections to asbestos are being pulled into the litigation; these peripheral defendants are now starting to collapse under the great weight of claims against them, just as the companies that came before them in the litigation. Absent some change in the way asbestos cases are handled, these problematic trends will only grow worse.

Courts Partly To Blame

Courts themselves are partly to blame for the ever-growing "elephantine mass of asbestos cases."[27] In lowering the legal barriers to recovery, courts have fueled the fire, inviting more and more claims.[28] The courts have undoubtedly acted with the best of intentions – faced with overwhelming numbers of asbestos claims, they have worked to put money in the hands of the sick as quickly as possible, and also to clear crowded dockets. The "pile on" litigation situation is reflected in a thoughtful statement by former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr., who observed:

> Think about a country circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demand of the system require speed and dictate case consolidation even where the rules may not allow joinder.[29]

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27 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see also The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. at 43 (July 1, 1999) (statement of Professor William N. Eskridge, Yale Law School).

28 *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 248 (2000).

29 The Fairness in Asbestos Compensation Act of 1999: The Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999)

Justice Mallett's observation explains how courts may view "mass joinder" and "jumbo" consolidations as a quick way to resolve the worsening asbestos litigation problem. In such proceedings, people with serious illnesses, such as mesothelioma or lung cancer, are lumped together with the unimpaired. The goal is to produce settlements with low transaction costs, even if it means trampling over the due process rights of defendants and the truly sick. Efficiency is promoted over fairness or reason. In cases that do not involve asbestos, judges would not consolidate or join cases when plaintiffs suffer completely different types of injuries, or no injury at all.

An egregious example of a "dragnet" mass joinder action is occurring right now in West Virginia. This week, a mass trial is beginning that will decide the liability of hundreds of defendants to approximately 8,000 plaintiffs. As West Virginia Supreme Court of Appeals Justice Elliott Maynard has explained:

> [T]his litigation involves thousands of plaintiffs; [approximately 250] defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.[30]

There will be virtually no opportunity for any defendant in the action to contest the individual claims against it. Furthermore, any defendant deciding to run the risk of such a massive trial may be subject to enormous punitive damages liability. The coercive

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(statement of the Hon. Conrad L. Mallett, Jr., former Michigan Supreme Court Chief Justice).

30 *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring).

terms of the plan obviously contemplate (or count on) mass settlements to simplify trial matters and block post-trial review.[31]

As it turns out, bending procedural rules to put pressure on defendants to settle brings no lasting efficiency gains. Rather than making cases go away, it invites new ones. As mass tort expert Francis McGovern has explained: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam."[32]

The push toward efficiency has encouraged the filing of baseless claims on behalf of unimpaired claimants. A small group of personal injury lawyers continue to dump on courts thousands of lawsuits by people who are "*not sick*, using those who suffer from serious disease to inflate the value of those claims."[33] Mass filings by the non-sick are harmful to the *seriously* ill; each dollar that is paid out to someone who is not sick is one dollar less that is no longer available to provide proper or timely compensation to the seriously ill and their families.

Federal Legislation Is Needed

Both plaintiffs' counsel and defendants have tried to resolve asbestos liability claims through mass settlements. One "near-heroic effort[] . . . to make the best of a bad

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31 *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) ("legalized blackmail").

32 Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

33 Prof. Edley Testimony, *supra*, at 6 (emphasis in original).

situation,"[34] involved mass settlements of hundreds of thousands or even millions of claims aggregated under Rule 23 of the Federal Rules of Civil Procedure. But that route was invalidated by the Supreme Court in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The Court made clear that Rule 23 cannot be used to approve mass settlements in asbestos cases in the federal courts. The Supreme Court,[35] federal appellate courts,[36] the Judicial Conference,[37] and others[38] have, therefore, called on Congress to provide a national solution to the asbestos litigation crisis.

To their credit, individual federal and state judges are trying to do what they can to solve the crisis. For example, state courts in the major cities of Chicago, Boston, and Baltimore have decided to give priority to the truly sick by placing the claims of the

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34 *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring).

35 *See Amchem*, 521 U.S. at 628–29 ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure."); *Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id.* at 865 ("'[T]he elephantine mass of asbestos cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted).

36 *See Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting) ("Unquestionably, a national solution is needed."), *modified in part*, 13 F.3d 58, *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (quoting *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985); *id.* at 338 (Garza, J., concurring) ("I implore Congress to heed the plight of the judiciary and the thousands of individuals and corporations involved . . . [in] the asbestos litigation crisis.").

37 *See* Judicial Conference Report, *supra*, at 3 (concluding that federal legislation is needed to solve the asbestos litigation problem).

38 *See, e.g., State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 425-26 (W. Va. 2002); *State ex rel. Appalachian Power Co. v. MacQueen, III*, 479 So. 2d 300, 304 (W. Va. 1996); *W.R. Grace & Co. – Conn. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994). *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986).

unimpaired in a registry, suspending their claims until an illness develops.[39] The judges in these cities are wisely protecting unimpaired plaintiffs in case they do get sick in the future. While on the registry, statute of limitations are tolled and discovery is stayed. Claimants are moved to the active trial docket when they present credible, objective medical evidence of impairment.

These "inactive docket" plans have several obvious benefits. First, sick claimants are able to have their claims heard faster; they can move "to the front of the line" and not be forced to wait until earlier-filed unimpaired claims are resolved. This can be especially important if the claimant has a fatal disease or is an older person. Second, the tolling of statutes of limitations protects the claims of the unimpaired from being time-barred should an asbestos-related disease later develop. This addresses a primary engine driving the filing of many claims by unimpaired claimants – a plaintiff's fear that if he or she does not sue at the first marker of exposure, a legal claim may be found time-barred in the future. Third, because there is no discovery or pressure to settle inactive claims, plans that give priority to the truly sick conserve scarce financial resources that are needed to compensate sick claimants — resources that are now spent litigating "claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be)."[40] Fourth, giving priority to the sick and suspending the

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39 *See* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001); Commonwealth of Mass., Middlesex Super. Ct., *Mass. State Ct. Asbestos Pers. Injury Litig. Order*, Sept. 1986; *In re Asbestos Cases*, Order to Establish Registry For Certain Asbestos Matters (Cir. Ct., Cook Cty., Ill. May 26, 1991); *In re Asbestos Pers. Injury and Wrongful Death Asbestos Cases*, Order Establishing An Inactive Docket For Asbestos Pers. Injury Cases, No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992).

40 Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 555 (1992).

claims of the unimpaired reduces the specter of more employers being driven into bankruptcy, and can help slow the spread of the litigation to "peripheral" defendants. The Chicago, Boston, and Baltimore plans have existed for many years; all have proven to be fair and have worked well.[41]

Other courts have taken a similar path, establishing a "gatekeeper" system that utilizes objective medical criteria to filter out claims by the medically unimpaired. For example, the Court of Common Pleas of Cuyahoga County (Cleveland), Ohio, recently established a case management order providing that all upcoming discovery and trial preparation in the Cleveland area asbestos litigation will focus on groups of plaintiffs whose claims seek redress for functional impairment due to asbestos exposure.[42] The court's order reflects the intent to allow the claims of plaintiffs who are functionally impaired to be decided before the claims of the unimpaired, thus helping to preserve assets needed to compensate the truly sick.[43]

At the federal level, Senior United States District Judge Charles R. Weiner, who oversees the federal multidistrict asbestos litigation that has been consolidated in the Eastern District of Pennsylvania ("the federal MDL Panel"), has recently ordered that all

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41 *See Inactive Asbestos Dockets: Are they Easing the Flow of Litigation?*, Columns-Asbestos Raising the Bar in Asbestos Litig. 2 (Feb. 2002) (discussing various inactive docket plans and reporting that state judges who oversee asbestos dockets in states with inactive dockets find the plans fair and effective); *see also In re Personal Injury and Wrongful Death Asbestos Cases*, Civ. Action No. 24-X-92-344501 (Cir. Ct. Baltimore City, Md. Aug. 15, 2002) (Memorandum Opinion and Order Denying Modification to Inactive Docket Medical Removal Criteria).

42 *In re Cuyahoga Cty. Asbestos Cases*, Gen. Pers. Injury Asbestos Case Mgmt. Order No. 1 (as amended Jan. 4, 2002).

43 *Id.* at 1.

cases initiated through mass screenings shall be subject to dismissal without prejudice until the claimant can produce evidence of an asbestos-related disease.[44]

These efforts are certainly helpful and the courts involved should be commended for their leadership. But, as long as there are some courts, such as those in West Virginia, that continue to adopt short-sighted and unsound policies with respect to asbestos litigation, the crisis will only continue to worsen. These "magic jurisdictions" have become magnets for many claims that have little, if any, logical connection to the forum. This has resulted in forum shopping abuse. Until Congress acts, asbestos cases will continue to pour into these "magnet states" – and citizens throughout the rest of the country will suffer as a result. Congressional legislation provides the only effective way to solve the litigation crisis in a comprehensive manner.[45] It is the only way to address serious problem of forum shopping abuse in asbestos litigation.

Conclusion

Despite both the energy and creativity of individual judges or some jurisdictions to help resolve the asbestos problem, there are few barriers to halt the avalanche of asbestos litigation and the crisis we are faced with today. Only Congress can curb this avalanche and bring equity and common sense to address the asbestos problem.

We appreciate that many crucial problems compete for attention before the Congress. Two decades ago, the asbestos problem did not rise to the level requiring congressional action. In 2002, however, the impact of the crisis on seriously injured

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44 *See In re Asbestos Prods. Liab. Litig.* (No. VI), (E.D. Pa. Jan. 16, 2002).

45 *See Waters*, 638 So. 2d at 505 ("Any realistic solution to the problems caused by the asbestos litigation in the United States must be applicable to all fifty states. It is our belief that such a uniform solution can only be effected by federal legislation.").

victims, manufacturers, shareholders, pension funds, and our Nation's economic well-being unite to demonstrate that the asbestos litigation crisis is a major problem of interstate commerce and must be addressed by the Congress now. Delay in action means denial of a just resolution of the crisis.

To assist the Committee in its deliberations, we are providing the Committee with a number of in-depth law review articles as well as analytical articles published by some of the most respected print media in this Nation. A detailed bibliography of these and other publications is attached. We would be pleased to discuss the material in these articles if it would assist the Committee.

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PREPARED STATEMENT OF
PROFESSOR WALTER DELLINGER

HEARING ON "ASBESTOS LITIGATION" BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE
September 25, 2002[1]

I. THE CURRENT ASBESTOS-LITIGATION CRISIS

A. An Overview of the Crisis.

When asbestos product liability lawsuits emerged almost thirty years ago,[2] no one could have predicted that courts today would be facing what the United States Supreme Court has aptly termed an "asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The Occupational Safety and Health Administration ("OSHA") promulgated its first asbestos regulation in 1971, and followed up with increasingly stringent regulations in the years to follow.[3] By the early 1970s, "use of new asbestos essentially ceased in the United States." *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 737 (Bankr. E. & S.D.N.Y.

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[1] Much of this written submission is set forth in two legal briefs I filed before the United States Supreme Court, in coordination with other law firms, including, among others, Shook Hardy & Bacon LLP and Drinker, Biddle & Shanley, LLP. *See* Brief *Amicus Curiae* of the Coalition for Asbestos Justice, Inc. *et al.*, in Support of Petitioner, *Norfolk & Western Railway Co. v. Ayers*, No. 01-963 (June 17, 2002); Petition for a Writ of Certiorari, *Mobil Corp. v. Adkins*, No. 02-132 (July 24, 2002).

[2] *See Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

[3] OSHA was created in 1970 and almost immediately promulgated an initial regulation limiting exposure to asbestos. *See* 36 Fed. Reg. 10466, 10506 (table G-3) (May 29, 1971). Soon thereafter, OSHA revised its regulations to limit exposure still further and to require special handling of asbestos products. *See* 36 Fed. Reg. 23207 (Dec. 7, 1971) (emergency temporary standard); 37 Fed. Reg. 11318 (June 7, 1972) (final standard). OSHA's asbestos regulations became progressively more restrictive until they effectively precluded the use of asbestos in most commercial applications.

1991) (Weinstein, J.), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (reviewing history of asbestos use). It seemed to many that, after the 1970s and 1980s, asbestos litigation would be a serious but diminishing problem. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 248 (2000) ("Schwartz & Lorber").

The opposite is true. Instead of declining, asbestos filings are multiplying exponentially. In 1991, there were approximately 100,000 asbestos cases pending in courts around the country. By 1999, that number had doubled to roughly 200,000. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on J.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 4 (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School) ("Edley House Testimony"). New cases are now filed at a rate greater than ever before. *See id.* In 2001 alone, plaintiffs filed at least 90,000 new claims, *see* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A-1, and up to 700,000 more cases are expected by the year 2050, *Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, 14 Mealey's Litig. Rep.: Asbestos 22 (June 18, 1999). All told, the number of future claimants could reach as high as 3.5 million. *See* Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 5 (Mar. 1991) ("Judicial Conference Report").

In short, "the asbestos litigation crisis not only remains with us, but has in important respects grown worse." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on S. 758, Before the Senate Judiciary Comm.*, 106th Cong. at [1] (Oct. 5, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law

School) ("Edley Senate Testimony"). In 1991, the Judicial Conference described a looming "disaster of major proportions." Judicial Conference Report at 2. Since that time, the rate of new filings and the mounting number of pending cases have only exacerbated the crisis. Long delays in resolving claims remain routine. Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 394 (1993) ("Edley & Weiler"). Bankruptcies increasingly threaten the ability of asbestos defendants to compensate seriously ill plaintiffs, now and in the future. To date, more than 56 companies have been driven into bankruptcy. *See* Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002, at A12; Mark D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, Vol. 1, No. 1 Mealey's Asbestos Bankr. Rep., Aug. 2001. In the last two years, this process has accelerated dramatically, forcing at least 18 companies with more than 100,000 employees into bankruptcy. *See* Alex Berenson, *supra*, at A1.[4] More companies will follow, probably by the end of this year. *See* RAND Rep. at 50 (predicting that "[a]ll of the major asbestos defendants are likely to be in bankruptcy within 24 months"). And each new bankruptcy puts "mounting and cumulative" financial pressure on the remaining defendants, including defendants who are increasingly removed from any wrongdoing, and whose resources are limited, Edley & Weiler, *supra*, at 392. The

[4] Employers that have recently declared bankruptcy include Owens Corning, Babcock & Wilcox Co., Pittsburgh Corning Corp., Armstrong World Industries, Inc., Federal-Mogul Corp., USG Corp., W.R. Grace & Co. and G-I Holdings, Inc. (formerly known as GAF Corp.). This year, Kaiser Aluminum Corp. and Porter-Hayden Co. filed for Chapter 11 reorganization. In addition, RHI Refractories Holding Co., the world's leading producer of refractory materials for the steel industry, was forced to seek bankruptcy protection for two of its U.S. subsidiaries.

total cost to the economy is already staggering, and may reach as high as $200 billion in the future.[5]

B. The Courts' Contribution to the Crisis.

The origins of the wave of asbestos litigation that began in the 1970s are well known. In the 1940s and 1950s, millions of American workers were exposed to asbestos, usually with few or no precautions. Resulting illnesses began to appear by the 1960s, and, because some asbestos-related diseases have latency periods of up to 40 years, injuries continued to emerge in later decades. Recent estimates suggest that hundreds of thousands of Americans were injured by exposure to asbestos and that thousands have died or will die as a result. *See* Edley & Weiler at 388-89; Judicial Conference Report at 2. Absent congressional action – action for which the United States Supreme Court has consistently pled[6] – it was inevitable that asbestos litigation would present a problem for the courts.

What is harder to understand is why a problem that should have begun to resolve itself by the 1990s has instead worsened dramatically. It is here that the

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[5] One ratings agency, A.M. Best, estimates that asbestos litigation already has cost American companies over $21.6 billion, and predicts that the litigation may cost another $43.4 billion over the next 20 years. *See* Christopher Oster, *Some Insurers Face Shortfall in Reserves for Costly Claims Related to Asbestos*, Wall St. J., May 7, 2001, at A4. Though estimates are inevitably speculative, at least one consulting firm has put the total future cost of the asbestos-litigation crisis at $200 billion. *See Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, June 13, 2001, http://www.towers.com/towers/locations/uk/press%20release/06-13-01.html..

[6] *See, e.g., Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *Jackson v. Johns-Manville Sales Corp.*, 720 F.2d 1314, 1327 (5th Cir. 1985) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation."); *State v. MacQueen, III*, 479 So.2d 300, 304 (W. Va. 1996); Judicial Conference Report at 3 ("The Committee firmly believes that the ultimate solution should be legislation . . . creating a national asbestos dispute resolution scheme . . . .").

courts themselves share some of the blame. With the best of intentions, many courts have adopted both procedural and substantive rules intended to facilitate resolution of asbestos claims. Those efforts have been massively counterproductive. Lowering the legal barriers to recovery may seem attractive in individual cases, but in the aggregate, it only fuels the fire, inviting more and more claims with little regard for merit. *See* Schwartz & Lorber at 248-251; *see also House Hearing on H.R. 1283* (statement of Prof. William N. Eskridge, Yale Law School) ("Eskridge Testimony") (describing judicial contribution to asbestos-litigation crisis).

1. Procedural Shortcuts.

Faced with hundreds or even thousands of asbestos claims on their dockets, courts have struggled to find ways of speeding final decision or settlement. One "near-heroic effort[] . . . to make the best of a bad situation," *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring), involved mass settlements of hundreds of thousands or even millions of claims aggregated under Rule 23 of the Federal Rules of Civil Procedure. But that route was invalidated by the Supreme Court in *Amchem* and *Ortiz*: even the most pressing efficiency interests, the Supreme Court held, cannot justify distortions of the civil justice system that are fundamentally unfair to the parties involved. *Amchem*, 521 U.S. at 620-29; *Ortiz*, 527 U.S. at 841-61.

Other courts have turned to mass joinders, "jumbo" consolidations and "conjoinders," aggregating under any number of labels thousands of claims against dozens or hundreds of defendants in an effort to produce quick settlements with low transaction costs. *See* Eskridge Testimony at 13 (describing pressure on defendants to settle on terms favorable to plaintiffs). Typically, the claims are so disparate – injured plaintiffs joined with the unimpaired, plaintiffs exposed to

asbestos in different settings and even in different decades – that they would not remotely qualify for aggregation under normal circumstances. *See id.*; Schwartz & Lorber at 256-57 ("In other cases that do not involve asbestos, judges would not consolidate or join cases when plaintiffs suffer completely different types of injuries."). In the asbestos context, however, courts see no choice but to forgo standard procedural protections in an effort to streamline resolution.

Even if this trade-off were acceptable – and the Supreme Court, in cases like *Amchem* and *Ortiz*, has suggested strongly that it is not – it has proven entirely counterproductive. As it turns out, bending procedural rules to put pressure on defendants to settle, *see* Eskridge Testimony at 39-40, brings no lasting efficiency gains. Rather than making cases go away, it invites new meritless ones. As Professor Eskridge explains, "[J]udicial experimentation has sacrificed both [procedural protections] and efficiency, by helping create a juggernaut whereby jumbo settlements generate more lawsuits." *Id.*; *see also* Schwartz & Lorber at 249. This effect should not be surprising:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).[7]

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[7] *See also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1822 (1995) ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more and larger mass tort filings become."); Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts – View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases").

2. Unimpaired Plaintiffs.

The courts' *substantive* rulings in asbestos cases also have contributed to the litigation crisis. Of special concern are substantive rules that make it easier for unimpaired or only mildly impaired plaintiffs to recover. For it is by now widely acknowledged that claims by the relatively unimpaired are at the heart of the continuing asbestos-litigation crisis. "No serious analyst believes that the increased number of filings is due to an increased prevalence of asbestos-related disease. . . . Rather, the new filings represent claims of people who have been exposed to asbestos . . . but are not impaired by an asbestos-related disease and likely never will be." Edley Senate Testimony.

Some unimpaired plaintiffs, though they have been exposed to asbestos, show no physical symptoms at all. Others show "pleural plaques" or "pleural thickening," physical changes in the lungs that do not affect lung functions and do not necessarily lead to or increase the risk of asbestos-related disease. Mild forms of asbestosis, a set of lung disorders, also may be present without significant impairment or any medical link to more severe illnesses. What all of these unimpaired or less-impaired plaintiffs have in common is that they do not suffer from the kinds of asbestos-related cancers – most often, mesothelioma – or severe asbestosis prevalent in asbestos plaintiffs of earlier decades. *See* Edley & Weiler at 393.

In *Amchem*, 521 U.S. at 629, Justice Breyer served that "up to one half of asbestos claims are now filed by people who have little or no physical impairment." That number is perhaps too conservative. For instance, Professor Edley estimated in 1992 that claims by unimpaired plaintiffs then accounted for 60 to 70 percent of new claims, with the trend toward unimpaired claimants steadily increasing, Edley House Testimony at 5, and some current estimates are as high as

90 percent, *see* Jennifer Biggs *et al., Overview of Asbestos Issues and Trends* 3 (Dec. 2001) (http://www.actuary.org/mono.htm). Whatever the precise percentage, mass filings by unimpaired or mildly impaired claimants are the "wild card" that caused earlier predictions of a decline in litigation to be so far off the mark.

The problem presented by these claims is self-evident: they divert scarce resources from the truly ill claimants who need them most. Backlogs of claims by the unimpaired or mildly impaired slow the judicial process, delaying resolution for those with fatal diseases and elderly claimants. And payments to the unimpaired or mildly impaired are rapidly exhausting limited assets that should go to "the sick and the dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3rd Cir. 2000), *cert. denied*, 532 U.S. 1066 (2001) (internal quotation omitted); *see also* Edley & Weiler at 393. Indeed, lawyers who represent asbestos plaintiffs with cancer share this concern, recognizing that recoveries by the unimpaired may so deplete available resources that their clients will be left without compensation. *See "Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39 (quoting plaintiffs' attorney Richard Scruggs).

A number of factors help to explain this phenomenon. Some plaintiffs exposed to asbestos may feel compelled to file suit despite the absence of symptoms for "fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability." *In re Asbestos Cases*, 586 N.E.2d 521, 523 (Ill. App. 1991); *see also* Mark Behrens and Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001) (proposing inactive dockets as solution to problem); Judicial Conference Report at 25-26 (discussing similar proposals). Other plaintiffs, aware that many

asbestos defendants are filing for bankruptcy, may seek compensation now because they worry that it will not be available later.

Again, however, the courts' own rulings in asbestos cases are a major contributor to the problem. Rulings loosening procedural rules have on a systemic level opened the floodgates to claims by unimpaired plaintiffs. Some courts have done this simply by recognizing as a compensable injury pleural thickening, visible only on an x-ray and entirely harmless. *See* Edley House Testimony at 5. Others have allowed unimpaired claimants to sue for medical monitoring, or for the fear of future injury. In *Metro-North Commuter Railroad Company v. Buckley*, 521 U.S. 424 (1997), the Supreme Court refused to authorize an asbestos-related medical monitoring claim under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, 53 & 56, recognizing that such a claim would extend to "tens of millions of individuals," expose defendants to unlimited liability, and thus drain the pool of resources available for meritorious claims by plaintiffs with serious present harm. *Id.* at 442. Nevertheless, several states permit medical monitoring claims under state law. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999).

Thus, substantive rulings regarding unimpaired plaintiffs have, like procedural shortcuts, become a part of the very problem they are designed to address. However well-intentioned, they inevitably encourage plaintiffs to sue even in the absence of any injury, and encourage aggressive lawyers to seek out unimpaired clients. *See In re Joint E. & S. Dist. Asbestos Litigation*, 129 B.R. 710, 748 (E. &. S.D.N.Y. 1991) (describing lawyers who have "arranged through the use of medical trailers . . . to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaques"); Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36 (lawyers advertise with solicitations

reading: 'Find out if YOU have MILLION DOLLAR LUNGS!'"). The upshot, of course, is that judicial resources and defendant assets are diverted from the truly sick claimants who need them most.

II. A CASE IN POINT: WEST VIRGINIA'S RECENT HANDLING OF ASBESTOS LITIGATION THROUGH MASS "CONJOINDERS."

West Virginia is perhaps *the* case in point for describing the asbestos-litigation crisis. The West Virginia courts believe that they have no choice but to "adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation." *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996). In practice, this has meant two mass asbestos trials, with a third mass trial—originally filed by over 8,000 plaintiffs against over 250 defendants—beginning this very week. But this judicial "innovation" has not solved West Virginia's asbestos problem. Instead, it has aggravated it. As one West Virginia trial judge involved in asbestos litigation has ruefully acknowledged:

> I will admit that we thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.

In re Asbestos Litigation, Civ. Action No. 00-Misc.-222 (Nov. 8, 2000) (transcript of hearing before Judge John A. Hutchinson).

The mass trial beginning this very week is the most aggressive example of West Virginia's "innovative" approach to asbestos litigation. In November of 2000, all "asbestos-based personal injury cases in West Virginia" were referred to the MLP by order of the West Virginia Chief Justice. *State ex rel. Allman v. MacQueen,* 551 S.E.2d 369, 372 (W. Va. 2001). The next month, those pending

asbestos cases were transferred to a trial judge, who entered a "master plan" anticipating a series of group trials containing between 20 and 100 plaintiffs each. *MacQueen*, 551 S.E.2d at 372. In July 2001, the West Virginia Supreme Court rejected the trial judge's plan, holding that a more expeditious approach was required. *Id.* at 375. Specifically, the court held that *all* of the thousands of pending asbestos trials were to commence in just one year, regardless of the circumstances. The court designated an additional judge to supervise the administration of the asbestos litigation, and ordered a report to the Chief Justice on the status of the case with a view toward a July 1, 2002 commencement of trial. *Id.*

On September 6, 2001, the new trial judge ruled that he would conduct a single "mass trial" of all asbestos claims. Over the due-process objections of many defendants, the judge entered the official "Trial Scheduling Order" ("TSO") on February 26, 2002. Under that TSO, the mass trial was set to resolve approximately 8,000 cases against three "groups" of defendants: manufacturers, premises owners, and employers. The first three phases of the mass trial – keyed to the three groups of defendants – will determine the fault of each defendant. The Group I trial, which includes over a hundred defendants, will resolve "the common issues of fault of all manufacturers and distributors of asbestos-containing products, as well as any defendants whose purported fault is based on an allegation of conspiracy, tortious joint venture, or other tortious combination with a manufacturer or distributor."

At the end of each of these three "fault" trials – but before any determination of causation or injury – the jury will consider punitive damages. For any defendant whose conduct warrants an award of punitive damages, the jury will select a "punitive damages multiplier" – that is, the number by which any subsequent

award of compensatory damages should be multiplied to arrive at a punitive damages award. Causation and compensatory damages will be determined only after the fault phase is completed, either through mini-trials or through mini-trials in combination with a statistical matrix by which early verdicts are extrapolated to the remaining claims.

On April 25, 2002, the West Virginia Supreme Court denied several defendants' request for relief and approved this mass trial plan. The decision of the West Virginia Supreme Court runs roughshod over the Due Process Clause of the Fourteenth Amendment. The hundreds of defendants include premises owners, manufacturers, employers, and insurance carriers. The thousands of plaintiffs worked at hundreds of locations across the country, in different types of jobs, at different time periods spanning six decades, with different degrees of exposure and different individual health backgrounds. They were exposed to hundreds of different asbestos-containing products with different applications, instructions, and warning labels, and are asserting different theories to recover for different injuries. In short, apart from the fact that their claims involve alleged exposure to asbestos, these approximately 8,000 plaintiffs have nothing in common.[8] But under West Virginia's special mass tort rule, the liability of hundreds of defendants to these thousands of plaintiffs will be resolved at once. There will be no inquiry into whether that mass adjudication affords defendants a fair opportunity to defend themselves. A defendant will not, for example, have any opportunity to show that the claims against it have no logical relationship to the claims made against other

[8] Eight thousand is a conservative estimate. Respondents' lawyers recently suggested that the number may be higher than 11,000. Plaintiffs' Proposed Trial Plan at 1. The West Virginia Supreme Court has stated that "we are uncertain as to the exact number of plaintiffs included in the litigation below."

defendants, or to demonstrate that the tremendous differences among defendants will be lost during a mass trial.

To be sure, States possess considerable flexibility in creating rules of civil procedure. That flexibility, however, is ultimately constrained by the Due Process Clause. *Hansberry v. Lee*,. 311 U.S. 32, 40-42 (1940); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) ("because minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate") (citation omitted). Of special relevance here, the Court has on several occasions invalidated state rules of civil procedure when they afford individuals affected by mass litigation inadequate protections. *See Hansberry*, 311 U.S. at 40-42; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Due process limits on state authority to aggregate cases for trial protect important interests of defendants. Specifically, many courts have recognized that cases joined, or conjoined, for trial must have enough in common so that a defendant forced to deal with several plaintiffs at once is in fact defending only against a single and narrowly presented legal situation. *See, e.g., Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973). In addition, even if cases have something in "common," and whatever broad level of abstraction, cases should not be tried together if they unfairly prejudice the parties to that joint trial. *See, e.g., Glussi v. Fortune Brands, Inc.*, 714 N.Y.S.2d 516, 518 (N.Y. App. 2000).

These twin precautions—what I call "commonality" and "prejudice"—are doubly important in cases involving not only multiple plaintiffs but also multiple defendants. Without a careful inquiry into commonality and prejudice, the proceeding may easily become so large and confusing that it is impossible for each defendant to present a meaningful defense: evidence inadmissible as to one

defendant may be admitted as to others, *see Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992), and the complexity of the proceedings may make it impossible for the jury to sort through the evidence and various defenses to tailor a verdict to each party's culpability, *see Logan*, 455 U.S. at 433 (due process guarantees "the aggrieved party the opportunity to present his case and have its merits fairly judged").

The West Virginia mass trial amply illustrates the wisdom of those constitutional limits. The single common element in the 8,000 claims massed for trial is that the word "asbestos" appears in each complaint. The thousands of plaintiffs have been "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some [plaintiffs] suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis or from mesothelioma." *Amchem*, 521 U.S. at 624 (quotation omitted).

The mass trial will also make it impossible for a defendant to assert its unique defenses in a meaningful way. The Group I mass trial originally included over a hundred defendants, each of which manufactured or distributed a different asbestos-containing product or products. Each defendant's liability will be assessed in conjunction with that of over a hundred other manufacturers, distributors, and alleged conspirators. Evidence concerning the alleged knowledge and conduct of all these other defendants will be admitted into the mass proceeding, where it will almost inevitably tar any other defendant, as well. *Gwathmey*, 215 F.2d at 154 (cumulative effect of evidence against some defendants prejudices jury against all defendants in consolidated case). And the sheer quantity and complexity of the information that will be presented is virtually certain to overwhelm the jury, making it impossible to distinguish one defendant or

defense from another and to render a fair verdict on any one defendant's unique defenses. *Malcolm*, 995 F.2d at 352 (finding that "sheer breadth of the evidence" when 48 asbestos cases are consolidated makes it impossible to prevent jury confusion).

Departures from prevailing practice like the West Virginia handling of asbestos claims should be particularly suspect in this context. The Supreme Court has recognized the critical importance of the traditional protections that attend class-action aggregations. Those protections will be rendered meaningless if state procedural innovations, like the West Virginia "conjoinder," operate unchecked by traditional aggregation rules and standards. Whatever the label affixed by a State, a mass aggregation that implicates the rights of plaintiffs to adequate representation and the rights of defendants to a fair opportunity to defend should be accompanied by the traditional protections – including the standard judicial inquiry into commonality and risk of prejudice and jury confusion. *See, e.g.*, Joan Steinnman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1042 (1993) (noting concern that mass consolidations lack the "procedural safeguards that due process and codified rules demand in class actions of similar magnitude").

The due process concerns at issue in the West Virginia case are especially troubling because post-trial review of mass aggregations is effectively unavailable, as the "paucity of appeals challenging trial settings of multiple [consolidated] claims" attests. *In re Ethyl Corp.*, 975 S.W.2d at 610-11. Given the enormous potential liability that mass aggregations pose for defendants, combined with scrutiny from financial markets, aggregated proceedings exert powerful pressure on defendants to settle even meritless cases. Aggregation may raise the stakes of litigation to the point where a defendant simply cannot risk trial, regardless of the merits, thus opening the door to what are effectively "blackmail" settlements.

"The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (same); Fed. R. Civ. P. 23(f), advisory committee notes (providing for interlocutory review of class certification decisions because certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). In *In re Chevron*, which involved an aggregation of 3,000 personal-injury claims against a single defendant, the Fifth Circuit concluded that the decision to aggregate would "probably not [be] effectively reviewable after trial. The pressure on the parties to settle in fear of the result of a perhaps all-or-nothing . . . trial is enormous." 109 F.3d at 1022. Outside observers increasingly agree. *See, e.g., The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong. (July 1, 1999) (Prof. William N. Eskridge, Yale Law School) ("Especially in state courts, defendants in the typical [asbestos] jumbo consolidation now face an Armageddon scenario if they do not settle on terms favorable to plaintiffs.").

Indeed, all of the parties to the West Virginia litigation fully understand the coercive pressures at work. Lawyers for unimpaired plaintiffs argued against Judge MacQueen's original small-group trial plan on the express basis that it would not impose "enough leverage on [defendants] to cause them to settle a thousand cases." *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. March 16, 2001), Transcript of Hearing at 72-73 (statement of James F. Humphrey). The West Virginia courts themselves have relied on the certainty that the planned mass trial will provoke mass settlements – in order to explain why the mass trial will not be as hopelessly sprawling and confusing as it

now appears. It is one thing to take account of the possibility of settlements driven by external factors in planning an aggregated trial. But it is something else entirely when the anticipated settlements are driven by the mass trial proceeding itself, so that the coercive nature of a mass trial becomes its own justification.[9]

[9] On behalf of several defendants, I have filed a petition for a writ of certiorari from the Supreme Court challenging the constitutionality of West Virginia's recent handling of asbestos litigation. Also now before the Supreme Court in that case are *amicus* briefs, or "friends of the Court" briefs, filed by the Chamber of Commerce of the United States and the American Chemistry Council, the Coalition for Asbestos Justice, and the Association of American Railroads. And, in an extraordinary development, parties supporting the defendants in the case also include a committee of plaintiffs' lawyers representing truly ill asbestos claimants, who argue that the rights of seriously impaired asbestos victims suffering from mesothelioma and related cancers are also compromised by mass proceedings like the one contemplated in West Virginia. As they conclude, cancer claimants are the "ultimate losers" when defendants are forced by mass proceedings to settle meritless cases. *See* Mot. for Leave to File Br. Amicus Curiae & Br. Amicus Curiae of the Unofficial Comm. of Select Asbestos Claimants in Supp. of the Pet. for a Writ of Cert.

HEARING STATEMENT
FULL JUDICIARY COMMITTEE
ASBESTOS
U.S. SENATOR MIKE DEWINE
SEPTEMBER 25, 2002

Thank you, Chairman Leahy, for holding this hearing today. I'd like to thank Senator Hatch, also, for his leadership on this complicated and difficult issue.

Mr. Chairman, our tort law system of compensating victims of negligence has failed in the context of asbestos claims. Quite simply, the system is not adequately protecting the rights of victims or defendants. As things stand now, victims face a growing risk of never being compensated for asbestos-related illness, and many businesses face a growing risk of bankruptcy.

Several factors have combined to create this troubling situation. First, the sheer volume of claims is staggering. So far, 600,000 asbestos claims have been filed in our courts, and the most recent RAND study estimates that anywhere between 500,000 and 2.4 million additional claims could be filed.

The second factor is the unusual nature of the illnesses caused by exposure to asbestos. As our witnesses will testify, there is a long latency period between exposure to asbestos and actual illness or impairment. And, not everyone exposed to asbestos gets sick. Yet, our tort system requires that a potential victim file his or her claim for injury within a year or two of discovering the harm.

What this means is that a vast majority of people who are filing claims don't have any actual symptoms, and many may not ever even get sick. Still, they have to sue in order to protect themselves.

Third, many of those who are exposed to asbestos feel compelled to sue immediately because the number of financially sound potential defendants is rapidly diminishing.

Someone who has been exposed to asbestos, even if he or she has no symptoms, may decide to sue now or take the risk that nobody will be left to pay a claim down the road.

Clearly, Mr. Chairman, this system isn't meeting the needs of victims, and it also is causing tremendous problems for the business community. Candidly, asbestos liability is bankrupting many potential defendants, as claims are now being brought against businesses that have a very remote connection with the manufacture of asbestos. So, the impact of asbestos claims is overwhelming, not just to some of our nations' largest companies, but to our small businesses, as well.

The impact in my home state of Ohio is particularly severe. From 1998-2000, Ohio was one of the top five states in which asbestos litigants chose to file their suits. This is partly because Ohio is the home of many businesses that, at one time or another, used asbestos in products.

It is also likely the result of forum shopping and litigation strategy. But either way, more than 20 companies with facilities in Ohio -- facilities employing thousands -- have asbestos related liability, and many of these companies already have filed bankruptcy.

I want to be clear, Mr. Chairman -- I believe that companies should be held accountable for their conduct. I am concerned, however, about the many companies that now find themselves held responsible for the actions of other companies. These companies employ thousands of people and contribute to our economy and tax base. No one, including the victims of asbestos, is served by the liquidation of these companies.

We have no choice but to come up with a legislative remedy to this problem. We must do something that protects the rights of those harmed by exposure to asbestos and allows certainty to businesses that may be liable. This hearing is a vital step in crafting the remedy, and I hope it is part of a continuing dialogue on this issue.

At the end of the year, the RAND institute will issue its final report, including an analysis of alternatives to the current approach. I will carefully consider the RAND report.

I urge all parties who have an interest in resolving the asbestos matter to work together. Everyone has a common interest in this issue, and there is no excuse for failing to find a

legislative solution that meets the needs of all involved.

Once again, thank you, Mr. Chairman, for holding this important hearing today. I look forward to working with all those affected by this issue in crafting a workable solution.

Senator Chuck Grassley's Statement, Judiciary Hearing on the Asbestos Crisis, September 25, 2002

Mr. Chairman, I appreciate your efforts to focus attention on the runaway asbestos litigation problem facing our courts. The asbestos litigation crisis in the courts has long been an enormous problem. In the early 1990s, the Judicial Conference convened an Ad Hoc Committee on Asbestos Litigation to study the problems with the way asbestos cases are handled, and it found that "Dockets in both Federal and State courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over again; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether."

A couple of years ago when I was Chairman of the Administrative Oversight and the Courts Subcommittee, I held a hearing on the asbestos litigation problems. Not

much has seems to have changed from that Judicial Conference assessment. The Subcommittee heard testimony that asbestos litigation has caused serious problems in the federal and state court systems for almost 30 years, to the point that endless filings have clogged the courts and created a crisis. Lawsuits brought by individuals who have no symptoms and who may never become sick jam the courts, effectively denying truly injured victims their day in court, bankrupting companies and hurting workers, investors and consumers.

Moreover, the Subcommittee heard testimony on the seriously high costs involved with asbestos litigation. We heard that claimants receive as little as 37 cents out of every dollar paid by defendants because of transaction costs and attorneys fees. The huge payments paid to non-sick claimants and plaintiff lawyers have bankrupted many of the defendant companies, thereby preventing many of the genuinely sick from ever receiving

appropriate compensation. That isn't a fair process. In fact, according to a study by the RAND Institute, up to 80 to 90 percent of new cases are filed by plaintiffs that are not sick. Sick plaintiffs are being lumped into classes with plaintiff members who have who have no manifestation of asbestos exposure. Sick plaintiffs who should be able to recover are not getting compensated, whereas those that are not sick are. Clearly justice is not being served.

The asbestos litigation crisis also is having a serious impact on many companies and their employees. To date, more than 60 companies have filed for bankruptcy as a result of litigation and settlements. Companies that manufactured asbestos have gone into bankruptcy because of the multitude of lawsuits and victims are getting pennies on the dollar. I understand that a number of these companies that are being sued now were not manufacturers, but used asbestos in their products. Some

of these companies have hardly any connection to asbestos, yet they are named as defendants. Yet some figures estimate that over 2,400 companies have been sued since litigation over asbestos began. Trial lawyers are going after anyone even remotely related to asbestos. But the net result is that good companies are going into bankruptcy and many people are losing their jobs.

There appears to be a consensus that something needs to be done to fix these problems, but people disagree as to what need to be done and how we do it. I look forward to hearing from today's witnesses about the extent of the problem and possible approaches to help implement a fair system for all those involved.

Law Offices of
McGarvey, Heberling, Sullivan & McGarvey, P.C.

Dale L. McGarvey
Jon L. Heberling
Roger M. Sullivan, Jr.
Allan M. McGarvey
John T. Lacey

745 South Main
Kalispell, Montana
59901-5399

Telephones:
(406) 752-5566
1-800-345-1763 (in State)
1-800-406-7544 (out of State)
Fax: (406) 752-7124

Emails: dmcgarvey@mcgarveylaw.com
jheberling@mcgarveylaw.com
amcgarvey@mcgarveylaw.com
rsullivan@mcgarveylaw.com
jlacey@mcgarveylaw.com

September 20, 2002

Senator Baucus
United States Senate
SH-511
Washington, D.C. 20510-2602

RE: 9/25/02 Judiciary Committee Informational Hearing

Dear Senator Baucus:

We represent many asbestos victims in Libby, Montana.

As we understand it, the informational hearing is requested by proponents of bills to limit the number of asbestos victims who can be compensated, while deferring the statute of limitations for others ("the unimpaired"). We understand that the medical exclusion criteria may be similar to those in the asbestos bailout bill of 1999-2000. At that time, we ran 125 Libby clients through the gauntlet of those criteria, and 75% were excluded. The problems with the Bailout bill were as follows:

1. Pleural disease standards.
2. Use of 1980 "B reader" standards for chest x-rays, in lieu of CT scans which are far more diagnostic.
3. Exclusionary number requirements in the lung function test scores.
4. The failure to recognize tremolite asbestos disease as progressive.
5. A high minimum exposure requirement for lung cancer deaths.

As you know, the EPA has screened about 7,000 people in Libby, with about 1,100 having positive chest x-rays. It is estimated that 850 to 1,000 have been diagnosed with Libby tremolite asbestos disease. Since most of the newly diagnosed patients have mild disease, I would estimate that the proposed medical criteria would exclude over 90% of the total diagnosed. This means that they would not qualify for medical expense compensation, and that they would not be compensated in the Grace bankruptcy. St. John's Hospital reports a writeoff of over $1 million in asbestos disease costs in the past year. And, Grace's medical plan is being further reduced.

We have the chronic problem of the failure of the traditional compensation norms, when applied to Libby tremolite asbestos disease. Probably 95% of the Libby patients have significant pleural disease, with very little interstitial disease. This may be because the tremolite fibers are little spears and tend to migrate all the way through the lungs to the lung lining (the pleura), whereas the normal chrysotile asbestos fibers are curly and get caught in the interstitia in between the air sacs in the lungs, and do not make it to the pleura. The problem is that the traditional system compensates interstitial disease at a low level, with even less for pleural disease. This is because it is thought that pleural disease does not progress, does not cause severe restrictive lung disease, and certainly does not cause death.

All this is incorrect for Libby tremolite asbestos disease. Dr. Whitehouse made a presentation to a medical conference in Missoula on 6/24/02. The overheads from that presentation are enclosed. Dr. Whitehouse showed a chest x-ray series for each of four cases of pure pleural disease which led to death. The pictures showed rapidly progressive pleural disease. Dr. Whitehouse presented results of a medical study he did (currently in press). He analyzed lung functions for 123 patients with at least two sets of pulmonary function tests. On the average the tests were 35 months apart. Dr. Whitehouse found that 76% of the patients progressed, with a loss of 2-3% of lung function per year. This means over 10 years a 20-30% loss of lung function and severe disease. The norm for chrysotile asbestos disease is that only about 20% progress. Therefore, of the chrysotile "unimpaired" (lung functions over 80% of normal), 80% will not get worse. It is just the opposite for the Libby patients. 76% will get worse. This needs to recognized in any bill that has medical criteria in it.

What we need in a bill is:

1. Use of CT scans for diagnosis.
2. No exclusion of any patient with Libby tremolite asbestos disease.
3. Recognition that Libby tremolite asbestos disease is highly progressive.

Clearly the old medical criteria are unacceptable for use on Libby patients.

We also understand that there is talk of limits on compensation. We hear statements that historically little money has been paid for pleural disease cases. In Libby, our historical verdict average is $464,000.

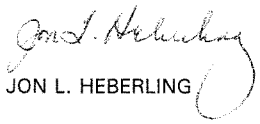
1997	Les Skramstad $660,000 (worker)
1998	Margaret Vatland $250,000 (housewife)
1999	Ken Finstad $483,000 (worker)

Moreover, Grace did not let us try our best cases. Life Care Plans show that it costs $500,000-$700,000 to die of tremolite asbestos disease. If compensation for the Libby asbestos victims is less than that amount or less than the average verdict, then the medical expense burden is being shifted from the wrongdoers to the taxpayers. Not a good idea.

If you have any questions, please do not hesitate to contact us.

Yours sincerely,

McGARVEY, HEBERLING, SULLIVAN
& McGARVEY



JON L. HEBERLING

JLH:joh

Enclosures

Testimony of Jonathan P. Hiatt
General Counsel
American Federation of Labor and Congress of Industrial Organizations
Submitted to the Committee on the Judiciary
United States Senate
September 25, 2002

Good morning, Chairman Leahy, and Members of the Committee. My name is Jonathan Hiatt, and I am General Counsel of the AFL-CIO. I would like to thank the Committee for providing me the opportunity to testify on the issue of Asbestos Litigation, and to present the views of the AFL-CIO on the need for federal legislation that would adequately address the rights of workers suffering from exposure to asbestos.

The AFL-CIO's member unions represent, we believe, millions of active and retired workers who have been exposed to asbestos. Hundreds of thousands of America's working families are living with the deadly consequences of this exposure, which for many occurred while working in defense-related industries or in public service. In addition, many workers in building and construction, transportation, and manufacturing industries have suffered from asbestos-related diseases. In recent years, we have also seen such diseases among workers in telecommunications and the service and maintenance trades. Compounding this tragedy, the legal system has offered lengthy delays followed by limited compensation, compensation that often comes too late.

The exposure of millions of working Americans to asbestos is one of the largest torts in the nation's history. It has led to hundreds of thousands of claims, and will lead to more. The judiciary has asked several times for Congress to consider how this case load might be managed, most notably in the U.S. Supreme Court's Fibreboard decision.[1] However, the need for

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[1] Esteban Ortiz et al. v. Fibreboard Corporation et al., 527 U.S. 815 (1999). See The Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (March 1991); Amchem Products, Inc. v. Windsor, 138 L. Ed. 2d 689, at 716 (1997).

innovative approaches to obtaining justice for asbestos victims must not be the basis for denying those same people effective access to our courts.

The labor movement has been actively involved in efforts over the past fifteen years to craft solutions to the tragedy of asbestos. We have sought to work with all the interested parties -- manufacturers, insurers and other defendants, counsel for both plaintiffs and defendants, the Manville Trust, and Congressional leaders of both parties. We continue to be willing to participate in such discussions.

We believe that there is a broad and growing recognition by all interested parties that there are serious problems with the way the civil litigation system has ultimately addressed the plight of asbestos victims. These problems include high transaction costs, inequitable allocation of compensation among victims, delays in payment to victims, and a general climate of uncertainty that is damaging business far more than it is compensating victims. Uncertainty for workers and their families is growing as they lose health insurance and see their companies file for bankruptcy protection. Meanwhile, we think there is a growing recognition that some of these problems could be eased by developing alternative methods of resolving the claims of asbestos victims.

In 1999 we participated in an extensive all-party dialogue under the aegis of then Chairman Hyde of the House Judiciary Committee. This effort failed to produce results but did produce significant learning. I would note that Chairman Hyde and his staff understood that consensus building was required and did everything they could to seek that consensus. Ultimately, that effort foundered first on the narrowness of the business community's representation in the process and second on three substantive obstacles.

First, there was never a meeting of minds on the basic issue of whether a new asbestos regime would compensate the less sick – those with physiological evidence of asbestos exposure or damage but who are not yet suffering from cancer, mesothelioma or late stage asbestosis.

Second, the prospect of compensating anyone through an administrative system gave rise to incredibly complex structures designed to avoid addressing the contribution or "shares" issue that has bedeviled manufacturer and insurer efforts to manage this problem for decades.

Third, and much related to the second, the manufacturers and their insurers failed to provide the financial information necessary to identify the funding levels that would be necessary to adequately support a new, acceptable claims resolution system.

We came away from that extensive process convinced that any legislative solution to the asbestos crisis must meet certain basic fairness tests. I have appended to my testimony the AFL-CIO Executive Council Statement on Asbestos, adopted at its most recent meeting last month which lays out these basic criteria. Among them are:

(1) Anyone whose body has been measurably affected by asbestos exposure has suffered a wrong and should receive monetary compensation for that wrong;

(2) While an administrative system may have benefits for some classes of asbestos victims, those with serious asbestos-related medical conditions must have unimpeded access to the courts — moreover, victims with early stages of asbestos-related diseases should not be required or pressured to give up their right to additional compensation should their conditions worsen;

(3) Any substitute reform system must be cheaper, speedier and less adversarial than the present system, for plaintiffs as well as defendants—and cannot be a device for relitigating the broad issues that have effectively been settled in these past many years of litigation;

(4) There must be a way of providing testing and monitoring to all those who have been exposed;

(5) There must be sufficient funding for any newly legislated system; and

(6) Any asbestos initiative must be understood as separate from the business community's larger tort reform agenda.

Permit me to amplify on several of these key principles.

First, I hope it is clear that the legislation some in business are proposing, which simply removes any ability for those victims with less serious conditions to receive any compensation at all, does not meet these tests. If such legislation were to move forward in current form, the labor movement would strongly oppose it.

Second, with respect to access to the courts, we remain opposed in principle to denying asbestos victims this fundamental right. Initially, we suggested that a voluntary alternative dispute resolution (ADR) system might be an appropriate alternative. Events over the past few years have led us to question whether an all-voluntary approach can solve the equitable treatment problem among victims with different degrees of damage, or can give defendant companies and their insurers the certainty they need to avoid catastrophic consequences for their firms. We have therefore become willing to consider proposals that would provide for an administrative claims approach for those victims at the earlier stages of their illnesses, but only if part of a comprehensive solution that meets the basic fairness tests and that includes non-waiver of those same victims' right to refile, with full access to court, if their conditions worsen.

Third, with respect to the economics of a substitute system, the labor movement's position points toward a possible settlement that would involve what one industry lobbyist described as "a huge pile of money" that would have to be set aside to fund a replacement system. If the defendant community is unwilling or unable to do that it will be impossible to reach any sort of consensus solution. Of course, we would strongly support a contribution from the federal government, which after all bears its own significant share of responsibility for the asbestos catastrophe. Nonetheless, government money will not remove the need for a major financial investment from the defendant community to fund any possible consensus solution. And such an investment cannot be arbitrarily capped in such a way as to place the ultimate risk on the victims, themselves, as we have seen with the Manville Trust experience.

That said, the goal would be for the costs to be more defined and more predictable than is true at present. Presumably the amounts involved would also be reflective of substantially

reduced transaction costs in the asbestos compensation system -- leaving more money for victims and for companies.

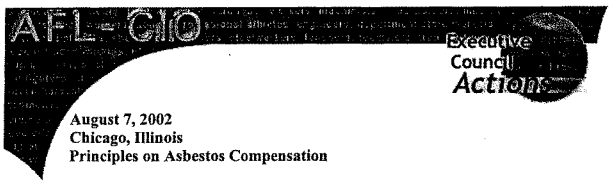
Finally, the new system must provide for testing and monitoring for those with a history of occupational exposure. This is particularly important since at present the trial lawyer bar is offering this service at no cost to the workers in numerous locations throughout the country. Any substitute initiative which significantly reduces the need for legal services will remove this critical feature of the current system, leaving potential victims unable to adequately track the status of their medical condition. We suggest that this may be an area where a federal government role would be particularly appropriate.

The labor movement is not sympathetic to those in the trial bar that pretend there is no problem in the world of asbestos litigation, and we are equally unsympathetic to those in the defendant community who pretend that the solution to those problems is to strip injured workers of their right to compensation. Pushing bills in Congress that seek to simply relieve the defendant community of their obligations to the people they poisoned will enrich a good many lobbyists but it will not solve anyone's problems.

The labor movement believes there is a real problem with the current system of asbestos compensation and that the problem calls for a real consensus solution. We are willing to put the time in to crafting such a solution, but only if it seeks as its ultimate goal fair and timely compensation for all victims, and only if the defendant community is truly prepared to recognize and fund the legitimate claims of diseased and exposed workers and their families.

Thank you.

Attachment



August 7, 2002
Chicago, Illinois
Principles on Asbestos Compensation

The story of asbestos is one of the most shameful in the annals of the American workplace. Long after manufacturers, their insurance companies and the federal government knew asbestos was a deadly poison, millions of workers were exposed to asbestos. As a result, hundreds of thousands of workers have or will develop serious disease, which in many cases is fatal.

For decades, the victims of asbestos poisoning have sought compensation for the terrible wrongs done to them and their families. With the help of their unions, many asbestos victims have received compensation through the legal system from asbestos manufacturers.

It has been clear since the Manville Industries bankruptcy that asbestos-related liability could exceed the assets of some asbestos manufacturers. In response, some in the labor movement, working together with lawyers for asbestos victims, have sought to enter into both class-action settlements and voluntary claims processing systems with asbestos manufacturers in order to lower the costs of getting compensation to victims.

While some asbestos manufacturers have been responsible participants in these efforts, other manufacturers have unfortunately sought to have laws passed that would limit their liability to their victims. The labor movement has successfully opposed laws designed to deny asbestos victims access to meaningful compensation that shut the doors of the courthouse to them.

However, the labor movement has long recognized that under current law and legal processes many asbestos victims are not being treated fairly or receiving fair and timely compensation. Some victims with early-stage asbestosis are settling their claims prematurely. Some victims who are dying from asbestos-related diseases are unable to get timely resolution of their cases.

At the same time, the burden of paying for the damage done by asbestos has driven many otherwise healthy firms into bankruptcy, with serious consequences for workers and communities dependent on those firms. The unpredictability of the current system has exacerbated these problems.

For all these reasons, the labor movement for years has been willing to engage in good-faith discussions with all interested parties to improve the asbestos compensation process while protecting the rights of asbestos victims. The AFL-CIO's participation in these discussions rests on certain principles the AFL-CIO believes must underlie any asbestos-related initiative:

· Anyone with physiological evidence of exposure to asbestos is a victim who deserves

and should receive fair and timely compensation.

· While an administrative payments system may have benefits for some classes of asbestos victims, all those who suffer from such serious conditions as cancers, mesothelioma and advanced asbestosis must have unrestricted access to the courts. There should not be incentives for victims with early stages of asbestos-related diseases to give up their right to compensation should their conditions worsen.

· All those who have been exposed to asbestos should have access to affordable testing and monitoring. To the extent any asbestos-related initiative diminishes the incentive for the plaintiffs' bar to provide testing and monitoring, that initiative should also provide a replacement testing and monitoring system.

· The federal government played a significant role in the widespread use of asbestos, particularly in defense-related industries. The federal government should accept its share of the responsibility for the harm caused by the use of asbestos in the workplace.

· Any reform initiative should reduce the costs, delay and uncertainty involved in getting compensation to victims. No initiative should be a vehicle for asbestos defendants to relitigate issues that have effectively been resolved already in the courts.

· Any effort to address the problems in asbestos compensation should not be misused as a vehicle to enact corporate America's tort reform agenda.

Prepared Statement of Steven Kazan

Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise

Hearing on Asbestos Litigation

Before the Committee on the Judiciary, U.S. Senate

September 25, 2002

Introduction

I am a plaintiffs' trial lawyer. I represent working people with asbestos cancers and their families. I've specialized in asbestos litigation since 1974 – almost 30 years. For the last 15 to 20 years, my firm has represented almost exclusively people who are dying of cancers such as mesothelioma. While I speak for myself, I also reflect the views of scores of other lawyers who primarily represent these cancer victims. Our views are aimed at protecting the interests of thousands of these victims, who we all can agree are the people who have been hurt the most by asbestos.

The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs' attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them. This bankrupts defendants – who are then not there when it comes time to seek compensation for cancer victims and their families – and it drains the assets

of the trusts established to pay the claims of these companies after they reorganize in bankruptcy.[1]

Asbestos: A Public Health Catastrophe

Exposure

Millions of people were exposed to asbestos before, during, and after World War II. Between 1940 and 1979, up to 27.5 million Americans worked in occupations where substantial asbestos exposures were common, and for many who worked in shipyards or the insulation trades, the exposure could be very high.[2] As many as 100 million American workers had at least some occupational exposure.[3] Although it was known as early as the 1920s that asbestos could be harmful to the lungs of workers, and even though the connection between asbestos and lung cancer was established beyond any doubt in the 1950s, asbestos manufacturers never even tried to give a warning to the people who would be exposed to the asbestos in their products until the 1960s.[4]

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[1] The flood of lawsuits from healthy plaintiffs (and plaintiffs with no asbestos-related symptoms) is drawing increasing concern and calls for reform, both from the lawyers involved in asbestos litigation and the media. A number of recent investigative articles, editorials, and news articles highlighting the resulting crisis are attached as Exhibits A and B.

[2] William J. Nicholson, et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980 – 2030*, 3 AM. J. IND. MED. 259, 259 (1982).

[3] David Austern, *The Manville Trust Experience*, in MEALEY'S ASBESTOS BANKRUPTCY CONFERENCE 2001 118 (2001) (cited in AMERICAN ACADEMY OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES & TRENDS, 1 (Dec. 2001)).

[4] See BARRY I. CASTLEMAN, ASBESTOS: MEDICAL & LEGAL ASPECTS 1-137 (4th ed. 1996). Castleman also describes the introduction of warning labels in the 1960s, and the earlier decisions of some manufacturers not to warn of asbestos's health hazards. *Id.*, at 386-87. See also *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 737-39 (E. & S.D.N.Y. 1991).

Public concern in the 1970s led to the establishment of OSHA and the advent of government regulation to protect workers' health.[5] This regulation and fears of liability led to a drastic reduction in asbestos usage after 1973.[6] As a result, exposure levels have been relatively low during the last 20 years. But pre-OSHA exposures have left a wake of devastation that will be with us for decades.

Health Effects of Asbestos

Asbestos causes several cancers and several "non-malignant" conditions. A non-malignant condition is simply one that does not involve cancer. It may or may not be medically important.

Asbestos Cancers. The two principal asbestos cancers are mesothelioma and lung cancer.

Mesothelioma is a cancer of the cells that make up the lining around the outside of the lungs and inside of the ribs (pleura), or around the abdominal organs (peritoneum).[7] There is as yet no known cure for mesothelioma; it is invariably fatal. The prognosis depends on various factors, including the size and stage of the tumor, the

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[5] The health hazards of asbestos figured prominently in the congressional hearing and debate concerning passage of the Occupational Safety & Health Act in 1970. As one of its first acts in 1971, OSHA adopted an exposure limit of 12 f/cc per eight hours from the American Conference of Government Industrial Hygienists (ACGIH). Since then, OSHA has officially identified asbestos as a carcinogen and repeatedly lowered acceptable exposure levels based on cancer risk assessments. The current standard is .1 f/cc, which was considered the lowest achievable exposure level when it was adopted in the late 1980s. OSHA has also specified abatement practices that must be followed and required additional warnings about the dangers of asbestos. For a review of this evolving regulation, see John F. Martonik, *et al.*, *The History of OSHA's Asbestos Rulemakings and Some Distinctive Approaches that They Introduced for Regulating Occupational Exposure to Toxic Substances*, 62 AM. IND. HYGIENE ASS. J. 208 (2001).

[6] Stephen Carroll *et al.*, RAND Institute for Civil Justice, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 12 (Aug. 2002). The U.S. Geological Survey has tracked the declining use of asbestos. See David A. Buckingham and Robert L. Virta, U.S. Geological Survey: Asbestos Statistics, at http://minerals.usgs.gov/minerals/pubs/of01-006/asbestos.pdf; see also David Austern, *Fictions & Facts from the Asbestos Almanacs* 2 (Aug. 2002) (presented at ALI-ABA Conference "Asbestos Litigation in the 21st Century," Sept. 19-20, 2002) (attached hereto as Exhibit C).

[7] In rare cases, it can involve the similar linings around the heart and testicles.

extent of the tumor, the cell type, and whether or not the tumor responds to treatment. In most cases this disease causes death within a year or two of diagnosis.[8]

Asbestos is also a leading cause of lung cancer – a fact that was established beyond any reasonable doubt by Sir Richard Doll's studies in England in the 1950s.[9] Irving Selikoff and his collaborators at New York's Mt. Sinai School of Medicine clearly established the link between asbestos exposure and lung cancer among insulators in the early 1960s.[10] Selikoff also showed that asbestos exposure worked synergistically with tobacco smoke to increase the risk of lung cancer.[11] An insulator who smoked had a risk of lung cancer more than 50 times higher than a comparable worker who neither smoked nor was exposed to asbestos.[12]

These cancers have long latency periods. Latency is the amount of time that typically elapses between a person's first exposure and diagnosis. For lung cancer, latency averages between 20 and 30 years.[13] An even longer average latency – as much

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[8] W.K.C. Morgan & J.B.L. Gee, *Asbestos Related Diseases*, *in* OCCUPATIONAL LUNG DISEASES, 308, 350-61 (W.K.C. Morgan & Anthony Seaton, eds. 1994); V. Roggli *et al.*, *Mesothelioma*, *in* PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 109, 151-53 (V. Roggli, *et al.*, eds. 1994); Carroll *et al.*, *supra* note 6, at 16; *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 740.

[9] See Richard Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 BRIT. J. INDUS. MED. 81 (1955). Ironically, Doll's research was commissioned by England's leading asbestos producer, which then tried in vain to suppress the results. See GEOFFREY TWEEDALE, MAGIC MINERAL TO KILLER DUST: TURNER & NEWALL & THE ASBESTOS HAZARD 147-50 (2000).

[10] I.J. Selikoff *et al.*, *Asbestos Exposure & Neoplasia*, 188 JAMA 22 (1964). A few of Selikoff's significant publications are attached as Exhibit D.

[11] E.C. Hammond, *et al.*, *Asbestos Exposure, Cigarette Smoking & Death Rates*, 330 ANNALS N.Y. ACAD. SCI. 473 (1979).

[12] Non-smoking asbestos workers had a 5 times greater likelihood of developing lung cancer than other non-smokers, and smoking was shown to increase the likelihood of developing lung cancer by 10 times. Hammond *et al.*, *supra* note 11, at 487 t.8; see also Francis J.C. Roe, *Biological Interactions: Important Things We Do Not Know*, *in* BIOLOGICAL INTERACTION OF INHALED MINERAL FIBERS & CIGARETTE SMOKE 1 (Alfred P. Wehner & Dvara-Lee Felton, eds. 1989).

[13] AMERICAN ACADEMY OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES & TRENDS 2 (Dec. 2001).

as 40 years – is common for mesothelioma.[14] For this reason, exposures that occurred decades ago are just now resulting in fatal cancers.[15]

It is generally accepted that mesothelioma has recently peaked at nearly 2,500 cases annually and that there will be 2,000 or more mesothelioma cases each year for at least the next 15 years.[16] Studies suggest that asbestos lung cancers peaked in the mid-1990s, but they will remain significant for decades as well.[17]

Some researchers have argued that other cancers, such as cancer of the gastro-intestinal tract, are also caused by asbestos exposure, but these theories are still controversial in the medical community.[18] In any event, "other cancers" result in

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[14] The seminal epidemiological study of asbestos-related mortality calculated that the relative risk of developing lung cancer starts to rise seven and a half years after exposure to asbestos begins and continues to rise for as long as a worker was exposed to asbestos. The risk of developing lung cancer does not begin to fall until 40 years after the initial asbestos exposure. Nicholson, *supra* note 2, at 293. According to Nicholson, the risk of developing mesothelioma does not peak until 45 years after exposure to asbestos begins, and the risk remains constant at its elevated level after that point. *Id.*, at 294.

[15] The average years of first exposure for individuals who filed claims against the Manville Trust in 2000 were 1954 for lung cancer and 1952 for mesothelioma. See Austern, *supra* note 6, at 3.

[16] Projections of national mesothelioma mortality include Bertram Price, *Analysis of Current Trends in United States Mesothelioma Incidence*, 145 AM. J. OF EPIDEMIOLOGY 211 (1997), and Nicholson, *supra* note 2. There were 2,535 mesothelioma deaths in the United States in 1998, and 2,284 mesothelioma deaths in 1999, according to National Cancer Institute SEER data from regions throughout the country that have been adjusted to a national level.

[17] Nicholson, *supra* note 2, at 299 t. XXII.

[18] Selikoff noted abnormally high incidences of gastrointestinal cancer in his epidemiological studies. See, e.g., IRVING J. SELIKOFF & DOUGLAS H.K. LEE, ASBESTOS & DISEASE, 307-36 (1978); I.J. Selikoff *et al.*, *Asbestos Exposure & Neoplasia*, 188 JAMA 22, 25 (1964); E.C. Hammond *et al.*, *Neoplasia Among Insulation Workers in the United States with Special Reference to Intra-Abdominal Neoplasia*, 132 ANNALS N.Y. ACAD. SCI. 519 (1965). Others have noted that the causal link between asbestos and these other cancers has not been established, and some conclude that such a link is doubtful. See e.g., S. Donald Greenberg & Victor L. Roggli, *Other Neoplasia*, *in* PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 211, 211-19 (Victor L. Roggli, *et al.*, eds. 1994); W.K.C. Morgan & J.B.L. Gee, *supra* note 8, at 361-62; *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 740-41. Although there is still litigation about whether asbestos can cause cancers other than lung cancer and mesothelioma (and, if so, which ones), there are actually very few claims involving those "other cancers." For example, in 2001, the Manville Trust received only 581 such claims. See Austern, *supra* note 6, at 12.

relatively few lawsuits, and difficulties in proving causation have generally meant that these cases settle for relatively low values.

Non-Malignant Conditions. In addition to cancer, asbestos causes two major "non-malignant" conditions, asbestosis and pleural thickening.

Asbestosis is a scarring of the walls of the air sacs within the lungs. In extreme cases, as a result of heavy exposures, asbestosis can severely interfere with the functioning of the lung, leading to disability and even death. These severe asbestos cases, common in the early days of asbestos litigation, have since then become rare.[19] Most people who have x-rays indicating possible asbestosis have no symptoms whatsoever.[20]

Pleural changes are different from asbestosis. They do not involve the tissues of the lung at all, but rather the thin membrane called the pleura, which covers the surface of the lung and lines the chest wall. In the vast majority of cases, pleural changes take the form of pleural plaques, which affect relatively small, circumscribed areas of this membrane. Pleural plaques do not cause symptoms: they are merely an indicator of

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[19] One researcher stated in 1994 that in studying 1,764 workers who had been exposed to asbestos, he had not seen a single case of advanced asbestosis in people whose first exposure occurred in the last 30 years. DR. EDWARD A. GAENSLER, ASBESTOS-RELATED PLEURAL PLAQUES: MUCH ADO ABOUT VERY LITTLE 5 (1994). Dr. John Dement, professor of environmental and occupational medicine at Duke says that "What we're seeing now is the downswing." Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, April 10, 2002, at C4. Dr. Dement notes that there are "far fewer cases of serious asbestosis today than 5 to 10 years ago." *Id.* The Berenson investigative article is reproduced in Exhibit A. See also Carroll, *supra* note 6, at 16 ("Severe asbestosis requires extensive high-level exposure to asbestos, which has not been prevalent in the U.S. for several decades."); Morgan & Gee, *supra* note 8, at 315-16.

[20] Moreover, for many individuals exposed to asbestos who *do* have decreased lung functioning or other symptoms, much (if not most) of the impairment is actually due to smoking. See, e.g., Gordon Gamsu, Expert Report, *filed in Falise v. Am. Tobacco Co.*, 97-CV-7640 (E.D.N.Y.); Albert Miller, Expert Witness Statement, *filed in Falise v. Am. Tobacco Co.*, 97-CV-7640 (E.D.N.Y.). These two expert reports are attached hereto as Exhibit E.

exposure. On occasion, pleural changes take the form of "diffuse pleural thickening," which can affect the functioning of the lung but usually does not.[21]

Progressivity. Non-malignant asbestos diseases are sometimes said to be "progressive" – i.e., they can get worse even after exposure stops. It is well established that after heavy exposures, asbestosis can be progressive, and can result in serious disability and even death. People in this situation deserve compensation just as cancer victims do. With lower exposures, however, asbestosis usually does not "progress" in this way. For most people, asbestosis that does not result in decreased lung function will not impair lung function in future years.[22]

Moreover, non-malignant diseases do not "progress" to become cancer. Cancer is a completely different disease from either asbestosis or pleural changes. Both, of course, can be due to asbestos exposure (and these non-malignant changes are certainly proof of asbestos exposure), but one disease does not turn into the other.[23]

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[21] See, e.g., GAENSLER, *supra* note 19, at 23 ("There is uniform agreement that circumscribed plaques do not cause symptoms or reduce exercise capacity."); S. Donald Greenberg, *Benign Asbestos-Related Pleural Diseases*, in PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 165, 176 (Victor Roggli, *et al.* eds. 1992) ("The great majority of individuals with pleural plaques alone have no symptoms or physiologic changes."); RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2 (1985).

Those who claim that plaques can have symptoms by themselves rely on the work of David Schwartz, which purports to show a very slight decrement in lung function in a population with pleural plaques. Even Dr. Schwartz, however, does not attribute this decline, which would be practically imperceptible to the patient in any event, to the plaques themselves. Rather, his explanation is that pleural plaques are correlated with undiagnosed asbestosis, which is what actually causes the slight decrease in lung function. See David A. Schwartz, *et al.*, *Asbestos-Induced Pleural Fibrosis & Impaired Lung Function*, 141 AM. REV. RESPIR. DIS. 321, 325 (1990); Jen-Fu Shih, *et al.*, *Asbestos-Induced Pleural Fibrosis & Impaired Exercise Physiology*, 105 CHEST 1370, 1375 (1994).

[22] Morgan & Gee, *supra* note 8, at 316-20; RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2, 32 (1985).

[23] Peter H. Schuck, *The Worst Should Go First*, 15 HARV. J.L. & PUB. POL'Y 541, 550 (1992).

Summary

Millions of people were exposed to asbestos before OSHA regulations and the deterrent effect of personal injury litigation led to drastic reductions in asbestos usage, beginning in the mid-1970s. Many of those individuals carry physical markers of their exposure—slight scarring of the lungs or pleural plaques —that do not affect their functioning at all. These people are the so-called "unimpaired." The words "impaired" and "unimpaired" will be used often in this statement and in these discussions; I want to be clear on what I mean. I use the term "impairment" in a common-sense way to mean that a person's bodily *functioning* is affected—in particular, that the functioning of his or her lungs is diminished to the point of interfering with daily life or the ability to earn a living. As I use the word, mere physical changes that cause no symptoms and do not lead to reduced functionality are not "impairment."[24]

While most people exposed to asbestos are not "impaired," thousands of people still will fall victim to asbestos cancers or serious asbestosis over the next 30 or more years. For those victims, asbestos continues to be a "public health catastrophe."[25] It also is a legal catastrophe, as, increasingly, people who are sick cannot be sure of compensation because payments to the unimpaired have drained massive amounts of defendants' financial resources and contributed to a recent flood of bankruptcy filings.

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[24] In this usage I follow the RAND Corporation. See Carroll, *supra* note 6, at 18. While the American Medical Association's Guide to the Evaluation of Permanent Impairment contains language suggesting that asymptomatic bodily changes could be considered "impairment," in the sense of an abnormality, in fact the AMA follows the common-sense use of the word by assigning a zero impairment rating to asymptomatic conditions. AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 2-5, 88 (Linda Cochiarella & Gunnar B.J. Andersson, eds., 5th ed. 2001).

[25] Deborah R. Hensler, Asbestos Litigation in the United States: A Brief Overview 6 (1991).

Asbestos Litigation: The Early Days

Asbestos litigation began in the late 1960s.[26] There had previously been state workers' compensation claims against asbestos manufacturers dating all the way back to the 1930s (although the manufacturers had largely succeeded in hushing them up through secret settlements).[27] Workers' compensation provided a completely inadequate remedy for workers seriously injured by asbestos. Benefits were, and still are, very low, and technicalities often kept workers with long-latency industrial diseases from obtaining any compensation at all.[28] One way of avoiding the problems of the workers' compensation system was to sue producers like Johns-Manville for negligence or strict product liability based on their sale of a dangerous product without any warnings to the workers who would be exposed. The Fifth Circuit validated this approach in its landmark *Borel* decision in 1973.[29]

Borel was a big step forward in part because it brought the asbestos catastrophe to the attention of plaintiffs' trial lawyers across the country. I first became involved in asbestos litigation in California in 1974. While *Borel* was important, it did not make asbestos litigation easy for injured plaintiffs. Defendants, led by Johns Manville, fought asbestos claims with a no-holds-barred approach. In case after case we had to relitigate

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[26] The best account of this phase of the litigation is PAUL BRODEUR, OUTRAGEOUS MISCONDUCT (1985).

[27] Notes from a 1933 Manville board of directors meeting demonstrate that the company knew that its employees were becoming ill with asbestosis and tried to keep the problem quiet by settling claims on the condition that their employees' attorneys not bring more such actions in the future. These minutes are attached as Exhibit F.

[28] See generally Louis Treiger, *Comment: Relief for Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179, 182-83 (1983).

[29] *Borel* v. *Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (affirming a 1971 verdict against asbestos manufacturers based on strict liability for failure to warn).

the "state of the art" – even though company documents conclusively showed that manufacturers had known for decades that asbestos was dangerous. Moreover, in many states we faced archaic statutes of limitations, which, according to the manufacturers, barred asbestos claims even before injured workers knew (or could know) of their injuries.

The plaintiffs' bar was united then. We showed that the state-of-the-art defense was a lie. We proved that manufacturers like Manville and Raybestos Manhattan had been involved in a cover-up for years. Increasingly, juries handed down significant punitive damages awards. By the late 1970s and early 1980s, we were able to obtain just remedies for more and more workers facing death or disablement because of asbestos. Even after the Johns-Manville and UNR bankruptcies in 1982, the plaintiffs' bar obtained recoveries for the injured by building a case against other, still solvent, defendants.

Asbestos Litigation: Warning Signals

By the mid-1980s a disturbing new trend was changing the shape of asbestos litigation: Some of my colleagues in the asbestos trial bar began arranging x-ray screenings to generate more and more clients, and this led to a sharp increases in filings by unimpaired plaintiffs. RAND recently described the new methods of recruiting unimpaired plaintiffs as follows:

> "By the mid-1980s, however, plaintiff law firms in areas of heavy asbestos exposure (such as jurisdictions with shipyards or petrochemical facilities) had learned that they could succeed against asbestos defendants by filing large numbers of claims, grouping them together and negotiating with defendants on behalf of the entire group. . . .
>
> "To identify more potential claimants, plaintiff law firms began to promote mass screenings of asbestos workers at or near their places of employment. Plaintiff law firms would bring suit on behalf of all of the

> workers who showed signs of exposure, sometimes filing hundreds of cases under a single docket number. Given the profile of asbestos disease, the majority of plaintiffs had little or no functional impairment at the time of filing . . . ."[30]

The number of asbestos cases pending in the federal courts alone more than quadrupled between 1984 and 1990.[31] Most of the new claims were for non-malignant conditions, and most of those were filed on behalf of people who were not sick.

In response to this sharp upturn, bankruptcy filings increased.[32] Between 1982 and 1989, asbestos liabilities led at least 16 companies to file for bankruptcy, and 9 more filed in the first half of the 1990s. In 1993, a leading plaintiffs' lawyer, Ron Motley, estimated that companies bearing more than three quarters of the liability in the early phases of the asbestos litigation had exited the tort system.[33]

Alarmed, Chief Justice Rehnquist appointed a committee of experienced Federal judges to study the asbestos litigation problem. The report of the Ad Hoc Committee on Asbestos Litigation, filed the following year, was prophetic:

> We have described in the current state of asbestos litigation a very great problem, even a crisis, for many Americans. However, the worst is yet to come. The committee believes it to be inevitable that, unless Congress acts to formulate a national solution, with the present rate of dissipation of the funds of defendant producers . . . all resources for payment of these

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[30] Carroll, *supra* n. 6, at 21 (citations omitted); see also *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 748 (noting in 1991 that some lawyers "have arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestation of disease and then filed complaints for those that had any hint of pleural plaques.")

[31] See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 745; see also Summary of the Report of the Judicial Conference, Ad Hoc Committee on Asbestos Legislation 27 (March 1991) (Exhibit G hereto).

[32] According to the recent RAND report, sixteen companies filed for bankruptcy on account of their asbestos liabilities in the 1980s. Carroll, *supra* note 6, at 68. For a partial list of asbestos bankruptcies, see Austern, *supra* note 6, at 5 (Exhibit C hereto).

[33] Ronald L. Motley & Joseph F. Rice, *The Carlough Settlement – Blueprint for a Sane Resolution of the Asbestos Problem*, 8 MEALEY'S LITIG. REP.: ASBESTOS 24, 25 (July 1, 1993).

> claims will be exhausted in a few years. That will leave many thousands of severely damaged Americans with no recourse at all.[34]

The Ad Hoc Committee Report lead to hearings in both Houses of Congress, but no legislation was introduced. Meanwhile, the defendants and some plaintiffs' firms tried to use the Federal class action rules to craft a solution to the asbestos litigation "crisis" identified by the Ad Hoc Committee. The first such effort was the so-called "Amchem" settlement, which was approved by the District Court in 1994.[35] Because I believed that the Amchem settlement provided too little to cancer claimants, I opposed it. However, my firm played a leading role as one of three class counsel in a second settlement class action which involved the Fibreboard Corporation.

At the end of the day, the Supreme Court concluded that these efforts to use class actions as a vehicle for a global resolution of the asbestos litigation crisis pushed the Federal class action rule beyond the breaking-point. The Supreme Court struck down the Amchem settlement in 1997 and the Fibreboard settlement in 1999.[36] In both cases, however, the Supreme Court emphatically called upon the Congress to take action. Thus, in Amchem, Justice Ginsburg's opinion for the Court pointedly noted that "the Judicial Conference of the United States [had] urged Congress to act [at the time of the Ad Hoc Committee Report]," but that "no congressional response has emerged."[37] The Court was even clearer in Fibreboard. Justice Souter's opinion for the Court stated that "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls

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[34] Ad Hoc Committee on Asbestos Legislation, *supra* note 31, at 26-7 (attached hereto as Exhibit G).

[35] *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994).

[36] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

[37] *Amchem*, 521 U.S. at 598.

for national legislation."[38] Moreover, Chief Justice Rehnquist and two of his colleagues concurred specially in order to stress that asbestos litigation "cries out for a legislative solution."[39]

Asbestos Litigation: Things Fall Apart

Almost immediately after the Court's decision in Amchem, the litigation began to spin out of control. The researchers at RAND summarized the new developments as follows:

> "After the failure of the *Amchem* and *Ortiz* settlements, the landscape of asbestos litigation began to change. Filings surged . . . . As filings surged, many of the asbestos product manufacturers that plaintiff attorneys had traditionally targeted as lead defendants filed for bankruptcy. Plaintiff attorneys sought out new defendants and pressed defendants that they had heretofore treated as peripheral to the litigation for more money."[40]

The asbestos plaintiffs' bar recognized the dangers inherent in this dynamic. In 1999 and early 2000, plaintiffs' lawyers representing the vast majority of claimants concluded framework settlement agreements with Owens Corning Fibreboard – then the largest single defendant. Collectively, those agreements were known as the "National Settlement Program" or "NSP." In the NSP plaintiffs' counsel agreed to recommend to their clients a settlement that would require future non-malignant claimants to demonstrate medical impairment in order to qualify for cash compensation.[41] Thus, at the beginning of 2000, it could be said that essentially all of the asbestos plaintiffs' bar

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[38] *Ortiz*, 527 U.S. at 821.

[39] *Id.*, at 865 (Rehnquist, C.J., Scalia, J, and Kennedy, J., concurring).

[40] Carroll, *supra* note 6, at 28.

[41] See Maura J. Abeln, *Prepared Statement of Maura J. Abeln: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (1999), 137, 139.

had agreed that, as a matter of policy, unimpaired non-malignant claims should not receive immediate compensation. Unfortunately, however, there was no way to police the NSP in the absence of a Federal class action, and lawyers newly entering the market, often offshoots of the law firms that had signed the NSP, began to file the very claims that the NSP signatories promised not to file. As a result the NSP first cracked and then fell apart. Owens Corning-Fibreboard filed its own bankruptcy petition in October 2000.

One way to obtain a quantitative picture of the changes in asbestos litigation that occurred after Amchem was decided is to examine Manville Trust data. Those data show the trend in claims since 1997, when Amchem was decided. First, as Table 1 demonstrates, claims filed with the Trust quadrupled from 1997 to 2001, and this increase was driven primarily by non-cancer claims.

Table 1: Recent Manville Trust Claims Experience

	Filings[42]				
	1997	**1998**	**1999**	**2000**	**2001**
Cancer Claims	3,361	3,034	3,684	4,985	4,558
Non-Cancer Claims	18,125	24,425	25,290	49,380	64,054
Claims Denied/Unknown	2,188	1,965	2,759	3,676	20,826
Claims Filed	23,674	29,424	31,733	58,041	89,438

Second, as shown in Table 2, the percentage of claims filed by cancer victims has steadily fallen, from 15.6% in 1997 to only 6.6% in 2001. Non-cancer claims – half of which are now filed by people who have do not even claim functional impairment – have clearly driven the overall increase in filings.

[42] See Austern, *supra* note 6, at 10. The total for 2001excludes refiled claims.

Table 2: Recent Manville Trust Claims Experience Percentage of Claims Filed: Cancer v. Non-Cancer[43]					
	1997	**1998**	**1999**	**2000**	**2001**
Cancer	15.6%	11.0%	12.7%	9.2%	6.6%
Non-Cancer	84.4%	89%	87.3%	90.8%	93.4%

Third, the filing trends have lead to a tragic misallocation of resources. In recent years Manville has paid more money to people who have nothing wrong with them than it pays to mesothelioma victims.[44] Indeed, as Table 3 shows, the percentage of settlement funds that went to cancer victims generally fell from 54.6% in 1997 to 22.8% in 1999, and it has never recovered. In 1999 and 2000, Manville actually paid out more for claims in which the claimant did not even assert impairment than it paid out for all cancer claims combined. In 2001, the percentages are almost exactly the same.

Table 3: Recent Manville Trust Claims Experience Percentage of Settlement Dollars, by Disease Type & Year Paid[45]					
	1997	**1998**	**1999**	**2000**	**2001**
Cancer	54.6%	50.5%	22.8%	24.7%	24.3%
All Non-Cancer	45.4%	49.5%	77.2%	75.3%	76.7%
Claims for Compensation Levels 1 and 2 (Which Do Not Require Impairment)	22.6%	27.0%	37.0%	31.3%	24.1%

The recent RAND study demonstrates that the experience of defendants litigating in the court system has been similar to Manville's. According to RAND, "Claims for nonmalignant injuries grew sharply through the last half of the [1990s]," and "[A]lmost

[43] See *id.* The percentages exclude claims that were denied or for which the disease category was unknown.

[44] As of December 31, 2001, just under 21% of the Trust's payments had been to mesothelioma victims, while just over 26% went to non-cancer claimants who did not even assert a functional impairment. (About twenty percent was paid for non-disabled asbestosis claims and 6% to claimants with only pleural plaques). Letter from David Austern, General Counsel of Manville Trust, to Joseph Rice (Aug. 20, 2002) and exhibits (Exhibit C hereto). In 2001, only 14.5% of Trust settlement funds went to mesothelioma victims, and under a quarter of the funds (24.3%) went to cancer victims at all. *Id.*

[45] See *id.* (Exhibit C hereto).

all the growth in the asbestos caseload can be attributed to the growth in the number of these claims, which include claims from people with little or no current functional impairment."[46] Those plaintiffs took in 65% of settlement and verdict dollars in the 1990s, and that percentage can only be growing.[47]

The sharp increase in cases has forced defendants into bankruptcy at an unprecedented rate, as Table 4 shows:

Table 4: Asbestos Bankruptcy Filings Since 1982[48]		
Years	**Number of Bankruptcies**	**Rate per Year**
1982-89	16	2.4
1990-99	18	1.8
2000-Present	22	8.2
Total	59	-

Over 50 companies have filed for bankruptcy since 1982, and 22 of these were forced into bankruptcy since January 1, 2000 – only 2 2/3 years.[49] Practically all of the defendants I battled against 25 years ago are bankrupt today.

Asbestos bankruptcies are a disaster for almost everyone.[50] Huge sums are swallowed up in transaction costs, and years are wasted in protracted and complex litigation. Stockholders – which today often means working people with their life

[46] Carroll, *supra* note 6, at 42-43. Plaintiffs with mesothelioma brought more than ten percent of all asbestos lawsuits in the 1970s, but they now represent only three or four percent of all claims. Other cancer victims brought between eleven and fourteen percent of the asbestos lawsuits in the 1970s and 1980s. Now, they account for only five percent of claims. Meanwhile, plaintiffs with non-malignant conditions have brought an ever-greater percentage of claims (90% now), and as noted earlier, few of those are serious asbestosis cases.

[47] Carroll, *supra* note 6, at 61-62.

[48] Carroll, *supra* note 6, at 68.

[49] See Austern, *supra* note 6, at 5 (attached in Exhibit C). Just recently, after these lists were prepared, yet another company—ACandS—filed for bankruptcy..

[50] Only bankruptcy lawyers and their consultants, including investment bankers and large accounting firms, make money.

savings invested in company 401(k) plans – usually lose their entire investment.[51] Financially strapped companies often cut back on employer contributions to such things as health benefits to retirees, as well as the investments that create new jobs in their communities.

My main concern, however, is with the impact of these bankruptcies on cancer victims. Here, there are three main problems:

- The asbestos bankruptcies filed since February 2000 have resulted in an immediate cessation of hundreds of millions of dollars in expected yearly payments. History shows that in many cases this money will be off the table for a long time. The average time from filing a bankruptcy petition to approval of a plan of reorganization has been 6 years, and it takes even longer for funds to begin flowing once again.[52] This may be fine for people who aren't sick. My clients usually haven't that many years to live.
- The trusts formed to handle compensation of asbestos claimants have invariably paid claimants only a small percentage of the value of their claims. They cannot pay more, because they must reserve much of their funds to pay something to future claimants.[53] The percentage of full

[51] For example, the value of Federal Mogul stock held by 22,000 employees in 401(k) accounts plummeted from $85 million at the end of 1998 to $15 million in August 2001, shortly before the company filed for bankruptcy. Griffin B. Bell, *Asbestos Litigation & Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6 BRIEFLY . . . PERSP. ON LEGIS., REG., & LITIG. 26 (June 2002).

[52] Carroll, *supra* note 6, at 65.

[53] The Manville experience showed that a bankruptcy reorganization cannot work unless the reorganized company is protected from future claims. Congress has provided for such protection in § 524(g) of the Bankruptcy Code, 11 U.S.C. § 524(g). Under that section, however, the interests of future claimants must be defended by a future claims representative; future claimants must be treated the same as similarly

liability that is actually paid out depends on long-term predictions of claiming behavior that have always proven to be too low – primarily because the number of non-malignant claimants has depended on the economics of claims solicitation and not on the development of medically significant non-malignant diseases found by doctors caring for their patients. Thus, the same filing trends that have caused a crisis in the courts have also steadily reduced the amount of compensation available to sick claimants from bankruptcy trusts.[54]

- There is no assurance that the bankrupt share can or will be made up by seeking recovery from new defendants. In the last 20 years, many states have limited joint and several liability, so that even if the plaintiff can prevail against some defendants, the plaintiff will not receive full

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situated current claimants; and the plan has to be approved by 75% of claimants who will present claims to the trust *regardless of the amount of their claim*. The principle that future claimants must be given equal protection to current claimants means that the trusts have had to reduce the amount that they pay to current claimants in order to reserve funds to pay the futures, including future claimants who are not sick. Moreover, because there are so many unimpaired non-malignant claims, those claimants have the power to veto any plan that depends on channeling claims to a trust under § 524(g) of the Bankruptcy Code and thus their lawyers have incredible leverage in forcing a disproportionate amount of the trusts' funds go to non-malignant claimants in general and the unimpaired in particular. In turn, the funds available to the non-sick for a minimal showing make it economical to conduct mass screening programs, which lead to increased filings, which in turn puts pressure on the trusts to reduce their already low payout percentage. In this vicious circle, it's always the sick who lose.

[54] The recent amendments to the Manville Trust Distribution Process recognize that cancer claimants have traditionally received too small a share of the trust's funds and purport to strengthen some medical criteria and exposure requirements – for the future. Even leaving aside the fact that this leaves a huge number of claims to be paid under the old criteria, people who aren't sick will still receive large amounts of money that ought to be paid to people who are sick instead. Advocates for this system claim that the trust must take the tort system as it finds it – by which they mean that the trust must pay people who would be able to reach a jury in tort actions. I am not sure that is right: unimpaired claimants do not reach the jury in states like Pennsylvania, or in state courts in Chicago and Baltimore, or in any Federal court. To the extent to which this contention is right, however, it illustrates why we desperately need Federal legislation to make sure that money that should go to the sick does not go instead to people who are not sick. This is still another reason why, in Chief Justice Rehnquist's words, the asbestos litigation problem "cries out for a legislative solution." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999).

compensation. In my own state, California, defendants are not jointly liable for "non-economic" loss such as pain and suffering, even though these losses are enormous for elderly plaintiffs with devastating cancers. The more fundamental problem, however, is in finding a solvent defendant to sue. When all of the "usual suspects" have taken refuge in bankruptcy, it becomes much harder to find a viable defendant who can be held liable to pay compensation. Inevitably, and increasingly, some cancer victims find themselves without a claim against any significant solvent defendant.

Congress Must Act To Make the System Work Again

In my view, what is wrong with asbestos litigation is due almost entirely to the huge number of claims filed each year by lawyers who have found people who are not sick. The problem is *not* the cancer cases or the serious asbestosis cases. There are only a few thousand cancer cases filed every year in the entire country and an even smaller number of asbestosis claims involving death or significant impairment. The courts and the defendants could deal with those cases, if they did not have to deal with many tens of thousands of claims brought by people who are not sick. Moreover, I do not believe that we need any new Federal bureaucracy to manage the cancer cases or the advanced asbestosis claims. Courts and juries are at their best in evaluating the claim of a genuinely injured plaintiff, and the number of such claims can easily be handled by our existing civil justice system.

As I show below, the non-malignant claims problem is driven by litigation screening. Traditionally toxic tort litigation follows a medical model: a plaintiff sees a

doctor to treat his illness or injury and then is referred to, or otherwise finds, a lawyer. Litigation screening substitutes an entrepreneurial model: the lawyer recruits the plaintiff – who usually feels fine, has no symptoms or impairment, and is unaware of any "injury" – and sends him to a screening company for an x-ray. The question is, what features of asbestos litigation have contributed most to this shift to an entrepreneurial model? I focus on three: the failure of courts to enforce the principle that a person should not have a tort claim unless he is "injured"; interstate forum shopping, that allows these claims to flow to pro-plaintiff courthouses with no connection to the plaintiff or the case; and consolidations that are intended to force the settlement of cases whether or not they have merit under state law.

Litigation Screening: The Driving Force

The engine that drives the filing of non-malignant cases is litigation screening. The Manville Trust estimates that as many as 90% of non-cancer claims are generated through screenings.[55/] People who are found, as a result of litigation screenings, to have what may seem to be some sign of a non-malignant condition, are often forced by the statute of limitations to file lawsuits before they are really sick. This can come back to haunt individuals who later develop cancer, because some states still maintain a "single disease" rule, which precludes a second lawsuit just when the individual is facing a serious injury and needs to provide for his family.

[55/] Letter from David Austern, General Counsel of Manville Trust, to Joseph Rice (Aug. 8, 2002) and exhibits (Exhibit C hereto).

Litigation screenings have absolutely nothing to do with medicine – they are a device for recruiting clients.[56] Internet advertisements invite readers to "Find out if YOU have MILLION DOLLAR LUNGS!" while newspaper ads warn readers not to delay, reporting that "[b]ased upon recent national information, it is our belief that workers have only a limited time remaining in which to file cases against the manufacturers."[57] When participants arrive for a screening, they often must sign a retainer agreement before receiving their "free x-ray."[58]

Participants at many screenings never even meet with a doctor: a technician takes the x-ray, which is then sent to a doctor, whose report is sent in turn to the lawyer who arranged for the screening.[59] Moreover, if the doctor does not give the lawyer the right answer, the lawyer can get a second opinion, or a third, or a fourth … as many as it takes.[60] Dr. David Egilman of Brown University, who regularly testifies as an expert for

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[56] As one plaintiffs' law firm admitted in 2000: [T]he sole purpose for . . . asbestos screening programs is in anticipation of future litigation against asbestos manufacturers . . . . [T]he entire screening process from the moment [the law firm] becomes involved is geared toward collecting evidence for future asbestos litigation." Brief of Appellants, *In re Asbestos Products Liability Litigation*, Nos. 98-1166 and 98-1165 (3d Cir. Mar. 21, 2000), at 19.

[57] See Newspaper Advertisement for the Law Office Wilson & Bailey and for Shinaberry, Meade & Venezia, L.C. These and other advertisements for litigation screenings are collected at exhibit H(2).

[58] See Deposition of Kenneth Werner, October 2, 2000, *In Re Asbestos Products Liability Litigation,* MDL 875 (E.D. Pa.), at 200; Deposition of Charles B. Kemeny, May 14, 1997, *In re Asbestos Products Liability Litigation*, MDL 875 (E.D. Pa.), at 225, 230. These depositions are attached hereto as Exhibit H(3).

[59] See Werner Dep., *supra* note 58, at 211-12, 225; see also *Adams v. Harron*, 191 F.3d 447, 1999 WL 710326 (4th Cir. 1999) (unpublished per curiam opinion) (noting that workers never even saw the doctors who reviewed their x-rays). This detached, impersonal arrangement means that no doctor-patient relationship is formed. And when doctors miss indications of possible lung cancer in their hurried reviews of x-rays, or fail to make sure that workers are informed of a serious diagnosis, workers have no recourse to malpractice. *Adams*, 1999 WL 710326.

[60] Not that it is usually hard to get a satisfactory opinion from the first doctor who reads an x-ray. One doctor who has evaluated about 14,000 individuals for two different screening companies admitted under oath that he has no experience in diagnosing asbestosis, and that he is not even practicing medicine. That doctor has concluded that every single person he has evaluated – all 14,000 – have asbestosis! Deposition of Dr. Gregory A. Nayden, March 28, 2002, *Bentley v. Crane Co.*, No. 92-7655 (Cir. Ct. Jasper County, Miss.), at 164-65.

plaintiffs, including for my firm, said in a recent letter to the American Journal of Industrial Medicine, "I was amazed to discover, that in some of the screenings, the worker's X-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one of them."[61] A "slightly positive reading" usually does not even amount to a diagnosis of asbestosis – that requires a real physical examination and a great deal more information than is available from reading X-rays taken en masse in mobile vans.[62] Rather, the reader of the X-ray merely concludes that the x-ray is "consistent with" asbestosis.[63]

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[61] David Egilman, Letter, *Asbestos Screenings*, 42 AM. J. INDUS. MED. 163 (2002) (Exhibit H(3) hereto).

[62] American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 AM. REV. RESPIRATORY DISEASE 363, 363-68 (1986).

[63] Unfortunately, these x-ray readings were "consistent with" numerous other causes as well; many of these plaintiffs did not have any physiological change caused by asbestos, and most were not suffering from the symptoms of an asbestos injury. One study reviewed the chest x-rays of more than 700 workers who had undergone a medical screening in the 1980s. More than 60% of the workers (440 in total) had gone on to file lawsuits, claiming that they had x-ray results consistent with an asbestos-related condition. Upon closer scrutiny, however, the researchers concluded that only eleven or sixteen of the workers truly had conditions that were consistent with asbestos exposure. "The vast majority of the abnormalities found were nonoccupational in origin and consisted of conditions one might expect in an aged population. Prevalent nonoccupationally related conditions included healed tuberculosis, histoplasmosis, emphysema" and so on. R.B. Reger *et al.*, *Cases of Alleged Asbestos-Related Disease: a Radiologic Re-Evaluation*, 32 J. OCCUPATIONAL MED. 1088, 1089 (Nov. 1990).

The results of the Reger study were shocking, but a sizable portion of the population has lung conditions that could be diagnosed as asbestosis unless care is taken in the evaluation. There are more than 150 types or causes of interstitial lung disease, many of which present similarly on x-rays. Marvin I. Schwartz, *Approach to the Understanding, Diagnosis, Management of Interstitial Lung Disease, in* INTERSTITIAL LUNG DISEASE 1, 4-5 table 1-1 (Marvin I. Schwartz & Talmadge E. King, eds. 1998). One study found that 11% of the participants without occupational exposure to any sort of dust (let alone asbestos) had x-rays showing small opacities in the lungs of at least a 1/0 level on the standard International Labor Organization (ILO) classification regime. See, e.g., David M. Epstein, *et al.*, *Application of ILO Classification to a Population Without Industrial Exposure: Findings To Be Differentiated from Pneumoconiosis*, 142 AJR 53 (1984). Another study found that about a quarter (24.8%) of males between the ages of 55 and 64 in the general population have lung abnormalities that register at least 1/0 on the ILO scale, and the prevalence of such x-ray readings continues to increase with age. Anders J. Zitting, *Prevalence of Radiographic Small Lung Opacities and Pleural Abnormalities in a Representative Adult Population Sample*, 107 Chest 126, 127 (1995).

The results of such screenings are totally unreliable. That is why the court that oversees all federal asbestos litigation now dismisses all claims that are based on a mass screening.[64]

Lawyers and public health advocates debate whether some sort of screening might be appropriate for people exposed to asbestos, or at least to some subset of that population. Since early detection is not helpful in the treatment of asbestosis or pleural changes, screening for non-malignant diseases has no justification, at least for workers that are no longer exposed to asbestos. Moreover, given the current state of medicine, screening is not likely to improve outcomes for mesothelioma. The real debate therefore focuses on screening for lung cancer. I personally believe that a screening program for lung cancer involving the use of high-resolution spiral CT scans is promising, though there is controversy even about that.[65] There is no legitimate scientific doubt, however, that litigation screenings are not calculated to provide real health benefits.

The U.S. Preventive Services Task Force has concluded that "[r]outine screening of asymptomatic persons for lung cancer with chest radiography or sputum cytology is not recommended."[66] That conclusion matches the position of the American Cancer Society.[67] Chest X-rays are simply too inaccurate to be useful in screening

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[64] *In re Asbestos Prods. Liability Litig.*, MDL 875, slip op. at 1-2 (E.D. Pa. Jan. 16, 2002) (Administrative Order No. 8)(attached hereto as exhibit H(1)) (Weiner, J.). The court understood the connection between mass screenings and the bringing of unimpaired claims. It stated: "Oftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future."

[65] The use of spiral CT scans in monitoring regime to detect lung cancer is explored in a brief collection of leading articles in Exhibit I(2) hereto.

[66] U.S. PREVENTIVE SERVICES TASK FORCE, DEPARTMENT OF HEALTH & HUMAN SERVICES, GUIDE TO CLINICAL PREVENTIVE SERVICES 135, 138 (2d ed. 1996) (attached hereto as Exhibit I(1)).

[67] Medical associations' recommendations with regard to general screening for lung cancer are attached hereto as Exhibit I(1). These include: American Cancer Society, *Guidelines on Early Detection of Cancer*,

asymptomatic people for lung cancer.[68] This is true even when they are read by real doctors, practicing medicine, and even when they are appropriately followed up with physical examinations and any necessary additional tests – none of which typically occurs in litigation screening In view of the absence of any real benefit from traditional X-ray screening for lung cancer, the potential harms from such screening cannot be justified. Among other risks, false negative screening results can create a false sense of security that leads people to avoid appropriate medical consultations if symptoms develop; false positives may give rise to unnecessary fear and anxiety and changes in lifestyle; and screened individuals may be exposed to unnecessary and potentially harmful levels of radiation.[69]

Three Key Defects That Encourage the Recruitment of Unimpaired Claims

The flood of asbestos claims involving no physical impairment results from three key defects in the asbestos litigation system.

First, many state courts do not in practice require claimants to show impairment, using objective medical criteria. In almost all states, any tort plaintiff must show that he

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50 CA CANCER J CLIN 34 (2000); American Cancer Society, *Guidelines on Early Detection of Cancer*, 52 CA CANCER J CLIN 8 (2002); and The Association of Occupational & Environmental Clinics, *Asbestos Screening*, at http://www.aoec.org/asbestos-screen.htm; see also Denise R. Aberle *et al.*, *A Consensus Statement of the Society of Thoracic Radiology*, 16 J. THORACIC IMAGING 65 (2001) (noting that "screening for lung cancer is not currently recommended by cancer organizations" and considering use of new technology – computed tomography (CT) – because screening with chest x-rays does not lower lung cancer mortality).

[68] The reason is that even when a lung cancer is found, it is almost always too far advanced to be cured.

[69] On the problems of false negative and false positive results, see U.S. PREVENTIVE SERVICES TASK FORCE, *supra* note 66, at xliii-xliv. See also Egilman, *supra* note 61; ALAN MORRISON, SCREENING IN CHRONIC DISEASE 150-54 (2d ed. 1992) (noting that it is important to implement screening programs with enough "specificity" that "the program will not be swamped with false positives"). Evidence suggests that the companies that conduct litigation screenings flaunt federal and state safety regulations concerning the administration of x-rays. See Werner Dep., *supra* note 58, at 132-33 (acknowledging that Most Health Services, a leading screening company, had never obtained mandatory pre-approval from state agencies before providing x-ray screenings.)

is "harmed" before he can bring an action for "personal injury."[70] In asbestos litigation, only a few state courts rigorously enforce this requirement, Pennsylvania being a leading example.[71] Other federal and state courts have adopted deferral dockets that, in effect, postpone the claims of people who are not sick until they meet certain objective medical criteria.[72] In many states, however, it is difficult for defendants to enforce the theoretically applicable rules at an early stage in the proceedings, and the risk of going to trial, especially in certain plaintiff-friendly jurisdictions in which thousands of asbestos claims are pending, forces defendants to settle claims that would have no merit if examined one-by-one.

Second, the absence of medical criteria is exacerbated by interstate mobility of claims. The existence of this strategic mobility has been forcefully demonstrated by RAND.[73] Claims are routinely brought in states that have no connection with the

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[70] Only five states have published opinions holding that pleural plaques or other asymptomatic conditions constitute an injury or are enough evidence of an injury to reach a jury. See *Werlein v. United States*, 746 F. Supp. 887 (D. Minn. 1990); *Caterinicchio v. Pittsburgh Corning Corp.*, 127 N.J. 428, 605 A.2d 1092 (N.J. 1992); *In re Cuyahoga County Asbestos Cases*, 127 Ohio App. 3d 358, 713 N.E.2d 20 (1998); *McCleary v. Armstrong World Indus., Inc.*, 913 F.2d 257 (5th Cir. 1990) (Texas); *Joyce v. A.C. & S., Inc.*, 785 F.2d 1200 (4th Cir. 1986) (Virginia). Although courts in many states have not specifically addressed whether asymptomatic plaques or asbestosis constitute an injury, all purport to require "harm" as the essential element of an injury that gives rise to a tort claim.

[71] See e.g., *Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996) (asymptomatic pleural thickening is insufficient physical injury to warrant damages); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192-93 (Ky. 1994) (no cause of action accrues until plaintiff has suffered "harmful change" resulting from exposure to asbestos); *Boyd v. Orkin Exterminating Co.*, 381 S.E.2d 295 (Ga. Ct. App. 1989) (non-asbestos case; asymptomatic conditions are insufficient to support fear-of-disease claims).

[72] A 1991 Illinois opinion concerning Cook County's deferral docket noted that courts had established deferral dockets for unimpaired plaintiffs in Baltimore, Milwaukee, Atlanta, Los Angeles, and U.S. District Court's in Hawaii, Connecticut, Northern Oklahoma, and Western New York. *In re Asbestos Cases*, 586 N.E.2d 521 n.4 (Ill. App. 1st Dist. 1991). These deferral dockets vary considerably, but many of them establish firm restrictions that keep claimants from proceeding toward trial unless they have medical evidence of meaningful physical impairment. Just a few weeks ago, the Circuit Court in Baltimore reaffirmed the importance of the deferral docket. The court's order is attached as Exhibit J.

[73] Carroll, *supra* note 6, at 27-34.

plaintiff or the facts of the case because they are perceived as being favorable. Unlike most tort cases, asbestos litigation is truly national in scope.

This strategic mobility has two effects. To begin with, it allows plaintiffs' lawyers to avoid the effect of state efforts to bring asbestos litigation under control. Thus, for example, if Pennsylvania requires functional impairment as a prerequisite for bringing an asbestos claim, Pennsylvania cases will migrate to other jurisdictions, such as West Virginia or Mississippi.[74] Moreover, non-malignant claims in particular accrue value they wouldn't otherwise have because they can find the courthouses with the most favorable procedural practices and most generous juries. In some of these jurisdictions, litigation generally (and asbestos in particular) has become the major economic activity. In Jefferson County, Mississippi, for example, the number of pending asbestos cases (more than 10,000) exceeded the population of the county (9,740).[75] The advantage of bringing asbestos claims in such jurisdictions is illustrated by a $150 million verdict returned last year in Holmes County, Mississippi, in favor of 6 men who had no impairment whatsoever.[76]

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[74] More than 2,500 plaintiff steelworkers from Pennsylvania and other Midwestern industrial states, for example, ended up having their claims filed in Mississippi. They recently filed a malpractice action concerning the settlement that their attorneys negotiated covering their claims and the claims of over 2,500 other plaintiffs. *Huber v. Taylor*, No. 02-0304 (W.D. Pa. Mar. 1, 2002) (First Amended Complaint). And in a recent West Virginia Supreme Court opinion, one justice wrote separately to voice his "profound disquiet," at the possibility that "as many as five thousand plaintiffs" with "NO connection whatsoever with West Virginia" had "migrated [t]here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." *State ex rel. Mobil Corp. v. Gaughan,* No. 30312, slip op. 3-4, *petition for cert. pending* (W.Va. July 5, 2002) (the unreported concurring opinion of J. Maynard in 563 S.E.2d 419 is attached as Exhibit K).

[75] Jerry Mitchell, *Jefferson County Groud Zero for Cases*, JACKSON CLARION-LEDGER, June 17, 2001, at A1.

[76] The plaintiffs did not even contend that they had ever missed even a single day of work on account of their asbestos exposure. Roger Parloff, *The $200 Billion Miscarriage of Justice*, FORTUNE, March 4, 2002 (Exhibit A hereto); see also Carroll, *supra* note 6, at 56.

Third, consolidations in jurisdictions such as West Virginia force settlements of massive numbers of claims brought by people who aren't sick. Some "jumbo consolidations" involve thousands of plaintiffs. Typically, one jury considers the fault of numerous defendants, determining which of their products are defective, when the defendants should have known about the risks of asbestos, and (in some cases) whether defendants should be liable for punitive damages. The jury's decisions then apply to every plaintiff included in the consolidation. Issues pertaining to specific plaintiffs—which products they were exposed to and what injury they have—are saved for subsequent small-group or individual trials, but that rarely matters. That is because defendants usually decide that they can't risk an adverse liability ruling (especially one for punitive damages) that would apply to thousands of plaintiffs, so they settle the whole lot.[77] This system creates an incentive for filing weak claims: plaintiffs typically need do no more than file a rudimentary complaint before the trial on the defendant's liability and the inevitable settlements, so the costs are low for each plaintiff and there is no opportunity to weed out bogus claims.[78]

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[77] One lawyer representing plaintiffs in West Virginia recently argued that no trial format short of a jumbo-consolidation would create "enough leverage on [defendants] to cause them to settle a thousand cases." *In re Asbestos Litig.*, No. 00-Misc.-222 (Cir. Ct. Kanawha County, W.Va. March 16, 2001) (statement of James F. Humphrey), quoted in *Mobil Corp. v. Adkins*, No. 02-132 (S. Ct. July 24, 2002) (Pet. for Writ of Cert.) (Exhibit K hereto), at 29.

[78] For example, since 1989, West Virginia has conducted a series of these jumbo consolidations, involving well over 16,000 claims. These are known in short-hand as the Mon-Mass I, II, & III consolidations, the Kanawha I, II, & III consolidations, and the Brooke Mass consolidation. Now the state Supreme Court has appointed a "Mass Litigation Panel" (MLP) charged with developing and implementing "case management and trial methodologies for resolving" all of the state's pending asbestos cases (at least 8,000, perhaps as many as 25,000) in one fell swoop. See Trial Court Rule (TCR) 26.01 (creating the "Mass Litigation Panel"), and *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369 (W. Va. 2001) (offering guidance on crafting the consolidation plan). Mobil Oil, has filed a petition for certiorari, which is attached as Exhibit K, in an effort to halt the mass consolidation on due process grounds. See *Mobil Corp. v. Adkins*, No. 02-132 (S. Ct. July 24, 2002) (Pet. for Writ of Certiorari). On September 16, 2002, however, the U.S. Supreme Court rejected Mobil's motion to stay the mass trial.

Conclusion

I have no sympathy for asbestos defendants. Many of these companies exposed millions of innocent people to a deadly poison without warning them of the risk to their health, and they should pay for the harm that they did.

I am worried about the working people who will be stricken with asbestos cancers this year and for years into the future. I have devoted most of my professional life to obtaining compensation for those people and their families. I cannot do that, however, if the defendants have been driven into bankruptcy because they have been overwhelmed by the claims of people who were exposed to asbestos but have nothing wrong with them.

Every person who has been exposed to asbestos should have his or her day in court if and when they develop cancer or a non-malignant condition that impairs their breathing. The people who have been exposed, but who are not sick, are the lucky ones. Most of them will never become sick, and that is luckier still. But unless Congress acts now, those who do become sick will suffer a double misfortune – when they contract

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Other states have also conducted mass asbestos trials. Maryland, for example, conducted two mass consolidated trials in the 1990s known as *Abate I* and *Abate II*. Appeals from those two trials resulted in two published opinions: *ACandS, Inc. v. Godwin*, 667 A.2d 116 (Md. 1995), and *A.C & S., Inc. v. Abate*, 710 A.2d 944 (Md. Ct. Spec. App. 1998). In Mississippi, *de facto* consolidations occur through use of the state's liberal joinder rule. In the *Cosey* case, the original complaint was amended several times to include more than 3,400 plaintiffs. Trial court Judge Lamar Pickard conducted one trial, involving 12 plaintiffs, that resulted in a $48.5 million verdict for the plaintiffs. Judge Pickard then pressured the defendants to settle the more than 1,700 remaining claims, or risk facing the same jury for a trial only on the issue of damages. See William N. Eskridge, *Jumbo Consolidations in Asbestos Litigation: Prepared Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Comm. on the Judiciary,* 106th Cong. 93 (1999). Under these circumstances, he informed defense counsel, the verdict would be so huge that they would be unable to post a sufficient bond to take an appeal. The result was a massive settlement of all claims before there was any opportunity to evaluate the plaintiffs' alleged injuries. Since *Cosey*, plaintiffs have filed numerous other mass joinder actions in rural Mississippi counties, including *Noble v. E.H. O'Neill* (4667 plaintiffs), *Bell v. Combustion Engineering* (987 plaintiffs), *Hedrick v. Metropolitan Life Ins. Co.* (2856 plaintiffs), *Abner v. Westinghouse Elec. Corp.* (1123 plaintiffs), *Appleton v. ACandS, Inc.* (89 plaintiffs), *Abercrombie v. Pittsburgh Corning Corp.* (214 plaintiffs), *Barksdale v. Pittsburgh Corning Corp.* (130 plaintiffs). These figures come from the amicus brief of the Mississippi Manufacturers Association in *American Bankers Ins. Co. of Fla. v. Alexander*, filed July 14, 1999.

cancer and again when they fail to receive the compensation they are entitled to because people who aren't sick have taken all the money.

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Statement of Senator Herb Kohl
Asbestos Hearing
Senate Judiciary Committee
September 25, 2002

Mr. Chairman,

Thank you for calling a hearing on the asbestos litigation problem. As we begin to address the problem, I hope that we can all agree on a few major principles. First, the truly sick must be compensated before the unimpaired. Second, those who have been exposed must not lose the right to sue if they get bumped from the front of the line. Third, the number of frivolous lawsuits must be kept to a minimum for the sake of our court system and the companies forced to defend them. Finally, we should try our utmost to respect the workings of our civil justice system while understanding the unique nature of this problem.

We have heard from constituents throughout Wisconsin who are trying to do the right thing about the numerous asbestos lawsuits being brought against them, but are afraid that the potential liability will drive them into bankruptcy. Perhaps worse, those who are truly sick with asbestos-related illnesses are receiving only cents on the dollar for their claims due to the financial difficulties of the defendant companies and the costs of bringing suit. And, there are stories about very sick people waiting for their turn in court behind others who have been exposed, but have not exhibited any symptoms. Simply put, some of the most seriously injured are just not getting their day in court quickly enough.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Sen. Patrick Leahy,
Chairman, Judiciary Committee,
Hearing On Asbestos Litigation
September 25, 2002

Today we will hear from experts, representing all sides in asbestos litigation, to get a better understanding of how asbestos victims, defendants and others fare in the courts. I hope today is the beginning of a bipartisan dialogue that will result in a comprehensive review of the complex and competing issues involved in providing fair and efficient compensation to asbestos victims.

We must begin by acknowledging the root cause of asbestos litigation. For decades, America's labor force was secretly poisoned. Unbeknownst to the men and women who worked in our nation's factories, shipyards, mines and construction sites, the worksite air was laced with a substance so harmful that they could become critically ill by simply breathing, and they risked contaminating their loved ones from their clothes after a hard day's work.

In 1906, England adopted the first labor regulation warning about the health effects of inhaling asbestos. In 1924, a national insurance company studied the health effects of asbestos exposure of Johns-Manville workers and then hid the results. In 1949, the American Medical Association Journal editorialized on the harm from asbestos exposure. In 1989, the Environmental Protection Agency banned asbestos in 3,500 products, only to see industry successfully overturn the ban in the courts. Asbestos – a known carcinogen – is still used today in many products.

Simply put, corporate America has been on notice that asbestos carried significant health risks for its workers and customers. Some corporate executives ignored these warnings and manufactured, mined or used asbestos because it was inexpensive and profitable. As a result, the marketplace has punished more than 50 companies that knew or should have known about the health dangers of asbestos, forcing them into bankruptcy because of their asbestos-related liabilities.

Three thousand Americans die every single year from mesothelioma, a horrible cancer caused only by asbestos. In addition, hundreds of thousands of Americans suffer from other injuries caused by asbestos exposure, including lung cancer, throat cancer, asbestosis and other diseases.

Perhaps the worst part of the asbestos nightmare is that many victims do not know yet that they will get sick. That is because of the long latency period for many asbestos-related diseases. Some cancers may take 30 or 40 years to fully develop. During that time, the asbestos illness just sits in the victim like a ticking time bomb.

Unfortunately, the asbestos time bomb is ticking in the bodies of thousands of innocent victims. Approximately 120 million Americans have been or continue to be exposed to asbestos. With the long latency period for most asbestos-related diseases, simple math tells us that innocent workers and others exposed to asbestos will be suffering for many years to come.

Indeed, asbestos victims who filed claims with the Manville Trust this year were, on average, first exposed to asbestos in 1961. Since asbestos production in the United States did not slow down until well into the 1980s and asbestos is still being used today, that means we have decades to go before we know who is going to be sick. In short, many more Americans will be seeking fair compensation for their asbestos-related injuries for decades.

All of this caused Supreme Court Justice Ruth Bader Ginsberg in the Amchem v. Windsor case to call for legislative intervention. I agree with Justice Ginsburg that Congress can provide a secure, fair and efficient means of compensating victims of asbestos exposure. I believe it is in the national interest to encourage fair and expeditious settlements between companies and asbestos victims. That is why I have convened this hearing, the first full Senate Judiciary Committee hearing on this matter since Justice Ginsburg urged congressional action.

But it will not be easy. It will require a commitment by lawmakers and interested parties to conduct a full and open debate to identify issues and craft possible solutions.

Unfortunately, Congress has yet to conduct that kind of debate. The past failed efforts at legislative solutions were thinly veiled attempts by some to avoid accountability for their asbestos responsibilities through what they euphemistically call national "tort reform." The lesson to learn from the past is that any compensation plan must be fair to asbestos victims and their families. I applaud the business leaders who met with me recently for their recognition that victims come first in any alternative compensation system.

This hearing is a first step in what I hope to be an honest and constructive debate. I for one am open to finding creative ways to devise a fair and efficient system for asbestos claims. As Senator DeWine and I have attempted to prove in our bipartisan asbestos tax legislation, encouraging fair settlements is a win-win situation for businesses and victims. I thank Chairman Baucus and Senator Grassley for including our legislation in their small business tax package to be considered soon by the Finance Committee.

Senator Hatch recently wrote to me that he wished to work in this same bipartisan spirit on asbestos litigation issues, and not to include controversial tort reform proposals in this debate. I am hopeful that we can move forward in that spirit.

For any proposal to work, it will take the good faith efforts of all stakeholders. Workers, industry and victims will have to come to the table for any solution to succeed.

Moreover, we will need full participation from the insurance industry. The press reported this month that many insurers have refused to pay claims that were related to the September 11th terrorist attacks, and even threatened to pull business coverage if such claims were filed. We will need the participation and cooperation of the insurance industry to reach a better solution for asbestos litigation.

As the chairman of the Judiciary Committee, I know that the insurance industry enjoys a one-of-a-kind statutory exemption from our antitrust laws. With that special privilege comes a special responsibility to the public. I hope and expect that they will be up to the task.

And I hope that this hearing will start the debate that we need to better understand the current process for compensating those suffering and developing afflictions from asbestos and to consider fair ways to improve it. I look forward to hearing from our expert panelists today on the nature and scope of asbestos litigation.

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Law & Justice

No. 40 August 2002

CLP
CENTER FOR LEGAL POLICY
AT THE MANHATTAN INSTITUTE

Asbestos Litigation: Malignancy in the Courts?

Lester Brickman

Professor Lester Brickman teaches at the Yeshiva University Benjamin N. Cardozo School of Law. His areas of expertise are lawyers' ethics with a focus on lawyers' fees; tort reform, including administrative alternatives to mass tort litigation; and contingency fee reform. He is widely quoted in the press, and his writings have been influential in changing policy with regard to non-refundable retainers and in setting the tone for national debate over tort reform. He has consulted for the US Office of Education, Ford Foundation, National Science Foundation, Council on Legal Education for Professional Responsibility, American Bar Association, and others.

Roger Parloff is a journalist who has been on the staff of The American Lawyer, Inside, *and* Brill's Content. *His work has also appeared in* The New York Times Magazine, Harper's, New York, *the* Wall Street Journal, The New York Times Sunday Book Review, *and* People, *among others. He recently authored a thorough article on the asbestos issue that appeared in the March 4th issue of* Fortune.

INTRODUCTION BY ROGER PARLOFF

While I was preparing for this introduction, I had a disconcerting experience. I learned that essentially every point that I tried to make in my Fortune *article had already been made more convincingly, more comprehensively, and more powerfully ten years earlier in an article in the* Cardozo Law Review *by Professor Lester Brickman. So, although Professor Brickman is an expert in the law and jurisprudence, I am relieved that he does not seem to be personally litigious.*

Please welcome Lester Brickman.

REMARKS OF PROFESSOR LESTER BRICKMAN

As many of you know from reading Roger Parloff's article,[1] about 90,000 new asbestos claims were filed last year. That's approximately triple the number of just two years ago.[2] If asbestos litigation filing rates were an accurate indication of asbestos-related injury, we could conclude that such injuries had reached epidemic proportions. In fact, they haven't. Far from it.

Most injurious exposure to asbestos-containing materials occurred during World War II when the United States undertook the most massive shipbuilding effort in history—an effort that was critical to our success in the war.[3]

The next wave of exposure came during the 1950s and the 1960s, when workers were exposed to asbestos-containing products during their installation at numerous construction sites. However, by 1970, or shortly thereafter, when knowledge of the hazards of the use of asbestos-containing

products became widespread, manufacture of such products pretty much ceased. Significant exposure—from the point of view of injury producing potential—diminished substantially thereafter.

For the principal asbestos-related diseases of asbestosis and mesothelioma[4] to occur, there has to be substantial exposure over a period of time, followed by a ten to forty year latency period, before actual disease manifestation occurs. Given the current ages of the occupational groups that were subjected to high-exposure levels, and their dates of exposure, one would expect that the numbers of new asbestos claims would be declining to a comparative trickle today.

Almost overnight, claimants and witnesses changed their testimony regarding Manville's share of the relevant market decades earlier.

What then accounts for the disconnect between the dates and rates of exposure and the huge increases in recent years in the numbers of claim filings? The answer is simply astounding. But, to understand it, I have to take you first on a whistle-stop tour through Asbestos Litigation Land.

The tour begins in the early 1970s when evidence was discovered that demonstrated that the Johns-Manville Corporation, Raybestos-Manhattan Corporation, and others had conspired decades earlier to suppress information on the hazards of inhaling asbestos in the course of mining and manufacturing asbestos-containing materials.[5] This damning evidence led the judiciary to facilitate asbestos disease claiming, beginning in 1973.[6]

By 1982, when asbestos litigation against Johns-Manville, which mined virtually all of the asbestos used in the United States and was, by far, the leading manufacturer of asbestos-containing materials, had mushroomed to 16,000 claims, Manville, surprising everyone at the time, declared bankruptcy. After Manville entered bankruptcy, every dollar of injury that a jury would attribute to Manville would be heavily discounted. This posed a severe problem for plaintiff attorneys, virtually all of whom, to that point, had concentrated on suing Manville. There then occurred one of the great sea changes in American legal history. Almost overnight, claimants and witnesses changed their testimony regarding Manville's share of the relevant market decades earlier. It plunged from as high as 80% to 25% or less and, by 1990, to 10%,[7] and even less today when the Manville Trust is paying only five cents on the dollar.

It is reasonably clear that this altered testimony was procured by plaintiff lawyers as part of their re-tooling of asbestos litigation. Judges, who probably knew what was occurring, were perhaps tolerant because seriously injured workers deserved compensation. They may have reasoned, at least in these cases, that the end justified the means.

Even today, the process inures. As each asbestos defendant goes bankrupt, there is an immediate and even uncanny change in claimant and witness testimony as to the percentage of that company's products at particular work sites.

Another issue created by the Manville bankruptcy (the biggest player and payer in the industry) was a looming capital shortage. This was partially solved in 1981 when Judge Bazelon held that, for purposes of insurance coverage, every carrier that had ever insured an asbestos-producing company over previous decades during which asbestos-containing products were being made, and every carrier that had insured a company at any point since, up to the time of the litigation, had to kick in policy limits for each and every year in which such policies were in force.[8] This holding was the equivalent of commandeering the government printing press into printing between 50 and 100 billion dollars in currency and putting the bill to the insurance companies. The creation of this enormous pool of insurance capital was seen by the former asbestos manufacturers as their salvation. In fact, it was their doom.

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But for that decision, there would be no asbestos litigation today to speak of. It would have ended long ago when all the available corporate assets had been consumed. Instead, the decision was to have the same effect as the discovery of gold at Sutter's Creek. But, before the rush could be on, a few more steps were necessary.

Most of the post-Manville defendants had ended up in the asbestos products business by purchasing much smaller companies. Had these smaller companies remained independent, then asbestos litigation would have ended long ago, when their assets and insurance proceeds had been consumed. The fortuity of their being bought up by larger companies enabled the courts to apply the doctrine of "successor liability" to multiply the effects of the decision to rewrite insurance coverage.[9] As applied, successor companies not only inherited the liabilities of the acquired companies to the extent of the assets of those acquired companies, but to the extent of the assets of the acquiring companies as well, including their newly-minted insurance coverage. Thus the successor companies were held liable, not only for the acts they did not commit but also for the consequences of the acts of their acquired companies that they were not aware of at the time of the acquisitions and, indeed, of which they could not have been aware.

Having created a pot of gold, the next step in the development of asbestos litigation was to provide a path to the pot that would circumvent a major obstacle—tort law. Tort law, reduced to its paradigm, provides that if A injures B, B can sue A for the extent of his injuries. But, to prevail, B has to prove that A proximately caused the injury. Most asbestos litigation involves claims of exposure to asbestos products 15, 20, 30 or more years earlier at multiple work sites where many different asbestos-containing products were being used. Thus, problems of proof abound in this litigation. Nonetheless, the proximate cause obstacle was swept aside by creative lawyering, resulting in the development of what I termed 10 years ago "special asbestos law."[10] Instead of having to directly prove both exposure to specific products and causation, all that was required was testimony from somebody that Company A's products were used at the work site, plus medical testimony that exposure could cause injury, plus a claim of significant injury,[11] and the case could go to the jury, and the jury could do what juries do. But in adjusting the rules of evidence to meet the exigencies of asbestos cases, that is, in creating a result-driven evidentiary regime for cases where the fullest compensation for serious injury seemed merited, the appellate courts failed to confine the circumstantial hearsay evidence rule that they had created to cases of serious injury. Almost immediately, special asbestos law was applied to cases of dubious injury and ultimately to cases, as we will see, with no injury.

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For some judges, "special asbestos law" needed to be augmented by numerous evidentiary rulings during the course of trials that would further weight the process in favor of the plaintiff. Thousands of such rulings were made which never saw the light of day outside of the courtroom. Let me give you one example. A plaintiff, claiming asbestosis testified, as is typical, that he was short of breath and could no longer work or engage in many of life's activities.[12] During the course of this trial, the judge became ill, and it was necessary to declare a mistrial and conduct a new trial with a different judge and a different jury. During the subsequent trial, a juror who had been seated at the first trial voluntarily came forth and offered to testify that he happened to observe that same plaintiff outside the courtroom and that he exhibited none of the symptoms that he had displayed in the courtroom (of shortness of breath, and so on). Despite the clear relevance and critical importance of this freely volunteered testimony, the judge disallowed it on procedural grounds.

Although there was overwhelming evidence that the plaintiff had suffered no injury, and that he continued to carry on his normal activities, *the jury awarded him a million dollars in compensatory damages and $25 million in punitive damages,* remitted by the judge to $500,000 and $2 million respectively, and somewhat further remitted in an appellate proceeding.

Here was asbestos litigation writ large. A claimant who almost certainly had no asbestos-related disease, no injury, no symptomatology, invoked "special asbestos law" and with additional and critical help from the judge, had been awarded huge sums by a jury.

The circle was now squared. There was a pot of gold, special asbestos law, and the removal of the last impediment posed by tort law, the requirement of evidence of real injury.

There were still obstacles to overcome in the development of modern asbestos litigation. Huge assets had been sequestered, special law created, but, at the rate of 4,000 malignancy claims a year, it would take much too long to accommodate the pecuniary interests of tort lawyers. The universe of claimants had to be expanded.

Perhaps 50% of persons heavily exposed to asbestos over a period of years, develop "pleural plaques," which are deposits of collagen fibers detectable only by x-rays, visible 20 or more years after initial exposures as thickenings of the lining of the lungs.[13] The vast majority of individuals with plaques have no lung impairment and no symptomatology whatsoever. For most, is a totally benign condition. Furthermore, there is no scientific evidence to indicate that having pleural plaques results in any greater likelihood of contracting an asbestos-related disease than others similarly exposed that have not developed pleural plaques. Indeed, a leading pulmonologist that I consulted indicated that someone with pleural plaques has a much lower likelihood of thereafter contracting asbestosis than a similarly exposed individual who does not have pleural plaques.

Despite the fact that there is no scientifically credible evidence that being diagnosed with pleural plaques is an indication, above and beyond the fact of exposure, of any greater likelihood of contracting an asbestos-related disease than if no pleural plaques existed,[14] the condition has been labeled a "disease" in some states (though in other states, such a categorization is rejected.) In other states, pleural plaque claims are denominated as "fear of cancer" claims though, again, there is no credible evidence relating pleural plaques to malignancy. Not surprisingly, claims migrate to those states where compensation is available. However denominated, pleural plaque claims were brought by the thousands and soon billions of dollars in compensation were being paid out to these claimants.

The circle was now squared. There was a pot of gold, special asbestos law, and the removal of the last impediment posed by tort law, the requirement of evidence of real injury.

Tens of thousands of asbestos claims began to inundate the courts, clogging their dockets. To deal with the traffic crisis that they had created, courts decided to build the equivalent of superhighways to accommodate caseload congestion. By use of consolidations, class actions and other aggregative techniques, courts began to dispose of cases by the tens, and then hundreds, and then thousands, in single swoops. This had three effects. First, the defendants confronted "bet the company" scenarios. The possibility existed that a jury in a jurisdiction specially selected by plaintiff's attorneys because of its propensity for awarding huge amounts to plaintiffs, could award millions in compensatory damages per claimant, and more importantly, tens or hundreds of millions in punitive damages collectively. And so, acting rationally, defendant's counsel settled the aggregated claims even though many of them, and later most of them, had little or no merit.

Second, plaintiff lawyers had great incentives to include more and more unimpaired claims since defendants were compelled to settle the aggregated cases.

Third, plaintiff lawyers mobilized. They had learned that the greater the number of claims that they brought, the greater the pressure they put on courts to aggregate them,[15] and the greater the pressure on defendants to settle the aggregated claims irrespective of their merits. In response, they used mobile x-ray vans to do mass screenings and engaged in other techniques to collect clients by the droves.

The strategies adopted by the courts to deal with the consequences of their own decisions were thus perverse.[16] They had the exact opposite of the intended effect. The more the courts aggregated asbestos claims in order to clear their dockets, the more claimants the plaintiff lawyers searched out to refill the pipelines and create new pressures to aggregate more groups of claims.

In addition to understanding how pleural plaque claims have been used to perpetuate a fraud on the civil justice system, comprehending the answer to the question I posed at the outset also requires understanding of the role of asbestosis claims. When any of scores of different dust particles penetrate the lung's forward line of defenses, they can produce inflammation that can lead to a scarring of lung tissue.[17] When it does, the condition is termed interstitial or parenchymal "fibrosis."[18] If the fibrosis is the result of exposure to silica (sand), the condition is termed "silicosis;" if it is the result of exposure to asbestos, it is called "asbestosis." There is no difference in these conditions—only the name is different. Asbestosis in its mildest form causes no breathing impairment and, like pleural plaques, is detectable only by chest x-ray. In more severe cases, it is progressive and debilitating and can lead to death.

Frequently, in asbestos litigation, diagnoses of asbestosis are disputed. Some medical experts hired by plaintiff lawyers virtually always find asbestosis and some hired by defendants rarely find asbestosis. Where does the truth lie? A Federal district court judge substituted court-appointed medical experts for the parties' experts, to examine 65 plaintiffs, each of whom would have been diagnosed by plaintiffs' experts as having asbestosis. The neutral experts found that only 15% had asbestosis and 20% were unimpaired but had pleural plaques. The remaining 65% had no identifiable condition.[19] If this example is characteristic of asbestosis claiming, and there is good reason to believe that it is, then 70% or more of claims currently denominated as asbestosis are simply bogus.

The strategies adopted by the courts to deal with the consequences of their own decisions were thus perverse.[16]

The role of asbestosis claims in asbestos litigation underwent dramatic changes in the mid-1990s. By then it had become clear that all of the so-called traditional defendants would soon go bankrupt. In a desperate attempt to survive, the CCR, an association of 20 of the leading asbestos defendants that had banded together to jointly defend asbestos litigation suits, sought out and entered into a $1.2 billion settlement agreement with the nation's leading plaintiff asbestos law firms (save one). The agreement, known in the trade as *Georgine*, provided that, in exchange for setting up an administrative claiming process for adjudication of all future claims, there would be huge payouts for the lawyers' current inventory of 14,000 claims, including their pleural plaque claims, that would net the lawyers approximately $300 million in fees. This settlement was closely associated with an immediately prior settlement of asbestos claims which netted the plaintiffs lawyers upwards of $300 million in fees.

The critical feature of *Georgine*, indeed the core reason why the defendants sought out the lawyers and agreed to both settlements, was that there was

to be a zero valuation for future pleural plaque claims. While the settlement agreement was later struck down by the United States Supreme Court,[20] it had an almost immediate and immense effect on asbestos claiming.

Plaintiff lawyers began reclassifying their unimpaired pleural plaque claims as asbestosis to defeat the *Georgine* exclusion of pleural claims.[21] For the Manville Trust, set up as part of the Manville bankruptcy, non-malignancy claims, consisting mostly of unimpaired claims, *have quintupled in the last four years.* In response to this cataclysmic increase in claiming, which forced the Manville Trust to decrease its payment rate from 10 cents on the dollar to 5 cents on the dollar (and a further reduction is clearly in line), the Trust began medical audits of the asbestosis claims being submitted by requiring x-rays, which they then sent out to experts for reading. The audit program demonstrated that several of the law firms were consistently using bogus medical evidence.[22] When plaintiff lawyers complained about being required to have to submit x-rays along with their claims, the presiding judge, one of the most sought after federal district court judges in the country by plaintiff lawyers filing certain mass tort actions,[23] instructed the Trust to stop the auditing program and to pay claims as submitted and not subject them to any kind of an auditing procedure. [24]

Effective hourly rates for plaintiff asbestos lawyers range from $1,000 an hour to $25,000 an hour.

The mass screenings of would-be clients was also facilitated by the establishment of entrepreneurial enterprises to administer pulmonary function tests.[25] Given the enormous financial incentives built into the medical evidence production process, it is not surprising that many of these enterprises systemically and deliberately deviate from testing standards in order to produce positive results.[26]

Even when medical evidence is produced by specialized professionals (radiologists who are called "B" Readers to recognize a higher level of skill), financial incentives have often overwhelmed professional standards. It is a fact that different asbestos law firms have different disease mixes that characterize their portfolio of claims. There is considerable evidence that some B-Readers conform their outcomes to the preferences of the lawyers that retain them. So, a B-Reader reading 100 x-rays for Law Firm A might find 95% to show evidence of asbestosis, whereas the same reader, reading the same 100 x-rays for Law Firm B and conforming to their disease mix, might only find a 50% rate of asbestosis.[27]

The engine that drives asbestos litigation is, of course, the contingency fee.[28] *Effective hourly rates for plaintiff asbestos lawyers range from $1,000 an hour to $25,000 an hour.* In some aggregations, the effective hourly rates of return are much higher. Only contingency fees in tobacco exceed these hourly rates.

In theory, lawyers' contingency fees ought to vary according to the degree of risk. At the very least, charging 40% contingency fees in cases utterly devoid of risk (as, for example, where by prior settlement, the lawyer automatically bills defendants for payment of new claims), would appear to clearly violate rules of ethics limiting lawyers' fees to reasonable amounts. In fact, they do not. *This is so because the rules of ethics simply do not apply to fees generated by asbestos lawyers (and, I might add, also do not apply to fees generated for many of these same lawyers wearing their tobacco litigation hats).*

Another example of the exemption of asbestos lawyers from rules of ethics, if not from criminal laws, are the methods used by some lawyers to process the claims of the unimpaired. Once the claimants are recruited by mass screenings and the requisite medical evidence is produced by the B-Readers and other mass medical testing enterprises, the mass processing continues at the law firms where paralegals prepare the clients for deposition.[29] If these clients cannot remember

what products they came in contact with 20 and 30 years ago at multiple and various work sites, as many do not, the paralegal will show them pictures of product labels, instruct them as to which products they are to testify they came in contact with, and then give them written information about those products with instructions to memorize that information, because they are going to take a test—it's called a "deposition"—and if you pass the test, you get money.[30]

In addition, they are told which products they are to testify that they did *not* come in contact with. These, of course, are the products of companies in bankruptcy that are paying too few cents on the dollar.[31] They are also instructed to say that they never saw warning labels on the bags containing the products and are reassured that they are not to worry about being challenged with regard to any feature of their testimony, because the lawyers for the defendants have no way of knowing which products they actually used and, therefore, cannot contest *anything* that they say.[32] Finally, they are instructed what to say with regard to their adverse health condition. Pages and pages of sample symptoms are provided.[33]

In my opinion, previously expressed in the form of an affidavit, this is subornation of perjury. It is also a principal, if not *the* principal, method of processing unimpaired asbestos claims today.

These exemptions, both from the rules of ethics and criminal law, are simply the tip of the iceberg in terms of delineating the influence that these lawyers have come to exert in American society. The final stop, then, in my whistle stop tour is to focus on the leading asbestos litigation lawyers. There is no better indication of their sheer, raw power than the account in the press and elsewhere of how some of these lawyers expressed their opposition to a bill introduced into Congress in late 1998 and re-introduced in early 1999, co-sponsored by more than a 102 Senators and Congressmen that would have set up an administrative process to defer resolution of the claims of "non-sick" persons until and unless they actually developed an asbestos-related disease.[34] As all of us know, the First Amendment to the Constitution of the United States provides that "Congress shall make no law. . . abridging the right of the people peaceably to assemble, and to petition the government for redress of grievances. . ." Note carefully that the First Amendment's prohibitions do not apply to asbestos lawyers, only to Congress (and the States.) When the proposed legislation to remove unimpaired claimants from the litigation process appeared to be generating a head of steam, the leading asbestos lawyers, representing 80% of pending cases, summoned the defendant companies supporting the bill to a series of meetings at which they informed the companies that unless they withdrew their support for the bill and instead, announced their opposition, they would be put out of business in short order. The threat was more than credible. All of the defendant companies, save one, capitulated.

In addition, they are told which products they are to testify that they did not *come in contact with. These, of course, are the products of companies in bankruptcy that are paying too few cents on the dollar.*[31]

I have searched historical records in an attempt to identify groups in U.S. history who have amassed wealth and power comparable to that of the contingency fee lawyers involved in the asbestos and tobacco litigations. The closest approximation I have been able to come up with are the Robber Barons of the late Nineteenth Century. The powers and excesses of the Robber Barons were ultimately curbed by legislative and judicial action. Today's version exercises far more power than the Goulds and Fisks, or even the Morgans and Rockefellers, ever did. The reality is that our modern-day robber barons, armed with their riches and shielding their naked power from public view with a little help from Hollywood, have come to exercise dominant control over both legislative and judicial processes.

Now that I have completed my whistle stop tour of Asbestos Litigation Land, I can answer the question that I posed at the outset: Why is asbestos litigation increasing at a time when medical science says it should be decreasing?

It is because asbestos litigation today has come to consist, mainly, of non-sick people, suing in jurisdictions where asbestos litigation is one of the main industries supporting the local economy,[35] claiming compensation for non-existent injuries, often testifying according to prepared scripts with perjurious contents,[36] and often supported by specious medical evidence.[37]

On the basis of the empirical data and analysis set forth in the articles I have published as well as other published and unpublished materials, it is my opinion that asbestos litigation today is, for the most part, a massively fraudulent enterprise that can rightfully take its place among the pantheon of such great American swindles as the Yazoo land frauds, Credit Mobilier, and Teapot Dome. The issues posed by asbestos litigation, as practiced today, in my judgment, should be seen less as matters of civil justice reform than as matters of law enforcement. Some years ago, a Federal judge, in addressing the S&L scandals and focusing on the role of professionals in the many fraudulent schemes that were uncovered, asked rhetorically, "Where were the lawyers?" Today, I answer, I think we know where the lawyers are. But where are the prosecutors?

AUTHOR'S NOTE

Empirical data, statements and conclusions set forth in this presentation are largely based upon three articles that I have written on asbestos litigation: *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 Cardozo L. Rev. 1819 (1992) (hereinafter *"Asbestos Litigation Crisis"); The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 Cardozo L. Rev. 1891 (1992) (hereinafter *"Asbestos Claims Management Proposal"*); and *Lawyers' Ethics and Fiduciary Obligation In The Brave New World of Aggregative Litigation,* 26 William & Mary Environmental Law & Policy Review 243, 271-298 (2001) (hereinafter *"Aggregative Litigation"*). As noted in *Asbestos Litigation Crisis*, some of the data that I relied on for my initial article "was obtained during the course of consulting work on contingency fees and punitive damages that I did for an asbestos defendant; however most of the unpublished empirical data which I refer[ed] to was obtained as part of my research for the Article.... [B]ecause of this and other opportunities I... had to 'extensively review empirical data, case files and other materials' on asbestos litigation, the Administrative Conference of the United States [an executive branch agency of the U.S. government] asked me to 'draft a proposed administrative solution to the asbestos litigation crisis which the panelists at [a] colloquy [that I organized for the Conference] were invited to criticize." *Id.* at 1819, quoting from Introduction of Lester Brickman by the Chairmen of the Administrative Conference at the colloquy titled: *An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, Transcript of the Administrative Conference of the United States (Oct. 31, 1991).

In editing this presentation for publication, I have added citations to supporting materials where I thought that would be helpful to the reader. Those seeking a more detailed understanding of asbestos litigation, however, may wish to read the articles I have listed above.

END NOTES

1. Roger Parloff, "Asbestos lawyers are pitting plaintiffs who aren't sick against companies that never made the stuff—and extracting billions for themselves," Fortune, March 4, 2002 at 155.

2. Certain industries have reported huge increases in filing rates. In the past two years, for example, there were increases of 721% in the textile industry, 296% in the pulp and paper industry, and 284% in the food and beverage industry. *Id.*

3. Convincing evidence exists that both the Navy Department and the White House knew that many of the shipyard workers, who were practically bathed in the asbestos installation that they were installing inside the ships, would contract deadly diseases but *c'est la guerre*. In war time, there are casualties and the U.S. Government apparently considered shipyard workers to be on the front lines. *Asbestos Litigation Crisis* at 1884-86.

4. For a description of mesothelioma, *see Asbestos Litigation Crisis* at 1842-44. It is commonly thought that mesothelioma, a particularly virulent malignancy of the pleural, pericardial and peritoneal cavities, is caused exclusively by exposure to asbestos. *See, e.g.*, O'Brien v. National Gypsum, 944 F. 2d. 69 (2d Cir. 1991). In fact, approximately 20% of malignant mesotheliomas are not caused by asbestos exposure. Michele Carbone, Robert A. Kratke & Joseph R. Testa, The Pathogenesis of Mesothelioma, 29 Seminars in Oncology 2 (Feb. 2002); Mark Britton, The Epidemiology of Mesothelima, 29 Seminars in Oncology 18 (Feb. 2002).

5. *See* Paul Brodeur, OUTRAGEOUS MISCONDUCT (1985).

6. *See* Borel v. Fiberboard Corp., 443 F. 2d. 1076 (5th Cir. 1973).

7. *See Asbestos Claims Management Proposal* at 1894 n. 13; *Aggregative Litigation* at 277 n. 105.

8. Keene Corp. v. Ins. Co. of North America (INA), 667 F. 2d 1034 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 951 (1982). *See Asbestos Litigation Crisis* at 1832 n. 51.

9. *Asbestos Litigation Crisis* at 1881-84.

10. *Id.* at 1840-52.

11. *Aggregative Litigation* at 294-95.

12. *See* Dunn v. Owens-Corning Fiberglas, 774 F. Supp. 929 (D.V.I. 1991); *see also Asbestos Litigation Crisis* at 1844-47.

13. *Asbestos Litigation Crisis* at 1852; *see also* Paul Sterk, "Imaging of Pleural Plaque, Thickening and Tumors," downloaded from UpToDate at www.uptodate.com, last visited April 30, 2002.

14. In a study of power plant workers, *See* Dr. Joseph M. Miller, Benign Exposure to Asbestos Among Power Plant Workers (1990) (unpublished), 172 workers were identified who had had significant exposure to asbestos, 19 of whom retired, 9 had died, 30 declined to enter the study and 114 were still alive, employed at the plant and were agreeable to participating in the study. Eighty percent had exceeded 30 years of latency and the mean latency of all participants was 32 years. The 114 workers were monitored annually from 1982 to 1990. Approximately 43 percent were found to have pleural plaques. Not one had asbestosis. Ninety five percent had no impaired lung function. Six of the seven individuals with slight to moderate reduction in lung function were heavy smokers, whose impairments were not characteristic of asbestosis, and the seventh was an ex-smoker. There was no significant difference in the mean values on lung performance tests between those with pleural plaques and those not found with pleural plaques. Of the 172 workers identified in 1982, 25 deaths had been recorded by

1990. None died of mesothelioma or asbestosis. Two who were heavy cigarette smokers died of lung cancer.

Included in the study was a review of other studies of power plant workers. These other studies showed an increased prevalence of pleural plaques but no significant difference in clinical symptoms or in lung function when compared to a control group. The study concluded: Despite the "... high prevalence of pleural plaques..., the absence of clinical asbestosis, the lack of excess lung cancer and no finding of mesothelioma provide reasonable evidence of low risk to those workers during a full occupational lifespan.... [T]he finding of no significant difference in mean [lung function] among those with and without plaques appear to absolve plaques as a cause of the minimal impairment of respiratory function noted in a few smokers." *Id.* at 7-9. "Only when asbestosis was also detected in association with plaques did the risk of cancer increase, thus signifying heavier asbestos exposure as the cause of increased risk, rather than the mere presence of pleural plaques." *Id.* at 10.

15. *Aggregative Litigation* at 257.

16. *Asbestos Litigation* Crisis at 1826-27.

17. *See* Ken Donaldson & C. Lang Tran, Inflammation Caused by Particles and Fibers, 14 Inhalation Toxicology 5 (2002).

18. *Asbestos Litigation Crisis* at 1846 n. 112.

19. *Id.* at 1847 n. 120.

20. Amchem Products Inc. v. Windsor, 521 U.S. 591 (1997), *aff'd* 83 F. 3d 610 (3rd Cir. 1996).

21. *Aggregative Litigation* at 284 n.112.

22. *Id.* at 286-92.

23. *Id.* at 264.

24. *Id.* at 290-91.

25. *Id.* at 273 n. 95, 282 n. 110.

26. *Id.* at 282 nn. 110-111.

27. *Id.* at 293 n. 141.

28. *Asbestos Litigation Crisis* at 1834.

29. Aggregative Litigation at 273-81.

30. *Id.*

31. *Id.* at 276-77.

32. *Id.*

33. *Id.* at 278-81.

34. *Id.* at 246 n. 13.

35. *Asbestos Litigation Crisis* at 1827; for a discussion of the role of forum shopping in mass tort litigation , *see Aggregative Litigation* at 258-65.

36. *Aggregative Litigation* at 275-81. For a description of the type of testimony that might emanate from the use of such scripts, *see Asbestos Litigation Crisis* at 1848 n. 125.

37. *Aggregative Litigation* at 281-293.

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Statement of the
NATIONAL ASSOCIATION OF MANUFACTURERS

before the
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Regarding
ASBESTOS LITIGATION

SEPTEMBER 25, 2002

Mr. Chairman, members of the Senate Committee on the Judiciary, thank you for holding this hearing on the problems – indeed, it's a crisis – surrounding asbestos litigation, and for holding the hearing record open for additional statements.

The National Association of Manufacturers is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

The NAM also chairs the Asbestos Alliance, a coalition of more than 200 organizations seeking a legislative solution to the asbestos litigation crisis. To make the situation clear, however, this statement reflects the views solely of the National Association of Manufacturers; the Asbestos Alliance will submit its own comments under separate cover.

The NAM appreciates that the focus for this hearing is to help the committee to learn about the problems in current asbestos litigation and how those problems have spilled over and into the general U.S. economy. As others have and will continue to

highlight for the record the legal problems of asbestos litigation, this statement will concentrate on the economic spill-over effects.

The spill-over effects are startling. A study by the RAND Institute for Civil Justice that was released on September 25, 2002, (Asbestos Litigation Costs and Compensation: An Interim Report. See www.rand.org.) finds that asbestos litigation affects defendants in 75 of the 83 U.S. Standard Industrial Classification codes, or 90 percent of the U.S. economy. More than 600,000 claims were filed by the end of 2000 at a cost of more than $54 billion. Furthermore, RAND reports $10 billion in reduced investment and a reduction in employment of 138,000.

The future looks even bleaker. In 2001, the Manville Trust alone received some 90,000 claims. The RAND study estimates that total future costs of asbestos litigation will be between $200 billion and $265 billion. *Best's Review*, which analyzes the insurance industry, estimated in September 2001 that future costs would be $275 billion. RAND predicts that "eventually" up to $33 billion in investment will be lost and 423,000 jobs will not be created as a result of asbestos litigation.

Asbestos Exposure Was Widespread. The growing cost and breadth of asbestos litigation are not due to serious asbestos-related diseases such as cancer. As the testimony before the committee showed, cancer claims are a small and declining percentage of all asbestos cases. Asbestos litigation is out of control because some states have allowed lawsuits on behalf of people, arguably exposed to asbestos, who are not sick and who may never become sick. Many of the defendants, moreover, are companies that have, at best, only a tenuous relationship with the harm being alleged but are forced to settle rather than try to defend themselves in these states.

Asbestos was broadly available and used in a wide variety of products during most of the 20th century, exposing millions of Americans. Many may have physical changes that are a marker of exposure, but do not have symptoms, and these changes in and of themselves would not be a concern but for the mass screenings that some plaintiffs' lawyers use to solicit clients. Most people exposed to asbestos will never get sick. If, however, everyone arguably exposed to asbestos has a cause of action, the pool of potential plaintiffs is practically endless. Today, these people are being aggressively solicited by some in the plaintiffs' trial bar, and the resulting explosion in claims filed on behalf of these "unimpaired" claimants threatens both the health of the economy and the ability of those who are sick to obtain fair and timely compensation for their injuries.

Everyone agrees that the people who are truly sick – cancer victims and those with impairing non-cancer diseases – should be compensated. RAND reports, however, that "a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily living." This conclusion is consistent with RAND's finding that a surge in non-cancer claims accounts for the sharp increase in annual filings that has occurred in recent years. Indeed, the proportion of non-cancer claims rose from about 80 percent of the total through the mid 1980s to 90 percent by the late 1990s. Thus, the explosion in annual filings is not due to a sudden increase in asbestos diseases, but to an increase in the efficiency with which part of the plaintiffs' trial bar generates claims from the pool of people who are exposed but not sick.

Economic Victims Should Be Included. Asbestos litigation has forced more than 60 companies into bankruptcy. Moreover, the explosion in non-cancer claims in the

past several years has led to a bankruptcy epidemic – at least 22 asbestos defendants have been pushed into bankruptcy since January 2000 alone. These bankruptcies have, in turn, spawned a search for other solvent companies to sue. These new defendants have an increasingly peripheral connection to true liability. The bankruptcies and the octopus-like reach for new defendants create new victims and inflict additional harm on those who are sick. The sick are first harmed when their asbestos exposure results in cancer or another serious disease, and again when the legal system fails to provide fair compensation to them and their families.

One NAM member company subsidiary that installed asbestos-containing products was recently hit with a verdict that was more money than the company had earned cumulatively over its entire 40-year history. The plaintiffs were not sick.

The list of victims begins, of course, with those who have contracted deadly cancers, such as mesothelioma, as a result of their exposure to asbestos. These people deserve compensation but they are increasingly unlikely to obtain it, because bankruptcy is making it ever harder to find a responsible defendant that is viable and able to pay damages. If they have won a judgment against a bankrupt company, the bankruptcy code makes it unlikely that they will see their full pay-out, even after waiting for years.

While the sick come first, the list of victims does not end there. Many employees of companies drawn into asbestos litigation have invested much of their life savings in company stock. Even a rumor of potential asbestos liability can result in plummeting stock prices, and bankruptcy usually reduces stock values to near zero. With the widely expressed concerns over the ill effects of the accounting-scandal-tainted companies on the value of 401(k) holdings, the NAM hopes that Congress will remember that asbestos

liability, inflated by claims from the non-sick, has caused even more widespread harm to shareholders.

Other victims of current litigation rules include workers who are laid off or whose wages are cut or frozen as their company slides into bankruptcy. Along with retirees, these people are truly the proverbial "innocent bystanders" of the asbestos litigation crisis. Their lives are disrupted, or even destroyed, through no fault of their own and, one might argue, for no good cause.

The list of victims goes on to include communities that depend on asbestos defendants for their economic and charitable well-being. Manufacturers and other corporate citizens are often the largest contributors to local charities where they have operations. This is especially true in small towns and rural areas. In addition, when companies declare bankruptcy, the surrounding communities stand to lose billions of dollars in investments and hundreds of thousands of jobs. Tax collections, as well, are drastically reduced when a company with a major local and/or state presence declares bankruptcy, further adversely affecting the community quality of life. All of these macro effects are heightened when once considers the effect of lost taxes and contributions from worker wages, as well as a need for additional public outlays.

For the company involved, bankruptcy is not the panacea some believe it to be. There is a credit committee that oversees and directs corporate activities, including payments. These decisions are subject to approval by the bankruptcy court. As importantly, access to capital is limited, as potential creditors have to weigh the risk of being repaid or not. This process does not always coincide with the long-term interests of the company – or its employees and retirees – and is what complicates the pay-out of

unsecured creditors, such as those people with asbestos disease who have already reached a settlement or had a judgment in their favor.

Even if a targeted defendant company is able to emerge from bankruptcy, its operations may be disrupted for many years. While the bankruptcy bureaucracy and procedures may be gone, access to capital for expansion, research and development, product promotion and other activities beneficial to long-term survival remains limited due to the stigma of having sought bankruptcy protection. Complicating matters, increased global competition also means that domestic manufacturers are not able to raise their prices to cover the increased costs of litigation and settlements.

Making the situation worse, the Small Business Survival Committee reported in May 2002 that the number of bankruptcies has meant that more and more small businesses are being named as asbestos defendants. The small-business sector is the largest generator of jobs in the economy, making the implications of this development all the more ominous.

The United States is struggling to recover from a manufacturing-led recession. Moreover, the manufacturing sector has lagged behind other sectors to the extent that there has been any recovery. The events of September 11, 2001, and their ensuing economic aftermath have not been helpful, but even these estimates are dwarfed by the costs of asbestos litigation. The economic spill-over from mounting asbestos liability – at more than $200 billion in present value – is, perhaps, even more hurtful.

Thus far, manufacturers in general have borne the brunt of asbestos litigation costs. These costs are, in effect, an anchor hindering the ability of manufacturing to come up for air. Since manufacturing supports six jobs in other sectors for every

$1 million in final sales, costs related to asbestos litigation will further hinder economic recovery and the creation or restoration of jobs. As noted above, RAND attributes the future reduction in employment as a result of asbestos litigation at 423,000. The indirect, albeit real, loss of jobs in other sectors resulting from an asbestos-related decrease in manufacturing employment would place this figure in the millions.

Conclusion. As noted above, the loose litigation rules in just a few states have resulted in profound, national economic spill-over effects. Thus, unless all states act in a similar manner, the economic problems spawned by asbestos litigation cannot be solved by the states. In addition, twice in the past five years the Supreme Court has said that the problem of asbestos litigation is so pervasive, widespread and out of control that Congress needs to act to resolve the asbestos litigation crisis. This is a job that cannot be done by the courts. As former U.S. Solicitor General Walter Dellinger testified, this issue must be resolved by Congress.

The membership of the NAM is united on the fact that litigation over asbestos is out of control and agrees with the United States Supreme Court that Congress needs to address this situation. This hearing was called to explore the problems caused by asbestos litigation and the extent to which it has had a negative effect on the overall economy rather than to discuss specific legislative proposals or solutions. The hearing showed unmistakably that the problems caused by asbestos litigation are real, severe and broad in their impact. The NAM looks forward to working with the members of the committee in shaping a consensus answer as to what Congress can and should do to stem the consequences of overly extensive asbestos litigation.

STATEMENT OF SENATOR E. BENJAMIN NELSON
Senate Judiciary Committee
Hearing on Asbestos Litigation

September 25, 2002

Good morning Mr. Chairman and members of the Committee. I want to thank you for the opportunity to appear before the Committee today as we discuss important issues regarding asbestos litigation.

I also want to thank you, Mr. Chairman and Senator Hatch, for your leadership in bringing together a group of individuals who can share information that may lead to a legislative solution regarding the many issues surrounding asbestos litigation. These issues are a growing concern to people in my state, and I suspect that the members of the Committee have seen the same increase in letters and calls from constituents as I have.

In the early 1970s, lawsuits against asbestos manufacturers opened the door for victims suffering from asbestos-related diseases to be justly compensated for their injuries. When Johns-Manville – the largest asbestos manufacturer – filed for bankruptcy in 1982, there were less than 20,000 asbestos cases, most on behalf of individuals with severe asbestosis or mesothelioma – a vicious asbestos-related cancer. The system worked – sick people and their families were given the financial security they deserved.

But the system isn't working anymore. It's been overwhelmed by a flood of cases; some from individuals who are not yet sick, but could potentially get sick in the future. We don't want to prevent these individuals from recovering down the road, but we also need to work toward allowing those who are sick now, to recover now. With the current docket load, that isn't happening. Over 90,000 new asbestos lawsuits were filed in 2001, representing an increase of 30,000 from the previous year. However, the American Academy of Actuaries estimates that there are only about 2,000 new mesothelioma cases filed each year; another 2,000 to 3,000 cancer cases that are likely attributable to asbestos; and a smaller number of serious asbestosis cases. As a result, we must work toward finding a way to address the lawsuits of seriously ill individuals immediately, without eliminating the ability for those who may become sick in the future from having their case addressed at the appropriate time.

The unfortunate result of these tens of thousands of lawsuits is that people who are seriously sick and dying from asbestos must wait longer to recover less money than they deserve – if they can recover anything at all. After transaction costs and fees for both plaintiff and defense lawyers, only about one-third of the money spent on asbestos litigation reaches the claimants. Moreover, as insurance is depleted and an increasing number of asbestos defendants declare bankruptcy, it is inevitable that many asbestos victims who develop cancer in the future will go uncompensated.

One such victim from my state was Val Johns. Mr. Johns was born and lived his whole life in Bloomfield, Nebraska, in the northeast corner of the state. He and his wife Sharon

raised three children there – two still live in the area and have their own families now. For 19 years before his death, Mr. John's maintained the town cemetery.

He served in the US Navy from 1957-60 as an electrician, and he was exposed to asbestos pipe insulation aboard the destroyer USS Charles Ware. Mr. Johns was diagnosed with malignant mesothelioma in January 2000 and passed away on November 5, 2001. Mr. Johns filed a lawsuit to pay his substantial medical bills and to do something for his wife to support her after his death, but all but one of the companies that made the asbestos he was exposed to were already bankrupt. As a result, the settlement for his family was a fraction of what it should have been.

The economic fallout from this situation extends beyond sick victims. Because every company that manufactured asbestos is now bankrupt, plaintiffs have been forced to seek alternative defendants to take their place. According to the RAND Institute for Civil Justice, 300 firms were listed as defendants in asbestos cases in 1983. By 2002, RAND estimates that more than 6,000 independent entities have been named as asbestos-liability defendants. Many of these new defendants are small businesses, located in every community, with little or no connection to asbestos.

I've heard from scores of small businesses in my state – local hardware stores, plumbing contractors, auto parts dealers, lumber yards. None of these businesses manufactured asbestos; none sold or installed asbestos products; but these business and the jobs they create are at stake. They are now afraid that as primary asbestos defendants declare bankruptcy, they will be next in line for the thousands of cases being filed and their businesses will not survive.

As the number of asbestos claims filed each year has nearly tripled in the last five years, the pace of asbestos-related bankruptcies has also accelerated dramatically. Since 1998, more companies have filed for bankruptcy protection than in the previous 20 years combined; and in the first seven months of 2002, 12 companies facing significant asbestos liability went bankrupt – more than in any other three-year period before 1999. Firms declaring bankruptcy since 1998 employed more than 120,000 workers prior to their filing, many of whom were significantly invested in their company's stock, pension and 401(k) plans.

According to *Fortune* magazine, for example, "[a]t the time of Federal-Mogul's bankruptcy filing [last year], employees held 16% of the company's stock, which had lost 99% of its value since January 1999." It was reported that Federal-Mogul employees lost over $800 million in their 401(k). Similarly, "[a]bout 14% of Owens Corning's shares – which lost 97% of their value in the two years before its filing – were owned by employees."

I think we can all agree that those individuals with legal claims who are very sick need to be taken care of in the most timely and equitable manner possible. That should be our number one priority. We must also work to ensure that those who are not sick now, but may become sick in the future are not precluded from recovery, and that there are still funds available for such a recovery. And finally, we must consider the unpredictable

economic impact the immense amount of pending litigation could have on secondary businesses and companies. The costs associated with increased bankruptcy filings to business owners, employees, and retirees would be devastating. In order to prevent future Enron disasters for our older workers nearing retirement, we must address the very real potential threat and adverse impact this type of litigation can have on our economy if we do not address these inequities now. We cannot afford to see more 401(k) and pension plans become worthless.

I am a strong believer that every American has a right to their day in court. I also believe that people dying of asbestos-related diseases deserve just compensation for themselves and their families. Achieving the latter does not require a change in our tort system – it requires the restoration of the system's true purpose of providing relief to those who need it most.

Mr. Chairman, I plan to work with you and the Committee for the remainder of the year and in the next Congress to resolve these issues in a fair and comprehensive manner.

Thank you.

Rutland Daily Herald ◆ Wednesday, September 25, 2002

SEP.25.2002 TO:NEWSBRIEF NO.249 P.1

Homeland security for veterans

Commentary

Ronald J. Gascon

There have been a number of reports in the media recently that Senator Leahy is preparing to hold a hearing on asbestos lawsuits later this month. The press usually looks at asbestos and asbestos litigation as a problem for business. But that's only one part of the story.

The untold story is the struggle of many veterans who are struggling not only from asbestos exposure itself, but also for assistance in a legal system that is broken and in need of repair.

The asbestos ordeal is a shining example of the nation's failure to watch out for our veterans. Beginning around World War II, the Navy mandated the use of asbestos on ships as insulation and a fire retardant. Its use continued through the 1960s, even though the Navy knew the dangers.

Many of the men who served on these ships have since gotten sick with fatal diseases like mesothelioma. These diseases carry high costs for medical treatment and lost wages.

Military veterans have a couple of options to get help with these costs. They can include filing claims through the Veterans Affairs Department (the VA), or filing a claim in a civil court of law. All veterans know that the VA can be slow, cumbersome, and unresponsive. But, the civil claims process can be even worse.

Sick victims who seek compensation through the courts are too often forced to wait too long for *too* little.

While we've all heard of multi-million dollar asbestos settlements, unfortunately, too often the money doesn't get to those who need it when they need it.

This is true for a number of reasons.

The first is time. A panel convened by Supreme Court Chief Justice William Rehnquist found that because there are so many asbestos claims, suits can take nearly twice as long as other liability suits to get processed. In fact, many victims actually die before there cases are completed.

The second reason is the costs. Rehnquist's panel also found that victims can receive as little as 37 cents for every dollar they are awarded. The rest goes to lawyers and administrative fees.

It's clear this system is broken, and it needs to be fixed – fast. Veterans who are sick and dying because they served their country deserve our support. The only way to do this is for Congress to step up to the plate. Our politicians in Washington need to create a new system that ensures all victims get the help they need, when they need it.

I am very pleased that Senator Leahy is doing the right thing by holding a hearing to examine the problem. Many victims of asbestos need his help, particularly veterans who already served their country – veterans who continue to fight battles every day against deadly illness and a system that doesn't seem to care.

Ronald J. Gascon is state adjutant for the Vermont department of the Veterans of Foreign Wars.

September 24, 2002

The Honorable Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

We are submitting the following letter as well as the attached report for admittance into the official record of the Senate Judiciary Committee hearing on Asbestos Litigation that is scheduled for September 25, 2002.

The Small Business Survival Committee (SBSC) works to create a favorable and productive environment for small businesses and entrepreneurship. By educating policymakers, legislators, the media and the public about the critical role that small businesses play in our economy--and how government actions can positively or negatively affect the small business community--SBSC strives to establish a solid public policy foundation upon which entrepreneurial activity and small businesses can survive and flourish.

It is our strong belief that the current state of asbestos litigation is on a path that will cripple our economic viability and the engine that drives it – small businesses. With many of the traditional defendants, asbestos manufacturers, being forced into bankruptcy, eyes have now turned to thousands of small businesses that at one time were considered peripheral defendants at best. These small companies, many of them less than 100 employees, never once marketed or manufactured asbestos but now are being targeted in these suits.

The majority of the people filing these claims are entirely healthy. They may at one time been exposed to asbestos, yet they show no evidence of asbestos-related diseases. They are joining suits to hedge against possible future illnesses that may not be covered due to statutes of limitations. The result has been a glut of filings, more than 200,000 cases pending today, leading to a depletion of funds set aside to deal with truly sick individuals. In short, sick people are not getting the level of help they need and healthy people are receiving benefits with no guarantee of future assistance if they get sick later.

1920 L Street, N.W., Suite 200 • Washington, D.C. 20036
Tel: (202) 785-0238 • Fax: (202) 822-8118
www.sbsc.org

The avalanche of asbestos litigation has forced more than 60 companies into bankruptcy, 18 of them in the last 24 months. The list includes Eastman Kodak, International Paper, Metlife and Pfizer. And with the pool of big corporate targets "drying up" smaller firms are now under siege.

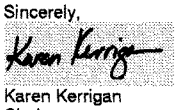
Small business owners can't afford the armies of lawyers that larger companies can employ. Nor, can their insurance coverage handle the loss of a major lawsuit. Therefore, many small businesses simply elect to pay an unmerited settlement rather than risk losing a large-scale lawsuit and going bankrupt.

The Los Angeles Times recently estimated that the number of people expected to file injury claims could eventually reach 2.5 million, and "the economic toll of asbestos could run as high as $200 billion." These and other figures concerning the potential costs of this legal problem can be found in the attached report compiled by SBSC's chief economist, Raymond J. Keating.

The Supreme Court of the United States has twice condemned the asbestos litigation quagmire as a problem that is beyond repair by the judicial system. The Supreme Court has strongly urged that Congress pass legislation setting up a system outside the courts to apply medical criteria to each claim and screen out the claims of people who are clearly not suffering from asbestos diseases.

We hope Congress will act soon to create such a system. Ideally, legislation would set up an agreed upon medical criteria and waive the statute of limitations on asbestos claims so that those exposed have a safety net in the future if they truly become ill. An orderly system such as this would restore order and fairness to the asbestos claims process. It would also restore justice for those who are truly ill and protect thousands of small businesses from becoming the next victims of the asbestos saga.

Sincerely,



Karen Kerrigan
Chairman

cc: All Senate Judiciary Committee Members

The Small Business Survival Committee's
21st Century Small Business Policy Series

Analysis #8
May 2002

The Asbestos Threat

by Raymond J. Keating
Chief Economist
Small Business Survival Committee
and
co-author of
U.S. by the Numbers:
Figuring What's Left, Right, and Wrong
with America State by State

Small Business Survival Committee
1920 L Street • Suite 200 • Washington, D.C. 20036
Telephone: 202-785-0238 • Fax: 202-822-8118
Website: www.sbsc.org

Introduction

A plague of asbestos lawsuits not only threatens thousands of U.S. businesses and our economy in general, but also serves as a major obstacle to getting funds to the individuals who actually suffer real, severe illnesses linked to asbestos.

Asbestos was widely used until the 1970s for insulation and as fire proofing. Unfortunately, when inhaled on a regular basis, asbestos fibers can cause asbestosis, mesothelioma, or lung cancer.

Fortune magazine recently reported ("The $200 Billion Miscarriage of Justice" by Roger Parloff, March 4, 2002): "When the first asbestos suits were filed in the 1960s, the plaintiffs were usually asbestos workers suffering from grave and crippling maladies." The article also went on to note, "The 1994 edition of the medical text Occupational Lung Disorders describes asbestosis as a 'disappearing disease."

Nonetheless, in recent years, lawsuits have been multiplying at an alarming rate. And a substantial portion of recent suits has been brought by individuals who have had minimal exposure to asbestos, and many are not ill in any sense.

Meanwhile, the targets of asbestos lawsuits now have spread far beyond asbestos manufacturers to businesses that had absolutely nothing to do with the production of asbestos. Thousands of businesses are now in the crosshairs of asbestos litigation. And they range from huge multinational firms down to local small businesses.

Vast Expanse of Litigation

As more and more people claim to have suffered in some way from asbestos exposure, the number of asbestos lawsuits has mushroomed far beyond the numbers anyone expected not all that long ago. In the March 4, 2002, issue, *Fortune* reported that recent forecasts put the projected number of asbestos-related claims between 1.3 million and 3.1 million, "of which only about 570,000 have yet been filed."

Later in the month (March 26), Reuters reported on the preliminary results from the latest analysis on asbestos-related lawsuits from the RAND Institute for Civil Justice, which put the number of lawsuits filed to date at 600,000, with an estimated 500,000 to 2.4 million still likely to be filed.

For good measure, *The New York Times* reported on April 10, 2002 ("A Surge in Asbestos Suits, Many by Healthy Plaintiffs" by Alex Berenson), that "at least 90,000 new claims were filed last year," and that "as many as 2.5 million people could file asbestos-related suits before the litigation begins to fade around 2030."

Costs of Litigation

The costs of such litigation have been formidable, and promise to only grow far worse in the future.

For example, the April 10 *New York Times* reported that U.S. businesses and insurers "have spent well over $30 billion to defend and settle asbestos lawsuits," and proceeded to note that estimates of eventual total costs of asbestos lawsuits range as high as $250 billion.

In fact, some estimates run even higher. In the September 2001 issue of *Best's Review*, from A.M. Best Co., the insurance industry analyst, it was reported that an analysis estimated "the ultimate cost of asbestos claims, including legal expenses, to be $275 billion, with $70 billion estimated to be paid by U.S. insurers under general liability coverage, $30 billion by non-U.S. insurers, and $175 billion uninsured."

One major problem with this flood of asbestos litigation is establishing uniform medical criteria. The Asbestos Alliance points out: "There is currently no uniform standard to distinguish sick claimants from those who are not sick." What does this mean? The Alliance points out: "The flood of claims from those who are not sick is straining the resources of otherwise financially secure companies." Along these lines, the *New York Times* (April 10, 2002) noted: "Lawyers for the companies being sued, along with independent experts and some lawyers who represent only seriously ill plaintiffs, say most suits are baseless and an abuse of the courts."

As a result, it turns out that there are other kinds of costs beyond those measured in dollars. Many of the truly ill are not being compensated due to lawsuits from people who are healthy today and in fact may never develop any asbestos-related diseases.

On April 25, 2002, *The Wall Street Journal* ("As Asbestos Mess Spreads, Sickest See Payouts Shrink" by Susan Warren) reported: "In the past two years, desperately ill plaintiffs have been eclipsed by a huge and growing numbers of relatively healthy people seeking awards for possible future illnesses."

Reporter Patti Waldmeir observed in the November 15, 2001, *Financial Times*: "But for every group of healthy claimants who demand compensation now for suffering that may never arise, there is a dying victim whose pain cannot be compensated because the defendants have run out of money settling dubious claims."

On March 31, 2002, *Detroit News* reporter Mark Truby noted that most people bringing asbestos lawsuits now "have not developed cancer or other life-threatening illnesses." The paper reported that 92% of these recent asbestos cases were non-malignant, 5% had lung cancer, 2% other cancers, and 1% mesothelioma. Truby went on to point out: "In 1982, only 4 percent of asbestos claimants showed no manifest injuries, according to the RAND Institute for Civil Justice. By 1993, about half of all suits were brought by claimants with little or no physical impairment. By last year, two-thirds of claims provided no evidence of impairment."

Due to the rise of these kinds of lawsuits and to legal costs, much of the money awarded in asbestos cases fails to make it to sick and dying people. For example, estimates peg the amount going for legal fees and other transaction costs at 60 percent or more of payments, while more than 50 percent of the money getting to claimants actually goes to people who are not sick.

The trusts established by bankrupt businesses to pay asbestos claims are being drained by the abuse of asbestos lawsuits. For example, the Johns-Manville Trust is projected to now pay claimants 5 percent of their full award or settlement. Again, that means that fewer resources are getting to those who are truly sick.

Threat to the Business Community

With the growth in asbestos lawsuits has come a dramatic increase in the number of businesses being targeted for legal action. And as more and more firms are forced into bankruptcy due to asbestos litigation, the attorneys involved in bringing these cases have expanded their nets to ensnare businesses – many of them small businesses -- that had nothing to do with asbestos manufacturing.

The September 2001 issue of *Best's Review* reported that "the defendant pool has increased to more than 2,400 companies from a

level of 300 in the mid-1980s." According to Reuters (March 26, 2002), the latest RAND Institute for Civil Justice, though, offered a preliminary list of asbestos defendants that reached to over 6,000 U.S. businesses.

To make clear how far astray almost all of these businesses are from asbestos manufacturing, *Fortune* (March 4, 2002) reported that the businesses named as asbestos defendants "are scattered across 44 of the 82 industrial categories used by the U.S. Department of Commerce, meaning that employers across more than half of the American economy now face asbestos liability."

However, again according to Reuters (March 26, 2002), the latest RAND Institute for Civil Justice estimates that asbestos litigation "has infiltrated about 85 percent of the nation's business sectors."

In the *Fortune* piece, a plaintiffs lawyer who "represents almost exclusively mesothelioma victims" explained the process to the magazine: "In the early days of the litigation, you had Manville. Manville goes away. Next in line are the regional distributors. If they go away, next in line are the contractors who bought from them. If those guys disappear, there are cases where we very legitimately are suing the neighborhood hardware store, because that's where the guy bought asbestos joint compound, or the lumberyard where he bought asbestos shingles, or the floor company where he bought floor tiles. They say, 'All of a sudden, why me? One answer is: 'Consider yourself lucky that we left you alone for 20 years.'"

Indeed, the companies that have been ensnared in the asbestos litigation web range widely by size and type. Just consider the following small, but prominent sample: Johns-Manville, Owens-Corning, W.R. Grace, Viacom, Gerber, Gallo Winery, Dow Chemical, Halliburton, 3M, Federal-Mogul, the Big Three automakers, General Electric, Lockheed Martin, AT&T, Campbell

Soup, Colgate-Palmolive, DuPont, Dow Jones & Co., Georgia-Pacific, Dana Brake & Chassis, and Sears Roebuck & Co.

To show that you do not have to be a big business to be targeted, according to *Contra Costa Times* (April 13, 2000), Allwood Door Co, which employs about 100 workers, faces lawsuits because it sold fire-barrier doors that unknowingly contained asbestos.

The number of smaller businesses targeted in asbestos lawsuits stretches across the nation, including, for example, Connecticut roofing company American Saturated Felt, Liberty Plumbing in Florida, the Aurora Pump Company in Illinois, shingle manufacturer Bird Inc. in Massachusetts, Just Plumbing & Heating in Maryland, and Eigen Supply Company in New York, just to name a few.

More than 50 companies have been forced into bankruptcy due to asbestos litigation, including all of the companies that manufactured asbestos. *The Wall Street Journal* (April 25, 2002) reported: "Since January 2000, the wave of less-severe claims has pushed at least 20 companies that sold or used asbestos products into bankruptcy protections. That's on top of 40 other asbestos-related corporate bankruptcies since the mid-seventies." Such bankruptcies have widespread effects. For example, operations are shut down and jobs eliminated.

Numerous reports have linked asbestos lawsuits and job losses at targeted businesses. For example, Armstrong laid off 119 employees in January 2001. Celotex laid off over 550 employees over the past four years. Crown Cork & Seal dropped over 500 employees over the past three-plus years. Federal Mogul has cut some 5,300 jobs over the past four years. Georgia Pacific cut over 1,000 jobs over four years. McDermott International eliminated more than 500 jobs last June. National Gypsum reduced 12 percent of its workforce after filing bankruptcy in 1993. And

Owens Corning eliminated over 1,800 jobs over the past four years.

Retirees, stockholders and bondholders can be devastated as dividends are eliminated, and stock and bond values are vastly diminished and sometimes completely wiped out.

Businesses of all types and sizes feel the impact of such bankruptcies. Firms that provide all kinds of products and services to the bankrupt firm lose business, and may not get paid for services already rendered. This can result in these related businesses – many quite small -- laying off workers, or shutting down altogether.

The costs to the economy in general are quite real. Those potential hundreds of billions of dollars in expected costs related to asbestos lawsuits translate into less investment, less entrepreneurship, less innovation, slower economic growth, and reduced job creation.

Congressional Action Needed

The September 2001 issue of *Best's Review* noted that in the late 1980s and early 1990s, the estimated number of people exposed to asbestos was pegged at 28 million. However, the report goes on to note, "The Manville Trust now believes that the exposed population is in excess of 80 million." The potential for asbestos lawsuits to cripple thousands of U.S. businesses should be obvious to all. In turn, as already noted, those who are truly ill due to asbestos exposure will suffer as well as a result.

It is apparent that our judicial system is not up to this task, and that congressional action is necessary. Indeed, the U.S. Supreme Court has acknowledged this fact. The Asbestos Alliance has pointed out: "The Supreme Court has called three times for congressional action to solve the asbestos crisis." In *Ortiz vs. Fibreboard Corporation*, U.S. Supreme Court Justice David Souter wrote:

"The elephantine mass of asbestos cases ... defies customary judicial administration and calls for national legislation."

Of course, the entire legal system is in desperate need of reform. But the fight for major tort reform is not going to be won in short order, and action is needed to specifically deal with the asbestos litigation issue.

Legislation should be focused on the following:

• Setting up objective medical criteria for evaluating asbestos illnesses. A minimum standard would be established for an asbestos illness, and once the criteria were met, an individual could pursue a claim.

• Changing statute of limitations rules so that an individual could file a claim whenever he got sick, and would not have the incentive to bring a lawsuit before becoming ill.

• Making sure that both plaintiffs and defendants are entitled to individual trials, rather than being lost in settlements with thousands of people, many of whom, as we have seen, may not be ill.

• Requiring that lawsuits be brought within the states where the plaintiffs reside or where the asbestos exposure actually occurred. This would cut down on lawsuits being brought in states that are particularly hostile to defendants in such cases, but had no link to the case whatsoever.

• Offering explicit liability protection to businesses – again, many of them small businesses – that had little or no responsibility for asbestos ailments. So, legislation should limit the liability of defendants to that for which they have actual responsibility. This is not only fair, but would reduce litigation risks across many industries, which would be good for the economy in general.

Such legislation would be critical in redressing the many abuses going on right now in the asbestos litigation arena – abuses that not only take a heavy toll on all kinds of businesses and their employees, but also on those individuals who are truly ill due to asbestos exposure.

The small business community certainly would experience some much-needed relief from the asbestos issue. As explained earlier, as large businesses declare bankruptcies due to asbestos litigation, lawyers look to ensnare smaller businesses in this litigation web. These small enterprises often are targeted as peripheral participants, which means that their products or services had some relationship to asbestos, no matter how remote or insignificant. So, a small business that sold a product containing asbestos, for example, is targeted. Such peripheral businesses include hardware stores, construction businesses, car repair shops, along with plumbers and other trades. These small businesses do not possess the resources to hire the legal staff necessary to wrestle with asbestos litigation, nor can their insurance handle a major loss in a case. The above proposed legislative remedies would be a huge help to these small businesses.

In addition, under this proposal, no federal tax dollars would be spent. These are solid reform steps that Congress should act quickly to implement.

In the end, this type of asbestos reform legislation would serve all those concerned with this issue well. Unnecessary bankruptcies -- and the accompanying fallout for employees, investors and retirees, other businesses and the overall economy -- would be avoided. Lawsuit abuse would be limited, and the truly sick claimants would receive compensation. And businesses would see their potential liabilities tied to their actual responsibility.

About the Author

Raymond J. Keating serves as chief economist for the Small Business Survival Committee. He is the author of hundreds of booklets, studies, and articles. Keating's latest book is *U.S. by the Numbers: Figuring What's Left, Right, and Wrong with America State by State* (Capitol Books, 2000). He also is a weekly columnist with *Newsday*.

About SBSC

The Small Business Survival Committee (SBSC) is a nonpartisan, nonprofit small business advocacy group with over 70,000 members across the nation. For more information, please visit SBSC's website at www.sbsc.org.

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For Asbestos Victims, Compensation Remains Elusive

By Albert B. Crenshaw
Washington Post Staff Writer
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Last September, Dale Dahlke, a 53-year-old electrician and cost estimator at the Puget Sound Naval Shipyard, began to feel short of breath playing in his usual recreation-league basketball games. Always athletic and rarely sick, he thought he might have a cold.

Eight months later he was dead. The "cold" turned out to be an array of asbestos-related ailments, including mesothelioma -- a form of cancer that emerges long after its victim has been exposed to asbestos but kills with gruesome speed.

In building Navy ships, Dahlke spent hours in cramped spaces where asbestos had been used to make the ships fireproof. Before he died, he sued 11 companies that he thought were responsible for his asbestos exposure.

Now it appears that his widow will receive relatively little in compensation. For nearly 15 years after the courts, industry and victims' attorneys reached an agreement on how to compensate the tens of thousands of people exposed to asbestos through their jobs, the compensation problem seems to be getting worse, not better.

In recent years, dozens of companies, including all 11 that Dahlke sued, have filed for bankruptcy protection in the face of a flood of new asbestos cases -- though almost all of them are still operating. Hundreds of other corporations are defendants, too, as tens of thousands of new claimants, many of whom show no symptoms of illness, sue because they fear they may get sick.

The result is the product-liability case that will not end. And with so many cases and so many bankruptcies, victims are having trouble collecting for their injuries. The bankruptcy filing provides some protection from existing lawsuit judgments, and many companies are turning to trusts to settle claims.

Thus, lawyers say, Dahlke's widow, Charisse, can expect only about 15 percent of the $1 million or so that her husband could have received had he filed suit before the bankruptcies.

As the number of cases has grown and major defendants have filed for bankruptcy, aggressive trial lawyers have sued companies far removed from manufacturing asbestos. The potential liability for U.S. business is estimated at more than $200 billion. That's comparable to what the savings and loan debacle of the 1980s cost the government. And insurers, who may pay one-third of the total, say it will be more costly than all their 9/11 terrorism claims.

The nation's court system is clogged as a consequence. A giant consolidated case involving about two dozen defendant companies and 5,000 claimants went to trial yesterday in West Virginia, after some 200 companies reached settlements following a failed attempt last week to get the U.S. Supreme Court to intervene. Another case involving 40 defendant companies and 1,300 claimants is scheduled for trial next month in Virginia after the state Supreme Court refused to block it.

Congress long rejected calls for a legislative solution. But the Senate Judiciary Committee has scheduled a hearing today that some hope will call attention to the dimensions of the problem.

"The last best hope here is the U.S. Congress," said Steven Kazan, an Oakland, Calif.-based lawyer who represents clients with mesothelioma, a cancer found mostly in people exposed to asbestos. Kazan and some other trial lawyers have split with their colleagues in the plaintiffs bar and sided with business groups out of fear the pot of available money will be too small to help their clients.

Michael Baroody, executive vice president of the National Association of Manufacturers, said that it needed to be understood that victims include not only those injured by asbestos but also "workers who find their jobs lost" as their employers fail and people investing for retirement who see "the value of those investments diluted if not evaporated by asbestos liability."

The pending claims are "an anchor" weighing down the manufacturing sector of the economy and slowing the overall recovery, Baroody said.

Proponents of change would like to see some provision made for claimants who have evidence of asbestos exposure, but little apparent injury. One proposal is for courts to create registries or "inactive dockets" through which claims could be preserved but not addressed until the people actually become sick.

But Fred Baron, of the Dallas law firm of Baron & Budd, who has been filing asbestos cases since 1973 and who opposes congressional action, noted that repeated efforts in Congress to limit or federalize asbestos claims have failed.

Baron said the corporations are "allied with a few lawyers who represent a few cases."

"Their complaint is not with the tort system, their complaint is with the bankruptcy situation," he said. "When a company goes into Chapter 11 for reorganization, the amount of money to pay claims gets consumed in large part by low-end claims.

"The bottom line is, asbestos companies don't want to pay claims. Lawyers for mesothelioma victims want them to get more of the pot. Those two groups have kind of banded together."

The explosion of asbestos claims in the past few years is a shock to many experts, who had calculated that most victims of the 40-year-old occupational disease would be dead or compensated by now.

By some estimates, 30 million tons of asbestos -- silicate minerals resistant to heat and fire -- were used in industrial sites, homes, schools, shipyards and commercial buildings in the United States during the past century. Because of its heat-resistant qualities, asbestos was used in thousands of consumer, industrial, maritime, automotive, scientific and building products.

Though it remains legal, the use of asbestos has fallen drastically.

The first company to file for bankruptcy protection from asbestos claims was Johns-Manville in 1982. The total is now more than 60, many in the past few years. Among them are such well-known names as Owens Corning and W.R. Grace.

There are currently more than 200,000 asbestos-injury cases pending in state and federal courts. Some 60,000 of these were filed in 2000 alone, up from an average of 20,000 new claims annually in the early 1990s.

The Manville Trust, a mechanism set up in the 1980s to pay claims against Johns-Manville, has seen the number of claims against the company almost double in 2000 compared with 1999, then almost double again last year, according to David Austern, president of the Claims Resolution Management Corp., which administers payments from the trust.

The trust has recorded 600,000 claims so far, and the total could eventually hit as many as 2.7 million, he said.

Johns-Manville's dominance in the asbestos industry was so complete that almost everyone with an asbestos injury has a claim against it. So its numbers are regarded as representative of the claims universe.

At the same time, the mix of claims has been shifting. The number of mesothelioma cancer cases has remained steady at about 2,000 cases a year, with cases of asbestosis and other non-malignant lung ailments taking a greater share. The ratio of non-malignant to malignant injury claims has risen from 88 to 12 in 1999 to 95 to 5 this year, Austern said.

"The entire increase in total claims filing is attributable to non-malignant claims," he said.

Just the specter of asbestos is enough to send a company's stock tumbling. Last month, the shares of papermaker MeadWestvaco Corp. plunged in one day after the firm announced it faced some 500 asbestos injury lawsuits involving about 6,000 plaintiffs.

Halliburton Co., which was run by Vice President Cheney, saw its stock price drop dramatically last December when it announced it faced asbestos liabilities.

While the search for a solution continues, so does the parade of big court cases.

Corporations complain that they do not get fair treatment in giant cases such as the one starting in West Virginia because jurors cannot possibly sort out who is to blame for what. Such cases allow those who are not sick to "leverage" the claims of the truly sick to inflate their own claims, the companies argue.

They also complain about "forum shopping" by trial lawyers seeking friendly juries. Juries in Mississippi, for example, have returned 20 verdicts of $9 million or more since 1995, and at least seven were for more than $100 million. Of 403 plaintiffs involved in litigation against GAF Corp., more than half were from Texas. Jefferson County, Miss., is sometimes called a "magic jurisdiction" for plaintiffs. Its population is about 9,700, but 21,000 plaintiffs filed asbestos claims there between 1995 and 2000.

Claimants and their attorneys reply that consolidated trials are the most efficient way to deal with what one court called the "elephantine mass of asbestos litigation." And they say that dividing the cases up is a tactic designed to make lawsuits more expensive and harder for plaintiffs to pursue.

Outside the courtroom, the Manville trust is paying about 5 cents on the dollar for claims filed against it, and Austern said no other trust set up by a bankrupt company has paid more than 20 percent. He noted that injured individuals often file claims against more than one trust.

The Manville trust earlier this month reached agreement with its plaintiffs on a new formula that "raises significantly the amount of money that will be paid the mesothelioma victims, and

commensurately reduces the amount paid" to those with non-malignant ailments. It also raises the amount paid to lung cancer victims and requires that "greater and more extensive medical documentation must be filed with each claim."

Many of the lowest-level claims will be barred entirely, he said.

"This distribution process is probably going to be a template for many other future bankruptcies," Austern said. "We have always been the coal mine canary for the way these things work."

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