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ASBESTOS LITIGATION CRISIS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

MARCH 5 AND JUNE 4, 2003

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CONTENTS

WEDNESDAY, MARCH 5, 2003

STATEMENTS OF COMMITTEE MEMBERS

	Page
DeWine, Hon. Mike, a U.S. Senator from the State of Ohio	34
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	1
prepared statement	111
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts	36
Kohl, Hon. Herbert, a U.S. Senator from the State of Wisconsin, prepared statement	147
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	4
prepared statement	149
Sessions, Hon. Jeff, a U.S. Senator from the State of Alabama	39

WITNESSES

Archer, Dennis, President-Elect, American Bar Association, Chicago, Illinois	21
Austern, David T., Claims Resolution Management Corporation, and General Counsel, Manville Personal Injury Settlement Trust, Fairfax, Virginia	19
Baucus, Hon. Max, a U.S. Senator from the State of Montana	6
Harvey, Brian T., Marysville, Washington	17
Hiatt, Jonathan P., Associate General Counsel, American Federation of Labor and Congress of Industrial Organizations, Washington, D.C.	23
Kazan, Steven, Kazan, McClain, Edises, Abrams, Fernandex, Lyons and Farrise, Oakland, California	25
McCandless, Melvin, Plymouth, North Carolina	14
Voinovich, Hon. George V., a U.S. Senator from the State of Ohio	11

QUESTIONS AND ANSWERS

Responses of David Austern to questions submitted by Senators Leahy and Kohl	46
Responses of Steven Kazan to questions submitted by Senators Leahy and Kohl	51

SUBMISSIONS FOR THE RECORD

Archer, Dennis, President-Elect, American Bar Association, Chicago, Illinois, prepared statement	61
Asbestos Study Group, statement	88
Austern, David T., Claims Resolution Management Corporation, and General Counsel, Manville Personal Injury Settlement Trust, Fairfax, Virginia, prepared statement	93
Baucus, Hon. Max, a U.S. Senator from the State of Montana, prepared statement	102
Harvey, Brian T. Marysville, Washington, prepared statement	107
Hiatt, Jonathan P., Associate General Counsel, American Federation of Labor and Congress of Industrial Organizations, Washington, D.C., prepared statement and attachment	114
Kapnick, Scott B., Managing Director, Goldman, Sachs & Co., New York, New York, statement	124
Kazan, Steven, Kazan, McClain, Edises, Abrams, Fernandex, Lyons and Farrise, Oakland California, prepared statement	136
McCandless, Melvin, Plymouth, North Caroline, prepared statement	151

Page

National Association of Manufacturers, Michael Elias Baroody, Executive Vice President, Washington, D.C., prepared statement 154
Voinovich, Hon. George V., a U.S. Senator from the State of Ohio, prepared statement 157

WEDNESDAY, JUNE 4, 2003

STATEMENTS OF COMMITTEE MEMBERS

Page

Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois 183
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah 159
prepared statement 362
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts, prepared statement 365
Kohl, Hon. Herbert, a U.S. Senator from the State of Wisconsin, prepared statement 370
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont 163
prepared statement 372

WITNESSES

Biggs, Jennifer L., Tillinghast-Towers Perrin, St. Louis, Missouri 207
Crapo, James D., M.D., Professor of Medicine, National Jewish Center and University of Colorado Health Sciences Center, Denver, Colorado 189
Dunbar, Frederick C., Senior Vice President, National Economic Research Associates, New York, New York 214
Green, Eric D., Professor, Boston University School of Law, Boston, Massachusetts 216
Hagel, Hon. Chuck, a U.S. Senator from the State of Nebraska 166
Hartwig, Robert P., Senior Vice President and Chief Economist, Insurance Information Institute, New York, New York 219
Murray, Hon. Patty, a U.S. Senator from the State of Washington 181
Parker, John E., M.D., Professor and Chief, Pulmonary and Critical Care Medicine, Robert C. Byrd Health Sciences Center of West Virginia University, Morgantown, West Virginia 195
Peterson, Mark A., Legal Analysis Systems, Thousand Oaks, California 210
Tribe, Laurence H., Professor, Constitutional Law, Harvard Law School, Cambridge, Massachusetts 170
Welch, Laura, M.D., Medical Director, Center to Protect Workers Rights, Silver Spring, Maryland 192

QUESTIONS AND ANSWERS

Responses of Jennifer L. Biggs to questions submitted by Senators Hatch, Specter and Leahy 228
Responses of James D. Crapo, M.D. to questions submitted by Senator Specter 238
Responses of Frederick C. Dunbar to questions submitted by Senator Hatch ... 242
Responses of Robert P. Hartwig to questions submitted by Senator Specter 249
Responses of Mark A. Peterson to questions submitted by Senators Leahy, Hatch and Specter 251
Responses of Laurence H. Tribe to questions submitted by Senators Kyl, Durbin and Specter 264
Responses of Laura Stewart Welch, M.D. to questions submitted by Senators Hatch, Leahy and Specter 271

SUBMISSIONS FOR THE RECORD

Baucus, Hon. Max, a U.S. Senator from the State of Montana, statement 282
Biggs, Jennifer L., Tillinghast-Towers Perrin, St. Louis, Missouri, prepared statement 287
Crapo, James D., M.D., Professor of Medicine, National Jewish Center and University of Colorado Health Sciences Center, Denver, Colorado, prepared statement 297
Dunbar, Frederick C., Senior Vice President, National Econimic Research Associates, New York, New York, prepared statement 313
Feinstein, Hon. Dianne and Hon. Herb Kohl, additional views on S. 1125 329

Page

Green, Eric D., Professor, Boston University School of Law, Boston, Massachusetts, prepared statement and attachment 334
Hartwig, Robert P., Senior Vice President and Chief Economist, Insurance Information Institute, New York, New York, prepared statement 358
Murray, Hon. Patty, a U.S. Senator from the State of Washington, prepared statement 376
Parker, John E., M.D., Professor and Chief, Pulmonary and Critical Care Medicine, Robert C. Byrd Health Sciences Center of West Virginia University, Morgantown, West Virginia, prepared statement and attachment 378
Peterson, Mark A., Legal Analysis Systems, Thousand Oaks, California, prepared statement 398
Phillips, Carter G., statement 405
Tribe, Laurence H., Professor Constitutional Law, Harvard Law School, Cambridge, Massachusetts, prepared statement 414
Waxman, Seth P., Wilmer, Cutler, & Pickering, Washington, D.C., prepared statement 440
Welch, Laura, M.D., Medical Director, Center to Protect Workers Rights, Silver Spring, Maryland, prepared statement 449

THE ASBESTOS LITIGATION CRISIS CONTINUES—IT IS TIME FOR CONGRESS TO ACT

WEDNESDAY, MARCH 5, 2003

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

The Committee met, Pursuant to notice, at 2:05 p.m., in room 216, Hart Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, DeWine, Sessions, Chambliss, Cornyn, Leahy, and Kennedy.

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

Chairman HATCH. Good afternoon. I would like to welcome everyone to this hearing as the Committee continues its examination of the asbestos litigation crisis.

At the outset, I want to make everybody know or I want everybody to know that I intend to make every effort to resolve this issue, this Congress. We simply cannot wait any longer, and we have to resolve it.

I am encouraged by the level of interest in this issue as expressed to me by my colleagues on both sides of the aisle, and I hope that the Ranking Member, Senator Leahy, and I along with other colleagues will be able to work in a bipartisan manner to resolve this issue.

As he indicated at the last hearing, Senator Leahy also recognizes that this is a situation that requires our attention, and he conducted a very good hearing as Chairman of this Committee.

It is not too often that an issue has such bipartisan interest in Congress, but this one does. The question is can we put it together. It is very complex and that is one reason for this follow-on hearing, and this will be the last hearing that we are going to hold that I can think of.

I don't think there can be any doubt that the crisis in asbestos litigation is a serious problem, and it continues to get worse as the abuse continues and Congress has failed to act, even as the Supreme Court has suggested that we must act in order to resolve this train wreck.

It is my sincere hope that we can do better this time around. As I stated in our hearing last fall, which Senator Leahy chaired, skyrocketing bankruptcies of companies being sued hurt not only those who are truly sick and deserving of appropriate compensation, but

also those many hardworking Americans whose jobs and pensions are lost or put at serious risk.

We have all heard the statistics by now, but they bear repeating, and I would like to use some charts here. Chart No. 1, as the New York Times has reported, the number of cancer cases has remained virtually stable sine 1995, while the number of non-cancer cases has spiked dramatically just in the last few years. This defies common sense.

Let me go to Chart No. 2. According to a recent study published by RAND, almost 90 percent of the pending asbestos claims are brought by persons with nonmalignant injuries. Nonmalignant cases get 65 percent of the compensation awards compared to 17 percent for mesothelioma and 18 percent for other cancers.

Now, there is something wrong with that, and the consequence is that more than 67 companies have been forced into bankruptcy, 67 companies and thousands and thousands of jobs, and more than 20 of those bankruptcies have occurred in just the last few years, as you can see from Chart No. 3.

Moreover, the scope of the litigation has increased exponentially and is mind-boggling to anyone. This has become such a gravy train for some abusive trial lawyers that over 2,400 additional companies were named in the last year alone as defendants.

One company recently shared their story with me. This company never engaged in the business of manufacturing, producing, distributing, or selling asbestos or asbestos-containing products, nor did this insurance company ever issue liability or worker's compensation insurance to companies in the business of manufacturing, producing, distributing, or selling asbestos or asbestos-containing products.

They did, in fact, lead the way in researching and issuing one of the first reports that exposed the true health risks of asbestos, a report that is actually cited by many plaintiff's attorneys in current cases and has saved lives. And how are they rewarded? They have been named in thousands of cases, more than 60,000 per year, alleging that they were not aggressive enough in revealing these dangers of asbestos, and they have been brought in as coconspirators.

Now, they told me it is cheaper for them to settle frivolous cases than to defend them in court. They could win every one of these 60,000 cases, but the last one they defended cost, just in defense costs alone, $1.4 million. So it is cheaper to pay a few thousand bucks per case and to pay what really is extortion money in order to resolve what really is a horrendous problem to them. This sounds ridiculous, and it is, but it is what is happening.

We have a tort system that is out of control here, especially in these asbestos cases, and I am encouraged by some recent developments that illustrate more widespread recognition of the problem. The American Bar Association recently adopted the findings of the Special Committee on Asbestos Litigation.

I look forward to hearing from our witness, Dennis Archer, the president-elect of the ABA, on their findings regarding medical criteria, which would defer the claims of those who are not currently sick in favor of those who are truly ill and require urgent compensation. That just seems logical. It just seems right.

We will also hear from David Austern, trustee of the Manville Trust, on the problems encountered by Manville and his ideas on how to resolve this issue.

We look forward to hearing from organized labor. Jonathan Hiatt kindly is making a return appearance before our Committee on this issue, as is Steven Kazan, an attorney who represents the truly sick claimants who are most adversely affected by this current system.

I know Senator Leahy joins me in my concern that the current system is hurting the victims of asbestos.

Our panel of witnesses include two physically impaired individuals, Brian Harvey and Melvin McCandless. We very much appreciate the effort it must have been for them to come here today to share their stories.

In addition, we have victims of another sort present in the audience, people like Mike Carter of Monroe Rubber and Gasket, who flew here from Louisiana. He is a small businessman whose business is being threatened by endless asbestos litigation.

In addition, and perhaps most importantly, we will hear from some victims who could not make it here today, victims who were unable to be here.

The video you are about to see, which we are putting on this video player here, was provided to us by an attorney representing these victims. Perhaps we can just take time and play that right now.

[Videotape shown.]

Chairman HATCH. Well, in conclusion of my remarks, let me just say that I believe that today's hearing is an important step toward finding the right solution, and I am committed to doing so.

I am going to keep an open mind about how to approach the best solution or solutions to this problem. We have heard from some who have proposed the creation of a trust fund. We also have heard from those who would support a court proposal requiring medical criteria, among other things, to manage the cases and to minimize abuses. Both are very intriguing matters to me, and I am looking at those and I know Senator Leahy is as well.

I have asked the various interested parties to meet over the past month and provide the Committee with their suggestions. We have received some recommendations as late as this past week, and I would encourage the various interest groups to take the next 2 weeks to try to come to a single approach that all can support, the sick victims, the companies who are targeted and their insurance companies who are at risk, and hopefully the labor unions who would be affected by the loss of jobs, the loss of pensions that result from these abusive suits.

Folks, time is running out before literally thousands of our most productive companies in this country and hundreds and thousands of jobs are put at serious risk by these suits, and there are enough people who have suffered enough here that we have got to try and figure out how to resolve this problem without having all the moneys supped up by those who aren't sick and by runaway juries.

Now, it is time to get together. It is time to come up with a solution. I will invite your input and look forward to working with anybody toward a solution here, but we have got to find a solution and

if we don't have the help from the folks in this audience and others, then we are going to find ourselves and we are going to come up with a bill here within the next short while, hopefully before the end of the month of March, and we are going to proceed with it. I hope that we can come up with something that will have the vast majority on board that we can proceed with and we can get these problems resolved.

With these remarks, I will turn it over to our distinguished ranking minority member, the former Chairman of this Committee, Senator Leahy, and then will look forward to hearing our witnesses.

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

Senator LEAHY. Thank you, Mr. Chairman, and also thank you for the video you showed. I know for some here, that was probably difficult to watch, but I thank you for allowing us to do it.

Today's hearing is aptly titled. It is a time for Congress to act on a fair and effective solution to the asbestos litigation crises.

Thousands of workers and their families have suffered debilitating diseases and death resulting from exposure to asbestos, and with the latency periods for asbestos-related illness of up to 40 years, the damage done by asbestos will not end for decades.

As the chairman said, I called the first Senate Judiciary Committee hearing last September on this to see if we could get a bipartisan dialog going about the best means to provide fair and efficient compensation to the current victims, but also those yet to come. When we had the hearing last year, Senator Hatch and I discussed the fact that at that time, we knew we could not go forward with legislation because of the time of the year, but that we ought to work on this in this year.

Senator Hatch and I have had a number of discussions on this, and I think it is fair to say we both want legislation to pass. I would join with the chairman in urging all of the interested parties to get together if they can.

I spend a lot of time with people who are involved in this from victims to insurance companies to manufacturers to labor unions to lawyers to everybody involved in it, and I think it is possible. I really do think it is possible to come together on a piece of legislation.

It will not be everything that every single side wants, not by any means. In fact, if anybody gets everything that they want, it means that enough others will be disappointed that nothing will pass. This is not a magnet for every single special interest from the left to the right by any means. If that happens, the legislation just would not be able to get through, and no matter how well-intentioned it is, we have to work together.

Mr. Chairman, you and I have worked together on this, and I would suggest, Mr. Chairman, that your staff and my staff just continue to work as closely together because, if we came out with a piece of legislation that both you and I supported, I have a feeling that it would pass the Senate. I really do.

Chairman HATCH. We will certainly work with you, Senator, and we hope we can put it together.

Senator LEAHY. I know you are committed to that, and I appreciate that.

We have all learned a great deal about the harms wreaked by asbestos exposure since last fall. Not only do the victims continue to suffer and their numbers to grow, but the businesses involved in the litigation, along with their employees and retirees, are suffering from the economic uncertainties surrounding this litigation. More than 50 companies have filed for bankruptcy because of their asbestos-related liabilities. These bankruptcies, of course, create a lose-lose situation. Asbestos victims deserving fair compensation do not receive it, and the bankrupt companies cannot create new jobs nor invest in the economy.

Now, as a general matter, our tort system is well-equipped to handle the resolution of conflicts. I have long battled the misguided attempts, hidden beneath the guise of "tort reform," to limit the access that American people have to courts, and I will continue to do so because one of the distinguishing characteristics of our judicial system is its openness to legitimate claims of injury, its availability to all aggrieved plaintiffs, but in this case, because of the particular circumstances of the harm caused by asbestos, the system is not working as it should.

These circumstances are causing the failure of asbestos litigation to meet the needs of many victims and the capabilities of many defendants. That is why, as I have said, if we work in good faith toward a bipartisan solution, we can meet the challenge created by this litigation. I agree with the U.S. Supreme Court's conclusion that the number of claims defies "customary judicial administration and calls for national legislation." The Supreme Court is right. We can put together such legislation. It is going to have to be one where people on both sides of the aisle and across the political spectrum come together or it won't work.

An effective solution is not one that would create more corporate bankruptcies. It would not erect arbitrary barriers to recovery, and it would not generate excessive legal fees. An effective solution will fairly and efficiently compensate victims. It will eliminate the financial uncertainty that hinders defendants and their insurers from resolving their liabilities. That is what we have to find. It is going to take creative ways to do that in a fair and efficient manner, and I am wide open to such suggestions and solutions.

As I said earlier, the one thing that could kill any chance for a real bipartisan reform is overreaching by special interests for immunity from legitimate asbestos claims. For Congress to enact reforms this year, all the stakeholders are going to have to come to the table. They have got to be willing to work with open minds toward a realistic and reasonable solution. The answer will require the full participation, both of the victims and the corporate defendants and then their insurers as well. It is not going to be a stacked solution that attempts to shoot the moon for one side to the other. It has to be narrowly targeted. It has to be balanced.

We began this discourse last September on the problem of asbestos injuries and the litigation that has ensued. It has been a good one. Senator Hatch and I and others—I see Senator Baucus here, Senator Voinovich, Senator Ben Nelson, and others—have worked with us on this. We want a solution that is going to bring fair and

adequate compensation to victims in a timely fashion, one that will resolve the financial uncertainty for corporate defendants and one that is going to enable insurers to predictably meet the obligations of the policies.

So, Mr. Chairman, you know, as I had before, I will continue to work with you. I think you and I have an opportunity, if all the parties will cooperate, to bring legislation that can not only pass the Senate and the House, but then could go to the President and be signed.

Chairman HATCH. Thank you, Senator. We are honored to have with us the Honorable Max Baucus of Montana and the Honorable George V. Voinovich of Ohio. Both of them, I know, share our concern for this issue. So we will hear first from Senator Baucus. Then we will hear from Senator Voinovich. We welcome both of you to the Committee.

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

Senator BAUCUS. Thank you, Mr. Chairman and Senator Leahy. Thank you for allowing me to testify before your Committee.

This is an issue that raises a lot of passion on both sides because so much is at stake, and I applaud you for continuing to address and to examine the status of asbestos litigation in this country and where it may or may not be appropriate for Congress to become involved.

However, Mr. Chairman, I am concerned that in a rush to address a real or perceived crisis in our courts, Congress may do an injustice to hundreds or thousands of injured people by arbitrarily denying those people the ability to protect their rights. Our number-one concern here should be justice, how do we ensure that asbestos victims, all asbestos victims, are treated fairly and compensated for their injuries.

Why am I so concerned about where we are headed? Because we seem to continue to circle back to the idea of requiring all claimants to meet strict medical criteria before they can file an asbestos-related claim. It sounds clean, orderly, and logical. People can't file for compensation until they are actually sick, theoretically allowing defendant companies to protect their assets and ensuring a greater chance that victims will be able to recover some compensation if and when they become sick.

Mr. Chairman, as with all issues as complicated as this one, the devil is in the details. What constitutes an injury? What does being sick mean? How can we know that money will be around the next 5, 10, 15, 20 or more years to compensate those who become sick in the future? And how do we address the concern that some people are far more likely to become seriously sick than others, depending upon when, where, or how they were exposed to asbestos? And frankly, how do we address the fact that there is still a lot that we just don't know about the causes and the effects of different types of asbestos exposure?

As I understand it, a major concern about the current asbestos litigation crisis is the repeated attempts to reduce procedural bars to claims. Too often, hundreds and thousands of people are being lumped together in a class action, even though those people may

have little relation to each other in terms of when and where they were exposed to asbestos, how they were exposed, how long they were exposed, and what kind of injuries they suffered.

The Supreme Court has noted that this approach in many cases was unfundamentally unfair to the claimants involved. Yet, the asbestos litigation reform that the American Bar Association and others have proposed would have exactly the same effect.

Strict medical criteria would treat all people in the same manner, regardless of their circumstances, regardless of when, where, and how they were exposed to asbestos, and in many cases, regardless of what kind of injury they have suffered. The proposal would narrowly define an acceptable injury, but also impose significant costs on claimants before they have any assurance that they can file a claim for compensation. The point is no matter how a medical criteria standard is developed, Congress will have to choose a, more or less, arbitrary standard that will cutoff people who have been injured or who ar about to be injured.

We had better be very, very sure that this is the only just way to address the asbestos litigation, and I have a hard time believing we can't be more creative.

I have spoken in detail about the little town of Libby, Montana, before this and other Committees, and on the floor of the Senate. I won't go back into the details of the terrible things that happened to the people of this town, that is, at the hands of a company called W.R. Grace, but this town and the people who live there, or used to live there, dramatically illustrate the points I have been trying to make. So I would like to touch upon a couple of facts.

The vermiculite mining and milling operations at W.R. Grace blanketed the town of Libby with asbestos-tainted dust for decades, until the early 1990's. The dust was everywhere, on clothes, on cars, on children, on the clothes of workers when they came home from the mine.

I can remember seeing miners years ago come off the mine, got off the bus. The bus itself was just one big dust bag, and the miners themselves were lots of little smaller dust bags, just covered with vermiculite dust.

It was on the high school track, this stuff, on the Little League field, in people's homes, in their gardens. They didn't know the dust was poison, but W.R. Grace new. What W.R. Grace knew was that this dust was contaminated not just with asbestos, ordinary asbestos, but with deadly tremolite asbestos fibers, much worse than the chrysotile asbestos that most of us are aware of. These fibers have killed hundreds of current and former Libby residents. Hundreds more are sick, and many of these people will die from asbestos-related diseases and cancers. Thousands may become sick in the future, and unlike most any other place in the country, many of these people were significantly exposed not as workers, but as children.

W.R. Grace lied to these people. Now the town of Libby is watching their families. Their friends and neighbors die or steadily become more sick. They have to watch them struggle to tend to their gardens or just take a walk to the local cafe. They have to watch them struggle to provide a secure future for their children, all the while wondering if their children will become sick, too.

At the same time, these people are struggling to rebuild their community, to make it a vibrant, prosperous town, to keep local businesses and help their friends and neighbors. Many of them wonder if and when they will become sick.

They have to do all of this with little or no help from W.R. Grace.

I have requested that a letter from the representatives of many of the Libby claimants, as well as two letters from doctors who have treated or screened many of the folks in Libby for asbestos-related disease, be included in the hearing record. These documents outline how the experience of the people in Libby, Montana, is unique and demonstrate that the pattern and progression of their disease—and this is very important—does not fit within the ABA or other proposed medical criteria.

These documents speak for themselves, including illustrating the simple fact that tremolite-related lung disease does not appear on a chest x-ray like chrysotile-related lung diseases. Chrysotile is the most common form of asbestos that most people have been exposed to in this country.

I would like to quote in detail from Dr. Brad Black's letter because he makes some very important points. Dr. Black is the medical director of the Center for Asbestos-Related Disease in Libby, Montana, and Dr. Black states, "I entered medical practice in the [Libby] community in 1977. . .At that time, like most physicians, I was trained to recognize disease due to chrysotile asbestos, from which significant lung disease manifested as. . .scarring in the lung tissues. This [scarring in the lung tissues] has a characteristic pattern on a chest x-ray. . . ."

Continuing the letter, "During the period of 1979 to 1999, asbestos-related disease was incubating in a large number of Libby residents, but remained undiagnosed. Why did our community physicians not recognize it? Simply because tremolite-related lung disease does not appear on a [chest x-ray] like chrysotile-related lung disease. . .[T]remolite usually causes scarring in the lining around the lungs (pleura) and infrequently shows up on x-ray as scarring inside the lung, even in the heavily exposed" W.R. Grace "workers. . .and is much better seen on" a CT scan.

Continuing the letter, "In the last 18 months, I have observed the diagnosis of five mesotheliomas, with three individuals already having died. Four of these individuals (nurse, office receptionist, forest service administrator, a no-resident who traveled to Libby for basic services) were exposed to tremolite simply by living and working in Libby." That is the only reason they got it, just because they are living there.

Continuing, "Another gentleman who lived near a vermiculite processing facility in the residential area of Libby died from progressive pleural fibrosis. His spouse has advanced asbestos-related disease. A significant number of residents who were exposed environmentally are experiencing advancing lung disease, some of whom require supplemental oxygen. Based on past observations with chrysotile exposure, one would not expect non-occupationally exposed individuals to develop such extensive asbestos-related disease. . .The relative potency of tremolite fibers in causing disease (progressive lung disease, mesothelioma, and lung cancer) has been striking," end quote, end Dr. Black's letter.

This is all included in Dr. Black's letter. It is only two pages long, and I would respectfully ask that all members of the Committee personally read Dr. Black's letter. It will be very instructive to a solution.

Mr. Chairman, medical criteria, such as that proposed by the ABA or in the Fairness in Asbestos Compensation Act of 1999, would devastate the people of Libby, Montana. The standard in the 1999 Act would exclude 73 percent of the Libby patients from filing a claim for compensation. The remaining 27 percent are either dead or in the end stages of asbestos-related disease and in the process of dying.

It has been made clear to me that we have likely lost ground under the ABA medical standard, with even more Libby patients barred from filing a claim under the ABA standard than were barred under the 1999 Act. I would refer members of the Committee to a letter from Dr. Whitehouse that I have submitted for the record where he describes in detail the arbitrary nature of the ABA standard as applied to tremolite asbestos patients.

I would also like to include in the record a list of 10 people in Libby who would be excluded from seeking compensation under medical criteria such as that proposed by the ABA, so that the Committee can get some idea of the human cost here.

Mr. Chairman, we are no better off today than we were in 1999 when we battled the Fairness in Asbestos bill. The differences between tremolite and chrysotile continue to be ignored. The sheer magnitude of the tragedy in Libby illustrates how hard it is to define the nature of an asbestos-related injury.

Am I frustrated when I hear about the thousands of people who have had little or no real exposure to asbestos, but who have filed asbestos-related claims for compensation? Yes, because I know that many of those people will be competing against the folks in Libby for compensation. However, do I know with any real certainty that some of those people aren't sick now, or won't become very sick, depending on where they are from, when they were exposed and for how long? Do I know if most of those people will be treated fairly by medical criteria such as that proposed by the ABA or the Fairness in Asbestos Act or similar legislation proposed in this Congress? No, and neither does the Congress.

I have stated before that I am sympathetic to the concerns of companies that have not filed for bankruptcy. These companies may not share W.R. Grace's or other defendants' liability or responsibility for asbestos-related disease and death, but they have been tagged with liability precisely because they are solvent. These companies are also being treated unfairly and unjustly by the actions of W.R. Grace and other companies that are able to hide their assets and declare bankruptcy; in essence, shifting their rightful share of liability and responsibility to other businesses.

I have also told this Committee before that I think a review of the injustices inherent in corporate bankruptcies would be an appropriate piece of the asbestos puzzle for this Committee to take a hard look at.

It is pretty clear that W.R. Grace hid a vast amount of its assets, up to 4- to $6 billion, from the reach of the bankruptcy court and, by extension, from Libby victims. About a billion of those assets

will be returned to the bankrupt estate, but W.R. Grace didn't suffer for this. The Department of Justice had to do all the work, at taxpayer expense, to unravel this transaction.

At the end of all this, W.R. Grace will likely emerge from bankruptcy lean and whole and able to continue to prosper as a business. The Libby victims, unless we are able to protect them in some fashion, will receive pennies on the dollar. This is just disgusting.

Add to this the fact that many of them can't get medical insurance, and that the total cost of treating all those who have been sick, who are sick or who will become sick, as a result of their exposure to asbestos in Libby is just staggering. The cost of treating the former W.R. Grace mine workers alone threatens to bankrupt the State of Montana's Medicaid program, another case of W.R. Grace masterfully shifting liability and responsibility to someone else.

So many people have come together to do the right thing in Libby. The Montana delegation, the State of Montana, the Federal Government, the community of Libby, and many concerned private citizens have been working so hard to bring new economic development and much-needed health care resources to Libby. This has been our, practically, number-one goal for the last couple or 3 years, I must tell you, all four of you. It is that important. Federal dollars have flowed to Libby for cleanup, for health care, and revitalizing the economy. There has been significant progress for the community.

Dr. Brad Black has called for developing a leading-edge, world-class research facility with the mission of 1 day developing cures for asbestos-related diseases. The silver lining is that Libby's tragedy could be used to protect the health of men, women, and children across the country.

It is just amazing to see how everyone has come together in Libby to create something positive from a terrible situation, everyone, that is, except W.R. Grace.

I say all of this because I want to circle back to the idea of making sure that when we attempt to step into the middle of the asbestos litigation debate that we are doing justice by the people of Libby and by the people of this country.

We keep being drawn away from the key issue here, which is that asbestos companies like W.R. Grace caused the death and serious illness of hundred if not thousands of people. We shouldn't be overly concerned about protecting companies like W.R. Grace. However, are there others who ultimately bear a share of responsibility for what happened to these hundreds and thousands of people? There is a good argument to be made that the Federal Government does share some of the responsibility for failing to take action to protect its citizens when the hazards of asbestos became known many decades ago. That is something for this Committee to consider.

Clearly, we won't be able to come up with an acceptable resolution to the problems that is perfect or where everyone will agree, but we have to do our best. We have to put the victims first. That is the key.

The medical criteria put forward by the ABA and others does not meet this standard. Their criteria are arbitrary. They are unfair, excessively burdensome, particularly to the people like those in

Libby who have every right to demand that W.R. Grace make their town whole and pay for their medical expenses and suffering.

Thank you, again, Mr. Chairman, Senator Leahy, ranking member of the Committee. I apologize for such a long statement. I thank you for your indulgence, but I can tell you that this is critically important.

If you could sit in the living room of Les Scramstad, as I did a couple, 3 years ago, and other people from Libby who are suffering from termolite-related asbestos diseases, you would understand why I am so passionate about this. I pledged to myself that moment that I was going to do everything humanly possible to make sure the people of Libby, Montana, are made whole again, and I am going to do my very best until it happens.

I ask the Committee, I beseige the Committee, in drafting legislation, recognize the main points I have made, namely that the medical criteria proposed by the ABA will exclude most of the people of Libby, Montana, who through no fault of their own have just gone through the biggest tragedy and are suffering the greatest calamity that I have ever seen in my State.

Thank you.

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

Chairman HATCH. Thank you, Senator. We appreciate having your powerful testimony.

Senator LEAHY. Mr. Chairman?

Chairman HATCH. Yes.

Senator LEAHY. Mr. Chairman, I just wondered if I could put in the record a statement by Senator Kohl and the testimony of The Asbestos Study Group, whose members include Dow and Ford Motor Company.

Chairman HATCH. Without objection, we will put that all in the record.

Senator Voinovich, we will turn to you.

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 Leahy for holding this hearing and allowing me to testify.

I am most impressed with your remarks and Senator Leahy's remarks about a bipartisan solution to this problem that is confronted by the victims and also the businesses in this country. I think that everyone involved has to understand that they have a symbiotic relationship with each other, and if everyone could get in the room and work together, that somehow we could come up with something that is fair.

I would say it would help also if The Asbestos Study Group and the Asbestos Alliance would get together and speak with one voice, so that you would have a clear point of view from their perspective.

I want to preface my remarks by saying that my thoughts are with the victims of asbestos exposure. Those families who have lost loved ones and have to live with the debilitating illness caused by asbestos, they are in the forefront of my mind and in my heart as I discuss the issue of asbestos liability.

I want to be sure that the solution we craft is one that will ensure that these truly sick individuals are allowed fair and just compensation, and, Senator Baucus, you have done a marvelous job of speaking eloquently on their behalf.

I think, Mr. Chairman, most people would agree that the issue of asbestos litigation and its aftermath is presenting a crisis in our country. With over 50 companies already in bankruptcy and a slew of bankruptcies soon to follow, the U.S. Supreme Court had it right when they called this an "elephantine mess." What people need to understand, though, is that the mess has far-reaching effects, and the ripples are being felt way beyond the corporate board rooms.

Corporate bankruptcies affect victims' compensation so that truly sick asbestos victims, in too many cases and more and more frequently, only receive pennies on the dollar.

Employees of bankrupt companies suffer as they watch their jobs disappear and their pensions in 401(k) plans decrease dramatically. For example, take the case of Federal Mogul, a company that employs over 1,200 people in six cities throughout my State. Employees held 16 percent of the company's stock and then watched as that stock lost 99 percent of its value. Not only current employees, but also retirees are feeling the effect of these bankruptcies. Many retirees depend on company stock and dividends for income. When this value heads south, retirees feel it immediately.

Ohio is a manufacturing State, and along with agribusiness, our manufacturers are the back bone of our economy. In fact, when you compare Ohio's manufacturing production with New England States, Ohio's gross State manufacturing is higher than all six of our New England States combined. Unfortunately, we have lost a lot of companies facing asbestos liability in many instances only because of companies that they acquired.

One company which does a lot for the Toledo area is Owens Corning. As Governor, I worked hard to get Owens Corning to put their new corporate headquarters in downtown Toledo to help facilitate the city's renaissance. Owens Corning unfortunately went bankrupt in 2000. In the 2 years preceding this bankruptcy, the stock lost 97 percent of its value, and 14 percent of the stock was owned by company employees.

Now Owens Corning has been making a comeback, and I recently read an article in the Toledo Blade stating that they saw their sales rise to $4.9 billion in 2002. This is a well-managed, profitable company. However, accounting charges to cover their asbestos liability expenses contributed to be what the Toledo's firm's biggest loss has been, a report of $2.8 billion for the year. The biggest factor in the loss, a $2.4-billion charge taken in the third quarter to reflect estimates of its asbestos liability over the next 50 years, and more and more companies, Mr. Chairman, are going to have to be reporting those liabilities and you are going to see a lot more of what has happened to Owens Corning in this country.

Another company recently spoke to me off the record about its growing asbestos liability. When this company announced that it had limited asbestos liability, the stock dropped by about 20 percent and its debt rating was lowered. This began a chain ripple effect, which included the loss of over 100 jobs, the sale of assets, a

50-percent cut in capital investments, and a huge cut in the amount of contributions to the surrounding community.

As a former mayor, I know firsthand the impact of decreased contributions to the community. Many of us forget that these companies make significant contributions to the tax revenues of the cities in which they are located and the States, contributions to the United Way, arts, education, health care, and many other forms of community involvement.

As I have said before, companies like this one make up the back gone of our State's economy. They don't want to shirk their responsibilities to those victims who have or will become sick because of asbestos exposure. They just want to know that they are not compensating those individuals who are unimpaired.

What I am hearing from Ohio companies is they support taking the medical criteria approach advocated by the American Bar Association. As you probably know, in coming to this decision, the ABA formed a commission chaired by Judge Nathaniel Jones, a distinguished Federal jurist from Ohio and former general counsel of the NAACP. This commission included seven members of the legal community representing the plaintiff, defense, and corporate bars. The commission heard extensive medical testimony from the Nation's leading physicians in the area of pulmonary function, and the ABA's end result, one that I support, is one that prevents resources from being misdirected because of a flood of premature claims. It helps companies avoid bankruptcy, and most importantly of all, it protects the rights of victims who suffer from a serious or functionally impairing asbestos-related disease.

I am not going to go into the details of that recommendation. Mr. Archer, who is on the next panel, can explain it much more eloquently than I can.

I am sure that there must be some way to accommodate the concerns that Senator Baucus raised here today before this Committee.

On a broader scale, the litigation crisis in this country is like a tornado ripping its way through our economy, an economy already on the ropes primarily because of the geopolitical situation that we are confronted with.

The American Tort Reform Association published a study last year of impact of litigation on my State and found that it cost every Ohioan $636 per person. A large part is due t the issue before you today, asbestos.

We need, Mr. Chairman, to move immediately on this issue. In my opinion, passing responsible asbestos reform legislation to ensure that the truly injured receive fair and just compensation and to prevent more companies from sliding into bankruptcy will do far more for my State than any of this so-called stimulus proposals that we are hearing about today.

We must stop the hemorrhaging for our victims of asbestos and the companies, their employees, their retirees, and their communities.

Mr. Chairman, I want to thank you very much for allowing me to testify here today.

[The prepard statement of Senator Voinovich appears as a submission for the record.]

Chairman HATCH. Thank you. We appreciate having the testimony of both of you fine Senators, and we appreciate the efforts that you have made to be here with us and to give us these statements. They are important, and we are paying strict attention to them. Thank you very much.

Senator VOINOVICH. Thank you.

Chairman HATCH. Our first panel will be made up of Melvin McCandless. Mr. McCandless came here from Williamston, North Carolina, to be here today. We want to thank him for agreeing to be with us. I know it is not easy for him. So we are grateful to have him here.

The second witness will be Mr. Brian Harvey. He has traveled all the way from Marysville, Washington, with his wife to share his story with us today, and we are very appreciative, especially given the hardship it must be with his medical condition. I know that mesothelioma is a very terrible disease. So we will listen to these two.

Plus, David Austern, Esquire, he is president of the Claims Resolution Management Corporation and general counsel for the Manville Personal Injury Settlement Trust in Fairfax, Virginia, which as we know has been dealing with asbestos claims for years.

Dennis Archer, Esquire, the president-elect of the American Bar Association. We are honored to have you with us, Mr. Archer. He is currently chairman of the firm Dickleson Wright in Detroit, Michigan. Mr. Archer initiated the ABA's Committee on Asbestos Litigation.

Jonathan Hiatt, Esquire, is general counsel for the American Federation of Labor and Congress of Industrial Organizations, the AFL–CIO, in Washington, D.C.

We are pleased to have all of you here with us today.

Finally, once again, Mr. Kazan, we are very pleased—am I pronouncing that name right?

Mr. KAZAN. "Kazan," Your Honor.

Chairman HATCH. "Kazan." That is what I thought.

You are a partner with the firm Kazan, McClain, Edises, et al., in Oakland, California. Mr. Kazan has represented asbestos cancer victims for years, has testified before. We decided to bring him back because of his tremendous experience in this area and his ability to help this Committee to try and arrive at, hopefully, some solutions. I intend to get there, and, hopefully, I will have the cooperation of our colleagues on both sides of the table.

So we will start with Mr. McCandless. Then we will go to you, Mr. Harvey, Mr. Austern, Mr. Archer, Mr. Hiatt, and then Mr. Kazan.

STATEMENT OF MELVIN MCCANDLESS, PLYMOUTH, NORTH CAROLINA

Mr. MCCANDLESS. Mr. Chairman and Honorable Members of the U.S. Senate Judiciary Committee, let me thank you for the opportunity to be here today to tell you about my family and my story. My name is Melvin McCandless, and I am from Williamston, North Carolina.

I am here today to address the unfairness in the bill that has been introduced by Senator Nickles, the Asbestos Claims Criteria

and Compensation Act of 2003, Senate bill 413, and in the medical criteria proposed by the American Bar Association.

I suffer from asbestosis, and I was found by the deputy assigned by the North Carolina Industrial Commission to be permanently and totally disabled because of my asbestosis. Although I have been found permanently and totally disabled by the deputy who heard my case, I would be unable to recover in a court of law for the very same disease if this bill or the ABA proposal became law.

I worked for one of the largest employers in North Carolina, a large mill in eastern North Carolina. It is lined literally with miles of asbestos-containing insulation around pipes, conduits, turbines, and boilers. I worked there 35 years, and for years, almost every day, you could see the dust in the air.

I worked there as a supervisor. None of us had any idea about how dangerous asbestos was. We worked around it every day. Down in eastern North Carolina, the plant where I worked is one of the few places where you could get a good-paying job.

None of the workers had respiratory protection. We were not given any special clothing to keep the asbestos off of us or to prevent us from taking it home to our families. I did not know asbestos was dangerous until after I already had the disease. I was required every month to have a safety meeting, but at no time did the company ever mention anything, nothing about asbestos, in any meeting that I ever attended. I did not see any warnings on any boxes of asbestos products.

For several years before I went out of work, I was short of breath while trying to do my job. At any time I was in dust or steam, which was really every day at work, it would affect my breathing. At any time I was in the heat or around the steam insulation, the coughing would be the same.

As a supervisor, I had to walk around various parts of the mill, including up and down stairs. I got to where I could not do my job anymore because I was so short of breath. At any time I had to exert myself, I would get winded almost immediately. my work environment aggravated all my breathing problems. In fact, because of my breathing, I couldn't wear a respirator because it would suffocate me.

To work as long as I did, I had the other guys help me do my job, and that was not right.

Although the company gave me a couple of chest x-rays, no one ever told me of any abnormalities. I did not know what was wrong with me, but my employer did. See, they had been monitoring my lungs sine 1985. In 1989, they started seeing changes on the x-rays the company doctor took, but they never told me. They just moved me out of the mill onto the woodyard. Then, 4 years later in 1993, they moved me back into the dust inside the mill, and that is where my breathing went downhill.

My doctors testified that I should not have been further exposed to asbestos after the chest x-ray showed I was developing the disease. After my chest x-ray showed up, the company took me out of the medical monitoring program.

There is not a lung doctor in my county or a B reader. The few doctors that are there are just general doctors who usually don't stay long because of our location. The only reason I ever found out

what was wrong with me is because I contacted a lawyer who I heard represented by coworkers.

I was sent to a pulmonologist first and then to an independent State doctor who is an associate professor of pulmonary medicine, who also confirmed that I had asbestosis. I also had the B reader who read chest films for the company confirm that I had it, as did other B readers. Yet, my lawyer tells me that despite all this, I wouldn't qualify to even file a claim for compensation in a court of law under the Nickles bill or the ABA proposal.

The North Carolina Industrial Commission found the reason I cannot work is because of my asbestosis. I am short of breath, and I cannot do my job. I could not do my job.

In fact, the dust was so bad, it would come home on my clothes. While washing these clothes and being around me, my wife of 37 years, Janice, started inhaling the asbestos as well. In fact, now my wife has been diagnosed with asbestosis, too. She is having breathing problems which are getting worse, and she has a terrible cough.

I am here today because my lawyer told me that if Senate bill 413 or the ABA proposal is passed, neither I nor my wife nor most of our friends would be able to recover in a court of law for asbestosis. Even though the North Carolina Industrial Commission has ruled I am permanently and totally disabled, I couldn't recover because my pulmonary function test is "within the range of normal," and I would, therefore, be excluded under the Nickles bill or the ABA proposal.

I cannot do any amount of exertion for over a very short period of time. Just pushing the garbage from the house to the road makes me short-winded and uneasy. My wife's condition is similar to mine, but she also would be excluded under the Nickles bill or the ABA proposal.

I had not planned to be here today because one of my coworkers was going to testify, but he was put in the hospital last week due to his asbestosis. He is on oxygen. Like me, his chest x-ray report would not allow him to qualify for access to a court under the Nickles bill or the ABA proposal.

I have worsening shortness of breath, a dry cough, and I am severely limited in what I can do. I cannot be around dusts, fumes, chemicals, and I truly believe that I may 1 day be like my friend who could not be here because he is on oxygen in the hospital.

That is wrong. It is wrong for me, it is wrong for my wife, and it is wrong for my friends at the mill and all the others whose lives have been hurt by asbestos.

Thank you for this opportunity to be here today to tell you my family's story and the story of a lot of my coworkers who my lawyers say would also not be allowed access to a court under the Nickles bill or the ABA proposal. Thank you.

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

Chairman HATCH. Thank you, Mr. McCandless.

We will turn to you, Mr. Harvey, and look forward to getting your testimony as well. If you will pull that mic up close to your mouth, that will help a little bit for everybody.

STATEMENT OF BRIAN T. HARVEY, MARYSVILLE, WASHINGTON

Mr. HARVEY. Mr. Chairman, my name is Brian harvey, and it is a privilege for me to address you here today.

In some respects, this is a little bit like being at home. My wife has already had the first word about being at this testimony, as you may have noticed in the video. That is not all bad. I should be dead today. The reason I am not dead today is my wife loved me enough to push me, prod me, and all but carry me across the State of Washington until I got to the chest clinic at the University of Washington Medical Center.

After I was in the center, 8 days later, I was presented with the fact that I was a victim of mesothelioma. I now had to face the facts as we knew them about mesothelioma. It has been considered a death sentence, and that is what I felt.

Then I was told, well, if you fight it, you might be able to string it out from 8 months, which is what they expected if you didn't fight, to maybe 18 months, but only one in 20 ever make it to 5 years. The doctor who is responsible for my care said due to the fact your diagnosis was early and your tumor is not too advanced, I have a very aggressive campaign that you would qualify for. I chose that course. That course included, first, chemotherapy to try to reduce size of the tumor and reduce its activity, follow that with surgery where he removed my entire left lung, the left side of my diaphragm, the left side of my pericardial sack, rebuilt the diaphragm with gortex.

Chairman HATCH. With what?

Mr. HARVEY. With gortex.

Chairman HATCH. I see. I missed that.

Mr. HARVEY. So that my left chest is now filled with fluid. You want the fluid there. If that were air, I would have trouble with infection. And he now followed that with neutron radiation in an effort to clean out any single cell of the mesothelioma tumor that might remain.

I am now 42 months from the time of my diagnosis, and I don't plan on checking out any time soon.

Every 6 months, I return to the University of Washington for a CAT scan, blood work, and a general checkup. It is a lot like playing Russian roulette. All of the treatments I was given were an effort by the doctors of the University of Washington to remove the bullets from the cylinder of the gun, but every time I go back, it is like the technicians take out the gun, spin the cylinder, and hand it to my doctor. He points it at my head and pulls the trigger. I have been lucky so far. It has always gone "click," and I remain at no evidence of disease.

Every day, I rejoice in the fact that I am alive, that I can still hear the birds in the park behind my house and the children playing in the yard across the street, and I have at least one more day to be with my family.

After being diagnosed with mesothelioma, I hired a lawyer and filed a lawsuit against several companies who manufactured some of the asbestos products that I worked around. Neither my wife nor I had ever filed a lawsuit before. However, when we learned that the asbestos industry had been aware of the dangers of their prod-

ucts by the 1930's, I felt justified in seeking compensation for my family and myself. After 6 months of litigation, my lawyers were able to obtain several significant settlements in my case.

My wife and I aren't wealthy. My wife still works so that she can maintain my health insurance. However, our settlement enabled us to relocate to Seattle where I could be close to the doctors who are responsible for my still being alive and to put some money away so that my wife and family are covered if I die.

Over the past several years, I have worked with the University of Washington and the Mesothelioma Applied Research Foundation to counsel other mesothelioma victims. I discuss possible treatment options and try to prepare the victims for the devastating effects of the disease. Many victims talk to me about financial disruption that follows a mesothelioma diagnosis. When I suggest that they pursue legal remedies, I am saddened to hear that all the companies from whom I received compensation have filed for bankruptcy in the past 2 years.

I have read many articles and magazines that tell me that the vast majority of asbestos claims filed in America today are brought by people who are not currently sick as a result of asbestos disease. It makes me angry that these cases are forcing the defendants into bankruptcy and diverting funds from the people who are truly sick and dying from asbestos disease. I am angry that the true victims of asbestos are not getting the compensation they need and deserve.

Congress must act comprehensively to address the asbestos crisis in America at four different levels: prevention, detection, treatment, and compensation.

Congress must act to ban asbestos in America. It is unbelievable that asbestos is still being used in this country when its dangers are so well known. My Senator, Patty Murray, has proposed legislation to ban the use of asbestos in America, and I ask the members of this Committee to join Senator Murray in this effort and stop people from being exposed to this deadly material. The best way to solve the asbestos litigation crisis is to prevent people from getting sick in the first place.

Detection. Asbestos disease is very difficult to diagnose and even more difficult to treat. Congress needs to establish a medical monitoring program to ensure that the 40 million Americans who have been exposed to asbestos receive regular examinations by qualified physicians. Most Americans were exposed to asbestos while serving in the military or, like myself, as a union member working in the trades. The Veterans Administration and AFL–CIO could provide the organization to administer an asbestos monitoring program for millions of these exposed individuals.

Treatment. Many individuals diagnosed with mesothelioma are simply told by their physicians to go home and prepare to die. Congress needs to appropriate funds for the research and treatment of asbestos-related disease. Asbestos victims need real treatment options when they become ill.

Compensation. Although the hazards of asbestos were well documented from the 1930's, asbestos was widely used by manufacturers through the 1970's, and it is still used by some today. People whose lives are disrupted or destroyed by asbestos disease should

be able to seek compensation from the responsible companies for their injuries. Individuals who are not suffering a real disease caused by asbestos should be eligible for medical monitoring, but not monetary compensation. The American Bar Association has developed criteria to distinguish individuals suffering from a real asbestos disease from those who are not impaired. Congress should act now to enact the ABA standards into law.

Asbestos has had a devastating impact on the lives of countless Americans. I ask that Congress adopt this comprehensive approach to the asbestos crisis for the benefit of all Americans.

Thank you.

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

Chairman HATCH. Thank you. We appreciate both of your testimonies. They are very dramatic and important to us on the Committee.

For the remaining witnesses, I have these lights. We have given each of you 5 minutes, and when that red light goes on, I would sure like you to wrap up, if you could, because we do have a lot of questions and we would like to be able to elucidate this matter a little bit more with some of the questions we have. If you need more time, just ask me, but if you can do it within the 5 minutes we have allotted, I would appreciate it.

We will start with you, Mr. Austern.

STATEMENT OF DAVID T. AUSTERN, PRESIDENT, CLAIMS RESOLUTION MANAGEMENT CORPORATION, AND GENERAL COUNSEL, MANVILLE PERSONAL INJURY SETTLEMENT TRUST, FAIRFAX, VIRGINIA

Mr. AUSTERN. Chairman Hatch, Ranking Member Leahy, and members of the Committee, thank you for the opportunity of being here today. I am David Austern, and I am president of the Claims Resolution Management Corporation, and I am also general counsel of the Manville Personal Injury Settlement Trust, which is the oldest and at least right at the moment the trust with the most money.

I appeared here 5 months ago and testified about the status of asbestos litigation and particularly claims, and I had some rather dire numbers at that time. I must tell you, after 5 months, things have not improved one single bit.

The CRMC has received on behalf of the Manville Trust well over 600,000 claims in the last 15 years. We have paid 520,000 of these people over $3 billion, and that sounds like a lot of claims and a lot of money, but we are not halfway there. Our future claims forecasters tell us we will receive between 1 million and 2.5 million additional claims. So, arguably, we are not halfway there. We are barely a quarter there.

Most distressing of all, numbers aside, this is a fortuitous system, and, unfortunately, the victims are a function of that fortuity. Whether a victim is paid and how much or, for that matter, if at all is a function of whether defendants are solvent, where those defendants are, whether they are in bankruptcy court, who the lawyer is, and a whole host of other idiosyncracies including jurisdiction.

In fact, that fortuity is before you here today. Both Mr. McCandless and Mr. Harvey have filed claims, and I will tell you that they have both been paid, but because of the fortuitous-ness of this, one of them was paid at a 10-percent rate by the Manville Trust because we only pay at a 10-percent rate at that time, and because of the increase in claims, we had to cut that pro rata rate to 5 percent. And one of these gentlemen, disease aside, got only 5 percent of the value of his claim, and that is so with every single extant asbestos trust. We pay 5 percent for the Manville Trust, and, yet, Manville, it is generally thought, had 30 percent of the liability for asbestos exposure in this country, and not one single, solitary extant asbestos trust pays more than a fraction. Indeed, one of them pays, if I remember my math right, less than a fraction because they pay less than 1 percent of the liquidated value of those claims.

And by the way, we have 18 trusts in bankruptcy court about to be formed, and not one single one of them will pay anything more than a small fraction of the liquidated value of those claims.

Why is there so little money for Mr. Harvey and Mr. McCandless and the other victims of asbestos? Well, you have been told before, and I will not reiterate, that the tort system eats up about 50 percent of all of the funds that get spent.

Let me turn to something else. We have 18 bankruptcies ongoing, and they are chewing up substantial sums. In the Manville bankruptcy, which emerged in 1988, the costs of the bankruptcy were $100 million in 1988 funds, and if you look at the market cap of the 18 companies that are now in the bankruptcy courts and try and figure out what it will cost, I predict for you, never mind future bankruptcies, those 18 bankruptcies are going to chew up in excess of $1 billion in trying to resolve the bankruptcy itself and, thus, Mr. McCandless and Mr. Harvey and their colleagues will have less than that billion dollars.

You have before you what are arguably some competing legislative initiatives, and I don't think it is particularly keen advocacy for me to sit here and be critical of one or the other. Others may have a different view of that, but U.S. policymakers have some tough decisions. So I would like to spend the rest of my time on the trust fund or what some call a national asbestos claims facility because I feel that, by far, it is the better of the proposals.

It would, in fact, create a one-payer system, and by the way, based on no fault, it would be private funded. It would, in fact, prioritize diseases, and it, in fact, would set, with your help, legislative standards for funding and for funding caps.

I would like to be able to sit here and tell you what I do for a business in paying claims requires the knowledge of a rocket scientist, but in candor, it does not. This can be done fast. It can be put together expeditiously, and I would guarantee to you that from the date of enactment to the payment of claims would probably not exceed 90 days. In short, those who criticize this proposal because they think it is complicated simply have never run an asbestos trust, as I have for 15 years. I promise you, it is not that difficult to do this sort of thing.

Let me make one last point before that red light goes on. We are in a situation in which we are paying fractions of asbestos trusts, and we will continue to do so. This is the only proposal that will

remove these cases from a litigation and bankruptcy system, the only proposal that will provide criteria that are meaningful to the payment of claims.

Now, competing, I realize, legislative initiatives before you lead to hard choices. This is the only one that, in fact, will save the money from bankruptcies and will save the money from the tort systems that Mr. Harvey and Mr. McCandless and their colleagues can look to further payments in the future.

Thank you.

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

Chairman HATCH. Thank you, Mr. Austern. That was interesting testimony.

Mr. Archer, we are honored to have you here now. I understand you have Dr. Crapo with you. Feel free, Dr. Crapo, to advise him anywhere through is testimony or questions.

STATEMENT OF DENNIS ARCHER, PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION, CHICAGO, ILLINOIS

Mr. ARCHER. Thank you, Senator Hatch, Senator Leahy, Senator Kennedy, and all Senators present.

My name is Dennis Archer, and I am president-elect of the American Bar Association. I appear before you today in that capacity on behalf of the American Bar.

As you have noticed, Mr. Chairman, in the audience with me today is Dr. Robert Crapo, an expert in pulmonary testing and pulmonary physiology. He chairs the American Thoracic Society Committee that sets these standards. He has been chair for 15 years. He is currently on the Committee that is writing international standards. He was one of 10 physicians interviewed by our Commission on Asbestos Litigation when it developed a medical criteria standard. Also in the audience is Philip McGuine, a member of the ABA Commission on Asbestos.

We cannot protect victims of asbestos like Brian Harvey and his wife unless we fix the system. Asbestos litigation, as both you and Senator Leahy pointed out in your remarks, is spiraling out of control. 600,000 claims have been filed, with 200,000 currently pending, and in New York City alone approximately 30,000 cases. Increasing caseloads lead to longer delays, which means people are, frankly, dying before they get their day in court, as 65 companies have bankrupted. Sometimes bankrupt companies can only pay, as you heard, pennies on the dollar. Workers have lost 60,000 jobs and an average of $8,000 in pension accounts. The courts are overwhelmed, and there may not be anyone left to pay victims.

There is a simple principle here: Help people who are sick when they are actually sick. We need to triage the mass of cases. Sick people are not getting the help they need. For victims, short-term windfalls can cause massive, long-term shortfalls. We should use more than three decades of medical and scientific research to craft a medical standard for sickness, concentrate on those who are sick and need our help today.

We need to implement a medical standard which will restore order to the system, and there needs to be a change of the Statute of Limitations. Implementing a Federal medical standard, a clear,

consistent, medically sound standard for those who are sick, change the Statute of Limitations that the clock will not start ticking when and if a person actually gets sick.

Debate should be about the system. Today, the system says file now or never. A better way is to file when you actually need it. Too often, there is no justice for victims or for corporations.

The American Bar Association House of Delegates is made up of lawyers who come from small law firms. They do plaintiff's work. They do general practice work. There are representatives there from State and local bar associations. There are representatives there from sections and divisions like labor and employment and litigation and health law, and 70 percent of the lawyers were present who heard the debate. I might add that we are a very engaging body.

We invited and had privileges of the floor, the president, the distinguished president of the American Trial Lawyers, Mary Alexander, who came in and shared her views as to why the standards should not be passed by the House.

There was an outstanding lawyer, I believe his name is, Roger Sullivan, who represented plaintiffs from Libby, Montana, who shared his views.

There was a young woman whose name escapes me, but she was from California, and her partner, interestingly enough, was a board-certified physician who shared their views. She shared their collective views as to why it should not be passed.

There was a former president of the State Bar of West Virginia who stood at the well of the House and said why he felt the standard should not be passed.

On the other hand, there were others who advocated the reason and rationale for the medical standards, and 70 percent of the people who voted, voted in favor of the standard.

I believe, as Mr. Austern has said, that perhaps one of the key elements to solve this may very well be a trust fund, but a trust fund without medical standards will have them going back to the well and having him paying 5 percent on a claim, and his prediction is others who are in bankruptcy and coming out with trust funds will be paying even less.

I believe you can solve this. You should know that I spoke to Senator Baucus' staff, and I spoke to the Senator. I have indicated to him that we believe, as I close, that the medical standards actually cover and respect the concerns of his constituency in Libby, Montana, but if, for some reason, that is not the case, I have offered and the Commission has offered to work with him to find a solution so that his constituents in Libby, Montana, and those similarly situated can be protected, but not to denigrate the standards in such a way that the status quo remains.

Thank you.

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

Chairman HATCH. Thank you, Mr. Archer. We are really pleased you would take time from a busy schedule to be with us today.

We are honored to have you, Mr. Hiatt, here representing the AFL–CIO, and we appreciate you taking time to be with us.

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

Mr. HIATT. Thank you very much, Chairman Hatch. Thank you, Ranking Member Leahy, and the other members of the Committee. I am very pleased and honored to be invited back, and I do want to thank the Committee for its interest in this major public policy issue and its clear intention and desire to see if we can't figure out some fashion of reaching closure and one that is, most importantly, based on as much consensus as possible.

Last fall, when you were kind enough to invite me to appear, you may recall I talked about three things. First, as a representative of the AFL–CIO that estimates having well over a million active and retired members of our affiliated unions who are victims of asbestos-related disease, we acknowledge that the system, as it presently stands, is broken.

We talked about how it is a system that does not, with very few exceptions, provide fair compensation to the people who deserve compensation. It doesn't provide compensation quickly enough. It doesn't provide it with the certainty that is necessary, the predictability, and it isn't providing with the certainty in predictability to companies either that is necessary.

We indicated, second, that we were open to a legislated solution as long as it wasn't imposing a system that was as bad or worse than the current system, that it would only make sense to go through this exercise if we could end up with a solution that did truly represent an improvement. We didn't espouse any one particular approach, but we shared with you a set of principles that the AFL–CIO's executive counsel had passed at its meeting last summer in which we talked primarily about the importance of reducing costs, reducing delay, reducing uncertainty, No. 1; No. 2, a system that, while it would make distinctions in terms of compensation levels based on severity of sickness, it wouldn't just take out of the system completely victims who may not be as sick as the mesothelioma victims or the victims represented by Mr. Kazan in many cases, but would still provide compensation as deserved to compensation victims who are still, indeed, sick, like Mr. McCandless, even if they are for the moment at a lower level of severity.

We talked about the need to make sure that testing and monitoring is built into the system to make sure that victims have a way of learning when their disease progresses. We talked about how any system should have at the end of the day some form of ultimate access to the courts, and we talked, finally, about the value of some role for the Federal Government, given the Federal Government's involvement in the early stages of this whole problem.

Since the hearing last fall, we have, at your urging, been very engaged with defendants, with defendant companies, with insurers, with trial lawyers, and with other interested parties across the board, but I want to report today on what really has for us become the most hopeful, I think, set of discussions that we have been having with a range of major asbestos defendants and insurers on a very comprehensive reform proposal, and it is the one that Mr. Austern described as the so-called trust fund approach.

It is extremely complicated. There are many still-unanswered questions, but I do feel that we are more optimistic that it would be possible to reach some form of a consensus approach here than I would have thought and certainly than is the case with respect to the Nickles bill or some of the other approaches that have also been proposed.

You have not only the testimony of Mr. Austern, but you have the written testimony from the so-called Asbestos Study Group, which consists of a large number of major companies, including, Dow, Viacom, Ford, General Motors, General Electric, Honeywell, Halliburton, and a number of major companies that have taken a very serious role in these discussions. I would urge that you read carefully their written testimony because I think that what is most notable is that we do at least in concept have agreement on a number of very basic features that this no-fault administrative compensation approach would have to have.

First of all, that the basic payment structure would, indeed, be a national no-fault administrative system with a payment schedule for asbestos-related conditions that would provide victims with fair compensation.

Second, with reference to Mayor Archer's comments, even in this trust fund approach, the payments would have to be based on medical criteria, we completely agree with that. We don't agree with the medical criteria that the ABA and the Nickles bill contain. We think that they are too restrictive in a number of ways, which I would be happy to discuss, but even there, it seems to me that it should be possible to reach consensus if you truly bring in representative doctors from the different groups. It should be possible to reach an agreement on what medical criteria should be used to distinguish between the different types of asbestos-related disease and the different levels of severity within certain types of asbestos-related disease.

Third, I think we have an agreement in concept that, while the schedule would take account of victims whose condition may have involved a variety of causes, it wouldn't deny compensation to those with asbestos-related disease who also smoked or were exposed to other harmful substances, which the ABA's approach and the Nickles' approach would eliminate.

Fourth, the administrative system would be funded by statutorily mandated payments from asbestos defendants and insurers, including the bankrupt defendants, and existing asbestos trusts, and that is something where I understand there is a good deal of discussions going on right now among the insurers, among the corporate asbestos parties as well.

Fifth, the Statute of Limitations would be revised so that the victims who received a payment for one asbestos-related condition and then developed a second condition would receive another payment for a different condition.

Sixth, that there would be some ultimate access to the court structured in, so as not to undermine, but one that wouldn't undermine the overall integrity of the system.

Seventh, that companies contributing to the funding of the system would have no standing to contest eligibility issues, such as

product identification or causation, and that this would truly be a no-fault system.

Finally, that the Federal Government would hopefully be able to play some significant role if we could find one that the Federal Government agreed made sense.

I want to just conclude by saying there are two critical issues that we still are working on very much and would be of utmost importance to us. One is the risk issue. We believe that all parties have a legitimate concern about bearing the ultimate risk here and not miscalculating how much this is going to cost and what that would mean 10 years from now, 20 years from now. However, we would not be able to agree to a system that risks ending up where Manville is today, where in 3 years we find ourselves, the victims only receiving 50 cents on the dollar and in 10 years receiving a nickel on the dollar. So the risk issue is clearly a critical one.

Finally, as I said at the beginning, any system has to really address the fairness of the compensation schedule. We recognize that no compensation schedule can meet the highest levels of compensation that some of the most successful lawsuits have resulted in, but by the same token, the numbers have to be fair. They have to be fair not only to those who have the most serious illnesses, such as mesothelioma and cancer, but also to others who are, indeed, impaired and cannot participate in regular life activities the way that you and I expect to be able to do.

Thank you very much.

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

Chairman HATCH. Thank you.

Mr. Kazan, we were very appreciative when you testified before. We had kind of a give-and-take between you and Mr. Baron, who differed, but we would like to hear from you again because you have been representing a lot of people who really suffer from this disease, and we would like to have your viewpoint once more and anything else you can add to what you said before.

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

Mr. KAZAN. Thank you, Mr. Chairman, and members of the Committee. I am honored to join you again as you consider this important issue.

The title of this hearing——

Chairman HATCH. Please pull your mic over just a little bit so everybody can hear you. That is good.

Mr. KAZAN. The title of this hearing says it best: It is time for Congress to act. As I emphasized when I sat here 5 months ago, asbestos litigation has become a national nightmare as well as a national disgrace, and it cries out for your attention. I sincerely hope that this hearing will be a springboard for action and that meaningful legislation soon reaches the President's desk.

At that September hearing, all of the panelists from the AFL–CIO to the Association of Trial Lawyers of America agreed that asbestos litigation was a serious problem requiring congressional

intervention, and we all pledged to work with you to find a solution.

Since then, others have joined the chorus, including your colleague, Senator Nickles, who has introduced an asbestos bill, and the American Bar Association. As Mr. Archer explained, the ABA recently adopted recommendations for asbestos legislation. So the debate has now shifted.

We are not just talking about the problem anymore. We are discussing how to solve it, and that is what I will address today from the point of view of someone who has represented asbestos victims for nearly 30 years.

My view is simple. Like Senator Leahy, I believe in our civil justice system. It is the best in the world, and we can solve the asbestos litigation nightmare simply by making some small adjustments in that system.

The heart of the asbestos problem is that tens of thousands of questionable claims, many generated by mass, for-profit x-ray screening programs are filed every year. These are not diagnosed cases of asbestos disease in any real sense. The vast majority of the claimants today have no real illness and no real symptoms. All they have is an x-ray that shows marks that could have been caused by asbestos. In most cases, they have not even seen a doctor. In short, Mr. Chairman, they aren't really sick. If they were your children, you would not even keep them home from school.

Unfortunately, in many States, this x-ray report can trigger Statutes of Limitations, forcing the premature filing of thousands of claims. These claims prevent the courts from doing their job, resolving the cases of those really injured by asbestos.

The first essential step toward solving this problem is to defer the claims of those who are not yet sick, but preserve their rights to sue if and when they become sick in the future. Congress could make this possible by tolling the Statutes of Limitations. This would allow the courts to focus on the 10 to 15 percent of current claims where the plaintiff has cancer or some breathing problems caused by asbestos. These claims would continue as they are today, without limitation. I know our courts can provide fair and evenhanded justice in those cases.

Another important element of any legislation is the establishment of medical criteria to distinguish between those who are sick from asbestos exposure and those who are not. Unlike other proposals which would take claims out of the courts, this simple approach would create the conditions that would allow the civil justice system to work.

It is also the approach taken by Senate bill 413 and the ABA. Their criteria are very similar and address the unique problems involved in integrating medical standards into the legal system.

Any legislation should require that a doctor obtain information about the plaintiff's work exposure and medical history. The doctor should also examine the plaintiff, review x-rays and lung function tests, and write a report that includes a medical diagnosis. Believe it or not, there is no real medical diagnosis made in most of today's claims, and, Senator, that is a travesty.

It is also important that Congress set out some sort of workable standard to objectively measure whether someone is functionally

impaired and whether that impairment is actually related to asbestos exposure. Unfortunately, many sick asbestos claimants are not sick from asbestos. They may have been smokers or have some other illness which has caused their problems. While the ABA resolution and Senate bill 413 differ in specifics, they both take a reasonable approach to this question.

The bottom line is that reasonable medical criteria will ensure that the truly sick have immediate access to the courts and will get the compensation they deserve. This would go a long way toward putting the brakes on the bankruptcies that delay and reduce compensation to those who deserve it the most.

It would also ensure that those companies already in bankruptcy could allocate their resources toward the truly sick claimants and emerge more quickly from reorganization. Since your last hearing, we have seen more studies quantifying the crisis, a lot of great discussions about solutions, and even proposed legislation, but in those same few months, more defendants have filed for bankruptcy and thousands more Americans have learned that they have serious asbestos disease. They face devastating illness and great uncertainty about whether they will receive just and fair compensation so that their families will be taken care of.

Congress cannot let this scandal continue. I urge you to pass legislation establishing medical criteria, and I urge that it be done soon.

Thank you, Mr. Chairman.

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

Chairman HATCH. Thank you, Mr. Kazan.

We will have 5-minute rounds, so each of us will have a crack at this.

As I have been listening here—and we have listened to our two folks who are suffering—it suggests that there is a split in the business community on this issue.

I think the only difference is in approach, but it is difficult to get to unanimity on any particular problem or a recognition. There ia unanimity that we need to reform. The question is what form to we reform in.

I am going to go to you, Mr. Austern, because you have been dealing with these type of problems, and you made a pretty dramatic statement on why the victims are really getting the short end of the stick here.

First of all, it looks to me like we are talking about coming up with some reasonable medical criteria that really will say who is sick and who isn't, and, yet, at the other end of that spectrum is the hope that we can maybe have an actuarily sound trust fund. And I presume that all of you would agree that trust fund is going to have to have a finality to it, so that all of these companies know just what their limits of liability are in the end. That is going to be hard to do.

In fact, I am not quite sure that the trust-fund approach is as easy as some have said, but I am very interested in it because, if we could get a finality to it and we have enough money there—let me just ask you this. Do you agree that this is kind of a generalized statement of where we are, that we have got to find some way

of melding those two things together or at least try to come up with some way of adding finality to this, while getting most of the money to the victims rather than to the lawyers?

Mr. AUSTERN. I think that is exactly right.

Let me say to you that the finality approach can be looked at in two different ways. One of them is a paper delivered to this Committee by a representative—in fact, I guess not a representative, a partner of Goldman Sachs makes the point—and makes several points, but makes the point that certainty or a lack of certainty is what is driving the stock market and driving the financial community.

Chairman HATCH. If we could solve this problem alone, it would be very helpful, it seems to me.

Mr. AUSTERN. If you could give certainty to what the total liability will be in some meaningful way, that would be very productive.

May I also point out—and I realize how inexcusably self-serving this is, but that is not going to deter me—a national fund can dispose of these cases and can pay fair compensation much more cheaply than the tort system. It costs the beneficiaries of the Manville Trust, including Mr. Harvey and Mr. McCandless, 3 cents on the dollar to, in fact, pay the claims, 3 cents on the dollar compared to 50 percent. Now, that is the transaction cost when you have a trust fund, 3 cents.

I am not here to criticize good-faith efforts that are otherwise, but the ABA proposal does not remove anything from the tort system, and my fear is that were you to merely adopt medical criteria, we would be right back here in 3 years.

Chairman HATCH. Well, if I understand you correctly, you are saying that it would be wise to have a trust fund if we could bring one about. It would be wise to have medical criteria. Would you accept the ABA's recommendations on medical criteria?

Mr. AUSTERN. I would not.

Chairman HATCH. OK. Why?

Mr. AUSTERN. Well, Senator, I have a fair number of problems with it. Let me mention just two.

Chairman HATCH. Can I ask one other question that you can weave into your discussion? How would this trust fund work? Would it be an opt-in situation where people can opt in and become part of it and have a finality to their obligations and be free of them in that sense once they have paid their money to the trust fund, or would you try to get every company that is involved—and I understand there are a thousand or so companies—to sign on right off the bat? How would you work that?

Mr. AUSTERN. Can I answer the criteria question first?

Chairman HATCH. Sure.

Mr. AUSTERN. Because the second one is much more difficult.

With respect to the criteria, Mr. Chairman, a 2/1 ILO profusion level, which is the way the ABA approaches the problem that Mr. McCandless has of not qualifying for pulmonary function tests, with all due respect, is not an escape clause. It is absolutely not an escape clause.

We got 56,000 claims last year. 51,000 of them were from people with some form of asbestosis. We didn't have thirty-five 2/1's. We are not talking about a way of creating a system that, in fact, will

excuse people that they do not qualify, as Mr. McCandless doesn't, with respect to the PFTs.

And second and even more importantly, as some people behind me in this room know, because they sued me over this question, we used to have medical criteria in which we hired our own B readers and our own B readers looked at x-rays, and they determined whether the x-rays submitted by the other B-readers who represented the claimants were correct.

Senator this is not an exact science. Our own B readers had a 50-percent inter-reader variability. It was 50 percent of the time, our own B readers disagreed with each other as to whether somebody would have qualified under the ABA standard. Essentially, the ABA standard is a binary system. You are in or you are out, and if you are out, you are out because somebody looking at a soft-tissue disease x-ray has reached a decision and that is a decision about which reasonable people can disagree.

Now let me turn to the second question. You can have an opt-in program in which people with asbestos liabilities can opt in, and then you have to get to a certain number of what the political scientists call decision trees. Are you going to make it an opt-in program in which everyone is eligible, no matter what their liability is? Are you going to make it compulsory so that you have to opt in? And although I realize there are constitutional limitations on that, I am much more concerned with the opposite end of the spectrum, and that is, are you going to have eligibility criteria for people to opt in, but if they are too small, they can't.

Chairman HATCH. Well, if they don't opt in and we don't provide a means for them to opt in, then they can be sued.

Mr. AUSTERN. That is correct, and, obviously, there will be important incentives, not to be sued——

Chairman HATCH. Sure.

Mr. AUSTERN [continuing]. To opt in.

My own view of this—and, Senator, I am not an economist, but my own view of this is that there are sufficient funds out there to, in fact, have enough people opt in and to have some finality to this system. I do not suggest, as I sit here, that in 4 hours we can solve that problems in terms of shares and in terms of the amount of money, but we can certainly have an opt-in system that will work.

Chairman HATCH. Mr. Archer, my time is up, but if you would care to comment about any of that——

Mr. ARCHER. Thank you, Senator.

Chairman HATCH.—I think all of us would appreciate it.

Mr. ARCHER. Let me just concede at the outset, by the very nature of having some standards, there will be those, depending upon the level of standards, that will be omitted. They will be deferred.

Chairman HATCH. You have indicated some flexibility, though.

Mr. ARCHER. Absolutely.

The other thing that I think is important to acknowledge is that what is going on in our State courts right now in New York, Baltimore, Chicago, other cities, is that judges, without any guidance from this Congress or anybody else, they have got so many cases that have been filed that they have simply said to the lawyers that are representing the plaintiffs, if your client is not sick, we are going to put them on a deferred status because we need to get to

the cases where people are sick and are dying. We are merely talking about deferring. When the person becomes sick, they are able to come into the system, so that there will be money there for them when they are sick.

As it relates to Mr. McCandless, we care deeply about Mr. McCandless and his concerns and his health care, but I can tell you sitting here, I can't admit or deny or suggest that the doctor or his lawyer, who is not a doctor I don't believe, was accurate in whether or not he would meet the medical standard or not. I don't know about Mr. McCandless' history, whether he happens to be someone who has emphysema or someone who smokes or didn't smoke or what his history might be, but we want to make sure that the victims who are sick are compensated.

If you have ever prayed with, prayed over someone who is dying of cancer, you would have an appreciation of the deep sensitivity that I and others in the American Bar Association share, even if they are not dying, but their lives are impaired so that the quality of their lives are impacted. We care about them, and so we want money there.

Chairman HATCH. We appreciate that.

What I wanted to just establish is that you are flexible.

Mr. ARCHER. Yes.

Chairman HATCH. We have got to put something together here that will work.

Mr. ARCHER. But the flexibility, Senator—I apologize. The flexibility is not to weaken the standard, so that the status quo remains the same.

Chairman HATCH. I understand. Sure.

Senator Leahy?

Senator LEAHY. Thank you.

The chairman had mentioned Mr. Kapnick's statement. Can we make sure that is part of the record? I have it here.

Chairman HATCH. Yes. Without objection.

Senator LEAHY. Mr. Mayor, I understand the scope of the ABA Commission report, and resolution on asbestos litigation was narrow. Am I correct? It only considered medical criteria and Statute of Limitations issues. Is that a fair statement?

Mr. ARCHER. That is correct.

Senator LEAHY. So the ABA Commission did not consider how victims of asbestos exposure might be compensated, such as medical monitoring for some of the asbestos victims?

Mr. ARCHER. That is correct.

Senator LEAHY. Mr. Mayor, incidentally, I also appreciate you taking the time to come here. I imagine you have more than enough to say grace over, and we appreciate you being here.

Some concerns have been raised—and I am sure you have heard them—that the composition of the ABA Commission may revise its recommendations. The commission did not include an attorney who represents organized labor, and, yet, so many of the members of organized labor have been exposed to asbestos. It did not have a member of the labor and employment section of the ABA. I wonder why that is so, and why didn't the ABA Commission include an attorney who represents nonmalignant asbestos victims? Should the ABA Commission have been broader in its representation?

Mr. ARCHER. With all due respect, no. As it relates to lawyers who represent those who have asbestos, but may not have the cancers and more serious problems, let me suggest that there were several, including Mr. Kazan. He didn't start practicing law on the complex cases. He gravitated through and tried other cases and handled other cases. So, therefore, that aspect was quite covered, and I was completely satisfied.

Let me also say that the House of Delegates was completely satisfied. The employment and labor section was given every opportunity to be heard, to speak on the floor of the House, as would anyone.

In fact, if Mr. Hiatt, for example——

Senator LEAHY. If I might on that——

Mr. ARCHER. Sure.

Senator LEAHY.—Mayor Archer. I offer the chance to speak, certainly. Somebody from the antitrust section could speak, somebody from the juvenile justice, but that is a little bit different than being part of the commission where a lot of the negotiations go on long before the matter is ever on the floor. Isn't that correct?

I mean, I think it is like here. At any time we bring up a piece of legislation on the floor, this piece if it comes out of here, any member of the Senate, all 100, can speak on it, but it is going to be those of us in this Committee who are going to craft the basic part of the legislation before it goes there.

Mr. ARCHER. Well, we work just a little bit different, Senator, and that is, that members of the House or sections and divisions have every opportunity in the well of the House to raise issues and concerns that they felt were not there, as well as to make amendments, to make amendments——

Senator LEAHY. We do, too, in the Senate. We do, too, in the Senate, but it still gets written primarily here.

Mr. ARCHER. Well, it has been primarily written by a commission that I believe was quite fair.

Senator LEAHY. And you don't think it needed somebody representing organized labor, even though they had so many members exposed?

Mr. ARCHER. Senator, let me just simply suggest that in 1983, when the American Bar Association issued its first policy and said that there needs to be Federal legislation, the labor and employment section, to my knowledge, has never advanced not one resolution before the House to have a policy. Others who have the same opportunity did not do so.

I chose to make sure that this was brought before it so we would have a voice at the table to work with this honorable Committee and the Senate, to make sure that we had a voice.

Senator LEAHY. Thank you.

Mr. McCandless, I was greatly moved by your testimony. We have heard a lot today about preventing unimpaired people from filing lawsuits based on asbestos exposure, either under the ABA proposal or Senator Nickles' bill. Do you consider yourself or your wife or your coworkers to be unimpaired, or would you consider yourself impaired?

Mr. MCCANDLESS. I am impaired.

Senator LEAHY. I think so. Based on your testimony, I would agree with you.

The use of asbestos has been banned in 20 countries, Argentina, Australia, Belgium, Chile, Croatia, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Latvia, the Netherlands, Norway, Poland, Saudi Arabia, Sweden, Switzerland, and the United Kingdom. Most of the European Union have banned it by 2005. Asbestos is still being used in some consumer industrial products in this country.

Let me ask you, yes or no: Should asbestos be banned here in the U.S., like it has been in all these other countries?

Mr. McCandless?

Mr. MCCANDLESS. Yes.

Senator LEAHY. Mr. Harvey?

Mr. HARVEY. Yes.

Senator LEAHY. Mr. Austern?

Mr. AUSTERN. Yes.

Senator LEAHY. Mr. Archer?

Mr. ARCHER. It is going to be up to this Senate.

Senator LEAHY. Do you have any feeling? You are a citizen of this country. What would you want?

Mr. ARCHER. Oh, I am a citizen of this country. We have no policy on it for me to speak to.

Senator LEAHY. I am asking you individually. Do you think it should be banned?

Mr. ARCHER. I think it is going to be up to our national interests and what you best decide. You will have more knowledge base on this issue than I will have.

Senator LEAHY. Fair enough.

Mr. Hiatt?

Mr. HIATT. Your Honor, I think I will pass on this because I am just a lawyer, and I would be a little nervous taking a position that might be at odds with the Federation's official position. So I think I had better hold back.

Senator LEAHY. I understand.

Mr. Kazan?

Mr. KAZAN. My sister who lives in London is the executive director of an organization called the International Ban Asbestos Secretariat.

Senator LEAHY. And you want to go to the next family gathering. Is that about the way you are leading here?

Mr. KAZAN. She is my smarter, younger sister, and I think it would be great, but I hesitate to go down the road that both you and the chairman promised each other last year, that we are not talking about broad issues and Christmas tree bills. I would be happy if we solve this problem——

Senator LEAHY. No, I am not——

Mr. KAZAN [continuing]. But I want to come back to talk about the ban.

Senator LEAHY. I understand. I am not suggesting to go in this bill, and no matter how I might feel about it, I would not want it in this bill because I do not want this to be a Christmas tree bill. But I am just curious while you are here. I remember what Mr.

Harvey said very strongly. I happen to agree with him, but I don't want it in this bill.

In the last Congress, Senator Hatch and Senator DeWine, who is here, and I introduced legislation to exempt investment income in asbestos bankruptcy trust funds from Federal income tax, doing this to increase the funds available to compensate victims and the like, investment income and 401(k) is treated. I thought it was particularly appropriate, given the Federal Government's role in exposing veterans to asbestos-related products. Should we exempt investment income from Federal income tax in order to increase the funds available under these things?

If I might just ask this of Mr. Austern and Mr. Hiatt.

Mr. AUSTERN. Senator, I cannot think that this would constitute a Christmas tree or bells and whistles, and I would strongly urge you to do this.

I will give you an example. The Manville Trust has about a $1.7 billion left. Our tax liabilities for capital gains and income tax over the next years if we do not get relief will be $100 million. If we can have that $100 million without paying taxes, then, in fact, it would make a big difference to Mr. McCandless and Mr. Harvey.

Now, we are just one trust, and we happen to pay a lower tax rate than other trusts. So I can tell you, speaking for the other trusts, you will provide hundreds of millions of dollars to victims of asbestos if that legislation is passed.

Senator LEAHY. I take it that you agree with Senator DeWine, Senator Hatch, and myself on this one?

Mr. AUSTERN. I cannot tell you how strongly I agree.

Senator LEAHY. Mr. Hiatt?

Mr. HARVEY. Yes. I think we agree, Senator, and I think this also goes to the question that Senator Hatch was asking about at the end of the day, any kind of a trust-fund approach is going to have to minimize if not completely do away with the risk factor that all the parties are going to be expected to bear. And the kind of cushion that this kind of a measure would be provide I think will certainly not be the entire answer, but would be helpful in that regard.

Senator LEAHY. Put my other questions in the record.

Chairman HATCH. Yes.

I am not convinced that this trust-fund approach can be put together. I have met with a lot of people who think it can be, and if it can, that is an interesting thing, but you are still going to have to have the other side of that coin, too. We are going to have to split the baby, so to speak, in order to figure out what to do to make this as reasonable and good as we possibly can for the benefit of those who are victims.

Senator LEAHY. But, Mr. Chairman, I am convinced that it is possible to get a legislative solution. I truly am convinced of that.

Chairman HATCH. I didn't say that.

Senator LEAHY. I know you are not. I know you are not.

Chairman HATCH. Legislation solution, I think it is possible. The question is what.

Senator LEAHY. You and I have been working on that, and I am convinced. And I just urge that all our staffs work closely together on this. I think you and I can work on that.

Chairman HATCH. I am going to count on us working together. Senator DeWine?

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Well, Mr. Chairman, let me just thank you for holding this hearing and salute you for that, and also Senator Leahy. Senator Leahy held a hearing last year on this, and I know how interested he is in this issue.

I can't think there is much more important this Committee is going to do this year than get a bill out, and I appreciate your commitment not only to hold a hearing, but to move a bill.

The status quo is simply intolerable. It is unfair to the victims. It is unfair to the employees of the companies that are being hurt.

We need to worry about, first of all, the victims. The victims need to be paid fully and they are not, and they need to be paid quickly and they are not. We need to worry about the companies that don't really have much of a future because of the uncertainty and the employees who work for these companies who don't have much of a future because of the uncertainty.

This has a tremendous impact, as Senator Voinovich has indicated, on many, many States. It certainly has an impact on my homestate and Senator Voinovich's State of Ohio. We have a number of victims in Ohio who this directly affects.

We also have a number of companies who this impacts. Let me just give an example. In one county in the State of Ohio, Cuyahoga County, there are 745 companies that have been sued in Cuyahoga County, and this is the list just in Cuyahoga County. None of these companies, Mr. Chairman, not one of these companies ever manufactured asbestos, not one company.

We talked about several different options. I don't know what is the most viable option. I think either option would be a vast, vast improvement over the status quo. I suspect that the medical criteria bill is probably the easiest bill to pass, but I certainly have an open mind about this. I am going to continue to listen to the testimony. I think the testimony so far today has been very, very helpful and very, very enlightening, and I am going to ask some additional questions beyond those that have already been asked.

Mr. Archer, let me start with you, if I could. You heard the testimony of Senator Baucus, and you commented a little bit on that. Let me just ask you and maybe Mr. Kazan about that, if I could, if you would go on a little bit further.

In the Senator's written testimony, he says: It has been made clear to me that we have likely lost ground under the ABA medical standard with even more Libby patients barred from filing a claim under the ABA standard than were barred under the 1999 Act.

I would refer members of the Committee to the letter from Dr. Whitehouse that I have submitted for the record, and this is a very lengthy letter. I am not going to reference it. It is in very tough medical language, but I don't know whether the two of you have had an opportunity to look at the letter. I would reference it to you, if you haven't. The Committee would appreciate your taking a look at the letter, and I would wonder if the both of you and any other members of the panel could comment on that.

Mr. ARCHER. Senator, at the time the doctor's letter was released, it was at a press conference in Seattle, Washington, during the midyear meeting of the American Bar Association. There was a dynamic trial lawyer by the name, I believe, of Roger Sullivan who is representing Libby, Montana, clients. They were there tethered to oxygen, and Mr. Sullivan asked of the six patients or clients who were there, how many would not meet the ABA standards and all six raised their hand.

At that press conference, there was a lawyer from Chicago, the chair-elect of the Illinois State Bar, Mr. Lavin, who practices law as a plaintiff and represents sick people who have been exposed to asbestos. He was asked after the press conference what he thought. His observation was: On the basis of what I see, these people are sick.

We took a look at the letter. In fact, one of the members of our commission, Robert Clifford, the immediate past chair of the litigation section of the American Bar, called several doctors, one of which was a physician at Northwestern University, who came in and offered testimony to our commission. He said under the facts that you were just reading to me, every one of these people are sick and they would clearly qualify under the standards.

It is consistent with what I shared with Senator Baucus that we believed that on the basis of the standards that have been set forth by the American Bar Association that the good citizens and the people who have suffered so badly in Libby, Montana, would be taken care of, but if, for some reason, that after looking at it further and if he had some physicians——

Senator DEWINE. You are willing to work with him.

Mr. ARCHER. Absolutely.

Senator DEWINE. All right. Thank you. Mr. Archer, thank you very much.

Mr. Kazan?

Mr. KAZAN. Senator, I have not ever seen that letter. I would be glad to look at it in writing.

Senator DEWINE. We would like for you to look at it.

Mr. KAZAN. I have, however, reviewed Dr. Whitehouse's past work and an article he has in press, and I can tell you that Dr. Whitehouse himself recognizes that people with clear x-ray abnormality, such as the pleural plaques that we have been talking about that are caused by asbestos, that that is very different from considering those people to be sick. He, in fact, has recognized that those findings alone really are not a form of sickness, without pulmonary function abnormalities.

To talk for a moment about Senator Baucus' concern, if this is the appropriate time to address that, I don't know, but, clearly, he has a passionate concern for the people of Libby, and I share that concern.

I have been representing people like his constituents for 30 years, and I have represented factory workers, asbestos manufacturing workers by the hundreds who have been in a similar situation. I would agree with every bad thing he wants to say about W.R. Grace, and I could add things that he doesn't even know about that make it sound even worse, but the irony is that the only hope for any compensation of meaningful amounts for the people

of Libby, unless you all want to pass some separate appropriations provision, is, in fact, the enactment of something like the ABA criteria because what is going to happen with the Libby people is they have claims only against W.R. Grace which is in bankruptcy.

W.R. Grace has historically gotten about 75 percent of the volume of cases filed against it that the Manville Trust gets. What that means is that in that bankruptcy, the bankruptcy trust, unless we change the rules, will have to make provision to compensate something like a 1.25 million future claims or more. By the time you do that, everybody in that trust will get pennies or fractions of pennies on the dollar.

If you impose the medical criteria, as the president of ATLA herself said to the ABA, that will eliminate 90 percent of pending claims, you will then concentrate the available moneys for those who are ill, who have symptoms, not only cancers, but people with real breathing problems.

Further, what Dr. Whitehouse makes clear is that the people in Libby, because of the tremolite exposure and the kind of disease they get, have an unusually virulent and progressive form of disease, and he says at least 75 percent of those people progress to have significant impairment. What that means, then, is that the great majority of people in Libby will qualify right now under the ABA criteria. They will share in a fund with far fewer people, and those of them who don't yet qualify will have a fund available for when they do get sick if they are unfortunate enough to progress.

I have done some rough calculations, and I can tell you that the ABA criteria will increase the payments to the citizens of Libby who have any level of functional impairment somewhere between 10fold and 20fold at a minimum. That is the way to take care of the people of Libby, and while it may be counterintuitive, that is just the reality.

Senator DEWINE. Thank you very much.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Senator Kennedy?

SATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman, and thank you for having the hearing. A panel such as this has been enormously helpful.

I listened carefully to the testimony of Mr. McCandless and Mr. Harvey. Both of the stories are compelling, and both of them deserve access to justice. And both of them are entitled to fair compensation. No proposal that would make us choose between them, I think, deserves the consideration by this Senate. Only reforms which would provide fair and timely compensation to both of them and to the thousands of victims with similar conditions deserves our support.

Nice to see you, Mayor Archer.

I am concerned, Mayor Archer, your proposal about the criteria which you have included, and we have heard concerns that have been expressed. You have indicated a willingness to consider alter-

natives, but on the other side, you have also said that you had to have some kind of a standard.

What kind of assurance can you give to those who, in the future, may not reach your standard, but still may get sick in the future, that there is going to be some resources or funding that will be available to them for their compensation?

Mr. ARCHER. Senator, I think on the basis of what you have heard here today and from the comments made by your colleagues on the Senate Judiciary Committee that there are a number of lawsuits being filed today without any standard, where people are not sick, and what has not been discussed is what occurs if they happen to be a publicly traded company, where an analyst reviewing their report suggests that—and I think Senator Voinovich did say this, that they downgrade their stock price and it becomes a self-fulfilling prophecy, that they are forced to either settle the cases, try the cases en masse, and ultimately what occurs is that the companies go out of bankruptcy. It is being driven, regrettably, by people who, frankly, are doing what they think is right, and the lawyers, frankly, representing them think that they are doing right.

If they have some evidence that they have been exposed to asbestos and under the present system the Statute of Limitations begins to run, they file. By setting up a standard, if the Senate Judiciary Committee and then the House and Senate were to concur and the President signs, it would prevent bankruptcies in the way that they have been coming. It would preserve assets, much like Steve Kazan I think has just responded to the last question from Senator DeWine, and that there would be more dollars there. I wish I could promise you and say this is what is going to occur. I don't know what is going to happen in the near future. We are all waiting, for example, to see what occurs as to the concerns of the Middle East and what is occurring in Korea and what is occurring in our economy. All of those kind of things will impact how we live now and in the future, and so I can't give you the kind of assurances that I wish I could.

But if all goes well, as I believe it will, for America, I think you will have the funds there.

Senator KENNEDY. We all hope that is going to be the outcome, but we wanted to try to make sure in terms of eligibility, that it is going to be there.

Are we looking at a problem where there is just too many legitimate claims and too little money, resources?

Mr. ARCHER. Senator, what we are looking at is you have got some entrepreneurs who drive up in a tractor trailer rig next to a Holiday Inn or next to a union hall. Everybody is invited to go in. They take a look at the x-ray. If there is something there and they are told that there might be something there, you ought to see a lawyer because there is a Statute of Limitations and people are not sick. If they are joggers, they still jog. If they walk up and down the steps, as Mr. McCandless used to be able to do before he became breathing-impaired, that is what is driving the system.

In an effort, I think someone stated, if it was not Senator Hatch, that it is cheaper for some of these companies to settle the case than for——

Senator KENNEDY. Let me—OK. I hear you. I see Mr. Hiatt. Did you want to make a comment?

Mr. HIATT. Thank you, Senator.

We have had conversations with numerous companies and business associations, the major business associations. Each one of them tells us, it is not a question of there not being enough money in the system.

The problem is the predictability and the certainty issue. This year, we may not need to spend more than a small fraction of what we will have to spend the year after, but we don't know that ahead of time. So everyone claims that they are looking for a system not that will reduce the total amount that is now being spent, but rather that will spread it out in a more rational way, in a more predictable way, and a more certain way.

The problem with the medical criteria bill is I think it keeps getting hung up on this false dichotomy of sick and not sick. It is very easy to say that not-sick people shouldn't be compensated under any of these approaches, but that is begging the question. As you say, it shouldn't be having to choose between a Mr. McCandless and a Mr. Harvey. These are both sick individuals. They have different levels of severity, but we are not talking about false claims. We are not talking about claims of people who do not have any kind of impairment. Those are the easy ones.

The way that Mr. Kazan and even the ABA criteria would have it is that you would virtually limit claims to people who are clients of Mr. Kazan or people who are of that level of severity and everyone else would have to take a back seat.

Furthermore, the problem with the medical criteria approach as it is now structured is we would go back to a system where companies would not be incentivized to pay claims quickly, in the 60 to 90 days as Mr. Austern talks about, but rather they would be incentivized to start raising all of the old product identification issues, the old causation issues, all of these other defenses that they haven't been raising in the context of the settlements which I agree have major problems with them as they now stand. But that has meant that people like Mr. McCandless and Mr. Harvey haven't had to prove which company's asbestos was it, which actually did the causing, if they have a history of smoking and asbestos, how much of it was one and how much of the other.

The medical criteria bill is going to open up all of those issues again in a way that I don't think is good public policy.

Senator KENNEDY. My time is up, but, Mr. Hiatt, one of the areas that you indicated is the Federal Government should accept a share of the responsibility of harm caused by the use of asbestos in the workplace. I assume this would require substantial appropriations of public dollars. Has any various work been done in terms of what would be a fair contribution from the Federal Government in dollars or in percentage terms?

Mr. HIATT. Not in terms of actual dollars, but, for example, Senator, we have talked about how critical it is that testing and monitoring be built into any approach. The fact that we have an infrastructure, for example, with VA hospitals around the country or other types of facilities where possibly there would be a major economy of scale that could be served by having the Government play

some role in some aspect of this such as in the testing and monitoring functions might be an area that would be worth exploring with your respective staffs. That just comes to mind as one possible area. We don't have any actual dollars.

Senator KENNEDY. Thank you, Mr. Chairman.

Mr. ARCHER. Senator, may I just respond, just briefly? And that is, I believe that part of the policy that has come out of the AFL–CIO on principles of asbestos compensation reads in part—and this was passed out, I believe, in Chicago on August 7th, 2002, and I quote from the paragraph on the first page, "However, the labor movement has long recognized, and 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 resolutions of their cases."

"On the second page, it reads in pertinent part dealing with asbestos-related principles or initiatives: While administrative payment systems have benefits for some classes of asbestos victims, all those who suffer from serious conditions as cancers, mesothelioma, and advanced asbestosis much 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 condition worsen. Asbestosis is a disease that progresses, and you run the real risk of getting sicker"

What happens is you have victims who accept little money from a settlement or from a jury verdict because it is commensurate with their disease, but when they get sick later, there is nothing there for their families or for them. That is wrong. There needs to be something in place.

We said we believe our standards are fair, but we have also said, Senator Kennedy, or other similar standards. I am not saying this is the Bible, the Torah, or the holy Koran, but what I am saying is that there needs to be a medical standard that will preserve at the end of the day, if there is a trust fund, those kinds of dollars, so that there will be something there for the victims.

Chairman HATCH. And allocate the funds for those who are sick. I mean, that just makes sense to me.

Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

You know, this is a matter that I became first acquainted within the late 1970's. I represented a shipyard worker who had worked in submarines, and that is a very closed area. He sawed asbestos as they sealed it around the pipes for insulation, and I remember tears coming to my eyes as he described it being so thick you couldn't breathe. They would let you go out for periods of time to get some air, and then you had to go back in there to do that work. Here he was in his early fifties on oxygen.

Somebody at that time knew that asbestos was far more damaging to health, and they should have made that known. This was

a Government ship. The Government should have known and helped to put the word out. So there is a real problem here.

But it was bizarre how the cases proceeded. People just simply copied the defendant list that somebody else in their lawsuit had filed and sued 60 people because somebody may have at one time sent asbestos to Engel Shipyards. So it was a bizarre thing as it developed to me.

All of which I would say, I have watched this thing now through the years. It seems to me that it is a fortuitous occurrence who gets paid and who doesn't. There is too little certainty and structure here. We have had 600,000 lawsuits filed, expecting another 1.2 million to be filed, people that are dying and ill or having compensation not be paid or dying before it gets paid, people who ar at this point healthy are being paid and clogging the system.

As you said, Mr. Archer, I can't blame a lawyer from filing a lawsuit. I mean, I went out and filed it within days because I didn't know when the Statute of Limitation was going to run, and I didn't want to be the one who failed to file the lawsuit because the statute had run.

Mr. Chairman, when they come in to you and they have a tendency to asbestos and exposure to asbestos, lawyers feel almost obligated, since they are on notice, the client is on notice, the Statute of Limitation is running, to file the lawsuit, but we can fix that through statutes.

We can create a statute that says if you have been exposed, you can come forward, the statute doesn't start running until you reach a certain degree of illness, and then you can seek compensation.

I have felt that we need to do something different in this country about a mass tort. For example, it took a while, a lot of lawsuits, and a lot of battles—and I have to give some of the plaintiff lawyers that I associated with in that day some credit because they proved the companies knew and they proved that the companies should have informed the people, but once the facts are all clear, every case then becomes basically how much they should be compensated.

So I think we need to create a system in which compensation can be readily made to the victims. Frankly, if someone has mesothelioma, I think they ought to be able to just file a claim and get a check. I mean, I just don't understand this, why this is happening the way it is.

I charged a legal fee, and I suspect at that time I had no idea what would happen, but as I look at it now, I can't justify morally a legal system that says only 40 percent of the money paid out by the asbestos companies actually gets to the victims.

And I think that is, Mr. Archer, what the ABA has realized, and I salute them for it. You just simply can't justify that when there is no dispute about liability. It is just a question of damages.

So I think, Mr. Chairman, you are wise to pursue this. We should have done something earlier. We got to stay at it until something gets done. I don't think anybody here will say we don't need to fix it. We disagree some about how to do that, and that is understandable, but it is time to bring this to a conclusion.

Mr. Austern, let me ask you. On the differences between the national trust and the criteria bill, wouldn't the national trust also

need some sort of medical criteria to distinguish people who have impairments and who don't? Aren't we always faced with that challenge?

Mr. AUSTERN. Certainly, we would have to have criteria, and I would like to suggest that I think that the ABA criteria can be improved upon, but Mr. Archer has already said that he is willing to work with us on this and I think it can be solved.

Senator SESSIONS. So, in your view, then, that puts us in a route to maximizing an amount of money, the percentage of money paid out by the defendants, maximizing the percentage they pay out, that actually gets to the victims, and it would improve the distribution by ensuring that the money got to those most needy?

Mr. AUSTERN. It would assure that it would get to those most needy. It would do it expeditiously, and, in fact, we would be very close to what you just described. You could file a mesothelioma claim, and you could get a check.

Senator SESSIONS. Well, I think we have got to get to that point. These cases no longer require long, complicated jury trials. I mean, they are just not that way. The law is settled. We know what the cases are about.

Mr. Harvey here, if he were just filing his claim, you know meso is called by asbestos, and he ought to get a check and it ought not to be years going by and tremendous amounts of expense.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Let me just wind this up this way. First, Mr. Hiatt, I would just like to ask you one question that still sticks in my mind. You mentioned that the trust that you envision would compensate claimants based on medical criteria. Does the AFL–CIO support deferring any of these cases?

Mr. HIATT. We would agree, just as Mr. Austern has just said, that while there should be a compensation schedule that is differentiated based on levels of severity, that the quickness of payments, the expeditiousness of the payment system should very much be triggered toward the most seriously sick.

Chairman HATCH. What I am concerned about here is that Mr. Kazan says that you can pretty definitely determine who is sick and who isn't. Now Mr. Austern says that that is true, too, except that you have got to have the right medical criteria to be fair, which is I think basically the way I interpret your thing.

Mr. HIATT. I think that is correct.

Chairman HATCH. I have been very impressed with Mr. Archer. I always have been, before he got here today, but especially today. I think the ABA is very fortunate to have you as their upcoming president.

Isn't it wonderful that Republicans are finding all kinds of good things, and the Democrats are finding all kinds of rotten things about you? I will tell you, it is just wonderful. I am working on you, I will tell you.

Let me just say this. You have expressed an interest in modification here. Let me just throw it out here. There are a lot of people in this audience who could help on this. I have real questions whether a trust could be done. I have real questions what the medical criteria should be that everybody agrees we ought to have. I

mean everybody on this panel certainly does. There are others who feel like if you do a strict medical criteria bill, you are not going to make it. If you do a strict trust, you are not going to make it because it is hard to get people together.

We understand that there are splits within the business community. There are splits within the insurance community, and there are splits even in labor. Perish the thought, but there are. There are a number of companies, a number of labor unions that are really concerned about their employees losing their jobs, their pensions, and everything else, and there are some in the labor union movement, unless it is done in such an expensive way that nobody can really do that they are not for it.

Look, this is almost an impossible job unless I throw out this challenge. I am going to get a bill here. I believe as Senator Leahy has indicated, he will work very closely with me on a bill. That means you are covering two ends of the spectrum, to a large degree. I would hope Senator Kennedy and other Democrats would help on this as well. I would hope my colleagues on the Republican side would help.

But I am going to challenge the business community. I am going to challenge the insurance community. I am going to challenge the unions. I got to have some help here because I have no desire to hurt anybody. I don't have any desire to leave anybody out of the system, but I will tell you this. What we have is a doggone stinking mess. We have got all kinds of people getting compensation, sometimes exorbitant compensation, while really hurt people, really sick people aren't getting anything, or if they get anything, it is pennies on a dollar. The costs of this thing are just astronomical because, I understand, it is about 60 percent that really goes for the costs and attorney's fees.

Now, you are looking at the guy who helped put together something that was unputtable together. I think that is a phrase that can be used. It was the radiation compensation matter. That took years. Today, all over the world, they use those standards that we set for radiation compensation. That was a very difficult thing, but that was a Government thing, and I am not so sure our Government should be paying for this. In fact, I am pretty sure the Government should not be paying for this, even though we might say the Government should have known, just like everybody else should have known.

I am going to challenge the various factions here. You had better get together, and I want support for whatever we come up with. I don't want to have to go to all of this work and then have little, itty-bitty arguments and fights and infights that destroy this because this is the year to do it, if it is going to be done. If we can't do it this year—and it is going to be within the next month—if we can't do it within that period of time, it ain't going to be done. That means that thousands and thousands of people who should have rights aren't going to have them the way they should have them. I will put it that way. It means that many people who are sick are not going to get compensated, while others who don't have a claim that is legitimate are going to get money because of this really out-of-control tort system.

I belong to ATLA, and I support ATLA when they are right, but it is not right to have 50 to 60 percent of these moneys going to lawyers. If we have a no-fault system, that means we can have a reasonable set of attorney's fees, but it is not going to be 50 or 60 percent of whatever this pot is, and I think everybody needs to understand. Lawyers will be able to make a very good living by a no-fault system if they have people who are truly sick.

I think you would agree with that, Mr. Kazan, although you would prefer it in the regular system.

Mr. KAZAN. Well, Senator, what I would say about that is that the concept of a trust fund has implicit in it the need for medical criteria, just like we have been talking about. The irony is that if you had the medical criteria, you probably don't need the trust fund because every company that has gone bankrupt has said if it weren't for the volume of the unimpaired cases they were facing, they would be able to handle the relative small number of people with illness in the ordinary course.

Chairman HATCH. That may be so, except that I believe there are those who believe that a pure medical criteria bill might be very difficult to get through, probably because organized labor might not go for it and might not agree with it or other groups might not go for it. I don't know. I don't know, but I just think of one case that everybody talks about, and that is that $150 million was awarded to six plaintiffs who claimed that asbestos exposure might some day make them ill. I mean, they weren't even sick, and now we have doctors fleeing Mississippi because 71 companies stopped writing insurance in the State.

Mr. KAZAN. And, Senator, those cases would not have qualified under——

Chairman HATCH. That is right.

Mr. KAZAN [continuing]. The ABA or other criteria.

The idea of finding a way to assess the contributions to a trust fund for the 8,400 presently active defendants, to say nothing of all the other companies who have not yet been sued, and getting that done this sessions seems to me to be rather a daunting task, and I think that is the problem. A trust fund would either have to be a defined benefit plan which leaves open-ended contribution issues or a defined-contribution plan which leaves the risk of a shortfall on the victims. They both have problems, and I, frankly, don't know that you can square that circle.

Chairman HATCH. Well, I am not for a trust fund that has an open-ended situation because——

Mr. ARCHER. Senator, if I may interject, and I apologize for doing so.

Chairman HATCH. Sure.

Mr. ARCHER. I think your admonition to everyone should be heeded. You have a very fine staff. Senator Leahy has a very fine staff. They have obviously been working together prior to this, witness the fact that there was a hearing in September——

Chairman HATCH. Right.

Mr. ARCHER [continuing]. Where you both spoke. I think the insurance industry, I think those who are involved in the study group ought to be given every opportunity to see if they cannot come to the table, to see whether or not, in fact, a trust fund could

be put together, whether or not the medical standards that the American Bar Association or something similar to it would be able to put something together, and given the timeframe that you have given and the fact that if something is going to be done, it should be done as quickly as possible, may be just the initiative to bring everybody, to get them closer.

As I hear Jonathan Hiatt say, they were close on almost every issue, but two, and perhaps with your observation and that of Senator Leahy, there might be enough incentive to do the right thing.

Chairman HATCH. Is today the 5th? It is the 5th of March. I am just going to challenge the business community and the labor community and the insurance community and any others who are interested, including the legal community, you better make your case to us within the next 2 weeks because that is going to be the time we are going to come up with a bill. When we come up with it, it is going to be your last chance to have this thing resolved, as far as I am concerned.

Nobody wants to be more fair than I, but on the other hand, you have to cut the rug sometimes and you got to get things done.

I would like to do it. I would like to do it so that victims are helped. I would like to do it so that there is some stability in the marketplace. I would like to do it so companies can come out of bankruptcy. The unions would benefit greatly from that. I would like to do it so that this system will start to work. I would like to do it so that attorneys aren't continuously maligned because of what appears to be a milking of a system.

I like having the American Bar Association work with us, and I commend you for leading out on this issue. We will look at the criteria situation that you have called for and see if it can be modified or it can be improved, and we would appreciate you looking at it again with your expertise and your Committee's expertise and let's see what we can do.

I would like some help from labor here because you are the ultimate beneficiary if we can get this done, but I will tell you this. I am not for a trust fund if there isn't a finality to it because, if you don't have that, you don't have anything. These businesses are all going bankrupt because they don't have any choice, and union jobs are being lost because these businesses are going bankrupt. The more they go bankrupt, the less people are going to get, and I would like to see those businesses knowing actuarily where they stand and what they can do and how they factor that into a business plan. I would like to see the insurance companies factor this. If they have time to pay, they can do a lot of things that they can't do by asking for big, whopping judgments right now.

I would like to see the legal community shape up its act a little bit. I am very appreciative of you, Mr. Kazan, because I think you have made some very, very important points here. Mr. Baron, who was here before, if I recall it correctly, he said he would try and help me with this.

I am going to count on ATLA waking up and realizing that they are killing our profession if they continue to go the way they are currently going on matters like this. I have a lot of respect for a number of the attorneys in ATLA who are leading plaintiff's attorneys, but these are attorneys who understand that the system has

to be a fair and adequate and right system and not just a windfall for attorneys, which is what this is turning out to be.

When I think of this one company that has never had an asbestos—and you heard other Senators talk about this—never done anything with asbestos, never insured for asbestos, never had anything to do with it other than they were the ones that came up with the medical knowledge that mesothelioma comes from asbestos and they are brought in as a coconspirator and wind up with an extortion of 60,000 claims, where they just, as a business matter, have to pay blood money just to get rid of those claims, even though they don't owe a dime and would win every one of those cases with a fair jury, I mean, that is just not right. It is one of the things that makes this such an intriguing and difficult thing for me.

So I am asking everybody to get your act in order and get with us. We are going to come up with a bill, and I just hope that it will be something, even though it won't be perfect, as Senator Leahy has said, that all of you will be able to get behind and help us to resolve. It is the art of the doable. It is the art of doing what we can.

This has been a very good hearing. It has sharpened up some things for me that I was worried about, and it has raised some other issues that I will be working on as we work on this bill.

I want to thank each of you for coming. I want to thank you, victims, for taking time out. I know it has been an inconvenience to you. It has been a very, very difficult thing for you, and I appreciate you coming very much. We all do, and not only do we welcome you, but we are very appreciative that you would take time to be with us.

With that, we are going to keep the record open for 2 weeks. We want everybody who has an interest in this to help us on this.

Thanks so much.

[Whereupon, at 4:37 p.m., the Committee was adjourned.]

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

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Written Questions from Senator Leahy
To Witnesses at the Hearing on Asbestos Litigation
Senate Committee on the Judiciary
March 5, 2003

For David Austern

Question 1: In your testimony before the Judiciary Committee, you endorsed the elimination of federal income tax for bankruptcy trusts as one possible reform that would generate more compensation to victims of asbestos exposure. Are there any changes you would recommend that Congress make to section 524(g) of the Bankruptcy Code that would improve the effectiveness of these trusts in providing fair and efficient compensation to asbestos victims?

Answer: Over fifteen years ago, when I began in the business of processing asbestos claims, Section 524(g) of the Bankruptcy Code did not exist. The injunction in the Johns Manville Corporation bankruptcy that channeled all asbestos claims to the Trust was not based on a statutory provision, but rather was based on the Bankruptcy Court's equitable powers. Indeed, it was the uncertainty concerning whether such a channeling injunction exceeded the Court's powers that, among other considerations, led to the enactment of Section 524(g). While an occasional claimant has attempted to evade the Manville channeling injunction, the injunction has never met serious challenge regarding either its equitable or statutory bases. As a result, I have never worked or, for that matter, relied on Section 524(g) as an injunctive bar to the filing of claims, and I believe it would be inappropriate for me to suggest changes to a statutory provision with which, as a practitioner, I have had little practical experience.

Question 2: The Manville Personal Injury Trust is now paying only 5 cents on the dollar for liquidated claims. If you could turn back the clock and redesign the Manville Personal Injury Trust, what would you do to ensure that the funding was adequate to compensate victims fully? Do you have any advice for the Committee on how to guarantee that any future trust fund is adequately financed to ensure future asbestos victims are adequately compensated?

Answer: Even if it were possible to "turn back the clock and redesign the Manville Personal Injury Settlement Trust" (the Trust), there would be insufficient funds available "to compensate asbestos victims fully." I do believe, however, that we could have more equitably compensated the majority of our claimants if we had known at the beginning what we have learned by experience.

To date, the Trust has paid more than $3 billion to settle approximately 520,000 claims of the over 600,000 we have received. Approximately 27,000 of these settled claimants received 100% of the liquidated value of their claims (approximately $1 billion). Most of the remaining claimants received only 10% of the liquidated value of their claims, and those claimants paid during the last two years have received only 5% of the liquidated value of their claims. The total liquidated value of the claims the Trust has paid (again, over $3 billion) is approximately $22.5 billion. We estimate that over one million future claims will be filed, and the liquidated value of such claims will exceed $35 billion. Thus, for the Trust to have been

able to have paid all claimants "fully", the Trust would have needed over $50 billion in assets. Obviously, it is very unlikely that a bankrupt corporation would have assets in this amount.

However, if we had known at implementation what we know today, the Trust would have more equitably compensated claimants – that is, there would not be an embarrassing disparity between the sums paid to early claimants and the sums paid to later claimants.

Thus, my "advice for the Committee on how to guarantee that any future trust fund is adequately financed to ensure future asbestos victims are adequately compensated" is as follows: barring the infusion of hundreds of billions of dollars by the Federal Government to compensate asbestos victims in the future (see, the answer to the first question from Senator Kohl, below), we must accept the presumption that those entities that have been named and will be named as asbestos defendants have insufficient funds to compensate fully those who have been injured by exposure to asbestos and asbestos-containing products. Therefore, it is important that the Committee recognizes the difficulty in estimating future claims (and future claim liabilities) and empower those who will have the responsibilities to pay future asbestos victims to adjust, even on an annual basis, the amount of funds paid to asbestos victims so as to better equalize the anticipated shortfall.

Question 3: In December 2002, the Manville Trust established, with court approval, a new Trust Distribution Process intended to provide greater amounts of liquidated damages to victims of asbestos based on the seriousness of the victim's disease. Please explain the changes made in the new TDP and how they are intended to improve the compensation process for victims of asbestos-related diseases.

Answer: The most significant change in what we refer too as the "2002 Trust Distribution Process" ("TDP") is that it adjusts the Trust's scheduled values, by raising the value of Mesothelioma claims and reducing the value of non-malignant claims, so that a far greater portion of Trust settlement funds will be directed to the most seriously injured claimants.

There also have been significant changes in the medical criteria and documentation that must be filed before a claimant is eligible for compensation, including the new requirement that, for most non-malignant claims, the claimant have had an in-person physical examination and that the diagnosis of an asbestos-related disease must have been made by the physician conducting the physical examination. Other medical criteria requirements include "either (i) a statement by the physician providing the diagnosis [of an asbestos-related disease] that at least ten years have elapsed between the date of exposure to asbestos or asbestos-containing products and the diagnosis, (ii) a history of the claimant's exposure sufficient to establish a 10-year latency period," and an x-ray reading by a certified B-reader plus pulmonary function testing, where necessary, to prove disease progression. A long-used measure of pulmonary function (diffusing capacity) has been eliminated as proof of impairment because its results are non-specific to asbestos-related disease.

Perhaps of even greater significance is the requirement that claimants seeking higher disease values (including disabling asbestosis) must now establish "Significant Occupational Exposure" which means "employment for a cumulative period of at least five years, in an

industry and an occupation in which the claimant (i) handled raw asbestos fibers on a regular basis; (ii) fabricated asbestos-containing products so that the claimant in the fabrication process was exposed on a regular basis to raw asbestos fibers; (iii) altered, repaired or otherwise worked with an asbestos-containing product such that the claimant was exposed on a regular basis to asbestos fibers; or (iv) was employed in an industry and occupation such that the claimant worked on a regular basis in close proximity to workers engaged in the activities described in (i), (ii) and/or (iii)."

Question 4: The Manville Personal Injury Trust categorizes claimants into seven payment schedules based on the severity of their asbestos-related diseases. Under the ABA proposal and the legislation introduced by Senator Nickles, S. 413, what categories of claimants would no longer be eligible for compensation?

Answer: Under the 2002 TDP discussed in the answer to the previous question, the Trust now categorizes claimants into eight scheduled disease payment levels. Under the American Bar Association proposal and S.413, two of the eight levels would no longer be eligible for compensation. More significantly, approximately two-thirds of all Trust claimants, both those that have filed prior to the recent changes in the TDP and those that are expected to file in the future, would no longer qualify for compensation.

Questions for the Record from Senator Herb Kohl
"The Asbestos Litigation Crisis Continues – It is Time for Congress to Act"
March 5, 2003

Predicting the Success of a "National Asbestos Claims Facility"

[to Mr. Austern]: Some suggest that a privately-funded National Asbestos Claim Facility created by Congress would offer an equitable solution for the greatest number of those affected by this crisis. If the federal government undertook such a scheme, would there be any guarantee that defendants' assets would cover all the costs? Or would the "claims facility" likely suffer from the same problem that bankrupt defendants have: an inability to estimate current and future liabilities? If the estimated claims could not be covered, would that cost then be borne by taxpayers, rather than the defendants?

Answer: With respect to the cost of fully compensating asbestos claimants being "borne by taxpayers rather than the defendants," as I said in my October 1, 2002 letter to Senator Leahy which followed my testimony at the "Asbestos Litigation" hearings held last year, 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. In short, there is a voluminous record that establishes government responsibility for asbestos exposure and the government's knowledge of the dangers of working with asbestos. Thus, there is a strong equitable argument that the government should contribute to a National Asbestos Claim Facility.

My support for a National Asbestos Claim Facility, however, is not based on my belief that the government should contribute funds to the Facility nor do I believe there is a guarantee that "defendants' assets would cover all the costs." I believe a structure can be established so that there will be minimal risk of a shortfall, but there is certainly no guarantee of that. Rather, my support for such a Facility is based on fifteen years of experience in processing asbestos claims and supported by the information that can be found on page 43 of the August 2001 RAND Report entitled "Asbestos Litigation in the U.S.: A New Look at an Old Issue." RAND found that "people who file claims against the Trust [Manville] are receiving about 70 percent of the total dollars spent by the Trust to compensate them, compared to the 37 percent RAND reported in the early 1980s [for asbestos victim compensation in the tort system]." Stated differently, a National Asbestos Claim Facility will eliminate the duplication of effort of multiple asbestos trusts (that could cost asbestos victims virtually scores of millions of dollars in the future) and will result in far more money going to the asbestos victims than any other system.

Assessing the "Medical Criteria" Approach

[to Mr. Austern, Mr. Archer, Mr. Hiatt, & Mr. Kazan]: If we assume that a "medical criteria" similar to the ABA's resolution is adopted, there is likely to be differences of opinion among doctors as to whether certain individuals satisfy the medical requirements to pursue their claims. How will such disputed or borderline cases be resolved? If resolved through a court procedure (the Nickles bill creates a preliminary proceeding to challenge prima facie evidence of impairment), will this "medical criteria" approach really address the problem of court congestion? [Second part of question]: Furthermore, if an individual does not initially meet the established medical criteria, how will he be able to return to court once his illness

progresses? Through another court procedure? If so, how does this additional procedure alleviate court congestion?

Answer: I would anticipate that there will be thousands of preliminary proceedings to challenge the denial of prima facie evidence of impairment, both at the initial diagnosis of an asbestos-related disease and later, if the disease progresses. That is not to say, however, that pursuant to the American Bar Association resolution, there will not be a substantial reduction in the number of asbestos claims and, thus, a substantial reduction in court congestion.

Preferential Venues for Asbestos Litigation

[to Mr. Austern, Mr. Archer, Mr. Hiatt, & Mr. Kazan]: The RAND study found that in 1988, five states – Mississippi, New York, West Virginia, Ohio and Texas – accounted for only nine percent of the asbestos cases, but handled 66 percent of the filings by the end of the 1990s. Does this imply that these jurisdictions treat asbestos cases differently from the rest of the country? Should a proposal to address asbestos litigation issues consider the fact that so many of the cases are filed in so few states?

Answer: I believe most people agree that a claimant should not be permitted to bring an asbestos action in any state they choose in which the defendant has or does conduct business. There must be a greater nexus between the claim and the state court, requiring, for instance, that a claim be filed only where the claimant resides or where a significant amount of the claimant's asbestos exposure took place.

Written Questions from Senator Leahy
to Witnesses at the Hearing on Asbestos Litigation
Senate Committee on the Judiciary
March 5, 2003

Questions for Steven Kazan

Question:

1. In discussing asbestosis, your firm's Internet site states: "...symptoms of asbestosis typically include shortness of breath .... As the disease progresses, symptoms can worsen. ... At the moment there is no cure or effective treatment ... People with asbestosis are also at higher risk of developing lung cancer or mesothelioma." Do you agree that under the tort law of nearly every state, people who suffer from asbestosis, as defined in your firm's web site, have an injury for which they are entitled to some compensation?

Answer:

1. I certainly agree that people who suffer from asbestosis as defined in the quoted passage have an injury which entitles them to some compensation under the tort law of most if not all states, providing, of course, that the symptoms are in fact attributable with reasonable medical probability to the asbestosis and not a coincidental result of some other cause, such as smoking.

But I most certainly do not agree that "under the tort law of nearly every state" all people who have asbestosis, as described in my firm's web site, have a legitimate tort claim. As the web site makes clear, "asbestosis often exists without any symptoms. . . . " It is true that tens of thousands of lawsuits involving alleged asbestosis are brought every year, and the overwhelming majority of these cases involve no symptoms whatever. As I explained in my written statement to the committee in September, these asymptomatic asbestosis claims are generated by the entrepreneurship of litigation screening companies whose objective is not to detect a genuine disease but to identify potential plaintiffs for profit. The huge number of people who arguably have an asbestos-related scarring of the lung but no symptoms has choked the civil justice system and diverted huge sums that should go to compensation of the sick.

The distinction made on my web site, made in my testimony, and made in everything I have tried to make clear is that real asbestosis which produces symptoms is a serious injury deserving of compensation. It is overly simplistic to draw a distinction as some have done between cancer and non-cancer across the board. In fact, there are several thousand cases a year of people with non-malignant asbestos-related disease such as asbestosis and pleural disease whose lives are truly altered by the symptoms produced by such illness, and they are of course deserving of compensation. They are also at increased risk for the development of cancers, not

because they have asbestosis, but because they have had by definition sufficient asbestos exposure to produce disease, thus putting them at such increased risk.

As it turns out, there are very few states whose highest courts have unambiguously held that individuals with asymptomatic asbestosis have a personal injury for which they are entitled to compensation. Some important states have made it clear that asymptomatic conditions (whether asbestosis or pleural changes) are not compensable. The leading case is *Simmons v. Pacor, Inc.,* 674 A.2d 232 (Pa. 1996).[1] I believe that Pennsylvania's approach to this problem, which relies heavily on the Restatement (Second) of Torts, is consistent with traditional common law principles and makes sense.

I certainly believe that people who are impaired by asbestosis have a right to compensation and should receive it. The medical criteria endorsed by the ABA House of Delegates on February 11, 2003, are specifically designed to identify such people. As my firm's web site notes,

> **"Diagnosis [of asbestosis] can be made only when there is a history of asbestos exposure and positive results from a clinical exam, chest x-rays, CT scans, and/or a pulmonary function test (PFT.) It can also be conclusively identified through a biopsy . . . ."**

The ABA-endorsed medical criteria follow this approach and are a reasonable way of diagnosing compensable asbestosis, and we desperately need some way to draw this distinction.

The heart of the current problem in asbestos litigation, triggered by the shrinking pool of assets available to compensate asbestos victims and creating a serious asset liability mismatch requiring consideration of ways in which to most appropriately allocate such scarce financial resources, is not the fact that there are some cases of real asbestosis on a purely anatomic basis without functional impairment, but rather that the majority of cases presented with allegations of "asbestosis" are in fact nothing of the kind. Instead, they are merely cases in which some physician, working for a for-hire, for-profit screening company has been willing to say there are x-rays showing changes that are "consistent with" asbestosis. These are cases in which no diagnosis has ever been made, no physician has ever performed a competent medical examination of the patient, and in which there is no basis to believe that the claimant has any symptoms whatsoever or, if he does have some symptoms, that asbestos exposure played any role whatsoever in producing those symptoms. That is why I draw the distinction between cases of asbestosis which produce symptoms and those that do not.

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[1] See also, e.g., *Bernier v. Raymark Industries, Inc.,* 516 A.2d 534 (Me. 1986); *Wright v. Eagle-Picher, Inc.,* 565 A.2d 377 (Md. 1989); *Miller v. Armstrong World Industries,* 817 P.2d 111, 113 (Colo. 1991)(pleural changes); *Bowerman v. United Illuminating,* 1998 Conn Super. LEXIS 3575 (1998). These cases are also in line with the practice of many courts of establishing inactive dockets for unimpaired non-cancer claims. Such inactive dockets exist in jurisdictions as varied as Cook County, Illinois, Baltimore, Maryland, and New York, N.Y.

Finally, since my firm's discussion of asbestosis on the web has been referenced, I think it would help avoid misunderstanding if the record contained the whole discussion. Accordingly, I have appended the relevant text (which is short) to this response.

Question:

2. Do you think the amount of damages a person can establish under traditional tort principles should influence the question of establishing liability in the first place?

Answer:

2. Yes. Under traditional tort principles, there cannot be a compensable "personal injury" without some "harm." (Although it is possible to recover nominal damages for some torts even in the absence of any actual damages, nominal damages are not available in personal injury cases.) In recent years the courts have struggled with the question whether subcellular changes resulting from exposure to toxins (especially carcinogens) involves a such a "harm." Thus, for example, many plaintiffs in asbestos cases have pleural plaques, which usually do not cause symptoms. Common law principles do not require a holding that such harmless physical change is an "injury." Moreover, since we are all exposed to such environmental toxins at some level, the failure to take seriously the principle that a personal injury requires "harm" could create practically unlimited liabilities. These are traditional concerns of courts trying to fashion sensible common law rules for modern conditions. See, e.g., *Metro North Commuter R. Co. v. Buckley,* 521 U.S. __, __ (1997).

Of course, it is true, as this question suggests, that once sufficient harm has been shown, a plaintiff does not need to prove any particular quantum of damages in order to establish liability at common law. The amount of damages demonstrated under traditional tort principles is unrelated to the question of whether a case of liability can be established. Traditional tort principles require that the plaintiff establish the defendant owed a duty to the plaintiff, that such duty has been breached, that such breach was a proximate or legal cause of harm to the plaintiff, and if so, the amount required to compensate the plaintiff for such harm. Under traditional tort law concepts, all these questions get presented to a jury, which considers the evidence, applies the law as given by the court, and decides the answers to those questions. I believe that juries are best able to make these determinations, which is why I am opposed to the concept of a national asbestos trust fund which would take all such questions in all such cases away from our juries and leave the answers to a new, privately funded but federally operated administrative bureaucracy. The medical criteria endorsed by the ABA House of Delegates would establish an objective, medically appropriate way of determining whether a claimant has been harmed by exposure to asbestos. Under the ABA approach, if the claimant has been harmed – i.e., if he has cancer or objectively

verifiable respiratory symptoms attributable at least in part to asbestos exposure – then he would have full access to the remedies provided by the civil justice system. One way of summarizing the heart of the issue in the asbestos arena at present is to address the question of whether every true anatomic change produced by asbestos (which is rarely in fact demonstrated – see answer to Question 1) in the absence of functional impairment, i.e., shortness of breath or other symptoms, rises to the level of compensable harm. Not every injury is in fact compensable, and not every harm is somebody's fault.

Question:

3. Senator Nickles has introduced legislation, S. 413, that prohibits both malignant and non-malignant claims from being consolidated n state or federal court without the consent of all parties. As you know, most corporate counsel oppose any consolidation of asbestos claims and, therefore, few, if any, corporate counsel would consent to a consolidation of claims under the Nickles bill. Do you believe this consolidation provision is appropriate?

Answer:

3. I do not object to the provision of the Nickles bill on consolidations, although my personal preference, here as elsewhere, would be to focus the bill on non-cancer claims. One of the engines of the asbestos litigation disaster has been the use of consolidations, especially in non-cancer cases, to force settlements of questionable claims.

As I indicated in my prepared testimony, I believe Senator Nickles' bill is a good start and helps focus our discussions in a useful way. However, I think several provisions (including venue and consolidation) proposed therein are inappropriate, although I do recognize that they reflect the views of some at one extreme in the debate. To be specific, I believe his consolidation provision is inappropriate. First, there is no demonstrable reason why any legislation should in any way affect asbestos cancer cases. No one has presented plausible evidence that these cases are any problem or that they cannot be handled by the current civil justice system in the ordinary course of business for all plaintiffs and all or virtually all defendants without material impact on either the court system or the financial stability of virtually all defendants. Thus, the consolidation provision in my view should not address cancer cases at all.

Last September, Professor Walter Dellinger described to the committee the abuses that he witnessed first hand in the recent mass consolidation in West Virginia, which contemplated trying the claims of 8,000 plaintiffs against over 200 defendants in a single trial. West Virginia is obviously an extreme case, but even much smaller consolidations can raise serious due process concerns. More importantly, from my point of view, consolidations are one of the tools used by some judges to give value to weak claims, including the claims of people who are not sick.

While the importance of this problem would be much reduced if Congress enacted appropriate medical criteria, the effectiveness of the medical criteria will depend to a considerable extent on the spirit with which they are implemented. A limitation on consolidations makes sense as a backstop to the medical criteria for non-cancer cases.

On the other hand, courts can use some reasonable flexibility in managing their dockets and juries can handle a limited number of cases consolidated for trial, the number depending upon the degree of similarity. No court or jury should have a problem, for example, trying the case of two brothers who worked side by side in the same shipyard who develop the same illness. On the other hand, no matter how similar the cases, I would suggest that any jury would have difficulty with 50 or 100 cases consolidated for trial. If some limitation on consolidation is felt to be appropriate, I would suggest that courts be permitted to consolidate no more than 20 to 25 non-malignant cases for trial. It might also make sense to bar the consolidation of cancer cases with non-malignant cases. The other portion of the Nickles' proposal which I believe is inappropriate is the limitation on venue for asbestos cancer cases. His proposal would exempt from venue restrictions cancer cases in which a doctor certifies a likelihood of death within three years. However, he would restrict venue on cancer death cases. For the reasons stated above, I see no reason to limit existing venue rules for cancer cases at all.

Questions for the Record from Senator Herb Kohl
"The Asbestos Litigation Crisis Continues – It is Time for Congress to Act"
March 5, 2003

Questions for Steven Kazan

Question:

Assessing the "Medical Criteria" Approach

This question is really in two parts with separate answers.

A. If we assume that a "medical criteria" similar to the ABA's resolution is adopted, there is likely to be differences of opinion among doctors as to whether certain individuals satisfy the medical requirements to pursue their claims. How will such disputed or borderline cases be resolved? If resolved through a court procedure (the Nickles bill creates a preliminary proceeding to challenge prima facie evidence of impairment), will this "medical criteria" approach really address the problem of court congestion?

Answer:

A. I believe that S. 413 has a sensible procedure for applying medical criteria at the outset of the case. Briefly, the bill would require the filing of medical evidence of impairment along with the complaint and would afford defendants the opportunity to challenge that filing at the outset of the case. This would mean that plaintiffs' counsel will have to determine, before filing a claim, whether the claim meets the medical criteria of the bill. Moreover, claims that fail to meet the medical criteria will not remain on the docket, to be settled along with an inventory of other claims, without any scrutiny whatever. At the end of the day, this procedure will prevent claims from being filed unless there is a real basis for believing that they meet the bill's medical criteria.

Of course, there will be circumstances where experts disagree on whether the applicable medical criteria have been met. However, since the medical criteria are objective, these disputes should be relatively rare. For example, under the ABA-endorsed criteria, the claimant either will or will not have a "forced vital capacity" or "total lung volume" below the lower limit of normal. Pulmonary function tests either will or will not meet the applicable technical guidelines. There is no realistic basis for thinking that unimpaired non-cancer cases will continue to be filed by the tens of thousands on the theory that doctors will disagree whether the claimants meet the applicable tests.

This conclusion is reinforced by the experience of courts that have established inactive dockets. These courts typically assign non-cancer cases to an inactive docket initially and allow them to be activated if they meet certain medical

criteria, which usually resemble the medical criteria endorsed by the ABA. In theory, this could give rise to thousands of mini-hearings on whether non-cancer cases should come off the inactive docket. In fact, however, few cases are activated, and the process for moving cases from the inactive docket to the active docket has not been unduly contentious.

When experts do disagree about medical issues, resolving those differences is the appropriate role of the trial court. A medical criteria approach would simply require that the plaintiff at the time of filing suit make a prima facie case on paper that a qualified physician applying appropriate standards and practices has determined that the patient (a) has an asbestos-related non-malignant disease, (b) has some minimal level of pulmonary function impairment or abnormality, and (c) that the asbestos exposure was a substantial contributing factor in the development of such impairment or abnormality. Defendants are of course free to dispute that and present contrary expert testimony. The reason this approach really addresses the problem of court congestion is that it will eliminate up to 90% of currently filed non-malignant cases. Such was the testimony of Mary Alexander, President of the Association of Trial Lawyers of America, during her presentation to the American Bar Association House of Delegates in February when the ABA Proposal was adopted. That is a prime reason for my support of the ABA Resolution. I can understand, however, that some might be concerned that this might still produce problems or court congestion, and it is for this reason that some propose additional restrictions on venue selection for non-malignant cases (see next answer) and limitations or restrictions on consolidation of cases.

At the end of the day, if a medical criteria bill adopts suitably objective criteria, a very large portion of 60,000-80,000 non-cancer claims that are filed every year will not be filed. While there may be disputes over a relatively small number of borderline cases, a medical criteria bill will certainly relieve congested dockets.

Question:

B. Furthermore, if an individual does not initially meet the established medical criteria, how will he be able to return to court once his illness progresses? Through another court procedure? If so, how does this additional procedure alleviate court congestion?

Answer:

B. Under S. 413, claims that fail to meet the medical criteria are dismissed without prejudice and may be refiled if the claimant meets those criteria later on. In most instances, such claimants will not get sick and will never have to refile a claim. But, both S. 413 and the ABA resolution strongly support such claimants' right to access to the courts if they become impaired.

As explained in my answer to question 4A, a medical criteria bill with clear and objective medical criteria will prevent the filing of most unimpaired claims. Non-cancer claims will be filed once – when the claimant has objective evidence of breathing impairment resulting from asbestos exposure. There is no reason to expect that unimpaired claims will be filed over and over on the off-chance that one day they will be allowed to proceed, any more than we expect to see (or do see) repeated frivolous motions to remove unimpaired claims from existing inactive dockets. Plaintiffs' lawyers have no incentive to engage in such behavior and would expose themselves to sanctions and possibly other disciplinary measures if they did engage in it.

Question:

The RAND study found that in 1988, five states – Mississippi, New York, West Virginia, Ohio and Texas – accounted for only nine percent of the asbestos cases, but handled 66 percent of the filings by the end of the 1990s. Does this imply that these jurisdictions treat asbestos cases differently from the rest of the country? Should a proposal to address asbestos litigation issues consider the fact that so many of the cases are filed in so few states?

Answer:

It does appear correct that the mentioned courts or at least many of them treat asbestos cases differently than do other courts. Indeed, the forum-shopping/venue problem is a good reason to include limitations on venue in non-malignant cases to jurisdictions in which the plaintiff resides or where asbestos exposure occurred. Some states have in effect become magnets for out-of-state plaintiffs.

The concentration of cases in a few states emphasizes the importance of forum shopping in asbestos litigation. Pennsylvania, for example, already has a rule requiring impairment as an essential element of a non-cancer claim – but Pennsylvania claimants can evade the rule by filing in "preferred" jurisdictions such as West Virginia or Mississippi, where the claim is likely to be settled as a part of a large consolidation with no scrutiny at all.

For example, I understand that Mr. McCandless, the first witness at the March 5 hearing who testified that his lawyer told him that he would not qualify under the ABA Criteria, lives and was exposed to asbestos in North Carolina, but for reasons that are not readily apparent, had his lawsuit filed in Ohio.

It is important to note that the "preferred" jurisdictions change over time. Before the mid-1990s, when Texas adopted a strict forum non conveniens rule, about half of all asbestos cases were filed in that state. The new Texas statute led to sharply reduced filings in Texas. But, enterprising plaintiffs' lawyers discovered

that rural counties in Mississippi were even more pro-plaintiff than the Texas courts, and so the claims formerly filed in Texas were filed in Mississippi instead.

Experience shows that one cannot address the asbestos litigation problem on a state-by-state basis. Asbestos litigation is simply not local. Rules to control it in one state will just push cases to other more favorable jurisdictions, which are constantly changing. Only Congress is in a position to address this national abuse in a national way.

Thus, I believe it reasonable for a proposal to address asbestos litigation issues to include appropriate restrictions on the venue of non-malignant cases. For reasons discussed earlier, I see no reason to restrict venue of asbestos cancer cases.

Appendix
"Asbestosis": Excerpt From www.kazanlaw.com

Asbestosis is, as its name suggests, caused by inhalation of asbestos fibers. It is not a cancerous lung disease.

The underlying disease process of asbestosis is not yet fully understood, but it appears that asbestos fibers in the lungs cause irritation and inflammation. The body attempts to neutralize these foreign fibers in various complex ways, and some or all of these processes lead to further inflammation and cell damage. Eventually a fibrosis or scar tissue develops in the interstitial spaces around the small airways and alveoli. This thickening and scarring prevents oxygen and carbon dioxide from traveling between the alveoli and the blood cells, so breathing becomes much less efficient.

Asbestosis often exists without any symptoms, and is then detected only by x-ray findings. However, the symptoms of asbestosis typically include shortness of breath and coughing. As the disease progresses, the symptoms can worsen. It can be a progressive disease, meaning that it continues to progress even after exposure to asbestos has stopped. In unusual cases it can be fatal.

The scarring and thickening can be seen on x-rays and CT scans. Also, if it reduces the functioning of the lungs, asbestosis can be detected by a breathing or pulmonary function test (PFT.)

Diagnosis can be made only when there is a history of asbestos exposure and positive results from a clinical exam, chest x-rays, CT scans, and/or a pulmonary function test (PFT.) It can also be conclusively identified through a biopsy; click on A, B and C to see three microscopic slides of asbestos fibers lodged in the lungs.

Asbestosis affects both lungs (it is bilateral) and, although it is mainly in the lower fields of the lungs, it is usually widespread (diffuse.)

Serious asbestosis is usually caused by heavy exposure to asbestos, such as sustained exposure over a period of years (e.g. a longtime worker at an asbestos textile plant) and/or intense exposure during a shorter period (e.g. a worker in the boiler and engine rooms of ships under construction in the Second World War.)

This does not mean that everyone who was heavily exposed to asbestos gets asbestosis, only that everyone who gets asbestosis was exposed to large quantities of asbestos fibers.

The specific type of asbestos fiber to which the worker was exposed does not seem to be significant in the development of asbestosis.

At the moment there is no cure or effective treatment for asbestosis. People with asbestosis are also at high risk of developing lung cancer or mesothelioma.

SUBMISSIONS FOR THE RECORD

Statement of

DENNIS W. ARCHER

PRESIDENT-ELECT

on behalf of the

AMERICAN BAR ASSOCIATION

submitted to the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

on the subject of

"THE ASBESTOS LITIGATION CRISIS CONTINUES – IT IS TIME FOR CONGRESS TO ACT"

March 5, 2003

Mr. Chairman and members of the Committee:

My name is Dennis Archer and I am here today at the request of our ABA President Alfred P. Carlton, Jr. on behalf of the American Bar Association, the world's largest voluntary professional organization with more than 410,000 members. I appear before you today in my capacity as the President-Elect of the ABA. I am pleased to be with you today and present you the views of the ABA regarding asbestos litigation.

I. Introduction

Today the United States faces an asbestos crisis that has gotten progressively worse over the past 20 years and is taking its toll on those who are sick with asbestos-related diseases and their families and on the court system. More than 200,000 claims are presently clogging the court system and tens of thousands of new claims are filed each year. Truly sick individuals are facing lengthy delays due to clogged court dockets. Funds that are needed to compensate persons who are sick now or who will become seriously ill from asbestos later are in danger of being dissipated due to claims by those who are not sick and may never become sick. The flood of claims from those who are asymptomatic is also harming current employees, retirees and shareholders of defendant corporations.

The ABA has long been concerned about the situation regarding asbestos claims. In February 1983, the ABA reaffirmed its opposition to broad federal product liability legislation. However, in the same resolution, (hereinafter identified as the February 1983 ABA policy), the ABA adopted a policy in support of narrowly drawn federal legislation

in two discrete areas of product liability law. One of those areas was victim compensation for certain occupational diseases such as asbestosis.

The February 1983 ABA policy supported federal legislation that addresses the issues of liability and damages with respect to claims for damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: a) there is a long latency period between exposure to the product and manifestation of the disease; b) the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems.

In its report, the Committee that sponsored the February 1983 policy stated that it "believes that the current social problem presented by occupational latent diseases, such as asbestosis, is unique and has been a catastrophic phenomenon on a national scale to asbestos workers and to the asbestos industry. While this Committee is reluctant to recommend federal intervention in the tort liability and common law systems of the several states, the Committee believes that the unique national scope and magnitude of the problems for adequate compensation to injured parties and liability for occupational latent diseases as they affect the financial stability of the specific industry, such as asbestos, warrants attention at the federal level. The Committee also believes that federal attention to such a unique and urgent national problem is neither premature nor

precipitous, and would not result in harmful violation of the inherent values of this country's common law tort liability systems of the several states."

In 1991 the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist found that "the situation has reached critical dimensions and is getting worse." The Ad Hoc Committee "recognize[d] that virtually all of the issues relating to a so-called 'national solution' are primarily matters of policy for the Congress" and stated that it "firmly believes that the ultimate solution should be legislation recognizing the national proportions of the problem...". U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation, p.2 (March 1991) (emphasis added).

In the continued absence of legislative action, some courts and parties attempted to craft creative solutions to the growing body of asbestos claims, including litigation class actions, settlement class actions, mass trial consolidations, joint defense claims handling organizations, and "global" settlement negotiations. None succeeded. Class actions failed because the factual disparity among the various claims and the disparate interests of present and future claimants precluded proper treatment under Federal Rules of Civil Procedure 23. The Supreme Court in 1997 and 1999 reviewed and struck down two proposed class action settlements known as the *Amchem* settlement and the *Ortiz* settlement. In both cases, however, the Supreme Court called upon Congress to correct the problem. Justice Ginsberg delivered the opinion for the Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed. 2d 689 (1997), in which she noted that the Judicial Conference had urged Congress to act on the situation and "no

Congressional response has emerged." In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L.Ed. 2d 715 (1999), Justice Souter delivered the opinion for the Court and said "this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in *Amchem* will suffice to show how this litigation defies customary judicial administration and calls for national legislation" 527 U.S. at 821 (emphasis added). Chief Justice Rehnquist's concurring opinion stated that asbestos litigation "cries out for a legislative solution" 527 U.S. at 865.

Mass consolidations, at least in the eyes of some courts, suffered similar shortcomings. *See, e.g.*, *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 320-21 (5th Cir. 1998); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350-353 (2d Cir.1993); *Cain v. Armstrong World Industries*, 785 F.Supp. 1448, 1454-56 (S.D.Ala. 1992). Joint defense claims handling organizations dissolved over various strategic and liability share issues, as did "global" settlement negotiations.

The February 1983 policy is silent as to what type of federal legislation might be appropriate in the area of asbestos. In the intervening years, the situation has become much worse and we believe must be addressed. Until last month, no subsequent ABA policy was adopted to address asbestos litigation or legislation.

In November 2002, at my request, the ABA created a Commission on Asbestos Litigation to bring a recommendation to the House of Delegates at its February 2003 meeting concerning widely reported and longstanding problems in asbestos litigation. The

recommendation was to address dual concerns: 1) protecting the right of claimants with impairing asbestos-related injuries to obtain fair compensation efficiently in the tort system, and 2) preventing scarce judicial and party resources from being misdirected by a flood of premature claims by individuals who have been exposed to asbestos but do not have, and may never get, any functional impairment from asbestos-related disease.

In establishing a commission to develop policy in the area, the ABA was most concerned about ensuring that those who become sick from asbestos-related diseases will receive reasonable and fair compensation for themselves and their families. The ABA is concerned that funds are being dissipated by payments to those who are not now sick and may never be sick with asbestos-related diseases, and the costs associated with administering those claims. A number of factors go into why those who are not yet sick file a claim. We acknowledge that those who file a claim often do so when they are not yet sick in order to file within the time prescribed by a statute of limitations. Others do so because they fear that, if companies go bankrupt by waiting, these claimants may not be compensated. These people often settle for a comparatively small amount of money in return for a complete release. Most never get sick, but those who do become sick are often precluded from the compensation they need, at the time they really need it.

Over the past 20 years, the problems associated with the tremendous volume of cases and the national scope of the problem resulted in increasingly urgent calls for federal legislation to address the problem. Recently, the concept of federal legislation to: 1) allow those with non-malignant asbestos-related diseases to file a cause of action only if

they meet specific medical criteria; and 2) toll all applicable statutes of limitations until those criteria are met has come to the radar screen as a possibility of dealing with the crisis at hand. At this time there is no national Standard to separate claimants who are not sick from those who are sick from asbestos.

The ABA believes that Congress should enact a Standard like the one developed by the ABA Commission or a similar appropriate Standard that would: (a) identify non-malignant claims that are entitled to compensation and defer those that do not currently belong in the courts, and (b) ensure that state and federal statutes of limitations do not run against individuals who do not yet (and may never) meet the medical criteria in the Standard. **Such a Standard should deal only with non-malignant claims and not in any way deal with claims for asbestos-related cancers or malignancies.**

The ABA adopted policy last month, attached as "Appendix A," does just that. Attached as "Appendix B" is a medically sound "Standard for Non-Malignant Asbestos-Related Disease Claims" that the ABA has developed. The ABA developed the Standard with the goal of ensuring that no one who should be permitted to file a claim would be precluded from filing one. We have attempted to be inclusive, while recognizing that no real progress could be made without establishing objective medical criteria for presently compensable claims.

While this issue is indeed complex and does indeed have important consequences, it is not new. Lawyers, public advocacy groups and think tanks have been studying the issue

for more than two decades. The ABA Commission members reviewed the extensive list of studies, statements and testimonies that have resulted from this effort and held consultations with leading medical experts on pulmonary function. Commission members worked very hard on this matter because they are truly concerned about those who have become sick due to exposure to asbestos. Their hard work produced, in my view and in the view of the 70% of the members of the ABA House of Delegates, a fair standard.

We believe this Standard or appropriate similar standards should be considered by Congress.

If legislation along these lines is not enacted, the assets of the defendants will be consumed by people who are not sick, leaving little or nothing for those who become sick in the years ahead. In addition, companies continuously being sued by those not impaired are likely to become less capable of earning money to pay claims. Analysts are now looking at footnotes in the annual reports of such companies to determine asbestos liability, and the financial ratings of these companies are being impacted negatively. If the present course continues, jobs and economic value will be lost and even more companies will be pushed into bankruptcy—causing further delays and reduced compensation to the very sick.

II. Background

Asbestos litigation is not a new phenomenon. It is the tragic legacy of extensive industrial use of asbestos in the workplace, predominantly from the 1930s to the early

1970s. Significant numbers of industrial workers began developing disabling, and sometimes fatal, asbestos-related diseases decades later (a delay attributable to the long latency between exposure and manifestation of disease). They brought suit against a relatively small number of former manufacturers of asbestos-containing industrial insulation products.

By the 1980s, what had once been a series of isolated cases turned into a steady flow. Claimants began regularly obtaining significant awards. In 1982, Johns-Manville Corporation -- the single largest supplier of asbestos-containing insulation products in the U.S. and the primary target of the early claims -- declared bankruptcy due to the burden of the asbestos litigation. At that point, it had approximately 16,000 pending claims. By comparison, today it is common for some defendants to have more than 100,000 cases pending.

The asbestos litigation paused only briefly, if at all, as a result of the Manville bankruptcy. Heavily exposed industrial workers continued to get sick from asbestos-related diseases and to bring claims in the tort system throughout the 1980s and into the 1990s. Asbestos dockets in certain jurisdictions swelled. Several other former manufacturers of asbestos-containing insulation declared bankruptcy (e.g., Unarco, Eagle-Picher, Raybestos Manhattan, Celotex).

Despite the failure of efforts to find a new solution to the asbestos litigation, the tort system appeared to be relatively stable in the early 1990s. The flow of new claims was

substantial (RAND estimates it was 15,000 to 20,000 per year), but fairly predictable. (*Asbestos Litigation Costs and Compensation, An Interim Report*, RAND Institute for Civil Justice, 2002, hereinafter the "RAND report"). More importantly, it appeared that by the mid-1990s there was a downward trend in new filings, reflecting the fact that the period of most intensive industrial use of asbestos had drifted further into the past and the occurrence of disabling non-malignant diseases was falling in corresponding fashion.

In retrospect, however, it is clear that a countervailing trend was emerging and accelerating in the 1990s: for-profit litigation screenings began systematically generating tens of thousands of new non-malignant claims each year by individuals who had some degree of occupational asbestos exposure, but did not have, and probably would never get an impairing asbestos-related disease. These individuals may or may not have markings on lung x-rays "consistent with" exposure to asbestos (and dozens of other possible causes) but do not, and may never, experience any symptoms of asbestos disease or develop any asbestos-related conditions that would impair or affect their life or daily functions.

Asbestos exposure can affect the body in a number of ways. It can cause mesothelioma, a cancer of the exterior lining of the lung and peritoneum. It can also cause cancer inside the lung. Although there is an ongoing debate about the issue, some believe that it can cause cancer at other sites in the body.

Asbestos exposure can also cause non-malignant pulmonary disease. Asbestosis is a fibrosis (scarring) of tissue inside the lung, particularly in the walls surrounding the alveolar spaces at the end of the airways. Significant fibrosis in this area reduces the elasticity of the lung and interferes with the lung's ability to oxygenate the blood. Asbestotic lungs are characterized by reduced capacity, i.e., they can process only a reduced volume of air compared to normal lungs. Workers who suffer from significant asbestosis generally have shortness of breath on exertion.

Asbestosis can be a progressive disease. In its milder forms, it may not cause any symptoms. It may or may not progress to the point of causing functional impairment detectable on objective pulmonary function tests.

Asbestos exposure may also cause non-malignant changes in the pleura, the tissue that lines the outside of the lung and the inside of the rib cage. The purpose of the pleura is to facilitate the smooth, constant movement of the lungs as they expand and contract. Asbestos exposure can cause circumscribed thickening of pleural tissue (called "pleural plaques") as well as diffuse pleural thickening. Ordinarily, these conditions -- which occur outside the lung -- do not result in any functional impairment. Significant diffuse pleural thickening, however, can restrict the ability of the lung to expand and may result in objective impairment that can be identified by pulmonary function testing.

While pleural plaques and diffuse pleural thickening involve the same tissue that is involved in the malignant disease mesothelioma, they are different physiological

processes. Pleural plaques and pleural thickening do not become or lead to mesothelioma. Mesothelioma incidence is a function of exposure and individual susceptibility, not the presence or absence of non-malignant pleural changes.

By virtually all accounts, contemporary asbestos litigation is no longer driven solely, or even primarily, by the occurrence of disabling asbestos-related diseases. Asbestos-related cancer and impairing asbestosis continue to occur, but they represent a small fraction of annual new filings. A recent RAND report noted that some studies claim that somewhere between two-thirds and 90% of new claims are now brought by individuals who have radiographically detectable changes in their lungs that are "consistent with" asbestos-related disease (and with dozens of other causes), but have no demonstrated functional impairment from those changes: The RAND report concluded that, "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 life." RAND report at pg. vi; and, pg. 20, 21.

Currently, lawyers are doing what they think is best for their clients. The manner in which the statutes of limitations operate under some states' laws is a major factor in generating numerous claims by claimants who are asymptomatic or without functional impairment. The ABA wants to improve the administration of justice by ensuring that only symptomatic persons file claims and that the statute of limitations is tolled for those who are not yet sick. Thus, the courts and the lawyers will be better able to handle these cases.

A number of states have expressly adopted a "two disease" rule for asbestos-related claims. Under this rule, a claimant who suffers from asbestosis must timely file a claim for that disease, but is not automatically barred from bringing a separate claim many years later should he or she develop an asbestos-related cancer. However, even states that have adopted the two-disease rule have found that it has not stopped the high levels of filings by asymptomatic plaintiffs.

The result of the legal dilemma created by screenings and statues of limitations is the wholesale filing of premature non-impairment claims. The statistics are startling. In 2001, the Manville Trust received over 90,000 new claims -- more than in any prior year and nearly six times the total number of claims pending against Manville when it declared bankruptcy twenty years before. Between 2000 and 2002, the Trust received more than 200,000 claims. The Trust has reported that more than 90% of the claims allege only non-malignant changes.

The experience of the Manville Trust is not unique. According to the RAND report, there has been a substantial increase in annual new filings for all defendants since the mid-1990s, and the increase is almost entirely attributable to non-malignancy filings. The vast majority of those non-malignancy claims, RAND reports, do not involve functional, objectively measurable impairment from asbestos-related disease.

The financial impact of this flood of non-impairment claims has been profound. According to the RAND report, more than sixty otherwise financially viable companies have gone bankrupt due to asbestos-related liabilities, over twenty in the last two years. None has claimed an inability to pay fair compensation to truly sick claimants. Virtually all point to the same problem: tens of thousands of non-impairment claims filed each year, with no end in sight.

Nobel Laureate Professor Joseph Stiglitz of Columbia University recently issued a report, commissioned by the American Insurance Association, that calculates the economic impact of these bankruptcies on the employees of the bankrupt companies. He estimates that 60,000 workers have lost their jobs when their companies went bankrupt as a result of asbestos-related liabilities. (The RAND report estimates job losses at approximately 128,000.) Stiglitz concludes that "[e]ach displaced worker at the bankrupt firms will lose, on average, an estimated $25,000 to $50,000 in wages over his or her career" and every worker will suffer "roughly $8,300 in pension losses, which represent[s], on average, a roughly twenty-five percent reduction in the value of the 401(k) account." Joseph E. Stiglitz, Jonathan M. Orszag, & Peter R. Orszag, "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms" (December 2002) at 3.

The direct costs of asbestos-related bankruptcies can be very substantial. Owens Corning, for example, recently disclosed that, in approximately two years, it has incurred $200 million in legal and consulting fees. These costs directly reduce the funds available to pay claimants.

Bankruptcy has not helped seriously ill asbestos claimants, either. Claims payments stop immediately when bankruptcy is declared and do not resume for several years, and then at significantly reduced values. The Manville Trust is currently paying only five cents on the dollar to claimants. Due to the flood of non-impairment claims, the Trust reports that, over the last five years, it has paid more money to claimants who describe themselves as unimpaired than it has to mesothelioma claimants.

Once a lawsuit is filed, unimpaired claimants may choose to resolve their claims for minimal values, executing a complete release. For the vast majority who never develop a disabling asbestos-related disease, the money is arguably a windfall. For those who later develop mesothelioma, the filing and resolution of a premature claim and execution of a full release can become a haunting mistake.

It is for these reasons, as well as concerns over the availability of fair compensation for seriously ill asbestos disease victims, that many disparate voices have joined in the call for change. The flood of non-impairment claims generated by litigation screenings crowd active litigation dockets, lengthening delays in the disposition of mesothelioma and other serious injury claims.

III. Discussion of the Standard referred to in the ABA's resolution that was developed by the ABA's Commission on Asbestos Litigation

The bulk of the ABA Commission on Asbestos Litigation's work focused on developing objective medical criteria that identify individuals with non-malignant asbestos-related

disease causing functional impairment and separate out cases where either the individual has no functional impairment or is impaired solely by some other cause, such as asthma, emphysema or smoking.

Similar criteria have been in use in many areas of the asbestos litigation for years. Several courts, including those in New York, Boston, Chicago and Baltimore, have used medical criteria to place unimpaired claimants on "pleural registries" or inactive dockets that keep such cases dormant until the claimant becomes impaired. Some private settlement agreements between defendants and plaintiffs' firms use such criteria, and courts have found such criteria to be fair. However, rather than adopt existing criteria from some other source, the Commission developed its criteria only after interviewing pulmonologists and occupational medicine specialists, including doctors who had testified for both plaintiffs and defendants in asbestos litigation. As a result, while the Commission's recommended criteria are similar to many of those already in use, it is not identical to any of them.

A diagnosis of asbestos-related pleural disease, and particularly asbestosis, requires assessment of a number of factors, including the review of chest x-rays, pulmonary function tests, latency, and the taking of a complete occupational, exposure, medical and smoking history. Because many symptoms and findings are not specific to asbestos-related disease, this approach is necessary to enable a physician to exclude other more probable causes for various findings. This then enables the physician to support a conclusion that the patient's medical condition is the result of asbestos exposure. These

types of requirements are typical for assessment of disability or impairment under various legislative and regulatory systems, including Social Security, the Federal Employees Compensation Act (FECA), and state worker compensation programs.

As a result, the Commission's medical criteria in the recommended Standard include several elements. Doctors basically agree that diagnosis of asbestosis that causes functional impairment requires several components, including (1) a history of occupational and other asbestos exposure, as well as a complete medical and smoking history, (2) a latency period of at least 15 years between initial asbestos exposure and the onset of disease, (3) an x-ray that suggests the presence of asbestosis, and (4) pulmonary function test ("PFT") results that establish abnormally low lung function and rule out the probability that the impairment was caused solely by something other than asbestos. Each of these requirements is incorporated into the Commission's recommended Standard, but certain key issues are discussed more fully below.

In drafting this Standard, the Commission attempted to achieve its goal of deferring only those claims involving individuals who are not impaired as a result of exposure to asbestos. As will be seen below, in several instances the Standard adopts less restrictive alternatives than some physicians recommended. The effect of this may be to allow claims that do not really belong in the tort system, but the ABA prefers to take that approach rather than to unfairly exclude any significant number of deserving claims.

If Congress were to adopt a weaker Standard it would render it ineffective in achieving the goal of ending the flood of premature claims that clog the courts and sap resources from the system and from truly sick claimants. Thus, the ABA would support enactment of either this Standard or an appropriate similar Standard.

A. **X-ray Standards**

A positive x-ray reading is almost always viewed as a necessary component of the diagnosis of asbestosis. It is not by itself a finding of functional impairment or a diagnosis of asbestos-related disease. X-ray readings have governing standards, but often depend upon the judgment of the individual doing the reading.

1. **ILO Readings**: The International Labor Office, in an attempt to standardize the classification of chest x-rays involving pneumoconiosis, created the ILO scale as a means of grading dust-related changes on chest x-rays. The ILO scale attempts to gauge the severity of the irregularities found by the reader, using a scale from 0 (normal) to 3. A grade of 0/0 would indicate a normal lung. A grade of 1/0 indicates that the reader found evidence of minimal lung irregularities – the "1" – but also considered whether the x-ray should be read as normal, or "0." A reading of 1/1 means that the reader found clear evidence of minimal lung irregularities, and is a stronger finding than a 1/0. A 2/1 or greater indicates more extensive lung abnormalities.

The American Thoracic Society (ATS) has stated that a 1/1 reading is an important factor in the diagnosis of asbestosis, but allows a diagnosis of mild asbestosis based upon a chest x-ray reading graded 1/0 in the presence of other confirming diagnostic findings. However, some settlement agreements and court orders creating "inactive dockets" have used 1/1 as an appropriate standard.

The Commission elected to incorporate a 1/0 standard into its medical criteria, for several reasons. First, the Commission intended that the standards not be unfairly exclusionary. Second, those who over-read x-rays as 1/0 for litigation purposes might just as easily over-read them as 1/1 if necessary to meet a medical standard. Finally, properly administered PFT's (discussed below) are the most important screening tool to determine significant asbestos-related functional impairment.

2. **B readers:** The minimum standard recommended by the Commission requires a positive chest x-ray finding by a NIOSH certified B reader. A B reader is a person, usually but not necessarily a doctor, who has passed the tests necessary for certification that he or she is qualified to read x-rays according to ILO standards. The requirement of a B reading in the proposed medical criteria reflects the Commission's attempt to create a uniform standard for the diagnosis of nonmalignant asbestos-related disease. The Commission also notes that B readings are already prevalent in asbestos litigation. The Commission acknowledges that many physicians who are not certified B readers are still qualified to read chest x-rays for the presence or absence of asbestos-

related disease, but the Standard adopts the B reader requirement in an attempt to obtain uniform standards.

3. **CT Scans:** A number of medical experts consulted by the Commission felt that both computer tomography scans and high-resolution computer tomography scans (CT & HRCT) can be useful diagnostic tools in distinguishing asbestosis and asbestos-related pleural disease from other chest abnormalities. However, these doctors acknowledged that no objective standard analogous to the ILO B reading scale for grading chest x-rays exists for the grading of CT and HRCT Scans. The lack of applicable standards compelled the Commission to require a positive B reading of a chest x-ray as the minimum radiologic diagnostic standard, rather than positive CT or HRCT Scans.

B. Pulmonary Function Tests

The Commission's proposed Standard requires that a claimant meet certain requirements on pulmonary function tests. The PFTs in the Standard demonstrate functional impairment, and also demonstrate that the impairment is of the type (restrictive impairment) that can be caused by asbestos exposure.

1. **Testing methodology:** It is generally accepted that pulmonary function testing provides the primary objective basis for assessment of functional impairment. However, the results of such testing can be affected by patient effort as well as technical deficiencies. Many of the doctors who met with the Commission believe that adherence to test quality standards has eroded in the asbestos litigation arena.

The American Thoracic Society in their 1991 and 1994 Official Statements published technical standards for pulmonary function testing, including equipment, methods of calibration, technique and interpretation. Virtually all of the physicians consulted by the Commission agreed that PFT's used for purposes of satisfying the medical criteria should meet the ATS technical criteria. This includes attachment of all test results and appropriately labeled spirometric tracings. One physician who met with the Commission, who has never testified in asbestos litigation, has evaluated tens of thousands of pulmonary function test results. He believes that ATS technical criteria are met in only 1% of the cases he has seen arising from litigation; in contrast, pulmonary function results outside the litigation/claims arena meet ATS technical criteria 90% of the time.

The Commission strongly believes that PFT's must be conducted according to ATS testing standards to be reliable for use in medical criteria. In addition, to ensure compliance with quality standards, the Standard requires that all PFT reports be included as attachments. This should not be an undue burden on claimants since, under the proposed Standard, they are required to have had these tests prior to filing their claim.

2. **Impairment measures:** The proposed criteria include several measures of impairment. These are discussed below.

Forced Vital Capacity: Asbestosis can cause *restrictive* lung disease. The scarring of the lung caused by asbestosis reduces the capacity of the lungs. to retain and expel air. This reduced volume can be measured by Forced Vital Capacity (FVC), the amount of air exhaled after a deep breath with maximum force during a standard

pulmonary function test. The proposed criteria require that to demonstrate impairment, a claimant demonstrate Forced Vital Capacity "below the lower limit of normal." The Commission considered whether to select a particular standard to use as "normal," but elected not to do so in order to allow medical science to continue to develop in this area. The Commission does note, however, that some standards suggest the use of racial adjustment factors in determining the measure of lung capacity. The Commission expressly intends that racial adjustment factors not be used in applying its medical criteria. Omitting these racial adjustments will have the effect of qualifying additional claims, rather than excluding claims, but is consistent with fairness and the Commission's desire that its standard be inclusive rather than overly exclusive.

FEV1/FVC ratio: It is critical to distinguish *restrictive* lung disease, which can be caused by asbestos, from *obstructive* lung disease, which is normally associated with smoking and is not associated with asbestos exposure. This is important because the population of persons exposed to asbestos includes a high percentage of smokers. A reduced FVC can be caused by either restrictive or obstructive lung disease. Additional findings help draw the distinction. When obstructive lung disease is present, the amount of air that can be expelled in the first second of a pulmonary function test falls faster than the amount that can be exhaled in the entire test. As a result, a low ratio of FEV1 (the amount of air that can be exhaled in the first second of the test) to FVC (the total amount of air exhaled during the test) indicates obstructive, rather than restrictive, lung disease. An FEV1/FVC ratio that is within normal limits is consistent with restrictive disease, assuming other tests of restrictive disease are also met, because the amount of air

expelled in the first second does not fall faster than the total amount of air that can be expelled. Thus, the criteria adopt a commonly used measure that requires the FEV1/FVC ratio to be above the lower limit of normal, in order to exclude cases where the impairment is obstructive rather than restrictive.

Total Lung Capacity: The most accurate method of determining restrictive impairment is Total Lung Capacity ("TLC"). Restrictive lung disease (which can be asbestos-related) reduces the total capacity of the lung, while obstructive disease (usually associated with smoking) usually does not. Thus, a TLC below the lower limit of normal is indicative of restrictive disease but not obstructive disease. Many doctors believe TLC's are more accurate in screening out obstructive cases than FVC in conjunction with the FEV1/FVC ratio discussed above, which can result in "false positives" – findings of restriction in individuals that do not have it. However, TLC tests can be slightly more costly and less widely available than the other tests described above, and the Standard developed by the Commission does not require them, notwithstanding that they may be the best evidence of restrictive impairment. Rather, in keeping with the ABA's goal of being overly inclusive rather than unduly strict, the Standard allows claimants to meet the impairment definition through the use of *either* FVC with the FEV1/FVC ratio or TLC test results.

Paragraph 4c ("Backstop" provision): There were additional pulmonary function findings suggested by one or more of the doctors as possible ways to identify asbestos-related restriction in individuals who have other unrelated lung problems, such as chronic

obstructive pulmonary disease. Other doctors rejected these suggested findings as unreliable, non-specific, or otherwise inappropriate. Rather than attempt to resolve these disputes, the Commission drafted a provision (paragraph 4c)) that would allow claimants to file suit even if they fail to meet the criteria set forth in paragraphs 4a) or 4b).

The overwhelming majority of persons who are functionally impaired as a result of non-malignant asbestos disease would meet the criteria of either paragraph 4a) or 4b). However, it is possible that in unusual cases, some legitimate claim might be excluded. The Commission felt it inappropriate to draft the general Standard based on these rare cases. Instead, the Commission adopted a "backstop" provision so that in cases of clear interstitial fibrosis (defined in the Standard as a person whose x-ray grades at 2/1 or higher under the ILO system), a treating physician's detailed opinion that the person suffers from restrictive impairment due to asbestosis is sufficient to allow the claimant to proceed.

C. Medical Report and Diagnosis

The ABA heard extensive evidence, some of which is discussed above, that the huge increase in claims from unimpaired claimants is caused by litigation screenings that do not comply with generally accepted clinical standards. In many cases, claimants are not seen by a licensed physician and no medical "diagnosis" has been made. The Commission believes that cases of abuse will be minimized if true medical standards are observed. In addition to the requirement discussed above that PFT tests meet ATS

standards and that supporting documentation be filed with the complaint, the Commission's proposed criteria require a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor. The Commission believes that such a requirement will dramatically enhance the integrity of the process by requiring that a licensed physician take responsibility for the diagnosis. Similar requirements exist today in many state statutes relating to medical malpractice and have helped to raise the standard for filing such cases. The Commission believes that the indisputable impact of for-profit litigation screenings that lack appropriate medical oversight justifies the simple requirement proposed in the Commission's criteria. The Commission believes that the integrity of the physician community, perhaps even more than the tests described above, is a key safeguard against the abuses that have been prevalent in the asbestos litigation.

Recommended Changes to the Statute of limitations

The ABA strongly believes that it would be unfair to require that claimants wait to file suit until they develop the level of functional impairment required by the Standard, if a statute of limitations could simultaneously be running against them. Thus, in any legislation deferring asbestos-related claims involving no functional impairment, the ABA recommends that there be a concomitant provision tolling any otherwise applicable statute of limitations until the required level of diagnosis is met. No other changes in state statutes of limitations are proposed.

IV. Conclusion

The ABA believes that the flood of asbestos cases fully justifies limited Federal intervention with respect to statutes of limitation and impairment criteria. We urge

enactment of federal legislation that would: 1) allow those alleging non-malignant asbestos-related disease claims to file a cause of action in state or federal court only if they meet the medical criteria in the "ABA Standard For Non-Malignant Asbestos-Related Disease Claims" dated February 2003 (which should be updated periodically in accordance with medical advances and scientific research) or an appropriate similar medical standard; and 2) toll all applicable statutes of limitations until such time as the medical criteria in such standard are met. However, the ABA has not addressed broader legislative solutions that have been discussed by others.

The ABA believes that any asbestos legislation should infringe on state law only to the extent necessary to achieve the goal of ensuring that the justice system operates to compensate those who are injured by asbestos equitably. As mentioned earlier, with few exceptions, the American Bar Association has long and consistently opposed the enactment of federal legislation that would attempt to create a national body of tort law that would apply in the fifty state justice systems. In addition to the February 1981 and February 1983 policies discussed earlier in this report, the ABA has adopted numerous other policies over the years that oppose the federalization of the tort laws in a host of areas. It has been the ABA's position that the state courts and legislatures are normally the appropriate bodies to develop product liability laws and that, *except in discrete circumstances*, Congress should not substitute its judgment for systems that have evolved in each state. A national solution is required because asbestos litigation presents unique challenges for this country's civil justice system and I believe the ABA's resolution adopted by our House of Delegates last month accomplishes this goal.

The ABA's resolution does not propose to create original federal jurisdiction for the prosecution of asbestos claims to the extent that such jurisdiction does not currently exist.

Thank you for giving me this opportunity to present to you the views of the ABA on this most important issue.

TESTIMONY OF THE ASBESTOS STUDY GROUP

Before the
United States Senate
Committee on the Judiciary
"The Asbestos Litigation Crisis Continues – It Is Time for Congress To Act"
March 5, 2003

The Asbestos Study Group commends the Senate Judiciary Committee for holding today's hearing on the asbestos litigation crisis, and we look forward to working with the Committee to find a solution that will bring certainty, finality, and relief to all who have been affected by this national tragedy.

There are few issues with a more immediate need of Congressional involvement and resolution. Today, those suffering from asbestos-related diseases are forced to endure long delays in litigation only to see little or no relief. Transactional costs drain far too much of the monies available for compensation, nearly two-thirds of all funds according to some studies. Over the past two years, another 20 companies have gone bankrupt. Sixty thousand jobs have been lost, injuring communities and swamping state assistance programs. Pensions have literally disappeared overnight. And there appears to be no relief on the horizon. Instead, the number of claims has only escalated.

As Chairman Hatch noted last year, the time has come to find a bipartisan legislative solution that is fair, balanced, and complete. The Asbestos Study Group (ASG) was formed in May 2001 to explore possible approaches to resolve the growing asbestos litigation crisis. The ASG represents companies not historically associated with asbestos manufacture or production but who have been swept into the asbestos litigation morass. Our members include Dow, Ford Motor Company, General Electric, General Motors, Halliburton, Honeywell, Pfizer, and Viacom. The current asbestos litigation system serves no one well, particularly the true victims of asbestos exposure. From the beginning, we have sought a comprehensive resolution that can deliver fair and timely compensation to victims suffering from asbestos-related diseases which also provides financial certainty and finality for the economy as the best system to ensure that payments are made, jobs are saved and the courts are protected from the overwhelming administrative burden of processing claims and re-litigating issues over and over.

Realizing that past legislative efforts have failed to build bipartisan consensus and support from key stakeholders, the ASG convened a panel of nationally renowned experts with diverse academic and legal skills to find a new way to address this problem. They worked tirelessly to find the best solution for all stakeholders, particularly victims suffering from asbestos-related disease, keeping the following principles in mind.

1. Those suffering from mesothelioma and other conditions caused by asbestos exposure deserve fair compensation for their injuries.
2. Those who are sick should receive compensation promptly.
3. The determination of illness should be determined by objective medical criteria based upon standards established by a panel of independent, knowledgeable experts.
4. The same medical standards should apply to pending claims and future claims.
5. If the current situation is left unchanged, many victims who are sick will be denied not only adequate compensation but even an opportunity to recover damages because there may not be sufficient assets available in the entire pool of possible defendants to satisfy the collective demands of all would-be plaintiffs.
6. The truly sick will not be able to recover if the transactional costs associated with litigation continue to consume over 60% of all payments by corporate defendants.
7. Litigating more companies into bankruptcy will not help victims recover and may jeopardize the ability of many who are suffering to receive any relief.
8. Any solution must provide finality and certainty in order to forestall continued bankruptcies.
9. The federal government has a unique role to play in finding a solution.

We took the findings of the panel and spent many more months exhaustively working with medical experts, financial cost estimators, trust experts, legal practitioners, professors, and budget experts to flesh out the structure and details of a claims facility. Hundreds of issues have been identified and resolved involving structure, funding, constitutionality, judicial and administrative review, claims processing, treatment of existing bankruptcy trusts, budget scoring, and tax issues, among others.

The task required extraordinary cooperation and effort by industry both within the ASG and with interested parties outside the ASG. This project has had the attention and dedication of time and resources at the highest levels of our member companies. More than a dozen general counsels representing major manufacturers and insurance carriers actively participated. We have also spent months discussing these issues productively with representatives of organized labor. These high-level discussions with key stakeholders have yielded significant progress and identified common ground on many critical issues.

The goal of this multi-year effort was not to write a bill; that challenge is uniquely for the Judiciary Committee and for Congress. Rather, our purpose was to identify the most comprehensive solution possible, to highlight and resolve critical issues, and to be in a position to share the key concepts with stakeholders and Congress so that together we may decide whether there is a comprehensive solution that can work.

As a result of this effort, we believe the best solution would be to establish a privately funded claims facility that will pay victims fair compensation quickly, on a no-fault basis, for a wide range of asbestos-related diseases. Although this is not the only possible solution, we believe that such a facility – sometimes referred to as a "trust fund" – can bring fairness, certainty, and finality for all stakeholders, including, most importantly, the victims of asbestos-related disease.

Under this proposal, victims of asbestos-related disease could be compensated on a no-fault basis, upon showing that they were exposed to asbestos and that they satisfy the other eligibility standards for compensation. Victim compensation would no longer be held hostage to bankruptcies or to years of expensive litigation over product identification, causation, and other issues. By reducing the heavy burden of transaction costs, the savings can be used to ensure fair compensation to those suffering from asbestos. Defendants and insurance companies currently caught in the litigation crisis would no longer face the uncertainty and the risk premium Wall Street imposes in order to deal with the unpredictable nature of the asbestos crisis. Instead, they would accept somewhat "rough justice" in providing the private funding for the compensation system in exchange for financial predictability and relief from vagaries of the tort system.

The following is a more detailed explanation of the four key components of our proposal.

Victim Compensation

- The statute would set a scheduled value to fairly compensate victims of asbestos-related diseases based on a variety of conditions and factors relevant to the valuation of claims.

- Priority would be placed on ensuring and expediting compensation for those most seriously ill from asbestos-related diseases. Living mesothelioma victims would be eligible to receive a substantial down payment of full claim value within a very short time of filing a claim.

- Payments for eligible claims would be made over a reasonable period of time with provisions for expediting payment for exigent circumstances and in cases of extreme hardship caused by the asbestos-related disease.

- Victims that receive compensation for one asbestos-related disease, but who later develop another disease, will be eligible for additional compensation under the program.

- Victims need not identify the liable defendants, and they would no longer be denied compensation if their exposure was limited to companies currently in bankruptcy.

Eligibility

- The categories of compensable asbestos-related diseases would be set by statute to include mesothelioma, lung cancer, other cancers, and qualifying asbestosis.

- Claimants would have to demonstrate the diagnosis of a compensable disease by a treating physician as part of an in-person physical examination. Other diagnostic criteria will also be adopted for individual compensable diseases (particularly to exclude other more likely causes of the claimant's condition and to ensure compliance with standard medical techniques).

- Claimants would also have to demonstrate threshold exposure to asbestos according to standards under the program; dates of exposure and latency periods will also be considered in determining eligibility for compensation.

- Upon satisfying the eligibility criteria, claimants would be eligible to receive benefits under the statute. Claimants would **not** have to meet other burdens typical of litigation, including establishing product identification, proving causation, etc.

Funding

- The program would be privately funded on an equitable basis among asbestos defendants and insurance carriers. Asbestos-related bankruptcies (both pending and confirmed) would be included in the program.

- The overall size of the program, as well as annual funding requirements, would be set by statute. The fund would have limited borrowing authority to help alleviate the financial pressure on funding in the early years (needed to deal with the large number of pending claims) while ensuring prompt payment of all eligible claimants. The private parties would pay into the claims facility on a yearly basis to cover annual costs.

- The ASG recognizes that many traditional defendants have gone bankrupt and some of the trusts established on their behalf have experienced an unanticipated flood of claims, resulting in reductions in compensation levels -- some to as little as pennies on the dollar -- thus increasing the unfairness to victims. The ASG is actively engaged in efforts to avoid that risk even as we develop a program providing the requisite affordability, predictability and certainty for the financial obligations of those funding the program.

- Despite the government's role in asbestos exposure, the program could be financed without any direct government funding. The corpus of the fund should be allowed to grow tax-free, and current deductibility of payments should be maintained.

Structure and Procedure

- The statute would create the claims facility as the exclusive remedy for all victims of asbestos-related disease (to include bodily injury and related causes of action, but excluding property damage claims). The statute would preempt all pending and future litigation in the tort system and instead compensate victims on a no-fault basis regardless of the source of their exposure.

- The claims facility would be privately funded and administered. Claims would be processed and evaluated under standards specified by statute and additional criteria and procedures developed in the trust plan.

- Compensation levels would be determined by the facility, subject to the schedules in the statute and the trust plan.

- Trustees would have audit authority over claimants and other entities submitting information or diagnoses under the program, including substantial civil and criminal penalties for knowingly filing false information and for fraud.

- Because this is a no-fault system, the administrative process and attendant costs would be limited.

We have achieved concrete progress in working out practical and substantive provisions of the program. This progress has, in turn, permitted us to engage in very productive discussions with critical stakeholders, including diverse sectors of industry, insurance carriers and organized labor. Based on these ongoing discussions, we believe it is possible as a practical and substantive matter to create a private claims facility with the most substantial funding and the most generous payment schedules ever considered by private parties working with Congress.

We look forward to working with the Committee and are prepared to share the details and the considerable research we have conducted concerning the numerous administrative, legal, and financial issues involved with the creation of a privately funded claims facility. We are also happy to share our analysis and work product concerning other ways to solve this crisis.

In the end, we believe that the best way to ensure that asbestos victims are compensated fairly and that companies can protect jobs and the pensions of their employees is for Congress to establish a privately funded national claims facility. This solution provides the best chance of ensuring that the determination of illness is based on sound medicine and the bulk of recovery goes to those suffering from asbestos-related diseases.

We look forward to working with you on this critical issue.

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
March 5, 2003

Mr. Chairman and Members of the Committee, my name is David T. Austern. I am President of the Claims Resolution Management Corporation ("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 share my views here today.[1]

Summary. When I testified before you last September, I delivered some dire news about the seemingly endless propensity to file asbestos claims. Sadly, things have not improved. The asbestos claims system is unfair to many victims, it drains resources from impaired and future victims, and it wreaks economic havoc on companies, workers, and retirees. Some have suggested that imposing medical criteria as a threshold to bringing an asbestos claim would be the best solution to the problem. In my view, however, the best legislative solution would be to create a National Asbestos Claims Facility that would ensure recovery to impaired victims, prioritize the claims of those with serious illnesses, preserve the rights of future claimants, and provide certainty to all parties.

[1] The views expressed herein do not necessarily reflect the opinion of the Directors of the CRMC or the Trustees of the Trust.

The Problem. The system is unfair to victims, and is plagued by fortuity. Whether victims receive compensation at all and, if so, how much they receive depends on the fortuity of where and when they file claims, who the defendants happen to be, whether those defendants are solvent at the time the claims are filed, and the leverage and skill of the trial lawyer. The amount of victim awards diverge wildly -- some victims receive grand slam awards, while others receive little or nothing. Sadly, some victims die before their case is heard.

These distortions in the system are exacerbated by jurisdictional idiosyncrasies. Five states had two-thirds of all asbestos case filings between 1998 and 2000. The concentration of a huge number of filings in a small number of jurisdictions only increases the delays and inequities inherent in the current system.

While this fortuitous system creates some windfalls, it leaves the unlucky without compensation, and it is only getting worse. In order for victims to be compensated, they need to be able to look to solvent companies for resources. However, over 60 companies have declared bankruptcy because of asbestos claims, with more than 20 of those bankruptcies having occurred during the past two years. It is true that bankruptcy trust funds are an efficient way of compensating victims, but that is only part of the story. A study of a number of major asbestos defendant bankruptcies showed that the average time from petition to confirmation of a reorganization plan was six years. During these proceedings, claimants are not paid. What is worse, after a company declares bankruptcy, it has limited resources to compensate victims. Even the Manville Trust can pay victims only five percent of the value of a claim. Not one single extant asbestos trust or any of the 20 or so trusts pending in bankruptcy court can or will pay any more than a fraction of the value of a claim.

Leading actuarial firms predict that total losses due to asbestos liability in the United States will be from $200 billion to $275 billion, with a large portion of that total (between $78 billion and $175 billion) not covered by insurance. The Manville Trust alone has received about 600,000 claims. The Trust has received more asbestos claims than any defendant in the tort system, including other asbestos trusts. The Trust has paid over 500,000 of these claimants approximately $3 billion. Unfortunately, the billions of dollars paid to asbestos claimants account for less than one-half of all the asbestos claims that will be filed with the Trust.

While some of the problems in the system are obvious, there are also trickle-down effects that burden American workers and retirees. A recent report by Sebago Associates estimates that asbestos-related bankruptcies have led to as many as 60,000 lost jobs. On average, the report stated, these workers lost between $25,000 to $50,000 in wages, and the average worker at an asbestos-related bankrupt firm with a 401(k) plan suffered roughly a 25 percent reduction in the value of the 401(k) account.

Claims on the Manville Trust are increasingly from claimants with non-malignant cases. 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, nine percent of the claims we received were cancer claims, and 91 percent were non-cancer claims. In 2001, cancer claims were only six percent of the claims filed, and non-cancer claims were 94 percent of the claims filed, while in 2002 the ratio was again 91 percent non-cancer and 9 percent cancer.

With respect to disease progression and how many of the non-cancers will eventually get cancer, of the approximately 450,000 non-cancer claimants who have been paid by the Trust, only 3,200 of them have -- after they received the non-cancer payment -- then developed an

asbestos-related cancer for which they filed a claim. This is substantially less than one percent of all the non-cancer claims we have paid.

Predicting non-malignant claims has become a daunting challenge and, indeed, it may be impossible. Our most recent claims forecast – performed by experts employed by many other solvent and bankrupt entities with asbestos liabilities – estimated the Trust may receive between 750,000 and 2.7 million additional claims. The reason for this uncertain estimate is that it is no longer possible to use medical models to predict future claims.

A medical model assumes a person becomes ill, is referred to a physician and thereafter is referred to a lawyer. However, based on a sampling of non-malignant Trust claims reviewed during the past two years, it is obvious that a very large percentage of non-malignant claims are based on so-called screenings pursuant to which mostly asymptomatic claimants are identified by screening facilities and then encouraged to file a claim.

In that environment, there is an almost limitless number of potential asbestos claimants, and the financial community, both here and abroad, is justifiably skeptical as to whether anything short of a legislative solution will produce meaningful asbestos reform.

Given this almost limitless population of potential asbestos claimants, given the risk that victims will not be compensated fairly, that companies will continue to declare bankruptcy to the detriment of victims and workers, and that the flood of the unimpaired will continue to break down the system, it is indeed time for Congress to act.

There are two asbestos legislative proposals currently in the public debate. One establishes medical criteria to determine eligibility to file an asbestos claim. The other establishes a National Asbestos Claims Facility. For reasons I only partly understand, these two proposals have become competing legislative initiatives. I do not believe it is particularly keen

or effective advocacy to be critical of another party's legislative proposal. Other than justification of principle, I do not believe any useful purpose is served by being critical of a good faith effort to solve the asbestos problem. However, after 15 plus years as an asbestos claims administrator, I believe very strongly that the better of the two legislative proposals is the one that establishes a National Asbestos Claims Facility, and I believe this because, in my judgment, it is the best way to compensate asbestos victims.

A national claims facility could provide fairness to victims and it could dramatically reduce the transaction costs that diminish victims' awards. By way of example, the Manville Trust uses only 3 percent of the dollars it pays to its beneficiaries for claims administration costs. Compare this to the asbestos litigation costs of up to 60 percent under the current system. Significantly, reducing transaction costs and attorneys' fees would create more money in the system to compensate victims.

A national claims facility could ensure that adequate funds are available to compensate victims not only now but also in the future. Compare this to the current system that is draining resources now, depriving many impaired claimants of meaningful recovery and leaving future claimants with the potential that they will receive even less. A comprehensive solution that provides certainty to defendants could help end the bankruptcy spiral and help ensure that there are solvent companies left to pay into the fund. Finally, a national claims facility could begin paying claims in a matter of months after enactment of legislation, and would pay eligible claimants very quickly.

Based on my experience with a large asbestos trust fund, I would like to offer a few observations about what kind of facility would work best. Such a facility should be a national, privately funded claims facility that is managed by trustees. The claims facility should be an

exclusive remedy for asbestos claimants and should prioritize the claims of the sickest victims. It should be a no-fault system, reducing the burden on claimants. It should reduce transaction costs, leaving more money to be transferred to victims, and it should be a faster, more reliable way for sick victims to receive cash awards.

Administration. The claims facility should be privately funded by asbestos defendants and insurance carriers. Pending and confirmed bankrupt companies should be included. Federal legislation should set the size of the program and annual funding requirements. The facility should provide the exclusive remedy for all victims of asbestos-related disease, and should not require a finding of fault to provide recovery to victims. Compensation levels should be determined based on schedules set by legislation and a trust plan. Trustees should have claim audit authority and the authority to audit levels of trust fund contributions.

Compensation. Federal legislation should set scheduled values to compensate victims based on appropriate conditions and factors. Those people who suffer from the gravest asbestos-related disease should be given priority for their claims. In particular, mesothelioma victims should be granted a substantial expedited down payment on the full value of their claim. In general, there should be provisions expediting payment for all exigent cases. Furthermore, victims who are compensated for a non-malignant asbestos disease, who thereafter are diagnosed with a malignant asbestos disease, should be eligible for additional compensation.

The claims facility should grant compensation based on a doctor's diagnosis and medical evidence, including an in-person physical examination. Significant occupational exposure to asbestos should be a prerequisite to any compensation.

A national claims facility should free victims from having to meet a number of burdens typical of litigation, including establishing product identification and proving causation, to name

a few. Rather than a system that relies on lawyers and judges to make medical determinations under the standards of 54 jurisdictions, the claims facility should rely on an individual patient-based decision that rests on standards established by a panel of independent, knowledgeable experts, an evaluation by a doctor, plus proof of exposure.

Of course, policy makers have a difficult task in evaluating the potential solutions to the asbestos crisis. No system is perfect, and all will have detractors. The main arguments against the claims facility thus far appear to center on a skepticism about whether the system is too complicated and difficult to implement. While it would be a large task to implement the system, many people have a good deal of experience with bankruptcy trust funds that can help our efforts. I have every reason to believe the task could be completed expeditiously, and in a matter of months claimants could begin receiving checks. Even in its worst light, the claims facility will easily improve life for claimants who now must withstand long delays, unequal and unpredictable treatment, and the loss of a significant amount of awards in transaction costs. Given that we still have not seen even one-half of the asbestos claims that will be presented, Congress should implement a solution that facilitates the smooth and speedy compensation of these claims, rather than permit the status quo to continue – a system that leads to further litigation, transaction costs, and unpredictability in the system.

The most appropriate resolution to the asbestos problem is through federal legislation. This was recognized by the Supreme Court in Amchem Products, Inc. v. Windsor, 521 U.S. 591, 597-98, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) and again in Ortiz v. Fibreboard Corp., 527 U.S. 815, 821, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), when the Court emphasized the need for legislative intervention in the "elephantine mass of asbestos cases." 527 U.S. at 821. See also,

In re Joint E. & S. Districts Asbestos Litig., 2001 WL 1464362 (E.D.N.Y. 2001); In re Johns-Manville Corporation, et al. Memorandum and Order, December 27, 2002 (E.D.N.Y. 2002).

In addition, many legal scholars have echoed the sentiments of the Supreme Court. See, inter alia, Griffin B. Bell, Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis, Briefly: Perspectives on Legislation, Regulation, and Litigation, National Legal Center for the Public Interest, Vol. 6, No. 6, June 2002; Mark A. Behrens, Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation, 54 Baylor L. Rev. 331 (2002); 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); Deborah R. Hensler, As Time Goes By: Asbestos Litigation After Amchem and Ortiz, 80 Tex. L. Rev. 1899 (2002); Samuel Issacharoff, "Shocked": Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz, 80 Tex. L. Rev. 1925 (2002); 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); Paul F. Rothstein, What Courts Can Do in the Face of the Never-Ending Asbestos Crisis, 71 Miss. L.J. 1 (2001); Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541 (1992).

During the hearing on asbestos litigation last September, the Judiciary Committee recognized that it has a critical role to play in solving the asbestos litigation problem. I commend the Committee for taking the next step with today's hearing, focusing on what type of solution is most promising. As the Committee considers today's testimony, I hope you will consider the National Asbestos Claims Facility. I am ready to assist you in any way I can as you

work toward legislative solutions. Thank you for hearing my testimony, and I look forward to answering your questions.

Statement of Senator Baucus
Senate Committee on the Judiciary
Hearing on the Asbestos Litigation Crisis
March 5, 2003
2 p.m.

Mr. Chairman, Senator Leahy, thank-you for allowing me to testify before your Committee today. This is an issue that raises a lot of passion in people, on both sides, because so much is at stake. I think this is an extremely important issue for the Committee to address and I applaud you for continuing to gather information about the status of asbestos litigation in this country, and where it may or may not be appropriate for Congress to become involved.

However, Mr. Chairman, I am concerned that in a rush to address a real or perceived crisis in our courts, Congress may do an injustice to hundreds or thousands of injured people by arbitrarily denying those people the ability to protect their rights. Our number one concern here should be justice – how do we ensure that asbestos victims – all asbestos victims – are treated fairly and compensated for their injuries.

Why am I so concerned about where we are headed? Because we seem to continue to circle back to the idea of requiring all claimants to meet strict medical criteria before they can file an asbestos-related claim. It sounds clean, neat and logical – people can't file for compensation until they are actually sick, theoretically allowing defendant companies to protect their assets, and ensuring a greater chance that victims will be able to recover some compensation if and when they become sick.

As I understand it, a major concern about the current asbestos litigation "crisis" is the repeated attempts to reduce procedural bars to claims, by lumping together hundreds and thousands of people togther in a class action, even though those people may have little relation to each other in terms of when and where they were exposed to asbestos, how they were exposed, how long they were exposed and what kind of injuries they suffered. The Supreme Court has noted that this approach in many cases was fundamentally unfair to the claimants involved.

Yet, asbestos litigation reform relying on the very strict medical criteria proposed by the American Bar Association and others would have the exact same effect of treating all people in the same manner, regardless of their circumstances, regardless of when, where and how they were exposed, and in many cases, regardless of what kind of injury they have suffered – it would narrowly define an acceptable injury. It would also impose significant costs on claimants before they have any assurance that they can even file a claim for compensation.

Mr. Chairman, what this shows us – as with all issues as complicated as this one – is that the devil is in the details. What constitutes an injury? What does being "sick" mean? How can we know that money will be around in the next five, ten, fifteen, twenty or more years to compensate those who will become sick in the future? How do we address the concern that some people are far more likely to become seriously sick than others, depending on when, where and how they were exposed to asbestos? And frankly, how do we address the fact that there is still a lot that

we just don't know about the causes and effects of different durations and types of asbestos exposure?

The point is, no matter how a medical criteria standard is developed, Congress will have to choose a more or less arbitrary standard that will cut off people who have been injured. We had better be very, very sure that this is the only just way to address the asbestos litigation issue. I just can't believe that we can't be creative about this.

Mr. Chairman, I have spoken in detail about the little town of Libby, Montana, before this and other Committees, and on the floor of the Senate. I won't go back into the details of the terrible things that happened to the people of ths town at the hands of a company called W.R. Grace. But, this town and the people that live there or used to live there, dramatically illustrate the points I've been trying to make, so I would like to touch upon a few facts.

The vermiculite mining and milling operations of W.R. Grace blanketed the town of Libby with asbestos-tainted dust for decades, until the early nineties. The dust was everywhere – on clothes, cars, on children, on the clothes of workers when they came home from the mine. It was in the high school track, the little league field, in people's homes and in their gardens. They didn't know the dust was poison; but W.R. Grace knew.

What W.R. Grace knew was that this dust was contaminated with deadly tremolite asbestos fibers. These fibers have killed hundreds of current and former Libby residents. Hundreds more are sick, and many of these people will die from asbestos related diseases and cancers. Thousands may become sick in the future. And, unlike almost any other place in the country, many of these people were significantly exposed as children.

W.R. Grace lied to these people; now they have watch their families, their friends and neighbors die or steadily become more sick. They have to watch them struggle to tend to their garden, or just take a walk to the local café. They have to watch them struggle to provide a secure future for their children, all the while wondering if their children will become sick, too. At the same time, these people are struggling to rebuild their community, to make it a vibrant, prosperous town, to keep local businesses and help their friends and neighbors. Many of them wonder if or when they will become sick.

They have to do all of this with little or no help from W.R. Grace.

I have requested that a letter from the representatives of many of the Libby claimants, as well as two letters from doctors who have treated or screened many of the folks in Libby for asbestos related disease, be included in the hearing record. These documents outline how the experience of the people in Libby, Montana is unique, and demonstrate that the pattern and progression of their disease does not fit within the ABA or other proposed medical criteria. These documents speak for themselves, including illustrating the simple fact that tremolite-related lung disease does not appear on a chest x-ray like chrysotile-related lung disease, chrysotile being the most common form of asbestos that most people have been exposed to in this country.

I would like to quote in detail from Dr. Brad Black's letter, because he makes some very important points. Dr. Black is the Medical Director of the Center for Asbestos Related Disease in Libby. Dr. Black said:

"I entered medical practice in the [Libby] community in 1977 . . . At that time, like most physicians, I was trained to recognize disease due to chrysotile asbestos, from which significant lung disease manifested as . . . scarring in the lung tissues. This [scarring in the lung tissues] has a characteristic pattern on a chest x-ray . . .

"During the period of 1979 to 1999, asbestos-related disease was incubating in a large number of Libby residents, but remained undiagnosed. Why did our community physicians not recognize it? Simply because tremolite-related lung disease does not appear on a [chest x-ray] like chrysotile-related lung disease . . . [T]remolite usually causes scarring in the lining around the lungs (pleura) and infrequently shows up on x-ray as scarring inside the lung, even in the heavily exposed Zonolite workers . . . and is much better seen on CT scanning. . . ."

"In the last 18 months I have observed the diagnosis of five mesotheliomas, with three individuals already having died. Four of these individuals (nurse, office receptionist, forest service administrator and a non-resident who traveled to Libby for basic services) were exposed to tremolite simply by living and working in Libby. Another gentleman who lived near a vermiculite processing facility in the residential area of Libby died from progressive pleural fibrosis. His spouse has advanced asbestos-related disease. A significant number of residents who were exposed environmentally are experiencing advancing lung disease, some of whom require supplemental oxygen. Based on past observations with chrysotile exposure, one would not expect non-occupationally exposed individuals to develop such extensive asbestos-related disease."

"The relative potency of tremolite fibers in causing disease (progressive lung disease, mesothelioma, and lung cancer) has been striking."

This is all included in Dr. Black's letter. It is only two pages long. I would respectfully ask that all members of the Committee personally read Dr. Black's letter.

Mr. Chairman, medical criteria, such as that proposed by the ABA or in the Fairness in Asbestos Compensation Act of 1999, would devastate the people of Libby, Montana. The standard in the 1999 Act would exclude 73% of the Libby patients from filing a claim for compensation. The remaining 27% are either dead, or in the end-stages of asbestos-related disease, and in the process of dying.

It's been made clear to me that we've likely lost ground under the ABA medical standard, with even more Libby patients barred from filing a claim under the ABA Standard than were barred under the 1999 Act. I would refer members of the Committee to the letter from Dr. Whitehouse that I have submitted for the record, where he describes in detail the arbitrary nature of the ABA standard as applied to tremolite asbestos patients.

I would also ask to include in the record a list of 10 people in Libby who would be excluded from seeking compensation under medical criteria such as that proposed by the ABA.

Mr. Chairman, we are no better off today than we were in 1999 when we battled the Fairness in Asbestos Bill, because we continue to ignore the differences between tremolite and chrysotile. The sheer magnitude of the tragedy in Libby illustrates how hard it is to define the nature of an asbestos-related "injury."

Am I frustrated when I hear about the thousands of people who may have had little or no real exposure to asbestos, but who have filed asbestos-related claims for compensation? Yes, because I know that many of those people will be competing against the folks in Libby for compensation. However, do I know with any real certainty that some of those people aren't sick now, or won't become very sick, depending on where they're from, when they were exposed and for how long? Do I know if most of those people will be treated fairly by medical criteria such as that proposed by the ABA? No. And, neither does the Congress.

Mr. Chairman, I have stated before that I am sympathetic to the concerns of companies that have not filed for bankruptcy and that do not share W.R. Grace's or other defendants' liability or responsibility for asbestos-related disease and death, but who have been tagged with liability precisely because they are solvent. These companies are also being treated unfairly and unjustly by the actions of W.R. Grace and other companies that are able to hide their assets and declare bankruptcy – in essence, shifting their rightful share of liability and responsibility to other businesses.

I have also told this Committee before that I think a review of the injustices inherent in corporate bankruptcies would be an appropriate piece of the asbestos puzzle for this Committee to take a hard look at. It seems pretty clear that W.R. Grace hid a vast amount of its assets – up to four to six billion dollars – from the reach of the bankruptcy court, and by extension, from the Libby victims. About a billion of those assets will be returned to the bankrupt estate. But, W.R. Grace didn't suffer for this – the Department of Justice had to do all the work, at taxpayer expense, to unravel this transaction.

At the end of all this, W.R. Grace will likely emerge from bankruptcy lean and whole – able to continue to prosper as a business. The Libby victims, unless we are able to protect them in some fashion, will receive pennies on the dollar. This is just disgusting. Add to this the fact that many of them can't get medical insurance and that the total cost of treating all those who have been sick, who are sick or who will become sick as a result of their exposure to asbestos in Libby is just staggering – the cost of treating the former W.R. Grace mine-workers alone threatens to bankrupt the State of Montana's medicaid program. This is another case of W.R. Grace masterfully shifting liability and responsibility to someone else.

Mr. Chairman, so many people have come together to do the right thing in Libby -- the Montana delegation, the State of Montana, the federal government, the community of Libby and many concerned private citizens have been working hard to bring new economic development and much needed health care resources to Libby. Federal dollars have flowed to Libby for cleanup,

healthcare, and revitalizing the economy. The Director of the Libby Clinic for Asbestos Related Disease, Dr. Brad Black, has called for developing a leading edge, world class research facility with the mission of one day developing cures for asbestos related disease, so that Libby's tragedy could be used to protect the health of men, women and children across the country.

It is just amazing to see how everyone has come together to create something positive from a terrible situation. Everyone, that is, except W.R. Grace.

Mr. Chairman, I say all of this because I want to circle back to the idea of making sure that when we attempt to step into the middle of the asbestos litigation debate, that we are doing justice by the people of Libby, and by the people of this country.

We keep being drawn away from the key issue here, which is that asbestos companies like W.R. Grace caused the death and serious illness of hundreds if not many thousands of people. We shouldn't be overly concerned about protecting them. However, are there others that ultimately bear a share of responsibility for what happened to these hundreds and thousands of people? There's a good argument to be made that the federal government does share some responsibility for failing to take action to protect its citizens when the hazards of asbestos became known, many decades ago, and that is something for this Committee to consider.

Clearly, we won't be able to come up with an acceptable resolution to the problems associated with asbestos litigation that is perfect, or that everyone will agree with, or think fair. But, we have to do our best, and we have to put the victims first. That is key.

The medical criteria put forward by the ABA and others do not meet this standard – the criteria are arbitrary, unfair and excessively burdensome, particularly to people like those in Libby who have every right to demand that W.R. Grace make their town whole, and pay for their medical expenses and suffering.

Thank-you again Mr. Chairman, Senator Leahy, for allowing me to testify before the Committee today. There is no other issue that is more personal or important to me than making sure the people of Libby, Montana finally get a clean bill of health.

Thank-you.

STATEMENT OF BRIAN T. HARVEY
BEFORE THE SENATE COMMITTEE
ON THE JUDICIARY

March 5, 2003

My name is Brian Harvey and I should be dead today.

On September 2, 1999, I was diagnosed with malignant mesothelioma caused by asbestos. In the United States, most people diagnosed with mesothelioma that don't receive treatment die within eight months. Those who do receive treatment increase their life expectancy to an average of 18 months. Overall, a person's chance of surviving five years is one in 20. I am now 42 months from my diagnosis and feel fortunate to be talking to you today about the asbestos crisis in America.

While mesothelioma can never be cured, I was lucky to have been diagnosed early. Because of my early diagnosis, I was eligible for an experimental treatment program at the University of Washington. I first underwent five months of chemotherapy followed by surgery. The surgeons removed my left lung, the surrounding pleura, a rib, the left half of my diaphragm and half of my pericardial sack. Following the surgery, I underwent a month of radiation treatment.

Every six months, I return to the University of Washington for a CAT scan and blood test. I like to describe it as a game of Russian roulette. My doctors did their best to remove all the bullets from the cylinder, but neither the doctors nor I know whether there are any cancer cells remaining. The technicians spin the cylinder and pull the trigger. So far my clinical condition shows no evidence

of disease. But every day I rejoice in the fact that I am alive, that I can still hear the birds in the park and children playing in the yard across the street and that I have at least one more day to spend with my family.

After being diagnosed with mesothelioma, I hired a lawyer and filed a lawsuit against several companies who manufactured some of the asbestos products that I worked around. Neither my wife nor I had ever filed a lawsuit before. However, when I learned that the asbestos industry had been aware of the dangers of their products by the 1930s, I felt justified in seeking compensation for my family and myself. After six months of litigation, my lawyers were able to obtain several significant settlements in my case.

We are not wealthy. My wife still works so that we can remain eligible for health insurance, since I am no longer employed. However, our settlement enabled us to relocate to Seattle where we could be closer to my doctors, to pay the medical bills that were not covered by insurance, to make up for my lost income and to put money away so that my wife and family are covered when I die.

Over the past several years I have worked with the University of Washington and the Mesothelioma Applied Research Foundation to counsel other mesothelioma victims. I discuss treatment options and try to prepare victims for the devastating effects of the disease. Many victims talk to me about financial disruption that follows a mesothelioma diagnosis. When I suggest that they pursue legal remedies, I am saddened to hear that all the companies from whom I received compensation have filed for bankruptcy in the past two years.

I have read articles in magazines and newspapers that the vast majority of asbestos claims filed in American today are brought by people who are not currently sick as a result of asbestos. It makes me angry that these cases are forcing defendants into bankruptcy and diverting funds from people who are sick and dying from asbestos disease. I am angry that that the true victims of asbestos are not getting the compensation they need and deserve.

Congress must act comprehensively to address the asbestos crisis in America at four different levels: Prevention, Detection, Treatment and Compensation.

Prevention. Congress must act to ban asbestos in America. It is unbelievable that asbestos is still being used in this country when its dangers are so well known. My Senator, Patty Murray, has proposed legislation to ban the use of asbestos of America. I ask the members of this Committee to join Senator Murray and stop people from being exposed this deadly material. The best way to solve the asbestos litigation crisis is to prevent people from getting sick in the first place.

Detection. I am alive today because I was diagnosed early enough to be eligible for radical experimental treatment. Congress needs to establish a medical monitoring program to ensure that the 40 million Americans who have been exposed to asbestos receive regular examinations by a qualified physician. Most Americans were exposed to asbestos while serving in the military or, like myself, as a union member working in the trades. The Veterans Administration

and AFL-CIO could provide the organization to administer an asbestos monitoring program for millions of exposed individuals.

Treatment. I was the beneficiary of an experimental treatment program at the University of Washington. However, many individuals diagnosed with mesothelioma are simply told by their physicians to go home, get their affairs in order and prepare to die. Congress needs to appropriate funds for the research and treatment of asbestos related disease. With 40 million exposed Americans, asbestos victims need real treatment options when they become ill.

Compensation. Although the hazards of asbestos were well documented from the 1930s, asbestos was widely used by manufactures through the 1970s -- and is still used by some today. People whose lives are disrupted by asbestos disease should be able to seek compensation from the responsible companies for their injuries. Individuals, who are not suffering a real disease caused by asbestos, should be eligible for medical monitoring, but not monetary compensation. The American Bar Association has developed criteria to distinguish individuals suffering from a real asbestos disease from those who are not impaired. Congress should act now and enact the ABA standards into law.

Asbestos has had a devastating impact on the lives of countless Americans. I ask that Congress adopt this comprehensive approach to the asbestos crisis for the benefit of all Americans.

United States Senate
Committee on the Judiciary

Committee Information Go

HOME > HEARINGS > "THE ASBESTOS LITIGATION CRISIS CONTINUES – IT IS TIME FOR CONGRESS TO ACT."

Members
Subcommittees
Hearings
Nominations
Business Meetings
Press

Statement of
The Honorable Orrin Hatch
United States Senator
Utah

March 5, 2003

PRINTABLE VERSION

I would like to welcome everyone to this hearing as the Committee continues its examination the asbestos litigation crisis. At the outset, I want everyone to know that I intend to make every effort to resolve this issue this congress, we simply cannot wait any longer.

I am encouraged by the level of interest in this issue expressed to me by my colleagues on both sides of the aisle and I hope the Ranking Member, Senator Leahy, and I along with our other colleagues will be able to work in a bipartisan manner to resolve this issue. As he indicated at the last hearing, Senator Leahy also recognizes that this is a situation that requires our attention. It is not too often that an issue has such bi-partisan interest in Congress.

I don't think there can be any doubt that the crisis in asbestos litigation is a serious problem, and it continues to get worse as the abuse continues and Congress has failed to act even as the Supreme Court has suggested that we must resolve this train wreck. It is my sincere hope that we can do better this time around.

As I stated in our hearing last fall, which Senator Leahy chaired, skyrocketing bankruptcies of companies being sued hurt not only those who are truly sick and deserving of appropriate compensation, but also those many hard-working Americans whose jobs and pensions are lost or put at serious risk. We have all heard the statistics by now, but they bear repeating. As the New York Times has reported, the number of cancer cases has remained virtually stable since 1995, while the number of non-cancer cases has spiked dramatically just in the last few years. This defies commonsense. According to the recent study published by RAND, almost 90% of the pending asbestos claims are brought by persons with nonmalignant injuries. Nonmalignant cases get 65% of the compensation awards compared to 17% for mesothelioma and 18% for other cancers. There is something wrong with that and the consequence is that more than 67 companies have been forced into bankruptcy – 67 companies, and thousands of jobs – and more than 20 of those bankruptcies have occurred in just the last few years.

Moreover, the scope of the litigation has increased exponentially and is mind-boggling to anyone. This has become such a gravy train for some abusive trial lawyers that over 2,400 additional companies were named in the last year alone. One company shared with me their story recently. This company never engaged in the business of manufacturing, producing, distributing or selling asbestos or asbestos-containing products. Nor did they ever issue liability or workers' compensation insurance to companies in the business of manufacturing, producing, distributing or selling asbestos or asbestos-containing products. They did in fact lead the way in researching and issuing one of the first reports that exposed the true health risks of asbestos – a report that is actually cited by many plaintiffs' attorneys in current cases, and has saved lives! And how are they rewarded? They have been named in thousands of cases, more than 60,000 per year, alleging that they were not aggressive enough in revealing the dangers of asbestos. They told me it is cheaper for them to settle frivolous cases than to defend them in court and win. It costs them hundreds of millions of dollars each year to settle cases, and even millions for a case that they won. This sounds ridiculous, and it is, but it is happening.

I am encouraged by some recent developments that illustrate more widespread recognition of the problem. The American Bar Association recently adopted the findings of its special Committee on Asbestos Litigation. I look forward to hearing from our witness Dennis Archer, the president-elect of the ABA on their findings regarding medical criteria which would defer the claims of those who are not currently sick in favor of those who are truly ill and require urgent compensation. We will also hear from David Austern, trustee of the Manville trust on the problems encountered by Manville and his ideas as to how to resolve this issue. We look forward to hearing from organized labor -- Jonathan Hiatt kindly is making a return appearance before our committee on this issue as is Steven Kazan, an attorney who represents the truly sick claimants who are most adversely effected by the current system.

I know Senator Leahy joins me in my concern that the current system is hurting the true victims of asbestos; our panel of witnesses includes two physically impaired individuals, Brian Harvey and Melvin McCandless – we very much appreciate the effort it must have been for them to come here today to share their stories. In addition, we have victims of another sort present in the audience – people like Mike Carter of Monroe Rubber and Gasket – who flew here from Louisiana. He's a small businessman whose business is being threatened by endless asbestos litigation. In addition, and perhaps most importantly, we will hear from some victims who could not make it here today – victims who were unable to be here. The video you are about to see was provided to us by an attorney representing these victims.

In conclusion, let me just say that I believe that today's hearing is an important step toward finding the right solution and I am committed to doing so. I am keeping an open mind about how to approach the best solution to this problem. We have heard from some who have proposed the creation of a trust fund. We also have heard from those who would support a court reform proposal requiring medical criteria, among other things, to manage the cases and to minimize abuse. I have asked the various interested parties to meet over the past month and provide the Committee with their suggestions. We have received some recommendations this past week and I would encourage the various interested groups to take the next two weeks to try to come to a single approach that all can support, the sick victims, the companies who are targeted and their insurance companies who are at risk, and hopefully the labor unions who would be affected by the loss of jobs that results from these abusive suits. Folks, time is running out before literally thousands of our most productive companies in this country and hundreds of thousands of jobs are put at serious risk by these suits. It is time to get together and come up with a solution. I invite your input and look forward to working towards a solution.

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- TOP OF THIS PAGE
- RETURN TO HOME

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01-03

Testimony of Jonathan P. Hiatt

Associate General Counsel

American Federation of Labor and Congress of Industrial Organizations

On the Asbestos Litigation Crisis

Before the

Senate Judiciary Committee

March 5, 2003

My name is Jonathan Hiatt. I am the General Counsel of the American Federation of Labor and Congress of Industrial Organizations. I want to begin by thanking the Committee for the opportunity to again appear before you and commending the Judiciary Committee for its interest in the state of asbestos compensation and for the thoughtful manner in which the Committee has been considering this issue.

Last fall the AFL-CIO was pleased to participate in the Senate Judiciary Committee's hearing on asbestos-related litigation. At that time we told the Committee we felt that the asbestos litigation system was far from optimal and that we were prepared to work with all interested parties to craft a solution that would benefit both asbestos victims and our economy.

I am pleased to now report that the AFL-CIO is engaged in serious and detailed discussions with a range of major asbestos defendants and insurers on a comprehensive

reform proposal centered on the creation of a no-fault administrative system for compensating all asbestos victims. These negotiations have been characterized in some press accounts as a "trust fund" solution. The AFL-CIO believes this approach, properly structured, can provide asbestos victims with the compensation they deserve with greater speed and certainty while providing defendants with the certainty they need to access the capital markets, and can do so at a lower overall cost than the current system.

In the last month these discussions have both become increasingly detailed and have grown to include a wider range of participants. They have been characterized by a degree of good will and a willingness to share information that in our view is unprecedented in the history of efforts to address problems in the asbestos compensation system. Although there are still a number of major issues where agreement has yet to be reached, we are cautiously optimistic that out of these negotiations a proposal will emerge that will be of assistance to this Committee in its efforts to draft legislation that will both improve the asbestos compensation system and be able to garner the wide support necessary to be enacted into law.

I am aware that the Asbestos Study Group has provided the Committee with written testimony describing this dialogue from the perspective of some of the major defendants in that dialogue. I wish to take a moment to describe for the Committee the AFL-CIO's view of where these discussions are and where they need to go to be of value to the Committee.

We have been discussing a no-fault administrative compensation plan for asbestos victims that would largely replace civil court litigation as the means by which asbestos victims are compensated for their injuries. The goal would be a system that provides victims with the compensation they are entitled to more rapidly and more certainly than civil court litigation, while giving defendant companies the certainty they need to access the capital markets and manage their businesses.

We agree this plan should have the following features:

The basic payment structure would be a national no-fault administrative system with a payment schedule for asbestos-related conditions that would provide victims with fair compensation.

The payment schedule would be based on medical criteria that distinguished between different types of asbestos related disease and different levels of severity within certain types of asbestos related disease. The schedule would also make allowances for the age of the victim and other exceptional circumstances. The labor movement is working to develop these medical criteria with a distinguished group of medical experts in this area who have helped our affiliates develop state of the art pulmonary health programs for their members. A number of these physicians are or have been associated with the Selikoff Center at Mount Sinai Medical School where the pioneering work in the area of asbestos disease was done by Dr. Irving Selikoff in the 1960's and 1970's.

While the schedule would take account of victims whose condition may have involved a variety of causes, it would not deny compensation to those with asbestos-related disease who also smoked or were exposed to other harmful substances.

The administrative system would be funded by statutorily mandated payments from asbestos defendants and insurers, including bankrupt defendants. Existing asbestos trusts should be merged into the administrative system.

Statutes of limitations would be revised so that victims who received a payment for one asbestos related condition who then developed a second condition would receive a second payment for that condition.

All asbestos victims would have some ultimate access to the courts structured so as not to undermine the overall integrity of the program.

Companies contributing to the funding of the system would have no standing to contest eligibility of victims for payments.

Part of the compensation provided to asbestos victims would be in the form of medical testing and monitoring. We are also exploring the possibility of some compensation being provided in the form of health care for victims.

Asbestos victims who have pending claims for compensation in the tort system would be covered by this system. Any monies collected to date would be offset against the system's claim schedule.

Finally, the federal government played a significant role in the widespread use of asbestos, particularly in defense-related industries. The parties to these discussions agree the federal government should accept its share of the responsibility for the harm caused by the use of asbestos in the workplace.

We are currently addressing together with our partners in these discussions a range of difficult issues. Some of these issues reflect the inevitable work that must be done to bring parties together who though they have different interests share a common interest in reaching agreement. Some of these issues are more in the form of technical problems that need to be solved in a spirit of common purpose.

There are certain matters the AFL-CIO believes must be satisfactorily addressed if this process is to result in a plan that the labor movement can support. I will mention two of the most important issues.

First, and most importantly, all parties to these discussions need certainty. This is true for victims at least as much as it is true for companies. This is a very major concern given the under-funding of existing asbestos trusts due in part to the underestimate of disease cases and claims. While estimates of future disease cases have been made, there is some

uncertainty about these estimates given incomplete information about the number of workers exposed and the actual levels of exposure. While exposures and risk have been significantly reduced, they have not been eliminated. Moreover, the long latency associated with many asbestos-related diseases means that cases associated with past high level exposures will be manifested for some years to come. We are exploring a number of ways in which this risk related to the uncertainty of the number of future cases and claims can be bounded and assumed by those both willing and able to bear it.

Second, this system cannot simply be a way defendants are relieved of liability while victims are left no better off than before. This system must leave victims as a group better off than they now are in the tort system. It must also provide individual victims with a fair level of compensation for their injury.

We are acutely aware of the pressures of the legislative calendar, as are our counterparts in these discussions. We are likewise optimistic that these discussions can produce a proposal that would be of value to you on a timeline that would allow the Congress to address this issue this year.

As you may know, the AFL-CIO is strongly opposed to S. 413, a recently introduced bill embodying the approach forwarded for some time by the National Association of Manufacturers and the Asbestos Alliance on behalf of certain asbestos defendants and insurance carriers. S. 413 is profoundly unfair to the majority of asbestos victims, whom it will bar from ever recovering any compensation for their injuries. Furthermore, it is

unlikely in our view to provide the certainty that defendants need to access the capital markets and create and preserve jobs. Perhaps most importantly, a legislative process focused on S. 413 is likely to polarize this issue at a time when a genuine consensus solution seems within reach.

The approach embodied in S. 413 recently received some support from the House of Delegates of the American Bar Association. The Committee should be aware that the process by which this occurred deviated dramatically from the usual evenhanded deliberateness of the American Bar Association.

Mr. Archer established a Task Force of lawyers to adopt medical criteria in late November, 2002. These lawyers reported back in late January, 2003. The labor movement only became aware of the existence of Mr. Archer's Task Force on Asbestos a few days before it completed its work. No ABA member representing the labor movement's views participated in the Task Force, nor did the Labor and Employment Section of the ABA, representing both union and management side lawyers with expertise in occupational safety and health issues. That Section as well as the Litigation Section, the largest in the ABA, both asked the House of Delegates not to adopt the Report of the Task Force. I have attached my correspondence with Mr. Archer regarding these matters.

Despite the increased polarization caused by these events, the AFL-CIO remains willing to engage in discussions with all parties, including supporters of S. 413, as part of what

we view as the necessary process of building a broad consensus behind fair and constructive reform.

The AFL-CIO would be pleased to be of any assistance we can to the Judiciary Committee as you continue your work in this important area. Thank you again for the opportunity to share our views with the Committee.

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January 13, 2003

The Honorable Dennis Archer
President-Elect
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611

Alfred P. Carlton, Jr., President
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611

Dear Mayor Archer and President Carlton:

I am writing on behalf of the AFL-CIO regarding the recently formed ABA Commission on Fairness in Asbestos Litigation. I first became aware of this body's existence late last week, when I was informed by acquaintances in the business community that a Commission existed which was planning to issue a draft report on January 16th advocating federal legislative adoption of medical criteria related to asbestos exposure.

My staff has searched the ABA web site and can find no reference to this Commission in the Commission section, nor can we find a list of who the members of this Commission are. We did find the following item from the minutes of the November, 2002 meeting of the Board of Governors of the ABA:

> 3.36 Request for the Creation of a Commission on Fairness in Asbestos Litigation
>
> The Board approved the creation of a Commission on Fairness in Asbestos Litigation of up to thirteen members. The Commission will: 1) Work with medical and legal experts to develop a legal definition of the circumstances which demonstrate the inception of medical problems caused by exposure to asbestos; 2) develop policy which would permit waiver of the statute of limitations, when

appropriate, to allow filing of a claim under the definition; and 3) urge the passage of legislation which would recognize the inception of the medical problems and permit the waiver of the statute of limitations when appropriate. No general revenues are requested. Funding for the Commission will be appropriated from the President-Elect's budget.

To our knowledge this matter has never been brought to the Section on Labor and Employment, despite the fact that the asbestos issue is fundamentally an occupational safety issue. More than one million unionized workers and retirees, and presumably millions more other workers, have been exposed to asbestos in the workplace.

All of this is extremely troubling because the labor movement in general, and the AFL-CIO in particular, have been at the center of public policy discussions surrounding the use of asbestos in the workplace for more than 30 years. The labor movement's involvement in the asbestos issue is well known to all involved in asbestos-related legal and policy work. Most recently as regards the ABA, a member of my staff participated in the ALI-ABA session on asbestos litigation in Chicago last September.

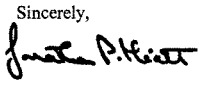
I cannot help but conclude that this extraordinary course of action on the part of the Board of Governors of the ABA reflects a desire to quickly obtain a preordained substantive outcome. In particular, the charge to the Commission appears to prejudge several of the major issues in the asbestos policy debate. Furthermore, if it is true that the Commission is planning to issue a draft report this month, there is no possibility that the Commission could have looked at these issues with any degree of knowledge or care in the short time that has passed since it was established.

For these reasons, the AFL-CIO requests that the Commission issue no report until both its composition and mission are broadened.

In closing I do though want to make clear that the AFL-CIO does not necessarily oppose federal medical criteria. What we do oppose is a hasty and one-sided process that falls well below the standards of fairness and care that have characterized the ABA under your leadership.

Please let me know how you intend to proceed in this matter. Thank you for your attention.

Sincerely,



Jonathan P. Hiatt
General Counsel

cc. Stephen D. Gordon
Bernard T. King

TESTIMONY OF
Scott B. Kapnick

Before the
United States Senate
Committee on the Judiciary
"The Asbestos Litigation Crisis Continues – It is Time for Congress to Act"
March 5, 2003

Chairman Hatch, Senator Leahy, and the Members of the Committee:

I appreciate this opportunity to address the Committee on the important economic issue of asbestos liabilities.

Background

My name is Scott Kapnick. I am a managing director at Goldman, Sachs & Co. (Goldman Sachs), and I co-head the Investment Banking Division. During my tenure at Goldman Sachs since 1985, I have worked on a broad range of financial transactions for public and private corporations, including mergers and acquisitions, spin-offs, restructurings, recapitalizations and the raising of debt and equity capital, both in the United States and abroad.

Goldman Sachs, founded in 1869, is a global investment banking firm that provides corporate advisory and financing services to all sectors of the US economy, including those with asbestos exposure. We are continually engaged in the valuation of businesses and their securities in connection with mergers and acquisitions, negotiated underwritings, competitive biddings, secondary distributions of listed and unlisted securities, private placements, and valuations for estate, corporate and other purposes.

Summary

The past several decades of asbestos litigation have imposed large costs upon the U.S. economy. In addition to the costs of settlements, judgments and litigation, there has been a negative impact upon certain sectors and specific companies within the markets from their past and prospective asbestos liabilities. The heart of the problem is the uncertainty that these large and unpredictable liabilities have created. As a financial advisor, we have seen that this uncertainty has tended to impose higher costs of capital on certain companies, thereby curtailing their investment and growth. In the most affected industrial sectors, there has been an increase in the rate of asbestos-related bankruptcies and related unemployment. We have also seen that the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their stockholders and employees, and the economy as a whole. We believe that the market and the economy could only react positively to any thoughtful reform that protects the interest of victims, but also has two critical elements: (1) creating greater certainty and predictability around the ultimate total cost of the asbestos problem for the U.S. economy as a whole and for specific industry sectors and individual companies, and (2) reducing the inefficiencies and transaction costs associated with compensating victims under the present system.

Credentials and Disclosure

Our knowledge and experience on the asbestos issue results from encountering it in a variety of situations and providing guidance to both our industrial and insurance company clients. This experience is both historical and current. For example, we served as strategic and financial advisor to the Manville Personal Injury Trust from 1992 until the eventual sale of Johns Manville Corporation in 2000. We served as financial advisor to Eagle-Picher and the asbestos trust in the sale of Eagle-Picher to Granaria Investments in the mid 1990s. More recently, we

have been a key financial advisor in the negotiation of an announced asbestos 524(g) global settlement of several billion dollars for a large corporation. We have provided restructuring advice to a large corporation with businesses involving asbestos liability in order to improve its overall valuation. In another example, we were a financial advisor in structuring a large finite reinsurance program to help mitigate the asbestos liability uncertainty in the context of an insurance company merger transaction. We have completed a $1.5 billion high-yield debt offering for a large corporation facing asbestos liabilities and a $1 billion high-yield debt offering for a subsidiary of another corporation facing asbestos liabilities. We are involved in several other projects on an ongoing basis where asbestos liabilities are an issue. More generally, we are continually in dialogue with a number of our clients regarding either their own asbestos liabilities or the impact of asbestos liabilities of others upon their businesses.

In addition to advising companies on asbestos matters, we have also been advisors in the creation of solutions for other large liability problems. These include formation of industry insurance vehicles such as the California Earthquake Authority, the proposed World Trade Center debris removal insurance captive for the City of New York, and a European terrorism insurance company.

In advance of this hearing, we have solicited input on the asbestos issue from several internal areas of Goldman Sachs. We have had discussions with, among others, our Chief U.S. Economist (Bill Dudley), Chair of Investment Policy Committee (Abby Joseph Cohen), and our sector investment research analysts (Industrials: Jack Kelly; Chemical: Avi Nash; Insurance: Tom Cholnoky). We have had discussions with our debt and credit derivative traders, as well as investment bankers. We also relied on information available from industry publications and expert consultants.

In the normal course of our business, we receive fees from companies who may have an interest in seeking a solution to the asbestos issue. We also regularly trade in debt and equity on behalf of our clients and for our own account including distressed debt and equity of many companies affected by asbestos-related issues. Our Global Equity Research has written research related to the asbestos issue and specific companies affected by asbestos liabilities. We are currently in dialogue with numerous companies or their representatives that may support one or another of the reform initiatives that have been proposed or are in development. We are providing this testimony in order to address the economic impact of the asbestos liability issue as part of the overall reform discussion.

Market Environment

We address the asbestos issue today in a post-bubble market environment. The U.S. equity market, as measured by the Wilshire 5000 index, has lost nearly $7 trillion in value from its peak in year 2000. There is currently sluggish economic activity, low consumer confidence, rising unemployment, reduced profitability and generally high anxiety in the marketplace because of geopolitical and economic uncertainty. Large and unpredictable asbestos liabilities is one of several important factors influencing certain sectors and specific companies by further contributing to the uncertainty that exists in the market.

Scope of Asbestos Issue

The impact of asbestos on the U.S. economy is meaningful. In 1982, the Institute for Civil Justice (ICJ) estimated that the direct costs of asbestos up to that point in time had been $1 billion and projected that total direct costs would ultimately reach $38 billion. Rand Institute for Civil Justice (Rand) now estimates that the direct costs through 2000 in asbestos payments have been $54 billion with more than half going towards transaction costs and further that more than 6,000 companies, covering over 75 different types of industries in the U.S., have been

named as defendants. Milliman USA (Milliman) projects that the total direct costs of asbestos personal injury claims will ultimately reach $275 billion. A. M. Best's estimates of asbestos liability for U.S. insurers have grown 63% from $40 billion in 1997 to $65 billion in 2002. From everything we have learned in our work as a financial advisor to companies in this area, we see no reason to believe that these projections are unrealistic in the absence of any reform. However, there is significant uncertainty around the projections, and it is possible that the ultimate losses under the current system could be higher than the projected $275 billion level.

Approximately 66 companies have filed for asbestos-related bankruptcy so far. The rate of these filings is accelerating as a third of these companies have filed petitions in or after year 2000. Parent or subsidiary bankruptcy has become a strategy of choice for a number of companies who are trying to manage their asbestos liabilities. These bankruptcies have additional costs for the economy beyond claims and litigation expenses. These costs include legal, accounting and other restructuring charges, lost wages and productivity, and losses in individual workers' pension accounts. None of these costs result in any payments to the injured parties. In the absence of any reform, the number of asbestos-related bankruptcies is expected to grow, leading to an increase in additional-bankruptcy related costs.

Comparative Analysis

In order to put the scope of the asbestos issue in perspective, it is interesting to compare the estimated total asbestos costs of $275 billion to other meaningful shocks to the U.S. capital markets. All of these large financial events are noteworthy because of their scale and because they prompted a legislative or regulatory response to address uncertainty and a loss of market confidence. The projected scope and associated uncertainty of the asbestos issue is clearly significant in comparison to these other market dislocations, although we recognize that these

situations are different for a number of reasons and in certain respects are not directly comparable.

Between 1986 and 1995, the Savings and Loan sector went through a major crisis. The industry realized unprecedented losses on loans and investments resulting in failure of hundreds of thrift institutions and the insolvency in 1986 of the Federal Savings and Loan Insurance Company (FSLIC), the federal deposit insurer for the thrift industry. There was substantial uncertainty as to the ultimate scale of the problem and the market was beginning to lose confidence in the banking sector. In response, Congress created the Financing Corporation (FICO) and the Resolution Trust Corporation (RTC). According to a study in the FDIC Banking Review, FSLIC and RTC together closed a total of 1,043 failed institutions. The study estimated that the total direct and indirect costs of the crisis were $153 billion of which $124 billion was borne by the public sector.

In 2000 and 2001, an energy crisis followed the deregulation of the power sector in the State of California. The price of electric power for California increased from $7 billion in 1999 to $27 billion in 2000 and was projected to reach $70 billion in 2001. This implied a $20 to $60 billion shock to the California economy in direct costs besides the indirect costs of blackouts, layoffs and lost productivity. In response, the Federal Energy Regulatory Commission (FERC) took action in 2001 to stabilize the power market.

In 2001 and 2002, Enron and WorldCom filed for bankruptcy, contributing to a crisis of corporate governance. The Brookings Institution estimated the total loss to the U.S. gross domestic product from these two bankruptcies to be between $37 and $42 billion. In response, Congress passed the Sarbanes-Oxley Act which led the SEC and FASB to change corporate governance, disclosure and accounting rules.

The insurance industry has also faced large financial shocks in the past some of which have caused significant market dislocations and insolvencies. In comparison to asbestos, the insured losses from these events, although large, were relatively easy to calculate and had less uncertainty associated with them. Ernst & Young (E&Y) estimates that the total insurance industry losses from the September 11, 2001 attacks were in the $35 to $50 billion range. Property Claims Services (PCS) estimated that the total property losses to the insurance industry from hurricane Andrew in 1992 were $15.5 billion and from the Northridge earthquake in 1994 were $12.5 billion. Uncertainty around the insurance industry's ability to handle such large events in catastrophe-prone areas led to the creation of a number of state-sponsored insurance vehicles, such as the California Earthquake Authority (CEA) and the Florida Windstorm Underwriting Association (FWUA).

Investor Perspective

Investors assess relative value of a company by evaluating its expected future prospects for earnings and growth. In this assessment, investors take into account the inherent risks. The issue of asbestos is a complex risk for investors to value. The uncertainty associated with asbestos liabilities affects valuations because it makes investors' financial analysis more speculative and problematic. This contributes to volatility in the valuation of certain sectors and specific companies. The complexity of the asbestos issue arises for several reasons.

First, asbestos liabilities for a company are not easily quantifiable even with full relevant disclosure. Actuarial estimates in the past have not proven to be completely reliable because asbestos diseases have long latency periods which makes future projections difficult and because the incidence rates for asbestos-related diseases have continued to change over time. A good example of this is the Manville Trust which has already received almost six times the maximum number of claims the Bankruptcy Court experts predicted it would receive.

Second, most investors do not have the resources to monitor all the asbestos claims filed against a company in potentially hundreds of courts all over the country. Keeping abreast of claims development and the tactics of the plaintiffs' bar is a potentially important valuation tool for investors. This capability, however, would require investors to have access to dedicated legal experts and incur the corresponding legal expenses. Without such resources, investors tend to use jury verdicts or settlements as a proxy for asbestos liability information. As a result, small jury awards can cause large market reactions, both to the defendant's stock price and to other companies not even parties to the judgment. The process by which legal cases are resolved in the current system adds to volatility in the valuation of certain sectors and specific companies.

Third, a typical asbestos claimant files suits against multiple defendants. If a case actually goes to trial, the courts have generally imposed joint and several liability, even against defendants with an insignificant market share of the relevant asbestos-containing product and even if the particular plaintiff's exposure to the defendant's product was a small part of that plaintiff's total asbestos exposure. This makes it difficult for the investors to assess the share of liability for a specific company or to properly extrapolate the consequences when one of the defendant companies files for bankruptcy. In the absence of any other information, investors tend to assume that most industrial companies have potential asbestos exposure.

Fourth, investors generally have not been able to predict any pattern in which companies have been named defendants in asbestos lawsuits, and it is not always clear which companies will be next in the asbestos litigation lifecycle. Asbestos liabilities increasingly show up in industry sectors that investors previously may have assumed to be peripheral or remote from the issue. For example, investors would not have thought some years ago that major automobile manufacturers could become primary asbestos targets. This has also increased investors' sense of uncertainty.

Fifth, the effect upon corporate parents and current or prior affiliates of companies with asbestos liabilities has been unpredictable. For example, some companies have suffered large asbestos liabilities and associated market value loss based upon conduct by a subsidiary that occurred long before the subsidiary was acquired. Others have suffered these liabilities and losses based upon conduct by entities that had at some point been subsidiaries but had been sold years before.

Sixth, it is difficult for investors to assess the possibility of legislative reform on the asbestos issue. Investors tend to adjust their valuations as the prospects for reform brighten or become more remote.

Finally, uncertainty around asbestos liabilities of a company makes it difficult for the investors to assess its financial strength and risk of insolvency. This can result in limiting the access of a company to the capital markets and substantially increasing its overall cost of financing. Investors take this increased cost into account and penalize the valuation of the company. In some extreme cases, investors factor in the risk of insolvency as a worst case scenario which contributes further to stock price volatility.

The insurance industry faces additional considerations. There is uncertainty around whether insurance companies can be required to pay under 'premises liability' or be held directly liable by asbestos plaintiffs for their own past conduct. This makes it difficult for the investors to assess the proportion of asbestos claims paid to victims that will be reimbursable by insurers and, therefore, the impact of these claims on the financial strength and credit ratings which are critical for the insurance companies to run their businesses competitively. Capital consumed by asbestos liabilities also cannot be deployed towards insuring other risks in the markets including natural catastrophes and terrorism.

Investor Reaction

In view of all these complex considerations around uncertain asbestos liabilities, investors' assessment of the financial strength and valuations of individual companies or whole sectors becomes somewhat more volatile. To illustrate this point, an S&P 500 company announced in January 2002 that it had settled a small number of the asbestos cases that it had been defending. Its estimated liability at that time was $200 million, which was fully covered by insurance. However, the company lost $6.5 billion in market capitalization in the days following the announcement. Other companies known to have asbestos exposure were also affected by this announcement. Five companies, none of them direct competitors but each faced with asbestos exposure, lost an additional $17.5 billion in market capitalization within a week of this announcement. Thus, a single announcement led to a total market value loss for six companies of $24 billion.

There is similar equity market volatility on the upside when the asbestos uncertainty is addressed. For example, in November 1996, T&N, a British mining and manufacturing company, announced a deal to cap its asbestos liability through the placement of the largest ever asbestos liability policy for an industrial company. The news led to a 42% increase in its market capitalization (however, after a merger with another company with asbestos exposure, the former T&N later filed for bankruptcy because of resurgent asbestos liabilities). More recently, Sealed Air announced an asbestos settlement at the end of November 2002 and its market value increased in a single day by $1.2 billion or 56%.

Merger Market Perspective

Uncertainty regarding asbestos liabilities has a similar dampening effect on mergers and acquisitions. In certain cases, asbestos liability has been transferred from companies that originally had the liability to acquiring companies. Legal theories of 'alter ego liability' or

'successor liability' or 'fraudulent conveyance' have been interpreted by courts in different ways leading to uncertainty. A buyer who acquires a company that might have asbestos exposure risks not only its investment in that company, but also its pre-merger assets. For example, Crown Cork and Seal (Crown Cork) acquired Mundek Cork Company (Mundek) in 1963 for less than $50 million and sold its asbestos-related insulation business three months later. Crown Cork has paid out over $300 million over the past 10 years in asbestos liabilities arising from Mundek, significantly more than its initial investment. The uncertainty associated with asbestos liabilities thus makes strategic decisions around mergers, acquisitions and dispositions very challenging. It diminishes the willingness of companies to engage in mergers and asset acquisitions, even in circumstances where such transactions would be in the best interest of the companies, their customers, employees and investors and would promote efficiencies for the economy as a whole. Anecdotally, as leading M&A advisors, we have observed that a number of such transactions are not proceeding because of the uncertainty associated with asbestos liabilities. In the long run, the result can be companies that are not strategically positioned to meet the continually evolving demands of their industries, the economy, and the capital markets.

Impact of Asbestos Reform

We believe that thoughtful asbestos reform could only be positive for the U.S. economy and the capital markets. The capital markets will assess the value of any legislative reform on the basis of two key elements. The first element is to reduce or eliminate uncertainty with respect to asbestos liability in terms of frequency and severity of claims for the economy as a whole and specifically for industry sectors and individual companies. This will allow investors to more accurately assess and project the liability and thereby value and finance these companies with a greater degree of confidence. In other words, the more certainty a legislative reform provides, the greater the positive influence on the markets. The second element is to increase efficiency of the system resulting from reduction of transaction and bankruptcy costs which

together have tended to be a significant proportion of the total asbestos costs. This can be achieved by minimizing areas of dispute between plaintiffs and defendants, defendants and insurers, and among insurers. In assessing the value of any reform proposal, the more it increases system efficiency, the greater the benefit to the market and the economy.

Conclusion

Asbestos liabilities impose meaningful costs on the U.S. economy in terms of direct claims, litigation costs and bankruptcies. The complexity around the asbestos issue leads to uncertainty for the investors and results in volatility in the valuation of certain sectors and specific companies. This volatility has a negative impact on economic activity and growth. Any reform that addresses the uncertainty and inefficiencies of the current system while being fair and equitable to the victims could only have a positive market impact.

Prepared Statement of Steven Kazan

Kazan, McClain, Edises, Abrams, Fernandez, Lyons, Farrise & Greenwood

Hearing on Asbestos Litigation
Before the Committee on the Judiciary
of the United States Senate

March 5, 2003

Mr. Chairman and members of the Committee: I am a plaintiffs' trial lawyer. I speak for myself and other members of the asbestos bar who stand up for the interests of asbestos cancer victims. For 25 years I have concentrated on obtaining compensation for people who are dying from asbestos cancers. I appeared before you before you last September to explain why I believe that asbestos litigation has become a tragedy for my clients.

I am grateful for the chance to appear before you again to address a different issue: what should be done?

In my view, the solution is simple. I believe in the civil justice system, and I do not think that we need a big-government solution to asbestos litigation. Nor do we need an elaborate National Trust Fund administered by a private bureaucracy. Asbestos litigation has become a nightmare because the courts have been inundated by the claims of people who may have been exposed to asbestos but who are not sick – who have no lung function deficit. This flood is conjured up through systematic, for-profit screening

programs designed to find potential plaintiffs with some x-ray evidence "consistent with" asbestosis. Ironically, and tragically, in many states, that x-ray evidence triggers the statute of limitations, literally forcing the filing of premature claims. These claims are choking the asbestos litigation system and keeping the courts from doing their job: providing compensation for people who are genuinely injured by asbestos diseases.

If the fundamental cause of the asbestos litigation crisis is the flood of "unimpaired" claims, the obvious solution is to defer the claims of the "unimpaired" until they are sick, while preserving their right to sue by tolling the statute of limitations and making that a meaningful right – there would still be asbestos defendants to sue. Such legislation would allow the courts to focus on the 10-15% of claims where the plaintiff is really injured. I have no doubt that our civil justice system would be up to the task of providing fair and even-handed justice in these cases.

1. The Medical Criteria Approach. Over the years, Congress has considered many asbestos bills. Most of them involved creating some kind of government compensation scheme, like Black Lung or the 9/11 program, but the problems involved proved too daunting. That was true even when filing rates were one-tenth what they are today, and when there were only 200-300 potential defendants. Today there are 8,400 defendants representing every major industrial sector in the country, and 60,000 to 100,000 new claims filed every year. Moreover, with an almost infinite

supply of exposed people, even this volume of new claims could be dwarfed in coming years.

Perhaps it is time to consider a simpler approach. Rather than supplanting the civil justice system, let's consider creating the conditions necessary to allow it to work. That is the approach that was advocated by the American Bar Association in its historic February 11 vote to support asbestos legislation that would defer the claims of the unimpaired while tolling the statute of limitations. And, that is the approach taken in S. 413, which was introduced by Senator Don Nickles on February 13, 2003.[1] I call this the "medical criteria" approach. It makes a lot of sense.

The purpose of medical criteria is to distinguish between people who are sick as a result of asbestos exposure and those who are not. Thus, the medical criteria proposals leave the cancer victims alone. Cancer victims are clearly impaired, and the courts are perfectly capable of sorting out the questions about causation that are usually the key to cancer cases. Cancer criteria are simply unneeded.

The ABA criteria and those in the Nickles bill are generally similar. Both are based upon medicine, and yet both take into consideration the special problems involved in integrating medical standards into the legal system. While leaving purely medical issues to the doctors, I would like to

[1] I have some reservations with respect to some provisions of S. 413 which I will discuss below. Nevertheless, I support the general thrust of that bill, which I believe can provide a useful framework for these discussions.

comment on some key issues in making medical criteria effective in the courts.

First, "forensic medicine" should observe the same standards as real medicine. In the real world, a person who wants to receive medical advice about a symptom, or even about risks of future illness from some exposure, would go to a doctor, explain his occupational and medical history, undergo tests that comply with generally accepted technical standards, and receive a considered diagnosis. That is the medical model. And that is precisely what does not happen in asbestos litigation.

In asbestos litigation, screening firms recruit asbestos-exposed individuals as clients. Technicians employed by those firms administer tests that rarely comply with applicable technical standards. The test results are provided to doctors who are often not licensed in the relevant state, who do not consider themselves to be in a doctor-patient relationship with the potential claimant, and who often have a financial interest in identifying as many potential plaintiffs as possible. The doctor usually does not render a diagnosis, but merely affirms that the x-rays presented to him are "consistent with" asbestosis. If this were medicine, it would be malpractice. But it is not medicine: It is the medical side of legal entrepreneurship.

The very first thing a medical criteria bill should do is require a genuine diagnosis based upon generally accepted medical procedures. Both the ABA criteria and the Nickles bill do that.

Second, a medical criteria bill should rely on workable, objective tests for determining whether the claimant has a breathing impairment. The Nickles bill uses the American Medical Association's Guides for the Evaluation of Permanent Impairment (5th edition) for this purpose. Although the AMA Guides address respiratory impairments generally, they do not focus on causation and thus do not determine if an impairment is asbestos related. However, they are objective and are widely used in state and Federal workers' compensation programs in evaluating claims of asbestos-related disability. Indeed, the AMA Guides have been incorporated by reference in the Longshore and Harbor Workers' Act for evaluating claims of retirees, including those claiming asbestos-related conditions.

The ABA criteria are based upon the work of a Commission on Asbestos Litigation appointed by President-elect Dennis Archer (on which I had the privilege of serving). Those criteria are specifically aimed at asbestos-related diseases and may be easier to administer than the AMA Guides. At the end of the day, however, they are likely to have a broadly similar effect.

Third, medical criteria should be able to sort out conditions that are and are not caused by asbestos. Accordingly, it is necessary to have x-ray evidence that supports the conclusion that the claimant has an asbestos-related disease. It is also necessary to distinguish people whose breathing problems are caused by "chronic obstructive pulmonary disease" or "COPD"

– a disease usually related to smoking -- rather than asbestos exposure. While the ABA resolution and the Nickles bill differ in specifics, both take a reasonable approach to this problem.

Fourth, medical criteria need to be objective and need to be applied at the outset of a case. Doctors treating patients normally start with a careful evaluation but understandably wish to consider developing information and where necessary make last-minute, subjective judgments, based on all relevant circumstances. But, as a lawyer who has tried asbestos cases for 30 years, I know that will not work in asbestos litigation. In practically every other kind of personal injury case, a plaintiff is expected to be able to provide sufficient grounds for filing a lawsuit when the case begins. It is reasonable to require the same in asbestos cases. If medical criteria are not applied then, they will be ineffective. Unfortunately, it is all too easy to find doctors on both sides of any question, and all too often their disagreements will be resolved at trial. In asbestos litigation, that is a recipe for continued screening. Lawyers for both sides know that it is unlikely that there will ever be a trial, or even real investigation or discovery, because the pressures for settlement are too intense, especially in "magnet" jurisdictions where large numbers of cases are consolidated for trial. The only way to break the vicious cycle that has brought untold numbers of asbestos "cases" into the courts is to apply objective medical criteria at the beginning of the case to distinguish between the sick and those who have not yet become sick.

There is nothing radical about this approach. Courts in New York City, Baltimore, Chicago, South Carolina, and other jurisdictions accomplish the same result through inactive dockets. Both the ABA proposal and the Nickles bill envision early application of objective medical criteria to make sure that people who are sick will have immediate access to the courts while deferring the claims of people who do not have anything wrong with them and protecting their right to bring a lawsuit if they fall ill.

The medical criteria approach will also have a tremendous beneficial effect on the currently pending bankruptcies. As a practical matter, it is impossible to reorganize successfully under Chapter 11 of the Bankruptcy Code without a so-called "section 524(g) injunction" which requires future asbestos claims to be presented to the trust that results from the reorganization. To be approved, a plan proposing a section 524(g) injunction must receive the affirmative vote of 75 percent of present claimants (regardless of the amount of their claims). While there is some controversy over whether people who are unimpaired have present claims and are entitled to vote, historically the unimpaired – or, more exactly, the lawyers who represent them – have held the key to approval of any bankruptcy reorganization. For that reason, reorganization plans systematically favor the unimpaired at the expense of people with fatal diseases. Indeed, this has led to instances where debtors or their parent

corporations overpay present cases in an attempt to buy approval of unfair reorganization plans that hurt present and future cancer victims.

A medical criteria bill would make clear that people who are exposed to asbestos but who are not sick do not have present claims in bankruptcy. People who are truly injured – the sick and dying – could receive full compensation, because they would not be required to compete for funds with the mass of unimpaired claimants, as they do today.[2] This benefit of a medical criteria bill is especially important when an injured person's only claim is against a bankrupt company.

As I noted above, the medical criteria approach is reflected in the Nickles bill, which I think is a very good start. That bill does, however, affect cancer claims in certain respects. In principle, I would prefer a bill that did not address cancers at all. Cancer claims are not the problem. But, in any event, I think that the provision of S. 413 on venue is wrong. Section 5(b) of the bill generally requires asbestos claims to be brought in a jurisdiction where the plaintiff lives or where his exposure to asbestos took place. Appropriately, there is an exception for cancer cases. That exception

[2] None of the existing asbestos trusts pay the full value of any of the claims presented to them. The Manville Trust, for example, pays only one-twentieth of the value of a claim. The reason is that the trusts must preserve their resources so that they can pay claims for decades to come. The primary factor that drives the payment percentage down is the estimated number of future non-cancer claims, which rarely involve any breathing impairment. If resources did not have to be set aside to pay claims that will be filed in the future by people who aren't sick, the asbestos trusts would be able to pay a much higher percentage of the real value of cancer and impaired non-cancer claims. Indeed, some of the debtors in the pending bankruptcies would be able to pay full value, and could even emerge from bankruptcy while preserving significant portions of their equity for shareholders, including union workers with stock in company 401(k) plans.

only applies, however, when a doctor certifies that the plaintiff can expect to die within 3 years after the date of filing a claim. While this would cover all, or practically all, claims filed by living cancer victims, if the victim has already died when the case is filed, the venue limitations of the bill would fully apply. I believe that this distinction between claims brought by cancer victims themselves and claims brought by their widows and children is unfair and unjustified. It could also create an anomalous situation where the surviving aspect of the victim's personal injury case is in one state and the wrongful death case must be in another.

2. Letting the Civil Justice System Work. I have devoted my life to representing seriously injured people in the civil justice system. I believe in trial by jury. I believe that the courts do a good job in dealing with claims brought by injured people against the people or companies that injured them. If asbestos litigation involved only 7,000-8,000 cancer cases a year and a few thousand more non-cancer claims involving real breathing impairment, no one would be arguing the need for significant reforms. Certainly I would not.

Asbestos is unique, even by mass tort standards. More than 500,000 asbestos cases had been filed by 2001, and the current rate of filing is 60,000-100,000 per year. This flood of cases has forced the courts to adopt a variety of measures, including mass consolidations, designed to force settlements. These measures have in turn stimulated more lawyer-funded

screenings, more filings, and even more intense pressure on courts to depart from the traditional legal process in order to deal with the onslaught of claims.

A medical criteria bill would relieve this pressure. It would let the courts go back to doing what they do best – resolving real cases and controversies between genuinely injured people and the defendants that they allege caused their injuries. In my view, this solution is most consistent with traditional American values.

We do not need a new federal entitlement program to compensate asbestos victims. We do not need federal officials to allocate responsibility among the 8,400 companies that have been named in asbestos lawsuits, or to unravel the tangled insurance relationships that have evolved over time. Nor do we need to build a quasi-public National Trust to do so. I strongly believe that substituting an administrative compensation scheme for the civil justice system is inappropriate. The federal government has not been notably successful in past schemes of this kind. It is far wiser to fix the problem – the filing of scores of thousands of claims on behalf of people who are not sick – and then let the courts do the rest.

3. "It's Time for Congress To Act". I am here today because I am very concerned about those who are hurt the most from asbestos, people who are dying of asbestos cancers, and their families. We have been talking about ending the asbestos nightmare for years. The first bills were

introduced a generation ago. The Judicial Conference's Ad Hoc Committee on Asbestos Litigation called for asbestos legislation in 1991. The Supreme Court challenged Congress to legislate in this area in its *Amchem* opinion in 1997 and again, even more forcefully, in its *Ortiz* opinion in 1999. Meanwhile more than 60 companies have gone bankrupt, the litigation has spread to touch every sector in the American economy, and my clients are increasingly in danger of dying without viable defendants who can compensate their families for this tragic loss.

Mr. Chairman, the title of this hearing says it all: "It Is Time for Congress to Act." Congress needs to act now, to establish medical criteria to ensure that those who are sick today, and the many more who will become sick in the years to come, are protected and that their right to a jury trial will be truly meaningful because the responsible companies will still exist and be able to pay for the harm they have caused.

STATEMENT OF SENATOR HERB KOHL
"The Asbestos Litigation Crisis Continues – It Is Time for Congress to Act"
March 5, 2003

Mr. Chairman, this is the second hearing we have held in six months on the asbestos litigation crisis. Last September's experience comprehensively established that there is a problem and that Congress must address it. We hope today to assess the various approaches, and hopefully, make progress toward a solution that addresses the asbestos problem. Amidst the debate of who deserves what, how much, and when, we all should agree that this problem – and the many lives affected by it – deserves a Congressional solution this year.

No doubt there is a problem. Indeed, the Supreme Court referred to the crisis as an "elephantine mass" of cases that "defies customary judicial administration" that is in need of Congressional action. The mountain of 600,000 asbestos-related injury claims has delayed compensation of the severely injured, forcing them to wait in line behind those who are not yet sick. Moreover, nobody wins when massive liability forces companies into bankruptcy, leaving those who are truly sick with only cents on the dollar for their claims.

Last September, I stated few principles that we should remember as we attempt to find a consensus. Let me restate them. 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 understand that competing proposals have either been introduced or are in the works. Some feel that we must establish a uniform, national "medical criteria" standard that separates those who are ill now from those who are not. This approach is reflected in Senator Nickles bill as well as a recently-adopted American Bar Association resolution (ABA Standard for Non-Malignant Asbestos-Related Disease Claims). Though not

without merit, many injured workers – like today's witness, Melvin McCandless – fear that they will be unjustly excluded or delayed from collecting their claims.

Others, like the Asbestos Study Group, which consists of major manufacturers including Ford Motors, General Electric, and General Motors among others, are working toward a privately-funded, national trust fund or claims facility that would attempt to compensate complaints in a uniform, predictable manner. Though appealing with its promise of certainty and finality, there remain many details to work through in this proposal as well.

I am optimistic that we can work together to reach a consensus solution that is as fair as possible to as many people as possible. Those who are sick deserve their compensation promptly and those who may be sick in the future deserve their day in court. It is only through a compromise between the injured, the potentially liable, the attorneys, and the insurers that a solution will be reached. I hope we can find it.

Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

March 5, 2003

PRINTABLE VERSION

Today's hearing is aptly titled, because it is time for Congress to act on a fair and effective solution to the asbestos litigation crisis.

Thousands of workers and their families have suffered debilitating diseases and death resulting from exposure to asbestos, and latency periods for asbestos-related illness of up to 40 years, the damage done by asbestos will not end for decades. I convened the first Senate Judiciary Committee hearing last September on asbestos litigation to begin a bipartisan dialogue about the best means for providing fair and efficient compensation to the current victims and those yet to come.

We have all learned a great deal about the harms wreaked by asbestos exposure since last fall. Not only do the victims of asbestos exposure continue to suffer, and their numbers to grow, but the businesses involved in the litigation, along with their employees and retirees, are suffering from the economic uncertainty surrounding this litigation. More than 50 companies have filed for bankruptcy because of their asbestos-related liabilities. These bankruptcies created a lose-lose situation. Asbestos victims deserving fair compensation do not receive it and bankrupt companies can not create new jobs nor invest in our economy.

As a general matter, our tort system is well-equipped to handle the resolution of conflicts, and I have long battled the misguided attempts, hidden beneath the guise of "tort reform," to limit the access that the American people have to their courts. I will continue to do so, for one of the distinguishing characteristics of our judicial system is its openness to legitimate claims of injury, and its availability to all aggrieved plaintiffs. Because of the particular circumstances of the harm caused by asbestos, however, the system is not working as it should.

These circumstances are causing the failure of asbestos litigation to meet the needs of many victims and the capabilities of many defendants. If we work in good faith toward a bipartisan asbestos solution, we can meet the challenge created by this litigation. I agree with the Supreme Court's conclusion that the number of claims defies "customary judicial administration and calls for national legislation."

Let me be clear: An effective solution is not one that would create more corporate bankruptcies. It would not erect arbitrary barriers to recovery, and it

would not generate excessive legal fees. An effective solution will fairly and efficiently compensate victims, and it will eliminate the financial uncertainty that hinders defendants and their insurers from resolving their liabilities. I am open to finding creative ways to devise such a fair and efficient system.

Let me also be clear about the biggest danger to bipartisan reform: overreaching by some special interests for immunity from legitimate asbestos claims. For Congress to enact reforms this year, all the stakeholders will have to come to the table willing to work with open minds toward a realistic and reasonable solution. The answer will require the full participation not only of the victims and the corporate defendants, but of their insurers as well. It will not be a stacked solution that attempts to shoot the moon for one side or the other. To succeed, it must be narrowly targeted, and it must be balanced.

Last September we began the bipartisan discourse on the problem of asbestos injuries and the litigation that has ensued. Now we must proceed to a dialogue on the solution to that problem, a solution that will bring fair and adequate compensation to victims in a timely fashion, that will resolve the financial uncertainty for corporate defendants, and will enable insurers to predictably meet the obligations of the policies.

I look forward to continuing to work with Chairman Hatch in a constructive and bipartisan fashion, and I thank our witnesses for their testimony today as they assist us in crafting a solution to the asbestos litigation crisis.

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- TOP OF THIS PAGE
- RETURN TO HOME

PRINTER FRIENDLY VERSION

Testimony of Melvin McCandless
U.S. Senate Judiciary Committee
Hearing On
"The Asbestos Litigation Crisis Continues – It Is Time For Congress To Act"
March 5, 2003

Dear Mr. Chairman and Honorable Members of the United States Senate Judiciary Committee:

Let me thank you for the opportunity to be here today, to tell you about my family and my story. My name is Melvin McCandless and I am from Plymouth, North Carolina.

I am here today to address unfairness in the bill that has been introduced by Senator Nickles, the "Asbestos Claims Criteria and Compensation Act of 2003," Senate Bill 413, and in the medical criteria proposed by the American Bar Association.

1. I suffer from asbestosis and I was found by the Deputy assigned by the North Carolina Industrial Commission to be permanently and totally disabled because of my asbestosis. Although I have been found permanently and totally disabled by the Deputy who heard my case, I would be unable to recover in a court of law for the very same disease if this bill or the ABA proposal became law.

2. I worked for one of the largest employers in North Carolina, a large mill in eastern North Carolina. It is lined with literally miles of asbestos-containing insulation, around pipes, conduits, turbines and boilers. I worked there 35 years, and for years, almost every day, you could see the dust in the air.

3. I worked there as a supervisor. None of us had any idea about how dangerous asbestos was. We worked in and around it everyday. Down in eastern North Carolina, the plant where I worked is one of the few places where you could get a good paying job.

4. None of the workers had respiratory protection. We were not given any special clothing to keep the asbestos off of us or to prevent us from taking it home to our families. I did not know asbestos was dangerous until after I already had the disease. I was required every month to have a safety meeting but at no time did the company ever mention anything, nothing about asbestos, in any meeting that I ever attended. I didn't see any warnings on any boxes of asbestos products.

5. For several years before I went out of work, I was short of breath while trying to do my job. Anytime I was in dust or steam, which was really every day at work, it would affect my breathing. Anytime I was in the heat or around the steam insulation, the coughing would be the same. As a supervisor, I had to walk around various parts of the mill, including up and down stairs. It got to where I could not do my job anymore because I was so short of breath. Anytime I had to exert myself, I would get winded almost immediately. My work environment aggravated all my breathing problems. In fact, because of my breathing, I couldn't wear a respirator because it would suffocate me.

6. To work as long as I did I had the other guys help me do my job and that just was not right.

7. Although the company gave me a couple of chest x-rays, no one ever told me of any abnormalities. I did not know what was wrong with me but my employer did. See, they had been monitoring my lungs since 1989. In 1989 they started seeing changes on x-rays the company doctor took. But they never told me....they just moved me out of the mill into the woodyard. Then, four years later, in 1993, they moved me back into the dust, inside the mill and that is when my breathing really went downhill. My doctors testified that I should not have been further exposed to asbestos after the chest x-ray showed I was developing the disease. After my chest x-ray changes showed up, the company took me out of the medical monitoring program.

8. There is not a lung doctor in my county or a B reader. The few doctors that are there are just general doctors who usually don't stay long because of our location. The only reason I ever found out what was wrong with me is because I contacted a lawyer who I heard represented my co-workers.

9. I was sent to a pulmonologist first, and then to an independent state doctor who is an associate professor of pulmonary medicine who also confirmed that I had asbestosis. I also had the B reader who read chest films for the company confirmed that I had it as did other B readers yet my lawyer tells me that despite all of this, I wouldn't qualify to even file a claim for compensation in a court of law under the Nickles bill or the ABA proposal.

10. The North Carolina Industrial Commission found that the reason I cannot work is because of my asbestosis; I am short of breath and I could not do my job.

11. In fact, the dust was so bad it would come home on my clothes. While washing those clothes, and just being around me, my wife of 37 years, Janice, started inhaling the asbestos as well. In fact, now my wife has been diagnosed with asbestosis too. She is having breathing trouble, which is getting worse and she has a terrible cough.

12. I am here today because my lawyer told me that if Senate Bill 413 or the ABA proposal is passed neither I nor my wife nor most of our friends would be able to recover in a court of law for asbestosis. Even though the North Carolina Industrial Commission has ruled I am permanently and totally disabled, I couldn't recover because my pulmonary function test is "within the range of normal" and I would therefore be excluded under the Nickles bill or the ABA proposal.

13. I cannot do any amount of exertion for over a very short period of time. Just pushing the garbage from the house to the road makes me short winded and uneasy. My wife's condition is similar to mine but she also would be excluded under the Nickles bill or the ABA proposal.

14. I had not planned to be here today because one of my co-workers was going to testify but he was put in the hospital last week due to his asbestosis. He is on oxygen. Like me,

his chest x-ray report would not allow him to qualify for access to a court under the Nickles bill or the ABA proposal.

15. I have worsening shortness of breathe; a dry cough, and I am severely limited in what I do. I cannot be around dusts, fumes, or chemicals, and I truly believe that I may one day be like my friend who could not be here because he is on oxygen in the hospital.

That is wrong!! It is wrong for me, it is wrong for my wife, it is wrong for my buddies at the mill, and all the others whose lives have been hurt by asbestos.

Thank you for this opportunity to be here today, to tell you my family's story and the story of a lot of my co-workers who my lawyers say would also not be allowed access to a court under the Nickles bill or the ABA proposal.

Michael Elias Baroody
Executive Vice President

March 18, 2003

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The National Association of Manufacturers (NAM), representing approximately 14,000 member companies of all sizes and in all industrial sectors, appreciates your holding a hearing on March 5 on the need for legislation to rein in excessive and abusive asbestos litigation. I serve as chair of the Executive Committee of the Asbestos Alliance, which has already submitted a statement for the hearing record. I write today on behalf of the NAM and respectfully request that this letter be placed in the hearing record.

The NAM submitted a full statement about the impact of asbestos litigation on manufacturing to this committee for its September 25, 2002, hearing on asbestos. That statement noted some jarring statistics taken from a study by the RAND Institute for Civil Justice (Asbestos Litigation Costs and Compensation: An Interim Report, September 25, 2002). In addition, later studies by Sebago Associates (The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, December 2002) and NERA Economic Consultants (The Secondary Impacts of Asbestos Liabilities, January 23, 2003) built on, reinforced and expanded RAND's findings. Combined, the studies make clear that the asbestos-litigation crisis—mainly caused by lawsuits brought on behalf of people who are not (and may never become) sick—is adversely affecting millions of innocent victims, while eating up money that could better be used to compensate those victims suffering from severe diseases caused by asbestos. The victims of the present out-of-control litigation begin with those who are ill, but they also include companies small and large, their workers, retirees and shareholders, as well as local communities in which affected companies have facilities.

Five days after the March 5 hearing, the Supreme Court issued its decision in *Norfolk & Western Railway Company v. Freeman Ayers,* et. al. Although the ruling is narrow and tailored to the confines of the Federal Employers' Liability Act, the majority of the Supreme Court concluded by once again noting that the "elephantine mass of asbestos cases" calls for national legislation.

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The NAM statement for the September 25 hearing noted that, according to RAND, 600,000 claims were filed by the end of 2000, at a cost of $54 billion; investment had been reduced by $10 billion, resulting in reduced employment of 138,000 jobs; the projected economic impact of asbestos litigation would be at least $210 billion; and asbestos litigation had forced at least 60 companies into bankruptcy. Twenty-two of those 60 bankruptcies had been declared just since January 2000; in less than six months since the September 25 hearing, there are at least 7 additional bankruptcies for a total of at least 67.

The December 2002 Sebago Associates study, co-authored by Nobel Prize-winning economist Joseph Stiglitz, focused on the impact that asbestos litigation has had on bankrupt companies. Most notably, Dr. Stiglitz found that the 61 bankruptcies studied (with operations in 47 states) resulted in the loss of 60,000 jobs; led to lost wages of $200 million; caused a roughly 25 percent decline in employee retirement assets; and incurred between $325 million and $625 million in costs associated just with bankruptcy proceedings. This study also noted that while non-bankrupt firms were not the subject of the paper, bankruptcies have spill-over effects on other firms that experience consequential financial shocks.

The NERA study looked at the "ripple effect" resulting from asbestos liabilities, and expanded on a point made in the NAM's September statement: namely, that affected facilities—especially those located in small communities—have an impact beyond the affected workers. Impacts for lost jobs include the loss of wages, the costs of retraining, the loss of group health care, a payout of unemployment insurance and the effect on other local businesses. NERA found that, on average, 8 additional jobs were lost in local communities for every 10 initial jobs lost. NERA also found that the ripple effects include falling local real estate values and lost tax revenue.

Not studied by NERA, but mentioned in the NAM's September statement, is that businesses (and their owners and managers) are often the largest philanthropists in communities, so another "ripple effect" is the loss of contributions for local charities. Thus, the local "safety net" of private relief organizations for displaced workers becomes all the more strained.

Approximately three-quarters of the NAM membership are small and medium businesses. The plight of Mike Carter, owner of the Monroe Rubber and Gasket Company in Monroe, Louisiana, demonstrates how the tentacles of asbestos litigation are reaching further and further afield from those with the most actual liability. Mr. Carter, whose company is not a member of the NAM, submitted a statement for the March 5 hearing record.

Prior to 1986, Monroe Rubber and Gasket used a compressed asbestos sheet in making its gaskets. The manufacturers of the asbestos sheets have been driven into bankruptcy protection. Because the bankrupt asbestos suppliers cannot be sued, Monroe Rubber and Gasket is now being overwhelmed by lawsuits from employees who worked for the chemical plants and paper

mills that the gaskets were distributed to. The company once employed 21 employees in its Monroe, Louisiana, store, but now employs only 16, due to the $250,000 per year it spends to defend itself. While he now has insurance to pay his settlement costs, Mr. Carter fears that he will have to close his doors and throw the remaining Monroe employees out of jobs if his insurance company goes out of business or is otherwise unable to pay the claims. (*The News-Star*, Monroe, Louisiana, March 6, 2003.) With each new large company bankruptcy, more and more small-business owners will find themselves in Mr. Carter's situation.

The NAM has also received numerous reports from member companies that they are being sued solely because they were next alphabetically on some list used by a plaintiff's lawyer who will sue anyone, regardless of liability. These companies fear that if they contest these lawsuits, other plaintiff's lawyers will learn that they are a target, thus subjecting them to an unimaginable number of additional lawsuits. Therefore, they begrudgingly agree to settle. Public companies, in particular, are in great fear because once investors learn of any asbestos liability, the stock is sent into a tailspin.

During the hearing, the topic of a trust fund was repeatedly raised and endorsed by several members on the witness panel. Many very important questions, however, remained inadequately answered and/or were not explored sufficiently. These questions include: How would a trust fund be structured, especially considering that more than 8,000 defendant companies likely would participate? How much would each participant pay into the fund? How often and for how long? What criteria would determine which defendant companies would be required to opt-in? Which defendants could opt-in voluntarily if they so chose? Could any defendant opt-out? If so, under what conditions or circumstances? What effect would bankruptcy have on obligations that were determined while a defendant was solvent and only faced minimal liability? Would a defendant be shielded from liability if the trust turned down a claim? Historically, trusts have been unable to fully compensate claimants and end up paying only a few cents on the dollar: Would this be taken into account in establishing obligations, and, if so, how? What criteria would be used to determine claimants who receive pay-outs? Finally, the NAM noted your strongly stated belief that a trust fund must have finality. If one is created, how and when would that finality occur? Would any federal financial obligation be involved or implied? This question becomes all the more vital given that all past projections as to the number of claims have underestimated actual filings.

The NAM favors medical criteria and the tolling of the statute of limitations as the primary features of a legislative solution. In addition, there should be restrictions on venue for non-cancer claimants and case consolidations that limit the former to where a claimant was exposed or resides and limit the latter to claims with close similarities. For severely ill claimants, convenience could be a factor for venue. These features would help those with the greatest need to access compensation quicker.

U.S. Senator George V. Voinovich
Statement on Asbestos Litigation, Committee on the Judiciary
March 5, 2003

Thank you, Mr. Chairman. I want to thank you and Senator Leahy for holding this hearing and allowing me to testify. I want to preface my remarks by saying that I have great concerns for victims of asbestos exposure. To those families who have lost loved ones or who have to live with debilitating illness caused by asbestos, I offer my deepest sympathies. You are at the forefront of my mind as I discuss the issue of asbestos liability, because I want to be sure that the solution we craft is one that will ensure that the truly sick are allowed fair compensation for their injuries.

I think, Mr. Chairman, most people would agree that the issue of asbestos litigation is presenting a crisis in our country. With over fifty companies already in bankruptcy and a slew of bankruptcies soon to follow, the United States Supreme Court had it right when they called this an "elephantine mess." What people need to understand, though, is that this mess has far-reaching effects and the ripples are being felt way beyond the corporate boardroom.

Corporate bankruptcies affect victims' compensation so that asbestos victims, individuals who are truly sick, only receive pennies on the dollar. Employees of bankrupt companies suffer as well as they watch their jobs disappear and their pensions and 401K plans decrease dramatically. Take the case of Federal Mogul, a company that employs over 1200 people in six cities throughout Ohio. Employees held 16% of the company's stock, and then watched as that stock lost 99% of its value. Not only current employees, but also retirees are feeling the effects of these bankruptcies. Many retirees depend on company stock and dividends for income – when this value heads south, retirees feel it immediately.

Now, Ohio is a manufacturing state. Our manufacturers are the backbone of our economy. Unfortunately, we also have a lot of companies facing asbestos liability. One of them, Owens Corning, is headquartered in Toledo and went bankrupt in 2000. In the two years preceding this bankruptcy, the stock lost 97% of its value -- 14% of the stock was owned by company employees. Now, Owens Corning has been making a come back and actually saw their sales rise to $4.9 billion in 2002. However, accounting charges to cover their asbestos liability expenses contributed to what may be the Toledo firm's biggest loss ever when last month, it had to report a $2.8 billion loss for the year. And their biggest factor in the loss? A $2.4 billion charge taken in the third quarter to reflect rising estimates of its asbestos liability over the next 50 years.

Another Ohio company recently spoke to me, off the record, about its growing asbestos liability. When this company announced that it had limited asbestos liability, the stock dropped by about 20% and its debt rating was lowered. This began a chain reaction ripple effect, which included the loss of over one hundred jobs, the sale of assets, a 50% cut in capital investments, and a huge cut in the amount of contributions to the

surrounding community. Not to mention the employees of this company, who own a significant portion of the stock and are now watching their savings plan dwindle.

As I've said before, companies like this one make up the backbone of Ohio's economy. They don't want to shirk their responsibility to those victims who have or will become truly sick because of asbestos exposure. They just want to know that they are compensating those individuals who need it and not lining the pockets of personal injury lawyers and their unimpaired plaintiffs.

And what I am hearing from my Ohio companies is that they support taking the medical criteria approach advocated by the American Bar Association. As you probably know, in coming to this decision, the ABA formed a commission chaired by Judge Nathaniel Jones and including eleven members of the legal community, representing the plaintiff, defense and corporate bars. The Commission heard extensive medical testimony from the nation's leading physicians in the area of pulmonary function. And the ABA's end result, one that I support, is one that prevents resources from being misdirected because of a flood of premature claims, that helps companies avoid bankruptcy, and most importantly of all, that protects the rights of victims who suffer from a serious or functionally impairing asbestos-related disease.

The asbestos crisis is ripping through our economy, leaving the truly injured behind and without compensation. We really need to do something about it. If we let this go, if we do nothing, no stimulus package will be able to undo the damage.

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

SOLVING THE ASBESTOS LITIGATION CRISIS: S. 1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003

WEDNESDAY, JUNE 4, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:07 a.m., in room SH–216, Hart Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, DeWine, Sessions, Leahy, Feinstein, Feingold, Durbin.

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

Chairman HATCH. Could I have your attention? I would like the officers to let in as many people as they can within the fire safety rules. There are a lot of people out there who have not gotten in, so if we can line them up along the side, let as many people in as we can because this is an important bill, maybe one of the most important bills that we could possibly do.

Good morning and welcome to this very important hearing on possible solutions to resolve the asbestos litigation crisis.

I want to thank all of our witnesses for providing their expertise and suggestions to the Committee so that we can arrive at the best possible solution as soon as possible. And time really is of the essence in this matter. This bill may not make it if we do not move with expedition.

Also, I want to thank my partner on this Committee, the leading Democrat on the Committee, Senator Leahy, the ranking member, for his continued efforts and interest in this subject matter. He along with Senators Dodd, Feinstein, Levin, and others continue to provide helpful suggestions that will help us all arrive at a bill that will truly help the hundreds of thousands of victims of asbestos exposure who currently get pennies on the dollar in compensation and whose pensions are in serious jeopardy as more and more companies continue to file for bankruptcy.

In addition, these workers are losing their health care, their pensions, their salaries, and we have got to find some way of solving this problem.

I have to say that I want to pay particular tribute to Senator Nelson and Senator Miller, who have been prime cosponsors on this bill, and also to Senators DeWine and Voinovich. We have not

tried to get a number of cosponsors, but these are people who have been concerned about this right from the beginning and who deserve a lot of credit.

Senator Leahy along with Senator Dodd, Senator Kennedy, and others have shown true courage in standing up and tackling the complex policy issues involved. And they are complex. To get this resolved, we have to dig deep, face the realities of the alternatives, and work together in a bipartisan manner to come up with the best possible solution, one that is fair to the claimants, one that recognizes the limitations of our economy.

The private sector has been trying to resolve the asbestos situation for nearly 25 years. Several times major settlements were challenged by a few members of the trial bar and various efforts have been curtailed, prompting the Supreme Court, among others, to call on Congress to "fix" this serious problem. We are very fortunate today to have one of our top constitutional experts in the country, Larry Tribe, Professor Tribe, here today to educate us on the constitutional implications of this pending legislative solution and perhaps on the private efforts in the past that have failed.

The private sector and the labor movement have had very important and constructive dialogues, and much has been gained by their efforts, and we have gained a lot from them. But we are now at a stage where, given the importance of this issue to our victims, our workforce, and our economy, we have to act. Now, it is time for legislators to legislate in the public interest, and that is why we are here today at our third hearing on this issue and why I commend my colleagues for their interests and courage to support efforts to arrive at an acceptable solution.

I should also say that the legislation we are examining today, S. 1125, is a product of much discussion and input from all interested parties. We introduced S. 1125, the bipartisan Fairness in Asbestos Injury Resolution Act of 2003, in an effort to move the legislative process along. I have said that we are open to constructive suggestions to aid us in improving this bill. I have heard many suggestions from outside affected parties and from my colleagues here on the dais and elsewhere. This has been very positive, and I think the legislative process is working and working well.

We had to bring it to a head. That is why we filed the bill, knowing that it is not going to be the absolute final bill. And we are open to these suggestions and to your suggestions.

Keep in mind, though, we have to get it through both Houses of Congress. We have to bring together a bunch of disparate people who do not agree on a lot of these things. So it is a tough, tough issue and battle as well, or at best, I should say.

This bipartisan bill, as I noted when we introduced it, is not without flaws, and this hearing today is intended to provide expert advice on how best to improve the bill. With that, I would hope that all of our witnesses today will provide specific solutions to possible problems or flaws they believe the legislation may have. It will not help anyone to point out flaws without suggesting reasonable and workable solutions for those flaws. In short, we want constructive criticism if there is going to be any criticism. Now, there is always the other kind and we can live with that, too, but we would prefer constructive criticism. If we all commit to that and to

be open on solutions, we will get a bill and we will get one soon, and we will be on our way to helping our economy immeasurably and helping our workers and our businesses.

On S. 1125, I want to say that the support around the country we have gotten has been overwhelming. Many recognize that it may not be the perfect solution, but it is close to being one of the best workable solutions. It establishes a system to pay victims faster, ensure that it is the truly sick getting paid, and provide the business community with the stability it needs to protect jobs and pensions. Now, I appreciate the bipartisan support of the cosponsors of the bill so far. Prior to introduction of this bill, we incorporated a number of very constructive suggestions by Senators Leahy and Dodd, and I look forward to continuing to work with them and our other colleagues so that we can win full support for this bill.

Moreover, we continue to address other helpful suggestions and concerns raised since we introduced the bill. For example, we are working with Senator Baucus to address the compensation for those victims who are in Libby, Montana. Senator Baucus testified at our two prior hearings on this issue, and I know that it is a serious concern for his constituents. We have also heard from some of those who are truly sick and suffering from asbestos-related diseases who are concerned that this bill as currently drafted would require reductions in awards for amounts received from collateral sources. We will look to address as many of those concerns as possible.

Now, I should note on that point that prior to introduction of the bill, at Senator Leahy's suggestion, we specified that life insurance proceeds would not be offset. Others, including Senator Murray, who will provide testimony today, have asked us to look at enacting a ban on asbestos and provide for research funding to find cures for these horrible diseases caused by asbestos exposure. All are laudable, all are well intentioned, and I would like to work with my colleagues to see if we can address these issues.

Unfortunately, I also recognize that there will be special interest groups who benefit handsomely from the current broken system and have every incentive to stop our efforts on behalf of victims. That is their right, and I know we will hear all sorts of parades of horribles on anything we do. I hope their efforts will not succeed and that we do what is best for the country and the victims as a whole. We need to recognize where we will be if we do not get this done.

I want to say to labor, already you have very sick members that are either being shortchanged in the current tort system due to the flood of claims and dwindling resources or those who may receive nothing at all, and members whose jobs and pensions and health care have suffered as a result of the skyrocketing bankruptcies. What will your union membership say if that is allowed to continue because we do not have the guts to do what we have to do here today and thereafter?

To the business community, I ask, how many of you will still be around in the next few years if we do not do something to resolve this crisis now? These are large companies, employing a lot of people, mostly union people. Let me caution that many that have gone

before you thought that they would survive, that they would not be flooded with claims, or that they had enough insurance to cover their claims.

Almost 70 companies have gone bankrupt, nearly a quarter of which occurred in just the last 2 years. And I should note, those companies thought it would not happen to them. I know. I worked with some of them on a legislative solution 5 years ago, which I introduced with Senators Lieberman and Dodd. And the insurance companies, I know you have exactly the same concerns. There has to be some certainty in this process or you cannot live with it.

One insurance company I know of never had anything to do with asbestos other than they did some of the medical research that said that mesothelioma may come from asbestos exposure. They are now brought in as a co-conspirator in some 60,000 cases. They can win every case; but, the last one they tried, they paid out $2 million in defense costs. They should not have to pay a dime, but they are part of this group trying to find some solution and some certainty to be able to continue in their business. And, unfortunately, I think they are going to have to pay something. And there are a number of companies in that same category who are just going to have to participate in order to help bring about and effectuate this settlement of these problems.

All of that being said, I hope this hearing and the fact that we have a bill to work from will encourage the interested parties to work with us to support a workable solution that will benefit the common good. We need to ensure that the truly sick get compensated first and foremost. But we can do that without bankrupting companies so that jobs and pensions will not suffer needlessly.

Now, I look forward to all of the constructive criticisms and views to be presented here today. I also invite anyone in the public and victims groups to provide any suggestions and improvements that you have to us by the close of business this week. As the interest from each member of this Committee indicates, we are serious about this, and we intend to get this done and make tough policy calls, where necessary.

Now, this is the last hearing we are going to hold on this, and we are going to go to a markup probably next Thursday—not this Thursday but the Thursday after this one. Now, we will see what happens at that markup. It may be put over for one other week, but that is going to be the due date. And I hope we don't have to put it over because I hope we can get enough consensus to be able to really go and get this done in this time frame where we have to get it done or perhaps it will never be done.

So we are very appreciative to have all of you here, all of you witnesses, and we look forward to hearing your testimony and hope that we can move on from here.

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

The only other opening remarks before we go to Senator Hagel will be the ranking member of the Committee, Senator Leahy.

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

Senator LEAHY. Well, thank you, Mr. Chairman, and I thank you my friend from Utah for calling this hearing on the asbestos litigation crisis. This is the third hearing we have had since the one I convened last September. Last fall, I had hoped to begin a bipartisan dialogue about the best means for providing fair and efficient compensation to the current victims and those yet to come.

I have a simple message for everybody who is here today, and I know you are all very interested in the outcome of this legislation, so I am going to say it right up front: To end this crisis we need to restart negotiations among the stakeholders and interested Senators to finish hammering out the details of an effective national trust fund for victims of asbestos-related diseases.

Our knowledge of the harms wreaked by asbestos exposure has certainly grown since last fall, and so have the harms themselves. Not only do the victims of asbestos exposure continue to suffer and their numbers to grow, but the businesses involved, along with their employees and their retirees, are suffering from the economic uncertainty surrounding this litigation. More than 60 companies have filed for bankruptcy because of their asbestos-related liabilities. These bankruptcies create a lose-lose situation. Asbestos victims deserving fair compensation do not receive it, and the bankrupt companies can neither create new jobs nor invest in our economy.

Chairman Hatch and I have been working for months with Senators Dodd, DeWine, Carper, Ben Nelson, Feinstein, and others to encourage representatives from organized labor and industry to reach a consensus solution, and to bring our own ideas and efforts to the table. And I want to say the stakeholders have made real progress in finding common ground around a national trust fund. But they have not yet reached consensus. Without consensus—and I would say this to my friends on all sides of this. Without consensus, we are not going to end this crisis.

I do commend Senator Hatch for his hard work in drafting this legislation. I agree with him that the most effective solution to the asbestos litigation crisis is taking all the asbestos cases out of the tort system and establishing a national trust fund. Our courts cannot handle these, and you are not going to get finality if we leave these in the normal tort system. That is what I urged at our last hearing. I still believe this. And I am continuing to work to develop medical criteria for use with such a trust fund that is going to be fair to all asbestos victims and can lead to the quick compensation of legitimate claims, but will also weed out frivolous claims.

Now, there are some areas where I disagree with the legislation before, and, thus, I do not support it as it is currently written. And I know, as the Chairman said, it is a work in progress. Senator Hatch has asked for suggestions to improve the legislation, and I know he is sincere in that. I have made a number of detailed suggestions already, but I want to point out a few of the remaining major issues.

First, this bill shifts the financial risk from defendants and insurers to victims. The bill guarantees businesses a lifetime of absolute legal and financial certainty, but it leaves asbestos victims

completely out of luck if the trust fund runs out of money at any time in the next five decades. The one constant in our experience with projections of asbestos liabilities is that the projections of today are going to be wrong tomorrow. Twenty years ago, all the experts predicted that the Manville Trust Fund would be paying asbestos victims full compensation for many years. Now, as they testified here, asbestos victims get 5 cents on the dollar because the Manville Trust Fund is nearly insolvent. The risk of insolvency, in fact, the risk of inadequate funding short of insolvency, in a national trust fund must be addressed in order to provide certainty to asbestos victims as well as certainty to defendants and insurers.

The bill does not cover victims, not yet, who were exposed to asbestos outside the workplace, such as spouses and family members who get exposure from workers' clothes and community poisoning cases like the one the Chairman has referred to in Libby, Montana, something Senator Baucus has spoken about. And I have heard from Senator Murray about the importance of addressing "take home" exposure, and Senator Murray will be testifying here later today. And I commend the Chairman for his usual courtesy in making the time available. We have talked with Senator Baucus about the basic fairness of covering victims of tremolite asbestos exposure in Libby.

I think the bill raises unnecessary hurdles that would bar many legitimate asbestos victims from receiving any compensation. For example, the bill does not compensate anyone who was exposed to asbestos in the workplace after December 31, 1982. Now, I see no reason to deny asbestos victims their rightful recovery because their exposure occurred after an arbitrary date, particularly because asbestos is still used today. An arbitrary cutoff in a national trust fund will just create more injustices later on.

The bill offsets any compensation to asbestos victims by collateral sources such as previous payments from disability insurance or health insurance, Medicare, Medicaid, and death benefits programs. This is really a dramatic change from current law, and it would result in a cost shift of millions, even billions of dollars. The cost shift is from defendants and their insurers to other insurance companies or health care plans and the Federal Government.

The use of these collateral sources would also reduce or eliminate compensation pledged to asbestos victims. For instance, a mesothelioma victim who had disability and medical insurance and who lived more than the usual 18-month survival time might not receive any of the aware under the bill because of these collateral source offsets. I cannot support reducing compensation to asbestos victims simply because they survived or because they had the good fortune and foresight to purchase insurance.

Moreover, the bill requires a physician to independently verify a victim's exposure to asbestos that may have occurred 10, 20, 30, even 40 years ago. That is an impossible bar to clear to be eligible for compensation.

Finally, I believe that any alternative compensation system must be truly no-fault to be fair to those victims who will no longer have recourse to the courts. Under this bill, before the thousands of pending asbestos victims may receive any compensation, Congress would have to create and put together the bureaucracy of a brand-

new asbestos court and do it at the Federal taxpayers' expense. If this is truly no-fault, we do not need that. I think such a court appears to be inconsistent with a no-fault system, and if past experience is any predictor, it would be unworkable.

So we need to work with all the stakeholders to resolve the remaining complex and interrelated issues—such as medical criteria, award values, and insolvency risks—necessary to enact an effective trust fund solution. I look forward to hearing from our expert witnesses as we try to craft that kind of a bipartisan piece of legislation.

Our undertaking is complex. It is unprecedented. It is not going to be easy to work out the details necessary for consensus. But I would tell everybody in the room the stakes are too high for us to leave the field before we try our utmost to complete this. I would urge everybody—industry, labor, victims, lawyers, everybody involved—keep on working for a consensus. If we have consensus, we pass a piece of legislation. If we don't have consensus, we don't.

You know, my two grandfathers were stonecutters in Vermont. One grandfather emigrated to this country from Italy, not speaking any English, worked as a stonecutter until he earned enough money to bring his wife and children over. My paternal grandfather, my Irish grandfather, whose grandfathers themselves were immigrants, worked as a stonecutter. They both died of silicosis of the lungs because of their workplace exposure to stone dust. I never knew my paternal grandfather. He died long before my parents met at a very young age. I do know his tombstone in Barre, Vermont, where it says "Patrick J. Leahy." Every time I see that, it reminds me that we can do better in the workplace. So I think of them. I think of the hundreds of thousands of present and future asbestos victims. I want to make every effort to solve this crisis, and I commend and encourage all those who are working in good faith to do it.

If we act together, if we encourage the private negotiations to resume, in my view that is the best way to move a consensus bill through the legislative process and into law. Both the Chairman and I want very much to get a piece of legislation on the President's desk that he can sign. There are a number of important issues on which we need to find common ground. But if we work together as we have in the past, we have the best chance of success. Our guiding principles should be fairness to the victims and certainty for the corporations involved, through a workable process that will function effectively over time.

Mr. Chairman, I look forward to continuing to work with you, Senator Dodd, Senator Hagel, Senator Murray, Senator DeWine, Senator Carper, Senator Nelson, Senator Feinstein, and other members of this Committee to craft an effective solution to the asbestos litigation crisis.

Mr. Chairman, there are a whole lot of other things you could be doing with your time. I applaud you for holding the hearing and keeping us moving forward.

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

Chairman HATCH. Well, thank you, Senator.

We have a variety of witnesses, so we are going to limit witnesses to 5 minutes, although, Senator Hagel and Senator Murray, we will grant more time to you. We are honored to have Senator Hagel here with us, and Senator Murray, when she does show up, regardless of who is testifying, we will interrupt to allow her to testify. Since we are all so busy around here, I want to accommodate her.

We are honored to have you here, Senator Hagel. You have a lot of experience in this area since you worked with Manville Trust, and we will be interested in what you have to say about this bill. So we will turn the time over to you.

STATEMENT OF HON. CHUCK HAGEL, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator HAGEL. Mr. Chairman, thank you, and to the distinguished ranking member, Senator Leahy, and all the distinguished members of this Committee, I appreciate an opportunity to share some thoughts with you on a subject that is very important, I would say even critically important.

Chairman HATCH. Would you pull the mike up a little bit closer, Chuck?

Senator HAGEL. As you noted, Mr. Chairman, I served as a trustee of the Manville Personal Injury Settlement Trust for over a year and a half, between February 1994 and June 1995. I was appointed by the trustees on the recommendation of the Honorable Jack B. Weinstein, U.S. District Judge for the Eastern District of New York.

Judge Weinstein and I were first acquainted in the 1980's when he appointed me chairman of the $240 million Agent Orange Settlement Fund. I am not an expert, Mr. Chairman, on any of this, but I do have some real-life experience in making a number of mistakes, knowing a little bit about what works, what does not work, and how imperfect the process is and how there are always questions and concerns, just as Senator Leahy noted. But this is an issue that affects hundreds of thousands of Americans, and we need to come to some resolution with some assistance that is realistic and practical and workable.

I would like to discuss today some of my experiences and thoughts on this subject and how it relates to your legislation, S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003. Mr. Chairman, I am pleased that the medical and exposure criteria contained in your legislation are based on the 2002 Manville Trust Distribution Process, because I think that process, as imperfect as it is, was arrived at over years of experience in dealing with a very complicated issue.

The history of the Manville Trust illustrates the problems facing asbestos claimants and defendants everywhere. And because the Manville Trust is the largest and the oldest of the asbestos trusts, it is in the unique position of being the bellwether for asbestos claims filings. I would like to share with you some of what I learned based on my experience on that trust and why I believe Federal legislation is needed to correct the shortcomings of the current system.

Allow me to begin by discussing three of the major problems facing the Manville Trust and others like it: first, insufficient payments to claimants, as we heard this morning; second, inability to accurately predict the number of future claims, as also heard this morning; and, third, depletion of resources by non-sick claimants.

First, insufficient payments to claimants. During the 15 years of the Manville Trust existence, the trust has received over 620,000 claims and has paid over $3.1 billion to approximately 530,000 claimants. This is substantially more than any other asbestos trust has paid to beneficiaries.

Unfortunately, only 27,000 of the total 530,000 paid claimants have received the full value of their claims. The remaining 500,000 claimants have received far less than the fair value of their claims as determined by the courts that established the trust. Because of a very serious asset/liability mismatch, approximately 400,000 claimants have been paid only 10 percent of the value of their claims, while an additional 100,000 claimants—those who have most recently filed claims—have been paid only 5 percent of the value of their claims. Like the Manville Trust, none of the existing asbestos trusts pay more than a few cents on the dollar when compared to the court-approved claim values. It appears that none of the 20 or so asbestos trusts pending bankruptcy confirmation will pay anywhere near full claim value.

Why does the Manville Trust and every other asbestos trust pay only a few cents on the dollar? And why do they all have an asset/liability mismatch? Again, the history of the Manville Trust illustrates the second problem affecting the fairness and solvency of the trust: the inability to predict future claims.

The Johns Manville Corporation declared bankruptcy in 1982 because of its asbestos litigation lawsuits. Since then, over 60 corporations have also declared bankruptcy because of asbestos liabilities. During 1986, expert claims forecasters testified in the Manville bankruptcy court that between the late 1980's and 2049, the Manville Trust would receive between 83,000 and 100,000 claims. The trust began operations in 1988 and as of today, only 15 years later, the Manville Trust has received, as I mentioned, over 620,000 claims, and 2049 is almost half a century away.

During 2001, the Manville Trust commissioned the fourth future claims forecast it has undertaken during its 15-year history. That recent forecast predicted that by 2049 the trust would receive between 750,000 and 2.7 million additional claims, in addition to the nearly one-half million claims it already has received. As you can imagine and know, a future claims forecast of between 750,000 and 2.7 million additional claims is essentially a useless prediction if you are trying to adjust claims payments on a pro-rata basis.

We learned from the Manville Trust that forecasting future asbestos claims is, at best, very difficult. When considering the pending legislation, all of us should try to become comfortable with the inevitable uncertainty associated with trying to determine the number of future asbestos claims. This hangs heavy over any final determination of legislative remedies.

The third problem, depletion of resources by non-sick claimants. In the morass of asbestos claims data and statistics, we must remember that behind the numbers are real people. Senator Leahy

mentioned how close he and his family are to this point, using examples of his grandparents. Some of these people are suffering from the inevitably fatal illnesses caused by their asbestos exposure. These claimants, drawn from a claimant population with an average age of over 66, have had their lives shortened by their asbestos exposure. Other claimants, while not terminally ill with an asbestos-related disease, nonetheless have had the quality of their lives destroyed.

These claimants have not received the full value of their Manville compensation. I noted earlier that the trust has paid its beneficiaries over $3.1 billion, almost all of that at either a 10-percent or a 5-percent share of claim value. Currently, the unpaid portion of the Manville claim values is over $23 billion. Every asbestos trust also has billions of dollars of unpaid and never-to-be-paid liabilities. While it is true that some underpaid claimants may have received funds from defendants in the tort system, it is doubtful that very many, if any of them, have or will receive the fair value of their claim.

Why do these huge liabilities remain unpaid? There is, of course, an ongoing debate as to whether all of the claimants who have been paid were impaired; what "impairment" means; whether too much money has been paid to claimants with non-malignant diseases versus the dollars paid to claimants with malignant diseases; and how many manufacturing and insurance dollars this country can afford to pay to the victims of one toxic substance.

Regardless of the definition of impairment, some claimants are seriously ill, and the proposed legislation you are addressing today appears to strike an appropriate balance between those potential asbestos victims who are seriously ill and those who are not, by codifying the Manville medical and exposure criteria.

Mr. Chairman, because S. 1125 incorporates the Manville Trust 2002 Trust Distribution Process, I wish to discuss briefly what I believe the trust has done right and should be emulated in any Federal legislation.

During 2002, the trust's administrative costs were less than 3 percent of claims payments. This is lower than the administrative costs of any other asbestos trust and lower than the administrative costs of practically all casualty insurance companies. The Manville trustees are appropriately proud of these very low administrative costs. The principal reason these costs are low is that the trust's operating subsidiary, the Claims Resolution Management Corporation, employs an interactive, web-based electronic claim filing system. Federal legislation, in my opinion, should maintain as low an administrative burden as possible.

Finally, I would like to conclude with a few short comments regarding why I believe your legislation, the FAIR Act, is needed. Some have raised relevant questions related to your legislation, and many more questions will be raised and should be raised. You will hear from the experts behind me, as you know, and they will raise questions and, I hope, provide some solutions and answers. I also hope we can work through these issues and move toward a solution to this critical and urgent problem.

With six operating asbestos trusts and with 20 or so companies pending bankruptcy confirmation, a national trust and its single-

payer format, such as the one in S. 1125, is long overdue. No useful purpose is served by having multiple asbestos trusts, each with their administrative burden, coupled with the economic burden of the tort system. Such a system depletes the funds that are available for victims of asbestos exposure, as I previously discussed.

Where bankruptcies have not occurred, asbestos plaintiffs and defendants are left to the tort system. In addition to being costly, the tort system is very uncertain. The tort system has many equitable attributes, but its uncertainties and unfairness for some asbestos personal injury victims, particularly under circumstances where there are insufficient funds for tens of thousands of injured asbestos workers, is not a system that should be perpetuated. To say it straight, Mr. Chairman, some claimants are doing very well under the system, yet others—many—equally deserving, are receiving little or nothing. It is obvious that a single-payer system is needed to bring equity and fairness to current and future asbestos injury claimants.

In conclusion, I encourage this Committee to focus on the fact, as you have, that the fair resolution of our asbestos crisis is not the province of one political party or one economic point of view but, rather, is an issue that should unite all of us in a common goal. I believe that S. 1125 accomplishes this objective in an imperfect but yet realistic and efficient way. And I applaud, Mr. Chairman, you and Senator Leahy and your Committee for taking this difficult task on. It is not only complicated, but it has many tentacles wrapped around it, and it is one that is confounding. And many of us appreciate the leadership this Committee has given to this issue and wish you well and stand by to serve or consult or advise in any way we can.

Once again, I appreciate an opportunity to share my thoughts with the Committee.

Chairman HATCH. Well, thank you, Senator Hagel. As I understand it, you are a cosponsor of the bill.

Senator HAGEL. I am, yes, sir.

Chairman HATCH. We are honored to have you on this bill and appreciate your testimony.

With that, we know how busy you are. We will let you go.

Senator HAGEL. Mr. Chairman, I would be very glad if any of your colleagues on this Committee would have questions—I have got to get back to another committee meeting, but I would be very happy to respond to those personally or in writing, and my staff would as well. I am available to any members of your committee.

Chairman HATCH. Thank you, Senator. We will keep the record open until the end of the day.

Senator HAGEL. Thank you.

Chairman HATCH. Thanks so much. We are grateful to have you here and grateful for your experience as well.

Our next witness, we would like to welcome to the Committee Professor Laurence Tribe. He is the Ralph S. Tyler, Jr., Professor of Constitutional Law at Harvard Law School and is known here and throughout the country as one of the most respected constitutional scholars and practitioners.

Professor Tribe graduated summa cum laude from Harvard College and magna cum laude from the Harvard Law School, clerked

for Supreme Court Justice Potter Stewart, and has authored what many of us feel are countless books and scholarly articles regarding many issues under our Constitution.

Professor Tribe has also argued asbestos matters before the Supreme Court in the landmark cases *Ortiz* v. *Fibreboard Corporation* and *Amchem Products* v. *Windsor*. I think it is safe to say that his practical experience here gives him a unique perspective on the constitutional issues presented by the bill.

Professor Tribe, we know you are a very busy man, and we are very grateful that you would take time from your busy schedule to come and be with us today and help to educate the Committee on where we are in this bill and what we might be able to do in the future. So we will turn the time over to you.

STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. TRIBE. Chairman Hatch, Senator Leahy, members of the Committee, I think I am the one who should be grateful. I am really very honored that the Committee is interested in hearing my views. And I certainly would join Senator Hagel and the many others who applaud the effort that you, Mr. Chairman, and the ranking member and others have made to untie this terrible Gordian knot, a really intractable problem.

I have a rather lengthy prepared statement that I will hopefully just have read into the record so that I——

Chairman HATCH. Without objection, we will put all prepared statements in the record, but we are happy to hear from you.

Mr. TRIBE. Thank you, Mr. Chairman. And I would like to speak really very briefly and want to focus on answering whatever questions members of the Committee may have.

The sole subject of both the statement that I have submitted in the prepared form and of my brief oral presentation this morning is whether the Constitution of the United States prevents Congress from doing what the United States Supreme Court on three occasions within the past half-dozen years—*Amchem* in 1979, *Ortiz* in 1999, and most recently, in *Norfolk & Western* just this year—implored, almost begged Congress to do, and that is, to replace a plainly dysfunctional system for processing what the Court itself called "an elephantine mass"—the word is almost as awkward as the use of the judicial system to achieve it—an elephantine mass of asbestos cases lodged in the State and Federal courts, to replace that mass with a more streamlined and certain administrative procedure for the orderly payment of newly created, exclusively Federal claims, claims against a national trust fund where the system rests on the recognition that the reality of approximate justice, swiftly and surely delivered, is sometimes vastly preferable to the illusion of precise justice, that is often delayed until the most grievously injured risk receiving no justice at all, because by the time the wheels of litigation grind their way to the most deserving victims, the finite funds available to satisfy their claims will often have been used up by payments to the relatively unimpaired, or used up by the absolutely enormous transaction costs, as the economists call it, often payments to lawyers, and often amounting to

about $1 of payments on the side for every $1 that any victim ever sees. It is really a case of the classic race to the bottom.

Now, I yield to, I think, very few in my admiration for the judicial system. I think it does a marvelous job with many problems. But this is not among them. And I think if there is anything on which there is consensus, it is surely that the illusory search for perfection, for absolute certainty, for making sure that everyone with a just claim can get every cent on the dollar or is somehow satisfied is nothing more than the hopeless attempt to seek perfection. And I think in this area, as in many others, the perfect is the enemy of the good.

This particular proposal, as you have said, Mr. Chairman, is a work in progress; it is not meant to be the final version of a final bill. But many of those whose real objection is that they think they could do better in the litigation system somehow, or that they could do better with a bill that is tweaked in one way or another—many of those people couch their objection in constitutional terms. I think those who make the objection forthrightly in policy terms, who propose constructive ways of moving the bill in a favorable direction, are to be commended. But those who cheapen the constitutional currency by suggesting somehow that Congress is without power to provide a rational administrative scheme here, simply because in some instances and for some claims the theoretical availability of relief under the judicial system is replaced with no relief under this scheme. Or for some people who might get $3 million, possibly, under the existing system, they may end up with less than $1 million under this scheme.

The fact that those things happen is simply testament to the absence of perfection in any administrative operation. And if one were to fine-tune the administrative process to the point where it tries to replicate what the idealized judicial system can achieve, if you imagine just one case and with all the time in the world, the thought that you can do that is itself a profound illusion. Because if you replicate the way common law claims for tort or contract are treated in the judicial system within the administrative apparatus that you have created, you will simply replicate all of the problems, all of the delays, all of the transaction costs.

And so it is unfortunately necessary that in order to make an omelet, some eggs are going to be broken. And I feel terrible for the victims who are not going to ultimately achieve the full measure of justice that a perfect system would deliver. But the Constitution does not promise perfection and can't deliver it. And the fact that some of the lines that have to be drawn in this bill are merely approximate, the fact that people could argue about whether the amount of money that the insurers pay and the amount of money that the asbestos defendants pay should be exactly equal, or whether some other ratio is better, the fact that people can argue about the precise formulas by which these tiers of defendants are established, should not distract attention from the proposition that this is a classic case of economic regulation and economic distribution.

And it is in that area where the Constitution is most forgiving of approximation and least demanding of perfection, that area where the watchword is rationality. And unless it can be argued that this scheme actually takes property from some people in order

to achieve the common good when, in fact, the taxpayers should be picking up the bill, the beleaguered taxpayer, unless it can be shown that there is a confiscation of private property—and I don't think there is that confiscation here—it seems to me that all of the other objections, whether they are couched in terms of equal protection or substantive due process or the non-delegation doctrine by some who would like a more precise set of guidelines as to how these burdens are to be allocated, whatever the label, it comes down to the same thing, the counsel of perfection, which I think the Chairman and the ranking member and those who have worked hard on this legislation have realized would be the death knell for any realistic solution.

I think I have overstayed my 5 minutes. I probably could lean harder on the Chair for more time, but I do not want to. I would rather be responsive to whatever questions any member of the Committee might have.

Chairman HATCH. I could listen to you all day. We appreciate your testimony because I think on the constitutional issues some people have been very concerned about that, and, you know, I believe you are right. But, Professor Tribe, we will ask some questions. Maybe we can elucidate even a little bit further, which would be, I think, pleasing to you.

People who know you think of you—and so do I—as a champion of victims rights because you have argued and won two leading Supreme Court decisions about the right of asbestos claimants to have their day in court. And you are now working with our colleagues, Senator Feinstein and Senator Kyl, on a victims rights amendment to the Constitution. Yet you are here today defending the constitutional validity of this legislation, which has been openly criticized as allegedly depriving victims from having their day in court even though we give all legitimate victims a quick and efficient access to the newly created fund.

Now, some may think that this represents a departure from your basic approach to the rights of victims to be fully and fairly heard, and I would just like to have you respond for the benefit of everybody here.

Mr. TRIBE. Well, I do care very much about victims, including the victims of crime; it is for that reason that, to the dismay of many people both to my right and my left, I favor a victims' rights amendment to the Constitution. And I care about the victims of torts and the victims of all kinds of injustice. But it is one thing to believe in somehow vindicating the rights of victims, and it is another thing to believe that you can get blood from a stone, that you can somehow make everyone whole by a system that promises 100 cents on the dollar but does not deliver; that is, a real concern for victims and their welfare, I think, has to be tempered with a measure of pragmatism.

I think it was Justice Jackson who talked about the illusory promise, a "promise to the ear to be broken to the hope, like a munificent bequest in a pauper's will". That is the promise that the present system has made to victims, the promise that many of the asbestos trusts make. And as we have already heard, they promise 100 and they deliver 5.

I think that a realistic concern for victims means that one must be open to accommodation and compromise, and to insist on purity for the sake of purity when in the end people are more grievously hurt I think would be a terrible mistake.

And let me add one other thing. I think that the most important system that this country has for protecting those who are genuinely victimized is ultimately in the most extreme cases the judicial system. Of course, as you point out, Mr. Chairman, it is not as though people are completely frozen out of adjudication here. They have access to an Article III court to review the determinations of the administrative body. But in the end, the ability of the Article III judiciary, which is in some ways the last stop on the train before people are ultimately abandoned to their fate, the utility of the Federal judiciary is compromised by the kind of cynicism and corrosion that is generated by the avalanche of asbestos cases.

I am not one who always agrees with the tort reform movements and putting this or that kind of cap on damages. Sometimes it is a good idea, sometimes not. But when you really do have an area where the experience of well over a quarter century plainly demonstrates that to promise that we will take care of victims through the judicial system and then simply to overwhelm the courts and give people who want to take potshots at the courts an excuse by saying, look, look how terribly the courts perform, we have got to get rid of judicial processing, that I think is a terrible mistake.

And one of the most serious costs of the asbestos crisis, a cost not measured in dollars, not measured in bankruptcies, not measured always in unsatisfied victims' claims and in more and more bankruptcies and in harm to the economy, is the cost of essentially using the scarce resource of our judiciary to solve a problem that it was never adapted to solve, leading more and more people to be cynical about its ability to do what it is ultimately best at doing, and that is, protecting ultimate human rights.

Chairman HATCH. Well, the bill that I have proposed would not affect any of those cases that have gone all the way to judgment. But it would require the dismissal of asbestos cases that are still pending in various stages of litigation, and it would direct those claims to the fund itself, which I would like to have $108 billion.

Now, the companies are not happy with that, and naturally the labor movement is not happy with that. But it is about $18 billion more than the companies are willing to pay, but that is what it is going to be, and less than what the trade unions would like, in any event. But some have argued that this interferes with the judicial process in those cases.

Now, do you have any concerns about Congress' authority to do this under the separation of powers principles?

Mr. TRIBE. No, I don't, Mr. Chairman. It seems to me well established through a series of cases, including those involving environmental law and those involving financial matters, that even where Congress takes aim at a number of pending cases by docket number and by name, as opposed to generically as you are doing here, as long as it affects those pending cases by changing the underlying rule of law that is to be applied, there is no invasion of the judicial province, no usurpation of the judicial power. That is, it is not a matter of telling the courts how to decide a pending case. It

is a matter of pulling the rug out from under those cases by saying, look, that rug is well worn, it won't support the weight that people are putting on it. We have got to change the law, replace the State and Federal bodies of law, primarily State, on which people have rested asbestos claims with a new Federal cause of action under a statute with an administrative remedy. And because the law itself is being changed, the fact that those cases disappear the way Cinderella turned into a pumpkin—I guess it wasn't Cinderella. It was her chariot, wasn't it?

[Laughter.]

Senator LEAHY. Don't you have grandchildren, Professor?

Mr. TRIBE. Not yet. Not yet. And this proves that my children are a little bit too old for me to remember the stories that I used to tell them.

The point is that when these claims evaporate, they don't evaporate because Congress has zapped them one by one, sort of taking potshots at specific cases pending in the courts. It is because Congress has said the body of law on which they rest really won't bear the weight. So we are supplanting with a new body of law, and as such, of course, that body of law is processed administratively without juries, no invasion of the separation of powers.

Chairman HATCH. Thank you, sir.

I am going to turn to Senator Leahy. I will submit other questions in writing that you have, I think, more than answered, perhaps, but I will still submit some.

Senator Leahy?

Senator LEAHY. Professor, if and when the grandchildren arrive, I have a whole library of books that——

Mr. TRIBE. I will take you up on it.

Senator LEAHY [continuing]. Mine are going through, and I will send them on to you.

Chairman HATCH. If only he would study the law books, you know, we would——

[Laughter.]

Chairman HATCH. I am only kidding.

Mr. TRIBE. I think he has done pretty well.

Chairman HATCH. Yes, he does very well. I am just kidding.

Senator LEAHY. Professor, you have experience in litigating a number of these asbestos cases, and that is valuable. And, of course, here we are asking about your constitutional experience. And what you are doing is you are—I want to make sure I understand. Your opinion today is that this legislation is constitutional. You are not going into all the policy aspects of it. Is that correct?

Mr. TRIBE. That is right, with one exception, Senator. I am saying that I think as a policy matter, which is sometimes a little hard to separate from the issue of fairness, as a policy matter a national trust of some kind with an administrative streamlined procedure makes sense. The Supreme Court has called for it. Observers on all sides think it is necessary. To that degree, I am offering, I guess, an opinion where I am not exactly an expert.

The one thing that I guess I learned in those asbestos cases I litigated, they weren't cases of individual claimants. They were whole class actions, and they were class actions in which the people involved were not fairly and effectively represented. They weren't

represented because the classes were so heterogeneous and so diverse that only a legislative body under a rule of one person, one vote could represent them. And that is why I think the Court basically said you can't do it this way in the judicial system. You can't appoint a few champions for this kind of class. You have got to do it legislatively.

Senator LEAHY. Of course, the reason we are here is we are trying to do something legislatively. Justice Ginsburg and others have suggested that. But you are not necessarily saying, for example, that we have to create a whole new court just to handle something that we work out as a no-fault type of recompense. Is that correct?

Mr. TRIBE. No, I do not have an opinion on whether a court is necessary, but just calling it no-fault doesn't——

Senator LEAHY. I understand.

Mr. TRIBE. It doesn't mean it is going to solve itself. It is not self-executing.

Senator LEAHY. Let me ask you this: The bill offsets compensation to asbestos victims by collateral sources, for example, previous payments from disability insurance or health insurance, Medicare and so on. Now, that is a shift of millions of dollars, maybe even billions of dollars. Nobody knows for sure. The cost shift is from defendants and their insurers to other insurance companies and health care plans. It could reduce or eliminate compensation to asbestos victims.

Do you have any take on that part of the legislation?

Mr. TRIBE. Certainly I believe that it is constitutional. Whether it is the best solution, given that the resources are finite and that one is trying to conserve them, is something I don't have any expertise in or opinion on.

Senator LEAHY. You talked about the propriety of eliminating a traditional common law claim in the State court systems. I just want to make sure I understand your testimony correctly. You say that Congress has the power to do away with these kind of suits, replace them with claims in an Article I tribunal. Those new claims involve public rights. Am I correct so far?

Mr. TRIBE. Yes, you are, Senator.

Senator LEAHY. And you say these public rights are rights against the Federal Government or they are closely intertwined with the regulatory scheme?

Mr. TRIBE. Correct.

Senator LEAHY. In S. 1125, what particular characteristics of it give that Federal nexus?

Mr. TRIBE. That it is a cause of action which is entirely a creature of Federal statute and not a derivative of some preexisting common law right. That is, there is a resemblance, a family resemblance between the torts claim of an asbestos victim, whether one who comes down with mesothelioma or something less severe, and a claim through the asbestos trust fund, but it'll be a pretty disparate and far-flung family, because claims against the statutory fund are not based on any finding of fault. These claims also do not require an attribution of causation to any particular company. They do not require the same kind of proof. They are claims every bit as novel and statutory in origin as those in the *Atlas Roofing* case.

Senator LEAHY. But is it enough that the Congress just directs assets into the fund; is that enough to do it?

Mr. TRIBE. Well, the mere movement of assets, if it was the same old claims, and we said, well, those old claims are simply going to be moved to a new place, no change, they are grounded in State law. That probably would not be enough, but that is something like this statute.

Senator LEAHY. You have probably seen the plan based on the United Mine Workers Combined Pension Fund. As a practical and constitutional matter, would that work in the asbestos context?

Mr. TRIBE. Well, you say as a practical and constitutional matter. First of all——

Senator LEAHY. Let me ask you as a constitutional matter. Would it work in the asbestos context?

Mr. TRIBE. I have to admit, Senator, you will have to remind me of more of the details of the United Mine Workers solution, but it is certainly not a solution that I think could easily be extrapolated to the whole Nation with all of the diversity that exists in the sources of harm and the nature of exposure.

Senator LEAHY. I have been advised that my time is up. I am going to submit that to you, because I realize this is something that came out of the blue for you, and I will submit it for the record, and if you could get back to me on that.

Mr. TRIBE. I would be delighted to.

Senator LEAHY. Thank you.

Chairman HATCH. Thank you, Senator Leahy.

Senator—Is Senator DeWine here? Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Tribe, I thank you for your wise insights. I think they are full of value for all of us. I think it was Justice Macklin Fleming in California that wrote that perfect justice is a mirage. In the pursuit of perfect justice we lose the possibility of what justice we can achieve. I do not know how we are going to do this and how we will get to it, but when we have a legal system that is unable to compensate adequately victims, and when our analysis of that legal system shows that as much as 60 percent of the amount paid out by the defendant companies does not get to the victims, we have really got something that is indefensible morally.

Would you not agree that is the fundamental problem, one of the fundamental problems we are dealing with is that we are not getting enough of the limited resources to the victims in need?

Mr. TRIBE. I completely agree, Senator.

Senator SESSIONS. And this Congress would have a moral obligation to try to create a system that gets as much of those limited resources to the people in true need as possible?

Mr. TRIBE. I think that is right.

Senator SESSIONS. I have a difficult with the concept that somehow the Government should be a last payer here, resource of last resort. I think about the case, I represented a young widow whose husband was killed in an automobile accident. People had crossed the center line and hit him head on. They had no money. They were not compensated. You could not recover against those victims, and all over America there are thousands and hundreds of thou-

sands of cases brought or even not brought because there is no money by the criminal or whoever committed the act against them.

So do you see an erosion of that—do you see a problem if the Government becomes a payer for the wrongdoing of an individual actor, and does it impact our whole philosophy of jurisprudence?

Mr. TRIBE. Well, I suppose it would if it relieved the actor of liability, but I think I said earlier that you cannot get blood from a stone. When it turns out that these funds, maybe even the $108 billion, prove at the end of the day not to be enough, it is not inconceivable to me that some creative solution might be worked out in which the Government, in the end, provides some kind of backstop so that the concern of insufficient funds that Senator Hagel expressed is in some way met. I mean I think personal responsibility and corporate responsibility are things we have given insufficient attention to, but responsibility is one thing and leaving people completely out in the cold is another.

Having said that, I recognize that there are lots of competing demands for scarce public dollars. The taxpayer can be squeezed only so much. And so in the end there may have to be some problems that are left undealt with for the time being. That is sad but not always avoidable.

Senator SESSIONS. These companies that are in bankruptcy, the creditor committees that work with the bankruptcy judges and have certain powers, those committees could sell the assets of that company, eliminate it if they chose, but they are allowing them to continue to function, I assume, on the theory they will get more money that way than selling them.

Mr. TRIBE. Well, that is sometimes the case. That is liquidation, and a fire sale is not necessarily the best way to maximize resources, and so the whole theory of replacing the liquidation with a debtor in possession and a confirmed plan of reorganization is to try to maximize asset value. But even having done that, sometimes there is not enough there to meet the just demands of various concerned individuals with rights at stake.

Senator SESSIONS. I guess just for those that suggest that companies have not paid all they can pay, they are under the gun right now, they are under the power of the bankruptcy courts, at least 60 of them are, and all their assets could be liquidated if the court and the creditors thought that was the best way to maximize their resources; is that not correct?

Mr. TRIBE. That is correct, but of course, part of what we are trying to do, Senator, I assume, what you are trying to do, is keep that number of 60 from mounting without limit. And the way we are going now, of course, the number of bankruptcies is going to escalate dramatically, and that certainly is not a way of maximizing the effective use of assets, returning on the investors' investment and ultimately satisfying the claims of those who have been injured by the companies involved.

Senator SESSIONS. Finally, it seems to me that this mass tort—and we have had others of breast implants and certain medications, mass tort cases. Should we as a Congress now, separate from this, maybe in the cool light of day, create a system from which once liability has become clear and it is a question of damages and payment, that we could create some sort of system that would

apply in these kind of cases in the future? Is that possible in your opinion?

Mr. TRIBE. I think trying to do it, Senator Sessions, in a very generalized way, would move very far in the direction of having sort of a mass tort administrative body, some court of a rather—it might become an elephantine court in itself, a hydra-headed court. It seems to me that dealing with problems in a somewhat more surgical way, targeted way, when we have had the kind of experience that we have had with asbestos so that we now can see to the horizon and recognize that there is no end in sight, that it is a mushrooming, ballooning problem, a problem in which compromise is indispensable, and we now know that the judicial system cannot handle it.

There are very few mass torts of which we can say with that kind of confidence that it is beyond the capacity of the judiciary. When we come to that point, it seems to me then it is time for Congress to act. I think we have come to that point with respect to asbestos, but I do not think it is the case that the whole tort system is broken, that the system is broken for all cases of mass exposure to injury. I would be hesitant to reach that conclusion, and trying to create a machine that is sufficiently diversified and flexible, that it could address all of those problems, would make the political bargaining that you are having to engage in here look like child's play. That is, getting agreement on a system to replace really the judicial system in a much broader way I think might be just about impossible.

Chairman HATCH. Senator, your time is up.

Senator SESSIONS. Mr. Chairman, thank you. Thank you for your leadership and hard work on this issue.

Chairman HATCH. Thank you, Senator. I can assure you it is not child's play.

Mr. TRIBE. I say it would look like——

Chairman HATCH. No, no. I know. I thought you were supportive.

Mr. TRIBE. I am sure it is not, no.

Chairman HATCH. Senator Feinstein, we will turn to you.

Senator FEINSTEIN. Thanks very much, Mr. Chairman. I want to thank you and the ranking member as well for your work in this area. I know the frustrations that both of you have had. I know a little bit about the discussions that you have had, and I know the extraordinary difficulty that rests in this in finding a solution to this.

I wanted to just make a couple of comments, and then welcome an old friend, Professor Tribe, and ask him a question about the backstop.

But I have just been reading Senator Murray's bill, her congressional statement, record statement, as well as the May 30th letter that she wrote to you, Senator Hatch, and she actually had developed I think a very positive bill to ban the use of asbestos in America. It is amazing I think to many of us to know that asbestos is still used, despite the fact of all the problems we have, and the long line that is outside this door waiting to come into this Committee room. I would just like to indicate that it would be my intention to move her bill as an amendment in markup to any bill that does come out.

Chairman HATCH. Senator, Senator Murray is here. If I could, as soon as Senator Feinstein is finished, maybe I could call on Senator Murray because of her busy schedule.

Senator FEINSTEIN. I think that would be excellent.

Chairman HATCH. And if you will stay there for Senator Durbin's questions. Do you mind if we do that?

Senator DURBIN. That will be fine.

Chairman HATCH. Okay, I appreciate that.

Senator FEINSTEIN. I really want to salute her for her work in this area, because I think it is also very timely right now.

Now to Professor Tribe. One of the problems is the concern that $108 billion is not enough, and we are just talking about occupational asbestos. We are not talking about all the other people out there, whether they be children or housewives or anyone else that comes into contact with asbestos and gets very sick from it, but the question that I have is how do we provide after the 25 years is up? And in 1996 the Supreme Court decision in *U.S.* v. *Winstar* may offer an option. As I understand the case, *Winstar* held that future congresses may be prohibited from passing regulations that interfere with an existing contract between the Government and a private business, which might offer the opportunity to make a contract for a voluntary payment from year 26 to year 50 from defendant companies, and that we would set the level of that voluntary payment, and the exchange would be a nonreturn for that period to the tort system. Would that be held legally viable?

Mr. TRIBE. I think with one qualification I would say that it would be. Let me just go back for a moment to the description you gave of the *Winstar* case. It is not so much, as I understand that decision, that Congress can be prevented from passing new rules and new laws because someone's contract with the Government says that they have a special deal. That is, Congress is always free to legislate, and one Congress cannot bind a succeeding Congress. But what Congress can do is authorize an official of the United States unmistakably and clearly, like the administrator in a scheme of this kind, or an insurance commission that is set up, the Asbestos Insurance Commission, to make specific arrangements with particular parties under which the risk of financial loss resulting from new congressional legislation no longer falls on the private contracting party. In effect, the Government insures that party against the loss that the party will incur if a future Congress changes its mind. That kind of arrangement can be binding on the United States, and the holding in *Winstar* was that, even though Congress acted within its rights in passing FIRREA, despite various promises about goodwill, those particular savings and loan institutions that were induced by government's specific loss-shifting promise to take steps in reliance on that promise were to be held harmless, and could sue the United States for the damages that they experienced when, because Congress saw a different or a better way of doing business, they suffered losses. That kind of arrangement, I think, could achieve the sort of thing you are talking about, that is, it could make the voluntary bilateral agreements effectively enforceable no matter what Congress did because the United States Treasury would make good the loss.

Senator FEINSTEIN. So you are saying the Treasury would become the bank, so to speak, at the end of the 25 years. That is not what I am suggesting. What I am suggesting is could there be a contract entered into after that period of time, that voluntary payments from the defendants would continue?

Mr. TRIBE. There is no question that could be done. The defendants would certainly be bound, but I am wondering what the quid pro quo is, that is, what are they getting in return?

Senator FEINSTEIN. If I understand it, the concerns is that the companies involved, after the 25-year period do not want to return to the tort system. Ergo——

Chairman HATCH. They do not want to have unlimited liability. That is what the companies are concerned about.

Senator FEINSTEIN. I beg your pardon?

Chairman HATCH. They want to have certainty. They do not want to have unlimited liability. They want to have certainty in what—if they are going to put up this kind of money, $108 billion, they sure as heck want certainty that that is all they have to put up.

Senator FEINSTEIN. But let me just—I see the red light. Just for 1 minute. The fact is, asbestos is still legal. It is still being used in building materials in one way or another, and yet—so the possibility of this becoming an ongoing and continuing problem is there. So to say just for 25 years we are going to solve the problem and then it is all gone, I do not think that works, Senator. It seems to me there have has to be some proviso——

Chairman HATCH. Let me assure the Senator that I understand there is an end game here that I have to resolve. The trade union movement is upset about it, and frankly, we are going to have to come up with some way of resolving that. I have to resolve it in a way that brings people together, not tears us apart.

Senator FEINSTEIN. All I am asking is if that is legal, if it would be legal to have an ongoing voluntary contribution commitment for another period of time.

Chairman HATCH. He said it is.

Mr. TRIBE. I do not have any problem with that.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

Chairman HATCH. But the companies do, as you can see. That is the problem. And I have got to be able to bring both sides together to pass this so we can get it through the House.

Senator LEAHY. As we have always said, everybody has got to give a little bit or even a lot of bit to get a bill through here. We are not quite there yet. I am encouraged that we are getting closer all the time. I think people of goodwill on both sides of the aisle, as well as all of the affected parties, are trying to bring us together.

Chairman HATCH. Well, good. I intend to come up with some sort of an end game. We are going to have to do that to bring everybody together, but hopefully that will bring them together if we can do that. And we will just have to see what we can do and what will get us the most Senators voting for this because I would like to be able to get it through the Senate and then hopefully get the House to take it as well. It is a tremendously difficult set of problems.

Mr. TRIBE. I do not envy you the task.

Chairman HATCH. It is a tough task. If you do not mind waiting, just stay there at the table.

Mr. TRIBE. I do not mind at all.

Chairman HATCH. I would like to call on Senator Murray. I apologize, Senator Murray. I thought we would be through——

Mr. TRIBE. I would be happy to move.

Chairman HATCH. Stay right there, stay right there.

I thought we would be through a little earlier, and I apologize to you, so we will take your statement.

Senator LEAHY. Mr. Chairman, Senator Feinstein mentioned Senator Murray's legislation, which I have also co-sponsored, and I thought Senator Feinstein's comments were ones I certainly ascribe to.

Chairman HATCH. Senator Murray.

STATEMENT OF HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator MURRAY. Thank you very much, Mr. Chairman, for allowing me to testify at this important hearing today on an issue that obviously has consequences for thousands of Americans.

And I do want to thank Senator Leahy for his support for my bill to ban asbestos, and Senator Feinstein for her comments just previously to this as well.

Mr. Chairman, I do have a longer statement I would ask to add to the record. As you know, I have already outlined many of my concerns in a letter to the Committee dated May 30th.

Chairman HATCH. Without objection, we will put it in the record.

Senator MURRAY. But today let me emphasize my greatest concern, and that is, if we are going to protect companies from asbestos lawsuits well into the future, then we must also protect all current and future asbestos victims into the future as well. If Congress is going to prevent any future lawsuits, then Congress must try to prevent any more asbestos casualties by banning the use of asbestos. More than 30 other countries have banned asbestos.

Mr. Chairman, this is the elephant in the room for this legislation. It is the most obvious, yet least discussed aspects of asbestos.

In 2001 America consumed 13,000 metric tons of asbestos in brake pads, gaskets and roofing sealants. Like most Americans I thought asbestos was already banned. The Environmental Protection Agency banned it in 1989, but the asbestos industry sued and that ban was overturned in 1991. That is why I introduced the Ban Asbestos in America Act, S. 1115. My bill would finally ban the use of asbestos and prohibit the import of asbestos products. S. 1115 creates a National Mesothelioma Registry to track where Americans are still developing this deadly disease. The bill would require us to raise awareness through an education campaign. In addition, it would require Federal agencies to improve protections for workers and consumers, and I greatly appreciate the support from Senators Leahy and Baucus, who are co-sponsors.

I do not believe that asbestos can be safely used in most consumer products. The terrible legacy of asbestos disease has shown us all that. According to the Occupational Safety and Health Administration, about 1.3 million workers are still today exposed to asbestos on the job. Between fiscal years 1996 and 2001, 3,000 of

OSHA's inspections and more than 15,000 of its violations involved asbestos. Ultimately, the best way to protect people from asbestos is to ban it. I do not see how Congress can end liability for companies that used asbestos while still allowing asbestos to be legal in America. Congress needs to pick up where the EPA and the courts left off by finally fully banning the deadly material.

Mr. Chairman, let me just talk briefly about my other concerns about S. 1125, which is before your Committee today In order for an asbestos liability reform bill to be truly fair to victims, it must ensure adequate compensation for all the people that are hurt by asbestos.

I want to share with the Committee today a photo that I brought from the late 1970's, and it is of Justin and Tim Jorgensen. These boys, as you can see, are climbing on waste rock. It is from the Western Minerals Plant in Minneapolis, Minnesota. This plant processed asbestos contaminated vermiculite from W.R. Grace's plant in Libby, Montana. The company knew, when it bought that mine in 1963, years before this photo was taken, that the mine was full of asbestos, but chose not to warn the workers or their families. The Jorgensens' grandparents lived across the street from Western Minerals. The pile that you see Justin and Tim playing on contains up to 10 percent friable tremolite asbestos. Their father, Harris Jorgensen, died at the age of 44 from asbestosis and lung cancer.

Under the bill being considered, if Justin and Tim get sick from asbestos from playing on this rock, neither one will receive a dime. Mr. Chairman, this picture breaks my heart. These kids were just playing outside and they were exposed to asbestos like many other children in Libby until last year. We should not abandon them in this bill.

Asbestos exposure can also occur when people work on their cars or in their homes. I have a constituent in Spokane, Washington, Mr. Ralph Busch, who while renovating his home, unknowingly was also regularly disturbing asbestos contaminated attic insulation. He is now very fearful that 1 day in the future he will suffer from asbestos related diseases. And Ralph Busch is not alone. As many as 35 million homes, schools and businesses could have this asbestos tainted zonolite insulation. In fact, just a few weeks ago, EPA, finally after much urging, launched an education campaign warning people not to disturb this material if it is in their attics.

Mr. Chairman, under the bill before you people like the Jorgensens and Ralph Busch would not get any compensation, and companies like W.R. Grace, which knowingly exposed workers and their families to asbestos, would be protected. I hope you will consider amending your bill to take in a much larger universe of existing and future asbestos victims.

In addition, the legislation sets restrictive medical criteria to determine who would qualify for compensation. I strongly urge the Committee to redraft the medical criteria section of this bill. The Committee should base the criteria on the latest information from the American Thoracic Society and from the doctors who have been working in Libby and know this better than any of us.

Finally, the total size of the trust fund, even at 108 billion, may not be sufficient. There is no Federal backstop to guarantee compensation like the FDIC does for a bank, to ensure that future vic-

tims would be covered, and furthermore, the funding levels to me seem arbitrarily low. Any legislation to fix the litigation crisis must be balanced in its protections for present and future asbestos victims. Protecting these people is at least as important as protecting companies from liability. We need to ensure that an end to asbestos liability also means an end to the creation of new asbestos victims. This should be the charge to this Committee.

Thank you very much, Mr. Chairman, for allowing me to testify before you today on an issue that is of great importance to me and to my constituents.

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

Chairman HATCH. Well, thank you, Senator. As you know, your staff is working with our staff to see what we can do. And there is only so much we can do, but we are going to try and do the very best we can.

Senator MURRAY. Thank you very much.

Chairman HATCH. Thank you for coming.

Senator LEAHY. And, Mr. Chairman, I thank you also for your courtesy in making sure Senator Murray could testify. I think it is very important what she is saying. If we don't have a bill that covers spouses and children who were exposed to asbestos outside the workplace, as we see in this picture, home or in the community, that bill is not going to have my support. And I would not work to pass it unless it does have the spouses and children covered. So I thank you very much for your statement.

Senator MURRAY. Thank you very much.

Chairman HATCH. Thank you.

Senator LEAHY. Mr. Chairman, could I put into the record statements by Senators Baucus and Kohl?

Chairman HATCH. Without objection, we will put those in the record at the appropriate place.

Senator Durbin? Or, excuse me, we better go to Senator DeWine. I didn't realize——

Senator DEWINE. I don't have any questions.

Chairman HATCH. Okay. Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman, and thank you for your efforts on this bill.

Let me say at the outset that my background before coming to Congress many years ago was in trial law practice, and I don't profess to be an expert at it, but I was exposed to it for some period of time.

Mr. TRIBE. Like being exposed to asbestos?

Senator DURBIN. I hope it was a more salutary——

Chairman HATCH. It was worse than that.

[Laughter.]

Senator DURBIN. But I do want to commend Senator Hatch, though I have some serious disagreements with major portions of this bill. I think that he has provoked the debate which needs to take place. Twenty years ago, when I came to Congress in the House, I was invited by a company known as Johns Manville to

come out to their national headquarters in Colorado. Of course, they are long gone now. Two years ago, U.S. Gypsum Company in Chicago, Illinois, came to me and said unless something is done about asbestos, we will be gone. And they are.

I believe in the court system. I believe in the tort system. I believe that people have a right to recover. We have reached a national crisis when it comes to asbestos, and I do believe that if there is going to be any compensation for the many victims, we have to do something. And I am looking for that solution, and that is why I come to this discussion with an open mind in the hopes that we can truly have a markup of this bill that is bipartisan and open. And I have said this to Senator Hatch personally, and I will repeat it now. I want to be a positive and constructive part of that conversation. I hope we can reach that point.

Let me address two or three points here that particularly stand out as I look at the first draft on the Hatch bill, Section 134, the collateral source rule. I remember collateral sources as a practicing attorney because it basically said we are not going to penalize you as a plaintiff if you had the foresight to buy protection. If you decided that you were going to have health insurance to pay your medical bills or life insurance to protect your family, if someone wrongly injured or killed you, that person, the defendant in the lawsuit, won't benefit from your good judgment and your personal sacrifice.

But this bill, unlike the law in every State in America, says exactly the opposite. It says that the defendant corporations found responsible and liable for the injury, for the death, will benefit if the person who was injured had the foresight and made the sacrifice to have collateral sources of compensation: health insurance, life insurance, Medicare, Medicaid. The list is pretty long. The only exception, as I understand it, is workers' compensation and veterans' benefits.

Tell me, Professor Tribe, how does this square with due process and equal protection that we would say in this one law we will provide that collateral sources can be deducted from a defendant's liability?

Mr. TRIBE. Well, until you came to your question, Senator Durbin, I was troubled because, as a matter of policy, I think there is much to be said for the trend in the States not to penalize people for having foresight, and certainly not to reward someone who has been found liable for the foresight of the victim.

Of course, in this case, we don't have a finding of liability. We don't have a finding at all. We have an administrative scheme in which approximation is the name of the game. And when you ask not is it a good idea but how does it square with due process and equal protection, I think there, whether one likes it or not, one would have to turn the clock back to well before 1937, at a time when the Supreme Court of the United States treated the Constitution as imposing very stringent limits on the kinds of lines that could be drawn, the kinds of compromises that could be reached with respect to economic matters.

The law now looks very different. The law now basically says that unless the legislature is drawing a classification that is itself suspect in the sense that it draws on characteristics that have been

the source of prejudice and victimization—race, religious minority, perhaps disability—or, on the other hand, the law deals with fundamental personal rights—speech, religion, certain aspects of privacy—unless one of those things is true, the fact that the law may draw lines that the ideal legislator in the sky with infinite resources might never draw, the fact that it might not seem optimal not to reward foresight, that doesn't bear on constitutionality.

Take the railroad retirement system. In a case called *Railroad Retirement Board* v. *Fritz*, Congress drew some very rough and ready lines. It drew distinctions ultimately between a group of railroad workers who were lucky enough to have an effective lobbyist at the bargaining table and, therefore, they were ruled in, and a bunch of others were ruled out. Congress was literally bamboozled in that case. There was no particular rationale for that line, but the Supreme Court by an overwhelming majority said if that was the test, that you have to have a really good reason for each line that is drawn when you are making these difficult economic compromises, and that Congress has to know exactly what it is doing in every detail, very few laws would survive. That was the Chief Justice of the United States speaking. I don't think there is a constitutional problem.

Senator DURBIN. Well, Professor Tribe, you are the acknowledged expert, and it has been many years since I took my con law course a few blocks away, so I am not going to quarrel with that. But I am going to tell you that I think there is something fundamentally wrong then with this bill. If we can take an established precedent, an established rule of law that has been found by 50 States to be a fundamental of fairness in America, that says if you make the sacrifice, if you have the foresight to have health insurance, you will not be penalized, you will not lose your right to recover as a person would have in a court of law when you find out that someone else has injured or killed you. And this bill, this proposed law, would make that distinction. And I think—let me just give you a couple examples, and, frankly, they are not my own. They come from a witness who will be testifying later, but I have read through them, and they are compelling.

A mesothelioma victim who receives medical treatment in excess of $750,000, which I do not believe is out of the realm of possibility, that is covered by their own medical insurance that they had would receive nothing under this bill.

A 49-year-old non-smoking lung cancer victim who underwent $350,000 in surgery and chemotherapy and radiation would have his compensation capped at $50,000 because he has already received $350,000 from his own health insurance.

That just isn't the case in any State in the Union in any physical personal injury case or a wrongful death case.

Mr. TRIBE. Senator, without undertaking to defend the policy of this part of the bill, I just want to say that you are comparing apples and oranges a little here. It is not the case within the tort system when we are trying to do something very different. We are trying to figure out who is really responsible for this person's harm and whether the responsible party fell below a certain level of care. We are putting all kinds of burdens of proof on the plaintiff, which

this system doesn't do. And we have a whole bunch of rules that go along with that.

Now, the fact that in that kind of system the States have marched to a different drummer and have said when you are going to be—trying to achieve individualized justice, it just isn't fair to penalize someone in this way, you can't quite jump from that to the conclusion that when you are trying to achieve a degree of certainty and a degree of predictability and conserving finite resources, that some of the compromises that you make are not going to be very fair.

Senator DURBIN. I don't disagree with you——

Mr. TRIBE. It doesn't make it analogous to the tort system.

Senator DURBIN. I don't think the creation of a no-fault system, which clearly benefits a plaintiff—and you have outlined it. The burden of proof is dramatically less in a no-fault system. But I don't think creating a no-fault system means that the aggrieved, injured, perhaps deceased party gives up everything. And in this bill——

Mr. TRIBE. Surely not.

Senator DURBIN [continuing]. They clearly give up a lot because they are capped in their recovery, their individual recovery. There is a limit to how much they can recover under the system.

And yet we have added another factor here with the collateral source rule that I think goes beyond penalizing. It really is totally and fundamentally unfair under the system to ignore the reality that some defendants and this system will get off the hook because a union bargained and bought health insurance to protect an employee who died an excruciating and long death with lung cancer.

Mr. TRIBE. You are preaching to the converted if you are asking me if I had the power, if I were the legislator of the world, would I avoid that? Sure. But no one of us has that power.

Senator DURBIN. Well——

Mr. TRIBE. And if you solve this problem, the question is what other problem are you going to create. That is, if you give these added dollars—which I would love to see these victims get—where are they going to come from exactly? They might come from another set of asbestos victims. I don't know that they will. But I take it that the problem that all of you have is to figure out how best to minimize the total of injustices, and there are going to be plenty no matter what is done.

Senator DURBIN. Fair enough. But I think we have that responsibility

Chairman HATCH. Senator, your time is up.

Senator DURBIN. I think we have to stand behind some fundamental principles that 50 States agree on in collateral sources.

Thanks for your testimony.

Chairman HATCH. Senator, your time is up.

Let me just mention one thing before I go to Senator Feingold. You know, Carter Phillips, who also is an excellent lawyer and constitutional expert, wrote to us and sent a statement in, and basically he said, "In order to address the underlying causes of the asbestos litigation crisis and bring some rationality and equity to compensation of the injured, Congress must engage in some line-drawing." And then he quotes directly from the *Beach Communica-*

tions case, which said, "This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable."

Do you agree with that?

Mr. TRIBE. Well, I agree with that, but I do want to say—and I imagine you agree with this, Mr. Chairman. Even if you knew for sure that no court in the world would touch this law, because perhaps somebody would say, oh, this is all a political question, you still have to worry, obviously, about the Constitution as a fundamental charter that binds this body as well as the court. So that if I thought it was fundamentally a deviation from principles of rock-bottom fairness, even in an administrative scheme, I think that would bear ultimately on the constitutional question, even though Carter Phillips and I agree that as a matter of judicial institutional role, the courts are simply not going to touch that kind of calibration.

Chairman HATCH. So it is constitutional. Let me just say this: We can't solve every problem with this bill. You have made that case, I think, very persuasively. With regard to children and families who may or may not ever suffer from asbestosis, this bill would not, I do not believe, prevent them later, if they actually could make a case, from utilizing the system.

So what we are trying to do here is solve the problem for workers who have been exposed to it. And, you know, it is—like you say, perfection can sometimes be the enemy of the good. And if we could get this done, it would be very good for society. And we intend to do it.

I think Senator Murray brings forth a good point when she think that asbestos ought to be banned, and probably she will win on that, and we may very well put that in this bill. But that is where we are.

Let me go to Senator Feingold.

Senator LEAHY. When you bring that up, if I might, Mr. Chairman, we also have the concern that this might repeal FELA for railroad worker asbestos claims. I don't know if that is what is intended or should be intended. I definitely don't want it to be intended. But the way it is written, it would effectively repeal the Federal Employees Liability Act with respect to Federal workers' claims for injuries, for railroad workers' claims for injuries due to asbestos. That is why we want to be very careful when we write this because if you start taking care of people's rights, that is important, but if you also cut off other people's rights, that has its own consequences.

Chairman HATCH. Okay. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, I hope to come to ask some questions of panel three, and I don't have any at this point for Professor Tribe. It is good to see you again.

Mr. TRIBE. Good to see you, Senator.

Chairman HATCH. That would be fine.

Senator FEINGOLD. Let me just comment briefly. I certainly agree with Senator Durbin's remarks. It is really quite exceptional to hear the level of concern on this issue from all sides. It is almost like a fever pitch kind of issue. And so I am hoping to spend more time at the hearing later, and I am very pleased that the hearing is being held.

This is a very important issue with very difficult and complex problems to try to work through. I think most of us can agree that it would be a wonderful result if we could craft a global solution to the asbestos liability issue. But that solution must be fair and equitable to all the stakeholders, companies that face liability, their insurers, and, of course, those who have been injured by asbestos, whether their illness is now apparent or will arise in the future.

And I also acknowledge that a lot of people have been working very hard on this, and I commend them for their efforts. It seems to me, though, that the current bill falls short in a number of ways from being the actual global solution that we can all unite around. But I am hopeful still that the process will yield a consensus bill that we can all support.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

We have been delighted to have Senator Carper here, who has taken a particularly important interest in this bill, and we are glad to have you here, Senator.

Senator CARPER. Thank you very much.

Chairman HATCH. Thank you.

Well, Professor Tribe, let me just say this: Fortunately, as the Supreme Court's repeated calls to action on this particular issue suggest, the Constitution does give Congress broad powers to address national economic issues such as the current asbestos litigation morass. Seth Waxman wrote a statement as well, the former Solicitor General under the Clinton administration, for whom I have a very high opinion, as I do of you. He said, "Some claimants might argue that they will receive less under the new national system than they might have recovered, even net of attorney's fees and other costs, by pursuing their claims against various potentially responsible defendants through the tort system. The courts should not, however, be receptive to such arguments if they are raised in an attempt to challenge the constitutionality of the act. No individual claimant has any vested right in the continued existence or application of any particular rule of law when Congress has otherwise validly chosen to preempt that law as part of its decision to enacted a comprehensive national solution to a national problem."

Do you differ with any of that?

Mr. TRIBE. Not at all.

Chairman HATCH. He also said, "While the funding allocation mechanisms must not, of course, be arbitrary, irrational, or fundamentally unfair, the courts clearly would not hold them to any standard of 'mathematical precision.' There is, accordingly, no constitutional requirement that Congress allow the perfect to become the enemy of the good in the process of designing a comprehensive solution to this complex national problem."

You agree with that as well?

Mr. TRIBE. It is very much my view, Senator.

Chairman HATCH. Well, the two of you are great leaders in this field, and we are just very grateful that you would take time from what we know is a busy schedule to come here and help us to understand this better. Thank you, sir.

Mr. TRIBE. I am grateful to you, Senator.

Chairman HATCH. We are honored to have you here.

Mr. TRIBE. Thank you, Mr. Chairman.

Chairman HATCH. Thanks so much.

Senator LEAHY. Take care.

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

Chairman HATCH. We are going to keep going until about 12:30, and we will break for about an hour. I apologize to those of you who are here to testify, but let's go to panel three.

Dr. James Crapo is Professor of Medicine at National Jewish Medical Research Center Hospital in Denver, Colorado. He has treated many patients exposed to asbestos and has extensive experience in asbestos-related illnesses.

Dr. Laura Welch is the Medical Director for the Center to Protect Workers Rights. She has treated many workers with asbestos-related disorders as part of her medical practice.

Dr. John E. Parker is Chief of Pulmonary and Critical Care Medicine at West Virginia University Hospital. In addition to treating numerous asbestos patients, he has extensive experience with the ILO classification system and the NIOSH B-reader program.

So you doctors, we are very grateful to have you here today to help us to understand this better and appear before the Committee. So why don't we get started with Dr. Crapo and move to each witness in the order that they were introduced, Dr. Welch, then Dr. Parker.

I have to step out for a minute, but I will be right back, and I naturally have read your statements. So we will turn to you, Dr. Crapo; then as soon as he is through, Dr. Welch; as soon as she is through, Dr. Parker.

STATEMENT OF JAMES D. CRAPO, M.D., PROFESSOR OF MEDICINE, NATIONAL JEWISH CENTER AND UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER, DENVER, COLORADO

Dr. CRAPO. Thank you. Good morning, Chairman Hatch, Ranking Member Leahy, and members of the Committee. I really appreciate the opportunity to be here to share my views today. I am Dr. James Crapo. I am currently professor and chairman of the Department of Medicine at the National Jewish Medical and Research Center in Denver, Colorado. It is affiliated with the University of Colorado. I am a board-certified physician in internal medicine and in pulmonary disease.

I am here to speak to you about some of the provisions of S. 1125, and I have provided a more detailed written statement, which I ask be included in the record.

Senator LEAHY. [Presiding] Without objection.

Dr. CRAPO. Upon review of the medical criteria in S. 1125, it is my opinion that this legislation is drafted to appropriately include those individuals who are genuinely sick from asbestos exposure and who should recover from this fund.

One of the primary diseases caused by asbestos exposure are asbestosis. It is a type of pulmonary fibrosis that can produce severe breathing impairment and even death in some individuals. However, in most cases it has few or minimal symptoms. Second, asbes-

tos exposure causes lung cancer and it causes mesothelioma, which is a very rare tumor of the lining of the chest cavity and the lining of the abdomen.

These are the major health effects of asbestos, and they are the ones to which this bill is appropriately targeted. There are also asbestos-related pleural changes—pleural plaques and pleural thickening—that are considered markers of asbestos exposure. These generally do not have an association with impairment, and they have not been identified as a cause or a precursor of more serious conditions. In addition, there are a variety of other cancers that have been associated with asbestos, but there, in my opinion, is not clear scientific or medical evidence that asbestos exposure is the cause of those cancers.

The medical criteria in this bill, while in some cases a little bit overbroad, are appropriate and reasonable in the context of a national solution to the asbestos litigation crisis, in my opinion. I would like to discuss some of the diagnostic criteria in the bill.

As a physician, I believe the criteria to be, in general, appropriate. In particular, I agree that the diagnosis of an asbestos-caused disease should be made with the requirement that a physician exclude other likely causes of the claimant's condition. This is important because asbestos is only one of the causes for each of the diseases being considered.

With respect to medical criteria, the bill establishes eight categories of asbestos-related diseases. Levels I through IV generally address non-cancerous conditions, while Levels V through VIII deal with cancers. Levels I and II cover asymptomatic conditions, including pleural plaques and pleural thickening, for which medical monitoring is provided but no other compensation. Compensating individuals in these categories could divert funds away from people who are genuinely sick and transfer them towards people who are basically unimpaired.

Level III is the first category that provides a compensatory award, and the medical criteria for Level III seem appropriate in the context of a compromise to me. The measure of impairment, however, is fairly broad and would allow many people to qualify for an award even though their breathing impairment is due to diseases caused by factors such as smoking.

In addition, the diagnosis of significant occupational exposure is quite broad, and it treats persons in various occupations and industries today as if they were the same as occupations and industries that had vastly different exposures. For example, exposures in the 1980's and 1990's are not equivalent to the heavy exposures that occurred in the 1940's, 1950's, and 1960's, primarily due to Federal regulations that were put in place that brought down the levels of occupational asbestos exposures. In fact, the Federal regulations largely eliminated the really high levels of exposures were initially strongly associated with very high incidences of asbestosis and lung cancer. Because the types of exposures are different in different decades in our country, the bill should probably be designed to account for those historic differences in exposure conditions.

Cancer claims are also divided into four levels. Level V consists of other cancers, primarily cancers of the larynx, the pharynx, the esophagus, and the stomach. I think it is important to recognize

that the weight of the medical evidence is that asbestos is not a cause of these cancers, many of which are very prevalent today. Including this category in a national asbestos program, if not constrained appropriately, creates the risk of compensating claimants whose medical condition is not associated with asbestos exposure. I think it is fortunate that Level V does not include colorectal cancer, which is also has a very weak link to asbestos exposure and is a very widespread cancer in the country today.

Levels VI and VII deal with lung cancer, and I have concerns with Level VI because it requires neither a significant occupational exposure nor underlying asbestosis as an indicator of an asbestos-related cancer. There is no causal link to asbestos as a cause of the lung cancer in Level VI, and the weight of the medical evidence is that lung cancer cannot be attributed to asbestos unless asbestosis is present or at least enough exposure to have caused asbestosis.

Also, there is some concern that compensation is limited to non-smokers, defining non-smokers as individuals who have quit smoking 12 years prior to diagnosis. This is problematic because heavy smokers continue to have an elevated risk of cancer even decades after stopping smoking.

Level VII, on the other hand, I think is appropriate and subject to my reservations of the broad definition of significant occupational exposure, I think it is appropriate.

Level VIII addresses mesothelioma claims and requires only some exposure to asbestos prior to December 31, 1982. Although the language of the bill is not clear, I think the bill should be interpreted as requiring a discrete and identifiable exposure for mesothelioma that goes beyond background. A majority of mesothelioma cases in men are caused by asbestos exposure, but a majority of the cases in women are considered to be idiopathic, or not caused by asbestos exposure.

So, in summary, I believe that S. 1125 will allow compensation for virtually all asbestos victims, although some provisions in the bill should be tightened to protect the integrity of the fund and avoid compensating those whose medical problems are not related to asbestos.

The medical criteria in the fund appropriately allow most fund resources to be directed to the appropriate categories, which are severe asbestosis, lung cancer, and mesothelioma. I think this is an excellent first step to providing a solution to our asbestos litigation crisis and should result in fair compensation to victims of asbestos exposure.

Thank you for listening to my testimony. I look forward to your questions.

[The prepared statement of Dr. Crapo appears as a submission for the record.]

Chairman HATCH. Well, thank you so much, Dr. Crapo. We know that you are personally serving as chairman and professor of the Department of Medicine at the National Jewish Center and University of Colorado Health Sciences Center. Dr. Crapo graduated from the University of Rochester School of Medicine in 1971, subsequently trained at the Harbor General Hospital in California, the National Institute of Environmental Health Sciences, and Duke University. And prior to his tenure at the National Jewish Center,

he served for over 20 years on the medical faculty at Duke University. Of those 20 years, Dr. Crapo served for 17 as chief of Duke's Division of Pulmonary and Critical Care Medicine. And, of course, you do maintain affiliation with several professional societies. You are board-certified in internal medicine and pulmonary diseases and have published all kinds of articles and several textbooks. So we are honored to have you here.

We are also honored to have Dr. Welch here. Dr. Welch also has a great deal of experience, and I don't quite have the same information on Doctor—well, I have got it. Dr. Welch is the director for the Center to Protect Workers Rights. She has personally treated many workers with asbestos-related disorders as part of her medical practice, and so we are very interested in your testimony as well here today, and we will turn to you at this time.

STATEMENT OF LAURA WELCH, M.D., MEDICAL DIRECTOR, CENTER TO PROTECT WORKERS RIGHTS, SILVER SPRING, MARYLAND

Dr. WELCH. Thank you. Thank you, Chairman Hatch, Senator Leahy, and other members of the Committee. I want to thank you for the opportunity to testify here today. As you mentioned, asbestos-related disease is an area that I have been involved in the whole time I have been practicing medicine.

My name is Laura Welch. I am a physician. I am board-certified in internal medicine and occupational medicine. I have been on the faculty at Yale University and at George Washington University School of Medicine prior to my current position as medical director for the Center to Protect Workers Rights here in the Washington, D.C., area.

I think it would help, before I really talk about the specifics of the bill and medical criteria, to just state a couple sentences why we are here today.

From 1940 to 1979, more than 27.5 million workers were exposed to asbestos in shipyards, manufacturing operations, and construction work, among other activities. Hundreds of thousands of workers and their family members have suffered or died from asbestos-related cancers and lung disease, and more than a million more cases are expected. In this year alone, over 10,000 people will die of asbestos-related disease. These are not insignificant cases. These are not people without impairment. These are people who are going to die, and we can use all sorts of different projections, and everybody agrees on those numbers.

So let me turn to the medical diagnosis, and I want to thank you, Chairman Hatch, and everyone else on the Committee for your hard work up to now to getting this bill to this point. As you know, I have been involved in some of the discussions that were going on to try to develop a consensus in this area.

The current bill mirrors in large measure the medical criteria, the Manville 2002 Trust Distribution Process, but I am concerned that it adds some additional requirements in addition to the medical criteria that narrow the group of workers who are eligible and make the application process more burdensome on people who are currently applying to the Manville Trust. It also sets levels of compensation that are lower than the total claims values and awards

that are available. So, in my opinion, we have to first look at the medical criteria, see what compensating those people fairly will cost, and set a bill that is based on fair medical and claims values.

As now constructed, I think the bill will exclude the vast majority of workers with asbestos-related diseases from receiving any compensation and provide relatively low levels of compensation for workers with significant impairment and fatal diseases.

The Manville 2002 TDP criteria were a revision from 1995, and I think that the 1995 Manville medical criteria were medically sound. The changes between 1995 and 2002 remove the tests that are most sensitive for the diagnosis of asbestos-related diseases, which include oxygen diffusion and CT scans. Such changes may be appropriate in the context of a bankruptcy trust that is running out of money and has to decide how to allocate limited resources, and that is a decision to be made by that trust. But a new system should be soundly based in medicine and use the medically recognized diagnostic tests that are recommended by the American Thoracic Society and by the American Medical Association.

The American Medical Association has guidelines for the evaluative impairment for lung disease, and I think that any bill that is crafted should be based on those guidelines. I think the current bill does deviate in some significant ways from the AMA guidelines.

Let me give you an example. The Manville 2002 TDP and S. 1125 require what is called a 2/1 film as part of the definition of severe asbestosis. That is using a classification system that is used internationally to grade the amount of scarring on x-ray. And a 2/1 film is very significant scarring. But using that as a determination of the amount of impairment in the lung is really not medically based. The density of scarring from asbestos on the chest x-ray doesn't correlate well with impairment, and we can use pulmonary function tests to measure impairment. The x-ray can be used to determine that asbestos-related disease is present, but I think we should then use the approach recommended by the AMA to determine if impairment is present and how significant the impairment is.

Let me give you an example of the impact of this. If you use the AMA Guides, at the highest level of impairment you can have a worker who has lost more than 50 percent of his lung function, and in that guide they describe the worker would be unable to perform activities of daily living, such as getting dressed, taking a shower, cooking dinner, or doing any minimal work around the house.

If you take a man with clear asbestosis using ATS criteria for diagnosis and have him in that impairment category, he could still have a very high likelihood of still being in Class III under S. 1125. The payment schedule is $40,000. He will have received more than $40,000 from Social Security disability because he will be eligible for SSDI given those pulmonary function tests. So you are taking someone who has asbestosis, has a significant impairment, and he gets no compensation under the bill, and that is because it is keyed to that x-ray criteria for entry. It is something we can fix. It is something that is in the Manville Trust. But it is really not medically based, and I think we have to go back to the beginning and make sure that these criteria are very medically based.

One other thing that I am really concerned about is this bill states that the physician should independently verify the duration, proximity, regularity, and intensity of exposure. The physician has no way of knowing what that individual worker did 30 years before. There is not air monitoring. There are no independently verifiable ways, and it is generally not something the physician does. The physician takes a history from the worker and uses his or her experience and judgment to determine whether that history of asbestos exposure is sufficient to cause a disease. So a requirement for independent exposure verification I think is really an impossible one that could be a real problem in this bill.

This bill incorporates the 2002 criteria for lung cancer, which are probably in some ways okay, but sets different levels of compensation for those. This essentially would set a value of $100,000 for lung cancer in a smoker, where in the current system, in the Manville system as well, it is more in the range of $300,000. Smoking and asbestos act in concert together to cause lung cancer, each multiplying the risk conferred by the other. And it is important to treat smokers fairly. We should not assume that every lung cancer that occurs in a smoker is not contributed to by asbestos. And any compensation system really must affirm when a worker has significant exposure to asbestos, however we define that, he is eligible for compensation for lung cancer.

Then the Level II, as defined by S. 1125, includes workers with significant impairment. There are people in there—it is not people who are asymptomatic. The way the bill is defined, people with significant impairment can be in that category, and I am particularly concerned about people who have definite asbestosis but have asbestosis combined with some other lung disease. This group of workers who may have a combination of asbestosis and disease from smoking are currently getting compensation in the Manville Trust, from the current tort system, and I don't think it is appropriate that we should completely deny those people compensation. But under the current bill, someone with definite asbestosis but who also has some disease from smoking would receive no compensation.

Then finally, we must remember that not everybody is going to fit the specific criteria set by the legislation. The Manville Trust and other bankruptcy trusts have a physician panel that allows individuals to come in for medical review if they can demonstrate that they meet in essence the criteria that—the intent of the legislation, even though they may not have the specific x-ray finding of a specific pulmonary function finding. And I think we should be sure that that is included because you can't write medicine into a bill. There needs to be a way for an independent review for people who don't meet the criteria.

So I appreciate the opportunity to appear before the Committee today, and I hope I have helped you understand that these diseases are real and affecting thousands of Americans, and that we can use the accepted medical criteria set by the AMA and the American Thoracic Society to guide us. I think a system that is based on these medical criteria will provide fair, timely, and good compensation to workers and others who have been made sick as a result of asbestos exposure. So thank you very much.

[The prepared statement of Dr. Welch appears as a submission for the record.]

Chairman HATCH. Well, thank you, Dr. Welch.

We will turn to Dr. Parker now.

STATEMENT OF JOHN E. PARKER, M.D., PROFESSOR AND CHIEF, PULMONARY AND CRITICAL CARE MEDICINE, ROBERT C. BYRD HEALTH SCIENCES CENTER OF WEST VIRGINIA UNIVERSITY, MORGANTOWN, WEST VIRGINIA

Dr. PARKER. Thank you, Mr. Chairman. I appreciate the opportunity to talk to the Committee, and I am flattered by the invitation. Again, I am John Parker. I am a board-certified internist as well as a pulmonologist and a NIOSH-certified B-reader. I am currently the professor and chief of Pulmonary and Critical Care Medicine at West Virginia University. In my current position, I care for patients at the hospital and also teach medical students, residents, and fellows. From 1976 through 1998, I held various positions in the United States Public Health Service, including positions in the Indian Health Service, the CDC, and NIOSH. While at NIOSH, I assisted in the administration of the B-reader certification program, and I also have conducted research on the respiratory system, on lung disease and chest imaging issues, and published articles and presented a number of invited presentations about the ILO classification system as well as the NIOSH B-reader program, and high-resolution CT scanning and other imaging techniques. I am also the co-author of a textbook on occupational lung diseases, and I have typically not served as an expert witness in asbestos litigation.

I want to address certain medical aspects of the bill, mainly those involving the non-malignant claims, and at the outset let me make it clear that I firmly believe that the medical science overwhelmingly confirms serious adverse health effects do indeed result from significant asbestos exposure. These, of course, include lung cancer, mesothelioma, and two non-malignant diseases of the pulmonary parenchyma and the pleura.

Overall, the proposed medical criteria in this bill create a medical criteria in this bill create a medically supportable system to compensate those that have been substantially exposed to as well as those substantially injured by exposure to asbestos. Importantly, this legislation adequately protects the rights of those who are sick and impaired while providing safeguards and balance against spending limited resources on claims by individuals who are not impaired.

It does this by requiring a person who is seeking compensation for non-malignant claims to meet several criteria. These, of course, include a detailed occupational and exposure history. They also include an abnormal chest radiograph as well as breathing impairment, as shown by pulmonary function tests; and, finally, a physician's conclusion that the impairment was not more probably the result of other causes.

In order to explain why these criteria are necessary, I would, of course, refer you to an attached paper to the submitted written information.

The first requirement for a respiratory history includes a detailed work and exposure history to identify exposure to contaminants at the workplace, including asbestos. And, unquestionably, the chest x-ray is also a valuable tool in diagnosing asbestos-related disease. And the International Labor Office in Geneva has attempted to standardize the reading of chest x-rays when establishing this classification system.

The ILO system consists of written guidelines, standard or reference films, as well as a specific form for recording the interpretation. For asbestos, the important findings include abnormalities of the lung parenchymal as well as abnormalities of the pleura.

NIOSH through the years has made attempts to improve upon the ILO classification system by administering a program of training, testing, and certification of physicians, and it was this training and testing that I helped oversee during my NIOSH career. This experience has provided me with firsthand knowledge of the ILO classification system as well as certain issues about variability among people that interpret chest radiographs.

Although the chest x-ray remains an important component in any medical criteria, over-reliance on the chest x-ray has its flaws. First, any interpretation of a chest x-ray remains at times inconsistent and subjective. The interpretation is subject to inter- and intra-reader variability.

Another problem with relying too heavily on chest x-rays is the x-ray interpretation is not specific to asbestos exposure or injury. There are many abnormalities associated with asbestos that are actually the same as abnormalities seen on the chest x-ray in other pulmonary diseases. For these reasons, the chest x-ray alone cannot support a finding of asbestos-related disease. And although computer tomography may be useful in many cases and add detail that the chest x-ray may miss, there is no universally accepted standardized interpretation scheme for CT scans. They are also expensive and do introduce additional radiation risk.

A third requirement in this current scheme is to have lung function that demonstrates impairment through the use of pulmonary function tests. Asbestos-related diseases cause a specific form of lung injury called "restriction," and it is because the lungs are fibrotic are scarred that breathing is restricted, and pulmonary function tests that include spirometry, lung volumes, and diffusing tests can separate obstructive from restrictive lung diseases.

Lung fibrosis such as asbestosis causes primarily this form of restriction, whereas chronic tobacco smoke exposure causes primarily expiatory air flow obstruction. Clearly, some asbestos-exposed workers have also been chronic smokers, and the separation of these two functional injuries is rarely difficult as the overwhelming injury from severe fibrosis causes restriction with a reduction or decrease in the forced vital capacity or total lung capacity.

When using pulmonary function tests, it is important that these test results are determined to be normal or abnormal based upon a statistical determination of lower limits of normal. The lower limits of normal are published reference values that are adjusted by a statistical confidence interval. The use of arbitrary cutoffs such as 80 percent of predicted for FVC and total lung capacity has no

statistical basis, and most would agree are medically and statistically unreliable.

The final requirement in the current proposal that I would like to mention is the requirement that a physician concludes that the impairment was not more likely the result of other causes. As I have mentioned, there are other causes for abnormal chest x-rays as well as impairment, and a physician must, as he or she would in any clinical setting, rule out other more probable causes.

In closing, I would like to reiterate that it is my opinion the proposed medical criteria are medically supportable, and I welcome this opportunity to answer any questions that you may have to further help explain these medical criteria or the lung injury that is associated with asbestos exposure.

[The prepared statement of Dr. Parker appears as a submission for the record.]

Chairman HATCH. Thank you so much. You three doctors have been excellent, and we really appreciate the advice that you have given.

I guess a big question that we want to ask—and you have tried—I think you have address it to a degree, is: How do we know who is sick and whose sickness is due to asbestos and whose is not? What is the best way to ensure that those sick due to asbestos get paid? Why don't we just start with you, Dr. Welch, and then go across the table?

Dr. WELCH. Well, I think that is a good way to divide it up. I think we can—we know who is sick primarily by using their pulmonary function test to measure impairment. And I mentioned that the American Medical Association has a series of guidelines for using pulmonary function tests for impairment of lung disease and puts people into different categories, because the pulmonary function tells you if they are sick or not, and then you know they are sick, you have to independently decide whether this sickness is related to asbestos. And I think it is important to keep them separate. That was my concern about the severe asbestosis, is it is trying to mix both at the same time.

Determining whether someone is sick from asbestos, has asbestos-related disease is the x-ray findings in the setting of a history of exposure to asbestos, and there are some characteristic pulmonary function abnormalities that are due to asbestos, although I was making the point before—and I do think it is important—that in people who have history of exposure to asbestos and an x-ray that shows asbestosis, their pulmonary function tests may show mixed disease. It may show some evidence of restriction from asbestos and some evidence of obstruction from smoking. And those are people that I think require medical evaluation. But they can have a very significant impairment, and in a physician's opinion, the impairment could be substantially contributed to by asbestos because in a way they already have smoking-related disease; the asbestos disease on top of that makes them sicker.

But the pulmonary function test really is most valuable for saying what level of impairment they have, and then the exposure and the x-rays, and the pulmonary functions for the pattern of impairment they have, and exposure and the x-rays tell you whether it is asbestos-related, in my opinion.

Chairman HATCH. Thank you.

Dr. Crapo, do you differ with any of that?

Dr. CRAPO. I would agree with Dr. Welch that the pulmonary function tests are the critical element that we should use to determine if the patient is impaired or an assessment of how sick they are. The biggest problem we have here is making the proper diagnosis and knowing the causation related to asbestos. For the three major diseases we are talking about—for example, asbestosis is a fibrotic disease of the lung. Asbestosis is only one of about a hundred different causes of lung fibrosis. And if we go into one of my clinics that have—let's say a pulmonary fibrosis clinic at National Jewish, the vast majority of the patients there would not have asbestosis. And the challenge is determining which ones are caused by asbestos.

For lung cancer, the biggest cause is smoking. By far and away most cancers are caused by smoking compared to asbestos exposure. And for mesothelioma, a small component are idiopathic and not caused by asbestosis or asbestos exposure.

So the challenge——

Chairman HATCH. Most of them are?

Dr. CRAPO. In men, most mesotheliomas are caused by asbestos exposure. In women——

Chairman HATCH. Especially if they have been working around asbestos, you would probably be readily able to conclude that.

Dr. CRAPO. That is correct, and that is why I am coming to the critical aspect of the diagnostic criteria which is to determine if a disease is caused by asbestos is the exposure history. There are some other pathologic ways we can do it, but they require lung biopsy, and we cannot—it is not really feasible in the context of this type of settlement.

Absent that, the exposure history is the critical element that lets the physician determine whether the disease is more likely than not associated with asbestos exposure.

Chairman HATCH. Dr. Parker, anything you care to add?

Dr. PARKER. I fundamentally agree with both the other panelists.

Chairman HATCH. Let me ask you this: Dr. Parker, are Level I and Level II claimants impaired, in your view? Do you think they require compensation?

Dr. PARKER. In the bill that I have seen, Level I and Level II do not have functional impairment as measured by lung function testing. So most would say those are unimpaired, and currently the existing AMA guidelines would say those are unimpaired individuals.

Chairman HATCH. Dr. Crapo? And then I will come back to——

Dr. WELCH. Could I comment on that, though? Because if their FEV1/FVC ratio is lower than 65 percent, they are in Level II. If they don't meet the other criteria, then Level II, so you can have people with significant medical impairment where the pattern is more obstructive.

Now, you may say that is fine, but I don't think it is fair to say people in Level II have no impairment. People in Level II have no impairment and have obstructive disease or mixed obstructive-restrictive because they can only move up to Level III if they meet this requirement. And we know what we are talking about.

Chairman HATCH. I have an idea.

Dr. PARKER. And Level II makes a provision for medical monitoring of those individuals.

Chairman HATCH. Yes, in our bill we do provide for medical monitoring, but we treat those levels, I guess, as unimpaired or not sick and not compensable under those circumstances. But we do monitor them, and we provide the money to monitor them, too, which is, I think, the right thing to do.

Dr. Crapo, can you add anything to this?

Dr. CRAPO. Yes. I think that when we are looking at a chest x-ray which shows minimal changes or early diagnostic changes that are consistent with this diagnosis, when the patients have pulmonary function changes that are primarily obstructive, that tells us that the primary disease driving that process is an obstructive disease, the most common of which is smoking-induced lung disease. In my experience, when these patients have significant asbestosis that will also contribute in a significant way to their impairment, the FEVI/FVC ratio moves upwards toward normal, and it is generally higher than a ratio of 65 percent. It is generally in the 70- to 80-percent range.

I agree with Dr. Welch, though, that diagnosing the mixed diseases is the most challenging thing that the physician faces.

Chairman HATCH. Let me ask you this, starting again with you, Dr. Welch. Would a finding that x-rays are consistent with a particular condition constitute a medical diagnosis? And, if not, what else is needed?

Dr. WELCH. Well, I think Dr. Parker did cover that in his testimony in a way. I mean, as a physician, I don't think any of us would say an x-ray is consistent with, is the same as saying I am diagnosing. It is very different, because the diagnosis takes into account all the information you have.

You could have some x-ray findings that are 99 percent likely to be one particular thing. I mean, sometimes you look at an x-ray, and although you don't have pathology, you say that is a lung cancer. You know, it is hard to be anything else.

But, generally, we don't like to work with just one piece of information. You have a medical history and, for asbestos, exposure history is really very important.

Chairman HATCH. Medical history and exposure are very, very important.

Dr. WELCH. And then the x-ray and then the pulmonary function tests, and the pulmonary function tests serve both the purpose of looking at the pattern of disease and also telling you the level of impairment.

Chairman HATCH. We provide for monitoring under this bill for those who think they might have or have feared that they might have asbestosis-causing diseases.

Let me ask you this, Dr. Crapo: What level of exposure to asbestos do you believe is required in order to contract an asbestos illness?

Dr. CRAPO. It is widely different depending on which disease you are talking about. For mesothelioma, fairly low levels of asbestos exposure can cause it. If we are talking about the disease asbestosis and its contribution to lung cancer, it takes a fairly substantial exposure. And most people that have developed those diseases

as a result of asbestos exposure have something in the range of 100 fibers/cc-years or more. That is a fairly high level.

Generally I think a fairly good consensus for a cutoff that would not cause those diseases would be about 25 fiber/cc-years.

Chairman HATCH. Should anyone with a change in a x-ray be entitled to compensation?

Dr. PARKER. If the chest x-rays reflect a pulmonary malignancy, I believe—and it is evaluated—that they should be, and the bill would do so, yes.

In the case of non-malignant pulmonary disease, the radiograph alone being abnormal as proposed would not compensate individuals.

Chairman HATCH. How can somebody reading an x-ray distinguish between asbestos-related diseases and those due to other causes? Hasn't it been—or isn't it possible to have abnormalities in x-rays from other sources than asbestos? I think you have basically said that, but I just want to get that out again.

Dr. PARKER. If it is addressed to me, we agree with that. What clinicians use——

Chairman HATCH. If anybody disagrees, feel free to respond.

Dr. PARKER. Frequently, clinicians, when looking at asbestos-related parenchymal disease or considering if you see pleural disease and have the history of exposure, it is quite common to attribute the exposure to asbestos, both disorders being caused by——

Chairman HATCH. And if you add to that the pulmonary tests, then you can pretty well definitively conclude that that is asbestos-related.

Dr. PARKER. A medical history is also helpful. I suppose if a person had extensive collagen vascular disease, you might wonder if it was caused by that.

Dr. CRAPO. I think that is very important to put in here, because you need to—you really need to rule out other diseases that cause that illness. And there are, as I said earlier, a large number, almost 100 different diseases that cause pulmonary fibrosis. And the diagnosing physician needs to consider the other diagnoses and rule them out as part of this process.

Chairman HATCH. Let me ask one last question before I turn to Senator Leahy, and that is this: Would all of you or each one of you support a heightened exposure requirement for other cancers due to the lack of medical evidence establishing a causal link between asbestos exposure and other cancers?

Dr. WELCH. Can you tell me what you mean by "heightened" when you say "heightened exposure requirement"? Number of years, for example?

Chairman HATCH. Sure, years or exposure in other forms, tobacco, et al.

Dr. WELCH. I think that to link lung cancer to asbestos it is really based on exposure, and I think that is what—the other doctors would agree that as your exposure goes up, at a certain level of exposure you can essentially say if you know that exposure occurred that asbestos contributed to that lung cancer.

Chairman HATCH. What is the level of exposure that you could say with pretty much certitude that that probably contributed?

Dr. WELCH. Well, I think if you want to construct something like that——

Chairman HATCH. Would a worker have to work his or her whole life around asbestos, or could 1 day of exposure cause this?

Dr. WELCH. One-day exposure is not going to cause lung cancer. One-day exposure may cause mesothelioma, although we hardly ever see cases that are that low. But leave out——

Chairman HATCH. That is highly unlikely?

Dr. WELCH. Leave out mesothelioma because that does occur from short—but for lung cancer, I think you can construct from existing guidelines and consensus criteria, you can construct an occupational exposure history that would say this amount of years in this kind of job significantly increases the risk of lung cancer.

Chairman HATCH. So we could actually, under this bill, the way it is drafted, be able to pretty well tell who deserves compensation? That is what we have tried to do.

Dr. WELCH. I think what you do is you need to agree on—in some ways, state explicitly what your assumptions are. Do you think somebody has to have a 20-fold more likely to be lung cancer that you know that lung cancer is 99 percent——

Chairman HATCH. We are leaving it up to the doctors.

Dr. WELCH. I mean, I think that in your written testimony you said 25 fiber years crosses a threshold, and there is this international group called the Helsinki criteria that came up with the same number. A lot of people have used that number. And we don't have that monitoring data for all individual people, so you have to create an occupational history that matches that. But it is possible to do that.

Chairman HATCH. How do we get rid of the dishonest doctor who is willing to come in and say this guy really has mesothelioma or cancer caused by—when there is no cancer at all or, you know, it is very difficult to prove and there is really no real exposure? How do we stop that? We face that all the time in personal injury cases.

Dr. WELCH. Well, I think the cancer diagnosis is easier because that is——

Chairman HATCH. It is there.

Dr. WELCH [continuing]. Available pathologically. Generally people have that. I think the debate about——

Chairman HATCH. So we should be able to definitively do this for——

Dr. WELCH. For the cancers, yes. I think that the concern that comes up is about what you were expressing to some degree, an x-ray reading that is consistent with asbestos.

Chairman HATCH. And with history.

Dr. WELCH. But it hasn't necessarily reached a medical diagnosis.

Chairman HATCH. Okay. What I want all three of you to do for us is look over our language. You know, we are not stuck with any language. I don't want to make this so broad that everybody who gets a cough gets compensation. Naturally, we don't want to do that. That takes money away from the honest people who do, in fact, have problems. But give us any suggestions you have, and we will take a look at them. But we think we have written this section pretty well. But especially you, Dr. Welch, we would like to see how

we can improve it, and especially you, Dr. Crapo, and you, Dr. Parker. All three of you have extensive experience in this area. So we would like to have the best really look this over.

I have no axes to grind on any part of this bill. I just want to get it done, get this problem behind us. I think it would help this country and these workers better than anything we could do this year, and maybe for the next 30 years. But it would certainly lay the groundwork to take care of some of these very, very difficult problems. And as you can see, we have to split the differences and come with a bill sooner or later. Now, this bill is there and we are interested in any changes that anybody would care to make that are willing to be constructive changes not just ideological changes. So if you will do that, we would be very grateful.

Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman. I would note—and I think everybody would agree with this, certainly from the testimony—that exposure can also be the so-called take-home exposure, too.

Dr. WELCH. Absolutely.

Senator LEAHY. Is that not correct?

Dr. WELCH. Right.

Senator LEAHY. It is interesting reading the bill, and I understand from the Chairman that this, again, is a work in progress. But it doesn't compensate anybody who is——

Chairman HATCH. Can I interrupt you just on that take-home exposure situation? Because I have been wanting to say something, and I think since you raised it, this bill—you know, it is my understanding that those affected by take-home exposure—a father who brings home clothes that the kids gets asbestosis from—they will be considered under this bill to have occupational exposure. So they will be covered, those children.

Now, we are going to look at that language and see if we can correct that language or make it better. Now, when they start throwing around figures like 32 million people might have exposure, I mean, you know, we can't resolve that problem. But I have to say if they don't fit in the category of take-home exposure, then they have got the regular tort system still available to them.

Now, I think they are going to be pretty tough cases, between you and me, but, nevertheless, that is where it is. And that doesn't stop dishonest lawyers from bringing cases that cost a fortune to defend that aren't valid. That happens. That is one of the problems with overutilization of our tort system today. And we have got to find some reasonable ways to bring Democrats and Republicans together so that our system doesn't destroy us.

So I would like your help on this, and I want to thank my colleague for letting me interrupt on this. But we will take care of those that have taken exposure because of their father or mother who has worked around asbestos. And this bill I think does take care of them. But if our language isn't good enough there, help us to know how to write it. Okay?

Go ahead. I am sorry.

Senator LEAHY. Well, of course, all personal injury cases related to asbestos are covered by the bill, and take out the tort system

and occupational or not, as it is written. So that is why we are having these hearings, and that is why it is a work in progress.

I notice the bill, I started to say, doesn't compensate anybody exposed to asbestos in the workplace after December 31, 1982. It is a puzzlement to me why we would deny asbestos victims their rightful recovery because the exposure occurred after an arbitrary cutoff date, New Year's Eve 1982. I mean, a great celebration for New Year's Eve, especially when you still use asbestos today, as Senator Murray and others have pointed out. You have an arbitrary cutoff in a national trust. It seems to me that only compounds the problems of this arbitrary cutoff.

Is there any medical reason for the December 31, 1982, cutoff? That should be easy to answer yes or no. I realize there may be policy reasons. There may be other reasons. But is there a medical reason for the December 31, 1982, cutoff?

Dr. WELCH. No.

Dr. CRAPO. There is not a medical reason. It has to do with exposures changing.

Senator LEAHY. I understand, but there is no medical reason.

Chairman HATCH. Keep in mind the reason we did that is we adopted the Manville approach which sets 1982.

Senator LEAHY. I understand.

Chairman HATCH. We are not necessarily bound by that approach.

Senator LEAHY. We are not going to follow everything of the Manville because they are getting 5 cents on the dollar right now. Dr. Parker, any medical reason?

Dr. PARKER. Not that I am aware of.

Senator LEAHY. Okay. So there would be—and we will debate all the other policy reasons, of course, but no medical reason.

Now, Dr. Welch and Dr. Parker, if I could direct this to you, you are both occupational physicians. As I listened to you today and as I have read your testimony, you both have discussed the importance of exposure history in the diagnosis of asbestos-related disease. I think we would all agree that is important.

Now, S. 1125 as it is drafted requires a diagnosis be independently verified with respect to the duration, the proximity, regularity, and intensity of the asbestos exposure involved. A lot of these exposures took place 30 or 40 years ago. I am wondering how you independently verify such exposures 30 or 40 years ago. Is that something that physicians would normally do in diagnosing occupational diseases with long latency periods? Is it possible to do that? Dr. Parker, how about you?

Dr. PARKER. I am flattered to have been given some honorary occupational medicine training. I actually have to say that my occupational medicine training is on the job. But I do consider myself expert in occupational lung disease. And the reconstruction of exposures that occurred many years ago in the workforce, primarily we take the history, how intense the exposures may have been, how long they worked in jobs that are historically associated with potentially high exposures; and then if there is a health effect, we try to sort out in our own mind whether that health effect is a result of that exposure.

They are difficult to reconstruct in individuals. They are also difficult to construct and reconstruct for research. But there are methods to do that. But certainly it would be very difficult to individually verify, yes.

Senator LEAHY. Dr. Welch, would you agree with that?

Dr. WELCH. I would agree. You know, as part of the practice of medicine, occupational medicine, you take the occupational history from the individual. And for a history of exposure to asbestos, we know so much. I can fill in so much about what the worker is telling me from the existing epidemiology, all the research that has been done, that there is no need to try to look for other data to verify that an insulator used asbestos. I mean, he is telling me that. I know it to be true independently, for example. You couldn't do it, but it is not standard practice. People don't do that in this kind of circumstances where the exposure history from the worker clearly represents a certain level of exposure. You can understand if you understand the work that was done in the literature.

Senator LEAHY. Thank you. Well, I know the Chairman has an event at 12:30, and he has also announced we are going to have a break at this time. And I realize under our normal practice he would extend me more time. But I think that we ought to be——

Chairman HATCH. Sure.

Senator LEAHY. I do have several other questions, as you can imagine, but if I might submit them for the record.

Chairman HATCH. Without objection. We will keep the record open for any questions until this evening at 6 o'clock, any questions that any member of this Committee would care to make. We would hope that you would get your answers right back because we intend to put this on a markup next week.

Now, we also intend to make——

Senator LEAHY. Also, I have a statement by Senator Kennedy.

Chairman HATCH. And we will put Senator Kennedy's statement in.

Also, we are looking for ways of improving the bill and changing it between now and then, and hopefully we could have some support from everybody involved, because there is no way that we can please everybody. All we can do is try to be as fair as we possibly can. And when you are talking $108 billion, you are talking a lot of money. Frankly, I understand I have got to come up with some—we have got to come up with some sort of an end situation here. We will do our best to do that. But I also have to bring together disparate political viewpoints. And unless we have a very acceptable bill to the majority of Members of Congress—and I am saying a significant majority—I think we are just climbing the wrong tree and we are basically going to fail.

So it is important that everybody get together. I don't have any axes to grind. Some feel that I have leaned too far in favor of the unions. Some of the unions feel I haven't leaned far enough. The trial lawyers are all mad at me. We have united them apparently with this bill.

[Laughter.]

Chairman HATCH. That is not hard to do, by the way. However, they were split. And, frankly, some trial lawyers like some of the aspects of this bill, but as a general rule, they are not real happy

with it. That ought to please a lot of people out there, but it doesn't please the trial lawyers.

We have 800-some companies who probably are going to go into bankruptcy if we don't resolve these problems, and we have got a bunch of insurance companies who can't afford to go into bankruptcy, but who either will have to go into bankruptcy or quit. And I don't want to see that happen when we have at our fingertips a chance to resolve this.

So you three are very important to us, and we would like your best advice as to how we might refine this bill further with regard to the medical aspects of it, health care aspects of it, or anything else you would care to weigh in on. And the next panel is going to be a very interesting panel that will have some differences, and I look forward to hearing from them. But we won't be back until about 1:30.

Senator LEAHY. Mr. Chairman, if I might, I agree with all of this, that we have to put together—we are much further along than we were a year ago. We have got a lot of parties in the room. We still have a way to go. When I was first in the Senate, I believe it was Senator Mansfield who said something about running the Senate was like trying to move around a wheelbarrow full of bull frogs. And maybe this is the same thing. But people——

Chairman HATCH. I like the analogy. I thought it was very good.

[Laughter.]

Senator LEAHY. You have never had that problem with the Committee, though, Mr. Chairman.

Chairman HATCH. Especially the "bull" part.

Senator LEAHY. We do whatever you tell us to.

[Laughter.]

Senator LEAHY. But on this——

Chairman HATCH. I think it is about time, is all I can say. We would all be better off.

[Laughter.]

Senator LEAHY. I will make a note of that should I forget. But——

Chairman HATCH. Don't worry. You will forget.

[Laughter.]

Senator LEAHY. What I would suggest is that when we do finish this hearing today—and there have been good questions and good answers—that once again we get those parties back in the room that we had before and continue negotiations, because we all know that there is not going to be a bill that is going to be perfect for everybody. No one group is going to find it perfect, and I understand that because there is no way you can do that. But we are getting closer. And a consensus bill with broad bipartisan support will pass the Senate, and the House may well take it with a sigh of relief. A fractured bill where the major parties are in opposition, where we don't have that kind of broad, real bipartisan support, that means across the political spectrum, doesn't pass and we all know that. We all know that, especially as we come into the summer months and the appropriations bills season and all the rest.

So I wouldn't have held that hearing last year if I didn't have hope this could be done. Senator Hatch has spent an enormous amount of time on this, as have I. Both of us have a million other

things on our agenda. We want it done. I don't have any major parochial interests in Vermont on this. I do have an interest, though, as a legislator in wanting to see this done and wanting to see a solution that we can all agree on.

I am committed to continue working with the Chairman, but I would hope that we can get the parties, once this hearing is over and we know where the main differences are, we get the parties back together.

Chairman HATCH. Well, I appreciate that, Senator. Let me just say that I have succeeded in irritating everybody, which is probably good. It means this must be a bill that is firming up.

Senator LEAHY. Except me.

Chairman HATCH. I am not going to answer that.

[Laughter.]

Chairman HATCH. Because I had something in mind. And I still have high hopes we will get you on the bill. But the fact of the matter is that we are to the point where this is rug-cutting time. I just don't think we will have the time after this month. I am certainly not going to kill myself any further. I mean, I have worked on it, a number of us have worked on it day and night, and I have met with literally hundreds if not thousands of people on this and, frankly, have tried to bring everybody together the best way I can. And I can't give a great advantage to anybody. We have got to try and get this so that we don't destroy the good because we desire perfection so much. And there is no way we can get to perfection on this and have a bill. In fact, there is no way you can get to perfection, like most things in life.

But this bill, even in its current form, would do an awful lot of good for an awful lot of people. For this hearing, the remaining purpose will be to get all the help we can to rewrite what has to be written and then bring it up next Thursday after this one, and hopefully pass it out of the Committee and get some time on the floor, which is going to be very difficult, because the last 2 weeks of this month are set up for Medicare. And that is extremely important to all of us.

So it is a timing thing as well as a cooperative thing, and I have just got to have cooperation from everybody in order to get this done. And if not, we are going to fail.

So let's not fail. Let's get this done, and we will be back here—I better make it quarter to 2 because we are 15 minutes late, and I have got to go be with Senator Kennedy at this time. So I don't have any choice. I have to be with these guys whether I want to be or not.

Senator LEAHY. We love you.

Chairman HATCH. We will recess until further notice.

[Whereupon, at 12:48 p.m., the Committee was adjourned, to reconvene at 1:45 p.m., this same day. Afternoon Session [2:02 p.m.]

Chairman HATCH. I apologize to all of you for all the delays that we have had here. I haven't been able to do anything better. So we appreciate all of you being here today and being here to help us to understand what we should do and to understand it better, because we certainly need to resolve some of these conflicts.

Now, we have an excellent panel here today. It is a diverse panel.

Jennifer L. Biggs. Ms. Biggs is a consulting actuary with Tillinghast-Towers Perrin and is a principal of Towers-Perrin. Her practice focuses on quantifying asbestos liabilities incurred by the insurance industry and corporate defendants named in asbestos lawsuits.

Dr. MARK A. Peterson. Dr. Peterson has been a special adviser to the courts regarding the Manville Trust and has studied asbestos litigation and is the founding member of the RAND Corporation's Institute for Civil Justice.

Dr. Fred Dunbar is the senior vice president and senior economist for National Economic Research Associates. He is a certified expert in the area of mass torts and claims valuation.

Professor Eric Green. Professor Green teaches negotiation, mediation, and resolution of mass torts at Boston University School of Law. He has served as special master in multi-district asbestos litigation and is court-appointed legal representative for future claimants in asbestos-related bankruptcies.

And Dr. Robert Hartwig. Dr. Hartwig is chief economist and senior vice president for the Insurance Information Institute, a property, casualty insurance trade association.

We are very grateful to have all of you here. We welcome you and we look forward to hearing your testimony, so we will start with you, Ms. Biggs, first.

STATEMENT OF JENNIFER L. BIGGS, TILLINGHAST-TOWERS PERRIN, ST. LOUIS, MISSOURI

Ms. BIGGS. Mr. Chairman, thank you for allowing me to testify today. My name is Jenni Biggs. I am a consulting actuary with Tillinghast-Towers Perrin and a principal of Towers Perrin. I am a Fellow of the Casualty Actuarial Society and a member of the American Academy of Actuaries. My consulting practice, as you mentioned, focuses on quantifying the asbestos liabilities of insurance and reinsurance companies as well as corporate defendants named in asbestos lawsuits.

In May of 2001, my colleagues and I released our estimate of the ultimate loss and expense projected to result from U.S. exposure to asbestos. Our estimate of $200 billion has since been widely quoted. During this testimony, I will explain to you how we anticipate our $200 billion estimate will change if Senate Bill 1125, the Fairness in Asbestos Injury Resolution Act of 2003, or the "FAIR Act", is enacted.

Tillinghast's $200 billion estimate of ultimate asbestos loss and expense includes both past payments and projected future payments. The RAND Institute for Civil Justice recently estimated that $70 billion in asbestos claims were paid through year-end 2002. Thus, our $200 billion ultimate figure translates to $130 billion of estimated future payments. This $130 billion estimate is based on assumptions consistent with the deterioration in the asbestos litigation environment observed by 2001.

An important feature of the proposed legislation is the elimination of plaintiff and defense attorney fees. To put this into perspective, Tillinghast's $200 billion estimate of ultimate asbestos loss and expense is significantly reduced when these frictional costs are removed. Of the $130 billion remaining to be paid, we estimate

that approximately $28 billion, or 21.5 percent, relates to defense costs. Of the remaining $102 billion, we estimate that approximately $41 billion, or 40 percent, will go to plaintiff attorneys. Therefore, out of the original $130 billion estimate of future payments, less than half, or only $61 billion, is expected to reach the claimants. Our conclusion is consistent with the findings of RAND: Transaction costs have consumed more than half of total spending.

In order to project indemnity awards under the proposed legislation, estimated claim filings are multiplied by the specific awards for each of eight disease levels under the Act. We did this separately for estimated future claims and for the refiling of existing claims. We then added a component for the cost of medical monitoring.

Tillinghast projected future claim filings using three disease categories: mesothelioma, lung cancer, and all other. Therefore, we relied on information provided by the Claims Resolution Management Corporation, or the CRMC, to split our original projections in the three disease categories into the eight disease levels under the Manville 2002 Trust Distribution Process, which are generally used in this Act. There are some differences in the medical criteria. However, with the exception of Disease Level VI Lung Cancer One claims, my analysis assumes that any differences between the 2002 TDP and the bill are unintentional, and that the proposed legislation will be modified.

We also increased the projected number of future mesothelioma claims to reflect that the increase in publicity relating to asbestos claims and compensation, as well as the potential ability to bring claims to a trust in a non-litigious environment with pro bono legal assistance will likely increase the propensity for victims to seek compensation.

For pending claim filings, as an upper bound we assumed that there are currently 300,000 claims pending in the U.S. court systems. Of these pending claims, we assumed that 230,000 will meet the minimum medical criteria and be refiled under the Act.

The proposed legislation outlines specific claim awards that range from zero for Disease Levels I and II to $750,000 for a mesothelioma victim.

As currently drafted, the proposed legislation does not address increases in the awards to reflect future inflation. However, we tested the sensitivity of the prospective payments to indexed awards increasing at 2.5 percent a year.

Under the proposed legislation, the claim awards will be reduced by the amount of benefits already received. We are not aware of any publicly available data that would allow us to estimate the settlement amounts that may have been achieved with specific defendants. Recall that a single plaintiff may sue as many as 60 different defendants. Therefore, we have conservatively assumed no offset to the prospective payments in the estimates that I will be discussing today.

We estimated medical monitoring costs based on current Medicare reimbursement schedules, and in total we projected relatively small medical monitoring costs of only $400 million.

Reflecting these provisions of the FAIR Act, we calculated the prospective payments from the trust as only $46.7 billion using the

scheduled claim awards and $60.2 billion if you assume a 2.5-percent annual increase in the claim awards. Thus, the $108 billion appears to be more than adequate compared to Tillinghast's best estimate of future costs, given a more stringent definition of Lung Cancer One claims, which is consistent with the Manville 2002 TDP.

We note that our estimates are on a nominal or undiscounted basis. Nominal estimates are appropriate for comparison with the nominal value of the trust of $108 billion. Discounted estimates would be lower; however, discounted estimates should be compared to the net present value of the trust, recognizing that the entire $108 billion will not be placed into the trust at inception.

Estimates of the prospective payments are very sensitive to assumptions regarding the number of future claims, especially mesothelioma, the potential indexing of future awards, and the definition of Lung Cancer One claims.

Therefore, for comparison, we also projected the prospective payments using future claim projections prepared for and provided by the Manville Trust which range from 600,000 to 2.4 million. In total, these future claim projections are higher than the Tillinghast claim projections contained herein, but the number of mesothelioma claims are very similar.

We also added the provision of 230,000 refiled pending claims to the Manville scenarios. The resulting Manville projections range from $36.8 billion to $72.3 billion, assuming no indexing of future awards, and that Lung Cancer One claims will be defined consistently with the 2002 TDP.

If future awards are indexed at 2.5 percent a year, then the prospective payments based on the Manville filing projections increase to $47.2 to $94.5 billion, still assuming a more stringent definition of Lung Cancer One claims: that they satisfy the requirement of either an underlying non-malignant asbestos-related disease or significant occupational exposure of 5 years.

As currently drafted, the FAIR Act does not require underlying asbestos-related disease and merely requires 6 months of occupational asbestos exposure prior to year-end 1982. Thus, potentially tens of thousands of claimants that weren't historically eligible for compensation under the Manville Trust will be eligible for compensation under the FAIR Act.

We have projected an additional 172,000 Lung Cancer One claims for non-smokers. Each of these additional claimants would be awarded $50,000 for a potential additional $8.6 billion of indicated payments (or $11.8 billion if the future awards are indexed at 2.5 percent a year).

We also increased the Manville projections to include our estimate of additional Lung Cancer One claims. If these additional cancer costs are added, then the Tillinghast estimate increases to $72 billion and the Manville projections increase to $56.4 billion under the minimum estimate, $77.6 billion under the mid-point estimate, and reach $108.4 billion under the maximum projection when future awards are indexed at 2.5 percent a year.

In conclusion, while the estimates are sensitive to the number of future claim filings, the indexing of future claim awards, and the definition of Disease Level VI Lung Cancer One claims, reasonable

projections of prospective payments under the Act are at or below $108 billion if future awards are trended at 2.5 percent or less.

Thank you.

[The prepared statement of Ms. Biggs appears as a submission for the record.]

Chairman HATCH. Thank you. I appreciate your testimony, and it was very interesting to me.

Mr. Peterson, we will turn to you.

STATEMENT OF MARK A. PETERSON, LEGAL ANALYSIS SYSTEMS, THOUSAND OAKS, CALIFORNIA

Mr. PETERSON. Thank you, Senator. I appreciate the opportunity to be here. It is a privilege to address the Committee. One of my major areas of research and professional activity for the last 20 years has been an attempt to develop a fairer and more efficient system for handling asbestos claims. And so I appreciate the opportunity to assist the Committee in dealing with those issues.

I want to go through and really take your invitation to identify areas of the bill that I think may create problems and make suggestions of how the Committee might want to deal with them. I want to do this in a constructive fashion to aid the Committee.

The first area I want to comment on is about the timing of payment. There have been repeated references today to the importance of swift payment of claims, swift provision of justice, and I think that is a particularly important area here given the age of the victims of asbestos diseases we are considering.

One of the major problems, I think, with the present bill is it won't be swift. It won't provide swift justice. And I think there are two reasons why both can be addressed. The first is that it sets up an extremely complicated process for paying claims, and not only does it set up a new bureaucracy to pay those claims with a variety of different courts and levels for doing so, an untested process, but it also sets up two taxing systems to bill and raise the money necessary to pay those claims. And it sets up a new court system. So it is a complicated proposal like nothing I have ever seen, and my own experience with regard to establishing and working with asbestos trusts is that the much simpler procedures that they have take several years, typically, to set up.

I am concerned here that this process will take more than several years to establish despite the requirements in the bill for timing. And I think as you go forward, you should try and seek advice from people that have worked and set up trusts that do these same kinds of processes. The attempt here is essentially to have procedures that are very similar to Manville. Manville has been paying claims under this process. One can learn and try and adopt a system that is closer to what is going on with the existing trust that doesn't have all the complications, expense, difficulties, and inertia, essentially, in setting this up. That is one area, source of delay.

The other area that really I think is the bigger problem with regard to delay is there is a mismatch in timing between the obligation of the fund and the money that will be available to pay claimants. The funding provisions of the bill are limited to $5 billion a year over the course of 22 or 23 years. Unfortunately, the liabilities, the obligations are not steady over time. They are front-load-

ed. It is true of any asbestos trusts we have set up. The reason is twofold: one is that there are, as Ms. Biggs suggests, around 300,000 claims pending today that will be seeking compensation; and in addition to that, if there is a two-, three-, four-, 5-year, whatever delay in setting up this process and beginning to get the revenue necessary, you are going to be accruing claims during that entire period of time. So you have to anticipate that when this fund opens its doors, it would have 400,000, 500,000, 600,000 claims there.

There are two issues with regard to that. Obviously that is an enormous number of claims to deal with in an administrative process, so it creates administrative burdens. But more problematic is you will be dealing with—you need $30, $40, $50 billion immediately to pay those claims, but the fund will only have $5 billion a year for 5, 6 years. It will need to wait 5 or 6 or more years in order to accumulate the money that is necessary to pay claimants who already have claims today. And, in the meantime, these people will now be waiting up to a decade to get payment. And I don't think anyone—I assume the Committee or anyone else—would be satisfied with setting up a procedure that is going to require elderly present claimants to have to wait 10 years to get paid. So that is one issue.

The second that I wanted to mention was the amount of money that is provided, the level of compensation in this bill. The answer, of course, to dealing with the problem of the mismatch and timing of liabilities and payments is to make more of the cash available immediately. I understand—well, I don't understand, but I can sympathize with the difficulties in working with the insurance and business community to get them to provide money sooner rather than later. But it will be necessary in order to avoid the delays I have been talking about.

With regard to the amounts of money, there were references earlier about attempting to have perfection and provide the highest amounts of money that victims might expect to receive in the tort system. I have no such expectations about asbestos litigation. Perfection is not something that is much there. But the average payment for mesothelioma claims, not the extremely highest, the average is $2 to $3 million today, as opposed to $750,000 in this plan. So this plan will cut those payments by a third. It will cut lung cancer claimants to a tenth because the average payment for lung cancer claimants, including most of whom are smokers, is about $1 million a claim. So this fund will greatly reduce the compensation levels that claimants get. Again, of course, there are some compromises necessary, but that is a very steep discount.

The next point I wanted to make is that the $108 billion I do not believe is enough money. It is not enough money to pay the claims. I have seen Ms. Biggs' forecasts, and I have done those of my own. I anticipate that using reasonable alternative forecasting assumptions, the liabilities are between $150 and $250 billion, well in excess of the $108 billion number. And I note that really the only difference between Ms. Biggs' forecast and mine is the number of future claimants. She anticipated that there will be a million future claimants; I forecast that there will be likely 1.9 million future claimants. And I would comment that the million—while I agree

with much of Ms. Biggs' work, I would comment that the 1 million future claimants is based, even though she notes in her report or statement that the Manville Trust got 200,000 claimants in the last 3 years, so in a world in which 200,000 claimants come in 3 years, I don't think it is reasonable to expect that there will only be a million future claimants.

The problem with that—and I have outlined it in my statement—is that this is a closed-end fund. So if the liabilities are greater, if they are at the level that I have suggested they might be as opposed to what Ms. Biggs suggests, then the claimants will bear the burden. At some point this fund will run out of money, and it will not be able to pay anyone anymore. It is the back end problem that Senator Feinstein referred to.

Chairman HATCH. Of course, if we don't do something about it, we are going to run out of money in the next few years.

Mr. PETERSON. I am assuming the criteria and the levels in this funding. I am not assuming any payments of the Level Two's. I am saying that based upon the provisions of this bill, with the numbers of claims that I am forecasting, there could be $150 to $250 billion of liability for the very bill you are considering. And there is a risk of that and the risk will be borne by the claimants.

Chairman HATCH. There is certainly going to be that if we continue with the tort system the way it is. As I understand it, about 60 percent of the people bringing litigation are people who aren't sick, but who have the fear of sickness, which the Supreme Court seems to have upheld.

Mr. PETERSON. I think that that is not a correct——

Chairman HATCH. Am I wrong on that?

Mr. PETERSON. Sixty percent is——

Chairman HATCH. I would be happy to have you give me the real figures on that.

Mr. PETERSON. I will try and respond to that. It certainly is much lower than that.

Yes, the tort system is expensive, no doubt about it. In the tort system, essentially the tort system is moving toward a series of independent trusts that are being run in a couple of facilities. The kind of process that you are talking about in your bill is occurring now within kind of the legal system. It is happening on a case-by-case basis in bankruptcy.

One of the things that the Committee might consider is making that process available to defendants without having to file bankruptcy, essentially to be able to have defendants negotiate *Georgine*, *Amchem*, the kinds of cases that the Supreme Court overturned.

Chairman HATCH. The problem is they can't make those kinds of payments and still operate the way they are used to operating. They are going to have to cut back on employees and everything else. That is why they go into bankruptcy so that they can reach some reasonable standard that might possibly keep their business alive.

I have got to say your figures that you have raised and some that I have got are completely disparate.

Mr. PETERSON. Well, I think you have raised an important issue, and that is that there is such uncertainty about the forecasts. I

can't tell you that my numbers are definitely right. Ms. Biggs can't tell you that her numbers are definitely right.

We don't know with certainty what the future would be. We don't know how many future claims there are going to be against all defendants, as I described in my statement. We don't know how this process would be carried out, but there is a substantial risk that the numbers could be greater than $108 billion, and that risk will be borne by the victims, not by the defendants and insurance companies.

Chairman HATCH. Let me ask you to do me a favor and do the Committee a favor. You know, your testimony does not specify how you are reaching these figures and these numbers. For instance, I have been led to believe that even with attorney's fees and everything else, the average award would be about $900,000 on a serious case, and that includes a whopping amount of money that the attorneys are going to get, which has been estimated at between 40 and 50 percent here. It would be wonderful if we could give everybody $3 million, but we can't.

Mr. PETERSON. I appreciate the difficulty of trying to get a compromise here.

Chairman HATCH. I mean, there is no way we can have a bill and do that, but we are trying to come up with a way that everybody who is sick and who has these problems is going to be compensated, where right now, we know there is going to be a dry-up of funds and a lot of companies in bankruptcy and a lot of loss of pension funds and a lot of loss of health care and a lot of loss of jobs if we keep going in the current system. So what I am trying to do, as you know, is come up with something that hopefully everybody can swallow and accept.

Mr. PETERSON. I understand.

Chairman HATCH. I don't know what else to do, and I can tell you that if you are right and it is 1.9 million claims that ultimately have to be settled, then we are going to have to do it within this fund.

Now, to me, if I am sitting there in the audience and I am one of the businesses that has got to pony up part of $108 billion, I am not happy about that.

Mr. PETERSON. I can imagine.

Chairman HATCH. And they are certainly not going to be able to do it in the first two or 3 years. I understand some of these cases go back 20 years now and they are still sitting there, in Philadelphia in particular.

Mr. PETERSON. There are probably some cases that hang around that long. They are not being pursued by the plaintiffs.

Chairman HATCH. That is right. The courts aren't doing the job, the attorneys aren't doing the job, and in the process justice isn't occurring.

I didn't mean to get into questions right now, but your testimony has been very interesting to me, as has Ms. Biggs'. I would like you to supplement that testimony with what you have used to arrive at these figures because that would be helpful to us.

Mr. PETERSON. I have described them in my statement, but I will see if there is some supplemental description that I can give you.

Chairman HATCH. If you can give some definitive economic analysis that backs up what you are saying, I would be very interested. And even if you could prove those figures, we are still faced with a limited ability to get this done, and that means that we are going to have to have people swallow hard if they want this done and help us to get it done.

I don't want the union members to be hurt, I don't want the companies to be hurt, I don't want the insurance companies to do broke. Frankly, I don't particularly want to hurt the trial lawyers, but, by necessity, we know the transaction costs do amount to almost 50 percent. That means that half the monies are going to people who aren't sick, and that is not counting the people who aren't sick who are getting some of the money. So you can imagine how that concerns, I think, any reasonable person who is looking at it.

But please give us more back-up, and we are open to it, but unfortunately we need you to do it soon because I am planning on marking this bill the Thursday after this.

Mr. PETERSON. Sure. The part of it that is most difficult, of course, is anticipating what is going to be the distribution of claims under the procedures and criteria that have been established.

Chairman HATCH. And our efforts may have to be on how do we solve this end game; I mean, how do we solve it if the fund runs out of funds. Now, admittedly, I want to solve that. I know one thing. If I have Government do it, this bill is dead. I can just tell you that right now. We don't have enough votes to get it through here or the House.

You are looking at the guy who put through the radiation compensation exposure bill, who has had Government do it. The Government needed to do it because they were the ones responsible for it. So you can see some of the difficulties that we have here. It is not an easy matter.

Mr. PETERSON. Senator, I understand very well the problems and implications of my testimony. I share with you the desire to have some efficient and fair resolution, and I appreciate the problems that asbestos generates and I am providing these numbers in that spirit.

I share with you the desire to try and do something, but I wanted to make the Committee aware of the implications of the very proposals that they are making.

Chairman HATCH. Well, back up your numbers with more facts and we will look at them very seriously.

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

Chairman HATCH. Let's go to Mr. Dunbar.

STATEMENT OF FREDERICK C. DUNBAR, SENIOR VICE PRESIDENT, NATIONAL ECONOMIC RESEARCH ASSOCIATES, NEW YORK, NEW YORK

Mr. DUNBAR. Thank you, Chairman Hatch and Senator Leahy.

Chairman HATCH. Of course, if any of you have comments to add to either of the first two witnesses, that would be fine, too.

Mr. DUNBAR. I am very grateful to have been invited to present the work of me and my colleagues. The research that I am going to talk to you about was based in part on the research of Sebago

Associates, with Professor Joseph Stiglitz, a Nobel Laureate economist who is teaching at Columbia.

As you mentioned, I am a Senior Vice President of National Economic Research Associates. We are the largest firm employing micro economists studying policy and legal issues. We were formed about 40 years ago by Professor Alfred Kahn. I and others at the firm have been studying asbestos issues for 12 years.

The focus of my comments today is really on workers, and it is not necessarily those workers which show up in asbestos claims statistics. Rather, it is those workers who are employed by firms bankrupted by asbestos, as well as those workers who supplied the goods and services to the bankrupt firms and their employees' families.

Now, the statistics that I can present will seem mind-numbingly dry, but they have a special meaning for people; in fact, people like me who grew up in a working-class home. In such a home, economic security is always a concern, and I and the others know firsthand how fine the line is between having economic security and adverse fortuity where it is lost.

Who are the workers? These are people that are your constituents. More precisely, they are the constituents of 94 members of the Senate because the 60-or-so bankrupt firms examined by Sebago had facilities with employees in 47 States.

What happens to these employees when a firm goes bankrupt? The lucky ones stay on, but 25 percent are really not so lucky. They become unemployed and, on average, they lose $30,000 to $60,000 in lost income while being unemployed and taking lower-pay jobs.

Sebago Associates estimates that, to date, 50,000 such workers have lost their jobs and borne costs that total $1.4 to $3 billion. In addition, 200,000 of your constituent workers of these bankrupt companies lost retirement benefits of $1,000 each, for a total adding up to another $200 million to their losses.

These are what economists call the direct costs. Those are the losses that people directly bear caused by the bankruptcies. There are also multiplier effects in the communities where these facilities were located. These are of two types.

The first type comes from the bankrupt firms that are buying less of the inputs for their production, things like equipment, office supplies and services, from the other firms that serve them. The second is that the families of the unemployed and displaced workers are buying fewer goods and services.

These effects can be quantified. In the communities involved, there are eight lost jobs for every 10 jobs that were lost by the bankrupt firms; that is, there has, to date, been a total of 90,000 workers that have been displaced, 50,000 direct workers, plus 40,000 from the multiplier effects.

When we add the costs together of the multiplier effects and the direct impacts, the total borne by these workers is anywhere from $2.2 billion to $5.2 billion. I will end by making three observations of why these are underestimates, and potentially vast underestimates.

The RAND study which has been mentioned here before, using a different method that focused on both non-bankrupt and bank-

rupt firms, estimated that lost job opportunities were nearly three times larger than those given by the Sebago estimates.

Also, these numbers exclude other costs to society—retraining costs, the fact that when an individual is unemployed they have to pay more for their health insurance, bankruptcy costs that have been estimated to be in the hundreds of millions of dollars, and then the legal costs which were mentioned before, which are, in fact, 60 percent of total claims which are now in the tens of billions of dollars and act like a tax on our goods and services.

Chairman HATCH. Just for our information, when you mention Sebago, you mean Stiglitz, right?

Mr. DUNBAR. That is correct.

Chairman HATCH. Okay.

Mr. DUNBAR. And then, third, these costs will definitely continue in the future unless something is done to correct the current system.

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

Chairman HATCH. Thank you. I have to say that I can see why economics is the dismal science.

[Laughter.]

Chairman HATCH. But this has been really interesting to us. It will be interesting to see what we can do here.

Professor Green, we will turn to you.

STATEMENT OF ERIC D. GREEN, PROFESSOR, BOSTON UNIVERSITY SCHOOL OF LAW, BOSTON, MASSACHUSETTS

Mr. GREEN. Thank you, Mr. Chairman, Senator Leahy. I appreciate the opportunity to testify before the Committee.

I would like to address the impact of this Act on the rights of the as yet unknown victims of exposure to asbestos. These victims are commonly referred to as the "future claimants". They are people who have been exposed, but they have not yet brought any personal injury claim or lawsuit, but they might or will in the future. They might not even know that they have a claim right now.

These are the overwhelming majority of the people who are going to be affected by this Act, any legislation we do. Estimates of their numbers vary. You have heard the range of estimates from the actuaries and epidemiologists, but the future claimants are two to five times the number of current claimants, anywhere from 1.5 million to 2.5 million claims.

I am currently the court-appointed representative for the future claimants in the Fuller-Austin, the Federal-Mogul, and the Babcock & Wilcox bankruptcies. And I am a professor of law at Boston University, where I have specialized in alternative dispute resolution, and specifically the resolution of mass torts. I have assisted courts in various capacities in the asbestos litigation.

There are 13 other individuals such as myself who are the court-appointed future reps around the country in the 18 pending bankruptcy cases. I will be representing my own views here, but I think my views are shared by most, if not all of them.

The future reps support a national legislative resolution to the asbestos litigation crisis that can provide an efficient, low-cost and effective national fund to fairly compensate present and future as-

bestos victims. But our support is reserved only for legislation that produces a result for future asbestos victims as good as or better than what those victims will obtain absent legislation.

We are not looking for the perfect solution. We want to do good for the future victims, but we want to avoid doing bad, and we know that that is what everybody wants to do. And we want to work with the Committee in a constructive way to try to achieve a good result, better than the "no agreement" alternative, in negotiation parlance. But we know we can't achieve ideal justice or perfect justice.

It is critical that we do everything we can in this legislation, in the short amount of time we have to work on it, to make sure that the future victims are protected from risks of error and uncertainty associated with a limited national fund.

None of us are perfect, Mr. Chairman. None of us have a perfect vision of what the future will be, and in this particular area everybody has been wrong more often than they have been right. And if we enact this legislation, my role will disappear; the future reps will be history.

Now, we don't mind that. We support this initiative even though we will be made redundant, but it must be noted that there will no one left with any statutory authority to protect the interests of the future claimants. If a single national fund is going to be the sole source of compensation for future claimants, it must have access to sufficient resources to pay all the future claims that we think we are going to get, and it must be designed in a way that will operate to ensure that future claimants are paid in full what we want to pay them in a timely manner.

In short, we must make sure the fund doesn't run out of money before all these future victims of asbestos are identified and paid or that will make them wait for payment for long years. That would be very sad and disappointing, I am sure, to the Chairman and to everybody involved in this effort. It would be an embarrassment and a danger to everybody.

So our concerns fall into three categories. Will the fund have the resources to timely pay future claims? Two, will the administrative procedures established under the Act be efficient, or will they be unduly burdensome and will they create a backlog of claims, with long delays in payment?

Unfortunately, Senator Hatch, the history through this litigation has been reform attempts, reform attempts, reform attempts. You are talking about Manville II here, not Manville I. Many, many attempts that were well-intentioned have resulted in long backlogs and delay, and made the problem worse.

Our third area of concern is whether the compensation criteria are fair and consistent with those currently applied.

We support your work. We would like to work with you constructively to make it good, if not perfect. The Act in its present form has some problems and concerns. We would like to work with your people and make it better. I will submit a full statement for the record at the end of the day.

Our greatest concern, I think, is what you have referred to as the back-end problem. It is a tough problem, Senator Hatch.

Chairman HATCH. Tell me about it.

[Laughter.]

Mr. GREEN. I mediate cases every single day, and people want to put it behind them and they want certainty. We are dealing with something that is going to be very difficult to supply certainty to people without at the same time taking risk and squeezing it and putting it on other people.

There are ways to do it and we offer some suggestions. One way would be to authorize the administrator of the fund to impose contingent calls on insurer and defendant participants after the fund has had some actual experience with the handling and paying of claims.

I am not prepared to put my money down on any of these experts' estimates on the future victims. Let's see how these new criteria for Manville II play out for a while. The people from Manville II will tell you they are so new that they don't really have any idea of what the claims filing is going to be under them.

All the future reps want to make sure of is that the proponents of whatever numbers are being proposed in funding are prepared, as they used to say in Pennsylvania where I grew up, to put their money where their mouth is. If it is not enough, if there needs to be a contingent call, there has to be some provision for it or there would have to be a Federal backstop. I understand you when you say that that is not likely to happen, so we have to look elsewhere to deal with that risk.

Chairman HATCH. Well, the reason I say it is not going to happen is because I can't get the votes.

Mr. GREEN. I understand.

Chairman HATCH. And if we don't have the votes, this bill isn't going to go anywhere anyway. That doesn't mean that some future Congress might not remedy that, but this one is not going to.

Mr. GREEN. If the worst happened and it turned out that these predictions were inaccurate, that they were low, and there is not some mechanism that we work out now to deal with that contingency, then I am sure that the pressures that would build would destroy the very stability and finality that the companies and the insurers are looking for.

Chairman HATCH. We will be interested in your suggestions. I have some ideas, as well, and so do others on this Committee. We realize we have to face that problem somehow or other, and I hope Ms. Biggs is right on this. She did a very good job of presenting her testimony, but I just hope she is right on it.

A hundred and eight billion dollars is a lot of money. If I can get all the companies to do what they are supposed to do there, that is a very, very substantial achievement by the companies.

Mr. GREEN. A hundred and eight billion dollars is a lot of money by any standard, but when one compares it to the reserves and expectations that many of these companies deep in this litigation have now, it might not be so large as some have claimed.

Chairman HATCH. Well, that is highly debatable, as you know, but I appreciate your testimony. We will look forward to your suggestions.

Mr. GREEN. Thank you.

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

Chairman HATCH. Mr. Hartwig, we will turn to you.

STATEMENT OF ROBERT P. HARTWIG, SENIOR VICE PRESIDENT AND CHIEF ECONOMIST, INSURANCE INFORMATION INSTITUTE, NEW YORK, NEW YORK

Mr. HARTWIG. Thank you, Mr. Chairman and Mr. Leahy, for the opportunity to testify before the Committee today. My name is Robert Hartwig and I am Chief Economist for the Insurance Information Institute, a property/casualty insurance trade association.

I have been asked to testify before the Committee regarding several of the most important economic considerations surrounding the asbestos debate. As an economist, I am particularly interested in eliminating the extraordinary inefficiencies associated with asbestos litigation, as well as the severe economic and financial dislocations associated with these inefficiencies, within a framework that is fair and equitable for all parties involved.

The macroeconomic implications associated with the current out-of-control asbestos litigation system are not in dispute. As we have heard several times today, nearly 70 companies have been pushed into bankruptcy by asbestos litigation. Approximately 8,400 companies in almost every industry have had claims filed against them.

And as we just heard from Mr. Dunbar, between 52,000 and 60,000 jobs have already been lost as a result of these bankruptcies. To echo again Mr. Dunbar, for shattered communities and families, these statistics are only the beginning of the story, as thousands of jobs are lost in industries dependent on these bankrupt firms.

If nothing is done to resolve what has already been described by the U.S. Supreme Court as the elephantine mass of asbestos litigation, scores, if not hundreds of additional businesses will be forced into bankruptcy and tens of thousands of workers will find themselves unemployed. Retirees and workers who have spent decades saving for retirement will continue to see their life savings and economic security vanish.

The inefficiencies associated with asbestos litigation stem largely from abuse, which has led to a rapid upward spiral in tort costs. Legislation now before the Committee will address these abusive practices.

Under the present tort system, hundreds of thousands of victims, up to 90 percent of whom are unimpaired by any asbestos-related illness, are able to move from State to State, setting their sights on the most sympathetic jurisdictions and judges.

As State and Federal policymakers have determined previously, there are some public policy crises so profound, or certainly so vital, as to require quantum legislative actions. These include, for example, the September 11 Victims Compensation Fund, funds for black lung disease, vaccine compensation, or State workers' compensation funds.

The trust fund proposal would be more efficient and rational than the current system for the following reasons. Only individuals who are impaired by asbestos exposure would be entitled to compensation under the fund. Transaction costs would be radically reduced in the new no-fault framework. According to the RAND Institute, up to 50 percent of asbestos litigation dollars go to cover

transaction costs rather than toward direct compensation of the victims.

Wild jury verdicts would be eliminated, such as the recent $250 million verdict handed down in Illinois or recent cases in Texas and West Virginia which have allowed plaintiffs to obtain millions of dollars without any asbestos-related impairment, or, in fact, to win cases that have allowed them to sue purely on the basis of fear of developing an asbestos-related illness.

Major insurers and manufacturers have been working with some of the best financial, actuarial and legal resources available to construct a privately-funded facility that will bring certainty, finality and equity to the country's asbestos problem.

Based on these analyses, insurers believe that $45 billion, contributed from both the insurance and policyholder sectors, will fund a facility that approaches $100 billion, and that that is sufficient to compensate present and future claimants based upon need, not when or where they file their suits.

Insurers are willing to perfect such a mechanism so that the annual cash flows run unimpeded and that the solvency risk is extinguished. The proposed insurer contribution of $45 billion is large and constitutes by far the largest pay-out in the history of the property/casualty insurance industry, and will inflict true financial pain on the two dozen or so companies who will pay the bulk of this amount. Forty-five billion dollars is approximately 50 percent more than insurers hold in reserves for asbestos claims today, and it is equal to about one-third of all the capital held by commercial insurance companies presently.

In conclusion, it is important to note that the consequences of inaction are grave. As previously mentioned, a large swath of corporate America is at risk, jeopardizing the jobs of thousands of employees, impoverishing retirees, and shattering families and communities. America's clear national interest lies in making sure asbestos funds are available for those who become sick and in lifting an ominous cloud of litigation from our troubled economy.

Thank you for the opportunity to appear at today's hearing and I look forward to answering any questions you might have.

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

Chairman HATCH. Thank you.

I have been asking some questions throughout, so I am going to turn to Senator Leahy first and recognize him.

Senator LEAHY. Thank you, Mr. Chairman.

Let me direct this first at Dr. Peterson and then Professor Green. When you read over Senator Hatch's legislation, it does not have—first, I should emphasize everybody up here wants to get asbestos legislation. We also all know that we either all hold hands on something eventually or nothing goes through.

I am worried that this legislation doesn't provide for any adjustments for inflation in the award values for asbestos victims, even though the trust fund provides for the next 50 years.

Should the award values for asbestos-related diseases be indexed for inflation to maintain the present value of compensation to victims?

Mr. PETERSON. I think absolutely, it should. Any kind of fund like this that goes over such a long period of time needs an inflation adjustment; I mean real inflation, not some speculation of what it might be. It just needs to keep track of inflation. Otherwise, someone coming 10, 15 years from now is only going to get a reduced portion of what someone gets today. It introduces the kind of present and future dichotomy that the people like Professor Green have been appointed to deal with.

I should note that both in my analysis and Ms. Biggs' analysis, we have assumed that a fund like this would have inflation adjustment. It is surprising that it doesn't, although I understand that if you add it, I mean it is another cost item, Chairman Hatch. It probably is another $15, $20 billion, or depending on what your assumption is, $10 billion.

Senator LEAHY. Professor Green, do you feel the same way?

Mr. GREEN. Yes, Senator Leahy, and it is tied up with two related issues. One perhaps little-noticed provision of the current Act is that all the existing trusts will be folded into this national trust. Now, that may well be a good idea, but all the existing trusts have, thanks to 524(g) of the Bankruptcy Code which you enacted in 1994 and the work of the future reps—all of those trusts have provisions which guarantee the future claimants, the far-out future claimants, that there will be money for them there when you get in those years.

Now, you take those trusts and you fold them in. That guarantee, that protection could disappear if the estimates are wrong. And if there is no adjustment for inflation, you are taking that away as well, and then if there is no interest on the payments, if there does turn out to be a backlog because of the $5 billion-a-year funding, now you have got a triple whammy on the futures, who are currently protected to some extent in the current trusts against those things.

Senator LEAHY. You also say that you get an additional $14 billion to be collected from the additional contributing participants. I tend to agree. I wonder how the administrator of the fund is going to identify future tort defendants. We have already eliminated a tort regime for these claims. Doesn't it make it pretty well impossible for the administrator to credibly assess such future defendants?

Mr. GREEN. It might be possible, Senator Leahy, to offer a voluntary—an invitation to voluntarily become a contributing member and provide some incentives for these peripheral defendants to do that, but providing that if they choose not to. The free market, so to speak, of the tort system can still operate with regard to those companies who do not come into the system and provide some mechanism where, if they think better of it, they could join up and pay their share and then get the protections of being a member of the national trust.

Senator LEAHY. I kind of worry about just who is in and who is out. For example, in S. 1125, all tort claims for asbestos-related injuries are taken out of the tort system. It also immunizes all future defendants.

Now, suppose if a company 5 years from now decides, well, we can cut a corner here, make life easier for us, we will use asbestos,

we have poisonings of our people, now they are immunized. Shouldn't at the very least only the contributors to the fund be immunized?

Mr. GREEN. That is the point I was making, Senator. Of course, if Senator Murray's bill passes, that situation might not happen. But there may be companies out there who, for one reason or another, haven't been identified. One of the things the tort system has done is it has been an efficient, perhaps aggressive identifier of responsible companies.

Senator LEAHY. Well, you have all looked at these future projections over the years. I have never found that any of the future projections that come out being on the high side. They are usually on the low side. Some have talked about the Manville Trust, simply tripling it, but back in the early 1980's, the Manville Trust represented about 25 percent of the liability of asbestos defendants. It is now 15 percent. So if we tripled that, we are still only at 45 percent. That is not—it might sound like a nice, easy formula, but it doesn't work, does it?

Mr. GREEN. Dr. Peterson is the world's leading expert on that.

Senator LEAHY. Over to you, Dr. Peterson.

Mr. PETERSON. It is hard to use Manville as the standard for dollar values because it hasn't participated in any kind of litigation now for 20 years. And even when it was, what percentage it was depended upon what your interests were in asserting that it was. But certainly given the ascendancy, if you will, of other defendants now since Manville has been unavailable, Manville is a much diminished part of the total compensation that people get. And even the full values of their claims I don't believe represent anywhere near the quarter that it did historically. So the 15 percent seems a correct number to me.

Senator LEAHY. Thank you.

Chairman HATCH. But most claimants file with Manville, and then they file a separate suit to begin with.

Mr. PETERSON. Well, Senator, we actually did a calculation of that. I have databases for the Manville Trust and a number of other companies that are in bankruptcy now. And we looked at a period of time when there were kind of current filings, so they were all the same era of database. And Manville constituted only about two-thirds of all the names we could identify.

There are a substantial number of people who haven't sued Manville or made claims against Manville. They may eventually. Part of that is affected by the joint and several rules and contribution rules in States. But Manville isn't—it is sometimes regarded as the universe of all claims, but I think that is not correct.

Chairman HATCH. Mr. Dunbar, you have done an excellent job of illustrating the consequential impact of these bankruptcies, the loss of jobs and pensions, not to mention economic impact on the community and the loss of other jobs that naturally arise because of the loss of the jobs with regard to asbestos.

Have you ever given any thought to the future impact? And would it be fair to say that the current system operates essentially as a tax on workers?

Mr. DUNBAR. Yes. Let me take the last question first. I think what is lost in the discussion is the fact that 60 percent of the dol-

lars that go into the asbestos problem go to professionals such as attorneys, both for plaintiffs and defendants. That operates—the entire amount, the $70 billion, operates like a tax, and the question that economists often ask is: Who eventually pays a tax? And taxes are usually backed into what are called the factors of production: land, labor, and capital.

Now, capital can move back and forth globally very quickly, so that leaves land and labor, and labor is by far then the biggest participant in that tax.

I mentioned some of the ways that labor is taxed, but generally how labor does get taxed and has to pay more than the 40 percent that it gets back in claims is because of the reduced demand and the higher prices that they have to pay on goods and services. That money comes eventually from—much of that money eventually comes from the workers. So it is basically the workers transferring their assets to other workers, but also in large to the defense bar and the plaintiffs' bar.

Chairman HATCH. If I am interpreting you correctly, what you are saying is that this $108 billion trust fund, settling the whole matter would be a very advantageous thing over the long run if we can solve that end game problem for workers as well as the companies.

Mr. DUNBAR. I think if you lower the transactions costs and if you lower bankruptcy costs, it is going to be advantageous to workers as a whole, yes.

Chairman HATCH. You are talking about lowering the transaction costs and bankruptcy costs, you are talking about the expenses of bringing the suits, the attorney's fees primarily, and then bankruptcy costs, which are quite extensive.

Mr. DUNBAR. That is correct.

Chairman HATCH. And this is where all this money has gone up the flue, to so speak, rather than for the people who are really hurt.

Mr. DUNBAR. That is correct.

Chairman HATCH. Do you believe that this particular bill that we have here would solve that problem?

Mr. DUNBAR. I think this bill is definitely a step in the right direction, and I hope that something works out to get it through this session.

Chairman HATCH. What you seem to be saying is that, yes, so far we have lost upwards of 70 companies.

Mr. DUNBAR. Yes.

Chairman HATCH. If a whole lot more go, this compounds even worse, doesn't it?

Mr. DUNBAR. That is right. These impacts will continue into the future under the current system. There are going to be more bankruptcies, more jobs lost, more of our——

Chairman HATCH. Not just direct jobs but spin-off jobs as well that rely on the direct jobs.

Mr. DUNBAR. That is right. The effects are going to be you are moving plants offshore, out of the United States entirely, and what is more, there will be communities—I think the median size community in a facility of a bankrupt company is 27,000 people.

Chairman HATCH. Well, I am obviously concerned about and very troubled about how asbestos litigation has hurt our national economy. If we could pass this bill, there is no question in my mind it would benefit the national economy greatly. But I am equally concerned, as you have just noted in your testimony, that smaller communities are perhaps the hardest hit.

Mr. DUNBAR. That is right. Whenever a——

Chairman HATCH. In terms of lost jobs. Can you give me some more details on some of these smaller communities?

Mr. DUNBAR. Yes. The median community in one of the facilities for a bankrupt company has a population of 27,000. That means that the multiplier effect of these bankruptcies is much greater because the ability for somebody who is displaced to find another position within a smaller community is much more limited. So what you are having then, because of the nature of the asbestos producers, is a disparate impact on smaller communities throughout the country.

Mr. GREEN. Mr. Chairman, may I add something?

Chairman HATCH. Go ahead.

Mr. GREEN. The futures reps who don't have a stake on the plaintiffs' or defendants' side are concerned about the viability and the health of the companies. But I am afraid you might be operating under the misperception that these companies who come through the Chapter 11 proceeding and set up asbestos trusts disappear and go out of business. They don't. The ones that I have been associated with reorganized, and they start——

Chairman HATCH. They become like Manville where they pay 5 cents on the dollar, and the people get nothing out of it.

Mr. GREEN. In the trusts, they are paying the victims 5 cents on the dollar, but Manville continued to operate. It was a successful and thriving building products company. Warren Buffet bought the company. Federal-Mogul, Babcock and Wilcox, the companies that I am involved in——

Chairman HATCH. That is because they came up with a trust that theoretically helps in this situation.

Mr. GREEN. Yes.

Chairman HATCH. But we are talking about 840 companies here, not all of whom are as well situated as Manville. And we are talking about at least 15 insurance companies that really can't go into bankruptcy. In other words, if they do they are gone. And so this is not some little itty-bitty problem here, and this bill I think goes a long distance in solving that problem.

Yes, Mr. Dunbar?

Mr. DUNBAR. I think Professor Green is a little serendipitous on this. It is true that the firms keep operations going, but they lose 25 percent of their employees. I mean, that is an impaired company, on average, the bankrupt companies.

Chairman HATCH. Well, and by losing——

Mr. DUNBAR. Moreover, I happen to know about some of these companies, and when they go into Chapter 11, it is very difficult for them to explain to a potential customer, especially a customer in Asia, yes, I am in bankruptcy but don't worry, everything is fine. They are losing business as a result of going into bankruptcy.

Chairman HATCH. I think it is much more complex than has been stated. But let me just—we have got to get over to a vote, Senator Leahy and I. But, Professor Green, you have concerns about whether future claimants will receive adequate compensation under the FAIR Act, the bill we are talking about.

Now, in your statement you hold up current asbestos bankruptcy trust funds as a way to ensure that all victims will be compensated. But according to the testimony we have received, these trusts are paying just pennies on a dollar, as I had mentioned. And assuming these assertions were correct, it is difficult for me to understand how they would be better off—how the claimants are better off under a system where claimants get nothing, others have no one to sue, so others have to wait years before the case is even heard; and for those who receive awards, a significant portion must be paid to their attorneys.

Now, is it your position that the current tort system is a better way to compensate these victims?

Mr. GREEN. Senator, we agree with you in your direction to set up a national trust. We think it should be better; it will be better. But the devil is in the details.

Chairman HATCH. That is right, but let me go back here to some of my original comments, and that is, the companies struggled to come up with $90 billion from the manufacturers and the insurance companies. And there is a reinsurance problem that is a big problem as well that has to be resolved here.

I was led to believe that if I could get that fund up higher, we would probably please organized labor. So I moved it to $108 billion, $18 billion more than they felt was reasonable for them—they didn't feel $90 billion was reasonable for them to pay, but they felt they could pay.

The unions came in at $120 billion a while back, but they are now at $130 billion, and some are even talking $200 billion. Well, $200 billion is gone, $130 billion is gone, $120 billion I think is gone as well. A hundred and eight billion bucks is where I think we can maybe get a consensus to put this through, which certainly is going to take care, according to Ms. Biggs, everybody, according to Mr. Hartwig, everybody who deserves compensation.

Now, maybe they are wrong. So there has to be in the eyes of you and Mr. Peterson and a few others, there has to be perhaps some sort of an end game where we can see if there is some way of having monies there if there aren't funds when we get to the end of 25 years.

Now, that is a problem that Senators Leahy and Nelson and Zell Miller and others and I have to solve. But I can tell you, anybody who thinks we can get this over $108 billion and get a huge vote in the United States Senate, which will hopefully get it through the House, I think has rocks in their head. And we have got to figure out a way of solving these problems, and I could use and I know Senator Leahy could use and others on this Committee could use some help in how do we solve that end game problem without saddling the Federal Government with it, which is a non-started.

Senator LEAHY. Mr. Chairman?

Chairman HATCH. Yes, Senator Leahy?

Senator LEAHY. I know you have worked very, very hard on this, as I have and so many others have. We actually want to get a consensus bill. Senator Hatch and I have served in the Senate long enough to know that there is a certain time, especially coming closer to both the congressional elections and a Presidential election where things slow up, except for those things that have to go through.

Chairman HATCH. Or it won't get done.

Senator LEAHY. And so this could be—if this is complex, if it is something where everybody is sniping at it, it doesn't go through because it is just not going to be the time to do it.

I think we have a chance of doing something. During the break, there was kind of an informal discussion about getting the parties back into negotiations, have Senator Hatch's staff, my staff there with them. I think that is a good idea. We have the basic guiding principles. You have got to be fair to the victims, and you have got to give certainty to the corporations.

This is something we are united on. Now we just want to find a way to make sure we do that. This is not an area—all the statistics you want, this is not an area where there is a huge parochial interest in my State for this. But I do see the court systems being clogged with this. I see a lot—I mean, your hearts have to go out for the victims who are here testifying. You have a lot of corporations, a lot of corporate leaders whom I respect highly who would like to put a certain amount of money out here and say, okay, that is our share, now let's get on and invest in new plants or business. And I agree with all of them.

So let's hope we can get together. Let's hope we can work together. I am committed to do that. But I want to make sure that we are going to have, as I said at the beginning of this hearing, both fairness for the victims and certitude for the corporations. I think it is possible. We are not quite there. We will keep working.

Chairman HATCH. Well, let me just end with these comments. This is a very important thing to our Committee, very important to me personally. I have met with hundreds if not thousands of people on this issue. I almost lost my health on it. I will be honest with you. I have worried about it so much. And, to be honest with you, nobody is totally happy, but everybody realizes that this may be the only way it is going to be resolved. And we have got a week to do it in.

Now, I just don't see going back to try and get all the companies together who basically have said, yes, we will go along if we have to, we don't like it but we will do it. But our offices are open. Our staffs are open. We have asked you for suggestions and ideas. But come next Thursday, there is going to be a bill put together, hopefully with even an end game. I would like to have the representatives of organized labor come and visit with me. I am not against them. In fact, if anything, we have moved it towards their direction from where it began. And I would like to resolve this.

But you have got about a week, maybe 2 weeks in which to get it resolved. If we don't get it done in the month of June—I mean, I personally believe we have a very uphill job to get it done this month. I thought last month had to be the window. But I think we could get it done if we just have a lot of cooperation.

And, look, that is what compromise is all about. We can't please everybody on this bill, and we can't please anybody on this bill. We have got to please everybody by getting a bill that hopefully will work a lot better than the current system, which is not working. And that is what we intend to do, and if we don't have cooperation—and we have had some companies that, yes, they are not paying much in so they are willing to make the others pay a lot more. I just don't see that negotiation going on and being effectively conducted. And there are others who are paying a lot more and don't want to give one dime more, you see.

Then there are some who just plain don't think we should be paying anybody if there is the slightest proof that they are not sick at all.

These are all complex issues. We could go on and on here. But this hearing has been very helpful to me, and I just want to thank everybody who has participated in it. But come next Thursday, we are going to have a bill that is either going to go or it is not going to go. I can live with either, between you and me. I don't think the country can. I don't think the employees can. I think they are the ones who are going to get hurt the worst. And I frankly think the organized labor will be hurt the worst, because who is going to pick up the health care for all these people? Who is going to make up for the lost pensions? Who is going to make up for the lost jobs and the hurts of these small communities because we can't come together on a bill that is outrageously expensive to some and I think very, very importantly expensive to people like myself.

So we have got to go vote. With that, we will recess until further notice. Please send in your ideas.

[Whereupon, at 3:10 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

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Tillinghast - Towers Perrin

June 11, 2003

Katie Stahl
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Ms. Stahl:

As requested by Senator Hatch, enclosed are my responses to questions from the Senate Judiciary Committee members relating to the June 4, 2003 asbestos hearing.

Sincerely,

Jennifer L. Biggs

Jennifer L. Biggs, FCAS, MAAA

JLB:klb

Enclosure

QUESTION FROM CHAIRMAN HATCH TO WITNESS JENNIFER BIGGS:

1) **Ms. Biggs is there anything further you would like to add to your testimony in light of what you have heard at this hearing?**

I would like to provide additional details regarding my estimates to assist you in identifying the differences between the various projections of prospective payments to be made from the Trust. This should allow you to better evaluate my conclusion that "... reasonable projections of prospective payments of the specific awards for individuals meeting the medical criteria used to define the eight Disease Levels in S.1125 are at or below $108 billion if future awards are trended at 2.5% or less" versus Mr. Peterson's testimony that "... it is likely that $108 billion would not be sufficient to pay all claims at promised levels."

While the wide range in the estimates and the observation that historical projections have been wrong (too low) highlight the uncertainty in making projections of the future payments, there are features of the bill that serve to reduce this uncertainty.

First, let's step back to review that the estimates of future costs are simply frequency/severity projections (i.e., the product of the number of future claims and the award per claim). Prior projections of asbestos costs have proved to be understated for two basic reasons:

- they understated the number of future claims, and
- they understated the severity of awards.

As drafted, S.1125 removes uncertainty in the severity component of the projections by establishing specific claim awards for each of the eight Disease Levels. Even if these awards are indexed to inflation the uncertainty in this component is significantly reduced. Therefore, the key to projections of future costs under the proposed legislation is reduced to projections of future claims by Disease Level, and the uncertainty surrounding the severity, a major source of the past understatements, is reduced or eliminated.

Current projections of the number of future claims may seem alarmingly different with ranges of 400,000 under Tillinghast's May 2001 estimate of $200 billion of ultimate costs to 2.4 million for the Manville Maximum and Peterson projections. However, it is important to recognize that not all claims should be counted equally under either S.1125 or the current tort system. The greatest differences in projected number of claims are in the Disease Levels with smaller or no awards under the bill.

In recognition of the changed environment under S.1125 we increased our projection of mesothelioma and lung cancer claimants. However, we did not similarly estimate the increase in claimants that will qualify for Disease Levels I and II, or the claimants that will not meet the criteria for any of the currently

defined Disease Levels, since these claimants will not receive indemnity awards and their medical monitoring costs are not significant.

It is important to recognize that malignant claims make up only a small percentage of total claims, and it is the larger payments associated with these malignancies that will make or break the Trust. Further, while both malignant and nonmalignant claims have increased over the past few years, it is the nonmalignant claim filings that have exploded.[1]

Mesothelioma claims against the Manville Trust grew as follows:

Annual Mesothelioma Claims Filed Against the Manville Trust

Filing Year	Mesothelioma Claims
1995	1,319
1996	1,307
1997	1,185
1998	1,117
1999	1,403
2000	1,843
2001	1,951
2002	2,138

Previous shortfalls in projections of mesothelioma claims have resulted due to two factors: (1) initial projections did not recognize the mesothelioma claims that would come from workers in secondary industries, and (2) the propensity to sue has increased. We agree with Mr. Peterson that in recent years the number of claims approaches published epidemiological estimates of the number of asbestos-related deaths.

The distribution of claims to Disease Level incorporated in my testimony is based on the historical experience of the Manville Trust and the resulting projections are summarized below:

[1]Total claim filings averaged 20,000 per year against major defendants in the early 1990s and grew to 50,000, 60,000, and 70,000 in the past few years.

Projections of Future Claim Filings 2003-2049 (000s)

Disease Level	Tillinghast	Manville – Minimum	Manville – Mid-Point	Manville – Maximum
0 - $0	NA	27	50	100
I - $0	147	35	68	136
II - $0	181	476	932	1,866
III - $40,000	17	62	123	242
IV - $400,000	2	0	0	0
V - $200,000	5	7	10	19
VI–LC1–S/NS - $0/$50,000	11	18	29	57
VII–LC2-S/NS - $100,000/$400,000	16	16	25	50
VIII – $750,000	41	29	40	53
Total: 0-VIII	NA	669	1,277	2,523
Total: I-VIII	NA	642	1,226	2,423

The total filings underlying the projections, including the re-filed pending claims and the additional Disease Level VI Lung Cancer One non-smoker claims is shown below:

Projections of Future and Re-Filed Pending Claim Filings (000s) Including Additional LC1 Non-Smoker Claims

Disease Level	Tillinghast	Manville – Minimum	Manville – Mid-Point	Manville – Maximum
I - $0	NA	48	81	149
II - $0	NA	651	1107	2041
III - $40,000	27	85	146	265
IV - $400,000	3	0	0	0
V – $200,000	8	8	12	21
VI–LC1–S-$0	13	17	26	47
VI–LC1–NS-$50,000	176	140	180	219
VII–LC2–S-$100,000	19	15	22	41
VII–LC2–NS-$400,000	6	5	7	14
VIII – $750,000	50	36	48	60
Total: I-VIII	NA	1,006	1,628	2,856

Thus, it is not appropriate to compare claim count projections because the Tillinghast number does not include Disease Levels with no award. It is the total dollars that are important.

Based on our projections and the sensitivity tests we used, under the current disease criteria the sufficiency of the Fund is most dependent on claims in Disease Levels VI and VIII. The number of claimants in the other Disease Levels does not have a significant effect on the result.

Mr. Peterson projected compensation from the Trust of $163 to $254 billion based on an estimate of 2.4 million future claims, which is the same number we used in the upper end of our sensitivity testing. Mr. Peterson stated in his oral testimony that he used amounts by Disease Level as specified in S.1125 indexed at 2.5% per year. We also included scenarios that indexed awards at 2.5% a year. Thus, while we do not have access to the distribution of claims by Disease Level underlying Mr. Peterson's projections, the magnitude of his estimates suggests that he either used an extremely high number of mesothelioma claims[2] and/or he assumed that the majority of nonmalignant claims that we classify in Disease Level I or II would qualify for an award under Disease Level III or IV.[3]

QUESTIONS FOR WITNESSES FROM SENATOR SPECTER:

1) **As it relates to S.1125 and the asbestos litigation solutions in general, what basis is there in the law for approximate justice?**

It is not within my expertise to opine on whether there is basis in the law for approximate justice. I understand that this legislation is intended to be a compromise and there are perceived inequities in the current tort system as well.

2) **What are your thoughts on Senator Durbin's discussion on set offs from collateral sources in the bill? Is it true that many of the most serious asbestos victims would get little or nothing from the bill as presently proposed?**

My estimates of the prospective payments from the Trust under the Fair Act are conservative, or overstated, in that they are not reduced to reflect collateral sources.

[2] It would take approximately 41,000 additional mesothelioma claims (or double the Tillinghast projection) to generate an additional $50 billion in prospective payments, with awards indexed at 2.5% per year.
[3] It would take approximately 925,000 additional Disease Level III claims (or 55 times the Tillinghast projection) to generate an additional $50 billion in prospective payments, with awards indexed at 2.5% per year.

3) **Do you believe that the $108 billion in funding is adequate without a federal backstop?**

I cannot guarantee that the amounts eventually paid from the Trust will not be materially higher or lower than the Tillinghast or alternate projections. However, I have provided my best estimate of the future liabilities as well as a reasonable range of projected outcomes.

My best estimate of prospective payments from the Trust according to S.1125 as currently drafted is $55.3 billion.[4] In addition, I testified that prospective payments from the trust will be significantly impacted by

- the actual number of number of future claims by Disease Level
- potential indexing of future award amounts, and
- the definition of Lung Cancer One claims.

In order to test the sensitivity of the estimated payments to these factors, I provided alternative projections of future costs – using a range of future claim filings by disease type, including an indexing provision of 2.5% on future claim awards, and with different definitions of Lung Cancer One claims. A summary of these projections is shown below:

Various Scenarios of Prospective Payments ($billions)

Scenario	Tillinghast	Manville – Minimum	Manville – Mid-Point	Manville – Maximum
No Inflation of Awards				
Claims Under 2002 TDP	46.7	36.8	50.7	72.3
Additional Lung Cancers	8.6	6.7	8.6	10.2
Total / No Inflation	55.3	43.5	59.3	82.5
Awards Indexed at 2.5%				
Claims Under 2002 TDP	60.2	47.2	65.8	94.5
Additional Lung Cancers	11.8	9.2	11.8	13.9
Total / Indexed at 2.5%	72.0	56.4	77.6	108.4

Based on these alternate scenarios, I concluded that reasonable projections of prospective payments for the specific awards for individuals meeting the medical criteria used to define the eight Disease Levels in S.1125 are at or below $108 billion if future awards are trended at 2.5% or less.

[4] Under S. 1125 as originally drafted, future awards will not be indexed and the definition of Disease Level VI Lung Cancer One claims is less stringent than included in the Manville 2002 TDP.

It is important to recognize that these projections will change if the medical criteria and awards defined for the various Disease Levels are modified. Further, the uncertainty in the projections will be increased if the medical and diagnosis criteria are changed such that historical claims cannot be segregated under similar definitions. For example, the current definition of Disease Level VI Lung Cancer One claims and the proposed elimination of the pre-December 31, 1982 exposure criteria are more expansive than the historical claims meeting the Disease Levels defined under the Manville 2002 TDP.

It is also important to understand that if awards are indexed to inflation, the Fund can be exhausted at inflation rates higher than 2.5%, which are plausible based on past experience.

4) **Is the cut off date of 12/31/82 for last exposure fair to those exposed after that date that eventually develop disease?**

It is not within my area of expertise to comment on whether provisions of S.1125 are "fair."

QUESTION FOR JENNIFER BIGGS FROM SENATOR LEAHY

1) **Ms. Biggs, in your written testimony you estimate that there are 300,000 pending asbestos claims in the tort system, and you assume that 23% of those will fail to meet the medical criteria defined in S.1125, so that 230,000 claims should be filed at the very initiation of the Fund. Yet S.1125 limits the amount that defendant corporations and insurers would be required to pay into the fund in each year. Therefore, as Mr. Peterson points out in his testimony, the victims who already have claims pending today will not receive full compensation until 2011 or 2012. How does your analysis address the tremendous crush of claims that will be filed on the Fund's first day, given that the companies and insurers are allowed to spread their payments out over many years?**

My initial testimony did not evaluate the cash flow of contributions to or payments from the Trust and the estimates did not include potential borrowing costs to cover a cash shortfall in a given year.

Mr. Peterson's testimony that claimants who re-file pending claims will not receive full compensation until 2011 or 2012 assumes that the Fund will not be operational and initially funded until sometime in year 2005. In the estimates below, I have assumed that the Trust will become operational by the end of 2003. I agree with Mr. Peterson that both the claims process and the funding mechanisms proposed in S.1125 are more demanding that those of other mass tort claims processes which typically have taken years to start. However, I have

assumed that if the compromises needed to pass this legislation can be achieved during the next few weeks, then the mechanics of the Trust can be implemented during the balance of the year.

The table below summarizes the projected indemnity awards by filed year for Tillinghast's best estimate as well as under the sensitivity testing we performed using the Manville filing projections.[5] Since we did not have access to details regarding the Manville projections by filing year, we assumed that the payments would be distributed by filing year similarly to the Tillinghast projections. The resulting projections are based on 776,000 (Minimum), 1,398,000 (Mid-Point), and 2,626,000 (Maximum) future claim filings plus a provision for 230,000 re-filed claims and additional Disease Level VI Lung Cancer One non-smoker claims estimated by Tillinghast.[6]

Projected Future Payments by Filed Year ($billions):

Filed Year	Tillinghast	Manville – Minimum	Manville – Mid-point	Manville – Maximum
Re-Filed[7]	10.5	8.0	8.0	8.1
2003	2.4	1.9	2.7	4.0
2004	2.5	2.0	2.8	4.0
2005	2.3	1.8	2.6	3.8
2006	2.4	1.9	2.7	3.9
2007	2.4	1.9	2.8	4.0

Projections of the timing of future payments from the Trust are uncertain, especially because payments will be dictated by administrative guidelines that have yet to be determined. S.1125 calls for claims to be paid over a period of not less than 3 years. It also allows for accelerated payments to mesothelioma victims who are alive on the date on which the administrator receives notice of the eligibility of the claimant and for expedited payments in cases of exigent circumstances or extreme hardship. However, using reasonable assumptions regarding the expected timing of the payments once claims are filed[8] results in estimated calendar year payments from the Trust as follows:

[5] This payout schedule relates to the scenario where future awards are indexed at 2.5% per year and additional Lung Cancer One non-smoker claims are included (i.e., Tillinghast's $72.0 billion estimate).
[6] See response to Hatch Question #1 for additional information regarding the distribution of claims by Disease Level.
[7] The claim awards reflect an average of the 2003 base and 2004 indexed claim awards.
[8] We assumed that 33% of pending mesothelioma claimants would still be alive at the time of filing and therefore would be eligible for accelerated payments, assumed to occur within the year of filing. We assumed that 67% of mesothelioma claimants first filing claims during 2003-2049 would be alive at the time of filing. These claimants would similarly be eligible for accelerated payments assumed to occur during the year of filing. We also accelerated the payment schedule for 50% of the remaining claimants to reflect expedited payments in cases of exigent circumstances or extreme hardship. The 33%, 67%, and 50%

Projected Future Payments by Calendar Year ($billions):

Calendar Year	Tillinghast	Manville – Minimum	Manville – Mid-point	Manville – Maximum
2003	9.7	7.5	8.2	9.2
2004	3.6	2.8	3.6	4.7
2005	3.7	2.9	3.7	4.9
2006	2.4	1.9	2.7	3.9
2007	2.4	1.9	2.8	4.0

The table above shows that payments from the Trust during its first year of operation would exceed a $5 billion contribution from defendants and insurers. However, under Section 223c, "The Administrator is authorized to borrow, in any calendar year, an amount not to exceed anticipated contributions to the Fund in the following calendar year ..." If the Trust begins operations in a timely manner, then it appears that the shortfall will exist for only a few years, and it does not appear that the borrowing costs would be significant.

2) **Ms. Biggs, in your 2001 article, "Sizing Up Asbestos Exposure," you estimated that the total cost of asbestos settlements would be $200 billion, and that the U.S. insurance market would pay $60 billion of the cost, foreign insurers would pay another $62 billion, and defendants would pay $78 billion. Given Senator Hatch's legislation calls for both U.S. insurance companies and foreign insurers to contribute only $45 billion, doesn't the bill dramatically understate the responsibility of the insurance industry for present and future asbestos liabilities under your analysis?**

Our understanding is that S.1125 represents a compromise amongst diverse interests that would deliver timely awards to claimants while eliminating the significant historical frictional costs that have consumed more than half of total spending.

3) **One assumption you make is that a total of one million people will ultimately file asbestos claims. We have received estimates, including those from defendant corporations, that the number is actually much higher, between 1.9 million and 2.4 million. Accepting that industry's estimates are more accurate, what would this do to your model? What would the correct dollar figure be for projected settlements?**

A response to this question is included within my response to Senator Hatch's Question #1. It is especially important to recognize that a doubling of claim

factors were selected judgmentally. For remaining claimants, we assumed that payments would be made equally over three years, beginning the year the claim was filed.

counts does not imply a doubling of prospective payments, because the majority of the difference in counts falls in the lower Disease Levels, which receive small or no awards. My sensitivity tests included the higher end of the projected claim filings.

James D. Crapo, M.D.

Responses to Questions by Senator Specter

"Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003 "

1. As it relates to S.1125 and the asbestos litigation solutions in general, what basis is there in the law for approximate justice?

Response: I am not an expert on the law, and if the term "approximate justice" has a legal meaning, I am not familiar with it. Nor, to the best of my knowledge, did I use the term in my testimony. I do recall that Mr. Tribe said something to the effect that approximate justice, swiftly and surely delivered, is sometimes vastly preferable to the illusion of precise justice, that is often delayed until the most grievously injured risk receiving no justice at all. I am not sure that I would characterize what happens in the legal system as "precise justice," or even "the illusion of precise justice." I do believe, however, that in the asbestos litigation as we know it today the most seriously injured do risk receiving nothing.

I did stress in my testimony that the medical criteria in S. 1125 appeared to me to be a compromise between conflicting viewpoints, and in that sense they are "imperfect." While I believe that their imperfection largely resides in their being overly broad, and while I think some tightening is necessary in order to protect the integrity of the fund, my overall conclusion was that the medical criteria in the bill would allow essentially all claimants who are sick from an asbestos-related disease to obtain compensation.

2. What are your thoughts on Senator Durbin's discussion on set offs from collateral sources in the bill? Is it true that many of the most serious asbestos victims would get little or nothing from the bill as presently proposed?

Response: My understanding is that S. 1125, as currently drafted, would subtract the proceeds of health insurance from the awards that would be paid to successful claimants. Thus, if a mesothelioma victim who received $750,000 in benefits had medical expenses covered by health insurance in the amount of $250,000, he would receive only $500,000. I assume that the rationale for that deduction is that the plaintiff did not actually pay $250,000 in medical expenses and should not be reimbursed for nonexistent expenses. I gather from Senator Durbin's discussion with Mr. Tribe that there is a legal background to this that I have not had the occasion to study. This area is outside of my field of professional expertise, however, my personal opinion is that offsetting medical expenses covered by insurance would be unfair to a claimant who had the foresight to purchase insurance.

In my opinion, most of the serious asbestos victims would be compensated by the bill as presently proposed. The primary risk in the current bill is the potential for large numbers of individuals whose disease or injury was not caused by asbestos exposure to receive compensation. This could potentially deplete funds from the trust and, in the long term, result in serious asbestos victims being not compensated due to lack of trust resources. For example, the body of medical literature shows that there is an increased risk of lung cancer in individuals with asbestos exposure. However, the primary cause of lung cancer even in those individuals is

smoking. The body of medical literature does not show a significant association for other forms of cancer being related to asbestos exposure except for a possible association for laryngeal carcinoma. The bill as currently drafted would compensate individuals with smoking-related lung cancers that have only a modest asbestos exposure and no evidence of asbestosis and would compensate individuals with gastrointestinal tract cancers which have not been significantly associated with asbestos exposure. The primary risk is that the inclusion of too many individuals in these categories could deplete trust funds from being available to compensate the most serious asbestos victims.

3. Do you believe that the $108 billion in funding is adequate without a federal backstop?

Response: The $108 billion in funding should be more than adequate and would not require a federal backstop if the medical criteria are sufficiently tightened to focus primarily on those diseases which have been clearly shown to be caused by asbestos exposure, i.e. pulmonary asbestosis with demonstrable impairment, lung cancer in individuals with substantial asbestos exposure and/or asbestosis, and mesothelioma with a significant asbestos exposure.

Since the occupational levels of asbestos exposure were substantially reduced in the late 1970s and early 1980s, the high level exposures that caused most of the severe asbestos related diseases did not occur after the early 1980s. Thus, the number of real cases of serious asbestos victims has already plateaued in the United States. The number of new, severe asbestosis patients has already dramatically decreased and the number of mesotheliomas has already peaked. The number of asbestos related lung cancers should show a similar pattern and decrease as the

incidence of both minor and severe asbestosis disappears. A possible way to protect the trust for the payment of the most serious asbestos victims would be to establish a lock box around the funds allocated for the payment of these three disease categories. This could prevent depletion of the trust by individuals with asymptomatic asbestos related diseases or processes which are not clearly associated with asbestos exposure.

4. Is the cut off date of 12/31/82 for last exposure fair to those exposed after that date that eventually develop disease?

Response: The cut off date of 12/31/82 is a reasonable date to identify individuals who likely had the high level occupational exposures that have been responsible for the majority of asbestos related illnesses. Federal regulations in the 1970s and 1980s substantially reduced the general levels of asbestos exposure in occupational environments in the United States. In my experience, it would be extremely uncommon for an individual to develop an asbestos-related illness based on exposures which occurred only after January 1, 1983. Virtually all the cases I have seen where a serious asbestos related illness was present had significant exposures that pre-date 12/31/82. This is not to argue that circumstances resulting in high level exposure to asbestos did not occur after 12/31/82, but rather that such high level exposures were much less common in the mid to late 1980s and workers would not be expected to be exposed to such environments for sufficient lengths of time to result in serious asbestos related injury. The above logic would not apply to mesothelioma which can be caused by lower levels of asbestos exposure. The bill, as I read it, would not apply the 12/31/82 date to mesotheliomas.

Consulting Economists

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FREDERICK, C. DUNBAR
Senior Vice President

VIA E-MAIL

June 10, 2003

The Honorable Orrin G. Hatch
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510-4402

Dear Senator Hatch:

On June 4, I had the privilege of testifying before you and the rest of the U.S. Senate Committee on the Judiciary hearing on "Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003"—or the "FAIR Act." I was also the co-author of a recent letter that proposed a call on a surcharge on all commercial property and casualty premiums as a way to fund any potential shortages.

The purpose of this letter is to respond to your written questions. The first two of these were as follows:

1) **Mr. Dunbar – there was testimony in the hearing today on S. 1125 regarding adjusting claims values for inflation. Please provide us with your thoughts on this issue.**

2) **Also, is this consideration affected by the expectation that the pool of claimants with serious asbestos related diseases expected to age due to decreases in more recent exposure levels?**

I have grouped these two questions together because they are interrelated. The following observations will demonstrate this proposition:

a) No asbestos trust of which we are aware has ever had an inflation adjustment.

b) New members of the exposed population are not being created--with minor exceptions, everyone who will make a claim has already been exposed. This means that the average age of the surviving exposed population is increasing because younger members are not being added.

c) Tort values for older claimants, everything else the same, decline with age. This is shown in the graph attached as Exhibit 1 taken from a recent expert report submitted in the Combustion Engineering bankruptcy.

d) This means that if the matrix values were inflated by the CPI, the fund would end up overcompensating future claimants.

e) One way to address the issue of inflation adjustment is to increase matrix values at the greater of zero percent or the cumulative CPI change minus a factor that takes account of the declining tort value of future claims.

There are a number of reasons why tort values for malignant conditions decrease with age, one of the most important being that the value of lost future earnings will be less the older the claimant. For nonmalignancies during the 1990s, it was widely thought that the average claimant would have less serious conditions over time because newer claimants had experienced exposures at lower overall doses; consequently, it was also expected that the average tort values of nonmalignancies would decline, everything else the same.

As an example, I estimate the age effect on claim values for Combustion Engineering.[1] This is computed by using the actual year-by-year age distribution as experienced by Combustion Engineering and the age-adjustment values shown in Exhibit 1. My analysis shows that the average lung cancer values decline by –0.31% a year and –1.6% every five years. The average mesothelioma values decline by –0.63% per year and –3% every five years.

For nonmalignant claims, we use a regression technique that computes an index number for values with multiple attributes.[2] The time trend in this index is shown in Exhibit 2 for

[1] I am using Combustion Engineering as a convenient example. Because of the short period available to respond to the questions, I am relying on existing graphics rather than performing a *de novo* analysis. The most recent analysis we at NERA have performed has been for the Combustion Engineering bankruptcy proceeding. I estimate that average age of malignant claimants increases 5 years every ten years.

[2] This technique is called "hedonic price index" and is not to be confused with "hedonic damages" which is an entirely different concept.

Combustion Engineering and shows a downward slope. The rate of decline in the value of nonmalignant indemnity over time has been –3.4% a year.

There is, of course, no guarantee that the rate of inflation will be exactly offset by the decline in claim values due to increasing average age of claimants or decreasing severity of disease. Nonetheless, inflating the matrix values of the proposed fund by an unadjusted change in the CPI will overcompensate future claimants.

It is my suggestion that the fund considers computing, on an annual basis, the cumulative change in the CPI at the beginning less the cumulative decline in the tort value of claims based on a reasonable index that takes account of age (and, possibly, decreasing severity). If this value is zero or negative, then the matrix amounts should not be changed. If, alternatively, it is positive, then consider indexing the existing matrix amounts by the difference between the change in CPI and the change in the tort value of the claims.

3) Is there anything further you would like to add to your testimony in light of what you have heard at this hearing?

The forecasts presented by some witnesses are based on a historical time period during which many claims that will not be compensated by the fund were compensated in the tort system. Thus, these forecasts will provide overestimates of the future claims to be made on the fund. The magnitude of these overestimates is quite large.

The medical criteria of S. 1125 are similar to those that were implemented by the Manville Trust in 2002 for its Trust Distribution Process. At the time, the Manville Trust performed an analysis of how the claims that had been filed under the original 1995 Trust Distribution Process would have been compensated under the new system. David Austern, President of Claims Resolution Management Corporation and General Counsel of the Manville Trust, recently testified as follows about the results:

> That model for Manville reflects approximately one third fewer claims and approximately a 30 to 40 percent reduction in claim values, all in the nonmalignancy area.[3]

NERA has independently analyzed this claim based on two separate audits of claims from the Manville Trust. As for the first of these, beginning in 1995, a medical audit randomly selected pending claims against the Manville Trust from the entire population of claimants with pleural disease, asbestosis, and lung and other cancers that were eligible for payment. The initial results were summarized in letters from the Executive Director of the Trust to an attorney representing plaintiffs' attorneys:

> [T]he failure rate at first review is around 60%, and the aggregate failure rate after two reviews is approximately 50%.[4]

> The dozen or so doctors that constitute the vast majority of diagnosticians being used have demonstrably dreadful audit records. . . These doctors are finding disease where there is none, with little regard for medical certainty or accuracy"[5]

Of course, in S. 1125 independent medical evaluation would remove such errors.

The second sample was drawn at random from the TDP for lung cancer, asbestosis and pleural claims. The x-rays and pulmonary function test results were recorded in a database. NERA independently checked the data entry. We determined the number of cases that were compensated by the Manville Trust but were not impaired under the S. 1125 criteria.

We estimate the combined effect of independent medical evaluation and not compensating unimpaired claimants. We found that 63 percent of all resolved claims are unimpaired accounting for 39 percent of the dollars.

---

[3] Deposition Testimony of David Austern in Combustion Engineering, page 54.

[4] Letter from Patricia Houser to Elihu Inselbuch, Esq., September 15, 1995 (Bates #CRMC 0189508). See also Houser Deposition, p. 193, lines 6-16; Memo to David T. Austern and Richard E. Flynn from Terry F. Lenzer and Kathy Lavinder, Re: Asbestos Settlement: Background Investigation of Doctors, March 2, 1996 (Bates #CRMC 0189815-30).

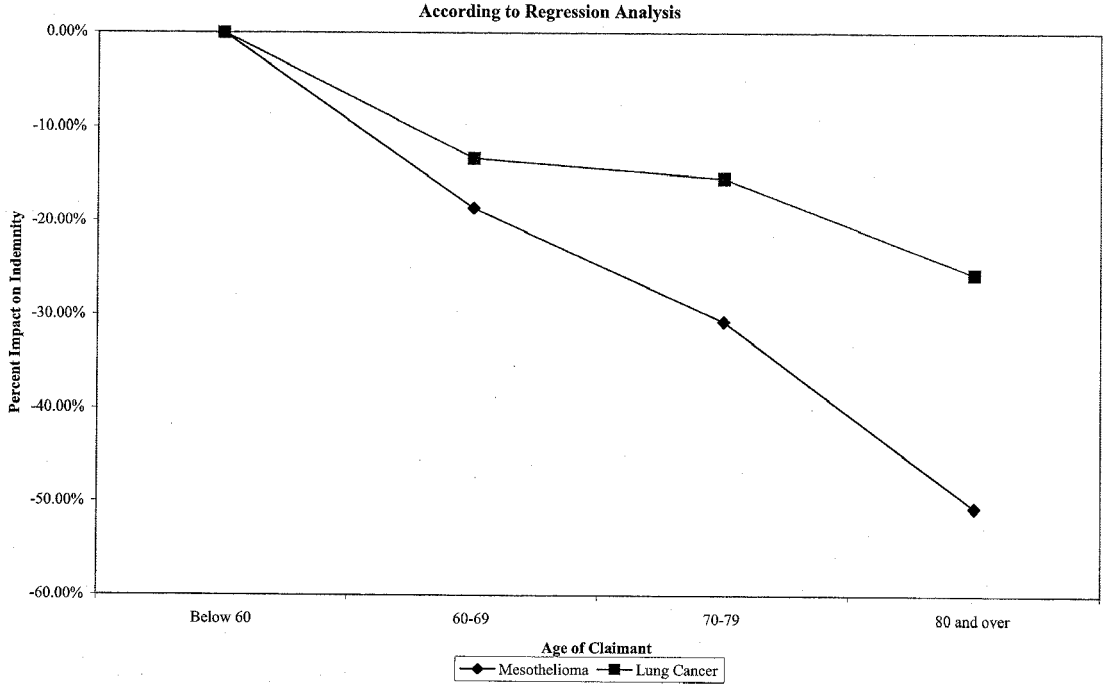
[5] Letter from Patricia Houser to Elihu Inselbuch, Esq., October 23, 1997 (Bates #CRMC 0123381–CRMC 0123382); see also Individual Evaluation Manual, Claims Department, March 1996 (Bates #CRMC 0013573). ("Readings from physicians involved in screening operations are generally known to overread x-rays (they 'see' more than what's there).")

The point of bringing these results to light is not to criticize the tort system but to point out that forecasts being presented to this Committee are based on a set of assumptions about how claims will be compensated that are wildly off the mark. The very point of S. 1125 is to prevent the past from being prologue whereas the bases for these forecasts is, implicitly or explicitly, that claims will be liquidated in the future the same way they were in the past.

Sincerely yours,

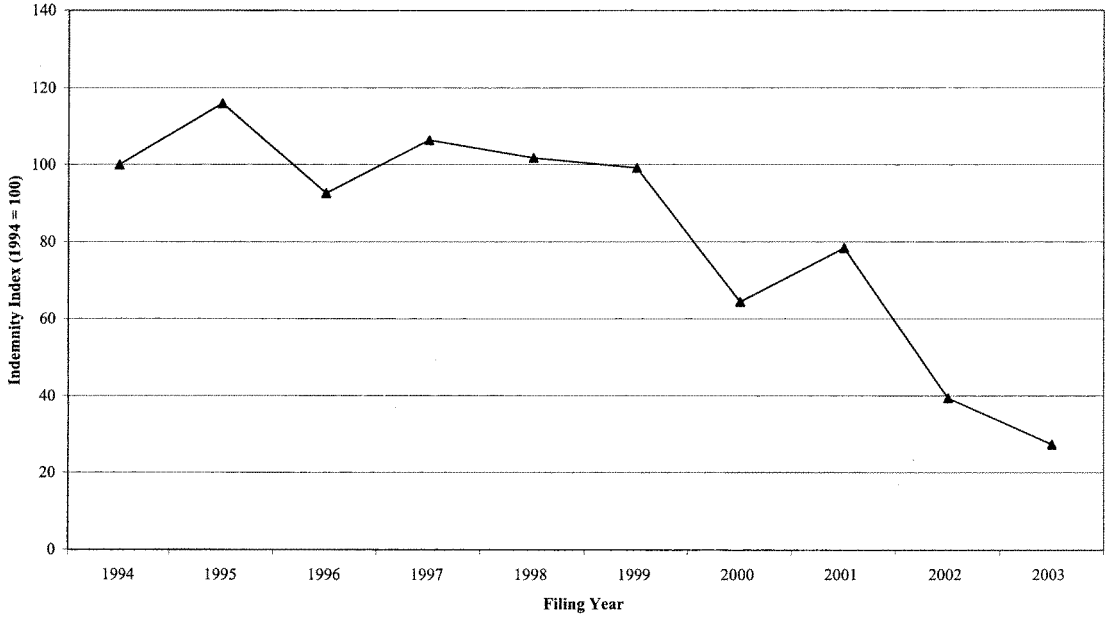
Frederick C. Dunbar

Exhibit 1
Combustion Engineering
Settlement Value Declines with Claimant Age
According to Regression Analysis



Note: See NERA tables "Combustion Engineering, Settlement Value Declines as Claimants Age, According to Regression Analysis" for each disease. n/e/r/a

Exhibit 2
Average Indemnity Index For Non-Malignant Claimants
Decreases Over Time



Source: Combustion Engineering database.

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June 12, 2003

Senator Orrin Hatch
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

Thank you for the opportunity to testify before the Senate Committee on the Judiciary regarding "Solving the Asbestos Litigation Crisis: S. 1125, The Fairness in Asbestos Injury Resolution Act of 2003" on June 4, 2003.

This letter is in response to questions from Senator Specter. I am qualified to answer Question 3.

Question 3: Do you believe that $108 billion in funding is adequate without a federal backstop?

Response: Yes, I believe that $108 billion is sufficient to provide appropriate compensation to all current and future asbestos plaintiffs. This belief is predicated on independent analyses performed by Goldman Sachs and Tillinghast-Towers Perrin suggesting that as much as 50 percent of costs in the current system are "frictional." These frictional costs are primarily associated with attorney fees. The analyses indicate that these costs could be reduced by as much as 80 percent to just 10 percent of total costs.

In addition to reducing frictional costs, the adoption of objective medical criteria for the purposes of determination of benefit eligibility and the severity of injury will prevent individuals who are unimpaired by any asbestos-related illness or disease from recovering compensation (other than medical monitoring). Under the present system, 70 to 90 percent of asbestos plaintiffs

are unimpaired by asbestos-related disease and are draining resources from the truly injured.

In summary, by increasing the efficiency of the system by drastically reducing transactional costs associated with asbestos litigation and conserving resources for individuals who are actually suffering asbestos-related illnesses, $108 billion is a sum that is more than sufficient to provide appropriate compensation to all eligible current and future plaintiffs.

Again, let me thank the Committee for the opportunity to contribute to the current national debate on the issue of asbestos reform. If I can be of any further assistance, I remain at the Committee's disposal.

Sincerely,

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Responses to Senate Judiciary Committee Members' Questions for the Record, Hearing of Wednesday, June 4, 2003 on "Solving the Asbestos Litigation Crisis: S.1125, the Fairness in Asbestos Injury Resolution Act of 2003".

Mark A. Peterson
June 11, 2003

(1) Question from Senator Leahy, "what would be the average claim value for each of these diseases"?

I estimated the average payment for each disease by adding up tort settlement amounts for thirteen different asbestos defendants in recent years and using the claims procedures of asbestos trusts to help allocate these totals to the disease categories of S.1125. I estimated payments for each of the four nonmalignant categories based on the relative values of claims in these categories in recently drafted asbestos trust distribution procedures and discussions with plaintiffs lawyers:

Value for Pleural Disease	≈	.2 to .3 of value for Asbestosis with loss of function
Value for Asbestosis without loss of function	=	.25 to .35 of value for Asbestosis with loss of function
Value for Severe Asbestosis	=	3.75 to 4 times value for Asbestosis with loss of function

These calculations provided an approximate high and low estimate for each disease category. I assumed that the sum of settlement values for these thirteen defendants represent about one third to one half of total payments to be received by plaintiffs from all defendants. Because hundreds of asbestos defendants are regularly named in law suits, many of whom pay substantial amounts in settlements and verdicts, this assumption is conservative. The assumption means that these thirteen defendants would be responsible for paying asbestos plaintiffs as much as all other defendants combined, or alternatively that all other defendants were responsible for no more than twice as much as these thirteen defendants.

AVERAGE VALUE OF ASBESTOS CLAIMS BY DISEASE CATEGORIES
(Estimated total compensation across all asbestos defendants)

$ 40,000	to	$ 70,000	Pleural placques and thickening
50,000	to	125,000	Asbestosis, without loss of lung functi
200,000	to	400,000	Asbestosis, with loss of lung function
800,000	to	1,500,000	Severe Asbestosis
450,000	to	600,000	Other cancers
1,000,000	to	1,500,000	Lung Cancer
2,000,000	to	3,000,000	Mesothelioma

While Senator Leahy did not request separate estimates of payments to lung cancer victims between smokers and nonsmokers, the $1 million to $1.5 million average value of lung cancer claims represents the values of claims for those who smoked. The substantial majority of workers who were occupationally exposed to asbestos were smokers. The substantial majority of victims who have receive payment for asbestos related lung cancer were smokers.

Claims by nonsmoking asbestos exposed lung cancer victims are relatively infrequent. Average settlements among these nonsmokers may be at or greater than $1.5 million, but because there are relatively few such nonsmokers, their settlements do not markedly change the overall average among all lung cancer victims.

(2) Question from Senator Hatch: "... provide backup analysis and supporting data for the claims projections and costs ..."

My statement and testimony to the Committee estimated the amount of money that would be required to pay asbestos victims under plausible assumptions about the number of future claims and the categories for which claimants may qualify under S.1125. The analysis demonstrates that S.1125 would impose on asbestos victims real and significant risks that they could not be paid within a $108 billion fund.

Assumptions About Number Of Claims

294,800 pending claims, an assumption provided by the AFL-CIO and used by both the AFL-CIO and the ASG. The assumption is consistent with the assumption of 300,000 pending claims used by Ms. Jennifer Biggs of Tillinghast.

Two alternative assumptions of future claims, 1,608,364 and 2,144,487. These assumptions have the following bases:

Manville's forecasts made in year 2001, based on filings through 2000 ranged from 747,726 to 2,684,719. Manville's consultant, ARPC, estimated that the mean of these forecasts weighted by probabilities assigned to each forecast was 1,421,598. Of these claims, 1.26 million of these claims were expected from 2003 through 2049. The ARPC forecasts were based on Manville's filings for 1996-2000, which totaled 193,927 or 38,785 claims per year. Since then, Manville's 2001 and 2002 filings totaled 142,309 or

71,155 claims per year, an 83 percent per year increase in the last two years.

Adjusting the 2001 Manville forecasts for Manville's actual 2001 and 2002 claims experience revises the ARPC forecast to 2.31 million future claims based on its most recent experience (71,155 / 38,785 = 1.83 x 1.26 million = 2.31 million). Alternatively, using 2000-2002 filings to adjust the forecast results in a revised Manville forecast of 2.17 million claims after 2002 (66,770 average for 2000-2002 / 38,765 = 1.72 x 1.26 million = 2.17 million).

The Manville Trust forecasts must be adjusted in a second way if the Manville claims experience is to be used to estimate the expected future asbestos bodily injury filings across all defendants. The Manville Trust has not received claims from every person who has made a claim against any asbestos defendant. I have compared Manville's claims database with databases of other asbestos defendants and determined that Manville had received claims from only about 67 percent of all claimants. (Note that while empirically derived, Manville's actual share of all claims may be more or less then 67 percent, because the various databases were extracted at somewhat different times, and also because I did not have data on all other asbestos defendants, which would have identified additional claimants who were not included in any of the databases and lowered the Manville share of all claims.) So to estimate the total number of claims against all defendants who would be included in payments under S.1125, the Manville forecasts are adjusted upward by 50% to reflect that historic Manville filings represent only a partial share of claims received by all defendants (1 / 0.6667 = 1.5). This "partial share" adjustment would be on top of the adjustments for increased recent filings discussed above, because it represents a second distinct way in which the Manville 2001 forecasts are under-representative as current forecasts of all future asbestos claims. With both adjustments, the Manville 2001 forecasts would imply future claims in the range of 3.26 million to 3.47 million (2.31 million x 1.5 = 3.47 million; 2.17 million x 1.5 = 3.26 million).

Even using the partial share adjustment by itself, without the adjustments for Manville's increased filings since its last forecasts were made, we obtain an adjusted forecast of 1.89 million future claims across all defendants by scaling up the ARPC forecast for Manville of 1.26 million future claims derived from Manville's 1996-2000 claim filings (1.26 million x 1.5 = 1.89 million).

Forecasts in current bankruptcy proceedings yield estimates of total future claims that are consistent with these Manville estimates. Forecasts are in the range of 1,250,000 future claims for Pittsburgh Corning, Armstrong and USG, companies who historically received about 60% to 67% percent of all claims. This implies 1.87 million to 2.08 million future claims across all defendants. (1,250,000 / 0.67 = 1.87 million; 1,250,000 / 0.6 = 2.08 million).

It is most plausible to assume that the number of future claims

across all defendants would fall within these ranges derived from the formal forecasts for Manville, Pittsburgh Corning and Armstrong, summarized on the table below:

Estimates of Total Future Asbestos Claims

Source	Estimate
Manville, Adjusted for 2001-02 Claims	2.31 million
Manville, Adjusted for 2000-02 Claims	2.17 million
Manville, Adjusted for partial share	1.89 million
Manville, Adj 2001-02 and part share	3.47 million
Manville, Adj 2000-02 and part share	3.26 million
Pittsburgh Corning, Adj for part share	1.87 - 2.08 million
Armstrong, Adjusted for partial share	1.87 - 2.08 million
USG, Adjusted for partial share	1.87 - 2.08 million

All of these analyses suggest an assumption about what will be the total number of all future claims received by all asbestos defendants together: around 2 million or greater. To be conservative in my analysis for my testimony to the Committee, I assumed a lower range of future claims: 1,608,364 to 2,144,487 total future claims against all asbestos defendants.

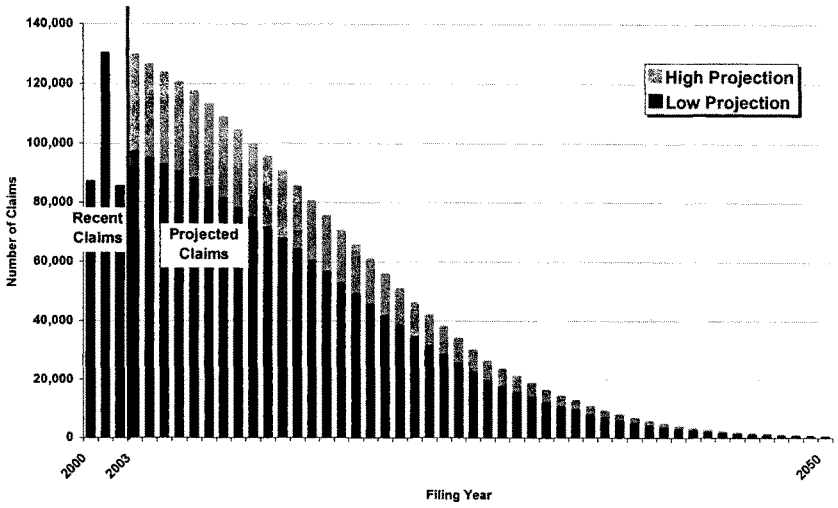
Further, to assure that the assumption of the number of future cancer claims would be consistent with medical forecasts, I assumed that future claims would approach but remain less than the Nicholson, Perkel and Selikoff (1982) epidemiological forecast of asbestos related cancer deaths that will result from occupational exposures through 1979: claims for 95 percent of forecasted mesothelioma deaths and 90 percent of deaths from lung and other asbestos related cancers. For future nonmalignant claims, I made alternative assumptions that the number of future nonmalignant claims would be either 11 or 15 times cancer filings in each year. These estimates of the relationships between future filings for cancers and nonmalignant diseases bracket the actual Manville Trust experience during 2000-2002, when it received about 12.5 nonmalignant claims for every cancer claim, and are less than Manville's experience during 2001 when Manville received 15.8 nonmalignant claims for every cancer claim. The ratios of 11 or 15 nonmalignant claims for each cancer claim provided me with the alternative assumptions of the number of future claims: 1,608,364 and 2,144,487 which differed only in the number of estimated asbestosis and pleural disease filings. The table below shows the total number of future claims for each disease for each alternative estimate of future claims.

ESTIMATED NUMBER OF FUTURE CLAIMS BY DISEASE

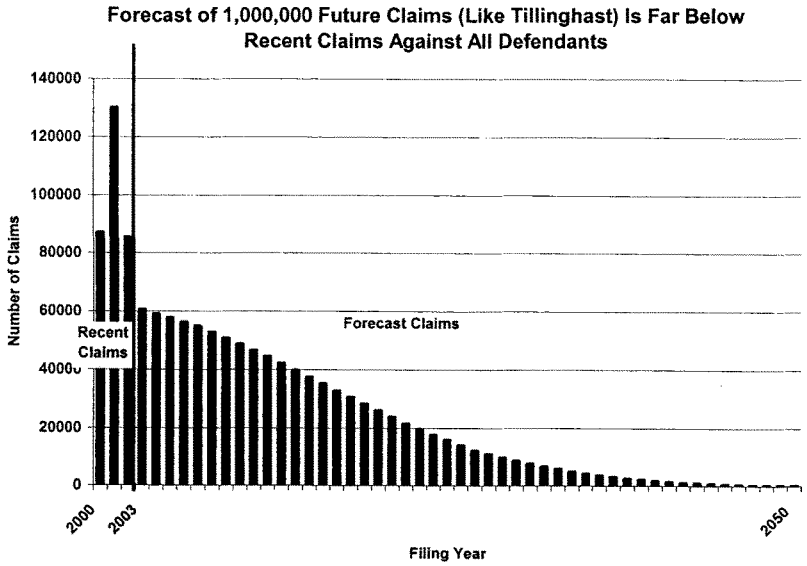
	1.6 Million Future Claims	2.1 Million Future Claims
Mesothelioma	57,995	57,995
Lung Cancer	59,877	59,877
Other cancer	16,174	16,174
Asbestosis	1,206,397	1,608,527
Pleural Disease	268,090	402,131

The assumptions about the number of future claims used in my analysis are a continuation of the level of claiming against asbestos defendants in recent years. Figure 1 below shows the best estimate of the total number of asbestos claims filed in recent years against all asbestos defendants, based on the number of claims filed against the Manville Trust between 2000 and 2002, adjusting for the empirical fact that Manville has received about 67 percent of all claims. The Figure also shows the estimated number of claims that would be filed in each future year for the two alternative estimates used in my analyses. Figure 1 shows that the lower estimate of future claims assumes that there will be fewer claims filed in each future year than have been filed on average against all defendants in recent years. Figure 1 also shows that the higher estimate assumes that annual filings of claims in future years will continue at the higher range of claims filed against all defendants in recent years. Both estimates of future claims are consistent with recent experience.

Estimated Future Claims Are Consistent with the Number of Claims Recently Filed against All Defendants



In contrast, Tillinghast's 1 million projection of future claims is consistent neither with current forecasts for asbestos bankruptcies and trusts nor with the recent history of claims against asbestos defendants. Tillinghast provided no details, analysis or supporting data for its 1 million projection, so I have had to estimate the annual number of claims that Tillinghast forecasts would be filed in future years, assuming 1 million total claims. Figure 2 shows a trend in annual future claims totaling 1 million that exactly parallels the most reliable epidemiological forecasts of the annual future asbestos related cancer deaths (Nicholson, Perkel and Selikoff, 1982). Had I been provided with it, the Tillinghast trend would undoubtedly be similar. As Figure 2 suggests, the annual future claims under Tillinghast's 1 million projection would be far below the number of claims that asbestos defendants are now receiving. Further, Tillinghast's forecast of 1 million future claims cannot be reconciled with Manville's receipt of 200,000 claims in the past three years. This single defendant has been receiving claims at the rate of 67,000 over the last three years, a rate greater than Tillinghast's forecast across all asbestos defendants. These disparities raise serious questions about the credibility of Tillinghast's forecast.



Assumptions About Categories And Payment

Like the Tillinghast analysis described in the statement and testimony to the Committee by Ms. Jennifer Biggs, I drew my assumptions about the categorization and payment of claims under S.1125 on analyses done for asbestos trusts. Ms. Biggs stated that she drew on the Manville Trust's assumptions about how claims will distribute to the various claims categories. I looked to analyses performed by different analysts that have been done in current bankruptcies of Manville, Armstrong World Industries, Pittsburgh Corning and other asbestos defendants. All of these analyses for other trusts, including Manville's, are prospective forecasts since no trust has sufficient experience with their new trust distribution procedures to derive empirical distributions of claims.

To reflect these uncertainties, both Tillinghast and I stated a range of payments that might be likely under S.1125. Those ranges are fairly broad. Tillinghast's highest forecast is 192 percent of its lowest. My range is narrower: my highest estimate of compensation under S.1125 is about 150 percent of my lowest within each of my two alternative forecasts of the number of future claims.

Significantly, Tillinghast's analyses about how claims would be valued under S.1125 correspond well with my alternative analyses. Ms. Biggs provides four alternative projections of future payments, from $56.4 to $108.4 billion (page 10, June 4, 2003 Statement of Jennifer Biggs). As part of these projections, Ms. Biggs calculates four different average values of future claims: $47,900, $61,100, $68,600 and $98,500 for her forecasted 1 million future claims. In comparison, under the assumptions that I described in my Statement of June 4, 2003 claimants would be paid average values under S.1125 between $66,817 and $112,960. I have made one further set of analyses since my testimony to the Committee. In the analysis described in my testimony and my June 4 Statement I used the lung cancer criteria and values of the draft bill, which did not reduce payments to lung cancer claimants who smoked. If, instead, I assume the treatment of lung cancer victims in the bill as filed with lower payments to smokers, this would likely reduce the total compensation under the bill by about $7 billion or one third of the previous compensation for lung cancer victims. With this changed assumption, asbestos disease victims would be entitled to between $63,947 and $109,282 under the assumptions of my analysis. In short, two of Tillinghast's four projections involve average values of $68,800 and $98,500 are within the range that result from my various assumptions and a third Tillinghast projection of $61,100 is within 5 percent of that range.

The point I make with this analysis is that asbestos victims bear a significant risk that the $108 billion fund will be insufficient to provide for their compensation. This risk would be placed on future victims and could be realized within a decade. Consistent with this point, three of Tillinghast's claim value estimates under S.1125 imply that the $108 billion fund would be inadequate if 1.6 million future claims are filed with the national fund, a

number which would be reached simply by extending into the future the current annual claim filings. All of Tillinghast's estimated values of claims under S.1125 imply that the $108 billion would be insufficient if 2.1 million future claims are filed. Tillinghast's claims value analyses imply that the fund would be inadequate based on plausible assumptions about how the number of future claims will be greater than what Tillinghast forecasts. Moreover, this comparison shows that differences between Tillinghast's and my estimates of the total compensation that would be payable under S.1125 arise primarily from our assumptions about the number of future claims not how those claims will be distributed among the various categories of S.1125.

(3) Question from Senator Hatch: "... compare the projections that you provided in your testimony on S.1125 with projections that you provided to the Manville Trust related to the 2002 Trust Distribution Procedures, and note any differences".

Neither I nor my company have made any such projections for the Manville Trust. For my own information I explored how the 2002 Manville Procedures might operate under a variety of assumptions and later sent computer files of some of these analyses to Mark Lederer, CFO of the Manville Trust, at his request, so that he might consider various alternatives as he modeled likely performance under the proposed procedures. These files were neither "projections ... you provided to the Manville Trust" nor were they public documents. Rather, they were data explorations and speculations that drew upon forecasts of future Manville claims made by others. I made no forecasts of future Manville claims myself.

I have received a copy of a document prepared at the Manville Trust that appears to summarize some of these preliminary analyses that I sent to Lederer and I understand that this document has been provided to the Committee. I did not prepare this document and I am not familiar it. The document seems to reflect some but not all of the alternative analyses that I had examined with regard to Manville's proposed new procedures. It presents only a portion of my exploratory analysis that was selected by someone other than me. It does not represent the entire range of possible outcomes that I had considered and it does not represent any particular outcome that I was asserting.

The document raises several issues relevant to S.1125 which I am glad to address. First, a forecast of future Manville claims is not a forecast of future claims that will likely be filed against all asbestos defendants. A Manville forecast will be an undercount of the total number of future claims that will be filed against any asbestos defendant. As I described above, my review of the claims databases for many asbestos defendants shows that Manville received only about two-thirds of all identifiable claims. So whatever forecast or count someone makes of future Manville claims, they should assume that the related forecast or count across all defendants would be about 50 percent greater.

Second, the assumptions of the "Higher" injury severity that I

described in both my Statement of June 4 and my testimony were developed by other analysts and describe their expectations about similar trust distribution procedures proposed for other asbestos trust. The "Higher" injury assumptions were derived from the history of claims submitted to and processed by other asbestos trusts by analysts who have significant experience with those trusts. I regard these assumptions developed by others as reasonable and plausible assumptions about how S.1125 might operate even though I am not their author. Because I am not the author of these assumptions, they differ in many ways from my alternative analyses of how the Manville procedures might operate.

Third, there are significant and material differences between the proposed Manville Trust distribution procedures and those in S.1125. Ms. Biggs addresses differences that she feels would lead to more lung cancer claims under S.1125 than would be filed against Manville (p. 9 of her Statement). The expected distribution of claims between nonmalignant categories 2 and 3 will be different. Unlike the Manville Trust procedures, S.1125 will not pay claimants who qualify for category 2 but will pay claimants who qualify for category 3. Because of this difference, we would see relatively more claims filed under category 3 compared to category 2 under S.1125 than we would under the Manville procedures which pay both categories. Next, fewer claimants will go to the trouble and expense of obtaining medical documentation required by the Manville procedures than will comply with the requirements of S.1125, requirements such as documentation of injuries by a physician who physically examined the claimant. So far no other asbestos trust uses procedures like Manville's. Because the Manville Trust currently pays little to nonmalignant claimants -- $600 for category 2 and $1,250 for category 3 -- claimants have little incentive to incur the trouble and expense of complying with Manville documentation requirements in order to get such small payment. And even if a claimant does not comply with Manville's requirements, the claimants will likely receive payment from other defendants. In contrast, under S.1125 asbestos victims will receive no compensation from anyone unless they comply with requirements of that bill. Therefore, claimants will have strong incentive to and will be more likely to comply with those requirements. Since, by example, S.1125 requires a physical examination by a doctor whose medical report is submitted for a claim, all claimants will have physical examinations.

(4) Question from Senator Specter: "as it relates to S.1125 and the asbestos litigation solutions in general, what basis is there in the law for approximate justice?"

The practices of parties in resolving asbestos claims sometimes involve "approximate justice", but this approximation results from the parties' actions and consent, not from the operation of law. Both the Trust Distribution Procedures of existing asbestos bankruptcy trusts and some settlement processes in tort litigation resolve some claims in a manner that might be described as "approximate justice", but both asbestos trusts and tort litigation provide opportunities to escape such approximate treatment. Asbestos trusts permit claimants to have their claims

individually reviewed or treated as extraordinary claims and will even consider and pay a claim that merits compensation although the claim does not meet the strict criteria of the claims procedures. Tort plaintiffs can always seek individual review and settlement of their claims and group settlement processes provide for such individual review. Of course both trust claimants and tort plaintiffs can reject settlement and try their claims.

These trust and tort settlement processes do in fact approximate justice in at least four ways. One, values fairly represent the values of our system of civil justice. Trusts value claims in amounts that represent the actual tort value of that claim; settlement values are negotiated freely between a defendant and the claimant's lawyers. Two, victims receive timely compensation. Because asbestos victims typically have claims against and receive compensation from many different defendants, they receive payments at different times. Even if victims sometimes have to wait for payments from some trusts or tort defendants, compensation from other trusts or defendants arrives quickly. Three, the criteria used to pay claims by trusts or as part of group settlement processes are negotiated with representatives of victims and permit all claimants who have legal causes of action to have their claims considered. Four, victims are assured either that they will receive compensation from an asbestos trust or a tort defendant or else have the right to pursue a law suit.

In contrast, S.1125 approximates justice in none of these ways. Values provided in S.1125 do not approximate the amounts that asbestos victims now receive for their claims, as shown in my response above to the question asked by Senator Leahy. For multiple reasons, those values cannot be regarded as a fair compromise. First, many claimants who would be entitled to and would receive substantial compensation in the current system will receive nothing under this bill. Second, payments under S.1125 are fractions of the amounts that victims now receive: only one third of the average payment to mesothelioma victims, less than 10 percent of what lung cancer victims receive on average if they smoked and similar small fractions for all other diseases. Third, the proposed legislation hurts the most seriously injured victims, paying them less than what they would now receive solely from asbestos trusts. Currently, victims of mesothelioma and other diseases who have extraordinary losses can have their claims individually reviewed by trusts and valued well in excess of maximum values, which do not apply to extraordinary claims. Even with the limited percentages that present and pending trusts pay, trusts would collectively pay extraordinary mesothelioma claimants more than $750,000. The trusts will collectively pay many lung cancer victims who smoked more than the $100,000 promised by S.1125 even if their claims are not considered to be extraordinary.

S.1125 will not approximate speedy justice. Payments under the bill would be delayed for many years. The bill establishes four different federal bureaucracies to evaluate and review claims and to tax asbestos defendants and insurers for needed funds. None of these bureaucracies now exists and nothing is comparable to what the proposed act would create. So it is likely to take years to

establish and begin operations of these new organizations. Then, once they are operational the fund will be inundated with claims: 300,000 claims that exist today and between 60,000 and 100,000 new claims in 2003 and every year until the fund is established. The fund will likely face a half million or more claims when it begins operations, claims which it must then process and pay. But because S.1125 limits payments to $5 billion per year, the fund will not be able to pay these claims for many additional years. The fund will need to accumulate its annual $5 billion payments over six or more years simply to pay claims that it will receive in its first year. Together, years of delay in establishing the bureaucracies under S.1125 and then the years of the fund's initial underfunding would force upon people who today are already victims of asbestos diseases waits of as much as eight years and more likely ten or more years for the compensation promised by S.1125. After that delays will continue as the fund receives money at the rate of only $5 billion per year but faces far more in liabilities to claims that arise after the first year, claims that the fund could not pay while it was paying claims that arose in the first year.

Finally, S.1125 does not approximate justice because it provides no assurance of compensation for claimants who would qualify under the act while denying claimants any other recourse for compensation. As I testified before the Committee, under reasonable assumptions the fund would likely run out money within the next ten to fifteen years. But even if you do not accept my specific analyses, no one can provide assurance that S.1125 will have sufficient funds to pay future claimants.

(5) Question from Senator Specter: "what are your thoughts on ... set offs from collateral source? Is it true that many of the most serious asbestos victims would get little or nothing?"

The collateral source set offs would be borne primarily by the most seriously injured victims. Treatment for lung cancer will frequently exceed $100,000 eliminating any compensation to lung cancer victims who smoke. While I do not have empirical data on medical costs for mesothelioma victims, clearly those expenses would greatly erode compensation under S.1125 and could wipe out any compensation for claimants who survive the longest period with the disease. Victims with severe asbestosis also require frequent medical care and aggressive treatment of lung infections that would also erode their compensation. In addition to falling most heavily on the serious injured, administration of a collateral source set off would be complex and expensive and would consume money that could be used to pay victims.

(6) Question from Senator Specter: "Do you believe that the $108 billion in funding is adequate without a federal backstop?"

First, it is not apparent that S.1125 would result in collection of $108 billion to pay asbestos victims. While S.1125 creates bureaucracies to assess $45 billion each from asbestos defendants and their insurers, methods for collecting an

additional $18 billion are poorly defined. There is neither certainty nor promise that this $18 billion would be obtained for the fund.

Second, I do not believe that $108 billion will be adequate to pay compensation called for under S.1125. I have provided my analysis supporting this concern. In my discussion above I have also shown that even Tillinghast's analysis of values of claims under S.1125 demonstrates that the fund will be inadequate if one makes reasonable assumptions about the number of future claims. Furthermore, there is no way to assure that $108 billion will be sufficient even if one is inclined to accept Tillinghast's forecast of future claims. Asbestos liability forecasts are inherently uncertain and historically have always been too low. There is no reason to believe that Tillinghast's forecasts are immune to these uncertainties or historical errors.

Without some form of backstop, asbestos victims at best bear risks (a) that the $108 billion fund would be inadequate and (b) that some victims would receive no compensation while being barred from making any legal claim for compensation of their asbestos disease. These risks are great and, I believe, certain to be realized if S.1125 were to be adopted.

The risks can be eliminated only if the fund were backstopped either by a federal commitment or by enforcible contingent obligations on asbestos defendants and insurers. While described as a "backstop" or "backend", this contingent money would have to become available when needed, likely within the next eight to 15 years. The greatest number of asbestos claims and greatest obligations under S.1125 would arise within the first eight to fifteen years of the fund and there is a significant risk that the entire $108 billion in funds will be exceeded by claims filed within eight to fifteen years. The fund would then need "backstop" funds at that time. The provision of money only twenty or years in the future after defendants and insurers have completed their string of $5 billion payments would require that asbestos victims and their families wait at least a decade for compensation promised by S.1125, denying them meaningful and timely compensation.

(7) Question from Senator Specter: "Is the cut off date of 12/31/82 for last exposure fair to those exposed after that date that eventually develop disease?"

This cut off date is clearly unfair and is bad as a matter of public policy. Asbestos products continue to be used today. Even if their use were to be outlawed, asbestos products remain in place creating possible exposures among persons who live or work in the vicinity of such products. The number of persons who will develop asbestos disease solely from exposures after 12/31/82 will likely be modest, but some disease will arise, particularly mesothelioma. There seems no reason to exclude those victims from a compensation fund; there certainly is no reason to preclude any opportunity for recovery either through the fund or by way of litigation. As written, the act would remove these victims' legal

rights without providing any compensating remedy.

Further, the law creates perverse incentives for persons to manufacture or sell asbestos containing products or to carelessly remove existing asbestos containing products. Under the current bill, such persons could expose and injure others without facing any legal responsibility and without facing disincentives for such harmful acts.

QUESTIONS FOR PROFESSOR TRIBE
FROM SENATOR KYL
"SOLVING THE ASBESTOS LITIGATION CRISIS: S.1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003"
JUNE 4, 2003

Question 1: This is a question about how exactly the bill will apply to particular situations. What if you had two companies, both of which had $30 million in what the bill calls "prior asbestos expenditures." Suppose that one company had purchased millions of dollars of insurance in the past, and that this insurance was adequate to cover all of the firm's asbestos liabilities. Suppose that the second company had not spent any money on insurance in the past, and was presently paying the entire $30 million in asbestos liabilities out of its own funds. As I understand it, under the FAIR bill, both companies – the one that had purchased insurance and the one that had not – would end up paying the same amount. Is that your understanding of how the bill works?

Answer: The companies might be treated as having the same "prior asbestos expenditures" (and therefore placed in the same tier), depending on the factors you mention as well as other factors (such as the amounts paid in settlements or judgments by the insurer). The bill defines "prior asbestos expenditures" to include "the total gross amount paid for or on behalf of a person at any time before December 31, 2002, in settlement, judgment, defense, or indemnity costs related to all asbestos claims against that person." § 201(6)(A). Therefore, amounts paid to an insurer – as well as settlements or judgments paid to plaintiffs – are counted in the calculation of "prior asbestos expenditures."

Question 2: You indicate in your testimony that "as-applied challenges [by payors] are case- and fact-specific and do not disrupt the operation of a statute as a whole." You also indicate that the FAIR Act "will satisfy" the factors that the Supreme Court has set out "in the vast majority (if not all) cases." This testimony suggests to me that you allow the possibility that there exist payors as to whom the application of the act would be so disproportionate to their past experience as to trigger due process or takings concerns, but that the existence of such payors does not undermine the bill as a whole. Is that a fair statement of your position?

Answer: I am not aware personally of concrete situations where the application of the Act to particular payors would be constitutionally problematic. I meant in my testimony to suggest that, even if there were such isolated situations, the operation of the Act as a whole would not be disrupted.

At bottom, constitutional challenges to the way the FAIR Act's fiscal burdens are allocated among various possible manufacturers, insurers, and other sources of financial support for the national asbestos trust fund that Congress would create come down to arguments that a particular company or group of companies is being asked to bear burdens that are so unrelated to any reasonable set of criteria that the imposition of those burdens fails to satisfy the minimum

substantive requirements of due process, including the equality component of the Due Process Clause of the Fifth Amendment. Although four Justices in the *Eastern Enterprises* case cast the relevant inquiry in terms of the Fifth Amendment's ban on takings of private property for public use without just compensation, *see Eastern Enterprises v. Apfel*, 524 U.S. 498, 523-24 (1998) (opinion of O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ.), and although their willingness to treat as "takings" the financial exactions that are made to fund a public program was expressed in a plurality opinion, a majority of the Supreme Court's Justices have taken the position that, inasmuch as something entirely fungible (namely, money) rather than a distinctive item of real or personal property was being exacted from the company that complained of a disproportionate burden, the ultimate issue was basically one of substantive due process and equal protection of the laws, just as it would be with an earmarked tax that someone wished to challenge as disproportionate or otherwise unfair in its impact on a given taxpayer or group of taxpayers. *See id.* at 568 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 556-58 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). And, with respect to that decisive inquiry, the difficulty of establishing that one's burdens are so out of kilter as to render them unconstitutional was underscored very recently when the U.S. Supreme Court, in unanimously reversing a state court's decision that had struck down, under the Fourteenth Amendment Equal Protection Clause, the Iowa Legislature's action in maintaining a 20 percent cap on the state's tax on *riverboat* slot machine revenues while imposing a 36 percent cap on the state's tax on *racetrack* slot machine revenues, undertook to hypothesize various possible purposes that might have been served by that differential and held that, with respect to such differential fiscal exactions, anyone who contests their constitutionality as an equal protection matter has the burden of "negativ[ing] every conceivable basis" that might support the challenged difference in treatment, *Fitzgerald v. Racing Association of Central Iowa*, No. 02-695, slip op. at 6 (U.S. June 9, 2003) (quoting *Madden v. Kentucky*, 309 U.S.83, 88 (1940)), a burden that the racetrack owners who challenged the Iowa tax in its application to them could not meet. In so holding, the Court's unanimous opinion stressed that the rational-basis review that is necessarily highly deferential in evaluating legislative classifications in the context of economic regulation "is especially deferential in the context of classifications made by complex tax laws," slip op. at 4 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)), and it seems plain to me that there is no principled basis on that score for distinguishing among laws that impose taxes to fund general revenues, laws that impose earmarked taxes of various kinds to fund specialized programs, and laws that fund such programs through involuntary "contribution" requirements that are given some label other than "taxes."

QUESTIONS OF SENATOR DURBIN TO LAURENCE H. TRIBE

"Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003"

June 4, 2003

I would like to know your opinions – both as a matter of Constitutional law and as a public policy consideration – about one potentially punitive and unfair consequence of S. 1145, the FAIR Act.

John Crane, Inc., is a mid-sized company in my home state of Illinois, that designs and manufactures high performance mechanical and polymer seals for a wide range of applications, including oil and gas, petrochemical, processing plants, mobile hydraulic machinery, and pulp and paper. At an earlier point in the company's history, it manufactured certain products that contained asbestos (although those products have been consistently found in court to have emitted fewer asbestos fibers than allowed even under today's most rigorous OSHA standards). As a result, John Crane, Inc., has been named as a defendant in numerous claims by third parties.

As an asbestos defendant, this company is unique in that, for over 20 years, John Crane, Inc., has refused to settle out of court and, instead, has litigated every single one of the thousands of asbestos-related claims brought against it. And unlike other asbestos defendants, John Crane, Inc., relies on a "safe product" defense, which has, to date, allowed the company to prevail in approximately 90,000 claims filed against it. Meanwhile, there have been only 24 adverse judgments entered against John Crane, Inc. That is a remarkable 99.97% winning record for an asbestos defendant.

Under Senator Hatch's FAIR Act, an asbestos defendant's mandatory contribution amount to the trust fund would be based on the company's past asbestos-related litigation payments. The underlying assumption of this approach appears to be that one can estimate a company's future asbestos-related liability based on the sum of its past asbestos-related payments. Thus, Section 201(6) of the FAIR Act defines "Prior Asbestos Expenditures" broadly as including "defense . . . costs related to *all* asbestos claims. . ." (emphasis added).

In the case of John Crane, Inc., however, this definition would sweep into the trust fund costs that this company incurred to *successfully* defend those claims, where, by definition, the company ended up paying no monetary judgments to the claimants.

Do you believe it is justified or fair to submit an asbestos defendant company in such a unique position to contribute the same amount to the trust fund as other defendant companies that paid both defense costs *and* judgments?

Do you believe it would be appropriate or even desirable to redraft 201(6) of the FAIR Act to define "Prior Asbestos Expenditures" in order to limit such costs to only those incurred in defending asbestos claims that ultimately resulted in adverse judgments against the defendant company?

Answer: Senator Durbin raises a telling example, which to my mind provides an even greater reason to support the basic approach taken by the FAIR Act. The fact that a mid-sized company has been forced to face more than 90,000 repetitive claims in court, despite a remarkable 99.97% winning record, illustrates much of what is wrong with the tort system's approach to asbestos litigation. The same issues are litigated over and over again; transaction costs are immense; money that might better be expended to help victims is instead wasted on keeping the litigation machine running at full tilt; and the burden on the judicial system is growing to intolerable levels. As the Judicial Conference Ad Hoc Committee on Asbestos Litigation found, "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; 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." Quoted in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997).

The specific question of whether it would be wiser to alter the definition of "prior asbestos expenditures" in Section 201(6) of the FAIR Act than to leave that definition in place while relying on the current draft's approach in Sections 204(d)(2) and 204(d)(3) of making limited adjustments available to individual companies based on financial hardship or demonstrated unfairness, raises a host of technical and political issues that are beyond the scope of my testimony and on which I lack the data to make a fully informed judgment. Among many other considerations, bending the definition of "prior . . . expenditures" with respect to asbestos litigation in order to account for the phenomenon Senator Durbin describes in which particular litigants are beset with repetitive and meritless lawsuits in which those litigants are victorious but whose costs they, rather than their opponents, end up bearing would raise the question of whether "crediting" such unfairly burdened litigants with these costs in the context of a solution to the asbestos crisis while providing no relief to similarly burdened litigants in other mass tort situations is a sensible approach. The standard "American rule" for attorney's fees, of course, requires each side to bear its own costs, with only the most limited statutory exceptions for successful civil rights lawsuits. While some have urged a broader reexamination of this approach, on the ground that it causes injustices and inefficiencies that might best be overcome through a broader movement toward the standard English system in which the losing litigant is typically required to pay the litigation costs of the victorious opponent, the English rule has both pluses and minuses when compared with the American model. I am certainly not arguing here that the English rule is, on balance, preferable to our own. I am simply pointing out that this is the kind of issue that Senator Durbin's thought-provoking example highlights, which is in turn among the reasons for my hesitation in simply embracing the notion that Section 201(6) ought, in fairness, to be amended in order to accommodate illustrations like that of John Crane, Inc., of Illinois.

I hope that drafting issues of this sort, which combine technical and policy concerns that are fundamentally distinct from the pros and cons of the basic approach taken by the FAIR Act, do not stand in the way of asbestos reform legislation that would benefit companies like John Crane, Inc., as well as injured asbestos victims.

QUESTIONS FOR PROFESSOR LAWRENCE TRIBE FROM SENATOR SPECTER
"Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003"
June 4, 2003

1. As it relates to S.1125 and the asbestos litigation solutions in general, what basis is there in the law for approximate justice?

Answer: First, before setting out the ample basis in the law for the FAIR Act, I would like to contrast the procedures established in the FAIR Act with the present tort system, which for many fails to provide *even* "approximate justice." The flood of claims prevents the courts from providing timely compensation for all but a smattering of people who have been gravely injured by asbestos diseases. The process of compensation often resembles a lottery. Whether victims receive compensation and, if so, how much they receive depends on many factors having little to do with the strength of their claims or the severity of their injuries. The decisive factors are the fortuity of where and when the alleged victims file their lawsuits, whom they happen to sue, whether those defendants are solvent at the time the claims are filed and when, if ever, those claims have been translated into enforceable judgments. Some victims receive astronomical awards, while others receive little or nothing. Quite a few severely injured victims die before their cases can be heard. Manville Trust claimants receive pennies on the dollar. It is important to bear in the mind that the relevant choice is between the FAIR Act and the current system – not between the FAIR Act and some hypothetically optimal system of perfect justice.

In any event, although the problems posed by asbestos are in many ways unique, the legal principles that support the FAIR Act are well established. The precedents include:

• The Black Lung Disability Trust Fund, which was upheld in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976);

• The Price Anderson Act, which caps damages in nuclear accidents, upheld in *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59 (1978);

• The September 11 Victims Compensation Fund;

• The National Swine Flu Immunization Program and the National Vaccine Program, which provide administrative compensation and limit lawsuits against manufacturers;

• Workers' compensation statutes enacted by the states, which substitute an administrative remedy for a cause of action in court.

These examples demonstrate that Congress has the power to adjust, restrict, or even abolish common-law and statutory causes of action. Congress has ample authority to rationalize asbestos claims by creating an Article I procedure in the asbestos court for the orderly payment of such claims and thereby avoiding a race-to-the-bottom in which relatively unimpaired plaintiffs are overpaid, transaction costs are high, and grievously injured plaintiffs risk getting little or no compensation at all. Congress has the constitutional power to substitute this procedure for existing federal and state laws, even if the claim values under the FAIR Act are lower than the amounts awarded in the tort system (§ 131); even if payments under the FAIR Act are spread out over three years or made non-assignable, in contrast to state-law claims (§ 133(a)(1), (b)); even if the FAIR Act abrogates the collateral source rule followed by many states (§ 134); and even if the FAIR Act two-year statute of limitations is less generous than that in some states (§ 111(c)). The Supreme Court has repeatedly held that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993).

2. What are your thoughts on Senator Durbin's discussion on set offs from collateral sources in the bill? Is it true that many of the most serious asbestos victims would get little or nothing from the bill as presently proposed?

It is not my understanding that the most serious asbestos victims would get little or nothing under the bill, particularly when compared with the vagaries of the tort system to which they would otherwise be relegated.

It is true that the bill abrogates the collateral source rule, but this is well within Congress' power. The bill provides that "[t]he amount of an award otherwise available to an asbestos claimant under this title shall be reduced by the amount of collateral source compensation that the claimant received, or is entitled to receive, for the asbestos-related injury, that is the subject of the compensation." § 134(a).

Many states have chosen by statute to abrogate the collateral source rule as well, in wrongful death cases, medical malpractice actions, and other tort suits. See, for example, Ala. Code § 6-5-545; Alaska Stat. § 09.55.548(b); Ariz. Stat. § 12-565; Cal. Civ. Code § 3333.1; Col Rev. Stat. § 13-21-111.6; Conn. Gen. Stat. Ann. § 52-225a; Fla. Stat. § 768.76(1); Idaho Code Ann. § 6-1606; Ill. Comp. Stat. Ann. § 5/2-1205; Ind. Code Ann. § 34-44-1-2; Kan. Stat. Ann. § 60-3403; MCL § 600.6303; Mich. Stat. Ann. § 27A.6303; Minn. Stat. Ann. § 548.36; N.J. Stat. Ann. § 2A:15-92; N.Y. CPLR § 4545; N.D. Cent. Code § 32-03.2-06; Or. Rev. Stat. § 18.850.

These states have concluded that a plaintiff should not be afforded a double recovery, in the sense of receiving compensation once from the collateral source (such as the insurance company), and then again at trial from the defendant. Such legislative judgments are rational, even if other states choose to retain the traditional collateral source rule.

The issue is not a new one in the federal courts. Ever since the Federal Tort Claims Act (FTCA) was enacted in 1946, the United States has been liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This provision has called upon the federal courts to apply the forum state's rule regarding collateral source compensation, because the extent of a private defendant's liability in damages, in cases where a plaintiff has received a collateral benefit, is affected by whether or not the forum state has abrogated the collateral source rule. See *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988); *United States v. Price*, 288 F.2d 448 (4th Cir. 1961); *Landon v. United States,* 197 F.2d 128 (2d Cir. 1952).

3. Do you believe that the $108 billion in funding is adequate without a federal backstop?

I believe the funding in the FAIR Act is probably adequate, particularly given the alternatives in the current litigation system, where bankruptcies and exhaustion of assets limit the funds available to compensate injured victims, but I cannot claim expertise in the econometric measurement of exactly how large the fund should be.

4. Is the cut off date of 12/31/82 for last exposure fair to those exposed after that date that eventually develop disease?

In Section 124, the bill requires proof of occupational exposure to asbestos prior to December 31, 1982, with different kinds of proof required for the various disease categories. The rationale for this requirement is presumably the latency period of asbestos-related diseases, combined with the fact that consumption of asbestos in the United States peaked in 1974 and has been steadily declining thereafter. See Barry I. Castleman, Asbestos: Medical and Legal Aspects 788 (4th ed. 1996) (fig. 1). And, of course, setting a later cut-off date for a fund of any given size would mean reduced payouts to those exposed earlier.

In addition, regulatory agencies began to take steps to regulate asbestos in the 1970s. In 1971, OSHA began to regulate asbestos in the workplace. In 1973, EPA banned the spraying of

asbestos for insulating and fireproofing. See 40 C.F.R. § 61.22(e) (1973). In 1978, EPA widened its restriction to include all spray applications for any purpose. 40 C.F.R. § 61.22(e) (1978). In 1976, the Mine Safety and Health Administration (MSHA) issued rules limiting mine worker asbestos exposure. In 1977, the CPSC issued rules banning consumer patching compounds containing respirable asbestos. CPSC, Consumer Patching Compounds and Artificial Emberizing Materials (Embers and Ash) Containing Respirable Free-Form Asbestos; Banned Hazardous Materials, 42 Fed. Reg. 63,353 (1977).

Even though asbestos continued to be manufactured and used after 1982, it is not irrational for Congress to adopt the classification proposed in the FAIR Act. Line-drawing is an essential part of the legislative process, which "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *see also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993) ("This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.").

WRITTEN QUESTIONS FROM CHAIRMAN HATCH TO WITNESS DR. LAURA STEWART WELCH, MD:

1) **There was testimony today on differences between historical exposures in the late 1940's, 50s and 60s compared to the exposures found in the late 1970's, 80's, and 90's with which you seemed to concur. How should these differences in historic exposure levels be incorporated into the legislation?**

I would recommend that the legislation incorporate information on asbestos exposure during different years and through different work activities for determining which lung cancers are caused by asbestos. Attached is a model that uses this information to created a definition for a weighted asbestos exposure.

2) **Is there any reason why an approach that weighs historical exposures more heavily as part of exposure criteria would not be appropriately applied to all disease categories?**

Where we are using sound medical criteria for the diagnosis of non-malignant asbestos-related disease and also relying on a physician diagnosis, we do not need as detailed a specification of exposure as we need for determining whether or not a lung cancer is due to asbestos exposure. We are using several complementary ways to ensure that the disease is asbestosis:

- When a physician makes a diagnosis of asbestosis, he/she has already made an assessment that there was sufficient exposure to asbestos to cause the disease. In essence, the doctor is taking what we know about historical exposures to asbestos into account when making the diagnosis.
- The diagnostic criteria ask the physician to state explicitly that he/she has considered other explanations for the medical findings, again raising the certainty that asbestosis is present.
- The x-ray and PFT criteria are also part of the diagnosis, and eliminate some other major causes of impairment.

Making a medical diagnosis is a process of assessing probability. A physician makes a list of possible causes of patient's problem (a differential diagnosis) and proceeds to narrow the list with medical history, physical examination, diagnostic testing, a trial of medication, etc. The diagnosis of asbestosis is based on an occupational history of exposure to asbestos, the presence or absence of other medical conditions that could cause the symptoms present, x-ray changes consistent with asbestosis, PFT changes consistent with asbestosis when impairment is present, and other findings. The physician weighs these different factors to arrive at a diagnosis.

Adding a requirement for some occupational exposure to asbestos again helps ensure that the disease present is asbestosis. However, this requirement should be the minimal level needed to

cause the disease in question, since it is only one of many criteria. This is in contrast to the lung cancer cases, where asbestos exposure can be the only criterion.

WEIGHTED OCCUPATIONAL EXPOSURE TO ASBESTOS – Basis for computing 20 year weighted occupational exposure for lung cancer.

(a) Moderate Exposure. Each year that an exposed person's primary occupation, during a substantial portion of a normal work year for that occupation, involved working in areas immediate to where asbestos-containing products were being installed, repaired, or removed under circumstances that involved regular airborne emissions of asbestos dust, shall count as one year;

(b) Heavy Exposure Each year that an exposed person's primary occupation, during a substantial portion of a normal work year for that occupation, involved the direct installation, repair, or removal of asbestos-containing products, shall count as two years;

(c) Very Heavy Exposure. Each year that an exposed person's primary occupation, during a substantial portion of a normal work year for that occupation, involved the direct manufacture of asbestos-containing products using raw asbestos fibers, or the direct installation, repair, or removal of asbestos-containing products in a shipyard during World War II, shall count as 4 years;

For the purposes of calculating years of exposure under this paragraph, each year of exposure prior to 1976 shall be counted fully; each year from 1976 to 1986 shall be counted as one half; and each year after 1986 shall be counted as one tenth.

Individuals who do not meet formula who believe their exposures post 1976 and/or post 1986 exceeded the OSHA standard may submit evidence, documentation, work history or other information to substantiate non-compliance with the OSHA standard (e.g. lack of engineering or work practice controls, protective equipment) such that exposures would be equivalent to exposures prior to 1976 or 1986 or to documented exposures in similar jobs or occupations where control measures had not been implemented. These claims will be evaluated on an individual basis.

The Administrator shall identify specific industries, occupations within those industries, time periods and employment periods for which significant occupational exposure is a reputable presumption for asbestos claimants, and specific industries, and occupations within those industries for which moderate, heavy and very heavy exposure is a reputable presumption.

Laura S. Welch, MD, FACP, FACOEM
Medical Director, Center to Protect Workers Rights
6/13/03
Response to questions after Judiciary Committee hearing June 4th, 2003

Questions for Dr. Welch from Senator Leahy

1. Much of the debate about appropriate medical criteria has centered on a notion that someone can be exposed to asbestos, and that their lungs can clearly show the effects of that exposure, but that they are still not "sick" or "impaired." What do you believe, in your medical judgment, are the hallmarks of "sickness" or "impairment" from asbestos exposure?

I believe the presumption of "impairment" for the purpose of this legislation should primarily be defined using the criteria established by the American Medical Association for respiratory disease. In addition to presumptions based on these criteria, an applicant to the fund should be able to request a review by a physician's panel, to be able to demonstrate that impairment exists using equivalent criteria. I provide more details on this question in my written testimony submitted at the hearings.

The AMA Guides do not represent the only way to measure whether or not a disease has an impact on someone's life. Workers with asbestosis may have a decrease in the quality of their lives even though their lung function has not declined to the level used to define impairment using the AMA Guides. For example, cancer specialists measure the impact of disease with a scale that assesses performance of activities of daily living. There are widely accepted methods for measuring functional and psychological impact of a disease, such as the SF-36 [1]. Even though I do not recommend we use the measures for this legislation, I do want to emphasize that workers with the disease asbestosis or with asbestos-related pleural plaques can have impairments that are not measured with basic pulmonary function testing.

2. I understand why an exposure history is important. However, S. 1125 as drafted, requires that the diagnosis be "independently verified with respect to the duration, proximity, regularity, and intensity of the asbestos exposure involved." Most of these exposures took place 30 or 40 years ago. How would a physician "independently verify exposure"? Is this something that physicians normally would do in diagnosing occupational diseases with long latency periods? Is it even possible to do?

As part of the medical diagnosis, S 1125 requires independent verification of the duration, proximity, regularity and intensity of exposure. Physicians do not have any way of

[1]Bowling, Ann. *Measuring Disease*. Open University Press, Philadelphia, PA 2001

independently verifying exposures that occurred 30 – 40 years ago, if by "independent" the legislation means from a source other than the worker. There generally are no records of air monitoring, nor is there any practical way a physician could verify the worker's exposure. The American Thoracic Society Statement on the Diagnosis of Non-Malignant Diseases Related to Asbestos [2], describes the details a physician should elicit in taking an occupational history from the asbestos-exposed worker. The ATS says the physician should obtain a reliable history of exposure, but does not suggest the physician attempt to look at other data sources. The existing bankruptcy trusts have mechanisms for assuring the validity of the worker's history of exposure to asbestos; this review is performed by the trust, not by the physician.

3. At the committee's March 5th hearing on asbestos, David Austern, General Counsel for the Manville Personal Injury Settlement Trust, testified that of more than 56,000 claimants to the Manville Trust in 2002, approximately only 35 qualified for the for Level IV/ Severe Asbestosis. In your opinion, are the Level IV/Severe Asbestosis requirements properly set, or are they unduly restrictive?

Both the Manville 2002 TDP and S 1125 require a 2/1 film as part of the definition of severe asbestosis. This requirement is not medically based. The density of parenchmal disease on chest x-ray has not been shown to correlate with impairment, and impairment can be directly measured with pulmonary function testing. Once the diagnosis of asbestosis is established, pulmonary function testing should be used to determine severity. At the highest level of impairment using the AMA Guides, where the worker has lost more than 50% of lung function, the AMA Guides describe that the patient would be unable to perform activities of daily living, such getting dressed, taking a shower, cooking dinner, or any minimal work around the house. Most of this group will still be in Class III under S 1125, and receive an award of $40,000 (reduced by collateral offsets). Clearly, compensation should be commensurate with impairment and disability, which is not the case under S 1125. The American Thoracic Society is finalizing diagnostic criteria for asbestosis, and these criteria should be incorporated into legislation when they are available.

4. The Manville 2002 TDP does not distinguish between smokers and non-smokers. In contrast, this bill does. While nonsmokers receive $50,000 for Level VI (lung cancer) and $400,000 for

[2] American Thoracic Society Statement on the Diagnosis of Non-Malignant Diseases Related to Asbestos, Amer Rev Resp Dis 1986: 134:383-388

Level VII (lung cancer), smokers receive nothing for Level VI (lung cancer) and only $100,000 for Level VII (lung cancer). Given that approximately 90% of workers exposed to asbestos are, or were, smokers, this distinction impacts a very large number of claimants. Do you think the distinction is equitable? Is there a more equitable way to treat smokers?

All major types of lung cancer are caused by asbestos. Numerous studies show that there is a dose-response relationship between exposure to asbestos and the risk of lung cancer, with increasing exposure leading to increasing risk of disease. Workers with asbestosis have a higher risk than other exposed workers, but the asbestosis may simply be a surrogate measure of exposure, for significant asbestos exposure is required to cause asbestosis. Asbestosis is not a necessary intermediary for development of asbestos related lung cancer. Workers with pleural plaque do not appear to be at higher risk for lung cancer than their co-workers with similar exposure who did not develop plaque. Pleural plaque is a convenient marker of prior exposure to asbestos, and so has been used as a surrogate for significant occupational exposure in bankruptcy settlement agreements, but the risk of lung cancer is not restricted to workers with pleural plaques.

The Helsinki Criteria [3] establish an exposure level of 25 fiber-years, or the equivalent exposure using an occupational history, as a level of exposure that significantly increases the risk of lung cancer. Several European countries have established this or a similar level of exposure as the criterion to be used for compensation of a lung cancer in an asbestos exposed worker. At the hearings on June 4th, all three medical doctors agreed that occupational exposure that approximated this level of 25 fiber-years was an appropriate criterion for a determination that asbestos exposure was a substantial cause of a lung cancer.

Smoking and asbestos act in concert to cause lung cancer, each multiplying the risk conferred by the other. Although smoking does increase the risk of lung cancer, this effect does not detract from the risk of lung cancer attributable to asbestos exposures. Any compensation system must affirm that when a worker has significant exposure to asbestos he is eligible for compensation for lung cancer.

5. At the hearing I chaired last year, as well as during the Committee's March 5, 2003, hearing chaired by Senator Hatch, we have heard about the plight of those exposed to the particularly potent variety of tremolite asbestos in Libby, Montana. Could you please briefly explain the pitfalls of establishing one set of medical and exposure criteria for all types of asbestos?

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[3] The Helsinki Criteria were developed in 1997 by an international group of experts, as a set of state of the art criteria for attribution of disease to asbestos exposure. (Scan J Work Environ Health 1997;23:311-6)

We cannot codify all possible exposure scenarios. We can say that certain exposures are presumed to cause specific diseases, but we must leave open room for consideration of specific cases that don't fit the general pattern established by presumptions.

Not all workers with asbestosis will fit the specific criteria set by legislation; there must be a panel of physicians to review medical exceptions. All claimants with significant illness due to asbestos exposure will not be able to meet the eligibility criteria for the compensation categories in any program. Some may have died before the required testing could be completed. Others may have medical conditions that obscure or complicate the interpretation of the required testing. Rather than try to establish diagnostic criteria for each possible set of findings, a more efficient approach would be to establish a medical panel to review and reach determinations on these cases.

One example of a case that should be reviewed in this way is a worker who has demonstrable impairment but still has test results that are in the normal population range. Comparing an individual's results on spirometry, lung volumes and diffusion to the normal range for the population is how we generally determine impairment. In some cases we know the person's pre-disease lung function, and so can compare current testing to his own normal tests from the past. This comparison allows much better precision in estimating impairment. The AMA Guides explicitly state that "in individuals where the pre-injury or pre-disease values differ from the population listed values, the examiner may depart from the population listed normal values for determining an impairment rating..." Such a case would be reviewed by a medical panel.

6. You have referred to certain components of Senator Hatch's legislation as "medically unsound." This causes me great concern. I believe it is vitally important that our provisions are precisely tailored to match *sound, consensus-based* science. Could you please review those elements of S. 1125 that ought to be altered so that the legislation might be less controversial within the medical community?

The serious shortcomings of S 1125 include the following:

a. **S 1125 relies in large measure on the medical criteria in the Manville 2002 TDP. The criteria in the 2002 TDP are much more restrictive than the criteria in the 1995 Manville TDP, which in my view were medically sound. Changes in the medical criteria between 1995 and 2002 included the removal of the tests that are the most sensitive for diagnosis of asbestos-related diseases, including oxygen diffusion and CT scans. For example, the medical literature states clearly that the DLCO is often the first test to become abnormal in asbestosis; this test was removed from the 2002**

medical criteria. This compensation system should be based soundly in medicine, and allow for the use of all medically recognized diagnostic tests.

b. **S 1125 requires claimants to receive a diagnosis from a "treating" physician, instead of permitting diagnosis by a qualified physician as is required by the Manville Trust. The use of the term "treating" in S 1125 implies that there must be a continuing relationship between the asbestos exposed worker and the doctor submitting the report. A pulmonary specialist who examines a patient and makes recommendations back to the patient's primary care doctor is not a treating physician. Most occupational medicine specialists serve as consultants to the patient's treating physician. Our health care system encourages each patient to have one treating physician with other physicians acting in consultation, so that care is coordinated; this is also sound medical practice. However, we want the diagnosis of asbestosis to be made by the most qualified physician, even if that physician is not the patient's primary care doctor.**

c. **As part of the medical diagnosis, S 1125 requires independent verification of the duration, proximity, regularity and intensity of exposure. Physicians do not have any way of independently verifying exposures that occurred 30 – 40 years ago, if by "independent" the legislation means from a source other than the worker. There generally are no records of air monitoring, nor is there any practical way a physician could verify the worker's exposure. The American Thoracic Society Statement on the Diagnosis of Non-Malignant Diseases Related to Asbestos [1], describes the details a physician should elicit in taking an occupational history from the asbestos-exposed worker. The ATS says the physician should obtain a reliable history of exposure, but does not suggest the physician attempt to look at other data sources**

d. **The bill requires that original x-rays and spirometric tracings be submitted with every claim, which seems to indicate that every claim will be subject to independent medical review. This level of review is unnecessary and will lead to conflicts and delays. Manville and other trusts require only the physician diagnosis and summary of exposure history. Detailed records are only required on a case-by-case basis when individual medical review is deemed to be warranted. This same type of approach should be followed in any national asbestos trust.**

e. **Both the Manville 2002 TDP and S 1125 require a 2/1 film as part of the definition of severe asbestosis. This requirement is not medically based, and is discussed under question (3) above.**

f. **S 1125 requires occupational exposure to asbestos prior to Dec. 31, 1982. This date makes senses as part of the Manville TDP since payments from that trust fund are**

keyed to exposure to Manville products specifically. It makes no sense as part of this legislation; as written the bill would exclude all asbestos victims from compensation if exposed on or after Jan. 1, 1983.

g. S 1125 appears to incorporate the Manville 2002 criteria for lung cancer, but sets very different levels of compensation. Manville 2002 assumes that the usual lung cancer victim will have been a smoker as well as having being exposed to asbestos; non-smokers are expected to apply for additional levels of compensation. This is a sound assumption given the fact that a large proportion of the asbestos exposed population were smokers and the fact that 90- 95% of all asbestos related lung cancers occur among smokers. S 1125 sets a very low value of $100,000 for lung cancer in a smoker (reduced by collateral offsets). By comparison, under the Manville Trust the scheduled claims value for a lung cancer in a smoker that meets the criteria of Level VII is approximately $ 285,000 - $380,000 (assuming that Manville's values represent one-quarter to one-third of a total claim value). It is important to treat all asbestos-related disease victims fairly, including those who were or are smokers. As described above, we can identify the lung cancers for which asbestos was a significant contributing factor, among smokers and non-smokers.

h. Level II as defined by S 1125 includes many workers with significant impairment, but there is no compensation awarded for this group of workers. This level includes workers with definite asbestosis who do not have a reduction in TLC or FVC below 80%. It also includes workers who have asbestosis combined with obstructive lung disease. Workers with asbestosis have a significant injury, and this group of workers now receives compensation from bankruptcy trusts and though a tort action. Sound medical criteria will identify those workers who have asbestosis, even if they also have some lung disease from smoking. Denying any compensation to this group of workers is not appropriate.

i. S 1125 limits compensation to those individuals who meet the medical and exposure criteria set forth in the bill. There is no provision for medical exceptions or for individuals to seek individual evaluation for their claims. As noted above, not all individuals with asbestos-related disease fall within the categories defined by S 1125, particularly given its restrictive criteria that exclude accepted diagnostic tests. One of the groups who generally will not meet the exposure requirements set forth in the bill are family members who develop disease as a result of take-home exposures. The Manville Trust and other trusts proved for medical exceptions and individual evaluation of claims. Any national asbestos trust should also do so.

7. I understand that one of the issues involved underlying the medical criteria in S. 1125 and the Manville TDP is how to address restrictive lung disease that is attributable to asbestos and obstructive lung disease that is generally attributable to smoking. It is my understanding that many workers who were exposed to asbestos also smoked, and that these workers may have both restrictive lung disease caused by asbestos and some obstructive lung disease caused by smoking. If you want to compensate workers for the asbestos related non-malignant disease, even if the worker smoked and has some obstructive disease related to smoking, what are the appropriate medical criteria for doing so? Will S. 1125 provide compensation to these workers? If so, how, in what category and at what levels?

As written, S 1125 does not compensate workers with asbestosis who also have moderate obstructive lung disease caused by smoking. (Workers with a small component of obstructive lung disease are included in Class III and IV.) Level II as defined by S 1125 includes many workers with significant impairment, but there is no compensation awarded for this group of workers. This level includes workers who have asbestosis combined with obstructive lung disease. I recommend establishing a diagnosis of asbestosis using x-ray criteria, such as a 1/1 film using the ILO classification, coupled with pulmonary function testing to determine impairment. Workers who have a mix of asbestosis and obstructive lung disease would then receive a lower level of compensation than workers whose impairment is due predominantly to asbestosis. It is not feasible to apportion the amount of impairment due to asbestosis and due to smoking related disease, but it is reasonable that workers in this group would receive less money than those in Class III.

QUESTIONS TO LAURA WELCH FROM SENATOR SPECTER

1. *As it relates to S.1125 and the asbestos litigation solutions in general, what basis is there in the law for approximate justice?*

2. *What are your thoughts on Senator Durbin's discussion on set offs from collateral sources in the bill? Is it true that many of the most serious asbestos victims would get little or nothing from the bill as presently proposed?*

Given the proposed claim values, any worker with non-malignant disease and a disability will receive no payments. The bill sets a value of $40,000 for asbestosis. Class III will include almost all the workers who have asbestosis; the x-ray criterion set for Class IV is almost impossible to meet. A worker who has retired on disability will receive more than $40,000 from Social Security or his pension, and so get nothing additional from this bill. The same analysis applies to malignant diseases, where medical expenses can be very high.

3. *Do you believe that the $108 billion in funding is adequate without a federal backstop?*

Certainly not. If the medical criteria are adjusted, as I believe is necessary, and the collateral sources are not used as off sets, the bill is seriously under funded. The injured workers should not make up the difference.

4. *Is the cut off date of 12/31/82 for last exposure fair to those exposed after that date that eventually develop disease?*

S 1125 requires occupational exposure to asbestos prior to Dec. 31, 1982. This date makes senses as part of the Manville TDP since payments from that trust fund are keyed to exposure to Manville products specifically. It makes no sense as part of this legislation; as written the bill would exclude all asbestos victims from compensation if exposed on or after Jan. 1, 1983.

Laura S. Welch, MD, FACP, FACOEM
Medical Director, Center to Protect Workers Rights

6/13/03

Response to questions after Judiciary Committee hearing June 4th, 2003

SUBMISSIONS FOR THE RECORD

Statement of Senator Baucus
Senate Committee on the Judiciary
Hearing on S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003
June 4, 2003
10:00 a.m.

Mr. Chairman, Senator Leahy – I appreciate the opportunity to testify today on the Chairman's bill, the Fairness in Asbestos Injury Resolution Act of 2003, also known as the FAIR Act. I know that both of you are working hard to resolve the complicated issue of asbestos litigation in this country. I believe that's a worthy effort.

I applaud the Chairman for attempting to move the ball forward in this debate by introducing the FAIR Act. I know he hopes that by doing so, all sides will soon come to swift agreement on a final bill. I hope that a healthy bi-partisan negotiation process will continue, so that good companies providing good paying jobs are not wrongly forced into bankruptcy over mounting asbestos claims, and the true victims of asbestos receive just compensation for their injuries.

However, as I outlined in a letter to the Chairman and every other member of this Committee two weeks ago, I have serious concerns about how the Chairman's bill will impact my constituents in Libby, Montana. I will briefly outline those concerns for the Committee, so they will become part of the record on S. 1125. At the end of my statement, I would like to make some suggestions to the Committee as to how the bill could be best altered to make sure that Libby is treated fairly in any final asbestos bill.

My greatest concern Mr. Chairman, is that your bill would give W.R. Grace a sweetheart deal, while at the same time denying any compensation to the majority of the people in Libby who were injured by W.R. Grace's actions. That is not just or fair.

Let me be specific. Section 124 of the FAIR Act, the Medical Criteria Requirements, would exclude the vast majority of current and future Libby claimants. Except for those persons who have mesothelioma, the criteria would require "meaningful and credible" evidence of both 6 months of occupational exposure to asbestos prior to December 31, 1982 and significant occupational exposure, which you define as cumulative employment for a period of at least 5 years in an asbestos-related industry.

Mr. Chairman, a large number of persons in Libby who have become sick, or will become sick, from their exposure to asbestos never had any occupational exposure to asbestos. They were the families of W.R. Grace workers or ordinary residents of Libby. Unlike almost every other part of the country, asbestos was everywhere in Libby – in the air, in the ground, in the houses, in the school track, on people's cars, clothes and on the people themselves.

To illustrate the significant non-occupational nature of asbestos related disease in Libby, I will quote again from the March 4 letter from Dr. Brad Black, Medical Director of the Center for Asbestos Related Disease in Libby:

> "In the last 18 months I have observed the diagnosis of five mesotheliomas, with three individuals already having died. Four of these individuals (nurse, office receptionist, forest service administrator and a non-resident who traveled to Libby for basic services) were exposed to tremolite [asbestos] simply by living and working in Libby. Another gentleman who lived near a vermiculite processing facility in the residential area of Libby died from progressive pleural fibrosis. His spouse has advanced asbestos-related disease. A significant number of residents who were exposed environmentally are experiencing advancing lung disease, some of whom require supplemental oxygen. Based on past observations with chrysotile [asbestos] exposure, one would not expect non-occupationally exposed individuals to develop such extensive asbestos-related disease."

This letter was included in the record of your March 5 hearing on asbestos.

Another odd problem with the medical criteria in S. 1125, is the requirement that a claimant demonstrated occupational exposure prior to 1982. What's magical about 1982? Grace was operating its vermiculite mining and milling facilities in Libby and releasing asbestos fibers until the early 1990's. Perhaps the year 1982 made sense in the context of one company – the Johns Manville Company and the Johns Manville Trust – but when applied to Grace, or other companies, it's completely arbitrary.

Mr. Chairman, I understand that W.R. Grace, a company that was less than honest with Grace workers and the Libby community about the asbestos that contaminated Libby vermiculite, has suggested language to "address" this occupational exposure problem. To their credit they agree with me that the definition of occupational exposure in your bill would negatively impact deserving Libby claimants. However, their proposed language would give the Asbestos Court created by S. 1125 the discretion to waive the exposure criteria requirements of section 125 of the bill. That's it. They would still have to meet the overly stringent medical criteria of Section 124, criteria that are arbitrary and difficult for Libby claimants to meet. They would still be subject to the collateral source requirements that I will address below. It would still not be clear whether or not occupational exposure would be required, before or after 1982.

So, Mr. Chairman – under Grace's proposal, Grace gets certainty and is obligated to pay a minimal amount to a national trust. The Libby victims get uncertainty and a chance to receive a minimal amount of compensation for their injuries. The Asbestos Court *may* waive the exposure requirements. The decisions of that Court are not reviewable. That Court is not required to consult with any experts or the public in establishing rules to implement exposure or other medical criteria in the bill, for the people of Libby, or anyone else. I apologize for being skeptical of Grace's proposal, but they have failed again, and again, and again to prove that they are a friend of Libby, Montana.

Now, why do I believe that Grace will get certainty and a sweetheart deal under S. 1125? If I have read the legislation correctly, W.R. Grace will be required to pay into the trust fund created by your bill only 1.45% of their 2002 revenues for years 1 through 5, with that amount declining over the next 20 years out to year 25. Even on revenues of $1 billion, that would mean a company like W.R. Grace would only have to contribute approximately $1.45 million per year in years 1-5. Over the life of the trust, such a company would contribute less $25 million, based on $1 billion in 2002 revenues. Grace has protested that $25 million was a one year contribution. That's great. But, I am curious as to how their calculations differ from mine. Perhaps their insurers will contribute more than that amount. I don't know. But, my calculations are based on what the bill requires from a company like Grace in the early stages of bankruptcy. Their liability is fixed and settled. They can move on.

But justice for people in Libby will not be fixed. They won't know what will happen. They don't know if this new Court will allow them any compensation. Some of them, although they are not sick yet, don't know if they will get sick, don't know if money will be around to compensate them if they do get sick 15, 20, 25 or 30 years from now. Or more. The Agency for Toxic Substances and Disease Registry (ATSDR), part of the U.S. Department of Health and Human Services, has documented up to a 47-year latency period for the onset of asbestos-related disease resulting from exposure to asbestos in and around Libby, Montana. The Trust created by S. 1125 will be long gone by the time a person exposed in the 1990's might get sick. But many of these people can't get health insurance now. They have no safety net, for themselves or their families. This is wrong. This bill punishes the wrong party here – the victims, not Grace.

Mr. Chairman, there is also so much that we don't know about asbestos exposure in Libby, and its relation to the onset of asbestos related diseases. The Agency for Toxic Substances and Disease Registry recently released a study – based on medical screenings and studies of thousands of current and former Libby residents – that concluded more research into low-level exposure and lung disease in the town is still needed. The medical science of diagnosing and identifying categories of asbestos-related disease in Libby is still developing, particularly as concerns the differences between what is traditionally known as asbestosis or pleural disease, and what manifests itself as debilitating pleural disease in Libby. S. 1125 does not accommodate this medical uncertainty.

Mr. Chairman, as I indicated in my letter to you, I am also concerned about the collateral source requirements in S. 1125. Section 134 would require a reduction in the amount paid to an asbestos victim by the amount of any collateral source payments he or she has received, or is entitled to receive, for their asbestos-related injury. This would include payments from Medicaid, Medicare, health insurance, and disability insurance. Mr. Chairman, this under-cuts one of the main points of an asbestos trust or other compensation mechanism, which is to fairly compensate victims for their injuries that were caused by others.

In addition, I have read about your concerns that the taxpayer should not bear any liability for this trust fund, or for the payment of asbestos claims in general. The FAIR Act's collateral source requirements could have exactly this undesired effect by shifting the cost of treating a person's asbestos-related illness to state and federal taxpayers through Medicare and Medicaid, or similar medical benefits program funded in whole or in part by the state or federal government.

Mr. Chairman, the evidence that the people of Libby, Montana have been exposed – over a period of decades – to dangerously high levels of asbestos, is undisputed. That W.R. Grace's vermiculite mining and milling operations caused this asbestos contamination is undisputed. That Libby, Montana is on the Superfund National Priorities List because of high concentrations of asbestos and environmental damage from Grace's vermiculite mining and milling operations is undisputed. That hundreds have become sick or died of asbestos-related diseases is undisputed. These people have nothing more to prove. If they are sick, they deserve compensation. Period.

Any asbestos bill that the Congress considers must take this reality into account, including S. 1125.

Grace workers and current and former Libby residents should not have to comply with the medical criteria or the exposure criteria in S. 1125. If they are a former worker or they lived and worked in Libby for a minimum amount of time, and they have an asbestos-related disease, that should be enough to qualify them for real and adequate compensation from the trust fund.

I also believe that the collateral source requirements of S. 1125 also should not apply to Grace workers or the people of Libby – and frankly, I don't believe they should apply to anyone. The health care costs of treating those who are sick in Libby has already placed an enormous strain on the state and local community. Many concerns have been expressed about the eventual impacts on the state Medicaid program from treating these people. It just seems patently unfair to continue to shift the burden for treating sick people in Libby to the taxpayers and to continue the drain on local resources.

I have also proposed my own bill that would create a Libby Health Care trust fund to pay for the health care costs associated with treating current and former Libby residents or Grace workers for asbestos-related disease.

This Libby Trust would be funded by amounts eventually recovered from W.R. Grace by the Environmental Protection Agency. Until those funds became available, the fund would be financed through the appropriations process. This fund would serve as a critical means of defraying the enormous costs of treating those in Libby who are ill, particularly those who are uninsured and uninsurable. Many of these people are young, with families. Even if the trust fund created by S. 1125 runs out of money, or is not available to claimants from Libby, they will always have some place to turn to pay for their medical expenses.

Mr. Chairman, everyone agrees the situation in Libby is unique. But what W.R. Grace wants in S. 1125 is a far cry from what the people in Libby need and deserve. That's why I look forward to continuing to work with you on asbestos legislation and addressing the needs of my constituents in Libby, Montana. I believe you have the best of intentions in proposing your legislation and attempting to bring closure to this complex issue.

Thank you again, Mr. Chairman, for allowing me to submit this testimony today.

Committee on the Judiciary
United States Senate

Solving the Asbestos Litigation Crisis:
S.1125, the Fairness in Asbestos Injury Resolution Act of 2003
June 4, 2003

Statement of Jennifer L. Biggs, FCAS, MAAA
Quantification of the Economic Impact of S.1125

Mr. Chairman and Members of the Committee: Thank you for allowing me to testify today. My name is Jenni Biggs. I am a consulting actuary with Tillinghast – Towers Perrin and a principal of Towers Perrin. I am a Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries. My consulting practice focuses on quantifying the asbestos liabilities of insurance and reinsurance companies as well as corporate defendants named in asbestos lawsuits.

In May of 2001, my colleagues and I released our estimate of the ultimate loss and expense liabilities projected to result from U.S. asbestos exposure. Our estimate of $200 billion has since been widely quoted. During this testimony, I will explain how we anticipate our $200 billion estimate will change if Senate Bill 1125, the Fairness in Asbestos Injury Resolution Act of 2003 (or the "Fair Act") is enacted.

First, I will briefly discuss how we arrived at the $200 billion estimate. Then I will step through how our underlying assumptions change, considering the provisions of the proposed legislation. Specifically, I will quantify the impact of removing frictional costs (or defense and plaintiff attorney expenses) from the system and implementing specific medical criteria with claim awards that vary by Disease Level as defined in S.1125. Finally, I will comment on the sensitivity of the prospective payments from the proposed Trust to various underlying assumptions.

TILLINGHAST'S $200 BILLION ESTIMATE[1]

Tillinghast's $200 billion estimate of ultimate asbestos loss and expense includes both past payments and projected future payments. The RAND Institute for Civil Justice recently estimated that $70 billion in asbestos claims were paid through year-end 2002.[2] Thus our $200 billion ultimate figure translates to $130 billion of estimated future payments. This $130 billion estimate is based on assumptions consistent with the deterioration in the asbestos litigation environment observed by 2001. The litigation environment has not improved since our study was completed, as shown by the increase in the number of claims filed in 2001–2002[3], the number of

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[1] Angelina, Mike and Biggs, Jennifer, Emphasis 2001/3, "Sizing Up Asbestos Exposure" p.26-29 at www.towers.com.

[2] Carroll, Steve, RAND Institute for Civil Justice, "The Dimensions of Asbestos Litigation" presentation at the Spring Meeting of the Casualty Actuarial Society, May 19, 2003.

[3] For example, while approximately 20,000 claims were filed annually against major asbestos defendants in the early 1990s, The Manville Trust had 58,000 claims filed in 2000, 86,381 claims filed in 2001, and 55,928 claims filed in 2002. Manville filings from LexisNexis "The Wall Street Forum: Asbestos" April 15,2003. Presentation by David Austern "Where are the

defendants seeking bankruptcy protection[4], and the number of newly identified defendants[5].

The analysis underlying our $200 billion estimate was quite robust. We used two approaches: top-down and bottom-up. The top-down method or macro approach focused on claimants by disease type and the awards that would be paid to each. The bottom-up approach focused on the amounts that each defendant in the litigation would be called upon to pay. It is important to understand that a single claimant typically sues an average of 60 defendants. Additionally, a single defendant might be sued by as few as 1 or as many as hundreds of thousands of claimants. For the bottom-up analysis, we analyzed the defendants in homogeneous groupings, or Tiers, that are defined according to a defendant's profile in the litigation.

Additionally, using the bottom-up approach, we estimated the portion of individual defendant payments that would be commercially insured versus retained by the defendants. Of the insured costs, we also estimated the portion expected to remain with the U.S. insurance industry versus the amount expected to be paid by the non-U.S. insurers and reinsurers. In total, we estimated that $78 billion of the $200 billion ultimate would be retained by the defendants and that $122 billion would be insured. Of the insured amount, we estimated that $55 - $65 billion would be covered by U.S. property / casualty insurers and reinsurers. As of year-end 2002, approximately $45 billion[6] of this amount was recognized by the U.S. insurance industry, as reported in Note 29 of their statutory financial statements.

Reduction Due to Elimination of Frictional Costs

An important feature of the proposed legislation is the elimination of plaintiff and defense attorney fees. To put this in perspective, Tillinghast's $200 billion estimate of ultimate asbestos loss and expense is significantly reduced when these frictional costs are removed. Of the $130 billion remaining to be paid, we estimate that approximately $28 billion (or 21.5%) relates to defense costs. Of the remaining $102 billion, we estimate that approximately $41 billion (or 40%) will go to plaintiff attorneys. Therefore, out of the original $130 billion estimate of future payments, less than half, or only $61 billion is expected to reach the claimants. Our conclusion is

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Asbestos Claims Going" – Manville Trust Evaluated Claim Filings by Year Received by Disease, as of 12/31/2002.

[4] Biggs, Jennifer, March 5, 2003 written testimony submitted to The Honorable Orrin G. Hatch, Chairman of the Committee on the Judiciary, United States Senate on behalf of the American Academy of Actuaries. While 38 corporate defendants filed for bankruptcy protection over the eighteen-year period from 1982 through 1999, the rate of bankruptcy filings increased dramatically, with 28 corporate defendants filing for bankruptcy during the three-year period from 2000 through 2002.

[5] The number of defendants named in asbestos claims has risen dramatically from around 300 in the early 1980s to approximately 2,000 identified in 2001 to 8,400 cited in the most recent RAND findings.

[6] The $45 billion estimate of reported losses as of December 31, 2002 reflects preliminary estimates of calendar year net paid loss and loss adjustment expense of $2 billion and year-end 2002 net loss and LAE reserves of $19 billion provided by Gerard Altonji of A.M. Best.

consistent with the findings of RAND: transaction costs have consumed more than half of total spending.[7]

QUANTIFICATION OF THE ECONOMIC IMPACT OF S.1125

Under S.1125, we estimate an indicated Trust balance as the sum of four components:

(1) Indemnity awards associated with claims that will first be filed from 2003 through 2049;
(2) Indemnity awards associated with claims that are currently pending, but will be dismissed and re-filed against the Trust;
(3) A negative cost, or reduction in benefit payments for awards from collateral sources; and
(4) Costs for medical monitoring for claimants in Disease Levels I and II.

Medical Criteria and Specified Claim Awards

S.1125 establishes eight Disease Levels with corresponding awards. This feature is intended to ensure that compensation goes to asbestos victims that have a measurable asbestos-related impairment, while providing medical monitoring to claimants who meet the criteria for Disease Levels I and II.

In order to project indemnity awards under the proposed legislation, claim filings are multiplied by the specific awards for each Disease Level. Claims against the Trust are assumed to include those filed for the first time from 2003-2049 as well as those that are currently pending in the U.S. court system that will be dismissed and potentially re-filed against the Trust.

Future Claim Filings. Since the asbestos problem began in the 1970s, there have been numerous projections of the number of future asbestos claims that will be filed by disease type. In May 2001 Tillinghast projected that 1 million claimants would ultimately file asbestos claims that meet the minimum Level I Disease Criteria. However, given the significant increase in publicity relating to asbestos claims and compensation, as well as the potential ability to bring claims to a trust in a non-litigious environment with pro-bono legal assistance, we have increased our projections of future mesothelioma claims. The increase reflects an increase in the propensity for victims of mesothelioma to seek compensation for this fatal disease. Our resulting projections assume that there will be approximately 41,000 future mesothelioma claim filings.

We relied upon information provided by the Claims Resolution Management Corporation (CRMC) to map the historical claims filed against the Manville Trust (which are categorized by disease according to the 1995 Trust Distribution Process (TDP)) into the eight Disease Levels defined in the 2002 Manville TDP.

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[7] Carroll, Steve, RAND Institute for Civil Justice, "The Dimensions of Asbestos Litigation" presentation at the Spring Meeting of the Casualty Actuarial Society, May 19, 2003.

Using the transition matrix provided by the CRMC, we restated the historical Manville claims to the 2002 TDP Disease Levels, and used the resulting distributions by Disease Level to refine Tillinghast's projections of future claims from three categories (i.e., mesothelioma, lung cancer, and all other) into the eight Disease Levels included in the proposed legislation. For example, the historical Manville data shows that total lung cancer claims have been distributed as 40% Lung Cancer One and 60% Lung Cancer Two using the 2002 TDP Disease Level definitions. Therefore, we assumed that 40% of Tillinghast's total projected lung cancer claims relate to Lung Cancer One (or Disease Level VI).[8] Similarly, we used information regarding the distribution of historical claims to Disease Levels I – V to allocate Tillinghast's projections of future non-malignant claims to Disease Level.

We assumed that 25%[9] of Lung Cancer One and Two claims will correspond to non-smokers.[10]

We note that the CRMC outlined some differences between the 2002 Manville TDP Disease Levels and the levels currently outlined in S.1125[11]. With the exception of Disease Level VI / Lung Cancer One claims as discussed below, my analysis assumes that any differences between the two sources were unintentional, and that the proposed legislation will be modified to include medical criteria that are identical to those defined in the 2002 Manville TDP. This assumption validates the use of the historical Manville data for the projection of future claim filings by Disease Level.

We note that as originally drafted, S.1125 potentially allows significantly more Lung Cancer One (or Disease Level VI) claims to be compensated than has been allowed under the Manville Trust 1995 TDP or 2002 TDP. Unless otherwise identified, we assumed that the medical criteria for Disease Level VI Lung Cancer One claims as described in the bill will be modified to be consistent with the historical data from the Manville Trust. However, we also provide estimates of the potential costs associated with additional Lung Cancer One claimants that could receive compensation under less stringent requirements for underlying asbestos disease or significant occupational exposure.

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[8] It is possible that the number of Lung Cancer Two claims in the historical Manville data is overstated, because under the 1995 TDP lung cancer claimants without underlying nonmalignant asbestos disease could qualify for higher compensation as Lung Cancer Two if they were non-smokers. However, there is no data available to evaluate the extent to which Lung Cancer Two status was obtained based on non-smoker / occupational exposure status versus underlying disease criteria. Therefore, we have made no adjustment to the Lung Cancer Two projections, which are based on the historical Manville data. To the extent that total lung cancer claims actually should have had a lower distribution of Disease Level VII claims and a higher distribution of Disease Level VI claims, our estimates are overstated.

[9] Estimate is derived from a sample of claims made against the Manville Personal Injury Settlement Trust as of March 31, 1999. See Expert Report of Dr. Francine F. Rabinovitz, "Estimation of the Tobacco Industry's Share of the Indemnity and Expenses of the Manville Personal Injury Settlement Trust," Falise et. al. v. The American Tobacco Company, R.J. Reynolds Tobacco Company, B.A.T. Industries, PLC, et. al. August 30, 1999.

[10] Non-smokers are defined as those who never smoked or did not smoke for twelve years prior to diagnosis of lung cancer.

[11] CRMC / David Austern Memo to Kevin O'Scannlain dated May 28, 2003 Re: S1125, p. 3.

Pending Claim Filings. As an upper bound, we assumed that there are currently 300,000 claims pending in the U.S. Court system. Of these pending claims, we assumed that 23% will fail to meet the medical criteria for any of the eight defined Disease Levels. This percentage is based on the historical number of claims that are estimated to fail to meet the minimum medical criteria under the Manville Trust 2002 TDP.

We assumed that the resulting 230,000 of re-filed claims will have the same distribution by Disease Level as Tillinghast's original projections of future claim filings (i.e., excluding the additional projected mesothelioma and Lung Cancer One claims discussed above).

Specific Claim Awards. The proposed legislation outlines specific claim awards for each Disease Level as shown below.

S.1125 Claim Awards

Disease Level	Disease / Condition	Award
I	Asymptomatic Exposure	0
II	Asbestosis / Pleural Disease A	0
III	Asbestosis / Pleural Disease B	40,000
IV	Severe Asbestosis	400,000
V	Other Cancer	200,000
VI – Smoker	Lung Cancer One	0
VI – Non-smoker	Lung Cancer One	50,000
VII – Smoker	Lung Cancer Two	100,000
VII – Non-smoker	Lung Cancer Two	400,000
VIII	Mesothelioma	750,000

We have not estimated the potential reduction to the prospective payments from the Trust due to the effect of multiple injuries.

Future Inflation. As currently drafted, the proposed legislation does not address increases in the awards to reflect future inflation. We tested the sensitivity of the prospective payments to indexed awards increasing at 2.5% per year, as well as a range of other future inflation assumptions.

Collateral Sources

Under the proposed legislation, the awards summarized above will be reduced by the amount of benefits already received.

We are not aware of any publicly available data disclosing settlements to individual plaintiffs that would allow us to estimate the awards already collected by claimants

with pending claims. Therefore, we conservatively assumed no offset to the prospective payments from the Trust for collateral sources in the estimates contained herein.

Medical Monitoring Costs

The proposed Trust will cover medical monitoring costs for claimants meeting the criteria for Disease Levels I and II. These tests are to be conducted every three years and be paid from the Trust to the extent that they are otherwise uninsured.

To estimate medical monitoring costs, we estimated the cost of chest x-rays and spirometry pulmonary function tests (PFTs) and the portion of these costs expected to be covered by private insurance or Medicare.[12] We estimated the number of Disease Level I and II claimants that we expect to be uninsured, insured by private insurance, or insured by Medicare.[13] We trended the medical costs forward through 2049 using an overall medical inflation rate of 5% and assumed that the average claimant will undergo five medical monitoring tests to be conducted every three years over fifteen years from the time that the claimant qualifies for Disease Level I or II. (Note that the average age of claimants against the Manville Trust is currently over 65.)

In total, we projected medical monitoring costs of $0.4 billion.

CONCLUSIONS

We calculated the prospective payments from the Trust as follows:

Tillinghast Projections ($billions)

Component	Without Inflation of Claim Awards	With 2.5% Annual Increase to Claim Awards
Future Filings	$36.0	$49.4
Re-Filed Pending	10.3	10.4
Collateral Offset	(0.0)	(0.0)
Medical Monitoring	0.4	0.4
TOTAL	$46.7	$60.2

[12]The current Medicare reimbursement for a chest x-ray is $40 and for a spirometry pulmonary function test (PFT) is $45. We assumed that the Trust would reimburse uninsured costs up to the Medicare reimbursement level. Thus for 2003, the Trust would pay an uninsured claimant up to $85 for the tests or an insured claimant for up to a maximum of $85 that they might have to pay through deductibles or for retail costs of the tests exceeding the insured amounts.

[13]We assumed that 50% of claimants were 65 or older and that 90% of these were eligible for Medicare, with the remaining 10% uninsured. Of the remaining 50% of claimants below age 65, we assumed that 14% were uninsured.

Thus the $108 billion appears to be more than adequate compared to Tillinghast's best estimate of future costs under S.1125, even if future awards are indexed to reflect a 2.5% increase per year, given a more stringent definition of Lung Cancer One claims consistent with the Manville 2002 TDP.

We note that the estimates provided above are on a nominal (or undiscounted) basis. Nominal estimates are appropriate for comparison with the nominal value of the Trust of $108 billion. Discounted estimates would be lower;[14] however, discounted estimates should be compared to the net present value of the Trust, recognizing that the $108 billion will not be placed into the Trust at inception. We did not provide a comparison of the net present value estimates, because the timing of contributions into the Trust is not fully documented in S.1125.

Additionally, we have not evaluated the cash flow of contributions to or payments from the Trust and our estimates do not include potential borrowing costs to cover a cash shortfall in a given year.

Sensitivity Testing

Estimates of the prospective payments are very sensitive to assumptions regarding the number of future claims (especially mesothelioma), potential indexing of future award amounts, and the definition of Lung Cancer One Claims.

For example if Tillinghast's projection of future mesothelioma claims is increased by 10%, then indicated payments from the Trust would increase by approximately $3.1 billion[15] to reflect approximately 4,100 additional mesothelioma claims.

Future claim filing projections. For comparison, we also projected the prospective payments using future claim projections prepared for and provided by The Manville Trust which range from 0.6 to 2.4 million under the Manville 2002 TDP.[16] In total, these future claims projections are higher than the Tillinghast projections contained herein, but the number of mesothelioma claims are similar. (We note that the majority of prospective payments from the Trust will be made to compensate mesothelioma claimants and that differences in projections of the future filing of claims in other Disease Levels have a lesser impact.)

We also added a provision for re-filed pending claims to the Manville scenarios. We assumed 230,000 additional claims for each of the Manville Minimum, Mid-Range, and Maximum Scenarios. The re-filed claims were distributed to Disease Level according to the Manville Mid-Range projection of future filings.

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[14] For example, the net present value of the prospective payments is approximately 25% to 30% lower than the nominal value, assuming annual interest rates of 3% to 4%.

[15] 4,100 claims x $750,000 = $3,075,000,000 with no trend applied to future awards.

[16] LexisNexis "The Wall Street Forum: Asbestos" April 15,2003. Presentation by David Austern "Where are the Asbestos Claims Going" – Future Claim Forecasts Based on Transition Tables.

Projections of Prospective Payments ($billions)
No Inflation of Future Awards

Component	Tillinghast	Manville Minimum	Manville Mid-Point	Manville Maximum
Future Filings	$36.0	$28.3	$41.8	$62.5
Re-Filed Pending	10.3	7.8	7.8	7.8
Collateral Offset	(0.0)	(0.0)	(0.0)	(0.0)
Medical Monitoring	0.4	0.6	1.1	2.0
TOTAL	$46.7	$36.8	$50.7	$72.3

Even under the Manville "Maximum" projection of future claim filings, the prospective payments remain well below $108 billion if future awards by Disease Level are not trended, given modification of the Lung Cancer One criteria to be as stringent as the definition under the Manville 2002 TDP.

Future Award Amounts. If future awards are assumed to trend upward at 2.5% per year, then the prospective payments increase as follows:

Projections of Prospective Payments ($billions)
Future Awards Trended at 2.5% Per Year

Component	Tillinghast Projection	Manville Minimum	Manville Mid-Point	Manville Maximum
Future Filings	$49.4	$38.7	$56.8	$84.6
Re-Filed Pending	10.4	7.9	7.9	7.9
Collateral Offset	(0.0)	(0.0)	(0.0)	(0.0)
Medical Monitoring	0.4	0.6	1.1	2.0
TOTAL	$60.2	$47.2	$65.8	$94.5

If future awards are trended upward at 2.5% per year, then the prospective payments from the Trust again remain below $108 billion, given modification of the Lung Cancer One criteria to be as stringent as the definition under the Manville 2002 TDP.

The Tillinghast projections do not reach $108 billion for trend rates below 6.9% applied to future awards. The Manville Maximum projections do not reach $108 billion until a trend of 3.6% is applied to future awards.

Potential Additional Lung Cancer One Claims. As noted previously, as currently drafted S.1125 potentially allows more Lung Cancer One (or Disease Level VI) claims to be compensated than has been allowed under the Manville Trust 1995 TDP or 2002 TDP. The requirements for underlying asbestos disease or

occupational exposure to asbestos are less stringent. The 1995 TDP required fifteen years of heavy occupational exposure to asbestos (i.e., visible asbestos dust). The 2002 TDP evaluates all Lung Cancer One claims individually and expects no significant compensation if there is no evidence of either an underlying bilateral asbestos-related nonmalignant disease or significant occupational exposure (five years), especially if the claimant is also a smoker.

However, S.1125, as currently drafted does not require underlying asbestos-related disease and merely requires six months of occupational asbestos exposure prior to December 31, 1982. Thus, potentially thousands of claimants that were not historically eligible for compensation under the Manville Trust 1995 TDP and 2002 TDP could be eligible for compensation under S.1125. Additionally, while the impact of changes toward more stringent criteria can be evaluated using the historical Manville Trust claim filing data (i.e., identifying which claims would be eliminated), the impact of expanding the definition of claimants qualifying for Lung Cancer One is more difficult to quantify.

To estimate the number of additional Lung Cancer One Cases (i.e., those who would potentially qualify under S.1125, but would not have qualified under the Manville TDP), we obtained the annual number of lung cancer diagnoses. For 2003, 171,900 cases are projected (91,800 male and 80,100 female) according to the American Cancer Society.[17] Additionally, smoking is considered responsible for 87% of lung cancers.[18] Thus, we estimated the total number of additional lung cancer cases relating to non-smokers as follows:

- 2003 Base = [(100% x 91,800 male + 3.8% of 80,100 female)[19] – (existing Disease Level VI: Lung Cancer One and Disease Level VII: Lung Cancer Two cases)] x 13% not attributable to smoking.
- The 2003 Base was projected through 2049 assuming the same pattern as for the original Lung Cancer One Claims.
- The resulting projection was multiplied by a judgmentally selected factor of 80%, assuming that this percentage of lung cancer cases would be able to meet the S.1125 six-month occupational exposure criteria and would pursue recovery from the Trust.

Based on these assumptions, we projected an additional 172,000 Lung Cancer One claims for non-smokers that would not have met the Disease Level VI criteria under the Manville 2002 TDP. Each of these additional claimants would be awarded

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[17] Projected lung cancer cases are from: http://www.cancer.org/docroot/cri/content/cri_2_4_1x_what_are_the_key_statistics_for_lung_cancer_26.asp

[18] The 87% attributable to smoking is from: http://www.cancer.org/docroot/GI/content/GI_6_2_fact_Sheet_cancer.asp?_sitearea=GI

[19] 100% of projected male lung cancer cases and 3.8% of female lung cancer cases were selected to derive a resulting distribution of 96.8% male / 3.2% female lung cancer cases which is consistent with the current distribution of claims by sex filed against the Manville Trust. The lower percentage of female cases reflects their lower representation in employment where they might have occupational exposure to asbestos.

$50,000, for a potential additional $8.6 billion of indicated payments from the Trust (or an additional $11.8 billion if future awards are trended at 2.5% per year).

We also increased the Manville projections to include our estimate of additional Lung Cancer One claims, due to the less stringent definition under S.1125, and have used a range of estimates to approximate the Manville scenarios.

Additional payments relating to potential additional Lung Cancer One claims that would not qualify for compensation under the Manville 2002 TDP are estimated as follows:

Additional Lung Cancer One Claims ($billions)

Future Award Trend Assumption	Tillinghast	Manville Minimum	Manville Mid-Point	Manville Maximum
0%	$8.6	$6.7	$8.6	$10.1
2.5%	$11.8	$9.2	$11.8	$13.9

If these additional lung cancer costs are added to the prospective payment estimates provided above, the Manville Maximum projection reaches $108 billion, when future awards are trended at 2.5% per year.

Projections of Future Payments ($billions)
Future Awards Trended at 2.5% Per Year
Including Additional Lung Cancer One Claims

Component	Tillinghast	Manville Minimum	Manville Mid-Point	Manville Maximum
Future Filings	$61.1	$47.9	$68.6	$98.5
Re-Filed Pending	10.4	7.9	7.9	7.9
Collateral Offset	(0.0)	(0.0)	(0.0)	(0.0)
Medical Monitoring	0.4	0.6	1.1	2.0
TOTAL	$72.0	$56.4	$77.6	$108.4

Closing

In conclusion, reasonable projections of prospective payments of the specific awards for individuals meeting the medical criteria used to define the eight Disease Levels in S.1125 are at or below $108 billion if future awards are trended at 2.5% or less.

WRITTEN STATEMENT OF DR. JAMES D. CRAPO, PROFESSOR OF MEDICINE, NATIONAL JEWISH CENTER AND UNIVERISTY OF COLORADO HEALTH SCIENCES CENTER,
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
CONCERNING S. 1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003

JUNE 4, 2003

Mr. Chairman, my name is Dr. James Crapo. I am a pulmonary specialist in Denver, Colorado. I appreciate your inviting me here today to testify with respect to S. 1125, the "Fairness in Asbestos Injury Resolution Act of 2003." I shall discuss, in particular, the medical provisions of the bill.

My remarks fall into three parts. First, I will explain my background, and why I am here to testify. Second, I will briefly describe the health effects of asbestos exposure. Third, I will summarize the medical provisions of the proposed statute and explain my conclusion that those provisions are generally reasonable in the context of an overall compromise among conflicting viewpoints. I will also note, however, certain areas in which I believe the medical provisions of the bill may be unduly lax, resulting in the possible payment of awards to people who are not sick as a result of any asbestos-related illness.

I am being compensated for my time at my usual consulting rates by the Asbestos Alliance and the Asbestos Study Group, both of which support the bill before the committee.

My Background

I am currently Professor and Chairman of the Department of Medicine at the National Jewish Center and University of Colorado Health Sciences Center. I graduated from the University of Rochester School of Medicine in June of 1971 and subsequently

trained at Harbor General Hospital in Torrance, California, the National Institute of Environmental Health Sciences, and Duke University. Before coming to the National Jewish Center I served for more than 20 years on the medical faculty of Duke University, and for 17 of those years I was the Chief of Duke's Division of Pulmonary and Critical Care Medicine. I am also the member of numerous professional societies. I served as the President of the American Thoracic Society in 1992 and I am currently President Elect of the Fleischner Society, a leading international society of selected specialists in radiology and pulmonary medicine. I am Board Certified in Internal Medicine and Pulmonary Diseases.

In my current position I care for patients. I teach medical students and direct the PhD Program for Graduate Health Care Professionals at the University of Colorado Health Sciences Center. I also conduct research and have published a multitude of peer-reviewed articles on the respiratory system. I am the co-author of several leading textbooks on pulmonary medicine. I have also served from time to time as an expert witness in asbestos litigation and have had the opportunity to observe that litigation first hand.

The Health Effects of Asbestos

All of us are exposed to asbestos from the environment and consequently have asbestos in our lungs. This "background" level of exposure does not cause any asbestos-related disease. Those diseases normally require substantial occupational exposures or the equivalent. Moreover, the amount of asbestos to which people have been exposed varies greatly by occupation and work setting. Due to federal regulation of asbestos that began in the early 1970s, current occupational exposure levels are a tiny fraction of those

that existed in the 1940s and 1950s. All of the asbestos-related diseases are considered dose dependent, and the pre-1973 exposures to asbestos that resulted in severe asbestosis and lung cancer are not present today.

We know that substantial exposure is required to produce asbestos-related diseases for several reasons. First, a 1997 study of Canadian miners and millers who were exposed to substantial amounts of asbestosis – up to 300 particles/cu. ft.-year – showed minimal increases in asbestos-related diseases.[1] Second, a 1998 study of women who lived near mining and milling operations showed no increased incidence of lung cancer, although there were several excess mesotheliomas. These women received primarily take-home and environmental exposures, averaging of 25 fibers/cc-years – a level normally seen only occupationally.[2] Third, ambient levels of asbestos very greatly across the United States with urban environments such as New York City and San Francisco having levels from 0.003 to 0.03 fibers/cc. These ambient levels of asbestos can lead to lifetime exposure in the range of 2-3 fiber/cc years and yet have not been shown to be associated with an increased incidence of asbestos-related diseases. Finally, my laboratory has undertaken an extensive evaluation of lung injury responses in rats after an acute exposure to asbestos dust.[3] Animals exposed acutely to 2.5 fibers/cc-year showed only small local areas of inflammation in the short term. After one year these animals were able to repair the initial inflammation and had normal lungs. There was no

[1] Liddell FDK, AD McDonald and JC McDonald. The 1891-1920 birth cohort of Quebec chrysotile miners and millers: development from 1904 and mortality to 1992. Ann Occup Hyg 41:13-36, 1997.
[2] Camus M, J. Siemiatycki and B. Meek. Nonoccupational exposure to chrysotile asbestos and the risk of lung cancer. N. Engl. J. Med 338:1565-1571, 1998; Camus M, J. Siemiatycki, BW Case, M Desy. L Richardson and S Campbell. Risk of mesothelioma among women living near chrysotile mines versus US EPA asbestos risk model: preliminary findings. Ann Occup Hyg 46:95-98, 2002; Case BW, M Camus, L Richardson, ME Parent, M Desy and J Siemiatycki. Preliminary findings for pleural mesothelioma among women in the Quebec chrysotile mining regions. Ann Occp Hyg 46:128-131, 2002.
[3] Chang LY, LH Overby, AR Brody and JD Crapo, Progressive lung cell reactions and extracellular matrix production after a brief exposure to asbestos. Am J Pathol 131:156-170, 1988.

long term fibrosis and no progression. The important point here is that, while asbestos can be responsible for very serious and even fatal diseases, that is not true of low level or incidental, background exposures. The lungs are good at defending themselves, and it takes a significant exposure to produce most asbestos-related conditions.

The primary asbestos-related conditions found in humans include 1) pleural changes or reactions, 2) pulmonary fibrosis (which, when caused by asbestos, is called asbestosis), 3) lung cancer, and 4) mesothelioma. It is sometimes asserted, based on early work done by Selikoff, that several other kinds of cancer – including gastro-intestinal cancers – are associated with asbestos exposure. However, the early results have not been confirmed in subsequent studies, and most medical experts at present believe that there is no persuasive evidence of a linkage between asbestos and any cancers other than lung cancer and mesothelioma.[4]

None of these asbestos-related conditions is due exclusively to asbestos, and if asbestos could somehow be eliminated from the planet, all of those conditions would continue to exist. This is true even of mesothelioma. While asbestos is today the only clearly identified cause of mesothelioma, it is generally accepted that a substantial proportion of all mesothelioma cases are "idiopathic" – i.e., they have some as-yet unidentified cause other than asbestos exposure.[5] A major task of the medical eligibility requirements in the bill is to determine when a given medical condition is due to asbestos exposure and when it is due to an alternative cause.

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[4] Goodman M, RW Morgan, R Ray, CD Malloy and K Zhao. Cancer in asbestos-exposed occupational cohorts: a meta-analysis. Cancer Causes and Control 10:453-465, 1999.
[5] McDonald AD and JC McDonald. Malignant mesothelioma in North America. Cancer 46:1650-1656, 1980.

Pleural Changes. The pleura is a membrane that surrounds the lungs. It is not itself a part of the lung tissue. Asbestos can cause changes in pleura, such as pleural plaques or pleural thickening. These pleural changes are not the same as asbestosis and do not increase the risk of developing asbestosis. Unless they are very extensive, pleural changes do not affect lung function, and there is no evidence that they increase the risk of an asbestos-related cancer. Pleural plaques may be a marker of asbestos exposure, but they can also result from other causes such as trauma or inflammation. Similarly, pleural thickening has a number of causes other than asbestos.

Asbestosis. Clinical asbestosis is a kind of pulmonary fibrosis -- a diffuse, bilateral scarring of lung tissue which in the case of asbestosis is due to asbestos fibers in the lungs. This type of lung fibrosis can also occur as a result of a large number of other lung diseases, and a chest x-ray determination of lung fibrosis is not specific for asbestosis. The scarring or fibrosis of the lung can lead to a reduction in total lung capacity, which ultimately can produce severe breathing impairment and even death. In many cases, however, asbestosis has few or no symptoms. Moreover, while asbestosis is often considered a "progressive" disease – that is, it can get worse even after exposure to asbestos stops – with the relative small exposures that are typical of people who have asbestosis today, the disease progresses very slowly, if at all. Most people who have asymptomatic asbestosis today never will develop any breathing impairment as a result of their disease.

There is an exposure threshold below which clinical asbestosis will not occur. Individual susceptibility is also an important factor. Even among individuals who are

exposed to levels above the threshold necessary to develop disease, some may develop asbestosis and others may not.

The threshold for the development of clinically detectable asbestosis is a cumulative dose of approximately 25 fibers/cc-years.[6] Reaching this threshold of exposure does not necessarily indicate that clinical asbestosis will occur. At a cumulative dose of approximately 75 to 100 fibers/cc-years, the risk of contracting clinical asbestos is on the order of 1 percent.

Lung Cancer. The development of lung cancer can be associated with asbestos. It is, however, impossible to distinguish clinically between a lung cancer caused by asbestos and one caused by something else. Physicians must therefore rely on statistical evidence.[7] There is a debate in the medical community as to whether lung cancer can be attributed to exposure to asbestos in the absence of clinically significant asbestosis. I personally believe that the answer to that question is no. Most of my colleagues agree with that view or believe that lung cancer cannot be attributed to asbestos unless there is at least enough exposure to have caused asbestosis.[8] Thus the exposure threshold for causation of asbestosis would also apply to the causation of lung cancer. There is a small minority viewpoint, however, in favor of the "single-fiber" theory, which holds that any exposure to asbestos is sufficient to cause a lung cancer.

There is a separate debate about the interaction between asbestos exposure and smoking and whether the scientific evidence supports an association between asbestos

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[6] Ontario Royal Commission, 1984

[7] Goodman M, RW Morgan, R Ray, CD Malloy and K Zhao. Cancer in asbestos-exposed occupational cohorts: a meta-analysis. Cancer Causes and Control 10:453-465, 1999.

[8] Weiss W. Asbestosis: a marker for the increased risk of lung cancer among workers exposed to asbestos. Chest 115:536-549, 1999; Meldrum M. Review of Fibre Toxicology. Health and Safety Executive, Great Britain, 1996.

and lung cancer in the absence of smoking. I believe that the synergistic relationship with smoking described in the literature is most appropriately a relationship of clinically significant asbestosis and cigarette smoking. The risk of lung cancer among smokers is influenced by several factors such as, for example, the age at which a person starts to smoke, the number of cigarettes smoked per day, the number of years smoked, and the depth of inhalation of the smoke. Exposure to side stream smoke or second hand has also been shown to increase the risk of lung cancer. There is no debate that the increased smoking cessation will reduce the risk of lung cancer, however. This benefit from smoking cessation is markedly reduced in those who have smoked heavily. Smoking 40-50 pack years is associated with an elevated risk of lung cancer that persists for decades after smoking cessation. Lung-cancer risk of non-smokers exposed to asbestos, if any, is far less than the risk of smokers.

Mesothelioma. Mesothelioma is a relatively rare tumor of the pleura or peritoneum. Although asbestos exposure has been associated with mesothelioma, there are a substantial number of cases a year of mesothelioma where these is no indication that the individual was ever exposed to elevated levels of asbestos. However, more than half the cases of mesothelioma in the United States can be shown to be caused by exposure to amphibole types of asbestos. The most commonly used type of asbestos in the United States, chrysotile, has a much lower propensity to cause mesothelioma in comparison to the amphibole forms of asbestos.[9] Although most mesotheliomas are caused by exposures to high cumulative doses of amphiboles, these tumors can occur after relatively

[9] Hodgson JT and A Darnton. The quantitative risks of mesothelioma and lung cancer in relation to asbestos exposure. Ann Occup Hyg 44:565-601, 2000. Chrysotile asbestos's lower effectiveness in causing mesothelioma is due largely to the fact that it is cleared from the lungs to a much greater extent and at a more rapid rate than are amphibole forms of asbestos.

low exposures. There is a threshold for exposure to asbestos below which there is no risk for development of mesothelioma. For chrysotile, exposure levels at least equivalent to that required to cause asbestosis are required to contribute to the causation of mesothelioma.[10]

The Medical Criteria of S. 1125

Having discussed the major health effects of asbestos, I turn now to the medical eligibility requirements of S. 1125. At the outset, it is important to note two general requirements. First, every claim upon the Fund created by the bill must be supported by a medical diagnosis that meets the requirements of Section 122. The provisions of Section 122 are comprehensive. They speak to the qualifications of the physician, the requirement of an in-person exam by a treating physician who has done a review of the patient's medical, smoking, work and exposure history, the technical sufficiency of x-rays, pulmonary function tests, and other laboratory results, and the usual medical requirement that the physician exclude other more likely causes of the claimant's condition in determining whether that condition is due to asbestos exposure. As a practicing physician, I think those diagnostic requirements are completely appropriate. In particular, the requirement that the physician exclude more likely causes of the claimant's condition is extremely important. As I indicated above, all of the health effects of asbestos are caused by other things as well, and a diagnosis cannot be well founded if it does not exclude these other alternative causes.

The second general requirement is latency – i.e., the time that has elapsed from first exposure to the date of diagnosis. While Section 123 of the bill would give the

[10] Churg and Green, *Pathology of Occupational Lung Disease, 2nd edition*, Baltimore: Williams & Wilkins, 1998, p.351.

asbestos court flexibility in setting different latency periods for different diseases, at the outset the bill establishes a 10-year latency requirement across the board. This period of time is much lower than the average latency of many asbestos-related conditions, particularly under conditions of low asbestos exposures. The latency period for mesothelioma, for example, can be 40 years. While a 10-year latency requirement may be somewhat permissive, it is not inappropriate in the context of a compromise for settling all asbestos cases outside the court system.

The bill's medical criteria are divided into eight levels. With one trivial exception, Levels I through IV address non-cancerous conditions, while Levels V through VIII deal with cancers.

Non-Malignant Conditions. Levels I and II define asymptomatic, non-cancerous conditions. Level I requires (a) a diagnosis of an "asbestos-related non-malignant disease," which must be based on x-ray evidence of asbestosis (i.e., an ILO reading of 1/0) or pleural changes, and (b) a brief (6-month period) of occupational exposure to asbestos prior to December 31, 1982.[11] Level II requires a similar diagnosis but has a more stringent exposure requirement. A claimant can qualify for either of these levels without showing any breathing impairment.

The bill provides medical monitoring for people who fall within these two levels. I believe that that is appropriate. Medical monitoring may provide some reassurance, and it will allow people with potentially abnormal x-rays to discover promptly when they

[11] Level I also includes people with asbestos-related cancers other than mesothelioma. This seems anomalous, although it is probably unimportant as long as people who qualify for Level I are limited to medical monitoring. It is my understanding that the reason for the inclusion of cancers in Level I is that this level is based on a discounted cash payment scheme in the Manville Personal Injury Trust that allows claimants to obtain a small amount of compensation on the basis of a minimal showing. It does not seem appropriate, however, to carry this feature of the Manville Trust over to the asbestos compensation system established by the bill.

may qualify for an award. Because of the large number of people who could qualify for Levels I and II, an award of compensation to people in these categories could result in a diversion of funds away from people who are genuinely sick to people who have basically asymptomatic conditions. Moreover, the definition of bilateral asbestos-related nonmalignant disease is general and could apply to a large number of diseases with causes unrelated to asbestos.

Level III is the first category that provides for a compensatory award. This level has four basic requirements. The first is a diagnosis of asbestosis or pleural changes. The asbestosis diagnosis must be based on either an ILO reading of 1/0 or pathology, while the diagnosis of pleural changes must be based x-ray evidence of pleural thickening or pleural plaques of a substantial size – i.e, those that are at least a B2 on the ILO scale.[12] Second, the claimant must show breathing impairment of a kind that is consistent with asbestos-related disease. Third, the claimant must show 6 months exposure to asbestos in 1982 or earlier and "significant occupational exposure to asbestos." Fourth, the claimant must present medical documentation that asbestos-exposure is a contributory cause of his condition.

The medical criteria for Level III seem appropriate in the context of an overall compromise. I do, however, have two reservations. The first has to do with the measure of impairment. It is generally accepted that the cut-off between normal and abnormal on such pulmonary function tests as "total lung capacity" ("TLC") or "forced vital capacity" ("FVC") should be set at the statistical 5th percentile rather than a rule-of-thumb number such as 80%, which does not take into consideration such factors as height or age. More

[12] The language of Section 124(b)(3) is not entirely clear and seems to conflate the diagnosis of asbestosis with the diagnosis of pleural changes. Nevertheless, I believe that the description of this provision in the text captures the intent of the provision.

importantly, one of the prescribed tests for impairment, FVC, will allow many people to qualify for an award even though their breathing impairment is due to emphysema or other obstructive diseases caused primarily by smoking. The reason for this is that the claimant can still qualify for an award with an FEV_1/FVC ratio of as low as 65%, even though a ratio under 70% or 75% is indicative of obstructive (non-asbestos) lung disease.[13]

My second reservation has to do with the definition of "significant occupational exposure" in Section 124(a)(8) of the bill. Generally, that definition requires employment for 5 years in an industry or occupation in which the claimant (a) handled raw asbestos fibers on a regular basis, (b) fabricated asbestos products in such a way that the claimant was regularly exposed to raw asbestos fibers, (c) altered, repaired, or worked with asbestos products in a way that the claimant was regularly exposed to asbestos fibers, or (d) worked in close proximity to workers covered by the above provisions. If applied strictly, this definition would be a reasonable proxy for the minimum levels of exposure that are necessary to cause asbestosis and lung cancers. It is conceivable, however, that clause (c) would be read broadly to include people who work with encapsulated asbestos-containing products under circumstances in which very few asbestos fibers escape into the air. To treat exposures of this kind as equivalent to exposures received working with raw asbestos fibers would not make any sense. This is important because, with the passage of time, fewer and fewer claimants will qualify on the basis of their work with

[13] FEV_1 or "forced expiratory volume (one second)" is the amount of air a person can exhale with maximum force in the first second after a maximum inhalation. FVC is the total amount of air the individual can exhale in the same maneuver. Usually a computer computes the ratio between the two. When people have obstructive disease, the amount of air they can exhale in the first second tends to be diminished more than the total amount they can exhale – and thus the ratio between FEV_1 and FVC is also diminished. When people have restrictive diseases like asbestosis, the ratio between these two measurements remains normal.

raw fibers (because regulations will have limited such exposures) and more will seek to qualify on the basis of work with and around finished products, in low-dose environments. Such a shift would make significant occupational exposure mean less and less as time goes by. This problem is exacerbated by the language in clause (d), which would allow those who worked in proximity to workers satisfying the requirements of clause (c) also to qualify, even though their exposure is even more attenuated.

The final non-malignant category, Level IV, provides for cases of severe asbestosis. To qualify for this level, a claimant must demonstrate asbestosis (and not mere pleural changes) through either a definitive x-ray of 2/1 or pathology and must present pulmonary function tests showing severe impairment. The claimant must also meet the same exposure and medical documentation requirements as claimants for Level III.

My reservations about Level III – the danger that many people with obstructive pulmonary diseases rather than asbestos-related disease will obtain awards and concern about the interpretation of significant occupational exposure – apply in principle to Level IV. However, the requirement of a 2/1 chest x-ray, which may be strongly indicative of asbestosis, significantly limits the extent of the problem as a practical matter. Generally, therefore, I believe Level IV is an appropriate category.

Cancers. Cancer claims are divided into four levels. Level V consists of "other cancer" – i.e., primary cancers of the larynx, the esophagus, the pharynx, or the stomach. Level V does not include colo-rectal cancer, which is one of the most widespread cancers in the United States. Claimants may qualify for an award under Level V by showing (in addition to the requisite cancer) evidence of an underlying bilateral asbestos-related

disease (generally, a 1/0 chest x-ray or x-ray evidence of pleural plaques), exposure (6 months exposure in 1982 or earlier and significant occupational exposure), and medical documentation of a causal relationship.

As I explained above, the decided weight of the evidence is that these cancers are not caused by asbestos at all. However, since there is a minority viewpoint in the medical community on this point, including these cancers in a compensable category may make sense in the context of an overall compromise. As part of that compromise, however, it also makes sense to exclude colo-rectal cancers. According to the National Cancer Institute, there are 147,500 colo-rectal cancers each year. To allow recovery based on nothing more than plaques and the requisite exposure could expose the Trust to considerable, unpredictable liabilities in future years. This would be ironic, since asbestos litigation as it is today involves few "other cancer" cases, presumably because of the difficulties of proof. There is a danger that the medical criteria in the bill would open the door to many more claims of this kind than are currently seen.

Levels VI and VII both deal with Lung Cancer. The relationship between the two is somewhat complex. At the outset, only non-smokers – defined either as people who have never smoked or as people who have not smoked within the 12 years immediately prior to the diagnosis – can use Level VI, `because the scheduled value for smokers under Level VI is $0. This means that, as a practical matter, smokers must apply under Level VII.

In effect, Level VI allows non-smokers to obtain a limited award ($50,000) on a showing that they have a primary lung cancer, six months exposure to asbestos in 1982 or earlier, and documentation of causation. In my view, there is no adequate justification

for Level VI. As noted above, I doubt that asbestos is associated with an increased risk of lung cancer in non-smokers, but in any event there is no basis whatever for attributing a lung cancer to asbestos on the basis of 6 months exposure unless that exposure was truly massive. Most, if not all, of the people who qualify for an award under Level VI will not in fact have an asbestos-related lung cancer.

To be sure, this problem is limited, because most asbestos workers smoked. Many, however, also quit smoking in recent years, and thus may meet the bill's definition of a non-smoker – someone who hasn't smoked in the 12 years before the diagnosis. Moreover, it is difficult to establish in a non-adversarial administrative proceeding whether a person quit smoking at the requisite time or not. Consequently, I believe that Level VI as written poses an unjustified threat to the financial integrity of the Fund.

Level VII is, and should be, the principal Lung Cancer category. It requires a claimant to demonstrate (a) a primary lung cancer, (b) evidence of an asbestos-related non-malignant disease (asbestosis as shown by a 1/0 ILO reading or pleural plaques), (c) 6-months occupational exposure prior to December 31, 1982 and significant occupational exposure, and (d) supporting documentation of causation. I believe that these criteria are generally appropriate as part of an overall compromise. I do have two reservations, however. One is my concern that "significant occupational exposure" will be interpreted too loosely, leading to a large number of unjustified claims in future years. The second is that the provision requiring an underlying asbestos-related non-malignant disease is too permissive in that it allows a claimant to satisfy this requirement with pleural plaques alone. While asbestosis is a risk-factor for lung cancer, pleural plaques are not. Moreover, while pleural plaques confirm that the claimant was exposed to asbestos, such

confirmation adds nothing important to the exposure requirements. In my opinion, it would make more sense to require, as a condition for a lung-cancer award, clinically significant asbestosis.

Finally, Level VIII addresses mesothelioma claims. It requires only a mesothelioma diagnosis plus evidence of some exposure to asbestos prior to December 31, 1982. Although the language is not clear, I assume that this provision does not permit an award based solely on the background exposure that everyone has to asbestos fibers in the environment. The bill should be interpreted as requiring a discrete and identifiable exposure that goes significantly beyond background.

Conclusion

My conclusion is that S. 1125 is a sensible compromise designed to provide a reasonable alternative to asbestos litigation in the courts. It is unlikely that any substantial number of people genuinely sick as a result of exposure to asbestos will be unable to recover from the Fund. Moreover, the Fund will direct most of its resources to the appropriate categories: severe asbestosis (Level IV), lung cancer (Level VII), and mesothelioma (Level VIII). As one would expect of a compromise, however, there are provisions in the bill that appear to me to be unduly permissive and that might be tightened in order to protect the financial integrity of the fund – and thus the ability of deserving asbestos victims to obtain awards in years to come. Level VI is a good example of an unwarrantedly liberal eligibility requirement.

In closing, I would like to commend you, Mr. Chairman, Senator Leahy, and this committee for the work you are is doing to find a better way to compensate asbestos victims. I have witnessed the operation of the court system for many years. It would be

difficult to imagine a more arbitrary and wasteful way to compensate people with asbestos-related diseases. Substituting a sensibly designed, streamlined, inexpensive, no-fault system would benefit everyone. In my view, S. 1125 is an excellent first step.

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STATEMENT OF DR. FREDERICK C. DUNBAR BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY HEARING ON SOLVING THE ASBESTOS LITIGATION CRISIS: S.1125 – THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003, ON WEDNESDAY JUNE 4, 2003

SECONDARY IMPACTS OF ASBESTOS LIABILITIES ON WORKERS, TAXPAYERS AND LOCAL COMMUNITIES*

EXECUTIVE SUMMARY

Asbestos-related bankruptcies and the associated layoffs will have ripple effects that harm many groups beyond company stockholders. Workers will suffer in many ways, including temporary or long-term unemployment, lower long-term earnings, and inadequate and/or more expensive interim health coverage. Taxpayers will bear the financial burden of publicly funded retraining programs and increased unemployment insurance payments. Residents and local businesses in affected communities will suffer as a result of reduced economic activity, lower property values, and reduced local tax revenues.

Workers laid-off have difficulty finding new jobs, and new jobs tend to be lower-paying. After two to three years, 11% remain unemployed and 14% drop out of the labor force. Wages for re-employed workers are between 3-17% lower at new jobs even two to three years after plant closure or layoff. Unemployment insurance typically accounts for less than 50% of the average wages for a displaced worker.

In addition to lost wages, laid-off workers face additional costs. Studies suggest about 40% of displaced workers undertake retraining, with costs ranging from $2,000-$3,000 per worker. A previous study by Sebago Associates estimates that asbestos liabilities have resulted in 52,000-60,000 displaced workers; these figures translate into $44-$76 million in retraining costs to date, borne either by the workers or public agencies. Laid-off workers face higher health insurance costs, averaging about $300 per month. For the 72% of the estimated 52,000-60,000 laid-off workers who participate in employer-sponsored health insurance, this translates into an overall loss of $26-$30 million to date over the transition period of unemployment. Some workers will forego health insurance, incurring costs in the form of reduced health and reduced preventive care.

* Prepared for U.S. Chamber of Commerce by National Economic Research Associates, February 2003.

Taxpayers will suffer in several ways. They will cover increased costs required for uninsured health care and will pay for additional unemployment insurance. Based upon the estimate of 52,000-60,000 displaced workers and an average duration of 14.6 weeks, the additional cost to taxpayers would be about $80 million to date.

Residents of communities where asbestos-related layoffs occur will also be affected:

1. Closure of local plants has the indirect effect of reducing plant expenditures in the region.

2. Reductions in local payrolls further reduce regional spending, creating a "multiplier" effect on the economy of the community.

On average, about five to eight additional jobs are lost through the "indirect" and "multiplier" effects for every ten jobs lost directly by the plant closure. When these multiplier effects are scaled to a nationwide impact, the result is that, to date, we estimate $0.6 to $2.1 billion in costs in the adversely affected communities, in addition to those reported by Sebago Associates.

In addition to losses in employment, asbestos-related layoffs cause the local economy to suffer reductions in regional output of goods and services, reductions in personal income, and reductions in population. Reductions in local economic activity will also lower all local residents' property values. Property tax revenues will decline more than population, putting greater stress on the cost of local public services such as education and public safety.

TABLE OF CONTENTS

I. INTRODUCTION AND OBJECTIVES 4

II. CHARACTERISTICS OF FIRMS FACING ASBESTOS LIABILITIES 4

III. CHARACTERISTICS OF WORKERS AT FIRMS AFFECTED BY ASBESTOS LIABILITIES 6

IV. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT: RETRAINING 6

V. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT: HEALTH INSURANCE 7

VI. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT: UNEMPLOYMENT INSURANCE 8

VII. COSTS BORNE BY LOCAL COMMUNITIES 9

VIII. COSTS BORNE BY LOCAL COMMUNITIES: REDUCED REGIONAL INCOME AND EMPLOYMENT 9

IX. COSTS BORNE BY LOCAL COMMUNITIES: REDUCED REGIONAL INCOME AND EMPLOYMENT 10

X. COSTS BORNE BY LOCAL COMMUNITIES: FALLING REAL ESTATE VALUES 11

XI. COSTS BORNE BY LOCAL COMMUNITIES: LOCAL SALES AND PROPERTY TAXES 11

XII. CONCLUSIONS 12

SOURCES 14

I. INTRODUCTION AND OBJECTIVES

Numerous studies have looked at the direct (or first-order) costs of asbestos litigation. A previous study by the RAND Institute (Carroll et al. 2002) found:

1. Over 600,000 people had filed asbestos claims by the end of 2000.
2. Asbestos claims have risen sharply in recent years.
3. $54 billion has been spent on asbestos litigation to date.
4. Transaction costs make up more than half of this spending.

This study aims to:

1. Assess the impacts of asbestos-related bankruptcies and the associated layoffs on workers and taxpayers
2. Investigate the additional economic impacts of plant closings on regional economies, local property owners, and local taxpayers

II. CHARACTERISTICS OF FIRMS FACING ASBESTOS LIABILITIES

A recent Sebago Associates study (Stiglitz, Orzsag, & Orzsag, 2002, hereafter "Sebago Study") finds that between 52,000 and 60,000 jobs have been lost due to asbestos related bankruptcies to date. Sixty-one companies with significant asbestos liabilities have filed for bankruptcy. The pace of bankruptcy filings has accelerated dramatically since 1998. Bankruptcy filings may have a "domino effect" on other defendants, increasing the asbestos-related costs for the remaining firms facing liabilities.

Our examination of 992 asbestos defendants and bankrupt companies as presented in a Prudential financial report (2002) reveals that, while asbestos liabilities affect all industries, the non-durables manufacturing sector has been hit the hardest so far:

1. Over 46% of defendants are in the non-durables manufacturing industry, including producers of insulation and construction products.
2. Almost all bankruptcies (90%) occurred at firms in the non-durables manufacturing sector.

Affected firms are located all across America. The Sebago study reports that 50 bankrupt companies have facilities in 47 states. A sample of plant closures and mass layoffs at firms facing major asbestos liabilities reveals:[1]

1. At least 22 states had a plant that closed;
2. Plant closures tended to be concentrated in small communities;
3. The average population of a community facing a plant closure was 138,000;
4. The median population of these towns was approximately 20,000.

So far, small communities have experienced most of the mass layoffs. Re-employment opportunities may be limited in these smaller communities, and thus the effects of the layoffs on workers and the local economy may be magnified.

An Institute for International Economics study (Hufbauer & Goodrich, 2001) describes the characteristics of a typical worker who lost a job due to a plant closing or mass layoff in the manufacturing industry between 1979 and 1999.

An average laid-off worker:

1. was in a blue-collar occupation;
2. had job tenure of six to seven years;
3. is a high-school graduate;
4. is 39 years old.

Displaced workers are not a completely homogenous population:

1. 37% of displaced workers are female;
2. 10% are ages 55-64; 14% are under 25;
3. 18% are minorities.

Between 1990 and 1997, the mean weekly wage of a displaced worker in the non-durables manufacturing industry was $506 prior to the layoff (see BLS Monthly Labor Review, 1993, 1995, 1999, 2001).[2]

III. CHARACTERISTICS OF WORKERS AT FIRMS AFFECTED BY ASBESTOS LIABILITIES

Many workers have difficulty finding new jobs after a plant closure or mass layoff. After two to three years (see BLS Monthly Labor Review, 1993, 1999, 2001):[3]

1. 11% of workers remain unemployed;
2. 14% have dropped out of the labor force entirely;
3. 75% are re-employed.

Even those workers who find new jobs face difficulties. The average duration of unemployment for displaced workers in the non-durables manufacturing sector is ten weeks.[3] However, between 22-26% of these workers are unemployed for more than six months [3]. Wages for re-employed workers are between 3-17% lower at their new jobs, even two to three years after the plant closure or mass layoff.

Workers in the non-durables manufacturing industry – the group most affected by asbestos liabilities – tend to be unemployed longer and have lower replacement wages than the national average.

While, in the long term, worker salaries may return to their pre-lay-off levels, there are clearly substantial wage costs to individual workers in the short- and medium-run.

IV. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT: RETRAINING

In addition to lost wages, workers face many other costs when they are laid-off. Many workers will require additional training as they seek re-employment. Approximately 60% of re-employed workers displaced from non-durables manufacturing jobs move to a different industry (see BLS Monthly Labor Review, 1999 and 2001). These workers may be particularly likely to require additional training. A study of manufacturing workers in New England found that 42% of displaced workers undertook some kind of retraining (Kodrzycki, 1997).

Estimates of the average cost to retrain workers range between about $2,000 and $3,000. It cost the Commonwealth of Massachusetts $2,925 to retrain a displaced worker in 2001. The State of North Dakota spent $2,039 retraining a dislocated worker in 2000-2001.

If 42% of the 52,000-60,000 workers estimated in the Sebago Study to have lost jobs due to asbestos-related bankruptcies undertake training, the total cost will range from $44-$76 million. Costs of this training are borne by both workers and employers; through government-sponsored training programs, taxpayers also bear some of the burden.

V. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT: HEALTH INSURANCE

Displaced workers may also face additional costs as they lose subsidized health insurance benefits. Nationally, on average, over 72% of workers participate in employer-sponsored group health insurance programs (see BLS Monthly Labor Review, 1993, 1999, 2001).[3] For the average displaced worker, employer-sponsored health insurance is substantially less expensive than individual coverage. The monthly cost to insure a family of four under an individual health plan is $464 (the average National Blue Cross Blue Shield rate, over the period 1990-2002).[4] The monthly cost for a family under an employer-sponsored plan is $162 (35% of the individual plan cost, National Compensation Survey, 2000). For workers losing group health care, individual plans cost $302 more each month.

Again using the Sebago Study estimates of 52,000-60,000 jobs lost to date, we estimate the collective monetary cost to workers from the loss in health insurance benefits sums to be between $26 and $30 million. We calculate these estimates by multiplying the number of lost jobs by the employer-sponsored health insurance participation rate (72%), excess individual monthly plan costs ($302) and the average duration of unemployment (2.34 months).

This $26-$30 million only measures the cost during the transition period of unemployment – approximately 13.6% of re-employed workers do not receive health insurance benefits at their new jobs (see BLS Monthly Labor Review, 1993, 1999, 2001); for these workers, the costs will be even higher.[3] While some displaced workers continue to purchase health care, other workers will choose not to continue their health insurance coverage. Under COBRA, employers are required to offer displaced employees the opportunity to continue to

purchase health insurance coverage, with employees paying up to 102% of the group total premium (Duchon, Schoen, Doty, Davis, Strumpf, & Bruegman, 2001). Despite these regulations, less than 20% of laid-off workers choose to participate in COBRA (Neuschler & Taylor, 2002).

While some individuals may choose to purchase private health insurance outside of COBRA plans, these numbers suggest that a substantial fraction of displaced workers remain uninsured while unemployed. Costs of going without insurance are numerous, though difficult to quantify. There are costs to the health of workers and their families: approximately 1/3 of the uninsured report not filling prescriptions, not obtaining medical tests, and not going to the doctor when sick (The Commonwealth Fund, 2001). The uninsured are two to four times more likely to use expensive emergency care rather than preventive care, using the resources and increasing waiting times in emergency room facilities (ACP-ASIM, 1999). Many of the uninsured are not able to pay medical bills – this drives up hospital and insurance costs for the rest of society. When displaced workers lose insurance coverage, their families, communities, and the rest of society all bear some of the costs.

VI. ADDITIONAL COSTS ASSOCIATED WITH WORKER DISPLACEMENT: UNEMPLOYMENT INSURANCE

Displaced workers can offset some of the costs of lost wages with unemployment insurance. Only 49% of displaced workers from the manufacturing industry take up unemployment insurance (Employee Benefit Research Institute, 2002). Of the manufacturing workers who received benefits, over 41% exhausted their available benefits before finding re-employment. The average national duration of unemployment insurance is 14.6 weeks (DOLETA, 1990 – 2000).[5]

The total cost to taxpayers of unemployment insurance benefits for workers displaced due to asbestos liabilities to date is approximately $80 million. While unemployment insurance helps to ease the burden of unemployment for displaced workers, it is only a partial offset of their lost income. Average benefit is less than 50% of the average weekly wages of a displaced worker (DOLETA, 1990 – 2000).[5]

Monthly private health insurance premiums for a family of four are over 50% of an average worker's unemployment benefit.

VII. COSTS BORNE BY LOCAL COMMUNITIES

Local communities bear additional costs due to plant closings and asbestos-related layoffs. In addition to direct effects from plant closings, other local firms lose business through the indirect and induced impacts of plant closures (the "multiplier effect"): Indirect effects are the impacts of reduced plant spending in the community, and induced effects are the impacts of reduced worker spending in the community. These impacts affect the local community in several ways through reductions in regional income and employment, falling property values, and effects on local sales and property tax revenues and local government expenditures.

VIII. COSTS BORNE BY LOCAL COMMUNITIES: REDUCED REGIONAL INCOME AND EMPLOYMENT

As local plants close and lay off workers, they cut back purchases from other local businesses. Laid-off workers also cut back spending. These indirect and induced impacts can be estimated using a regional economic model.

The estimates are based on a "state-of-the-art" regional impact model developed by Regional Economic Models, Inc. ("REMI"). REMI can be used to estimate all of these effects. We used REMI to estimate the local economic impacts in an average case, due to asbestos liabilities. Our example focuses on Licking County, Ohio.

Although the magnitude of effects depends on the characteristics of the local community, the Licking County region had a typical multiplier value in a sample of communities with asbestos-related layoffs. Thus, results can be extrapolated to all affected communities. For example, in 2000, Owens-Corning laid off 275 workers from its Granville plant in Licking County, Ohio.

Licking County, Ohio (U.S. Census Bureau 2002) has:

1. Population of 145,491 in 2000;
2. 58,760 households in 2000;

3. Per capita income of $20,581 in 1999.

In comparison to the direct impacts, REMI model predicts about 225 additional jobs lost due to indirect and induced effects.

Indirect/induced impacts occur in many sectors, for example, we estimated:

1. 77 jobs lost in local services;
2. 60 jobs lost in local retail trade;
3. 48 jobs lost in local construction;

In total, we estimated 500 lost jobs in Licking County, Ohio due to layoff in 2000.

IX. COSTS BORNE BY LOCAL COMMUNITIES: REDUCED REGIONAL INCOME AND EMPLOYMENT

REMI model also predicts impacts on regional output of goods and services, regional income, and population. We estimated that total regional output would be reduced by over $30 million annually. More specifically:

1. $21 million due directly to laid-off workers;
2. $4.5 million in goods and services supplied to the plant;
3. $4.5 million in general goods and services to the population.

This corresponds to a total reduction in regional income of about $15-$20 million annually.

For every ten workers laid off directly, our model predicts that approximately five people relocate out of the county, due mostly to reduced wage levels in the county. These impacts occur in local communities across the country. Since the "multipliers" vary by community, the impacts will be different for the various communities facing layoffs due to asbestos-induced bankruptcies.

X. COSTS BORNE BY LOCAL COMMUNITIES: FALLING REAL ESTATE VALUES

Plant closures and asbestos-related layoffs will also affect owners of real estate in local communities. Jud and Winkler (2002) show that property values are dependent on local incomes and population. A 10% reduction in local per capita income results in a 2% decline in local real estate prices (other factors held constant), and a 10% reduction in local population results in an 11% decline in local real estate prices (other factors held constant). In our example of Licking County, Ohio, we estimate 500 jobs were lost after Owens-Corning's 275-worker layoff in 2000.

In response, we estimate that both population and per capita income each fell by approximately 0.1%.. The median home value in Licking County, Ohio in 2000 was $110,700, and there were 58,760 housing units in Licking County in 2000.

Applying multipliers from Jed and Winkler indicates total local real estate values would have fallen by $5-$10 million.

XI. COSTS BORNE BY LOCAL COMMUNITIES: LOCAL SALES AND PROPERTY TAXES

Plant closings also will lead to reductions in local tax receipts. The precise effects on local taxes depends on the community's tax structure, including the tax rates and the definitions of the tax base. Several factors cause the decline in local tax receipts:

1. Lower real estate values;
2. Reduced population;
3. Reduced spending from remaining residents due to falling incomes.

These declines in tax revenues are likely to outweigh the declines in local government spending due to reduced population. These effects shift some of the cost burdens onto local governments.

XII. CONCLUSIONS

Asbestos liabilities impose costs not just on shareholders, but on many other groups, including workers, taxpayers, and local communities affected by asbestos-related plant closings. Workers in bankrupt firms are hurt through numerous direct and indirect channels. These costs include unemployment, lost wages, lost health care, and reduced wages due to bearing the burden of retraining costs. Not only did laid-off workers suffer the impact, but the costs were also passed onto taxpayers across the country.

Local communities can also be hard hit. Other local businesses are hurt as industry spending falls, local per capita income falls, population declines, and local property values fall.

Finally, local governments face a decline in revenues, which is likely to be much greater than a decline in costs. These costs and impacts will continue to expand as the volume of asbestos litigation grows.

NOTES

1. List of asbestos-related bankruptcies obtained from Committee on the *Judiciary United States Senate, Hearing on Asbestos Litigation* (2002), Statement of Jennifer L. Biggs, FCAS, MAAA Chairperson, Mass Torts Subcommittee American Academy of Actuaries, September 25. A sample of approximately 90 plant closing/mass layoffs was created based on WARN reports from various state labor departments. Population estimates based on the 2000 U.S. Census. A detailed list of plant closings and mass layoff events used in this analysis is available upon request.

2. In 2002 dollars; dollars have been inflated and discounted using average annual inflation rates and T-bill rates, respectively. The reported wage is an un-weighted average of the mean earnings of a displaced worker in the non-durables manufacturing industry from specified years.

3. Calculated using data from BLS Monthly Labor Review 1993, 1995, and 2001. The reported values are un-weighted averages across these years.

4. In 2002 dollars; average monthly premium quotes obtained from Blue Cross Blue Shield websites assuming non-corporate coverage and age of 40 years for subscriber and spouse. Family rates assume one spouse and two dependent children of age 10. For detailed notes, see NERA table: "Blue Cross, Blue Shield Monthly Premiums by State," available upon request.

5. Un-weighted average of duration and value of unemployment insurance for all states from 1990 to 2000.

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Additional Views of Senator Dianne Feinstein
and Senator Herb Kohl
on S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003

We write separate views on S. 1125, the FAIR Act, to clarify certain amendments passed in Committee and to highlight our priorities as the legislation proceeds to the Senate Floor. The legislation passed out of Committee reflects a substantial improvement over the FAIR Act as introduced. But we strongly believe that additional changes are necessary before the bill is ready for final passage.

Without question, our State and Federal courts face an asbestos litigation crisis. An estimated 18.8 million U.S. workers were exposed to high levels of asbestos from 1940 through 1979. Claims resulting from related cancers and other ailments are expected to cost up to $210 billion. More than 500,000 cases have been brought in the past 20 years, targeting 8,400 companies. The court dockets are simply clogged with claims. As a result, the sickest victims must wait years before their claims are resolved and dozens of companies are filing for bankruptcy due to the overwhelming cost of lawsuits. The enormity of this crisis calls for a national solution.

We support the concept of a comprehensive, no-fault national trust. However, any Trust Fund created by Congress must be fiscally responsible, establish fair compensation for asbestos victims, and provide certainty for all. We supported amendments in Committee to accomplish these goals, and many of those amendments passed. But there is more to be done.

Financial Risk Amendment

The Feinstein-Kohl contingent call amendment passed by the Committee provides an important financial reserve in case of unexpected contingencies. As introduced, the FAIR Act provided no mechanism to raise additional funds from defendant companies or insurers if claims outstripped the resources of the Trust Fund. Our amendment addresses this deficiency and is explained below.

S. 1125 separates contributions from defendant companies into eight time periods stretched over 27 years. Each time period has an annual aggregate amount that applies to defendant company contributions. For example, years one through five total $2.5 billion a year to be paid by

defendant companies. In subsequent time periods, the annual aggregate number is reduced according to scheduled step-downs.

Our amendment would require that these reductions only be allowed if the Administrator can certify that the Trust Fund has paid and will continue to fully pay the compensation awards afforded to asbestos claimants.

Specifically, the Administrator must consult with experts in determining whether or not to certify a reduction. A contributor to the Trust Fund (defendant company or insurer) is allowed an opportunity to comment and offer additional information to support a determination that additional contributions are not necessary and hence, a reduction is in order.

Denying a reduction in one time period does not restrict the Administrator from allowing a reduction in the future to the value allotted that future time period. Furthermore, the Administrator is allowed flexibility to partially limit a reduction so long as the contributions will be sufficient to meet current and future claims.

Our amendment is not a one-way street. It would permit the Administrator to reduce the aggregate contribution levels and give defendants a credit if the defendants were denied deductions in earlier time periods. These credits would not exceed the amount of extra payments received earlier.

Under the FAIR Act as reported out by the Committee, insurance company contributions will be determined by the Asbestos Insurers Commission, but shall equal the total amount ($52 billion) paid by the defendant companies. For the purposes of our amendment, the insurance companies will be liable for the same amount for any contingent funding assessed upon defendant companies.

Our amendment also offers a solution to the back-end problem. Namely, we need to address the possibility that the Trust Fund will require additional dollars beyond the initial 27 year period. Our amendment permits continued contributions past year 27 if the Administrator finds that more funds are needed to cover claims. We do not require companies and insurers to pay this further obligation. If they choose, they can return to the tort system. Working with Senator Hatch, we agreed that this return to the tort system be the federal court system. Alternatively, companies and

insurers can maintain their immunity by making payments into the Trust Fund. The choice is theirs to make based on each company's or insurer's self-interests.

There must be a check to ensure that we aren't giving defendant companies and insurers a break on their contributions if we aren't able to guarantee a full compensation award allowed for by the Trust Fund. The amendment is a common-sense approach that provides accountability that asbestos victims are fairly and fully compensated per the law. Furthermore, this amendment still provides a measure of certainty for the companies of what their total contribution could be, even if it is higher than what the bill allows for now. We are pleased that Chairman Hatch worked with us to include this amendment which we feel greatly improves the FAIR Act.

Ban on Asbestos Products

The legislation reported out of Committee includes an amendment we drafted with Senator Hatch banning the production, manufacture and distribution of asbestos-containing products. We believe this amendment is a crucial component of any comprehensive bill. Any resolution to the asbestos litigation crisis should also end the tragic legacy of disease and death that exposure to asbestos has wrought. We must minimize the creation of new asbestos victims by banning the use of this dangerous mineral in this country. The Judiciary Committee has become very familiar with the tremendous long-term human health, environmental and economic costs of reliance on asbestos. It makes no sense to develop a complex plan for mitigating these costs while still allowing this harmful substance to be used in workplaces across America.

The asbestos ban amendment included in S. 1125 builds off of the asbestos phase-out and ban regulations that the Environmental Protection Agency (EPA) finalized in 1989 and that would have taken full effect by 1997. Unfortunately, the 5th Circuit Court of Appeals overturned these rules in 1991 and this decision was not appealed to the U.S. Supreme Court. The asbestos ban amendment also draws from Senator Murray's Ban Asbestos in America Act, S.1115. The language requires the EPA within two years to finalize rules banning the manufacture, processing and distribution in commerce of asbestos containing products. The ban also applies to the importation of asbestos containing products from other countries. Prior to finalizing these rules, the EPA shall be required to conduct a study to

determine whether certain roofing products should remain exempt from the ban. It is worth noting that in 1989, the EPA chose not to exempt this product category from its ban; however, in the spirit of compromise we agreed to defer this decision to EPA's expertise. However, we must stress the importance of EPA conducting this study prior to finalization of the asbestos ban.

Fair Claims Values

As the bill goes forward, the legislation must ensure fair claims values. Senators Feinstein and Graham passed an amendment in Committee that substantially increases the award values for claims under the Trust Fund. Through these increased award values, the amendment would direct an estimated $11 billion additional dollars to victims (from $96.2 to $107.8 billion).

The new claims values increase compensation for the more serious diseases. For example, under the Feinstein-Graham amendment, compensation for pleural disease rose from $60,000 to $75,000, Compensation for disabling asbestos went up from $600,000 to $750,000; and the maximum compensation for non-smoking lung cancer victims went up sharply. Lung cancer victims with 15 years of exposure can now get maximum awards of $600,000 (instead of $100,000). Those with pleural disease or disabling asbestosis can get maximum awards of $1,000,000.

After adoption of the claims awards amendment, Senators Leahy and Kohl proposed another amendment to truly fund the FAIR Act at its purported $108 billion level. The Leahy-Kohl amendment provides an additional $14 billion of mandatory contributions -- $7 billion each from defendant companies and insurers – and eliminates an ill-defined section that sought to raise $14 billion from companies that had less than $1 million in asbestos-related litigation expenses. We concur with the minority views of Senator Leahy that it is both the intention and the effect of this amendment that the contingent funding mechanism established by the Kohl-Feinstein amendment - and the amount of additional dollars available under that mechanism - remain unchanged.

Transition to Trust Fund

We remain very concerned about the adequacy of the bill's provisions regarding the transition of the 294,000 pending asbestos lawsuits into the Trust Fund. The Committee took one step forward by adopting the Feinstein amendment that delays implementation of the tort preemption provisions of the bill until the Trust Fund is fully operational and processing claims. As the bill was originally drafted, pending claims were barred from the court system upon the date of enactment. This preemption would have deprived mesothelioma patients and other victims any legal remedy while the Trust Fund was being set up. Since individuals with mesothelioma typically live for only a matter of months after diagnosis, the bill as introduced would have essentially denied them any remedy while they were alive. Under the bill as amended, individuals with asbestos-related diseases will maintain their legal rights during the transition period.

The bill still has not fully addressed issues raised by final settlements. During Committee mark-up, Senator Feinstein offered language that would exempt from the Trust Fund settlements that were valid under state law as well as claims upon which a court rendered a judgment to pay money. Senator Feinstein withdrew her amendment after Chairman Hatch agreed with Senators of both parties to put language excluding settlements from the Trust Fund into the manager's package on the Floor.

Many asbestos victims have reached settlements with corporate defendants that are only partly paid. The participants in these settlement agreements are counting on these payments to support their families and pay medical bills. Are we really going to replace a claimant's current stream of income with a future promise to pay? In some cases, individuals getting compensated under current settlement agreements will get less money or even no money under the Trust Fund. Exclusion of these settlements is necessary to preserve basic fairness and to protect the bill against constitutional challenges

In sum, we applaud the Chairman and Ranking Member for their efforts in shepherding this enormously complex legislation through Committee. However, we have more work to do before this legislation can become law.

TESTIMONY OF PROFESSOR ERIC D. GREEN TO THE SENATE COMMITTEE ON THE JUDICIARY ON "SOLVING THE ASBESTOS LITIGATION CRISIS: S. 1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003" Scheduled For Wednesday, June 4, 2003, at 10:00 a.m.

INTRODUCTION

I would like to thank Chairman Hatch and Senator Leahy as well as the other members of the Judiciary Committee for giving me the opportunity to appear before you today to talk about the Fairness in Asbestos Injury Resolution Act of 2003.

Specifically, I would like to address the impact of the Act on the rights of the as-yet-unknown victims of exposure to asbestos. These victims, commonly referred to as "future claimants," are persons who have been exposed to asbestos and who have not yet brought a personal injury claim or lawsuit but will assert such a claim in the future. These are the overwhelming majority of people who will be affected by the Act. Although estimates vary, most epidemiologists predict that the number of future claimants is two to five times the number of current claimants. Predictions by the most highly-respected experts in this field range from 1.5 million to 2.5 million future claims.

I am currently the Court-appointed representative for future claimants in the Fuller-Austin, Federal-Mogul and Babcock & Wilcox bankruptcy cases, a

position often referred to as a "futures representative." I also am a professor at Boston University School of Law, and I operate a firm specializing in alternative dispute resolution. I have served as a Special Master to several state and federal courts in asbestos litigation matters, and as a mediator I have settled tens of thousands of personal injury asbestos cases and resolved numerous asbestos insurance disputes. Like the other futures representatives, I have dedicated a large portion of my career to assisting in the fair resolution of asbestos claims. However, I have never directly brought or defended an asbestos personal injury lawsuit and have no personal stake in the outcome of any asbestos litigation or legislation.

My testimony is based on my own experience with resolving asbestos claims and on the collective views of other individuals who have been appointed to represent the interests of future claimants in asbestos-related bankruptcy proceedings. There are 13 such individuals, including myself, currently representing future claimants in the 18 pending bankruptcy cases in which courts have appointed futures representatives. Based on the number of asbestos bankruptcy cases and the overlap in exposure to many asbestos products that most claimants allege, the current group of futures representatives in all likelihood represents virtually all future claimants.

Congress previously has recognized the need for an independent representative to act on behalf of future claimants before the rights of future claimants can be effectively limited to recourse against a trust. The bankruptcy trust and "channeling injunction" structure codified at 11 U.S.C. § 524(g) in a 1994 amendment to the Bankruptcy Code was first implemented in 1982 in the Johns Manville bankruptcy proceedings. The mechanism provided pursuant to 11 U.S.C. § 524(g), which requires the participation of a futures representative, is currently the only means through which a company can fully resolve its asbestos liability. Since Manville, over 60 companies have sought bankruptcy protection because of liability from asbestos. Several other companies have negotiated pre-packaged bankruptcy plans with representatives of the current and future claimants and will file for reorganization and protection under section 524(g) in the coming months unless a better alternative – possibly such as legislative reform – presents itself.

As reflected in the legislative history, the purpose of section 524(g) is to preserve the assets of companies faced with mass asbestos liability and protect the claims of future asbestos victims. Thus, the futures representatives have an appreciation for the economic issues that underlie the trust mechanism and the competing needs and rights of businesses and tort victims.

The futures representatives are also intimately familiar with the issues that arise in creating a limited fund to satisfy an as-yet-unknown number of asbestos claims. One of the futures representatives' primary responsibilities is to ensure that the trusts established in the bankruptcy cases for asbestos victims have adequate administrative and procedural safeguards to minimize the risk of future shortfalls in funding. Those safeguards are often developed through negotiations with representatives of holders of pending claims over such issues as the medical and exposure evidentiary criteria to be used by the trust and the size of the pro rata payment to be made by the trust to valid claims.

Futures representatives are non-partisan participants in the world of asbestos litigation. They include judges, law professors and practicing lawyers, all of whom have substantial experience with asbestos personal injury litigation and asbestos-related bankruptcies. None of us, however, is an asbestos personal injury plaintiff's lawyer or an employee of a defendant company or insurance company. The primary mission of the futures representatives in chapter 11 bankruptcy proceedings is to ensure that the future claimants are treated fairly and similarly to current claimants – an essential due process ingredient that Congress recognized when it created section 524(g) as a mechanism for protecting the rights of unknown claimants from the competing and well-represented interests of both the current claimants and the defendant companies and their insurers.

Futures representatives bring a unique perspective to the subject of asbestos litigation and legislative reform. We are:

- focused on the plight of all unknown future claimants,
- dedicated to the equitable distribution of scarce resources in the face of substantial uncertainty,
- concerned with the sustainability of companies and insurers not only to provide for current and future asbestos claimants, but to provide employment and a livelihood for current and future workers and value for shareholders,
- unbiased and not motivated by any contingent fee arrangement or duty to preserve and maximize shareholder value, and
- grounded in detailed, practical experience in coping with an unknown but overwhelming number of future claims.

Since the introduction of Senate Bill 1125, the futures representatives have devoted considerable time studying the bill. This past Sunday, we gathered to share our views and concerns, and my testimony today in large part is the product of those discussions. We also have attached an appendix reflecting additional concerns and suggestions from the futures representatives.

DISCUSSION

The futures representatives support a national legislative resolution to the asbestos litigation crisis that provides an efficient, low-cost and effective national fund to fairly compensate present and future asbestos victims. Indeed, we are supportive of a national resolution even though such a resolution likely will eliminate the need for futures representatives. Our support is reserved, however, only for legislation that produces a result for future asbestos victims as good as or better than what the future asbestos victims will obtain absent legislation.

This is critical. Any legislation that replaces the current system must protect future asbestos victims from the risks of error and uncertainty associated with the limited national Fund contemplated by Senate Bill 1125. Such protection is all the more essential since there will be no one with the statutory authority to protect the interests of the future claimants. If a single national Fund is to be the sole source of compensation for future claimants, it must have access to sufficient resources to pay all future claims and be designed to operate in a way that will ensure that future asbestos victims will be paid in full and in a timely manner. In short, we must be certain that the Fund will not run out of money before all the victims of asbestos have been identified and paid, and that the Fund will not run short of money and make victims of asbestos wait for payment.

Thus, the futures representatives' concerns mainly fall into three categories: (1) whether the Fund will have the resources to timely pay future claims, (2) whether the administrative procedures established under the Act are unduly burdensome and whether such procedures will result in a backlog of claims with long delays in payment, and (3) whether the Act's compensation criteria are fair and consistent with those currently applied by the tort system and by the established asbestos trusts.

Unfortunately, several key characteristics of the Act in its present form fall short of meeting these concerns and must be addressed if we are not to disenfranchise future claimants.

I. FUNDING

From our collective perspective, our greatest concern about the Act is that it does not provide any assurance that all claims that are eligible for compensation will get paid. In enacting section 524(g), Congress imposed a requirement that every asbestos trust provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future claims in substantially the same manner. Every trust created since 1994, as well as the trusts created in the Johns Manville case and its progeny, assures future asbestos claimants that funds will be available to pay their claims. Such assurances protect

the future claimants from the risk of error in predicting the number and magnitude of all the claims that will ultimately be presented for payment to the trust. Senate Bill 1125 should provide future claimants with similar assurances and protections against underfunding.

The Act faces two underfunding risks. The first risk arises from the absence of any assurance that the defendant and insurer participants will in fact contribute $45 billion each. The second risk arises from the absence of any assurance that additional funds will be available if the actual claims exceed the forecasts of claims. Without protection against underfunding, the Act will shift all of the risks of inadequate funding onto the shoulders of asbestos claimants. This risk is most profound for the future claimants because they will be last in line for payment. Moreover, if the amount of funding from industry and the insurers proves insufficient to pay future asbestos claims, the Act provides no mechanism for the Administrator to obtain additional funding. Additionally, the Act provides no tools to the Administrator to manage the use of the Fund in a way that ensures that all asbestos victims will receive some payment, even if not full payment. The only option the Act gives the Administrator for managing a funding shortfall is to delay payment to claimants.

My concern about the Act's ability to fairly address future claims is heightened by the fact that the Act proposes to dismantle the existing trusts created under the Bankruptcy Code. Doing so would reverse Congress' decision in 1994 when it created section 524(g). Every future asbestos victim with a claim against an existing section 524(g) trust is assured that he or she will receive compensation in substantially the same manner as present asbestos victims. Not so under the Act. The Act takes the money now reserved for future claimants and uses it to create the Fund without any assurance that money will remain available to pay future claimants.

The Act also ignores the risk that the projected number of future asbestos claims filings upon which the Fund's contribution requirements are based may turn out to be inaccurate. In our experience, in every instance where companies or trusts have attempted to project future asbestos claims they have always seriously underestimated. The actuaries with whom the futures representatives have consulted tell us we have no reason to expect that the forecasts upon which the funding requirements of the Act are based will be any more accurate than prior estimates. Indeed, the Act changes many of the assumptions upon which prior forecasts have been based and the effect of those changes is untested. If the forecasts prove too low, the future claimants will be the losers.

I am also skeptical about the proposition that up to an additional $14 billion may be collected from what is defined in the Act as "additional contributing participants." We believe it unlikely that the Administrator will have the ability to identify additional contributing participants once the Act eliminates the opportunity for claimants to pursue additional defendants in the tort system.

Potential changes to the Act that may provide some assurance that the Fund will be able to timely pay all claims, including future claims, include:

- Authorizing the Administrator to impose contingent calls on insurer and defendant participants after the Fund has had actual experience with handling and paying claims to ensure that all eligible claims receive compensation at the proposed levels;
- Adding a Federal guarantee that all eligible claims will be paid at the scheduled values and that the holders of such claims will not be required to endure unreasonable delay before receiving payment from the Fund;
- Imposing joint and several liability on the defendants and the insurers to the extent necessary to ensure that the proposed funding levels will be attained. Joint and several liability in the tort system provides some assurance that plaintiffs will recover in full. The same purpose would be served if joint and several liability were imposed by the Act;

- Limiting the applicability of the Act's bar on the further pursuit of asbestos claims in the tort system to protect only those companies that are contributors to the Fund. This would provide market incentives for the so-called additional contributing participants to voluntarily contribute to the Fund. It would also make the tort system a useful tool to assist the Administrator in identifying additional contributing participants;

- Authorizing the Administrator to extend past 27 years the contribution obligations of defendants and insurers; and

- Authorizing the Administrator to require additional contributions from reinsurers.

II. CLAIM RESOLUTION PROCEDURES

In addition to the risks inherent in the Act's funding provision, the futures representatives are also concerned that the Act's claims resolution procedures may further reduce the likelihood that future claimants will be treated in a manner similar to those who will be first in line to recover under the Act. The Act creates a claims handling bureaucracy that likely will be significantly more inefficient and cumbersome than we have seen in any of the trusts created to date, and that is likely to create delay.

The claims administration and processing methodologies described in the Act are, at once, unnecessarily expensive, very time consuming, likely to result in inconsistent awards by the large number of decision makers, and very unlikely to attract experienced and otherwise qualified claims personnel. As to the expense and likelihood of delay, we estimate that as many as 500 magistrates – perhaps slightly fewer – will be necessary to examine, in the detail described in the Act, the claims submitted. Wholly apart from the lack of horizontal justice that is likely to emerge, that is, inconsistent rulings by this many decision makers, the "fly specking" of claims that appears to be contemplated will lead to innumerable delays and an endless stream of appeals – further delaying the process and increasing the expense. In addition, we believe that the claims review performed by the Judges of the Asbestos Court is essentially duplicative of the same task performed by the magistrates.

Over fifteen years of claims administration experience has taught that the cumbersome claims resolution system described in the legislation is unnecessary to ensure the fair resolution of asbestos claims. Worse, there appear to be at least implicit instructions in the legislation to resolve all claim submission doubts against the claimant regardless of the evidence submitted in support of the claim.

Finally, with a jurisdictional imperative requiring the judges of the Asbestos Court to live within 50 miles of Washington, D.C., coupled with the restrictions on salary based on federal civil service compensation, we are unclear as to where the hiring authority will find magistrates and other personnel who are experienced in asbestos medicine, exposure theory, and the other knowledge and skills that must be employed in order to resolve fairly personal injury asbestos claims. One is forced to speculate that absent the opportunity to hire from a larger experienced personnel cadre than is likely to be available, it will take many, many months of recruitment and training, not to mention systems testing, before the first claim can be considered.

Potential improvements to the administrative provisions of the Act include:

- Give consideration to placing claims handling in the private sector. The private sector, because of at least fifteen years of asbestos claims handling experience, is better equipped to undertake this important responsibility, and nobody should dispute the efficacy of having the private sector pay for claims processing.

- Having claims review in this no-fault, single payer system consist principally of documenting that a claim file is complete, that the enumerated exposure criteria have been met, that the medical evidence supports the diagnosis of an asbestos-related disease pursuant to the disease levels, and that the medical documentation

is consistent with medical standards. Based on that review, compensation, if any, should be determined at the appropriate level. Appeals, pursuant to the administrative review standards already described in the Act, may then be taken to the Asbestos Court.

- While section 101 of the Act empowers the Chief Judge to "appoint or contract for the services of such personnel as may be necessary and appropriate to carry out responsibilities of the Court of Asbestos Claims," and while section 114 of the Act authorizes the Asbestos Court to "contract for the services of qualified individuals to assist magistrates by conducting eligibility reviews of asbestos claims," it is not clear to what extent the Act includes the authority to contract out claims administration services in the event that private sector administration, as described above, is rejected. Such authority should be broadly and explicitly granted in the Act.

III. COMPENSATION CRITERIA

The claim values in the Act are significantly below the amounts available to claimants in the tort system and from the existing asbestos trusts. Moreover, thousands of persons exposed to asbestos who could recover compensation from the current asbestos trusts or in the tort system will be unable to recover anything under the proposed Act. Both of these defects must be addressed to prevent serious unfairness to future claimants.

While there is not a consensus among the futures representatives regarding which types or levels of asbestos diseases that should be eligible for compensation or the appropriate claim values for each level of disease, the reduced values for the diseases compensable under the Act as compared to what claimants would receive in the tort system is particularly troubling to all the futures representatives when coupled with the Act's reduction in awards on account of payments from collateral sources. The Act proposes to reduce awards of compensation from the Fund by the amount a claimant receives not only from defendants, insurers of defendants and compensation trusts, but also from health insurance, Medicare, Medicaid, and death benefit programs (but not life insurance).

The futures representatives share the view that the offset of collateral compensation from the awards to be paid under the Act is unfair and inequitable. Claimants with the more debilitating of the asbestos diseases, cancer and Mesothelioma, may very well receive amounts from Medicare, Medicaid and health insurance in connection with their medical treatments that could easily exceed the levels of awards available for such diseases under the Act. In those instances, claimants with the most serious of injuries would not be entitled to receive any compensation from the Fund.

Even if the collateral source offset is eliminated, the currently proposed levels of compensation appear to be significantly less than the value placed on such claims by the tort system, less than the combined value that a claimant could expect to receive from the asbestos trusts and the companies and insurers not in trusts, and less than the amounts that Congress has decided that victims with comparable non-asbestos-related injuries should receive from other non-asbestos trusts, thus rendering the amounts inadequate.

Without venturing into the public policy issues of which injuries are worthy of compensation and precisely how much those injuries are worth, there are several other issues in the claiming criteria that the futures representatives would like to bring to the Committee's attention.

- The Act should include colo-rectal cancer among the other cancers scheduled at Disease Level 5. In our experience, colo-rectal cancer is commonly compensable in the tort system and by the existing bankruptcy trusts as an asbestos-related disease;
- The limitation on compensation to only those claimants who can demonstrate asbestos exposure within the United States or its territories unfairly excludes U.S. citizens exposed to asbestos while working for U.S. companies overseas or while on U.S.-flagged ships;

- The Act's scheduled disease values should be indexed to inflation.
- The limitation on compensation to only those claimants who can demonstrate asbestos exposure prior to 1982 unfairly excludes many asbestos victims. In a no-fault system, there is no reason to adopt a cut off date.

CONCLUSION

In conclusion, I want to re-emphasize the view of the futures representatives that a national legislative resolution to the asbestos litigation crisis is in the national interest and can be a benefit to all concerned – current and future victims, companies, insurers, and the community at large. The futures representatives applaud this legislative effort and would like to assist the Committee in any way that we can be of service in achieving a solution that satisfies the concerns of all parties in interest.

I am happy to answer any questions the Committee may have.

APPENDIX TO
TESTIMONY OF PROFESSOR ERIC D. GREEN TO
THE SENATE COMMITTEE ON THE JUDICIARY ON
"SOLVING THE ASBESTOS LITIGATION CRISIS: S. 1125,
THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT
OF 2003" Scheduled For Wednesday, June 4, 2003, at 10:00 a.m.

Section 101 - Establishment of Asbestos Court

The Act creates the United States Court of Asbestos Claims. Five judges appointed by the President under Article 1 of the Constitution are to preside over the Court for fifteen-year staggered terms. The Court is to sit in the District of Columbia.

The creation and use of the Asbestos Court to oversee and participate in the administrative function of reviewing and allowing claims is likely to create a significant bottleneck in claims administration, as well as the potential for delay in administering the Fund while judges are selected and approved. If a public agency structure is to be used to administer claims under the Act, experience suggests that an efficient process would be to allow an agency to handle the administrative function of claims review and allowance and allow the courts, perhaps a specialized court of asbestos claims, to handle disputes.

Section 114 – Eligibility Determinations and Claim Award

Section 114 establishes an aggressive timetable for claim review and determination, as follows: Within 20 days of filing with the Asbestos Court, the Court refers the claim to a magistrate. The magistrate then conducts an initial review to determine what additional information, if any, may be required from the claimant. Within 60 days of the magistrate's receipt of all required information, the magistrate is to make an eligibility determination and transmit a recommendation of compensation to the Asbestos Court. Within 30 days after receipt of a recommendation, a judge of the Asbestos Court is to make a final decision on compensation. If a judge of the Asbestos Court determines that a claim is entitled to compensation, the Administrator is notified to award the claimant compensation from the Fund in the amount of the judge's decision.

The timetable imposed by Section 114 appears to be quite unrealistic, especially given that the Fund likely will receive 600,000 to 700,000 claims upon its inception. It is likely that the proposed timetable, particularly during the processing of the backlog of pending claims, will impose such a burden on the Asbestos Court that processing claims will become unduly expensive to the detriment of future claimants.

Section 125 – Exposure Criteria Requirements

This section authorizes, but does not require, the Asbestos Court to collect information about specific industries and occupations within those industries, among other things, to allow it to prepare lists of sites and occupations that would allow claimant to qualify for payment based on those known sites and occupations. The passage of time will render this an issue of particular importance for future claimants because memories will fade and records will be lost. From the point of view of future claimants it will be desirable to make mandatory the collection of data and the creation of site and job lists for which there is a rebuttable presumption of significant occupational exposure.

Section 132 – Medical Monitoring

A claimant may receive a reimbursement every three years for medical monitoring costs not covered by health insurance (including x-ray tests and pulmonary function tests).

Reading Section 132 in conjunction with the collateral source rule in Section 134 suggests that the collateral source rule may apply to medical monitoring payments. The ambiguity should be clarified by eliminating the application of the collateral source rule.

Section 203 – Sub-Tier Assessments

The Act creates Sub-Tiers for each of the Tiers. In Tier 1, the Tier comprising debtors in bankruptcy, Sub-Tier 1 comprises the majority of all of the pending bankruptcy cases and requires the debtors to pay a percentage of their gross revenues each year through year 27 following enactment of the statute. The percentage of gross revenue begins for years 1 through 5 at 1.5005% and declines over the life of the payment obligation to 0.1794% in year 27. Sub-Tiers 2 and 3 of Tier 1 address debtors with no material continuing business operations.

Defendant contributions to section 524(g) trusts, excluding contributions by their insurers, by and large would exceed by a substantial amount the payments required under the Act. Two examples follow and others are available:

> Armstrong (Tier 1): Armstrong's gross revenue for 2002 was approximately $3.172 billion. Under the Act, the net present value of Armstrong's required contribution for years 1 – 27 is $600 million ($914 million nominal). The estimated value of Armstrong's contribution to the § 524(g) trust under the pending plan is $1.8 billion, exclusive of insurance.

Babcock & Wilcox (Tier 1): Babcock & Wilcox's gross revenue for 2002 was approximately $1.497 billion. Under the Act, the net present value of Babcock & Wilcox's required contribution for years 1 – 27 is $283 million ($432 million nominal). The estimated value of the equity that Babcock & Wilcox will contribute to the § 524(g) trust under the pending plan is approximately $400 – 500 million.

Section 204 – Assessment Administration

Under Section 204(g), an affiliate group that includes more than one defendant participant may irrevocably elect to report on a consolidated basis and be treated as a single participating defendant. Several asbestos defendant corporations are members of larger conglomerates. To date, we have seen no data that evaluates the impact of elections by conglomerates under Section 204(g) to report on a consolidated basis. A preliminary analysis suggests, however, that the application of Section 204(g) may significantly impact the ability of the Fund to raise $45 billion from defendant participants. Eliminating consolidated reporting would help assure that the $45 billion goal will be achieved.

Additionally, when computing an entity's prior asbestos expenditures under Section 204, payments by an indemnitor are counted as part of the indemnitor's prior asbestos expenditures, rather than the indemnitee's prior asbestos expenditures. A number of examples exist of asbestos manufacturing

defendant companies passing from owner to owner through a series of sales and acquisitions. In many of these cases indemnities are granted by either the purchaser or the seller, and in many cases the indemnitee and indemnitor relationships among the past and present owners of the asbestos manufacturing defendant create a complex interrelationship of obligations. As it is drafted, the Act does not appear to account for these complexities and may create an opportunity for considerable delay and debate in determining defendant participants' shares. Some attention needs to be given to modeling how the indemnitor rules will apply in several specific examples.

Section 212 – Duties of Asbestos Insurers Commission

The commission is charged with responsibility for allocating among the participating insurers the $45 billion contribution to be made by insurers. Any insurer that has paid or has been assessed at least $1 million in defense and indemnity costs is a mandatory participant.

Unlike the contribution levels required of defendants by Tiers and Sub-Tiers, the Act does not delineate the contribution levels for individual insurers. Instead, the Act contemplates that the Asbestos Insurers Commission will conduct hearings and make a final determination of the obligation of each insurer participant. The determination of the Asbestos Insurers Commission is subject to judicial review pursuant to Title III of the Act.

The Act's deferral of the determination regarding insurer participation to a commission and judicial review process likely will create opportunities for delay in the commencement of contributions by insurer participants. Imposing a tier system similar to that imposed upon defendant participants as part of the Act likely would significantly reduce the risk of delay.

Additionally, under the Act, the contribution required of all insurer participants is capped at $45 billion, while defendant participant contributions do not have a per se cap, rather a goal of $45 billion. To help insure that the Fund will have sufficient funds, and to create parity with the defendant participants, the Act should provide that the Asbestos Insurers Commission is charged with raising *at least $45 billion.*

Testimony as delivered

by

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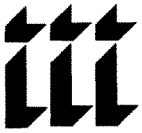
New York, New York

United States Senate Committee on the Judiciary

Solving the Asbestos Crisis: S.1125

The Fairness in Asbestos Injury Resolution of 2003

JUNE 4, 2003



Thank you, Mr. Chairman, and members of the Committee.

My name is Robert Hartwig and I am Chief Economist for the Insurance Information Institute, a property/casualty insurance trade association. I have been asked to testify before the Committee regarding several of the most important economic considerations surrounding the current asbestos debate. As an economist, I am particularly interested in eliminating the extraordinary inefficiencies associated with asbestos litigation, as well as the severe economic and financial dislocations associated with those inefficiencies, within a framework that is fair and equitable for all parties involved.

MACROECONOMIC DISLOCATIONS

The macroeconomic implications associated with the current out-of-control asbestos litigation system are not in dispute:

- Nearly 70 companies have been pushed into bankruptcy by asbestos litigation
- Approximately 8,400 companies, in almost every industry, have had claims filed against them
- Between 52,000 and 60,000 jobs have been lost as a result of these bankruptcies
    - For shattered communities and families, these statistics are only the beginning of the story, as thousands of jobs are lost in industries dependant on the bankrupt firms.

TOWARD AN EFFICIENT SOLUTION TO THE ASBESTOS CRISIS

If nothing is done to resolve what has been described as the "elephantine mass" of asbestos litigation, scores, if not hundreds, of additional businesses will be forced into bankruptcy and tens of thousands of workers will find themselves unemployed. Retirees and workers who have spent decades saving for retirement will continue to see their life's savings vanish.

The inefficiencies associated with asbestos litigation stem largely from abuse, which has led to a rapid upward spiral in tort costs. Legislation now before the committee will address these abusive practices.

Under the present tort system, hundreds of thousands of victims—up to 90% of whom are unimpaired by any asbestos related illness—are able to move from state to state setting their sights on the most sympathetic jurisdictions and judges. As state and federal policymakers have determined previously, there are some public policy crises so profound, or certainly so vital, as to require quantum legislative actions: these include the September 11 Victims Compensation Fund, funds for Black Lung, vaccine compensation and state workers compensation funds.

The current trust fund proposal would be more efficient—and rational than the current system for the following reasons:

1. Only individuals who are impaired by asbestos exposure would be entitled to compensation under the fund;
2. Transactions costs would be radically reduced in the new no-fault framework; According to the RAND Institute, up to 50% of asbestos litigation dollars go to cover transactions costs rather than towards direct compensation of victims. RAND estimates that transaction costs can be reduced to just 10% of total costs.
3. Wild jury verdicts, such as the recent $250 million verdict handed down in Illinois, would be eliminated, allowing funds to be distributed more equitably.

CONSTRUCTING A PRIVATELY-FUNDED FACILITY THAT PROVIDES CERTAINTY, FINALITY AND EQUITY

Major insurers and manufacturers have been working with some of the best financial, actuarial and legal resources available to construct a privately-funded facility that will bring certainty, finality and equity to the country's asbestos problem. Based on these analyses, insurers believe that $45 billion dollars contributed from both the

insurance and policyholder sectors, combined with contributions from manufacturers and others will fund a facility that approaches $100 billion and is sufficient to compensate present and future claimants based upon need, *not* when or where they file suit. Insurers are willing to perfect such a mechanism so that annual cash flows run unimpeded and that solvency risk is extinguished.

The proposed insurer contribution of $45 billion is large and constitutes, by far, the largest payout in the history of the property/casualty insurance industry and will inflict true financial pain on the two dozen or so companies who will pay the bulk of this amount. Forty-five billion dollars is approximately 50% more than insurers hold in reserve for asbestos claims today and is equal to about one-third of all the capital held by commercial insurance companies today. That's significant because there is no excess capital in the industry today -- it is all committed to paying for workers hurt on the job, for business owners recovering from national disasters or terrorist attacks.

The few dozen insurance companies most affected by asbestos litigation are small in number compared to the thousands of manufacturing companies that are currently involved in the pending asbestos litigation system. As a result, the financial burden of payments into the trust will fall much harder on insurers.

IMPLICATIONS OF INACTION

The consequences of inaction are grave. As previously mentioned, a large swath of Corporate America is at risk, jeopardizing the jobs of thousands of employees, impoverishing retirees and shattering families and communities.

America's clear national interest lies in making sure asbestos funds are available for those who become sick and lifting an ominous cloud of litigation from our troubled economy.

Thank you for the opportunity to appear at today's hearing. I would be happy to answer any questions you may have.

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

June 4, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the
United States Senate Committee on the Judiciary
Hearing on

"SOLVING THE ASBESTOS LITIGATION CRISIS: S. 1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003 (FAIR ACT)"

Good morning and welcome to this important hearing on possible solutions to resolve the asbestos litigation crisis.

I want to thank all of our witnesses for providing their expertise and suggestions to the Committee so that we can arrive to the best possible solution as soon as possible. Also, I want to thank my partner on this Committee, the Ranking Democrat, Senator Leahy for his continued efforts and interest in this subject matter. He, along with Senators Dodd, Feinstein, Levin and others continue to provide helpful suggestions that will help us all arrive at a bill that truly will help the hundreds of thousands of victims of asbestos exposure who currently get pennies on the dollar in compensation, and whose pensions are in serious jeopardy as more and more companies continue to file for bankruptcy.

Senator Leahy, along with Senators Dodd, Senators Kennedy and others have shown true courage in standing up and tackling the complex policy issues involved. To get this resolved, we will all have to dig deep, face the realities of the alternatives and work together in a bipartisan manner to come up with the best solution possible. One that is fair to the claimants, and one that recognizes the limitations of our economy.

The private sector has been trying to resolve the asbestos situation for nearly 25 years. Several times major settlements were challenged by a few members of the trial bar and various efforts have been curtailed, prompting the Supreme Court, among others to call on Congress to "fix" this serious problem. We are fortunate to have Professor Tribe here today to educate us on the Constitutional implications of the pending legislative solution and perhaps on the private efforts in the past that have failed.

The private sector and the labor unions have had very important and constructive dialogue and much has been gained by their efforts. But we are now at a stage where given the importance of this issue to our victims, our workforce and our economy, we must act. It is time for legislators to legislate in the public interest. And that is why we are here at our third hearing

on this issue and why I commend my colleagues for their interests and courage to support efforts to arrive at a solution.

I should also say that the legislation we are examining today, S. 1125 is a product of much discussion and input from all interested parties. We introduced S. 1125, the bipartisan "Fairness in Asbestos Injury Resolution Act of 2003," in an effort to move the legislative process along. I have said that we are open to constructive suggestions and to improvements to this bill. I have heard many suggestions from outside affected parties and from my colleagues here. That has been very positive and I think the legislative process is working and working well.

This bipartisan bill, as I noted when we introduced it, is not without flaws and this hearing today is intended to provide expert advice on how best to improve it. With that, I would hope that all of our witnesses today will provide specific solutions to possible problems or flaws they may believe the legislation may have. It will not help anyone to point out flaws without suggesting reasonable and workable solutions. In short, we want constructive criticism if there is going to be any criticism. If we all commit to that and to be open on solutions, we will get a bill and get one soon.

On S. 1125, I want to say that the support around the country we have gotten has been overwhelming. Many recognize that it may not be the perfect solution, but it is close to being one of the best workable solutions. It establishes a system to pay victims faster, ensure that it is the truly sick getting paid and provide the business community with the stability it needs to protect jobs and pensions. I appreciate the bipartisan support of the co-sponsors of the bill so far. Prior to introduction of this bill, we incorporated a number of very constructive suggestions by Senator Leahy and Senator Dodd, and I look forward to continuing to work with them and our other colleagues so that we can win their full support.

Moreover, we continue to address other helpful suggestions and concerns raised since we introduced the bill. For example, we are working with Senator Baucus to address compensation for those victims who are in Libby, Montana. Senator Baucus testified at our two prior hearings on this issue and I know it is a serious concern for his constituents. We have also heard from some of those who are truly sick and suffering from asbestos related diseases who are concerned that the bill as currently drafted would require reductions in awards for amounts received from collateral sources. We will look to address as many concerns as possible. I should note on that point that prior to introduction of the bill, at Senator Leahy's suggestion, we specified that life insurance proceeds would not be offset. Others, including Senator Murray who will provide testimony today have asked us to look at enacting a ban on asbestos and provide for research funding to find cures for these horrible diseases caused by asbestos exposure. All are laudable and well intentioned and I would like to work with my colleagues to see if we can address these concerns.

Unfortunately, I also recognize that there will be special interest groups who benefit handsomely from the current broken system and have every incentive to stop our efforts on behalf of victims. That is their right and I know we will hear all sorts of parades of horribles on anything we do. I hope their efforts will not succeed and we do what is best for the country. We need to recognize where we will be if we don't get this done. I want to say to labor – already

you have very sick members that are either being shortchanged in the tort system due to the flood of claims and dwindling resources or those who may receive nothing at all, and members whose jobs and pensions have suffered as a result of the skyrocketing bankruptcies. What will your membership say if that is allowed to continue? To the business community, I ask, how many of you will still be around in the next few years if we don't do something to resolve this crisis now? Let me caution that many that have gone before you thought that they would survive, that they would not be flooded with claims or that they had enough insurance to cover their claims.

~~More than sixty~~ Almost 70 companies have gone bankrupt, nearly a quarter of which occurred in just the last two years! And I should note – those companies thought it wouldn't happen to them – I know, I worked with some of them on a legislative solution five years ago, which I introduced with Senators Lieberman and Dodd. And the insurance companies – you should have the same concerns.

That being said – I hope this hearing, and the fact that we have a bill to work from, will encourage the interested parties to work with us to support a workable solution that will benefit the common good. We need to ensure that the truly sick get compensated first and foremost. But we can do that without bankrupting companies, so that jobs and pensions will not suffer needlessly.

I look forward to all constructive views presented here today. I also invite anyone in the public and victims groups to provide any suggestions or improvements you have to us by close of business this week. As the interest from each member of this Committee indicates, we are serious about this and we intend to get this done and make tough policy calls, where necessary.

# # #

June 4, 2003

STATEMENT OF SENATOR EDWARD M. KENNEDY

AT THE SENATE JUDICIARY COMMITTEE HEARING ON

ASBESTOS LEGISLATION

The real crisis which we have today is not an "asbestos litigation crisis," it is an asbestos-induced disease crisis. Asbestos is the most lethal substance ever widely used in the workplace. Between 1940 and 1980, there were 27.5 million workers in this country who were exposed to asbestos on the job, and nearly 19 million of them had high levels of exposure over long periods of time. That exposure changed many of their lives. Each year, 10,000 of them die from lung cancer and other diseases caused by asbestos. Each year, hundreds of thousands of them suffer from lung conditions which make breathing so difficult that they cannot engage in the routine activities of daily life. Even more have become unemployable due to their medical condition.

And, because of the long latency period of these diseases, all of them live with fear of a premature death due to asbestos-induced disease. These are the real victims. They deserve to be the first and foremost focus of our concern.

All too often, the tragedy these workers and their families are enduring becomes lost in a complex debate about the economic impact of asbestos litigation. We cannot allow that to happen. The litigation did not create these costs. Exposure to asbestos created them. They are the costs of medical care, the lost wages of incapacitated workers, and the cost of providing for the families of workers who died years before their time. Those costs are real. No legislative proposal can make them disappear. All legislation can do is shift those costs from one party to another.

Any proposal which would have the effect of shifting more of the financial burden onto the backs of injured workers is unacceptable to me, and I would hope that it would be unacceptable to every one of us. The key test of any legislative proposal on asbestos claims is whether it will put more money into the pockets of seriously injured workers and their families than they are receiving under the current system. That should be our goal.

I believe that a properly designed trust fund to compensate workers suffering with asbestos-induced disease can move us toward that goal. However, it must provide fair levels of compensation for all workers who have been injured, it must use inclusive medical criteria which covers all workers who have sustained real injuries, and it must guarantee that all injured workers who qualify will receive full compensation. Any proposal which would merely create one new large underfunded trust in place of the many smaller underfunded bankruptcy trusts which exist today is unacceptable. Injured workers need certainty even more than businesses and insurers.

Unfortunately, S.1125 does not live up to these standards. It does not provide a fair system for compensating the victims of asbestos-induced disease. As currently written, 1) the bill establishes overly restrictive medical criteria that are more stringent than those used in the Manville Trust and other bankruptcy trusts, 2) it imposes unreasonable evidentiary burdens on injured workers, 3) it sets levels of compensation that are substantially below what victims currently receive, and 4) it places all the risk of inadequate funding on the injured workers.

This is not a bill which reduces the high transaction costs in the current system, and thus puts more money in the pockets of injured workers while reducing the costs to businesses and their insurers. That would be a real solution. This is a bill which merely shifts more of the financial burden of asbestos-induced disease to the injured workers by unfairly and arbitrarily limiting the liability of defendants. Sick workers would receive lower levels of compensation than they receive on average in the current system, and payment of even those lower levels of compensation would not be guaranteed. That is no solution at all.

I have been told by leaders of both business and labor that the parties were making significant progress at the negotiating table before those talks were abruptly interrupted two weeks ago. If we are serious about developing a consensus proposal which can pass the Senate, we should send the parties back to the negotiating table and tell them to redouble their efforts. Those talks offer the best hope for developing a trust fund plan that we all can support.

STATEMENT OF SENATOR HERB KOHL
"Solving the Asbestos Litigation Crisis: S. 1125, The Fairness in Asbestos Injury Resolution Act of 2003"
June 4, 2003

Mr. Chairman, this is the third hearing we have held in nine months on the asbestos litigation crisis. Last September's experience comprehensively established that Congress must pay attention to this massive problem. This past March, we assessed the different approaches that hope to solve this complicated puzzle. Today we have before us S. 1125, The Fairness in Asbestos Injury Resolution Act of 2003 introduced by Chairman Hatch. This bill, the FAIR Act, would create a privately-funded national trust fund that will compensate asbestos claims for many years to come. I applaud Senator Hatch for the leadership he has provided on this very complex issue thus far. I hope we can work together to get the bill across the finish line this year. A solution, though close at hand, is long overdue. This crisis demands finality – finality for all those involved, be it the victims, the companies, or the insurers.

Though I favor the trust fund approach embraced by the FAIR Act, several essential questions are raised by this legislation. Realizing that any trust fund will not be perfect, we must at least attempt to answer these questions as we further improve this bill.

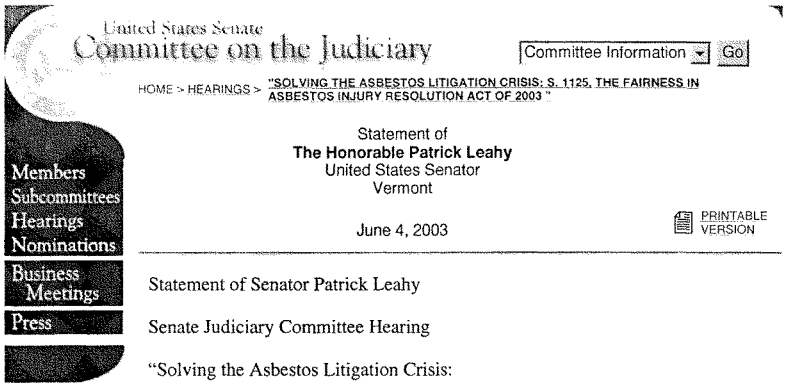
Some of these questions include: How big should the fund be and how much should the companies and insurers pay into the fund? Under the current proposal, the fund would receive roughly $108 billion over the next twenty-five years – truly a significant amount of money. Some, like the AFL-CIO, feel this number is too low. Others, notably some defendant companies, feel this is more than enough to satisfy asbestos claims in the coming years. First and foremost, we must agree upon a number – both the grand total and the individual contribution made by companies and insurers alike – that we are confident is enough to compensate sick people for their loss. There is likely some negotiating still to be done, <u>but let's reach an agreement on this point as soon as possible and move on</u>.

Second, what happens if the fund runs out of money? One would think such an obvious question would demand a simple answer. Some argue that the federal

government should provide a so-called "backstop" in the event that the fund runs out of money to pay claims. Though this would certainly provide security for the trust fund, it does expose the American taxpayer as the last resort to ensure the trust fund's solvency. However, to construct such a massive trust fund without any sort of guarantee that it will remain viable until the last claim is paid seems foolish as well. We understand that the negotiating parties are working to create a mechanism that will provide a measure of certainty that the fund will stay afloat throughout its lifetime. It is important that a backstop or guarantee of some sort be included in the FAIR Act.

Third, will the most severely injured workers be adequately compensated? Some of us were discouraged that the FAIR Act contains compensation levels lower than many had expected. For example, mesothelioma victims – who often win jury awards in excess of a million dollars – only receive $750,000 under the FAIR Act. Many felt that these mesothelioma victims should receive at least a million dollars under the program. And this is only one category of asbestos-related illness. We must ensure that victims receive compensation that is appropriate to their loss. We are confident that agreement can reached on this point as well.

To be sure, many more questions remain regarding collateral source payments, compensation for non-occupational exposure, medical criteria, and the Asbestos Court. Indeed, more work needs to be done before an equitable compromise can be reached. That said, I support the efforts driven by the Chairman to further this difficult process along. We applaud all those involved in the still ongoing negotiations. We must be mindful that the current broken system cannot go on forever, with more bankruptcies leading to more lost jobs and smaller claims to those who deserve them most. We have an opportunity to change that. Let's hope that we can reach a consensus solution where all the parties walk away confident that their most urgent needs are satisfied. Thank you.



Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

June 4, 2003

PRINTABLE VERSION

Statement of Senator Patrick Leahy

Senate Judiciary Committee Hearing

"Solving the Asbestos Litigation Crisis:

S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003"

June 4, 2003

I thank Chairman Hatch for calling this hearing on the asbestos litigation crisis, the third that the Committee has had since I convened the first one last September. Last fall, I hoped to begin a bipartisan dialogue about the best means for providing fair and efficient compensation to the current victims and those yet to come. My message today is simple: To end this crisis we need to re-start negotiations among the stakeholders and interested Senators to finish hammering out the details of an effective national trust fund for victims of asbestos-related disease.

Our knowledge of the harms wreaked by asbestos exposure has certainly grown since last fall, and so have the harms themselves. Not only do the victims of asbestos exposure continue to suffer, and their numbers to grow, but the businesses involved, along with their employees and retirees, are suffering from the economic uncertainty surrounding this litigation. More than 60 companies have filed for bankruptcy because of their asbestos-related liabilities. These bankruptcies create a lose-lose situation. Asbestos victims deserving fair compensation do not receive it, and bankrupt companies can neither create new jobs nor invest in our economy.

Chairman Hatch and I have been working for months with Senators Dodd, DeWine, Carper, Ben Nelson, Feinstein and others to encourage representatives from organized labor and industry to reach a consensus solution, and to bring our

own ideas and efforts to the table. The stakeholders have made real progress in finding common ground around a national trust fund. But they have not yet reached consensus, and without consensus we cannot end this crisis.

I commend Senator Hatch for his hard work in drafting this legislation. I agree with him that the most effective solution to the asbestos litigation crisis is taking all asbestos cases out of the tort system and establishing a national trust fund. That is what I urged at our last hearing and still believe. I am continuing to work to develop medical criteria for use with such a trust fund that will be fair to all asbestos victims and can lead to the quick compensation of legitimate claims and to weed out frivolous claims.

I disagree, however, with some of the key provisions of the Fairness in Asbestos Injury Act, and I cannot support the bill as currently written. Senator Hatch has said he is open to suggestions to improve the legislation. I have made several detailed suggestions already, but I want to point out a few of the remaining major issues to help us move forward.

First, this bill shifts the financial risk from defendants and insurers to victims. The bill guarantees businesses a lifetime of absolute legal and financial certainty, but it leaves asbestos victims completely out of luck if the trust fund runs out of money at any time in the next 50 years. The one constant in our experience with projections of asbestos liabilities is that the projections of today will be wrong tomorrow. Twenty years ago, all the experts predicted that the Manville Trust Fund would be paying asbestos victims full compensation for many years. Now, asbestos victims get 5 cents on the dollar because the Manville Trust Fund is nearly insolvent. The risk of insolvency, and indeed the risk of inadequate funding short of insolvency, in a national trust fund must be addressed in order to provide certainty to asbestos victims as well as to defendants and insurers.

This bill also fails to cover victims who were exposed to asbestos outside the workplace, such as spouses and family members who get exposure from workers' clothes, and community poisoning cases like the one in Libby, Montana. I have already heard from Senator Murray about the importance of addressing "take home" exposure, and from Senator Baucus about the basic fairness of covering victims of tremolite asbestos exposure in Libby. I agree wholeheartedly with Senator Murray and Senator Baucus.

This bill also raises unnecessary hurdles that would bar many legitimate asbestos victims from receiving any compensation. For example, the bill does not

compensate anyone who was exposed to asbestos in the workplace after December 31, 1982. I see no reason to deny asbestos victims their rightful recovery because of their exposure occurred after an arbitrary date, particularly because asbestos is still used today. An arbitrary cutoff in a national trust will only compound this injustice over time.

The bill also offsets any compensation to asbestos victims by "collateral sources" such as previous payments from disability insurance, health insurance, Medicare, Medicaid, and death benefit programs. This dramatic change from current law would result in a cost shift of millions, or perhaps billions, of dollars. This cost shift is from defendants and their insurers to other insurance companies, health care plans, and the federal government.

The use of these "collateral sources" would also reduce or eliminate compensation pledged to asbestos victims. For instance, a mesothelioma victim, who had disability and medical insurance and who lived more than the usual 18-month survival time, might not receive any of the scheduled $750,000 award under the bill because of these collateral source offsets. I cannot support reducing compensation to asbestos victims simply because they survived, or because they had the good fortune and foresight to purchase insurance.

Moreover, the bill requires a physician to independently verify a victim's exposure to asbestos that may have occurred 10, 20, 30, or even 40 years ago – an impossible bar to clear to be eligible for any compensation.

Finally, I believe that any alternative compensation system must be truly no-fault to be fair to asbestos victims who will no longer have recourse to the courts. Under this bill, before the thousands of pending asbestos victims may receive any compensation, Congress would have to create and staff a brand-new asbestos court at the federal taxpayers' expense. Such a court appears to be inconsistent with a "no fault" system and may prove unworkable.

Now we need to work with all the stakeholders to resolve the remaining complex and inter-related issues -- such as medical criteria, award values, and insolvency risk -- necessary to enact an effective trust fund solution. I look forward to hearing from our expert witnesses today to help us craft bipartisan solutions to these outstanding issues.

Our undertaking is complex and unprecedented. It will not be easy to work out the details necessary for consensus. But the stakes are too high for us to leave the field before trying our utmost to complete this task.

My two grandfathers worked as stonecutters in the granite quarries of Vermont. They both suffered from silicosis because of their workplace exposures to stone dust. One of my grandfathers died at the age of 35 because of the disease. Thinking of them, and of the hundreds of thousands of present and future asbestos victims, I want to make every effort to solve this crisis, and I commend and encourage all who are working in good faith to help do that.

Acting together, and encouraging the private negotiations to resume is, in my view, the best way to move a consensus bill through the legislative process and into law. There remain a number of important issues on which we need to find common ground. Working together we stand the best chance of success. Our guiding principles should be fairness to the victims and certainty for the corporations involved, through a workable process that will function effectively over time and in the real world.

I look forward to continuing to work with Chairman Hatch, Senator Dodd, Senator DeWine, Senator Carper, Senator Nelson, Senator Feinstein and other Members on the Committee to craft an effective solution to the asbestos litigation crisis.

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- TOP OF THIS PAGE
- RETURN TO HOME

PRINTER FRIENDLY VERSION

Testimony of Sen. Patty Murray
Hearing Before the Committee on the Judiciary
Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003
Wednesday, June 4, 2003

Chairman Hatch, thank you for allowing me to testify at this important hearing today. I would also like to thank Senator Leahy for his support for my bill to ban asbestos.

Mr. Chairman, I have a longer statement that I would ask you to add to the record. As you know, I have also already outlined many of my concerns in a May 30th letter to you. My greatest concern is that if we are going to protect companies from asbestos lawsuits well into the future, then we must protect all current and future asbestos victims into the future as well.

If Congress is going to prevent any future lawsuits, then Congress must try to prevent any more asbestos casualties, by banning the use of asbestos.

More than 30 other countries have banned asbestos. This is the elephant in the room for this legislation. It is the most obvious, yet least discussed, aspect of asbestos. In 2001, America consumed 13,000 metric tons of asbestos in brake pads, gaskets and roofing sealants. Like most Americans, I had thought asbestos was already banned. The Environmental Protection Agency banned it in 1989, but the asbestos industry sued and the ban was overturned in 1991.

That's why I introduced the Ban Asbestos in America Act, S. 1115. My bill would finally ban the use of asbestos and prohibit the import of asbestos products. S. 1115 creates a national mesothelioma registry to track where Americans are still developing this deadly disease. The bill would require an education campaign to raise awareness. In addition, it would require federal agencies to improve protections for workers and consumers. I greatly appreciate Senators Leahy and Baucus cosponsoring S. 1115.

I do not believe asbestos can be safely used in most applications. Millions of workers are still being exposed to asbestos today. According to the Occupational Safety and Health Administration, an estimated 1.3 million employees in construction and general industry face significant asbestos exposure on the job. Between fiscal years 1996 and 2001, three thousand of OSHA's inspections and more than fifteen thousand of its violations involved asbestos. Ultimately, the best way to protect people from asbestos is to ban it.

I do not see how Congress can end liability for companies that used asbestos while still allowing asbestos to be legal in America. Congress needs to pick up where the EPA and the courts left off by fully banning the deadly mineral.

Now I'd like to touch just briefly on my other concerns about S. 1125. In order for an asbestos liability reform bill to be truly fair to victims, it must ensure adequate compensation for all people hurt by asbestos.

I'd like to share with the Committee a photo from the late 1970s of Justin and Tim Jorgensen. The boys are climbing on waste rock from the Western Minerals plant in Minneapolis, Minnesota. This plant processed asbestos-contaminated vermiculite from W.R. Grace's plant in Libby. The company knew when it bought the mine in 1963 that the mine was full of asbestos, but chose not to warn workers or their families.

Justin and Tim's grandparents lived across the street from Western Minerals. The pile that Justin and Tim are playing on contains up to 10 percent friable tremolite asbestos. Their father, Harris Jorgensen, died at the age of 44 from asbestosis and lung cancer. Under the bill being considered, if Justin and Tim ever get sick from asbestos, neither one would receive a dime because they were not exposed to asbestos on the job.

Mr. Chairman, this picture breaks my heart. These kids were just playing outside but were exposed to asbestos, like many of the children in Libby until last year.

Asbestos exposure can also occur when people work on their cars or their homes. I have a constituent from Spokane, Washington, Mr. Ralph Busch, who regularly disturbed asbestos-contaminated attic insulation while renovating his home. He is now afraid that one day, he too, will suffer from asbestos related diseases. Ralph Busch is not alone. As many as 35 million homes, schools and businesses could have this asbestos-tainted Zonolite insulation. Just a few weeks ago, EPA launched an education campaign warning people not to disturb the material.

Mr. Chairman, under this bill, people like the Jorgensens and Ralph Busch wouldn't get compensation. And companies like W.R. Grace, which knowingly exposed workers and their families to asbestos, would be protected. I hope you will consider amending your bill to take in a much larger universe of existing and future asbestos victims.

In addition, the legislation sets restrictive medical criteria to determine who would qualify for compensation. I strongly urge the Committee to redraft the medical criteria section of this bill. The Committee should base the criteria on the latest information from the American Thoracic Society and from the doctors working in Libby.

Finally, the total size of the trust fund -- even at $108 billion -- may not be sufficient. There is no federal backstop to guarantee compensation – like the FDIC does for a bank – to ensure that future victims would be covered. Furthermore, the funding levels seem arbitrarily low.

Any legislation to fix the litigation crisis must be balanced in its protections for present and future asbestos victims. Protecting these people is at least at important as protecting companies from liability. We need to ensure that an end to asbestos liability also means an end to the creation of new asbestos victims. This should be the charge to this Committee. Thank you.

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STATEMENT OF JOHN E. PARKER, M.D., PROFESSOR AND CHIEF, PULMONARY AND CRITICAL CARE MEDICINE, ROBERT C. BYRD HEALTH SCIENCES CENTER OF WEST VIRGINIA UNIVERSITY BEFORE THE SENATE COMMITTEE ON THE JUDICIARY CONCERNING S. 1125, THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003

JUNE 4, 2003

Mr. Chairman and Members of the Committee: My name is Dr. John Parker. If I may, I would like to provide you a brief statement about my background. I am a board certified internist and pulmonologist and a National Institute for Occupational Safety and Health ("NIOSH") certified B-reader. I am also a professor and the chief of pulmonary and critical care medicine at West Virginia University in Morgantown, West Virginia. In my current position I care for patients at that hospital. I also teach medical students and oversee the pulmonary and critical care department. From 1976 through 1998, I held various positions with the United States Public Health Service, including several positions at NIOSH. Among other things, at NIOSH, I assisted with the administration of NIOSH's B-reader certification program, served as the chief of the clinical investigations branch of respiratory disease studies, and served as the chief of the epidemiological investigations branch of respiratory disease studies. I also conduct research and have published several peer-reviewed articles on the respiratory system, lung disease and chest imaging issues. I also have published articles and made many invited presentations about the ILO classification system, the NIOSH B-reader program, high resolution CT scans and imaging techniques. I was the co-editor of a textbook on occupational lung disease and I have written several book chapters about pulmonary medicine. I generally have not served as an expert witness in the asbestos litigation.

I am appearing before this committee at the invitation of the Chairman of the committee and I hope to help explain some of the medical issues involved with this legislation. I am being compensated for my time at my usual consulting rates.

The Medical Criteria

I wanted to address certain medical aspects of this bill, mainly those involving the nonmalignancy claims. At the outset, let me make clear that I firmly believe that medical science overwhelmingly supports that serious adverse health effects result from significant asbestos exposure. These include lung cancer, and mesothelioma as well as non-malignant disease of the pulmonary parenchyma and pleural. Overall, the proposed medical criteria in this bill will create a fair and medically supportable system to compensate those substantially exposed to and injured by asbestos. While I believe that medical science supports more stringent medical criteria than what are now proposed, the current proposal is a fair compromise. I will address my concerns about some of the shortcomings of the proposed criteria shortly as they result in the possible payment of awards to people who are not sick as a result of an asbestos-related illness. More importantly, this legislation adequately protects the rights of those who are sick by ensuring that they recover, while providing safeguards against spending valuable resources on claims by individuals who are not.

It does this by requiring that a person seeking compensation for a nonmalignancy claim meet several different criteria, including, among others: (1) A detailed occupational and exposure history that also establishes a sufficient latency period; (2) A detailed medical and smoking history; (3) A physical exam by the physician making the

diagnosis; (4) An abnormal chest x-ray; (5) Lung and breathing impairment as shown by pulmonary function tests; and (6) A physician's conclusion that the impairment was not more probably the result of other causes. As I will explain, it would be inadequate and medically improper to only require some of these criteria without the others.

I'd like to take this opportunity to explain why these criteria work and why each is necessary. You can find a more in-depth explanation in my paper, "Understanding Asbestos-Related Medical Criteria," which I have provided as an attachment.

The first requirement I'd like to discuss is the respiratory history including inquiry about respiratory symptoms. It also includes a detailed work history and exposure history to identify exposure to contaminants including asbestos. Further the physician needs to obtain a detailed smoking and medical history that includes a thorough review of past medical problems and their most probable cause. This is important because a detailed smoking and medical history helps show whether a person's impairment and lung scarring is the result of asbestos exposure, other exposures or the result of the many other lung disorders which can cause lung scarring and impairment. This is an especially common problem with older patients who often have medical problems that are more likely the cause of impairment and lung scarring than exposure to asbestos.

A physical exam by the diagnosing physician is also critical to the evaluation. The physical exam, for example, may involve determining the presence or absence of inspiratory crackles or clubbing of the digits which may be seen with asbestosis but are not specific to asbestos disease and are present in various other diseases.

The next requirement I'd like to discuss is the chest x-ray. Unquestionably, a chest x-ray is an invaluable tool in diagnosing asbestos-related diseases. This is

especially true ever since the International Labor Office (ILO) attempted to standardize the reading of x-rays by setting up a classification system.

The ILO Classification System consists of written guidelines, standard or reference chest x-rays and a specific form for recording interpretations. For asbestosis, important findings include the size and shape of abnormal shadows by using the six letter designations, p, q, r, and s, t, u and the small opacities on a number scale of 0/0, which represents a normal finding, to 3/3, which represents the most severe abnormalities. For pleural diseases, the ILO system classifies abnormalities by the use of letters A, B, or C for increasing thickness or width coupled with a numerical description using 0, 1, 2, or 3. I can also provide more details about the ILO classification system in terms of the different classifications involved since individuals may be classified with only parenchymal markings, only pleural findings or with both or neither.

NIOSH further attempts to standardize the ILO Classification System by administering a quality assurance program for the training, testing and certification of physicians who after passing a strenuous examination of interpreting x-rays can become B-readers. It was this training and testing that I helped oversee at NIOSH. This experience also provided me first hand knowledge of the ILO Classification System and certain issues about interreader variability among NIOSH B-readers.

Although the chest x-ray must remain a component to any medical criteria, over reliance upon it has many flaws. First, any interpretation of an x-ray, even under the ILO Classification System by a certified B-reader, remains inconsistent and subjective. Any interpretation of an x-ray has inter-reader and intra-reader variability. This means that if a B-reader finds an x-ray to have abnormalities consistent with asbestos exposure on

Monday, the same B-reader can interpret the same x-ray as completely normal on Tuesday. Also, two B-readers can honestly disagree on the interpretation of an x-ray without either being incorrect. Further, certain B-readers simply generate an inordinate high number of biased interpretations to support or refute compensation claims.

Another problem with relying too heavily on x-ray findings is that an x-ray interpretation is not specific to asbestos exposure. Rather, the abnormalities associated with asbestosis are often the same abnormalities associated with numerous of other ailments.

For these reasons, a chest x-ray alone cannot support a finding of an asbestos-related disease. Also, while computer tomography (CT) may be useful in many cases by adding detail that chest x-rays miss, there is no universally accepted standardized interpretation scheme for CT scans. They are also expensive and introduce additional radiation risk.

The third requirement is demonstration of lung function impairment by pulmonary function tests. When a pulmonary function test is completed and interpreted according to the American Thoracic Society's standards, it is the best way to objectively show whether someone is impaired due to an asbestos-related disease. Asbestos-related diseases cause restrictive lung function because the lungs have diminished size that restricts breathing. Pulmonary function tests include spirometry, lung volumes and diffusing capacity tests.

Lung fibrosis such as asbestosis causes primarily restriction on lung function testing. Chronic tobacco smoke exposure causes expiatory air flow obstruction. Clearly some asbestos exposed workers are also chronic smokers. The separation of

these two functional injuries is rarely difficult as the overwhelming injury from severe fibrosis causes restriction with a reduction or decrease in FVC (forced vital capacity) or TLC (total lung capacity).

Spirometry tests measure forced vital capacity, which is the amount of air exhaled, and 1-second forced expiratory volume, which is the quantity of air exhaled in one second. Restrictive lung disease is demonstrated when the forced vital capacity is reduced below the lower limit of normal, but the ratio between forced vital capacity and 1-second forced expiratory volume is normal.

Lung volume tests measure the total lung capacity, which is how much air is in the lungs after maximum inhalation. The total lung capacity is the gold standard for identifying restrictive lung function.

Diffusing capacity tests measure the ability of the lungs to transfer gas from inhaled air to the red blood cells in the pulmonary capillaries. This test is the least helpful of the three. It does not separate restrictive lung diseases from obstructive lung diseases, which are not caused by asbestos.

When using pulmonary function tests, it is important that the test results are determined to be normal or abnormal based upon a statistical determination of the lower limits of normal. The lower limits of normal are the published predicted or reference values adjusted by a statistical confidence interval. The use of arbitrary cut-offs, such as using the criteria of below 80% of the predicted values for FVC and TLC, has no statistical basis and is, therefore, unreliable medically. In fact, using arbitrary cut-offs, such as this 80% cutoff, result in shorter, older people being incorrectly found to have abnormal lung function and younger, taller people being incorrectly found not to have

abnormal lung function. Further, use of the 65% cutoff for the ratio between FEV1 to FVC in the medical criteria also is arbitrary and will result in compensating many individuals who are impaired due to smoking-related illnesses or illnesses other than an asbestos related condition. Instead, those criteria that refer to this ratio should state that for the ratio between FEV1 to FVC should be above the lower limit of normal. A ratio under 70% or the lower limit of normal is usually indicative of obstructive (non-asbestos) lung disease.

The final requirement that I would like to discuss is the requirement that a physician conclude that impairment was not more probably the result of other causes. As I've mentioned throughout my testimony, there are many causes for abnormal chest x-ray findings and impairment. In fact, most people who are exposed to asbestos do not suffer from an asbestos-related ailment. This includes anyone who has lived in a city and inevitably was exposed to asbestos. For example, exposure to 25-fiber years/cc lifetime exposure doubles the risk of an asbestos related lung cancer which is the point of epidemiological significance. Such an exposure is significant because it would require an annual exposure at the dose level of 1 f/cc over 25 years. A physician must, as he or she would in any clinical setting, rule out other more probable causes before asbestos is pinpointed.

In closing, I reiterate my opinion that the proposed medical criteria are both fair and medically supportable. I welcome this opportunity to answer any questions that you may have to help explain the medical criteria or anything else of interest.

Understanding Asbestos-Related Medical Criteria

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Medical criteria for the treatment of asbestos claims are not new. Medical criteria have also been used by the courts and by parties settling asbestos claims for many years. Perhaps the most recent attempt to develop objective medical criteria for asbestos claims was the American Bar Association's adoption of its "ABA Standard for Non-Malignant Asbestos-Related Disease Claims" in February 2003. The ABA guidelines, which the ABA urged Congress to include as part of federal asbestos legislation, require that the filing of a civil action alleging personal injury for asbestos-related nonmalignant disease be accompanied by a detailed narrative medical report, signed by the diagnostic physician, demonstrating the following:

a. An occupational and asbestos exposure history and a detailed medical and smoking history;

b. Fifteen years elapsed time between the claimant's first exposure to asbestos and the time of diagnosis;

c. A quality chest x-ray, read by a NIOSH certified B-reader, demonstrating specific physical changes;

d. Lung or breathing impairment through properly administered pulmonary function tests; and

e. The physician's conclusion that the claimant's medical findings and impairment were not more probably the result of other causes revealed by the claimant's employment and medical history. (1)

The ABA guidelines do not appear to mandate any specific formula for the medical diagnosis of asbestos-related lung disease, but rather, spell out minimal requirements for compensation consideration. However, the ABA guidelines highlight the fact that there is no single test or medical tool that is available for either diagnosing a non-malignant asbestos-related disorder or measuring the extent of any impairment resulting from such a disorder. It is not enough if one of these factors, such as an x-ray, is merely consistent with exposure to asbestos. Instead, all of the different criteria identified in the guidelines – medical and exposure history, latency period, chest x-ray, pulmonary function test – must be considered together. The purpose of this article then, is to provide a primer on the most common types of non-malignant asbestos disorders and to explain the medical criteria used by physicians to evaluate the presence and severity of those disorders.

I. Nonmalignant Disorders and Asbestos Exposure

Asbestos exposure has been associated with certain malignant disorders, including mesothelioma (cancer of the lining of the lung) and other types of lung cancer. Asbestos exposure is also associated with certain non-malignant (or non-cancer) disorders. The most well known non-malignant chest disorders caused by exposure to asbestos involve the pleura of the lung and the lung itself.

The pleura of the lung consist of the thin linings or membranes surrounding both the lung and the inner surface of the chest wall. The lining adjacent to the chest wall is referred to as the parietal pleura and the lining adjacent to the lung is the visceral pleura. The two most common

benign pleural abnormalities associated with asbestos are called pleural plaques and diffuse pleural thickening. Pleural plaques are typically localized, irregular thickenings adjacent to the parietal pleural surface on the chest wall while diffuse pleural thickening affects the visceral pleura surrounding the lung.

With regard to the lung itself, the most common disorder associated with asbestos exposure is lung fibrosis, referred to as asbestosis. An important function of the lung is to perform gas exchange between air and blood. This is accomplished through a series of conducting airways such as the trachea and bronchi, gas exchange structures called alveoli, and blood vessels or the pulmonary arteries, veins, and capillaries. The gas exchange region of the lung is also referred to as the pulmonary parenchyma. Asbestosis is a lung disorder characterized by fibrosis of the alveoli or injury to the pulmonary parenchyma caused by inhaled asbestos fibers. This fibrosis may cause a type of lung injury often referred to as interstitial lung disease. The phrases interstitial fibrosis or pulmonary fibrosis are often used interchangeably, and refer to scarring at the gas exchange region of the lung.

In describing these non-malignant disorders, a number of things are worth bearing in mind. First, the great percentage of people exposed to asbestos (anyone living in a city today has been exposed to asbestos) will not suffer from any of these disorders. Second, pleural plaques may occur without asbestosis and asbestosis may be present without plaques; these two disorders also may both occur together in one individual. Third, pleural plaques, pleural thickening and interstitial lung disease have causes other than asbestos exposure and in cases involving asbestos, typically can be seen on both lungs (the disorders are "bilateral"). Finally, the severity or extent of pleural disorders and asbestosis likely relates to the intensity and duration of exposure to

asbestos fibers (significant exposure to asbestos over time is required for these nonmalignant disorders), the type of asbestos, and the exposure latency or lapsed time since initial exposure.

II. Medical Criteria Are Well-Known in the Medical Community

Two questions are at the heart of asbestos-related medical criteria -- how much evidence is necessary to firmly establish a diagnosis of a disorder and how can one determine if that disease is causing impairment. The medical community has addressed these issues for years.

For example, the American Thoracic Society ("ATS") published widely accepted criteria for the diagnosis of asbestosis as early as 1986. (2) (The ATS was formed as a division of the American Lung Association back in 1905. It is an independent, international, educational and scientific society which focuses on respiratory and critical care medicine. The society today has about 13,500 members who are mainly clinical physicians and scientists that prevent or treat respiratory illnesses.) The ATS guidelines for the diagnosis of asbestosis require an adequate history of exposure to airborne asbestos fibers, an appropriate latency period after fiber exposure to disease diagnosis, an abnormal chest x-ray with widespread fibrosis in the gas exchange region of the lung, and restrictive lung physiology.

ATS requires a restrictive lung physiology because impairment from asbestosis is generally regarded as a restrictive disease. A restrictive disease results in the lungs not being able to accommodate sufficient air. The lungs diminish in size and restrict breathing. To illustrate, a person would have chest restriction if he or she were forced to breathe with a tight belt around the chest. By contrast, smoking related diseases such as emphysema or chronic bronchitis, as well as asthma, are obstructive diseases. Airway obstruction is a term that is used to define the condition where the lungs are not reduced in size as with restriction, but rather the

airways do not allow the inhaled air to be rapidly or fully exhaled. There is obstruction to the emptying of air trapped in the lungs.

Although the diagnosis of asbestosis can be made with even more certainty if lung tissue from biopsy or autopsy is available, the majority of clinical evaluations for asbestos-related fibrosis of the lung do not include tissue analysis. Instead, the diagnosis of asbestosis is typically based on the exposure history, chest x-ray, lung function testing, and the absence of illnesses that might mimic asbestosis. One of these tools, in and of itself, does not permit a diagnosis of non-malignant disease, which is why the ATS guidelines look at all of these criteria. The ATS guidelines remain as the guiding principles to establish a clinical diagnosis of asbestosis.

Demonstrating the presence of impairment also is not a new concept for the medical community. The American Medical Association (AMA) has published serial editions of *Guides to the Evaluation of Permanent Impairment (Guides)* addressing human impairment induced by disease. The *AMA Guides* have a chapter devoted to assessment of the respiratory system for impairment and define impairment as "the loss, loss of use, or derangement of any body part, organ system, or organ function."(3) Statutes or regulations in at least 40 states have adopted the *AMA Guides*. In addition to the *AMA Guides*, the Social Security Administration also publishes and updates editions of *Disability Evaluations under Social Security* that address issues concerning asbestos-related impairment. (4)

III. Medical Criteria Used For Non-Malignant Disease

The medical evaluation of individuals with potential non-malignant lung diseases from asbestos exposure typically requires a respiratory history, physical examination, chest x-rays and lung function testing. Each of these tasks has limitations.

- The **respiratory history** includes inquiry about pulmonary symptoms, typically shortness of breath or cough. The exposure history to airborne contaminants including asbestos is also needed. The physician should also take a detailed medical and smoking history that includes a thorough review of past medical problems and their most probable cause. Because breathing difficulties and cough are symptoms of many lung disorders, are more prevalent among older patients and, of course, are not specific to asbestos disease, a complete and detailed respiratory history is critical to a proper diagnosis.

- The **physical examination** focuses primarily on the presence or absence of inspiratory "crackles" during the chest exam and/or clubbing of the fingers. Crackles refer to the presence of fluid or fibrosis in the lungs that cause crackling sounds audible with a stethoscope. Clubbing refers to a characteristic enlargement and sponginess of the fingertips, often involving the tips of the toes as well. These findings may be seen in asbestosis but, again, they are not specific to asbestos disease and are present in various other diseases. Indeed, when associated with asbestos, they are typically only seen in the more severe cases of asbestos-related disease.

- The **chest x-ray** is another valuable tool to assess the presence of abnormalities of the pleura or lung. A standardized method for reading x-rays has been published by the International Labor Office (ILO) and is often used to recognize and classify dust diseases of the lung. (5) The ILO system was originally established to improve disease detection and achieve consistency in x-ray film interpretation for epidemiological investigations.

Despite efforts toward standardization in chest x-ray interpretation through the use of the ILO system, however, there remain inconsistencies among different x-ray readers (or even inconsistencies by the same reader at different times) as to whether an x-ray shows the presence

or absence of abnormalities. (6) In the United States, the National Institute for Occupational Safety and Health (NIOSH) administers a quality assurance program for the training, testing and certification of physicians, known as the "B reader" program, to help provide greater consistency among x-ray readers. (7)

The ILO Classification System consists of (1) written guidelines, (2) standard or reference chest x-rays that can be used as guides, and (3) a specific form for recording findings and observations of each chest x-ray that is reviewed. The system first requires the chest x-ray reader to rate the film quality and then record the presence or absence of any "shadows" or "opacities" on the chest x-ray that are consistent with asbestos exposure.

Next, the chest x-ray reader must identify the zone or zones in the lung (upper, middle and lower) where the abnormalities have been found and record a size and shape of the abnormal shadows. The size and shape are identified by six letter designations - p, q, r, and s, t, u. The letter designations most commonly associated with asbestos induced "shadows" are of the "s" and "t" type, and these correspond with small irregular or linear shadows on the film and usually are found in the lower lung zones. The shape of the abnormalities and the zone of the lung where they are found are important factors in determining whether there is any relationship to asbestos. In contrast to asbestosis, the classic radiological findings for simple silicosis involve rounded opacities with "shadows" of the "p," "q" or "r" type that generally are located in the upper lung zones.

The chest x-ray reader also classifies these small opacities or abnormal shadows utilizing a scale that uses the numbers 0, 1, 2, and 3 to represent normal, mild, moderate, and severe abnormalities respectively. The chest x-ray reader classifies the x-ray by assigning two numbers.

(When classifying a chest x-ray, the x-ray is compared to the standard or reference x-rays which have predetermined classifications.) The first number is the reader's primary classification of the film. The second number is the other classification the reader seriously considered. A classification of 1/0 means the reader's final determination was the category 1 classification (mild), but seriously considered category 0, or normal. Thus, 0/-, 0/0, or 0/1 represent three "shades" of normal. On the other end of the spectrum, 3/2, 3/3, or 3/+ are the sub-categories of severe abnormality.

The ILO system also prescribes another method for describing pleural abnormalities. This method includes the review of the radiograph and the classification of abnormalities by the use of letters A, B, or C for increasing thicknesses or "widths." A numerical description using the numbers 0, 1, 2, or 3 is coupled with the thickness/width classifications and together they are used to describe the length or extent of chest wall plaques. For example, a B2 plaque means it has a thickness or width grade of B which is greater than five millimeters but less than ten millimeters and an extent grade 2, which is a total vertical height of greater than ¼ but less than ½ of the height of the lateral chest wall.

Although chest x-rays have many advantages, they are an imperfect tool for diagnosing asbestosis and pleural abnormalities. The radiographic findings for asbestosis are not specific to asbestos. (8) The small abnormalities on the chest x-ray associated with asbestosis often are no different than the x-ray "shadows" caused by other types of fibrosis. Further, the chest x-ray is a non-invasive test that allows for good, but far from precise, visualization of normal and abnormal anatomical structures. Chest x-rays are held in high public esteem, likely due to their role in tuberculosis screening in the past century. But the presence of irregular or linear shadows

detected by chest x-ray alone does not currently permit a diagnosis of non-malignant asbestos-related disease, nor does it establish functional impairment from asbestos exposure.

- **Lung function testing** is necessary for evaluating the severity of non-malignant asbestos-related disease. Lung function testing primarily includes spirometry, lung volumes, diffusing capacity, and cardiopulmonary exercise testing. The performance and interpretation of these tests are well standardized by published statements of the American Thoracic Society. (9) Each involves powerful and well-validated tests that are important in the diagnosis and management of lung disease.

- Spirometry is a routine medical test that requires the subject to take the deepest breath possible and then to rapidly and completely exhale the air from the lungs. This full complete "deep breath" followed by forcibly "blowing out" all of the air allows the measurement of the total air exhaled called the forced vital capacity or FVC. A second measurement performed during this forced breathing maneuver is the 1-second forced expiratory volume or FEV1. The FEV1 measures the quantity of air forcefully exhaled in one second.

An important tool is the Forced Expiratory Volume 1/Forced Vital Capacity (FEV1/FVC) ratio: the ratio of the FEV1 divided by the FVC. It measures how fast the air comes out in the first second of exhalation of the test (FEV1) compared to how much air is forcefully exhaled out totally (FVC). The ratio for a patient can then be compared to "normal" or "expected" values.

Normal or expected values for FVC and FEV1 are published as reference values and were developed by the study of normal or healthy populations. The major determinants of FVC and FEV1 are age, gender, height, and ethnicity. Reference values decrease slowly for increasing height and age. To determine whether FVC or FEV1 test results are abnormal, an

individual's result is compared with the published normal or predicted reference values. (10) For any given individual, there is a range of FVC or FEV1 that is considered normal. This range is usually identified by a statistical test to determine what is called the lower limit of normal. To determine the lower limit of normal, the published predicted or reference value is adjusted by a statistical "confidence interval." One statistically acceptable approach for establishing lower limits of normal for FVC, FEV1 or FEV1/FVC is to define the lowest 5% of the reference populations as below the lower limit of normal. The *ABA Guides* utilize lower limits of normal as the standard for identifying asbestos-related impairment.

In the past, some have used a different standard other than the lower limit of normal to define what is considered normal. Such a standard often involves using a fixed percent of the predicted value (such as using less than 80% of predicted) as an abnormal cutoff. This standard has no statistical basis in adults according to the ATS. The use of a fixed percent of the predicted value as abnormal is also unreliable because it results in shorter, older subjects being more readily classified as "abnormal" and some younger, taller subjects being misclassified as "normal."

Spirometry is an essential component of an asbestos-related disease diagnosis and the assessment of potential impairment, and the spirometry exam is easily performed and relatively inexpensive. The stiff and scarred lung in severe cases of asbestosis induces a typical restrictive lung disease, and reduces the forced vital capacity. The hallmark of restrictive lung disease is a reduced FVC with preservation of the ratio between the FEV1 and FVC. The ratio of FEV1 to FVC is normally around 70 percent or greater (or above the actual lower limit of normal for

FEV1/FVC). The findings in obstructive diseases such as in emphysema are an FEV1 to FVC ratio of less than around 70 percent (or below the actual lower limit of normal for FEV1/FVC).

- A second lung function test is the measurement of lung volumes; either using a body box called plethysmography, or timed gas dilution. Lung volume testing measures Total Lung Capacity or TLC, which refers to how much air is in the lungs after a maximum inhalation. The TLC is considered the gold standard for identifying lung restriction and is more precise than spirometry. (11) The TLC may be used to determine whether there is a restrictive impairment, such as seen in asbestosis. A restrictive impairment reduces the total capacity of the lung, while obstructive lung diseases usually do not reduce the TLC and may indeed frequently induce an increased TLC. Thus, a low TLC is more consistent with an asbestos-related disorder.

- A third lung function test that may be helpful is the diffusing capacity for carbon monoxide or the DLCO. Diffusing capacity measures the ability of the lungs to transfer gas from inhaled air to the red blood cells in the pulmonary capillaries. The DLCO is relatively easy to perform. The test requires a quick deep inhalation of 0.3 percent carbon monoxide followed by a ten-second breathhold by the subject and then a rapid exhalation. It is worth noting, however, that this test does not separate obstructive from restrictive lung diseases; both emphysema and interstitial lung diseases such as asbestosis can reduce the DLCO.

Finally, cardiopulmonary exercise testing can be performed as an adjunctive means of assessing disease severity. When properly performed and interpreted it can help to differentiate pulmonary impairment from cardiac impairment or the effects of physical deconditioning. Exercise studies are expensive and used sparingly in impairment evaluations and often only when it is necessary to clarify the nature of impairment. These studies are not routinely used

when other pulmonary function studies are normal and also are not generally important when spirometry, DLCO, or lung volumes already indicate severe impairment.

Summary

Medical criteria are available both to perform diagnostic assessment of asbestos exposed individuals and to measure the extent of impairment for non-malignant asbestos diseases. The challenge will be to create acceptable objective methods for separating diseased from non-diseased individuals, and to separate impaired from unimpaired individuals. Any attempt to come up with widely acceptable criteria, of course, will require an understanding of the limitations posed by the particular medical tools available and the recognition that several factors – occupational history, latency period, chest x-rays, and lung function tests – need to be considered.

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STATEMENT OF MARK A. PETERSON BEFORE THE SENATE JUDICIARY COMMITTEE HEARING ON S.1125 "FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003"

June 4, 2003

Mr. Chairman and Members of the Committee, I am Mark Peterson, and I am submitting this statement to provide data, quantitative analyses and comments that I hope will aid the committee in its consideration of the "Fairness in Asbestos Injury Resolution Act of 2003".

My Background and Expertise

First let me describe my background and knowledge about asbestos injuries and litigation. For over twenty years I have studied, written about and participated as an expert in asbestos litigation and other mass tort litigation. I have worked for four U. S. District and Bankruptcy Courts as the Courts' expert on how asbestos claims are valued and on asbestos claims procedures and trusts. For thirteen years I have been the "Special Advisor to the Courts" regarding the Manville Trust, serving Judges Jack Weinstein and Burton Lifland for five years and the Manville Trust and all of its beneficiaries for the past eight years. I am a consultant and expert for ten asbestos trusts. I have developed claims procedures for ten asbestos trusts. I am a trustee of an asbestos trust. I am a director of a nonprofit corporation that administers the process for allowing and paying claims for four asbestos trusts. I have worked as an expert on asbestos litigation for defendants, insurance companies, actuarial firms, other businesses, law firms and claimants' committees in bankruptcy. I have participated as an expert on asbestos liabilities in over 20 bankruptcies of asbestos defendants.

I have studied asbestos litigation for over twenty years as a founding member of the RAND Corporation's Institute for Civil Justice. I have published peer-reviewed scholarly articles on mass torts, asbestos litigation, claims facilities for paying asbestos and other mass tort claims, workers compensation and how medical and legal issues determine the values of asbestos bodily injury claims and other subjects related to asbestos litigation. I have taught courses on mass torts at UCLA Law School and the RAND Graduate Institute. I am a lawyer, a graduate of Harvard Law School and have a doctorate in social psychology from UCLA. I have been recognized by courts as an expert on all areas that I address in this letter and all of my comments come from scholarship and work as an expert on asbestos litigation.

Asbestos Injuries and Compensation

The burdens and costs of asbestos litigation result from the large number of persons exposed, injured and killed by their workplace exposures to asbestos. Twenty five million workers had been exposed to asbestos in primary asbestos industries by 1980. Millions more were exposed in other industries and in more recent years. Diseases caused by these exposures have created a public health catastrophe. By now 300,000 workers have died because of their asbestos exposures. Almost as many more will die over the next three or four decades. Millions more exposed workers have or will develop asbestosis or pleural disease.

Others have described these diseases. My expertise includes collection and analysis of data on the "values" of these diseases, how much money is paid to compensate victims of asbestos related diseases.

The general values of asbestos diseases are well understood. There is enormous experience about this. Hundreds of thousands of claims have been settled by many defendants creating histories of claim values that are understood by professionals who work with these cases.

Victims of asbestos disease receive payment from many different defendants. There is no central database from which we can total the average payments for each disease across every defendant, so we cannot simply count up the total of recent settlement amounts across all settling defendants. But I have reviewed asbestos claims databases for many asbestos defendants, mostly databases provided in bankruptcy proceedings of a company's settlements prior to its bankruptcy, and can add up that portion of their compensation that victims receive from these defendants.

These databases show that the average recent settlements paid by eight defendants to mesothelioma victims add up to $900,000. This $900,000 paid by eight defendants would grow substantially if we added the rest of the money that victims received from the many other defendants. For this reason, the best evidence is that mesothelioma claimants now receive total settlements ranging from $2 million to $3 million and that lung cancer victims now receive more than $1 million, ranges reported by plaintiffs lawyers throughout the country.

Future Asbestos Claims

To date asbestos defendants and their insurers have not been asked to pay the full costs of asbestos injuries and death, because most injured workers have not made claims. Among the 300,000 deaths to date from asbestos related cancers, fewer than a third have filed law suits.

This is now changing. The number of cancer claims is up sharply. In recent years the number of claims for each asbestos disease approaches published epidemiological estimates of the number of asbestos related deaths for each cancer.

While we must anticipate a high level of future claim filings, we cannot be certain of the number of future asbestos claims either within the tort litigation system as it now exists or within a national fund of the proposed act.

First, forecasting is inherently uncertain. Forecasts of future claims for specific defendants have been uncertain for many reasons. For example, eight forecasts for the Manville Trust in 2001 had almost a 4 to 1 range from a low of 747,726 to a high of 2,684,719 claims from 2001 to 2049. Such a range in forecasts is not unusual. Further, this uncertainty is not symmetrical: forecasts are more likely to be too low rather than too high. Past forecasts have been consistently wrong, consistently too low.

Second, the task here is more daunting. We have no data about the total number of asbestos law suits that have been filed against any and all defendants. All of our data is about the claims against specific defendants. There is no central data repository across defendants. Consequently, we lack the data required by standard forecasting methods, all of which look to past claim filings in order to forecast future filings.

Third, the number of claims that will qualify under each category of the Asbestos Injury Claims Resolution Procedures will depend greatly upon how those procedures are administered and who administers them. The Manville procedures are administered by trustees who have fiduciary duties to both present and future claimants. The administrators of the Claims Resolution Procedures under the proposed act will have different duties.

The Proposed Act Shifts Uncertainties and Risks to Victims

Because the National Fund would limit the amount of contributions by asbestos defendants and their insurers, it shifts risks and uncertainties to victims of asbestos diseases. Presently in our legal system when an insolvent defendant becomes unable to pay asbestos victims or when liabilities are greater than anticipated, solvent and responsible defendants continue to compensate victims. In contrast, under the proposed act victims bear the risks that insolvent defendants will not pay their contributions and that liabilities will exceed the $108 billion fund limits.

These risks to victims are significant. While ultimate compensation under the proposed act is uncertain, it is likely that $108 billion would not be sufficient to pay all claims at promised levels.

To examine these risks I estimated how much money would be needed to provide compensation under the act using varying assumptions about the number of future claims and about the categories for which claimants may qualify. I assumed 294,800 pending claims, which I understand is the assumption used both by the AFL-CIO and the ASG, and that pending claims would have the same disease distributions as claims pending in current bankruptcies. I used two alternative assumptions of the number of future claims:

1,903,331 and 2,439,507 which differed only in the number of asbestosis and pleural disease claims. These assumptions are consistent with forecasts in current asbestos bankruptcy cases. To estimate how many victims would qualify for each category in the proposed act, I used a summary of the experiences of present asbestos trusts which produces an assumption of relatively "higher injury severity" for asbestosis and pleural disease claims and an alternative assumption of relatively "lower injury severity" for those claims.

I assumed that, contrary to the currently proposed legislation, future payments would be adjusted for inflation so that all claimants receive the same real value of compensation, using a future inflation rate of 2.5 percent from the Congressional Budget Office. The fund is proposed to compensate victims whose claims will arise over the next 50 years. Funds intended for such long periods must be adjusted for future inflation if they are to make meaningful and equitable payments to future claimants. The Fund's compensation obligation would be reduced by the present omission of any provision for future inflation, but even without an inflation adjustment, the fund could not pay all of its obligations with $108 billion.

The table below shows the total compensation that would be needed for pending and future claims under these various assumptions.

TOTAL PROPOSED COMPENSATION
UNDER ALTERNATIVE ASSUMPTIONS
(Billions of Dollars)

Number of Futures	Injury Severity	Estimated Compensation
1,903,331	Higher	$215
1,903,331	Lower	146
2,439,507	Higher	$254
2,439,507	Lower	163

This analysis indicates that under any set of these assumptions the total amount of money needed to compensate asbestos victims under the proposed act would exceed $108 billion. Under any set of these assumptions, some future claimants would go without compensation. The Fund could become insolvent as early as year 2010 when it would have received claims whose values exceed all of the $108 billion that the Fund could ever receive. Because the proposed act has no provision for reserving money for future claimants, victims who suffer an asbestos disease and file claims as early as 2010 may expect to receive no compensation. Victims who had filed claims before them would have already consumed all of the money to be received by the Fund.

To reiterate, these analyses are estimates based on plausible assumptions about pending and future claims under the proposed act. I expect that the Fund's obligations would greatly exceed

$108 billion, but I cannot say with certainty what will happen -- no one can provide certainty. But at a minimum the analyses demonstrate that there are real risks that a proposed $108 billion fund would be inadequate and that future claimants would be denied both compensation under the act and the opportunity to pursue legal claims for their injuries. Asbestos victims do not face such a risk now. It is a risk created by the proposed act.

Delays in Payments

There is no uncertainty, however, about the fact that claimants will have to wait many years to receive compensation under the proposed act, well beyond the three years that has been suggested. To examine how the Fund would operate, I ran an analysis of how long claimants would have to wait for payment if we assumed that the $108 billion would be sufficient to pay all compensation. The analysis shows that, assuming an ultimate liability of $108 billion, those asbestos victims who already have claims pending today will not receive full compensation until year 2011 or 2012, eight or nine years in the future.

For this analysis I assumed that the proposed Asbestos Injury Claims Resolution Fund would be operational and initially funded sometime in year 2005. This is optimistic. Both the claims process and the funding mechanisms proposed in the act are far more demanding than those of other, previous mass tort claims processes which typically have taken years to start.

Then when it begins the Resolution Fund will face a stark imbalance between its then present obligations for compensation and the money available to meet those obligations. The Fund's liabilities would be front loaded while its income would be paid evenly over at least twenty two years. With its formation, the Fund will be faced with pending claims which both the AFL-CIO and the ASG have estimated at 294,800 in number. (I expect that well over 294,800 persons have pending asbestos claims, but I use this estimate to provide continuity with work done by others.) The Fund will also face accrued claims that would have been filed in 2003 and 2004 as well as claims arising in 2005. Even assuming that these claims would come in and be allowed in amounts that would produce only $108 billion in total liabilities for the Fund, about $30 billion of that liability would arise in 2005 from pending claims and claims forecasted to be filed between 2003 and 2005. The Fund would be able to fully pay these claims that arrive in 2005 only when it had collected its first five or six payments of $5 billion per year, the maximum available under the proposed act. Note that conversion of the assets of existing asbestos trusts would not relieve the Fund's initial illiquidity. The estimated $4 billion in assets of those trusts would be small in comparison to the Fund's early liabilities and, in any event, many of the assets of existing trusts are themselves illiquid.

More likely the Fund's total liabilities would substantially exceed $108 billion, its obligations for claims arriving in year 2005 would exceed $30 billion and victims who already have claims or whose claims arise by 2005 would have to wait beyond year 2011

to be paid in full.

Victims who file after the Fund's first year would face real threats of even longer delays. During the minimum five or six years while the Fund is collecting the annual payments that it will need to pay the claims that arose in 2005, the Fund will continue to receive additional claims, claims that the Fund could not pay until it had paid those claims that had arrived in 2005. So by year 2010 or 2011 when the Fund finally has fully paid its first year's claims, it will then face a new backlog of five or six years of filed, unpaid claims. Indeed under some of the scenarios discussed above, using likely assumptions about the numbers and categories of claims, victims who file claims in 2010 or 2011 would have to wait to be fully paid until the Fund has received all of its payments in year 2026. Victims filing later would never be paid.

Summary

While the creation of a national fund for asbestos victims offers an appealing alternative to the burdens of current litigation, the risks of underfunding and certainty of delay seem to make the current proposal unworkable. Total compensation under the proposal will almost certainly exceed the $108 billion proposed funding level, most likely by a great amount. While total compensation is uncertain, asbestos victims alone would bear the risk that actual liabilities would exceed $108 billion.

More specifically future asbestos claimants would bear this risk. The Fund could pay victims who have already filed claims and those whose claims arise in the next few years. But exposed workers who develop asbestos disease more than a few years in the future would have no assurance of payment. Thus the proposed act would abrogate the protections of Bankruptcy Code Section 524(g). The proposed act would also turn on its head the assurances of resolved bankruptcies and the obligations of existing asbestos trust to treat future claimants equivalently to present claimants. The Fund would take money that trusts have set aside for future claimants, pay that money to pending claimants and provide future claimants with no assurance that they would ever be paid.

The present proposal's failure to provide for inflation adjustments further disadvantages future victims. If payments are not adjusted for inflation, a future claimant would receive 22 percent less than current claimants if his or her disease arises ten years in the future, 39 percent less if her or his disease arises 20 years in the future.

Both pending and future claimants would bear extended delays. Asbestos victims who have already filed claims would not be fully paid until years 2010 or 2011 under any circumstances. Victims who file claims within the first few years of the Fund would have similar delays. Victims who file later run the risk of far longer delays, if they receive compensation at all.

Finally, the Manville Trust's maximum values do not represent, and

were not intended to represent, the full value of asbestos disease claims across all defendants. These maximum values were set to provide room for individual negotiations of claims that do not accept the Manville Trust's scheduled values, and were simply ratios of maxima used in the earlier Manville Trust distribution procedures. In fact, claimants who were exposed predominantly through Manville products and who must look only to Manville for their entire compensation can and do have their claims valued well in excess of the Manville maxima. I know of these matters both because I helped draft the Manville Trust distribution procedures and because I serve on the Manville extraordinary claims panel that decides on these matters. Also, because Manville has not participated in litigation for over 20 years, the notion of a Manville "share" now has little meaning. When Manville was participating in litigation, Earl Parker, Manville's general counsel, estimated that Manville represented about 25 percent of the liability of all asbestos defendants. Today, because the liability of other defendants has increased with Manville's absence from litigation, Manville's "share" would be less than 15 percent.

Thank you for the opportunity to comment on the proposed "Fairness in Asbestos Injury Resolution Act of 2003". I would be pleased to provide any further information that would help your committee in its consideration of the proposed act.

Mark A. Peterson

STATEMENT OF CARTER G. PHILLIPS
BEFORE THE SENATE JUDICIARY COMMITTEE
JUNE 5, 2003

Chairman Hatch, Senator Leahy, and members of the Committee, I want to thank you for this opportunity to comment on the constitutionality of various aspects of Senate Bill 1125, the "Fairness in Asbestos Injury Resolution Act of 2003" ("FAIR Act").

Any constitutional assessment of the FAIR Act must begin with an appreciation of the magnitude and complexities of the asbestos litigation crisis that this Act is designed to resolve. As the Committee is well aware, the "elephantine mass of asbestos cases,"[1] has defied all predictions and expectations concerning the likely scope of asbestos liabilities, and has created a crisis that is harming victims, defendants, their insurers, and the national economy as a whole. The flood of court filings by asbestos claimants has continued unabated for over two decades, and the estimated costs of asbestos litigation have increased dramatically as a result. To date, asbsestos litigation has driven some 60 companies into bankruptcy,[2] and claimants' lawyers have responded by turning to other companies in pursuit of solvent defendants, many "with little asbestos connection."[3] By 1998, non-traditional defendants in 73 different industries accounted for more than 60% of asbestos litigation expenditures,[4] prompting a respected commentator to warn that "it is possible that almost every company with even a remote connection to asbestos may be driven into bankruptcy or at least suffer serious financial difficulties."[5]

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[1] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 827 (1999).
[2] *Norfolk & Western Ry. Co. v. Ayers*, 123 S.Ct. 1210, 1230 (2003).
[3] *In re Joint Eastern and Southern Districts Asbestos Litigations*, 237 F. Supp.2d 297, 305 (E.D.N.Y. 2002).
[4] *See* Stephen J. Carroll et al., RAND Inst. for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002) ("*RAND Study*") at 47-50.
[5] Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Court's Duty to Help Solve the Asbestos Litigation Crisis* at 29 (Nat. Legal Center for the Public Interest, June 29, 2002).

The same acceleration and expansion of asbestos litigation that has spawned the growing number of bankruptcies also has created a very significant risk "that much of the money available [to pay those with asbestos-related injuries] will run out before all those who have and are likely to file asbestos claims under existing tort law can be compensated."[6] In 20 years, the number of asbestos filings climbed from 21,000 to some 600,000 claims, with a "growing proportion of the claims . . . submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily living."[7] The increase in filings by unimpaired claimants results in a vicious cycle, as other unimpaired claimants file out of fear that no funds will be left to compensate them if they do not file when they first become aware of a condition that may be asbestos-related. As a result, many of the bankruptcy trusts established to pay persons with asbestos injuries are able to pay claimants only only five to 15% of the liquidated value of their claims, and nearly two-thirds of asbestos payments by solvent and insolvent defendants are made to persons who do not have malignant illnesses.[8] And, because transaction costs consume more than half of all money spent on asbestos litigation, the burgeoning growth of asbestos litigation further depletes the money available to pay persons with life-impairing injuries.[9]

The FAIR Act seeks to solve this crisis by replacing a tort regime that has failed to serve the interests of victims and defenandants alike with an administrative scheme that will

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[6] *Joint Asbestos Litigs*, 237 F. Supp.2d at 305.
[7] RAND Study at 21, 51; *see also Joint Asbestos Litigs.*, 297 F. Supp.2d at 306 ("Claimants are no longer primarily those who are seriously ill and dying, but have expanded to the exposed asymptomatic and those with less serious non-cancerous conditions").
[8] RAND Study at 65, 80; *see also Joint Asbestos Litigs.*, 297 F. Supp.2d at 314 (between 1995 and 2001, 88% to 94% of all claims filed with the Manville trust were based upon non-malignancies, and the amount of money the trust paid to those with malignant illnesses dropped from 44% to 24%).
[9] *See* RAND Study at 60 (finding that claimants recover about 34% of the total spent on asbestos

compensate claimants who satisfy certain medical eligibility standards. The Act will compel asbestos defendants to make very substantial contributions to a national claims fund based on a tiering system that places companies in different funding tiers based on their levels of historical defense and indemnity costs paid in asbestos litigation. The proposed legislation also will abrogate general liability insurance coverage for participants by reducing, or drawing-down, existing general liability coverage to reflect payments made by the participants' insurers. And, the legislation will preempt all state tort claims by asbestos plaintiffs, including non-final judgments held as of the law's effective date.

It is likely that these aspects of the legislation will prompt constitutional challenges by companies and claimants alike. Under the law's funding scheme, for example, there are likely to be significant disparities in historical litigation costs, overall company revenues, and the extent of remaining liability coverage among companies assigned the same funding obligations. These disparities are likely to prompt due process, takings and equal protection challeges to the proposed legislation. In addition, claimants who might have expected to fare better under the state tort system, or who will lose the benefit of non-final judgments, can be expected to mount such challenges. Although it is impossible to anticipate the myriad ways in which the proposed legislation may affect particular individuals and companies, I believe the solution set forth in FAIR Act is constitutionally sound.

There can be no doubt that Congress has the power to preempt state law and to abrogate private contracts in order to effectuate a solution to the asbestos litigation crisis. That crisis has had and will continue to have a pervasively deleterious effect on interstate commerce and on the national economy as a whole. The Commerce Clause gives Congress plenary

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litigation).

authority to redress economic problems of such national scope and, together with the Supremacy and Necessary and Proper Clauses, empowers Congress to preempt any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and to abrogate any private contracts that stand as such obstacles as well. *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 290, 307-08 (1935) ("Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").

Accordingly, any constitutional challenge to the proposed legislation would presumably be brought under the Due Process Clause or the Takings Clause of the Fifth Amendment. Under the Due Process and Equal Protection Clauses, the proposed legislation would enjoy a presumption of constitutionality that could be overcome only by a showing that Congress's solution is an "arbitrary and irrational" cure for the asbestos crisis.[10] The Supreme Court has repeatedly made clear, however, that Congress enjoys very wide lattitude when weighing relative economic equities, and that claims that turn on "degrees" of unfairness or responsibility are for Congress, not the courts, to resolve. To date, the Court has found the test of rationality satisfied as long as there is a reasonable nexus between the societal problem Congress seeks to solve and the conduct of the party upon whom Congress imposes liability. Thus, in *Turner Elkhorn*, the Court found it "rational" for Congress "to spread the costs of . . .

[10] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (due process); *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993) (due process); *Hodel v. Indiana*, 452 U.S. 314, 331 (1981) (equal protection).

the employees' disabilities to those who have profited from the fruits of their labor." 428 U.S. at 18. Similarly, in *Concrete Pipe*, the Court held it was rational for Congress to impose pension withdrawal liability on withdrawing employers who had "contributed to the plan's probable liability by providing employees with service credits." 508 U.S. at 638. By contrast, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), Justice Kennedy concluded that it was irrational for Congress to impose liability to fund retired coal miner's lifetime health benefits on a company that "was not responsible for [employee] expectation of lifetime health benefits or for the perilous financial condition of the [health] plans which put the benefits in jeopardy." *Id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part); *see also id.* at 530-35 (plurality) (relying on same lack of nexus to find an unconstitutional taking).

The FAIR Act's funding scheme is based on a clear and rational nexus between the problem Congress seeks to solve—the national asbestos litigation crisis—and the conduct of those upon whom it seeks to impose liabilities—companies whose conduct has already rendered them subject to suit in asbestos cases. Indeed, the nature of the asbestos litigation problem does not permit use of a more direct nexus. It is often impossible to determine whose asbestos injured a particular plaintiff, or whether anyone else could or should have prevented the injury. A legislative "solution" that attempted to assign funding responsibilities based on concepts of relative fault would simply replicate the complexities and inefficiencies that have caused the crisis in the first place, and would thwart the fundamental purposes of the law by diverting funds from injured persons and subjecting companies to the continued uncertainties of a fault-based system. The virtual impossibility of devising a system that allocates funding obligations based on degrees of fault or responsibility confirms the constitutional permissibility of the proposed legislation's funding scheme.

The constitutional propriety of the funding scheme is buttressed by the fact that the proposed legislation will not only impose financial burdens on entities whose conduct has caused a societal problem, but also will confer very significant benefits on those entities. By replacing the adversarial tort regime with a federal administrative remedy, the proposed legislation will spare companies the very significant expenses and uncertainties of tort litigation. Thus, claims that the proposed legislation is unfair will in reality be claims that the legislation distributes *benefits* unevenly, for example, by requiring one company to pay larger contributions in order to eliminate relatively smaller future asbestos liabilities. Because the Court has never based a finding of irrationality on claims of relative inequities, rather than lack of a sufficient nexus, it is hard to imagine that the Court would do so where the challenge is based on the relative degree of overall benefit received.

For many of these same reasons, the proposed funding scheme should pass muster under the multi-factor test the Court has developed for determining when a regulatory taking occurs. In *Eastern Enterprises*, a plurality of the Court concluded that application of the Coal Act to certain entities did give rise to an impermissible taking. In reaching that conclusion, however, the plurality stressed the retroactive nature of the liability imposed, *see* 524 U.S. at 532-36, emphasizing that the Act "divest[ed] Eastern of property long after the company believed its liabilities under [the benefit plans it had funded] to have been settled." *Id.* at 534. The FAIR Act, by stark contrast, will not retroactively impose liabilities on conduct that did not previously give rise to liability. To the contrary, it will attach a fixed funding obligation to conduct that has already given rise to liability in the past and that, given the unpredictability of asbestos tort litigation, will continue to do so in the future.

Similarly, the FAIR Act's preemption of state tort actions and its substitution of a federal administrative remedy is an entirely rational response to the arbitrary and dysfunctional operation of the tort regime in asbestos cases. Preemption of tort litigation will eliminate the significant transaction costs that currently divert more than half of all money spent on asbestos litigation from the injured. Moreover, because claims by those suffering no life-impairing illness are a central factor behind the asbestos litigation crisis, it is plainly rational for Congress to cabin eligibility standards and reserve the greatest payment for those who suffer the most serious injuries. Collectively, these measures maximize the likelihood that all those who suffer serious asbestos-related injuries will be able to obtain an adequate remedy. Surely, Congress has extremely broad authority to devise such a system of fair compensation.

Although this administrative remedy is designed to provide significant benefits to claimants in terms of speed, certainty, and ease of proving entitlement to recovery, it is possible that some individuals will not fare as well as they would have under the tort system. But "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit," *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917). In order to address the underlying causes of the asbestos litigation crisis and bring some rationality and equity to the compensation of the injured, Congress must engage in some line-drawing. "This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable." *FCC v. Beach Communications, Inc.*, 508 U.S. 306, 316 (1993) (addressing equal protection challenge); *see also Concrete Pipe*, 508 U.S. at 639 ("there is no need for mathematical precision in the fit between justification and means") (addressing due process challenge); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1981) ("The

problems of government are practical ones and may justify, if they do not require, rough accommodations") (internal quotation marks and citations omitted).

The FAIR Act does not purport to upset any final judgments entered in an asbestos tort action, but it would preempt all pending claims, including all non-final judgments still on appeal. The established rule, however, is that retroactive application of a statute to eliminate pending claims is not subject to constitutional challenge because "'a legal claim affords no definite or enforceable property right until reduced to final judgment.'" *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir.1990) (quoting *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989).[11] This rule applies even as to claims on appeal after judgment, since the longstanding rule in the federal courts is that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). The *Schooner Peggy* is predicated on the Supremacy Clause, and the Supreme Court's holding that supreme federal law binds the courts of the United States at every step of the judicial process would apply equally to state courts. Thus, even if a plaintiff could be said to acquire a vested right merely by entry of a nonfinal state court judgment on a matter of state law, that right would not defeat the superior power of preemptive federal law; inherent in any vested right under state law is the limitation that, prior to the judgment's becoming final, the right could be superseded by federal law.[12] Because no asbestos plaintiff

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[11] *See also, e.g., Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) (no vested right "until a final, unreviewable judgment is obtained"); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); *In re Consol. United States Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987); *Ducharme v. Merrill-National Labs.*, 574 F.2d 1307, 1309 (5th Cir. 1978) (per curiam).

[12] *See FHA. v. Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958) ("[A]ny 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power."); *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947)

who has won a nonfinal judgment can claim a right that limits the power of Congress, their claims are likewise subject to preemption.

Thus, asbestos claimants have at most a property interest that triggers due process protections. But Congress has broad power to modify or even destroy such interests as long as it has a sufficiently strong justification for doing so. The FAIR Act merely modifies the claimant's rights and channels them to a new source of remedies. Those remedies are designed fairly to compensate all victims of asbestos, not simply those who are first in line, and to halt the significant economic harms that asbestos litigation inflicts on the national economy. In my judgment, the Constitution does not hamstring Congress's ability to protect the welfare of all victims, all manufacturers and premises owners, all insurers, and the federal and state court systems, which is what the FAIR Act is intended to do.

I would be happy to discuss this matter in greater depth, either in writing or orally, or to answer any questions members of the Committee may have.

Thank you.

(holding that Congress could prevent landlords from executing rights under state court judgment to evict tenants, for "[t]he rights acquired by judgments have no different standing" from other rights that are subject to federal legislative intervention).

Testimony of Laurence H. Tribe*
on the
FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT of 2003 ("FAIR Act)
before the
Senate Judiciary Committee

June 4, 2003

It is an honor and a pleasure to testify at the invitation of the Committee today. I am here to address the constitutional issues raised by the Fairness in Asbestos Injury Resolution Act of 2003 (the "FAIR Act"). This legislation would create a five-judge federal court under Article I of the Constitution (§ 101 of the bill) to adjudicate asbestos claims on a no-fault basis (§ 112). Claimants would be required to prove by a preponderance of the evidence that they have an eligible disease or condition (§ 113) and that they meet certain diagnostic, medical and latency criteria that have been borrowed from the Manville Trust Distribution Process. (§§ 121-25). Awards would be made according to a compensation schedule depending on the severity of a claimant's condition (§ 131). For example, claimants with asymptomatic exposure or minor pleural disease would receive only medical monitoring benefits. Mesothelioma victims would receive $750,000. There is no provision for punitive damages. If a claimant disagreed with the compensation decision, he or she could seek en banc review in the asbestos court, followed by appeal in the D.C. Circuit under an arbitrary and capricious standard, and then Supreme Court review by way of a petition for writ of certiorari (§ 141(a)(1)(B), § 301(b)(3)(A), § 301(b)(4)).

The FAIR compensation scheme would displace existing federal and state laws governing asbestos claims, except workers' compensation and veterans' benefits laws. All pending asbestos claims that have not yet reached final judicial judgments would be subject to dismissal. (§ 403). The cases could be re-filed in the new asbestos court. (§ 111(c)(2)). The scheme would be financed by assessments against companies with asbestos liabilities and against insurers. (§§ 202-03, 211-13). Each of these two groups would be required to contribute $45 billion. The fund would be authorized to impose (1) a further $14 billion in assessments on certain "additional contributing participants," which are defined as companies whose liability and defense costs are less than $1 million and which are likely to avoid future civil liability as a result of the FAIR Act (§ 225), and (2) an additional $4-6 billion in assessments on trusts established to compensate asbestos claims, including trusts established under Section 524(g) of the Bankruptcy Code. (§ 402 of the bill).

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* Tyler Professor of Constitutional Law, Harvard Law School. The opinions expressed here are my own as a scholar of constitutional law and do not purport to reflect the views of Harvard Law School. I am appearing today on behalf of myself and not on behalf of any entity or organization, and I am especially grateful to two splendid lawyers whose talents and energies I have been privileged to harness on this as on other challenging occasions, Jonathan Massey and Tom Goldstein. Their painstaking and wide-ranging research under unusually pressured time constraints contributed vitally to this written submission.

My conclusion, in brief, is that the FAIR Act is well within Congress' authority to enact and does not offend the constitutional guarantees of due process, equal protection, or right to jury trial. Nor does it represent an uncompensated taking of private property, an unconstitutional impairment of contracts, or a violation of the separation of powers. I will suggest some relatively minor ways in which the bill could be strengthened – by, for example, including explicit congressional findings to support the exercise of Congress' power under the Commerce Clause. But the FAIR Act is already comfortably within constitutional limits.

Introduction

Before I develop these points at length, it is worth noting that I come before the Committee with a distinctive perspective on asbestos litigation, having briefed, argued, and prevailed in the two landmark Supreme Court decisions invalidating attempts at *judicial* asbestos settlements: *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). While some might suppose that these judicial decisions cast a cloud over the FAIR Act, the reality is quite different. In fact, *Amchem* and *Ortiz* strongly *support* the propriety of what Congress is being asked to do here.

In *Amchem*, the Supreme Court recognized the need for legislation to address what it called the "asbestos-litigation crisis." 521 U.S. at 597. The Court quoted extensively from the report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist. The report predicted a continuing flood of asbestos claims:

> On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

Id. at 598. The Court also expressed deep concern over the manner in which asbestos claims are handled in the judicial system:

> The most objectionable aspects of asbestos litigation can be briefly summarized: 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; 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.

Id. (quoting report of Judicial Conference Ad Hoc Committee on Asbestos Litigation). In *Ortiz*, the Supreme Court again noted these findings and referred, with evident alarm, to "the elephantine mass of asbestos cases." 527 U.S. at 821 & n.1. The Court stated that asbestos litigation "defies customary judicial administration and calls for national legislation." *Id.* at 821.

Hence, the Supreme Court's decisions disapproving the judicial class action settlements in these two cases rested not on any conclusion that case-by-case adjudication in the tort system was the required method for resolving asbestos claims, but rather on the legal determination that the judiciary lacked the authority, under current law, to adopt what was essentially a quasi-legislative solution to the problem. The Court noted the Ad Hoc Committee's recommendation that "[r]eal reform . . . required federal legislation creating a national asbestos dispute-resolution scheme." *Amchem*, 521 U.S. at 598; *see also id.* (noting recommendation of "passage by Congress of an administrative claims procedure similar to [that in] the Black Lung legislation") (internal quotation omitted). The *Amchem* Court acknowledged that "[t]he 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." 521 U.S. at 628-29.

In the absence of legislation to the contrary, the Court had no choice but to rule that an unelected Article III federal district judge, bound by the Federal Rules of Civil Procedure, could not compel a putative "class" of millions of people exposed under disparate conditions to asbestos — a class far too heterogeneous to be capable of being meaningfully represented by the few parties who brought the case to court, and by their attorneys — to proceed through an administrative compensation scheme negotiated by those parties and the defendants and approved by the district court. The Supreme Court recognized that only Congress may "negotiate" any such solution. *See Amchem*, 521 U.S. at 599 ("In the face of legislative inaction, the federal courts . . . lack[] authority to replace state tort systems with a national toxic tort compensation regime").

The Court's plea for action on the part of Congress was repeated again this year.[1] And it's hard not to echo that call for national legislation. The landscape of asbestos litigation is not pretty. During the past 20 years, more than 500,000 asbestos cases have been filed, and some 2,100 asbestos cases have been tried or settled at a total cost of $54 billion. As the Wall Street Journal has observed, that is more money than the dollar cost of September 11, Enron, and WorldCom put together. Over half of that money has been consumed in transaction costs – chiefly for plaintiffs' and defendants' lawyers. According to a September 2002 study by the RAND Corporation, 65 percent of compensation over the last decade was paid to people claiming non-cancerous conditions.[2]

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[1] "The elephantine mass of asbestos cases lodged in state and federal courts, we again recognize, 'defies customary judicial administration and calls for national legislation.'" *Norfolk & Western Railway Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003) (citation omitted). Justice Stephen Breyer noted in his dissent, "Members of this Court have indicated that Congress should enact legislation to help resolve the asbestos problem. Congress has not responded." *Id.* at 1238.

[2] *See* Stephen J. Carroll *et al.*, RAND Institute for Civil Justice, Asbestos Litigation Costs and Compensation: An Interim Report (2002). This study was presented to the Committee previously in testimony by Dennis Archer, President-elect , American Bar Association, in Hearings on Asbestos Litigation, March 5, 2003.

In 2001 alone, nearly 90,000 individuals filed or joined in asbestos-related personal injury suits against 6,000 different entities. Yet only 10 percent of those claimants displayed any symptoms of asbestos-related illnesses. Many were forced by state statutes of limitations to file claims pre-emptively, before serious symptoms appeared. But the effect of such filings is to flood the asbestos litigation system and hinder the courts from providing timely compensation for people who have been gravely injured by asbestos diseases.

The process of compensation often resembles a lottery. Whether victims receive compensation and, if so, how much they receive depends on many factors having little to do with the strength of their claims or the severity of their injuries. The decisive factors are the fortuity of where and when the alleged victims file their lawsuits, whom they happen to sue, whether those defendants are solvent at the time the claims are filed and when, if ever, those claims have been translated into enforceable judgments. Some victims receive astronomical awards, while others receive little or nothing. Quite a few severely injured victims die before their cases can be heard.

The picture on the defendants' side is hardly better. One of the most marked changes in asbestos litigation is that the class of defendants is no longer limited to asbestos producers or companies, like shipbuilders, most heavily involved in its use. RAND found that the typical asbestos lawsuit now names 60 to 70 defendants, up from an average of 20 two decades ago. Since 1982 when 16,000 asbestos personal injury suits forced Johns Manville Corporation into Chapter 11 bankruptcy proceedings, asbestos litigation has driven more than sixty companies into bankruptcy. Twenty of those bankruptcies have been filed since 2001. Such filings benefit neither the companies nor asbestos victims. According to a study of a number of major asbestos defendant bankruptcies, an average of *six years* elapses between the initial filing of a bankruptcy petition and confirmation of a reorganization plan. During these proceedings, claimants are not paid. Moreover, bankrupt companies typically have limited resources to compensate victims. The Manville Trust, for example, can pay victims only five percent of the value of a claim.

The pace of asbestos litigation is not abating. Currently there are 8,400 defendants representing every major industrial sector in the country, and 60,000 to 100,000 new claims are filed every year. Thus, congressional inaction will carry serious consequences. That is why we must keep in mind that, although any bill with any realistic prospect of being enacted will entail some sacrifices that might not seem ideal, the long-run effects of *not* having a legislative solution (both the systemic effects and the concrete consequences for those in various positions in the virtually endless queue of asbestos claimants, present and potential) would be horrendous, both for the legal system as a whole and for its ability to vindicate the rights and meet the just claims of those who have been injured. Indeed, the prospect of doing nothing is so horrendous that one must say to those who find fault with this bill — because they would prefer a legislative solution more generous to them and to others they see as similarly situated, or because they hold onto the hope, against mounting evidence to the contrary, that taking their chances with the current hodgepodge system of catch-as-catch can litigation would be preferable — that it is illusory, although understandably tempting, for them to imagine that they and their allies would fare better by digging in their heels in opposition, or by holding out for some unattainable ideal.

But of course I am here to address the constitutional rather than policy implications of the FAIR Act, so let me turn to those issues:

1. Legislative precedents for the FAIR Act.

Although the problems posed by asbestos are in many ways unique, the legal principles that support the FAIR Act are well established. Congress has frequently enacted statutes addressing particular liability issues in specific industries, including:

• The Bankruptcy Reform Act of 1994, Pub.L. 103-394, § 111(a), which previously responded to the asbestos litigation crisis by amending the Bankruptcy Code to enable a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability. 11 U.S.C. §§ 524(g), (h).

• The September 11 Victims Compensation Fund, codified at 49 U.S.C. § 10101 note, which was established as part of the Air Transportation Safety and Stabilization Act. Its goal is to provide compensation for economic and non-economic loss to individuals or relatives of deceased individuals who were killed or physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001. Once a claim is filed, the applicant is deemed to have waived the right to file a lawsuit to seek compensation for injury or death sustained as a result of the September 11 attacks. The applicant does not waive the right to seek compensation from collateral sources (such as life insurance) or to file a suit against alleged terrorists themselves. The fund is publicly subsidized, with pay-outs expected to reach four to five billion dollars for the families of the approximately 2,800 deceased victims of the attacks, along with the several hundred who were injured. The fund is administered by Special Master Kenneth Feinberg, who was appointed by the Attorney General.

• The Black Lung Disability Trust Fund , 30 U.S.C. § 901, et seq., which displaces state workers' compensation laws if they are found inadequate by the Secretary of Labor and provides more generous federal benefits. Under the black lung program, a claimant seeking benefits files a claim with the District Director in the Department of Labor's Office of Workers' Compensation Programs. The District Director investigates the claim and determines whether the claimant is eligible for benefits. If the claimant is eligible, the Director must then determine which employer should be held responsible for paying benefits to the claimant, either directly or through insurance. If no employer can be held responsible for the claimant's illness, the claimant is instead paid from the Fund, whose resources derive from an excise tax paid by coal mine operators based on the tonnage and price of coal sold. The scheme was upheld in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

• The Price Anderson Act, which caps damages in any single nuclear accident to $560 million, upheld in *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978).

• 42 U.S.C. § 2210(s), which limits the punitive damages liability of nuclear facilities licensees and contractors.

• The Federal Credit Union Act, 12 U.S.C. § 1787(c)(3)(A)-(B), which limits damages for lost profits, lost opportunity, or for pain and suffering stemming from the liquidation of federal credit unions.

• The National Swine Flu Immunization Program, Pub. L. No. 94-380, § 2, 90 Stat. 1113 (1976), which precludes private liability for adverse reactions to the Swine Flu vaccine that are not the result of manufacturer negligence or breach of contract and replaces such tort liability with a special remedy against the federal government.

• The National Vaccine Program, 42 U.S.C. §§ 300aa-1 to -33, which provides direct compensation to individuals who suffer injuries as the result of mandatory childhood vaccination and imposes limits on the assertion of claims against vaccine manufacturers.

• The Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, which provides a negligence-based federal cause of action for interstate railroad employees injured in the course of employment and preempts state common-law causes of action.

• The Jones Act, 46 U.S.C.App. § 688, which displaces state law and gives merchant seamen essentially the same benefits and limitations as FELA provides for interstate railway employees.

2. Congress' power to limit, modify, and extinguish causes of action.

The legislative precedents illustrate the breadth of Congress' power to adjust, restrict, or even abolish common-law and statutory causes of action. Thus, Congress has ample authority to rationalize asbestos claims, by creating an Article I procedure in the asbestos court for the orderly payment of such claims and thereby avoiding a race-to-the-bottom situation in which relatively unimpaired plaintiffs are overpaid, transaction costs are high, and grievously injured plaintiffs risk getting little or no compensation at all. Congress has the constitutional power to substitute this procedure for existing federal and state laws, even if the claim values under the FAIR Act are lower than the amounts awarded in the tort system (§ 131); even if payments under the FAIR Act are spread out over three years or made non-assignable, in contrast to state-law claims (§ 133(a)(1), (b)); even if the FAIR Act abrogates the collateral source rule followed by many states (§ 134); and even if the FAIR Act two-year statute of limitations is less generous than that in some states (§ 111(c)).

It has long been settled, ever since the states began adopting workers' compensation statutes, that a legislature is free to modify or abolish common-law causes of action without violating due process or creating a claim for compensation under the Takings Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Martinez v. California*, 444 U.S. 277, 281-83 (1980). "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central Co. v. White*, 243 U.S. 188, 198 (1917) (collecting cases); *see*

also Branch v. United States, 69 F.3d 1571, 1577-58 (Fed. Cir. 1995) ("[A] legislature is free to make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property. The reason, the Supreme Court has explained, is that no one is considered to have a property interest in a rule of law."), *cert. denied*, 519 U.S. 810 (1996).

The Supreme Court has applied this principle to uphold statutory limits on liability. In *Duke Power*, the Court upheld the Price Anderson Act's $560 million cap on total compensatory damages recoverable under state-law causes of action from any single nuclear power plant accident, observing that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978). The Supreme Court has explained that "our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby." *Id.* (citations omitted).

Judicial review of such matters is highly deferential. "[T]he judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that do not affect fundamental rights or proceed along suspect lines." *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976). As the Court made clear in *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), in upholding Congress' decision to destroy statutorily scheduled retirement benefits for a class of railroad employees, the rational basis test is quite forgiving. Indeed, in *Fritz*, the Court attributed a "rational basis" to Congress even though the legislative history conclusively showed (and the district court expressly held, in never-repudiated factual findings) that Congress had had *no idea* that it was destroying the benefits in question. The highly complex bill was drafted by a coalition of railroad management and labor, without any input from the class of retirees in question. Yet it was simply irrelevant, according to the Supreme Court, that Congress might have been bamboozled. Nothing like that is occurring here, but it illustrates just how deferential any judicial review of the legislation will be.

3. Elimination of punitive damages.

To be sure, the FAIR Act does not provide for the recovery of punitive damages, but it is important to recall that private plaintiffs have no constitutionally cognizable entitlement to such damages. Punitive or exemplary damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Congress may reasonably decide to limit or eliminate punitive damages altogether for certain cases.

Indeed, in several areas of the law, and in some state legal systems, punitive damages are not available at all. The Supreme Court has, for example, held that punitive damages are not recoverable against municipalities under Section 1983, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247

(1981), or under the labor laws against unions that breach their duty of fair representation. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). Congress has eliminated punitive damages in several categories of cases involving nuclear power plants. 42 U.S.C. § 2210(s). Members of the Court have repeatedly urged deference to legislative measures that might be adopted either by Congress or by the states to regulate punitive damages. *E.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583-84 (1996); *id.* at 607 (Justice Ginsburg, joined by Chief Justice Rehnquist, dissenting); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Justice Scalia, concurring in the judgment); *id.* at 57 (Justice O'Connor, dissenting).

4. Equal protection objections by asbestos victims.

I understand that some have argued that it is unfair to impose a special Article I compensation scheme on asbestos victims while permitting other product liability and toxic tort plaintiffs to remain in the tort system. (In addition, some have contended that the various lines and classifications regarding defendants and insurers raise problems of unjustifiably disparate treatment. I address the issue of disparate impact on payors in the next section of my testimony.)

I do not believe that the proposed legislation offends norms of equality protected by the Fifth Amendment's Due Process Clause. It is entirely permissible for Congress to tailor its legislative response to a particular industry which raises special liability issues — as the asbestos industry palpably does. "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." *United States v. Carolene Products Co.*, 304 U.S. 144, 151 (1938). "Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (citations omitted).

5. Equal protection objections by payors.

I have heard complaints that the classifications in the bill are unfair to certain payors. For example, some contend that the allocation formulas in the bill unduly burden particular companies and insurers while sparing others who are arguably at least as responsible. Indeed, even the decision to impose $45 billion in assessments on defendants and insurers might strike some as arbitrary; why should the two very disparate groups be required to pay precisely the same amount?

Further, the funding formulas might penalize responsible and conscientious defendants that have already satisfied all of their asbestos liabilities. The FAIR Act in effect forces such defendants to pay twice, while rewarding defendants that have thus far fortuitously escaped massive tort judgments or recalcitrant defendants that have refused to pay their fair share. Or consider a company whose asbestos liability has been masked by a latency period, only to be discovered next year or in the year 2020. That company benefits from the FAIR Act's approach because its asbestos liability will not be translated into financial payments to plaintiffs during the relevant time period made

decisive by the Act. On the other hand, some defendants with previously known asbestos exposure may have already exhausted their insurance coverage (perhaps on the expectation that they have satisfied their liabilities) and will be particularly hard-hit by the assessments.

In short, it is easy to image scenarios where the application of the FAIR Act produces less-than-perfect justice. Whatever the merit of these complaints as a matter of policy, in my view none of them amounts to a valid constitutional objection.

(a) The deferential standard of the rational basis test.

The FAIR Act imposes its assessments on defendants according to two general parameters: past costs incurred for asbestos liability and current revenues. (§§ 201-02). For insurers, proportionate liability will be determined based on the following factors: net written premiums received from policies covering asbestos that were in force at any time during the period beginning January 1, 1940 and ending on December 31, 1986; net paid losses for asbestos injuries compared to all such losses for the insurance industry; and net carried reserve level for asbestos claims on the most recent financial statement of the insurer participant.

These factors are reasonably related to Congress' purposes in adopting the FAIR Act. They are not perfect, but they are "good enough for government work." To be sure, it is possible to imagine other proxies, but the Supreme Court has repeatedly held that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted).

These restraints on judicial review have particular force "where the legislature must necessarily engage in a process of line-drawing." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. at 179. Developing classifications among defendants and insurers "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id. See also Beach Communications*, 508 U.S. at 316 ("Congress had to draw the line somewhere . . . . This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.").

Further, if a socioeconomic measure is generally rational, the fact that its rationale fails to fit or to explain a particular application of the measure is not a basis for finding an equal protection

violation. *See Beach Communications*, 508 U.S. at 316; *see also New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979) (upholding city transit authority's refusal to employ any user of narcotic drugs – even successful methadone users who were recovering heroin addicts – because "[e]ven if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required'") (citations omitted); *Cleland v. National College of Business*, 435 U.S. 213, 221 (1978) (*per curiam*) ("If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'") (citation omitted); *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.").[3]

(b) Previous assessments upheld by the Supreme Court.

The Supreme Court has repeatedly upheld exactions imposed by Congress against similar objections. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), for example, the Court emphatically rejected a constitutional attack on the Black Lung statute by certain coal mine operators who argued that the Act violated the Fifth Amendment Due Process Clause by requiring them to compensate former employees who had terminated their work in the industry before the Act was passed. The operators accepted the constitutionality of the liability imposed upon them to compensate employees working in coal mines now and in the future who may be disabled by black lung, and they recognized Congress' general power to create a program for compensation of disabled inactive coal miners. But the operators complained that imposing liability upon them for their former employees' disabilities would impermissibly charge them with an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time. In particular, the operators maintained that the Act spread costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than by taxing all coal mine operators presently in business. The operators noted that a coal mine operator whose work force had declined might be faced with a total liability that was demonstrably disproportionate to the number of miners currently employed. And they argued that the liability scheme gave an unfair competitive advantage and even a free ride to new entrants into the industry, who would not be saddled with the burden of compensation for inactive miners' disabilities.

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[3] The principle is so well established that the Court's one and only departure from it, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (refusing to apply heightened scrutiny to a law requiring homes for the mentally retarded to apply for a special use permit, upholding the law as rational, but more carefully scrutinizing its application to the particular home at issue in the case before the Court and concluding that, as applied to that home, the denial of a permit was the product of irrational prejudice and could not stand), has become something of a landmark precisely because of its remarkable departure from the otherwise settled practice to the contrary. *But see Board of Trustees v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (discussing *Cleburne*).

The Supreme Court assumed all of this to be true, yet nonetheless upheld the Black Lung statute. The Court held that "it is for Congress to choose between imposing the burden of inactive miners' disabilities on *all* operators, including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those *early* operators whose profits may have been increased at the expense of their employees' health." *Id.* at 18 (emphasis added). The Court explained that laws "adjusting the burdens and benefits of economic life" come to the judiciary with a heavy presumption in favor of their constitutionality and will be sustained unless they are palpably irrational. *Id.* at 16. Exactly the same analysis governs the FAIR Act.

Similarly, in *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the Supreme Court upheld the Multiemployer Pension Plan Amendments Act against a constitutional claim that the Act assigned certain employers more than their proportionate share of liability under multiemployer pension plans. The Court explained that "[i]t is true that, depending on the future employment of Concrete Pipe's former employees, the withdrawal liability assessed against Concrete Pipe may amount to more (or less) than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe." *Id.* at 638. "But this argument simply ignores the nature of multiemployer plans, which, . . . operate by pooling contributions and liabilities." *Id.* at 637-38. The Court held that imperfect allocations of liability could not render the statute irrational.

Such a deferential judicial view, in my opinion, means that this aspect of the proposed legislation should – and almost certainly would – be upheld. Nor is this an area in which the reasons for judicial deference are exclusively institutional so that Congress might properly impose upon itself more stringent constitutional constraints than would be imposed by the Court. Rather, the reasons for judicial deference here go to the fundamental truths that it is folly to make the perfect the enemy of the good and that pragmatism must sometimes temper idealism if we are to avoid truly disastrous outcomes. Congress does not abandon its constitutional responsibilities but fulfills them when it heeds the dictates of such practical wisdom.

6. As-applied due process, takings, and retroactivity challenges by certain payors.

I have also heard the argument that individual payors disadvantaged by the allocation procedures established in the bill might bring as-applied challenges. That is, a particular defendant or insurer who believed that its assessment was disproportionate to its past responsibilities or to its reasonable expectation of future liabilities might challenge a specific assessment by the Asbestos Injury Claims Resolution Fund or the Asbestos Insurers Commission. The Supreme Court encountered such an as-applied challenge in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where it held the Coal Industry Retiree Health Benefit Act of 1992 unconstitutional as applied. But *Eastern Enterprises* makes clear that such as-applied challenges are case- and fact-specific and do not disrupt the operation of a statute as a whole.

The Coal Act required the Commissioner of Social Security to assign each coal industry retiree eligible for benefits to an extant coal operating company or a "related" entity, which was then responsible for funding the assigned miner's benefits under the United Mine Workers of America Combined Benefit Fund. In *Eastern Enterprises*, the Supreme Court held that the Coal Act could not be validly applied to require a company to pay health care benefits to over 1,000 of its former employees. Although there was no single opinion for the Court, Justice O'Connor, writing for a plurality that included Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, distilled three factors of "particular significance" in determining whether governmental action was permissible: "the economic impact of the regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action." *Id.* at 523-24 (internal quotation omitted). The plurality concluded that the Takings Clause of the Fifth Amendment forbids a retroactive governmental assessment in a particular case if it "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and [if] the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29 (internal quotation omitted). Justice Kennedy, concurring in the judgment and dissenting in part, agreed that the Coal Act as applied to Eastern Enterprises was arbitrary and therefore unconstitutional. He rested his decision on the Due Process Clause of the Fifth Amendment rather than on the Takings Clause.

It appears to me that the funding formulae set forth in the FAIR Act will satisfy the three *Eastern Enterprises* factors in the vast majority of (if not all) cases. The formulae do not impose unfair retroactive liability based on past events. Rather, they use past histories of payments for asbestos-related judgments to predict future liabilities. The system, like all such systems, is not perfect. But it is rational and reasonably tailored to the companies' expectations. The aim is to apportion liability according to responsibility, not (as in *Eastern Enterprises*) to saddle one company with liability because it is the last remaining solvent defendant. Indeed, the aim of the legislation is precisely to *avoid* such a scenario, which is currently being played out in the tort system.

Further, under the FAIR Act limited adjustments are available to individual companies based on financial hardship or demonstrated unfairness (§§ 204(d)(2), 204(d)(3)). Although these adjustments are capped in the aggregate (3% of total annual contributions in the case of the financial hardship exception, 2% in the case of the inequity exception), they can provide important relief in individual cases, and an aggregate cap would likely be upheld under reasoning akin to that in *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (upholding state regulation placing an absolute welfare limit of $250 monthly per family, regardless of the family's size or actual need). The adjustments would certainly foreclose a facial attack on the statute and would force potential objectors to pursue separate, and plainly uphill, as-applied challenges.

7. Nondelegation challenges by payors.

I have also heard the objection that the FAIR Act grants an impermissible delegation of authority to the Administrator in allocating defendant participant contributions and similarly grants an improper delegation to the Asbestos Insurance Commission in deciding the amount of insurer contributions. I do not believe these objections carry much constitutional weight.

The Supreme Court has not invalidated a single delegation of congressional power on nondelegation doctrine grounds since 1936. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Since then, the Court has followed a highly deferential approach to congressional delegations of authority, making clear that a delegation is permissible so long as Congress has established "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

The standard of an "intelligible principle" to guide the agency is not unduly demanding. Thus, in *Whitman v. American Trucking Assns.*, 531 U.S. 457 (2001), the Court upheld a provision of the Clean Air Act directing EPA to set air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety." In *Touby v. United States*, 500 U.S. 160 (1991), the Court upheld a statute permitting the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was "necessary to avoid an imminent hazard to the public safety." *Id.* at 163. The Court has approved the Occupational Safety and Health Act provision requiring the agency to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health." *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980). The Court has upheld the authority of the SEC to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicated" and do not "unfairly or inequitably distribute voting power among security holders." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). And the Court has found an "intelligible principle" in various statutes authorizing regulation in the "public interest." *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (FCC power to regulate airwaves); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (ICC power to approve railroad consolidations). In short, the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting); *see id.* at 373 (majority opinion).

Given the current state of constitutional doctrine, I believe the bill contains a sufficiently intelligible standard by which the Administrator can decide each defendant's contribution amount. Defendants are placed in different tiers according to administrable factors: their respective amounts of prior asbestos expenditures. (§ 202). Contribution assessments are calculated according to percentages of revenue set out in the bill. (§ 203). Statutory minimum contributions are also specified. (§ 204). Similarly, the Insurance Commission is given what I believe is constitutionally adequate direction in allocating contributions among insurer participants based on the proportionate liability of each. Section 212 enacts the factors that the Commission is to consider.

If there were any doubt on the matter – including the standards by which assessments are to be imposed under Section 225 on additional contributing participants (companies whose liability and defense costs are less than $1 million and are likely to avoid future civil liability as a result of the FAIR Act) – the bill could be quite readily clarified by supplementing the list of allocation and assessment criteria.

8. Federalism and the Tenth Amendment.

I understand that some have questioned whether the FAIR Act is consistent with states' rights and principles of federalism. It is important to note that the proposed legislation would simply displace state law substantively and replace it with a special Article I scheme containing an exclusively *federal* statutory cause of action. It would not conscript or commandeer state agencies or state courts into the service of the federal government. The FAIR Act therefore does not run afoul of the Tenth Amendment and related principles of federalism.

These principles prohibit the federal government from compelling the states to enact or administer a federal regulatory program, as in *Printz v. United States*, 521 U.S. 898 (1997), and they bar federal efforts to "commandeer" state governments in the service of federal regulatory programs. *New York v. United States*, 505 U.S. 144, 175 (1992). However, these principles do not prevent Congress from fully pre-empting state law so long as Congress acts within a substantive sphere of federal power. *New York v. United States*, 505 U.S. at 160, 167, 168, 174, 178, 188. *See also Reno v. Condon*, 528 U.S. 141 (2000) (upholding Driver's Privacy Protection Act even though it was not in practice a generally applicable law and regulated only records generated by the states themselves).

Federal pre-emption of state law is, of course, entirely familiar under the Supremacy Clause of Article VI, § 2. Ever since *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law which conflicts with federal law is automatically "without effect." Accordingly, the pre-emption effected by the FAIR Act is not a matter of constitutional concern.

9. The Commerce Power.

(a) The several ways in which Congress' commerce power is triggered here.

The FAIR Act fits comfortably within Congress' commerce power. The sale of asbestos, which was processed and used in thousands of construction and consumer products, clearly occurred in interstate commerce. The health harms of asbestos are direct effects of that commerce. Just as Congress may regulate the hazardous waste dumps which are the byproducts of interstate commerce (some of which occurred decades ago), Congress may also regulate the lingering effects of asbestos commerce, even if it occurred many years ago. In addition, asbestos litigation as an activity in itself is a uniquely interstate phenomenon, with lawyers, medical consultants, and expert witnesses almost invariably crossing state boundaries in order to conduct the proceedings.

Moreover, the economic *effects* of asbestos litigation on interstate commerce are indisputably significant. The asbestos claims system wreaks economic havoc on companies, workers, and retirees throughout the nation.[4] Congress has a particularly compelling reason to act, for asbestos litigation

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[4] Much of this information has already been presented to the Committee in hearings on asbestos litigation (including hearings on March 5, 2003). It was also the subject of hearings on the State of the Economy before the Senate Budget Committee on January 29, 2003. *See also*

has a massive impact on the entire federal court system. As I have already noted, the total cost of asbestos litigation is already $54 billion. It has contributed to more than sixty business bankruptcies. A recent report sponsored by the American Insurance Alliance and prepared by Nobel Prize laureate Joseph Stiglitz, professor of economics at Columbia University, Jonathan Orszag, managing director of Sebago Associates, and Peter Orszag, the Joseph A. Pechman Senior Fellow in Economic Studies at the Brookings Institution, estimated that asbestos-related bankruptcies have cost as many as 60,000 jobs. On average, the report stated, these workers lost between $25,000 and $50,000 in wages, and the average worker at an asbestos-related bankrupt firm with a 401(k) plan suffered roughly a 25 percent reduction in the value of the retirement account.

A U.S. Chamber of Commerce-sponsored study by National Economic Research Associates, released in January 2003, found that there will be as much as $2 billion nationwide in additional costs borne by workers, communities and taxpayers due to indirect and induced impacts of company closings related to asbestos. Even non-bankrupt companies suffer. Many firms, in order to avoid bankruptcy and to compensate the most deserving victims, have attempted to set aside sufficient resources to compensate the victims who have manifest injuries from exposure to asbestos, reducing capital expenditures to that degree. According to the RAND Corporation, if current trends continue, another $150 billion to $200 billion will be spent on asbestos litigation, resulting in the loss of an estimated 423,000 U.S. jobs.

The FAIR Act thus has ample constitutional basis under the Commerce Power. To make the matter crystal clear, some of these interstate effects could be addressed at length in the appropriate Committee Report, or even included as findings in the text of the statute itself.

(b) The FAIR Act is a valid exercise of the commerce power, even as interpreted in *Lopez*.

Readily distinguishable is *United States v. Lopez*, 514 U.S. 549 (1995), which became the first Supreme Court ruling since 1937 finding a congressional enactment to have gone beyond the bounds of the commerce power when it held that the Gun-Free School Zones Act exceeded Congress' power under the Commerce Clause. *Lopez* rested on the Court's assessment that the regulated activity – there, any instance of firearms possession near a school – did not substantially affect interstate commerce. *Lopez* is best understood as focusing on the nature of the underlying activity – whether that activity could be described as part of or intrinsically related to a commercial transaction or economic enterprise. Mere possession of a handgun has no manifest connection to interstate commerce. The phenomenon of gun possession near schools can, of course, be linked to ultimate effects on the nation's economy – but only through a causal chain so long and so greatly attenuated that, if it were deemed to suffice, then the power of Congress under the Commerce Clause

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Joseph E. Stiglitz *et al.*, The Impact of Asbestos Liabilities on Workers in Bankrupt Firms (American Insurance Assocation, 2002); *Asbestos Suits Affect Worker Wages, 401(k) Values: Study*, National Underwriter, Dec. 9, 2002; *Findley v. Trs. of the Manville Pers. Injury Settlement Trust (In re Joint E. & S. Dists. Asbestos Litig.)*, 237 F. Supp. 2d 297, 305 (E.D.N.Y. 2002).

would be truly plenary. By contrast, in *Lopez* the Court reaffirmed its decisions upholding federal laws regulating such intrastate activities as coal mining, loan sharking, running a restaurant or a hotel, and producing wheat for home consumption.

In the instance of this legislation, the use of asbestos in shipbuilding, pipelaying, and other industrial activities is clearly part of indisputably commercial activity subject to federal regulation, just as are the subjects reached by OSHA rules, federal mine safety regulations, and EPA rules. And the palpable effects of asbestos litigation on interstate commerce make this situation completely unlike that in *Lopez*.

Cases subsequent to *Lopez* do not suggest that it would pose a problem for the FAIR Act. *E.g., Pierce County v. Guillen*, 537 U.S. 129 (2003) (statutory privilege for data collected as part of federal highway program fell within commerce power because it was aimed at improving safety in the channels of interstate commerce).

In a unanimous *per curiam* opinion issued on June 2, 2003, in *Citizens Bank v. Alafabco*, No. 02-1295, the Court held that application of the Federal Arbitration Act (which extends only to "contract[s] evidencing a transaction involving commerce") was not defeated simply because some of the debt-restructuring transactions at issue in the case did not have a "substantial effect on interstate commerce." The Court opined that "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.' Only that general practice need bear on interstate commerce in a substantial way." Slip op. at 5 (citations omitted). The Court explained that *Lopez* did not "purport to announce a new rule governing Congress' Commerce Clause power over concededly economic activity such as the debt-restructuring agreements before us now." *Id.* at 6-7.[5]

10. Impairment of contracts.

Some have raised questions regarding the impact of the FAIR Act on private contracts. For example, defendants and their insurers have contracts apportioning financial responsibility for asbestos liability. Plaintiffs and their attorneys have agreements as to fees. These and other private arrangements will upset by the FAIR Act. Does Congress have the authority to disrupt such

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[5] *Cf. Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (Clean Water Act provision requiring permit from Army Corps of Engineers for discharge of fill material into navigable waters did not extend to isolated, abandoned sand and gravel pit with seasonal ponds which provided migratory bird habitat); *Jones v. United States*, 529 U.S. 848 (2000) (federal arson statute did not cover the arson of an owner-occupied dwelling not used for any commercial purpose); *United States v. Brzonkala*, 529 U.S. 598 (2000) (Violence Against Women Act beyond commerce power because it did not regulate economic activity or interstate commerce).

expectations? The short answer is that the Impairment of Contracts Clause does not apply to Congress and, in any event, its principles would not prove fatal to the FAIR Act.

(a) The Impairment of Contracts Clause does not apply to federal legislation.

The Impairment of Contracts Clause of Article I, § 10 applies only to state legislative acts, not to Congress. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732-33 (1984). "It could not justifiably be claimed that the Contracts Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government. Indeed, records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause." *Id.* at 733 n.9.[6]

Further, the Supreme Court has "never held . . . that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts. Indeed, to the extent that recent decisions of the Court have addressed the issue, [the Court has] contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses." *Id.* at 733. Hence the long-settled rule is that "[c]ontracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-08 (1935). "If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224 (1986). *See also Horowitz v. United States*, 267 U.S. 458, 460 (1925) (government's sovereign acts do not give rise to a claim for breach of contract).

(b) The Clause would not invalidate the FAIR Act in any event.

In any event, violating the literal command of the Contracts Clause is far from automatically fatal even for state legislation. In *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), the Supreme Court made clear that, although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of each state "to safeguard the vital interests of its people." *Id.* at 434. Thus, a state prohibition law may be applied to contracts for the sale of beer that were valid when entered into, *Beer Co. v. Massachusetts*, 97 U.S. 25 (1878); a law barring lotteries may be applied to lottery tickets that were valid when issued, *Stone v.*

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[6] The fact that the Contracts Clause binds the states but not Congress is one reason the Court has long held that Congress, but not any of the states, is empowered to enact bankruptcy laws. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (Marshall, C.J.).

Mississippi, 101 U.S. 814 (1880); and a workmen's compensation law may be applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries, *New York Central R. Co. v. White*, 243 U.S. 188 (1917).

As the Supreme Court has explained, the Contracts Clause must be interpreted against the background assumption that a state may make reasonable exercise of its police powers: "the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Blaisdell*, 290 U.S. at 434-35 (citation omitted). The Court has indeed held that even a substantial impairment of contract is presumptively valid where the state itself does not have a direct interest (pecuniary or otherwise) in the subject of the regulation, *see United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977), and where the state has "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Resources Group v. Kansas Power & Light*, 459 U.S. 400, 411 (1983). "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' Unless the State itself is a contracting party, '[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Id.* at 412-13 (citations omitted and brackets in the original). *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 190 (1983).

Congress may, of course, empower federal officers or agencies, such as the Administrator of the Fund, to enter into binding agreements on behalf of the United States that safeguard contracting parties, such as companies that enter into contracts with the U.S. Government for valid consideration, from the financial impact of legal changes wrought by Congress so long as that power to bind the United States is unmistakably conferred and unambiguously exercised. But the FAIR Act would not abrogate existing federal contracts to which the government is a party, and so the principle of *United States v. Winstar Corp.*, 518 U.S. 839 (1996), may be left to one side.

11. Termination of pending cases and the separation of powers.

The FAIR Act would require the dismissal of any case that is still pending, even where a trial judgment is on appeal. But the operation of the Act in this respect poses no constitutional difficulty. For it is settled that Congress may change applicable law in a way that terminates or settles pending civil actions. *See, e.g., Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992) (drawing distinction between terminating pending cases, even by name and docket number, by formulating a change (however peculiarly aimed at the specific cases in question) in the applicable rule of law – which is deemed not to interfere with or usurp the judicial function – and aiming at a designated closed class of pending cases as such and simply commanding that they be terminated – which is deemed a usurpation). Not until a lawsuit proceeds to final judgment does a vested property right

attach that cannot be upset through congressional action. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 431 (1856).

Thus, Congress has the power "retroactively" to abrogate common-law causes of action, so long as it leaves final judgments intact. The cases terminated by the FAIR Act are in no sense analogous to a list of specific cases but constitute an understandable general category (as in "pending" cases dealing with asbestos), legislation with respect to which clearly entails promulgation of a change in the underlying applicable rule of law. Indeed, the class of cases terminated by the FAIR Act is not a closed set, because future cases asserting the same causes of action are prohibited, and that part of the affected class is manifestly open rather than closed.

12. Abrogations of bankruptcy reorganization plans.

The FAIR Act interacts with the Bankruptcy Code in several ways, none of which is constitutionally problematic in my view. For example, companies with prior asbestos expenditures that have a case pending under a chapter of the Bankruptcy Code prior to a date specified in the Act are automatically assigned to tier I (for purposes of calculating assessments) if the bankruptcy filing was caused by asbestos liability. (§ 202(c)).[7] The FAIR Act supersedes any plan of reorganization of any debtor assigned to tier I and any related agreement or understanding with respect to the treatment of any asbestos claim. (§ 202(f)). No person will have any rights or claims regarding any such plan or agreement. (*Id.*). In addition, the FAIR Act authorizes $4-6 billion in assessments on trusts established to compensate asbestos claims, including trusts established under Section 524(g) of the Bankruptcy Code. (§ 402l).

Some have questioned whether Congress has the authority to supersede these plans of reorganization and, in effect, appropriate funds out of confirmed bankruptcies and into the congressionally created fund. The answer is plainly in the affirmative. For the bankruptcy process, and in particular the confirmation of a plan of reorganization, does not provide a debtor with ongoing immunity from federal law. After confirmation, the operations of the debtor are fully subject to congressional and other forms of federal regulation. The Bankruptcy Code does not give the debtor

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[7] Any company that filed for Chapter 11 protection prior to January 1, 2003, and "has not confirmed a plan of reorganization as of the date of enactment of this Act . . . and the Chief Executive Officer, Chief Financial Officer, or Chief Legal Officer" of which "certifies in writing to the bankruptcy court presiding over the [company's] case, that asbestos liability was neither the sole nor precipitating cause for the [company's] filing under chapter 11," "may proceed with the filing, solicitation, and confirmation of a plan of reorganization" notwithstanding other provisions of the FAIR Act if the presiding bankruptcy court finds the plan's "confirmation . . . necessary to permit the [company's] reorganization . . . and assure that all creditors and that [company] are treated fairly and equitably; and . . . confirmation is clearly favored by the balance of the equities" so long as the confirmation order is entered within nine months "after the date of enactment of this Act or such longer period of time approved by the bankruptcy court for cause shown."

"carte blanche to ignore nonbankruptcy law." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 502 (1986). *See NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 534 (1984)(debtor not relieved of labor law obligations merely by petitioning for bankruptcy); *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353-55 (9th Cir. 1994) (reorganization plan does not immunize debtor from state law on ongoing basis).

The Supreme Court applied this principle in *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141 (1944), involving a provision of the 1938 Chandler Act that required the reduction of the basis of property transferred in the acquisition of an insolvent corporation to the fair market value of the property at the date of confirmation of a reorganization plan. Observing that "the whole problem . . . was to give the Chandler Act as wide room as possible for future operation, notwithstanding the previous vesting of substantive rights or institution of bankruptcy or reorganization proceedings,"323 U.S. at 157-58, the Court had little difficulty in concluding that the changes in the tax laws applied even to reorganization "plans already confirmed in pending proceedings." *Id.* at 158. *See also Dickinson Industrial Site, Inc. v. Cowan*, 309 U.S. 382 (1940) (application of new procedural rules to a bankruptcy proceeding that was pending when the new statute was enacted); *Carpenter v. Wabash Railway*, 309 U.S. 23 (1940) (provision giving personal injury judgments the status of operating expenses and thus priority over mortgages in ongoing railroad reorganizations); *McFaddin v. Evans-Snider-Buel Co.*, 185 U.S. 505 (1902) (curative statute providing the methods by which valid mortgages could be created in the Indian Territory); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870) (payment of debts in legal tender).[8]

13. Article III and the Asbestos Court.

Some have attempted to argue that Congress may not take tort claims out of the judicial system and assign them to Article I courts for resolution, even where (as here) Congress provides for subsequent judicial review in the Article III courts. However, the law has been to the contrary ever since *Crowell v. Benson*, 285 U.S. 22 (1932) (holding that Congress may replace a seaman's traditional negligence action in admiralty with a statutory scheme of strict liability in which an administrative official's award of compensation could be enforced or set aside by federal district court). The Court has underscored "the importance of [its] time-honored reading of the Constitution as giving Congress wide discretion to assign the task of adjudication in cases arising under federal law to federal tribunals." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 889 (1991).

It is important to clarify that the FAIR Act does not simply *transplant* existing state and federal causes of action to the new asbestos court. Rather, it creates new administrative remedies for a new kind of federal claim and establishes a federal government fund from which compensation

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[8] *Railway Labor Executives Assn. v. Gibbons*, 455 U.S. 457 (1982) (striking down federal railroad reorganization statute under uniformity test because it could not be said to apply uniformly even to major railroads in bankruptcy proceedings throughout the United States), is inapposite here. The FAIR Act is justified under the Commerce Clause, not simply the Bankruptcy Clause, and in any event it applies uniformly to a defined class of debtors.

may be provided. Those new claims involve paradigmatic examples of "public rights" cases, which *Crowell* defined as those "aris[ing] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." 285 U.S. at 50; *see also Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 593-94 (1985) ("public rights" are rights against the government or closely intertwined with a regulatory scheme); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) ("The crucial question, in cases not involving the Federal Government, is whether Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.") (internal quotation omitted). All claims against the Asbestos Injury Claims Resolution Fund by persons injured by asbestos, and all disputes involving assessments on defendants and insurers, fall within this definition of "public rights."

The Supreme Court has long confirmed the power of Article I courts and administrative agencies to resolve claims involving "public rights" such as those involving the Asbestos Injury Claims Resolution Fund. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (Congress "may or may not bring within the cognizance of the courts of the United States, as it may deem proper," matters involving public rights). Thus, in *Thomas* the Court upheld a provision of the Federal Insecticide, Fungicide, and Rodenticide Act that required private parties under certain circumstances to arbitrate disputes arising under the statute, with Article III judicial review of the arbitrator's decision only for "fraud, misrepresentation, or other misconduct." The Court opined that "Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts." 473 U.S. at 583. In *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the Court upheld a statute empowering the CFTC to entertain state-law counterclaims by a broker when a customer brought an administrative action against the broker. *See also Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943) (permitting initial adjudication of state law claim by a federal agency, subject to judicial review, when that claim was ancillary to a federal law dispute).

And in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), in the course of holding that parties who had failed to file claims against a bankrupt's estate were entitled to a jury trial when they were sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer, the Court reaffirmed Congress' power to assign matters of "public rights" to administrative agencies for resolution. *See, e.g., id.* at 55 n.10 (affirming congressional power to bar jury trial over claims "involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity").

14. The right to jury trial.

Relatedly, some have questioned whether the FAIR Act is consistent with the Seventh Amendment, insofar as the Act would create an Article I court in which claims are resolved without jury trial. My conclusion is that this procedure is constitutional. Whatever limits the Seventh

Amendment might impose on a scheme that left asbestos claims in Article III courts and sought simply to withdraw the right to jury trial, Congress under the FAIR Act would be proceeding differently: the Act would abolish the cause of action in the Article III federal courts altogether, leaving nothing for a jury to hear. In place of a common-law claim, the bill would create a new statutory action before the Article I asbestos court.

In *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455 (1977), the Supreme Court held that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" The Court continued, in language directly apposite to the asbestos context, that "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency." *Id.*

Thus, "Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right," *Granfinanciera*, 492 U.S. at 53, if that statutory cause of action involves a matter of "public right" – that is, if it inheres in, or lies against, the federal government in its sovereign capacity, as is the case with claims in the asbestos court. In other words, "if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Id.* at 53-54.

By way of example, Congress historically has fashioned causes of action – even causes of action closely analogous to common-law claims – and placed them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable. *See, e. g., Atlas Roofing*, 430 U.S. at 450-461 (workplace safety regulations); *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) ("[T]he Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. . . . [T]he Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency."); *Block v. Hirsh*, 256 U.S. 135, 158 (1921) (temporary emergency regulation of rental real estate).

15. Procedural due process.

I understand that two arguments regarding procedural due process have also been raised: first, that it is somehow unfair to modify or extinguish existing asbestos claims without the consent or participation of the victims themselves; and second, that the procedures in the new asbestos court are constitutionally inadequate. Neither objection has merit.

(a) Procedural due process regarding adoption of the FAIR Act.

Due process does not require Congress to provide individualized notice and opportunities to be heard before enacting legislation. In the national legislature, all citizens are represented on a basis of one person, one vote, *see Reynolds v. Sims*, 377 U.S. 533 (1964), and the interests of even future Americans are affected every day by decisions that Congress makes regarding the national debt, federal borrowing, and myriad fiscal priorities. Conflicts of interest among different groups in the legislative process are hardly unique to this legislation and could not provide a basis for attacking statutes without rendering Congress and all fifty state legislatures all but impotent. "General statutes within the [government's] power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

(b) Procedural due process regarding the operation of the asbestos court.

The procedures in the asbestos court plainly satisfy due process, the familiar elements of which are notice, an opportunity to be heard, and a fair hearing before an impartial decisionmaker. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *see also Mullins Coal Co. v. Director, Office of Workers Compensation Programs*, 484 U.S. 135, 155-58 (1987) (upholding regulations for the processing of claims for black lung disease).

The composition of the court is unobjectionable. The FAIR Act creates an Article I "United States Court of Asbestos Claims." There are five judges appointed by the President and confirmed by the Senate for 15 years (§ 101(a), creating 28 U.S.C. § 201(a)(1))[9] who may be removed by the President for "good cause" (§ 101(a), creating 28 U.S.C. § 201(b)(2)), who appoint magistrates (§ 202(a)), who in turn use claims examiners (§ 114(a)). The judges make the final decisions based on magistrate recommendations. There is en banc review (§ 141(a)(1)(B)), arbitrary and capricious review in the DC Circuit (§ 301(b)(3)(A)), and then Supreme Court review by way of certiorari (§ 301(b)(4)).

The asbestos court will award compensation on a no-fault basis according to objective medical criteria, without requiring the claimant to prove product defect. The requirements for filing claims are set out clearly in the statute. The medical and exposure criteria are borrowed in part from the Manville Trust Distribution Process. The court is authorized to promulgate rules and rebuttable presumptions to govern the elements of claims. In addition, the bill authorizes the asbestos court to establish a legal assistance program to aid claimants. The court is to maintain a list of attorneys who are willing to provide their services on a pro bono basis.

Finally, the FAIR Act provides constitutionally adequate guidelines for the timely processing of claims in the first instance. Claims must be referred to magistrates within 20 days. Claims

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[9] This appointment process is the same as that used by the United States Court of Federal Claims, which is also an Article I court. 28 U.S.C. § 171(a).

examiners must notify claimants if additional information is needed to determine eligibility, such as a medical exam. Once a claims examiner has all the necessary information, the claim and a recommendation are sent to a magistrate who has 60 days after receipt of a completed claim to provide a written recommendation, including the requisite findings of fact. No later than 30 days after the magistrate makes these recommendations, a judge of the asbestos court is to make a final decision of the award to which the claimant is entitled. The court is to establish expedited procedures for exigent cases.

These procedures certainly satisfy due process.

16. Suggestions for possible consideration by the Committee.

In the course of my review of the FAIR Act, I have noted several issues that, although they do not raise constitutional questions and therefore are not addressed by the analysis offered thus far, may bear consideration.

Section 134(a): Payments are "reduced by the amount of collateral source compensation that the claimant received, or is entitled to receive, for the asbestos-related injury that is the subject of the compensation." Arguably, however, an action by the claimant to secure this collateral source compensation is preempted under Section 403(d)(2); an exception to the preemption provision is arguably warranted.

Section 141(c): The Act appears to contemplate the presence of counsel on behalf of the Fund or Administrator only in en banc proceedings. It seems entirely possible, however, that such counsel might be warranted before the examiner, a magistrate, or a single judge, particularly early in the Act's implementation as practices and procedures are developed. Consideration should be given to substituting "before a panel" with "under the Act."

The availability of en banc review as a matter of right potentially invites a substantial administrative burden on the court. Consider making en banc review discretionary or imposing some reduction in the award for failed en banc appeals.

Section 202(f): The Act broadly preempts *entirely* any plan of reorganization of a defendant company, but does not provide substitute provisions relating to aspects of the bankruptcy unrelated to the payment of asbestos claims. Some clarification may be in order here.

Sections 204(i): The Act provides little incentive for participants to provide timely information. Consideration should be given to including penalties, especially for willful violations.

Section 204(i)(8): The Act confers an automatic right of rehearing for assessments. As with Section 141(c), *supra*, this right makes the process painless. Consider adding a provision that permits the Administrator to impose a penalty for a frivolous rehearing request.

Section 212(b)(3)(B): The Act requires the Commission to make an initial determination regarding the contribution obligations of insurers within 120 days of its first meeting. This is just one of a number of provisions that seems a bit optimistic regarding the ability of administrative and judicial officers to complete their assigned responsibilities expeditiously. That is a particular concern with respect to contribution obligations because, once the Act is passed, contributors will be submitting an extraordinary deluge of complex financial information.

Section 216: The Commission terminates 60 days after submitting the required report to Congress under Section 212(d), not Section 212(c).

Section 212(a)(4): The Administrator is deemed a fiduciary of the Fund. In light of the litigation over Native American trust funds, consideration should be given to whether to create specific provisions governing any judicial challenge to the administration of the asbestos Fund.

Section 212(e): The Orphan Share Reserve Account includes funds above the annual maximum contributions. Consideration should be given to the fact that such annual excess contributions may portend annual shortfalls in later years.

Section 302(b)(2): The D.C. Circuit may overturn a contribution determination as arbitrary and capricious. A ruling with respect to a single contributor could have wide implications for entire classes of contributors, however. Consideration should be given to permitting the Administrator or Commission to adjust all contributions so affected in the event of such a ruling.

Section 303(b): There is a direct right of appeal to the U.S. Supreme Court of any decision holding the Act unconstitutional in whole or in part. Consideration should be given to a provision mandating that any challenge to the constitutionality of the Act be brought in, or transferred to, the D.C. District Court, which should endeavor to consolidate the challenges.

Section 304: Insurers are permitted to sue reinsurers in the D.C. District Court. Consideration should be given to clarifying what law applies and whether this provision is intended to preempt arbitration agreements.

Section 403(b): The Act supersedes other agreements previously made by defendants. Consideration should be given to clarifying that this provision is subject to subsection 403(d)(1), which permits the enforcement of prior court judgments.

Section 403(d): The Act appears to intend that the D.C. District Court will stay or transfer action on any asbestos claim. This provision seemed designed to appear within Section 403(d)(4), perhaps as subsection (E).

Conclusion

In my view, the FAIR Act is a constitutionally sound solution to a problem that clearly

demands a remedy that only Congress can provide. I look forward to working with the Committee and answering any questions it may have.

Statement of Seth P. Waxman

Wilmer, Cutler & Pickering

Mr. Chairman; Senator Leahy; Members of the Committee:

I am pleased to submit these remarks for the record of the Committee's hearing today on S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, or FAIR Act. The FAIR Act addresses the critical topic of designing a national legislative solution to the asbestos litigation crisis. Over the past year or more I have had the opportunity to become familiar with the grave problems, injustices, and risks inherent in the present system, through representation I and my colleagues have provided to The Hartford Financial Services Group, Inc., in connection with various asbestos-related matters, including discussions about the development of the sort of comprehensive legislative solution that the Committee is now considering. As you know, The Hartford is one of several leading American insurance companies that have been working hard -- along with major industrial companies, representatives of organized labor, members of this Committee and their staffs, and other interested parties -- to design and achieve such a solution.

Background

I will not belabor what I believe is, by now, the obvious seriousness of the current situation. Because of its many desirable properties, asbestos was once widely used in many sectors of the economy. Over time, however, it became evident that with sustained occupational exposure, asbestos could also prove to be, for some, a slow but pitiless agent of disability or death. Because of the large number of people exposed to asbestos in one way or another and the long latency period typically associated with the development of actual asbestos-related health impairments, standard tort litigation has confronted plaintiffs, defendants, and the courts with

special problems. These include, among many others, the difficulty of fixing either the fact or the ultimate scope of particular defendants' potential responsibility for asbestos-related injuries; the need to treat fairly exposed persons whose actual injuries, if any, will manifest themselves only at some point in the future; and the related phenomenon of large numbers of claimants overwhelming the legal system with present claims when they have not yet developed, and may never develop, any actual physical impairment related to their exposure to asbestos.

More than ten years ago a committee of the United States Judicial Conference, appointed by the Chief Justice, studied the special features of asbestos litigation and concluded that the "ultimate solution should be [federal] legislation recognizing the national proportions of the problem . . . and creating a national asbestos dispute resolution scheme . . . ."[1] Since that time, the Supreme Court has called repeatedly for such a solution -- most recently just this past March, when Justice Ginsberg wrote for the Court: "The 'elephantine mass of asbestos cases' lodged in the state and federal courts, we again recognize, 'defies customary judicial administration and calls for national legislation.'"[2] In the meantime, by some estimates more than 600,000 individuals have brought asbestos-related claims; more than 200,000 cases are presently pending; and asbestos litigation has been a significant factor in bankruptcies of more than 60 American corporations -- more than a third of them filed since the year 2000. As to the future, it has been estimated that, under the current tort system, there could be as many as 2.7 million asbestos

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[1] Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (Mar. 1991); see also *id.* at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation").

[2] *Norfolk & Western Ry. v. Ayers*, 123 S. Ct. 1210, 1228 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-629 (1997) ("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.") (footnote omitted).

claims yet to come. It is hard to escape the conclusion that the need for national legislation is both clear and urgent.

Any such national program must meet two core goals: Providing fair compensation to those who have been truly injured by their exposure to asbestos; and providing defendant companies, their insurers, and the financial markets with the rationality and certainty that will allow affected businesses to recognize their just asbestos liabilities, provide for them at a sustainable level, and then move on to drive the American economy forward. Achieving both those goals may sometime seem a daunting task. But this Nation has solved daunting problems before, and surely we can solve this one. Mr. Chairman, Senator Leahy, allow me to commend you and all your colleagues on this Committee for the leadership you are showing in bringing the various affected parties together to craft a just and workable approach to asbestos compensation.

Constitutional Analysis

Of course, a legislative project of this magnitude and complexity, affecting both so many injured or potentially injured individuals and the future financial stability of so many major American businesses, must be undertaken with care and sensitivity to all the various rights and interests involved. Fortunately, as the Supreme Court's repeated calls to action on this issue suggest, the Constitution gives Congress broad power to address national economic issues such as the current asbestos litigation morass. Obviously, given the current state of development of this complex legislation, the interrelationship of its various provisions, uncertainty concerning its final terms, and the often critical effect of concrete facts in evaluating particular legal arguments, it would not be appropriate at this time to offer concluded views about the constitutionality of particular provisions of the proposed legislation. It is, however, both possible and desirable to

lay out certain general principles that should not, I think, be controversial, and that may help provide a useful framework for the Committee's continuing deliberations.

To begin with, for the reasons noted above, and many others that could be adduced, it is clear that asbestos injuries, asbestos litigation, and asbestos liability have all had, and will continue to have, a dramatic effect on the national economy. Given the history and projected future of all aspects of the asbestos problem, there can be no serious doubt that Congress has not only ample reason to address these issues, but ample power to do so under its constitutional mandate "[t]o regulate Commerce . . . among the several States."[3] There is further no doubt that in pursuing proper national goals, Congress may, to the extent it deems necessary or desirable, preempt and supersede the operation of state law. These principles provide the foundation for the creation of the sort of exclusive national compensation system that would be created by the bill now before the Committee.

That system would, in effect, substitute a national administrative compensation mechanism for all claims based on the health effects of asbestos that are now pending in the tort system (including claims made against various bankruptcy trusts), and for all such claims that are made in the future. This substitution of public administrative compensation mechanisms for tort litigation to deal with particular sorts of problems has been a familiar feature of American law since the origins of workers' compensation systems toward the beginning of the last century, and as a general matter should not present constitutional difficulties.[4] It is important to note that different issues would be presented if the legislation sought to affect claims that have already been reduced to final money judgments that would no longer be subject to revision on appeal or

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[3] U.S. Const., Art. I, § 8, cl. 3.

[4] *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22 (1932); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

otherwise under the generally applicable rules of litigation governing the federal or state courts. As I understand current proposals, however, nothing in the legislation would affect the ability of the holder of such a final judgment to seek to collect it from the defendant against whom the judgment was rendered. The legislation would instead affect only claims that had not yet resulted in a final judgment -- or had not even been filed -- at the time of enactment.

From the point of view of current or future asbestos claimants, the proposed FAIR Act would provide adequate administrative process in the initial determination of claims for compensation under the Act, including processing by a claims examiner, fact-finding and a recommendation by a magistrate, and decision by a judge of the new Asbestos Court that the Act would establish under Article I of the Constitution. These procedures differ, of course, from those that apply in state or federal courts hearing tort cases; but they are appropriate in the context of administering a statutory compensation scheme. That scheme should, of course, at the same time provide claimants with very significant benefits in terms of speed, certainty, the ability to obtain comprehensive relief in one proceedings, relief from any responsibility for proving fault or responsibility on the part of a particular defendant, and associated savings in litigation expenses and other transaction costs.

Substantively, compensation under the FAIR Act would be linked to specified values for particular asbestos-related conditions, and all claims would be treated equally under one set of compensation rules. Some claimants might argue that they will receive less under the new national system than they might have recovered -- even net of attorneys' fees and other costs -- by pursuing their claims against various potentially responsible defendants through the tort system. The courts should not, however, be receptive to such arguments if they are raised in an attempt to challenge the constitutionality of the Act. The factual premises of the argument in any

given instance are likely to be speculative; and in any event, no individual claimant has any vested right in the continued existence or application of any particular rule of law, when Congress has otherwise validly chosen to preempt that law as part of its decision to enact a comprehensive national solution to a national problem.[5] In such a context, Congress has broad latitude to determine what amounts of compensation may fairly and reasonably be made available under the Act. In making that determination, Congress will of course take into account the significant harm that many individuals have suffered. It will also no doubt take into account, however, such additional factors as the demonstrated dysfunctionality of the standard tort system in dealing with asbestos claims; the considerable advantages that asbestos claimants will derive from the rationalization, unification, and simplification of the claims process; the limited resources ultimately available to pay all asbestos claims; and the need to ensure that those resources are effectively marshaled so as to provide fair treatment not only to persons who have developed actual asbestos-related injuries as of today, but also to persons whose actual injuries will manifest themselves only in years to come.

From the point of view of defendant companies, insurers, and reinsurers, the proposed FAIR Act would impose very substantial statutory funding obligations. On the other hand, three fundamental premises of the proposed Act are that it would immediately abolish the great mass of asbestos claims now pending in numerous state and federal jurisdictions all across the country; channel those claims and all future such claims to a single new national asbestos compensation system; and clearly define and cap the present and future asbestos liability of the defendant, insurer, and reinsurer participants in the system at the amounts each group is required to pay into the new national Fund under the Act. These advantages of relief from standard tort liability (and

[5] *See, e.g.*, *New York Central R.R. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.").

the large transaction costs associated with tort litigation), simplicity of administration, and certainty and finality of obligation substantially serve to offset the funding burden imposed by the Act. Moreover, this analysis highlights the important point that in designing this legislation, Congress is not so much imposing new liability as rearranging, rationalizing, and imposing new order and parameters on legal liabilities that already actually or arguably exist under conventional tort and contract principles. Particularly in that light, it is clear that Congress has broad power to impose the sort of funding obligations and related requirements contemplated by the FAIR Act, even when those actions may entail overriding, displacing, or modifying the application of previously existing legal or contractual rights, obligations, or expectations. In contexts such as this one, the Supreme Court has made clear, "[i]t is by now well established that legislative Acts adjusting the benefits and burdens of economic life . . . [are entitled to] a presumption of constitutionality, and that the burden is on one complaining of a [constitutional] violation to establish that the legislature has acted in an arbitrary and irrational way."[6]

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[6] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (rejecting due process challenge to imposition on coal mining companies of obligations to fund disability benefits for former employees); *see also, e.g.*, *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985) ("To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, the party complaining of unconstitutionality has the burden of demonstrating . . . [a substantial impairment warranting close review.] When the contract is a private one, and when the impairing statute is a federal one, this next inquiry is especially limited. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way." (citations and internal quotation marks omitted)); *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 639, 641-646 (1993) (rejecting due process and takings challenges to Multiemployer Pension Plan Amendments Act; "under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means"; no regulatory taking where plaintiff did not show that statutory funding burden was "out of proportion to its experience with the [pension] plan" before enactment, where plaintiff had "more than sufficient notice" that it was operating in a field in which recognized issues might ultimately lead to legislation, and where the challenged legislation was a "public program that adjusts the benefits and burdens of economic life to promote the common good" (internal

Of course, any final constitutional analysis would have to take proper account of the details of the way the Act determines the funding obligations of individual defendants, insurers, and reinsurers. That is beyond the scope of my testimony today, other than to note again that while the funding allocation mechanisms must not, of course, be arbitrary, irrational, or fundamentally unfair, the courts clearly would not hold them to any standard of "mathematical precision."[7] There is, accordingly, no constitutional requirement that Congress allow the perfect to become the enemy of the good in the process of designing a comprehensive solution to this complex national problem. That said, because it will likely be impossible to predict how the general standards embodied in the legislation will apply in every particular case, in my own view it would be desirable to include in the legislation appropriate mechanisms to allow for limited adjustments in cases in which a particular funding participant might be able to demonstrate clearly that a statutory standard would produce truly untoward results when applied in some unusual and unanticipated situation. It would also be desirable for the Committee to consider the adoption of reasonable transition rules to accommodate particular concerns that may be pointed out by the parties in interest to the legislation. Finally, the Committee should consider including in the legislation provisions designed to guide the exercise of remedial discretion by courts, and to limit and manage the impact on parties in interest and on the new national system, of any post-

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quotation marks omitted)); *compare Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-529 (1998) (plurality opinion) (although "Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties," statutory funding requirement constituted a taking where it imposed "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of th[e] liability [was] substantially disproportionate to the parties' experience" apart from the legislation); *id.* at 539-550 (Kennedy, J., concurring in the judgment) (rejecting takings analysis but concurring on due process theory, likewise focusing (at 549) on the "degree of retroactive effect" of the statute in "*creating* liability for events which occurred 35 years ago" (emphasis added)).

[7] *Concrete Pipe*, 508 U.S. at 639.

enactment decision preventing or limiting the enforcement of some particular portion or application of this complex legislation.

With those parting thoughts, let me once again commend you, Mr. Chairman, Senator Leahy, and members of the Committee, for your leadership in addressing this critical national problem. Congress clearly has the constitutional authority to bring order, fairness and finality out of the chaos, unfairness, and economic devastation that has unfortunately come to characterize asbestos litigation in the tort system. The time for concerted national action has clearly arrived, and I am tremendously heartened by the Committee's serious engagement with these issues. Much work remains to be done, but I have every confidence that if all the stakeholders work together with this Committee, together we can create a national asbestos compensation system that will be better for injured victims, better for defendants and insurers, better for our economy, and better for the country.

June 4, 2003

Testimony of Laura Welch, MD

Medical Director, Center to Protect Workers Rights

On Asbestos Related Diseases – Medical Criteria, Populations at Risk and Disease Projections

Before the Senate Judiciary Committee

June 4, 2003

Chairman Hatch, Senator Leahy and members of the committee, I want to thank you for the opportunity to appear before the committee to testify on medical and diagnostic criteria for asbestos-related diseases.

MY BACKGROUND

My name is Laura S Welch. I am a physician, board certified in internal medicine and occupational medicine, licensed to practice here in DC and in Maryland. For many years I have had an active medical practice and treated many workers with asbestos-related disorders. I am currently medical director for The Center To Protect Workers Rights, a research institute affiliated with the Building and Construction Trades department of the AFL-CIO. I am also the author of over 50 peer-reviewed publications and technical reports in the field of occupational and environmental medicine, and am currently an investigator on six research projects in the field. I have served as a consultant to many federal agencies, including OSHA, NIOSH, CDC and the NIH. I have special interest and experience in health and safety in the construction industry.

I have worked with several union-management committees on health and safety issues, including Boeing-United Auto Workers, and Rail Management and Rail Labor for the US railroad industry. Since 1987 I have worked with the Sheet Metal Occupational Health Institute (SMOHIT), a labor-management trust for the unionized segment of the sheet metal industry. SMOHIT has sponsored a medical examination program for sheet metal workers in the United States and Canada, to detect occupational lung disease and asbestos-related disease in particular. I have published several papers describing the findings of asbestos-related disease in this group of construction workers[1], and am now looking at changes in patterns of disease over time in order to

[1] Welch LS, Michaels D, and Zoloth S. Asbestos-Related Disease among Sheet Metal Workers. American Journal of Industrial Medicine 25:635-48, 1994;
Welch LS, Michaels D, and Zoloth S. Asbestos-Related Disease among Sheet Metal Workers: Preliminary Results of the National Sheet Metal Workers Asbestos Disease Screening Program. Annals of New York Academy of Sciences, Vol 64B pp 287-295 1991;
Hunting KL, Welch LS. Occupational exposure to dust and lung disease among sheet metal workers. Brit J Indust Med 50:432-442, 1993.

project disease rates into the future. Over the past several months I have been participating on behalf of the AFL-CIO in discussions with the Asbestos Study Group, interested insurance companies, and other parties on establishment of an administrative system for asbestos compensation.

THE LEGACY OF ASBESTOS

Decades of uncontrolled use of asbestos, even after its hazards were known, have resulted in an occupational disease crisis in the United States and throughout the world of monumental scope. In this country, from 1940 to 1979, 27.5 million workers were occupationally exposed to asbestos in shipyards, manufacturing operations, construction work and a wide range of other industries and occupations; 18.8 million of these having high levels of exposure [2]. As a result hundreds of thousands of workers and their family members have suffered or died of asbestos-related cancers and lung disease, and more than a million more cases are expected. In this year alone, in 2003, almost 10,000 people in the United States are expected to die from asbestos-related diseases. Because of the long lag between exposure and the development of cancer or other asbestos diseases, the asbestos disease epidemic is only now peaking, and will be with us for decades to come. There is no disputing the fact that many have died of asbestos related disease, and many more will die in the future. Everyone here today must agree that a remedy is needed; we now must agree on what remedy is fair and adequate.

OVERVIEW OF ASBESTOS RELATED DISEASE

There are several medical diseases that occur as a result of asbestos exposure. The ones of greatest concern and importance are pleural plaques and thickening; asbestosis; lung cancer; colon, laryngeal, pharyngeal cancer; and mesothelioma. For many workers, these diseases are disabling or fatal. For each disease there is a standard set of tests, and generally accepted criteria, for diagnosis.

Pleural Plaques and Thickening

Pleural plaques are also called pleural fibrosis, pleural thickening, and pleural asbestosis. A majority of persons with heavy exposure to asbestos develop pleural abnormalities. The pleura is a thin lining that surrounds the lung. Asbestos fibers that are breathed into the lung are transported to the outside of the lung and cause a scar to form in the pleural lining. When these scars reach a certain size they are visible on chest x-ray as a plaque.

Most of these plaques alone do not cause disability, but they do tell us that significant exposure has occurred, and that other asbestos related diseases may be present. However, some types of plaques can cause loss of lung function. Scars that involve the costophrenic angle, the angle between the base of the lung and the diaphragm, can cause loss of lung function, as can extensive plaques on both sides of the lung.

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[2] Nicholson WJ, Perkel G, Selikoff IJ., 2001, Occupational exposure to asbestos: population at risk and projected mortality--1980-2030. Am J Ind Med 1982;3(3):259-311

Parenchymal Asbestosis (Pulmonary Asbestosis)

Parenchymal asbestosis is a scar formation in the substance of the lung itself. These scars can interfere with lung function, for they block the transport of oxygen from the air in the lungs into the blood vessels that travel through the lungs. Oxygen can only cross the membranes of the lung if they are thin; asbestosis causes them to thicken. As a general rule the greater the exposure the more the disease, i.e. there is a dose-response relationship between exposure and disease. However, some people seem to form scars more readily and so we see a variety of disease from the same level of exposure.

These scars are visible on x-ray in most cases but certainly not all cases. High resolution CT scan of the chest can find disease not seen on a plain chest x-ray, and is becoming an important component of the standard practice for the diagnosis of asbestosis.

The International Labor Organization developed a way of grading chest x-rays for dust diseases of the lung. The most recent version is the1980 Classification of the Radiographic Appearance of Pneumoconioses (dust diseases of the lung). This system is accepted around the world. It provides a standard notation, so that if one reader calls a film a "1/1" another reader will know what the first reader is referring to. The classification uses a 12-point scale to define the degree, or severity, of increased lung markings. Classification of pleural changes (involvement of the membrane lining the chest wall and the lung) uses a separate scale, with specific notations made for side of the chest, whether or not the plaques contain calcium deposits, and the specific type, length, and width of the thickening of the pleura.

This 12-point scale runs from 0/- to 3/+; a "0" film is normal and a "3" film is the most severe scarring. Each reading on the scale is characterized by a number between 0 and 3, and a second number, separated by "/". The first number, preceding the "/", is the final number assigned to that film by that reader. The second number, following the "/", is a qualifier. The numbers 0, 1, 2, and 3 are the main categories. An x-ray read as a category 1 film might be described as 1/0, 1/1, or 1/ 2. When the reader uses 1/1, he is rating the film as a 1, and only considered it as a 1 film. If he uses 1/0, he is saying is rating the film as a "1", but considered calling it a "0" film before deciding it was category 1. Finally, when the reader uses 1/2, he is saying he is rating the film as a "1", but did consider calling it a "2" film. In clinical practice, any category "1" film is abnormal; therefore a 1/0 film is consistent with asbestosis. [3]

Even though the ILO system was designed to standardize reading x-rays for asbestosis, studies using the classification in asbestos exposed workers have found readers often disagree about classification of the same x-rays. Using the classification is somewhat of an art. Body size, weight, position of the person during the x-ray, and x-ray technique affect the amount of scarring that is visible on an x-ray. If an x-ray is less than perfect, one reader may think he can be sure scarring is present, while another cannot be sure and grades the film with a lower score for scarring.

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[3] International Labour Office (ILO) (1980): Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconiosis. Geneva, International Labour Office

The "best" readers agree 80% of the time with each other; 20% of the time they assign a different score to the same x-ray. If the scarring is extensive, a difference of one grade on the scale is not important. But if the x-ray shows less extensive scarring, a difference of one grade can be the difference between making diagnosis of asbestosis or deciding asbestosis is not present. For this reason experts agree that the x-ray alone should not be used to make a diagnosis of asbestosis; the examining physician should use the occupational and medical history, results of pulmonary function testing, and other medical data to reach a diagnosis. Experts also agree that asbestosis can be present in the lung even though the x-ray is normal using the ILO classification system.

High resolution computed tomography (HRCT) is now widely accepted as a diagnostic tool for asbestosis and asbestos-related pleural scarring. HRCT is an excellent technique for diagnosis of asbestosis and asbestos-related plaque. Recent studies show that readers using a scoring index were more accurate and reliable in the diagnosis of asbestosis that when using plain chest x-rays. [4] This study concluded that "the examined HRCT scoring method proved to be a simple, reliable, and reproducible method for classifying lung fibrosis and diagnosing asbestosis also in large populations with occupational disease, and it would be possible to use it as a part of an international classification". Expert consensus supports this conclusion.

Disease from asbestos is also detected on pulmonary function testing, and PFTs are used to quantity the level of lung impairment due to asbestosis. Asbestosis makes the lung stiffer and smaller, so the volume of air in the lungs is decreased. Oxygen transport as measured by the diffusion capacity is also decreased. Abnormalities are measured using spirometry, lung volumes, and gas exchange testing. Spirometry is reliable and reproducible when performed according to the specifications set by the American Thoracic Society (ATS) [5]. Determination of lung volumes can be done by the gas dilution method or by body plethysmography; both are standard measures and also are reliable and reproducible. The ATS also sets standards for diffusion capacity [6], which ensure uniformity among laboratories and reproducibility.

Asbestosis can affect each of these tests without necessarily showing an abnormality in the other two. Spirometry and total lung capacity both measure lung volume, but one may be abnormal while the second remains normal. The diffusion capacity measures a decrease in oxygen exchange in the lung, and so is measuring a different function of the lung than lung volumes. Asbestosis can just as easily be manifest with a decreased lung volume or a decrease in gas exchange; neither is a better, more sensitive or more accurate test, and both types of tests must be used in any set of diagnostic criteria. The diffusion capacity has been shown to correlate with the severity of fibrosis found on pathologic examination of the lung, and a reduction in diffusion capacity can precede x-ray changes.[7]

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[4] Scan J Work Environ Health 2001 27: 106-12

[5] American Thoracic Society. *Standardization of Sprirometry* 1994 update, published in the Amer J Resp Crit Care Med 1995; 152:1107-1136

[6] American Thoracic Society *Single Breath Carbon Monoxide Diffusion Capacity – Recommendation for a Standard Technique -1995 update.* published in the Amer J Resp Crit Care Med 1995; 152:2185-2198

[7] American Thoracic Society Statement on the Diagnosis of Non-Malignant Diseases Related to Asbestos, Amer

The changes in pulmonary function at times can be subtle, and test results should be interpreted by someone with experience in asbestos-related diseases. Pulmonary exercise testing can be used to clarify subtle abnormalities, and any compensation system must allow the examining physician to submit a medical report and rationale based on accepted medical tests. Because the diagnosis of asbestosis or any other asbestos-related disease can be made with a range of medical tests, it is essential that any compensation system include a medical panel to review cases that do not meet the most common diagnostic criteria. As just one example of a study that supports the need for a medical panel, Kipen reported that 18% of insulators who had asbestosis found on pathological examination the lung had a normal chest x-ray [8]. If we were to require a 1/0 film in all cases of asbestosis, these workers would be excluded. Pathological examination is not required in the absence of x-ray abnormalities; a combination of CT scan and exercise testing can reasonably approximate the specificity as tissue examination.

Once this scar formation takes place it is irreversible. It gets worse in some cases, even after exposure stops. Factors that are associated with worsening scarring include the severity of disease (the more the scarring, the more likely it is to get worse), and the amount and intensity of exposure to asbestos. Because of the damage to the lungs a person with asbestosis is at increased risk of lung infections and so should get regular medical care and influenza vaccines.

Determination of Impairment

Lung function can be measured accurately and reliably with pulmonary function testing. The American Medical Association has developed guidelines for the evaluation of impairment from many diseases including lung disease [9]. The AMA Guidelines have been incorporated into compensation systems in states, and are widely used by physicians. The diagnosis of asbestosis depends in part on characteristic findings on pathology, chest x-ray or CT scan, but impairment must be measured with pulmonary function testing.

The AMA Guide states that each worker should undergo spirometry and DLCO as part of the evaluation of impairment, and exercise testing can add additional information if needed. Using a combination of forced vital capacity (FVC), forced expiratory volume in one second (FEV1), DLCO, and oxygen consumption on exercise testing (VO_2max) the patient is placed into one of four levels. The first level under the AMA has no impairment, the second level is between the lower limits of normal lung function and 60% of normal; the third level is less than 60% and more than 50% of normal lung function; the most severe level is a loss of more than 50% loss of lung function. The illustration in the AMA Guide for the second level is a good example to use here:

Rev Resp Dis 1986: 134:383-388

[8] Kipen HM, Lilis R, Suzuki Y, Valciukas JA, Selikoff IJ Pulmonary fibrosis in asbestos insulation workers with lung cancer: a radiological and histopathological evaluation. : Br J Ind Med 1987 Feb;44(2):96-100

[9] Guides to the Evaluation of Permanent Impairment, 5th edition. American Medical Association 2001 AMA Press USA

Fifty four-year-old retired power plant mechanic with a history of asbestos exposure from age 18-37. He is short of breath when walking on level ground with other people his own age. His chest x-ray shows asbestos-related pleural changes, but no parenchymal asbestosis. His FVC is 64% of predicted, his FEV1/FVC ratio is 81%, and his DLCO is 78%.

This man has asbestos related disease. He has lung impairment significant enough to make him short of breath with normal walking; in my experience, this degree of impairment would make him unable to continue in a physically demanding job. As noted in the example, this man is retired at age 54. He would fall into the Manville Class III.

At the highest level using the AMA Guides, where the worker has lost more than 50% of lung function, the worker would be unable to perform activities of daily living, such getting dressed, taking a shower, cooking dinner, or any minimal work around the house. Most of this group will still be in Class III under Manville.

Not all workers with asbestosis will fit the specific criteria set by legislation; there must be a panel of physicians to review medical exceptions. All claimants with significant illness due to asbestos exposure will not be able to meet the eligibility criteria for the compensation categories in any program. Some may have died before the required testing could be completed. Others may have medical conditions that obscure or complicate the interpretation of the required testing. Rather than try to establish diagnostic criteria for each possible set of findings, a more efficient approach would be to establish a medical panel to review and reach determinations on these cases.

One example of a case that should be reviewed in this way is a worker who has demonstrable impairment but still has test results that are in the normal population range. Comparing an individual's results on spirometry, lung volumes and diffusion to the normal range for the population is how we generally determine impairment. In some cases we know the person's pre-disease lung function, and so can compare current testing to his own normal tests from the past. This comparison allows much better precision in estimating impairment. The AMA Guides explicitly state that "in individuals where the pre-injury or pre-disease values differ from the population listed values, the examiner may depart from the population listed normal values for determining an impairment rating..." Such a case would be reviewed by a medical panel.

Determining That Impairment on PFTs Is Caused By Asbestos

Asbestos scarring of the lung primarily causes a reduction in lung volume, leading to a reduction in FVC and total lung capacity on pulmonary testing (restrictive disease). Asbestosis also causes reduction in diffusion capacity, as discussed above. Smoking causes a reduction in air flow out of the lung (obstructive disease), and causes an increase in lung volume. Since the pattern of injury is different, we can establish medical criteria that differentiate asbestos-related diseases from smoking-related diseases. The ratio referred to as the FEV1/FVC ratio serves as a measure of the amount of obstructive lung disease present, and is an objective test that can be

incorporated into compensation criteria. Workers can have both diseases, and those workers should be compensated for the asbestos-related disease they do have.

Lung Cancer and Respiratory Cancers

All major types of lung cancer are caused by asbestos. Lung cancer is incurable in 90% of cases at the time of diagnosis, and these people usually die within a year. Numerous studies show that there is a dose-response relationship between exposure to asbestos and the risk of lung cancer, with increasing exposure leading to increasing risk of disease. Workers with asbestosis have a higher risk than other exposed workers, but the asbestosis may simply be a surrogate measure of exposure, for significant asbestos exposure is required to cause asbestosis. Asbestosis is not a necessary intermediary for development of asbestos related lung cancer. Workers with pleural plaque do not appear to be at higher risk for lung cancer than their co-workers with similar exposure who did not develop plaque. Pleural plaque is a convenient marker of prior exposure to asbestos, and so has been used as a surrogate for significant occupational exposure in bankruptcy settlement agreements, but the risk of lung cancer is not restricted to workers with pleural plaques.

The Helsinki Criteria [10] establish an exposure level of 25 fiber-years, or the equivalent exposure using an occupational history, as a level of exposure that significantly increases the risk of lung cancer. Several European countries have established this or a similar level of exposure as the criterion to be used for compensation of a lung cancer in an asbestos exposed worker.

Smoking and asbestos act in concert to cause lung cancer, each multiplying the risk conferred by the other. In a large study of asbestos insulation workers in North America, non-smoking asbestos workers were five times more likely to die from lung cancer, smokers not exposed to asbestos were approximately 10 times more likely to die from lung cancer, and asbestos workers who smoked were more than fifty times more likely to die from lung cancer. Asbestos workers who stopped smoking demonstrated a sharp decrease in lung cancer mortality [11]

Although smoking does increase the risk of lung cancer, this effect does not detract from the risk of lung cancer attributable to asbestos exposures. Any compensation system must affirm that when a worker has significant exposure to asbestos he is eligible for compensation for lung cancer.

The risk of cancer of the pharynx and larynx is also increased by asbestos exposure. Smoking also contributes to the development of these diseases, and the risk from asbestos is thought to multiply the risk from smoking as it does for lung cancer.

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[10] The Helsinki Criteria were developed in 1997 by an international group of experts, as a set of state of the art criteria for attribution of disease to asbestos exposure. (Scan J Work Environ Health 1997;23:311-6)

[11] Selikoff IJ and Seidman H. Asbestos associated deaths in the United States and Canada, 1967-1987. Ann NY Acad Sci 1991 643:1-14.

Colon Cancer and Gastrointestinal Cancer

There is also a higher incidence of cancers of the gastrointestinal tract among asbestos workers. In people exposed to asbestos for more than 20 years, the rate of colon cancer is increased by a factor of 2. It is important for all asbestos-exposed workers to have regular check-ups with their doctors, to look for early signs of colon cancer.

Mesothelioma

Mesothelioma is a rare cancer of the pleura, the lining of the lung, and the peritoneum, the lining of the abdomen, that occurs in persons exposed to asbestos. Mesothelioma can result from a limited exposure to asbestos. Virtually all of mesotheliomas in this country are caused by past exposure to asbestos. This cancer is almost impossible to treat and is usually fatal within 18 months of diagnosis.

POPULATIONS AT RISK AND PROJECTIONS OF FUTURE DISEASE

Central to the development of sound and appropriate policies to address the asbestos disease crisis is an understanding of the populations at risk and the extent of future disease that is likely to occur.

Nicholson, Perkel and Selikoff set the standard on this subject two decades ago at the Mt. Sinai School of Medicine [2]. Their analysis estimated that from 1940 to 1979, 27.5 million workers were occupationally exposed to asbestos, with 18.8 million of these having high levels of exposure. Groups at highest risk were insulators, shipyard workers (many who worked during World War II) and workers engaged in the manufacture of asbestos products. Other high- risk industries and occupations included other construction trades, railroad engine repair, utility services, stationary engineers, chemical plant and refinery maintenance, automobile maintenance and marine engine room personnel.

Many of these workers were in the group sometimes referred to as the "first wave" of asbestos exposed workers – those directly involved in the manufacture or installation of asbestos insulation or products before there were any control measures or standards in place. Exposures for some of these workers regularly exceeded 20 – 40 f/cc, levels that are 200 – 400 times the current OSHA standard of 0.1 f/cc, with exposures of several months resulting in an increased risk of mesothelioma and lung cancer.

The 1982 Nicholson analysis projected that the occupational exposures that occurred between 1940 and 1979 would result in 8,200 – 9,700 asbestos related cancer deaths annually, peaking in 2000, and then declining but remaining substantial for another 3 decades. Overall, the Nicholson study projected that nearly 500,000 workers would die from asbestos related cancers between 1967 and 2030.

It is important to point out that these projections did not include mortality or morbidity from non-

malignant asbestos diseases, which have or will affect even greater numbers of workers. Nor do these projections reflect the full risk of disease among populations who were exposed in the 1950's and 1960's, but didn't have sufficient latency for asbestos related diseases to be manifested at the time the Nicholson study was conducted. This includes many of the building trades and construction workers who not only installed asbestos products, but also were exposed during removal, demolition and renovation. This group is often referred to as the "second wave" of asbestos exposed workers, who account for much of the disease that is being manifested today. Similarly, the Nicholson study did not address the risk of exposures that occurred after 1979. While, OSHA and EPA regulations reduced asbestos exposures in the 1970's, strict regulation of asbestos did not occur until 1986. Moreover, non-compliance by some employers means, even today, that some workers are exposed to levels of asbestos that place them at increased risk of disease.

Due to the long latency of most asbestos related diseases (30 – 40 years or longer), many of the cases of disease that are being manifested today are among workers who were first exposed in the 1940's, 1950's and 1960's, before asbestos was regulated and controlled. It is worth noting that a major portion of the asbestos-related disease that is occurring is among workers who were exposed while in the military or employed in shipyards doing work for the government. In fact, review of Manville claims data for the period of 1995 – 2001 shows that more than 16 percent all lung cancer claims and more than 30 percent of all mesothelioma claims came from military personnel and shipyard workers. The federal government clearly played a major role in contributing to the asbestos disease crisis and should bear some responsibility in any asbestos disease compensation program.

Nicholson's work provides a good foundation for estimating the future cases of asbestos disease, and has been utilized in many of the models to develop future asbestos disease claims projections, including claims projections made by the ARPC for the Manville Trust. However, it is important to recognize that there is a good deal of uncertainty associated with these projections. That uncertainty is reflected in the wide range of future disease projected by Manville and others (ranging from a low of 750,000 future claims to a high of 2.6 million future claims) and the fact that past projections have generally proved to be too low.

There are a number of factors responsible for this uncertainty. As noted above, the Nicholson study and model projected cancer mortality related to asbestos. There have been no similar studies or estimates made for the non-malignant asbestos related diseases, such as asbestosis. All of the estimates in the projections for future disease and future claims for non-malignant disease have been based upon ratios of non-malignant disease to lung cancer cases or claims, not independent estimates of non-malignant disease.

Epidemiological evidence shows that hundreds of thousands of workers have developed and will develop non-malignant disease. The claims information from the Manville Trust shows the majority of claims from 1995 – 2002 were for non-malignant diseases. While we know that certain groups of workers are at increased risk, and that these diseases will decrease as a result of reduced exposures, the extent and magnitude of non-malignant asbestos disease is not as well

defined as the malignant diseases.

I would add that a recent analysis I conducted of data available from a national screening program for sheet metal workers shows a direct relationship between the decade these workers started work and the prevalence and severity of non-malignant disease. Workers who started work in the 1960's and 1970's have much less disease than workers with the same length of employment in the trade who began work in the 1940's and 1950's. Based upon this data, and what we know about the reduction in asbestos exposures overtime, it appears that once we get through this next decade, when large numbers of cases are still expected, that the non-malignant diseases may fall off at a faster rate than what some of the estimates have projected.

Another factor that contributes to the uncertainty of asbestos claims projections relates to the number of individuals with disease who will file claims. All of the asbestos disease claims models are driven in large measure by past claims experience. That is, the models base future claims projections on what has happened in the past. For example, based upon past experience, the ARPC high-end estimate for future lung cancer claims assumes that 23 percent of individuals with asbestos-related lung cancers will file claims. While this may be a reasonable assumption, it is also quite possible that the claims filing experience in the future may change, which could lead to greater or fewer numbers of claims.

To be sound and fair, any asbestos disease compensation legislation must address this uncertainty and build in mechanisms to guarantee full coverage for all valid claims, even if claims exceed projected numbers.

SPECIFIC COMMENTS ON S 1125

S 1125 establishes medical criteria and an administrative mechanism for compensation of asbestos-related diseases. This bill mirrors the in large measure the medical criteria of the Manville 2002 Trust Distribution Process, but adds other requirements that narrow the group of workers who are eligible and make the application process much more burdensome. It also sets levels of compensation that are lower than total claims values and awards available in the current system. Overall, as constructed the bill will exclude the vast majority of workers with asbestos-related diseases from receiving any compensation, and provide very low levels of compensation for workers who have significant impairment and fatal diseases.

The serious shortcomings of S 1125 include the following:

1. S 1125 relies in large measure on the medical criteria in the Manville 2002 TDP. The criteria in the 2002 TDP are much more restrictive than the criteria in the 1995 Manville TDP, which in my view were medically sound. Changes in the medical criteria between 1995 and 2002 included the removal of the tests that are the most sensitive for diagnosis of asbestos-related diseases, including oxygen diffusion and CT scans. For example, the medical literature states clearly that the DLCO is often the first test to become abnormal in asbestosis; this test was removed from the 2002

medical criteria. The effect of these changes will be to reduce the number of workers who qualify for compensation. Such changes may be appropriate in the context of a bankruptcy trust that is running out of money and has to decide how to allocate limited resources; that is a decision to be made by the Trust. But, any new system should be based soundly in medicine, and allow for the use of all medically recognized diagnostic tests.

2. S 1125 requires claimants to receive a diagnosis from a "treating" physician, instead of permitting diagnosis by a qualified physician as is required by the Manville Trust. The use of the term "treating" in S 1125 implies that there must be a continuing relationship between the asbestos exposed worker and the doctor submitting the report. A pulmonary specialist who examines a patient and makes recommendations back to the patient's primary care doctor is not a treating physician. Most occupational medicine specialists serve as consultants to the patient's treating physician. Our health care system encourages each patient to have one treating physician with other physicians acting in consultation, so that care is coordinated; this is also sound medical practice. However, we want the diagnosis of asbestosis to be made by the most qualified physician, even if that physician is not the patient's primary care doctor.

3. As part of the medical diagnosis, S 1125 requires independent verification of the duration, proximity, regularity and intensity of exposure. Physicians do not have any way of independently verifying exposures that occurred 30 – 40 years ago, if by "independent" the legislation means from a source other than the worker. There generally are no records of air monitoring, nor is there any practical way a physician could verify the worker's exposure. The American Thoracic Society Statement on the Diagnosis of Non-Malignant Diseases Related to Asbestos [3], describes the details a physician should elicit in taking an occupational history from the asbestos-exposed worker. The ATS says the physician should obtain a reliable history of exposure, but does not suggest the physician attempt to look at other data sources. The existing bankruptcy trusts have mechanisms for assuring the validity of the worker's history of exposure to asbestos; this review is performed by the trust, not by the physician.

4. S. 1125 imposes other heavy evidentiary burdens that are difficult if not impossible to meet. Claimants are required to submit a detailed description of their asbestos exposure, including product identification information. If this is a no-fault system, there is no need for product identification.

   The bill also requires that original x-rays and spirometric tracings be submitted with every claim, which seems to indicate that every claim will be subject to independent medical review. This level of review is unnecessary and will lead to conflicts and delays. Manville and other trusts require only the physician diagnosis and summary of exposure history. Detailed records are only required on a case-by-case basis when individual medical review is deemed to be warranted. This same type of approach

should be followed in any national asbestos trust.

5. Both the Manville 2002 TDP and S 1125 require a 2/1 film as part of the definition of severe asbestosis. This requirement is not medically based. The density of parenchmal disease on chest x-ray has not been shown to correlate with impairment, and impairment can be directly measured with pulmonary function testing. Once the diagnosis of asbestosis is established, pulmonary function testing should be used to determine severity. At the highest level of impairment using the AMA Guides, where the worker has lost more than 50% of lung function, the AMA Guides describe that the patient would be unable to perform activities of daily living, such getting dressed, taking a shower, cooking dinner, or any minimal work around the house. Most of this group will still be in Class III under S 1125, and receive an award of $40,000 (reduced by collateral offsets). Clearly, compensation should be commensurate with impairment and disability, which is not the case under S 1125. The American Thoracic Society is finalizing diagnostic criteria for asbestosis, and these criteria should be incorporated into legislation when they are available.

6. S 1125 requires occupational exposure to asbestos prior to Dec. 31, 1982. This date makes senses as part of the Manville TDP since payments from that trust fund are keyed to exposure to Manville products specifically. It makes no sense as part of this legislation; as written the bill would exclude all asbestos victims from compensation if exposed on or after Jan. 1, 1983.

7. S 1125 appears to incorporate the Manville 2002 criteria for lung cancer, but sets very different levels of compensation. Manville 2002 assumes that the usual lung cancer victim will have been a smoker as well as having being exposed to asbestos; non-smokers are expected to apply for additional levels of compensation. This is a sound assumption given the fact that a large proportion of the asbestos exposed population were smokers and the fact that 90- 95% of all asbestos related lung cancers occur among smokers. S 1125 sets a very low value of $100,000 for lung cancer in a smoker (reduced by collateral offsets). By comparison, under the Manville Trust the scheduled claims value for a lung cancer in a smoker that meets the criteria of Level VII is approximately $ 285,000 - $380,000 (assuming that Manville's values represent one-quarter to one-third of a total claim value). It is important to treat all asbestos-related disease victims fairly, including those who were or are smokers. As described above, we can identify the lung cancers for which asbestos was a significant contributing factor, among smokers and non-smokers.

8. Level II as defined by S 1125 includes many workers with significant impairment, but there is no compensation awarded for this group of workers. This level includes workers with definite asbestosis who do not have a reduction in TLC or FVC below 80%. It also includes workers who have asbestosis combined with obstructive lung disease. Workers with asbestosis have a significant injury, and this group of workers now receives compensation from bankruptcy trusts and though a tort action. Sound

medical criteria will identify those workers who have asbestosis, even if they also have some lung disease from smoking. Denying any compensation to this group of workers is not appropriate.

9. S 1125 limits compensation to those individuals who meet the medical and exposure criteria set forth in the bill. There is no provision for medical exceptions or for individuals to seek individual evaluation for their claims. As noted above, not all individuals with asbestos-related disease fall within the categories defined by S 1125, particularly given its restrictive criteria that exclude accepted diagnostic tests. One of the groups who generally will not meet the exposure requirements set forth in the bill are family members who develop disease as a result of take-home exposures. The Manville Trust and other trusts proved for medical exceptions and individual evaluation of claims. Any national asbestos trust should also do so.

10. S 1125 includes no funding mechanism to ensure that all valid claims to the trust will receive compensation. As discussed, there is a great deal of uncertainty in the projections of future disease and claims, and the experience to date is that such projections have underestimated the numbers of disease claims. Any national trust must guarantee that victims of asbestos-related diseases receive full, fair and timely compensation for their diseases, particularly if it is the exclusive remedy for such claims. It is simply not acceptable or fair for the victims to bear the risk if disease and claims exceed current projections.

I appreciate the opportunity to appear before the committee today. I hope this testimony has helped you understand that asbestos-related diseases are real, and are affecting thousands of Americans every year in this country. These men and women went to work every day, helping build ships for our wars, power plants for our cities, the cars that we drive, and homes and schools for other Americans. I hope you see that there are accepted medical criteria for diagnosis of each of these asbestos-related diseases, which can be readily codified into an administrative compensation system. Any such system should be based on these medical criteria, and provide for fair, timely and guaranteed compensation to workers and others who have been made sick as a result of asbestos exposure. Thank you.