

## **Calendar No. 239**

108TH CONGRESS }  
*1st Session*

SENATE

{ REPORT  
108–118

**THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT  
OF 2003**

JULY 30 (legislative day, JULY 21), 2003.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary,  
submitted the following

## R E P O R T

together with

## ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1125]

The Committee on the Judiciary, to which was referred the bill (S. 1125) to create a fair and efficient system to resolve claims of victims for bodily injury caused by asbestos exposure, and for other purposes, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

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## I. PURPOSES

The Fairness in Asbestos Injury Resolution Act of 2003 “FAIR Act” S. 1125, is essential legislation that is needed to fix a broken system. It will create an alternative, but fair and efficient system to resolve the claims of victims for bodily injury caused by asbestos exposure. It is intended to bring uniformity and rationality to the system so that resources are directed toward those who are truly sick. It is also intended to provide economic stability by stemming the tide of runaway asbestos litigation that has clogged our courts, bankrupted companies, compensated those who are not sick at the expense of those who are, and endangered the jobs and pensions of employees.

The FAIR Act, S. 1125, has five key components:

First—S. 1125 compensates legitimate asbestos victims faster and on a “no-fault” basis. Under the FAIR Act, asbestos victims’ claims are resolved under specific time limits that enable claims to be processed in under a year, not including appeals—which are also required to be timely resolved. In the tort system today, victims face delay and unpredictable results. Currently, victims must bear the burden of identifying a specific product, proving that it caused their illness and showing culpability of a particular defendant, usually years after the exposure occurred. Moreover, suits by unimpaired claimants have bankrupted companies and diminished the funds available for the truly ill. Often times there is no identifiable party for a claimant to sue, either because the culpable party has been driven into bankruptcy or it is impossible to identify the cause of the claimant’s exposure. And when a suit is filed, it is usually several years before claimants see resolution, and far from certain that they will obtain compensation. Under S. 1125, victims will receive timely and certain compensation on a “no fault” basis. They will not need to prove causation or culpability or find a solvent party in order to be compensated. Instead, with this legislation they need only satisfy the eligibility requirements under the Act in order to receive compensation or medical monitoring reimbursement. S. 1125 establishes fair and balanced eligibility criteria to ensure that the \$108 billion privately financed Asbestos Injury Claims Resolution Fund (the “Fund”) directs compensation to those who are truly sick as a result of their exposure to asbestos. The mass screenings and other abuses in the current litigation system will be replaced with a sound medical diagnosis of an asbestos-related disease by the claimant’s physician. The FAIR Act also takes into consideration that the most seriously ill should receive priority and provides for expedited payments. There are special exceptions for claimants in unique circumstances whose injuries are also asbestos-related, but who cannot, through no fault of their own, meet the requirements of the Act. The medical monitoring that will be available under the FAIR Act for those who have been exposed but are not sick preserves resources for those same claimants for the time, if and when, they become sick. The streamlined administra-

tive process also diminishes the need for large attorney fees that currently can deplete claimant awards by as much as 40%.

Second—S. 1125 provides certainty to asbestos victims. In the current system, claimants who are legitimately sick have no certainty they will ever be compensated due to the increasing number of bankrupt companies and the long delays of current litigation. While some may receive high awards, others receive nothing at all. S. 1125 sets up a \$108 billion fund that is based on sound statistical data and is projected to be more than adequate to compensate all present and future eligible claims. To compound that certainty, S. 1125 includes several contingent additional funding mechanisms to address any unanticipated needs of the Fund.

Third—S. 1125 provides economic stability and preserves jobs and pensions by offering certainty to defendants and insurers. The FAIR Act ensures that the allocation of payments into the fund will be fair, rational, and predictable. Companies are unable to plan for asbestos litigation spending because of the irrationality and unpredictability of the current tort system. Even companies with the most tangential relationship to asbestos have been crushed under the weight of overwhelming litigation, driving many into bankruptcy and hurting employees and investors. The legal burden of compensating victims and paying unimpaired claims is distributed irrationally. With most of the original asbestos manufacturers bankrupt, companies with little relationship to asbestos are targeted with massive suits. Insurers and reinsurers are affected as well, increasingly threatened with insolvency due to the current crush of asbestos claims. Under S. 1125, in return for contributing significant amounts of money to the Fund, businesses will be able to move forward, a step that will preserve jobs and pensions and result in broad economic benefits. An administrative system will provide for fair, balanced, reasonable, and predictable allocation of payments by defendant companies and their insurers.

Fourth—S. 1125 ensures that the fund will be administered simply, fairly, and efficiently. The tort system today is backlogged and manifestly unfair. The flood of lawsuits in the tort system, moreover, has led to unacceptable delays; some seriously ill plaintiffs even die before their suits are resolved.<sup>1</sup> One such victim was Texas resident Ronald Bailey who died of mesothelioma in June of 2000, about two months before his scheduled trial date.<sup>2</sup> Under S. 1125, claims will be processed efficiently and fairly by the U.S. Court of Federal Claims through a newly established Office of Special Asbestos Masters, pursuant to clear standards. Under this streamlined system, a Special Asbestos Master will determine eligibility and payments based on fair and balanced eligibility criteria, including a sound medical basis for all claims, and payments will be issued by the Fund which will be run by an Administrator solely for the benefit of asbestos victims.

Finally—S. 1125 bans harmful asbestos to help prevent future illnesses. Although the use of asbestos has largely been reduced by federal regulations it has not been eliminated. The FAIR Act seeks

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<sup>1</sup> See Stephen J. Carroll, et al., Rand Institute for Civil Justice, “Asbestos Litigation Costs and Compensation: An Interim Report,” 35 (2002). [Hereinafter RAND 2002].

<sup>2</sup> Thomas Korosec, Enough to Make You Sick: In the struggle for a shrinking pot of money from asbestos litigation, the sickest victims are getting nickels and dimes while lawyers get their millions, Dallas Observer, Sept. 26, 2002.

to eliminate the risks of future injuries from asbestos use by prohibiting any further manufacture, processing, and distribution in commerce of harmful asbestos-containing products, subject to certain exceptions. S. 1125 would also require that prohibited asbestos-containing products be disposed of pursuant to federal, state and local requirements within three years of the date of enactment to ensure that such products are no longer in the stream of commerce.

Above all, the purposes of this legislation are to ensure that people who become sick as a result of exposure to asbestos are compensated surely, fairly, and quickly, while protecting the economic viability of defendants, and the employees, investors, and the communities that depend on them.

## II. LEGISLATIVE HISTORY

The asbestos litigation crisis has been under consideration by Congress for many years with several hearings and multiple legislative proposals. The most recent events that led to the introduction of S. 1125, The Fairness in Asbestos Injury Resolution Act of 2003 (FAIR Act), began in the 107th Congress when then Chairman Leahy held a hearing on September 25, 2002, "Asbestos Litigation." At that time the Committee heard testimony from Senator Max Baucus (D-MT) and Senator Ben Nelson (D-NE) as well as witnesses Fred Barron, Steven Kazan, General Counsel of the AFL-CIO Jonathan Hiatt, General Counsel of the Manville Personal Injury Settlement Trust David Austern, and former Solicitor General Walter Dellinger III. Chairman Hatch followed up with another hearing on March 5, 2003 "The Asbestos Litigation Crisis: It Is Time for Congress to Act" and testimony was given by Senator Max Baucus (D-MT) and Senator George Voinovich (R-OH) and witnesses Melvin McCandless, Brian Harvey, David Austern, President-elect of the American Bar Association Dennis Archer, Steven Kazan, and Jonathan Hiatt.

S. 1125 the "Fairness in Asbestos Injury Resolution Act of 2003 (FAIR Act)" was introduced in the Senate on May 22, 2003 by Chairman Orrin Hatch (R-UT), Senator Ben Nelson (D-NE), Senator Mike DeWine (R-OH), Senator Zell Miller (D-GA), Senator George Voinovich (R-OH), Senator George Allen (R-VA), Senator Saxby Chambliss (R-GA) and Senator Chuck Hagel (R-NE) and reported to the Judiciary Committee. Chairman Hatch held a hearing on S. 1125 on June 4, 2003 "Solving the Asbestos Litigation Crisis: S. 1125 the Fairness in Asbestos Injury Claims Resolution Act of 2003 (FAIR Act)" and the committee heard testimony from Senator Patty Murray (D-WA), Senator Chuck Hagel (R-NE) and from witnesses Professor Laurence H. Tribe, Dr. James Crapo, Dr. Laura Stewart Welch, Dr. John E. Parker, Jennifer L. Biggs, FCAS, MAAA, Dr. Mark A. Peterson, Prof. Frederick C. Dunbar, Prof. Eric D. Green and Dr. Robert Hartwig.

S. 1125 was considered by the committee during Executive Business meetings held on June 19, 24, 26, 2003 and July 10, 2003. The Committee approved S. 1125 on July 10, 2003 by a rollcall vote of 10 yeas, 8 nays and 1 pass. The Committee then ordered S. 1125 favorably reported with amendments.

### III. VOTES OF THE COMMITTEE

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each Committee is to announce the results of rollcall votes taken in any meeting of the Committee on any measure or amendment. The Senate Judiciary Committee, with a quorum present, met on June 19, 24, 26, 2003 and July 10, 2003 at 9:30 am to markup S. 1125. The following votes occurred on S. 1125.

**Vote on: Agreed Upon Amendments:** Indexing all awards for future inflation; removing collateral source offsets; doubling the statute of limitations; coverage for claimant exposures on U.S. flag ships or while working for U.S. companies overseas; strengthening enforcement of contributions; recoupment authority for the administrator; criminal penalties for fraud or false information; bankruptcy certification; congressional oversight—administrator annual reports; and, Hatch technical amendments to S. 1125.

Date of markup: June 24, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	
Mr. Specter .....	X
Mr. Kyl .....	
Mr. DeWine .....	
Mr. Sessions .....	
Mr. Graham .....	
Mr. Craig .....	X
Mr. Chambliss .....	
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	X
Mr. Biden .....	
Mr. Kohl .....	
Mrs. Feinstein .....	X
Mr. Feingold .....	X
Mr. Schumer .....	
Mr. Durbin .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

**Vote on: Agreed Upon Amendments:** Hatch Asbestos Ban; Feinstein Second Degree to Hatch Asbestos Ban; Leahy FOIA amendment for the Commission; and, Leahy FOIA amendment for the Office of Asbestos Injury Claims Resolution.

Date of markup: June 24, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	
Mr. Specter .....	X
Mr. Kyl .....	
Mr. DeWine .....	
Mr. Sessions .....	
Mr. Graham .....	
Mr. Craig .....	X
Mr. Chambliss .....	
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	X
Mr. Biden .....	
Mr. Kohl .....	
Mrs. Feinstein .....	X

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Feingold .....	X
Mr. Schumer .....	
Mr. Durbin .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

**Vote on: Leahy/Hatch Medical Criteria Amendment.**

**Date of markup: June 24, 2003.**

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	X
Mr. Specter .....	
Mr. Kyl .....	
Mr. DeWine .....	X
Mr. Sessions .....	
Mr. Graham .....	
Mr. Craig .....	X
Mr. Chambliss .....	
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	X
Mr. Biden .....	
Mr. Kohl .....	
Mrs. Feinstein .....	X
Mr. Feingold .....	X
Mr. Schumer .....	
Mr. Durbin .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

**Vote on: Agreed Upon Amendments: Grassley/Leahy/Feinstein/Durbin Asbestos Court Amendment; Grassley Federal Liability Amendment; Leahy Environmental Crimes Amendment; and Leahy Successor in Interest Amendment.**

**Date of markup: June 24, 2003.**

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	
Mr. Specter .....	X
Mr. Kyl .....	
Mr. DeWine .....	X
Mr. Sessions .....	
Mr. Graham .....	
Mr. Craig .....	X
Mr. Chambliss .....	
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	X
Mr. Biden .....	
Mr. Kohl .....	
Mrs. Feinstein .....	X
Mr. Feingold .....	X
Mr. Schumer .....	
Mr. Durbin .....	
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

**Vote on: Durbin/Kyl Hardship Amendment that would double the caps for the financial hardship and inequity adjustments; permits**

the inequities panel to consider a participant's litigation successes when assessing prior asbestos expenditures; and requires a reduction in contribution allocation if a participant's exposure was remotely attenuated under certain circumstances.

Date of markup: June 24, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	
Mr. Specter .....	X
Mr. Kyl .....	
Mr. DeWine .....	X
Mr. Sessions .....	X
Mr. Graham .....	
Mr. Craig .....	X
Mr. Chambliss .....	X
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	X
Mr. Biden .....	
Mr. Kohl .....	
Mrs. Feinstein .....	X
Mr. Feingold .....	X
Mr. Schumer .....	
Mr. Durbin .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

Vote on: Sessions Pro Bono Amendment that would require the Asbestos Court to provide information to claimants of the availability of pro bono representation. Attorneys would have to provide notice of pro bono representation.

Date of markup: June 24, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	
Mr. Specter .....	X
Mr. Kyl .....	
Mr. DeWine .....	X
Mr. Sessions .....	X
Mr. Graham .....	
Mr. Craig .....	X
Mr. Chambliss .....	X
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	
Mr. Biden .....	
Mr. Kohl .....	
Mrs. Feinstein .....	X
Mr. Feingold .....	X
Mr. Schumer .....	
Mr. Durbin .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

Vote on: Kohl/Feinstein Contingent Call Amendment, which would require reductions of participants' contributions if the Administrator can certify the fund has and will continue to fully pay compensation awards. The amendment also allows the Administrator, if necessary, to request \$1 billion in the aggregate from defendant participants and \$1 billion from insurer participants beginning in the 28th year. This is a voluntary contribution, whereby

non-payment subjects the participant to the tort system. If this occurs, the statute of limitations is tolled. This amendment was amended with a Hatch 2nd degree amendment, allowing defendant companies to continue paying into the fund after year 27 or else re-enter the tort system in Federal Court only.

Date of markup: June 26, 2003.

[Approved—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	
Mr. Specter .....	X
Mr. Kyl .....	X
Mr. DeWine .....	X
Mr. Sessions .....	X
Mr. Graham .....	
Mr. Craig * .....	X
Mr. Chambliss .....	X
Mr. Cornyn * .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	
Mr. Biden .....	
Mr. Kohl .....	X
Mrs. Feinstein .....	X
Mr. Feingold .....	
Mr. Schumer .....	
Mr. Durbin * .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

\* Members indicated opposed the Amendment.

Vote on: Kyl Lock Box Amendment, that would insert a new Sec. 223(e) into S. 1125, as amended with new Hatch criteria, that requires a “lock box account” to ensure compensation will be available for claimants who fall into specified medical criteria categories with more significant impairment.

Date: June 26, 2003.

[Approved by a vote of 10 yeas, 9 nays]

Members	Yea	Nay
Mr. Grassley .....	P	
Mr. Specter .....	X	
Mr. Kyl .....	X	
Mr. DeWine .....	X	
Mr. Sessions .....	X	
Mr. Graham .....	X	
Mr. Craig .....	X	
Mr. Chambliss .....	X	
Mr. Cornyn .....	X	
Mr. Leahy .....		X
Mr. Kennedy .....		P
Mr. Biden .....		P
Mr. Kohl .....		P
Mrs. Feinstein .....		P
Mr. Feingold .....		P
Mr. Schumer .....		P
Mr. Durbin .....		P
Mr. Edwards .....		P
Mr. Hatch, Chairman .....	X	

Vote on: Hatch Insurance Commission Amendment that would amend the Asbestos Insurance Commission by broadening criteria considered in allocations, clarifying insurer and re-insurer obligations.

**Date of markup: June 26, 2003.**

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	
Mr. Specter .....	X
Mr. Kyl .....	X
Mr. DeWine .....	X
Mr. Sessions .....	X
Mr. Graham .....	X
Mr. Craig .....	X
Mr. Chambliss .....	X
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	
Mr. Biden .....	
Mr. Kohl .....	
Mrs. Feinstein .....	
Mr. Feingold .....	
Mr. Schumer .....	
Mr. Durbin .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

**Vote on: Agreed Upon Amendments: Hatch/Leahy Takehome Exposure Amendment; Revised Hatch Congressional Findings Amendment; Hatch Insurer Commission and Asbestos Ban Technical/Non-technical Amendments and the Hatch Technical Amendment for Tier I Allocation.**

**Date of markup: July 10, 2003.**

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	X
Mr. Specter .....	X
Mr. Kyl .....	X
Mr. DeWine .....	
Mr. Sessions .....	X
Mr. Graham .....	
Mr. Craig .....	
Mr. Chambliss .....	X
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	X
Mr. Biden .....	
Mr. Kohl .....	
Mrs. Feinstein .....	
Mr. Feingold .....	
Mr. Schumer .....	
Mr. Durbin .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

**Vote on: Leahy/Kennedy Claims Value Amendment would increase awarded values for the 10 disease categories under the bill.**

**Date: July 10, 2003.**

[Defeated by a vote of 10 nays, 9 yeas]

Members	Yea	Nay
Mr. Grassley .....		X
Mr. Specter .....		X
Mr. Kyl .....		X
Mr. DeWine .....		X

[Defeated by a vote of 10 nays, 9 yeas]

Members	Yea	Nay
Mr. Sessions .....	.....	X
Mr. Graham .....	.....	P
Mr. Craig .....	.....	P
Mr. Chambliss .....	.....	X
Mr. Cornyn .....	.....	X
Mr. Leahy .....	X	.....
Mr. Kennedy .....	X	.....
Mr. Biden .....	P	.....
Mr. Kohl .....	X	.....
Mrs. Feinstein .....	X	.....
Mr. Feingold .....	P	.....
Mr. Schumer .....	P	.....
Mr. Durbin .....	X	.....
Mr. Edwards .....	X	.....
Mr. Chairman .....	.....	X

**Vote on: Feinstein \$108 Billion Claims Values Amendment would raise the amount of money many victims can recover under the fund with an aggregate cost of \$108 billion.**

Date: July 10, 2003.

[Defeated by a vote of 10 nays, 9 yeas]

Members	Yea	Nay
Mr. Grassley .....	.....	X
Mr. Specter .....	.....	X
Mr. Kyl .....	.....	X
Mr. DeWine .....	.....	P
Mr. Sessions .....	.....	X
Mr. Graham .....	.....	X
Mr. Craig .....	.....	X
Mr. Chambliss .....	.....	X
Mr. Cornyn .....	.....	X
Mr. Leahy .....	X	.....
Mr. Kennedy .....	P	.....
Mr. Biden .....	P	.....
Mr. Kohl .....	P	.....
Mrs. Feinstein .....	X	.....
Mr. Feingold .....	P	.....
Mr. Schumer .....	P	.....
Mr. Durbin .....	X	.....
Mr. Edwards .....	X	.....
Mr. Chairman .....	.....	X

**Vote on: Graham/Feinstein/DeWine Claims Values Amendment with new values.**

Date: July 10, 2003.

[Approved by a vote of 14 yeas, 3 nays, 2 voting pass]

Members	Yea	Nay
Mr. Grassley .....	.....	P
Mr. Specter .....	X	.....
Mr. Kyl .....	.....	X
Mr. DeWine .....	X	.....
Mr. Sessions .....	.....	P
Mr. Graham .....	X	.....
Mr. Craig .....	X	.....
Mr. Chambliss .....	P	.....
Mr. Cornyn .....	X	.....
Mr. Leahy .....	X	.....
Mr. Kennedy .....	P	.....
Mr. Biden * .....	.....	.....
Mr. Kohl .....	P	.....

[Approved by a vote of 14 yeas, 3 nays, 2 voting pass]

	Members	Yea	Nay
Mrs. Feinstein .....		X	.....
Mr. Feingold .....		P	.....
Mr. Schumer .....		P	.....
Mr. Durbin .....		X	.....
Mr. Edwards *	.....		
Mr. Chairman .....		X	.....

\* Voting pass.

**Vote on: Kohl/Leahy Financing Amendment** that would increase the amount of contributions to the Fund by defendant and insurer allocations from \$45 billion to \$52 billion each and strikes the “additional contributing participants” section (Sec. 225).

Date of markup: July 10, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

	Members	Present
Mr. Grassley .....		.....
Mr. Specter .....		X
Mr. Kyl .....		X
Mr. DeWine .....		X
Mr. Sessions .....		.....
Mr. Graham .....		X
Mr. Craig .....		X
Mr. Chambliss .....		.....
Mr. Cornyn .....		.....
Mr. Leahy .....		X
Mr. Kennedy .....		.....
Mr. Biden .....		X
Mr. Kohl .....		.....
Mrs. Feinstein .....		X
Mr. Feingold .....		.....
Mr. Schumer .....		.....
Mr. Durbin .....		X
Mr. Edwards .....		.....
Mr. Hatch, Chairman .....		X

**Vote on: Feinstein Start-up Amendment** would provide that none of the preemption, removal or dismissal provisions of the bill would become effective until the Trust Administrator determines that the fund is fully operational and processing claims. This amendment was approved subject to Kyl provisions prohibiting claimant double dipping and the offsetting of payments made by defendants and insurers post enactment but prior to the fund being up and running.

Date of markup: July 10, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

	Members	Present
Mr. Grassley .....		.....
Mr. Specter .....		X
Mr. Kyl .....		X
Mr. DeWine .....		X
Mr. Sessions .....		.....
Mr. Graham .....		X
Mr. Craig .....		X
Mr. Chambliss .....		X
Mr. Cornyn .....		X
Mr. Leahy .....		X
Mr. Kennedy .....		.....
Mr. Biden .....		X
Mr. Kohl .....		.....

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mrs. Feinstein .....	X
Mr. Feingold .....	
Mr. Schumer .....	
Mr. Durbin .....	X
Mr. Edwards .....	
Mr. Hatch, Chairman .....	X

**Vote on:** Durbin Mesothelioma Amendment would exempt from trust fund and leave in the tort system pending claims dealing with levels IV through VIII which were filed on or before the FAIR Act was introduced.

Date: July 10, 2003.

[Defeated by a vote of 10 nays, 9 yeas]

Members	Yea	Nay
Mr. Grassley .....		P
Mr. Specter .....		X
Mr. Kyl .....		P
Mr. DeWine .....		X
Mr. Sessions .....		P
Mr. Graham .....		X
Mr. Craig .....		X
Mr. Chambliss .....		X
Mr. Cornyn .....		X
Mr. Leahy .....	X	
Mr. Kennedy .....	P	
Mr. Biden .....	X	
Mr. Kohl .....	P	
Mrs. Feinstein .....	X	
Mr. Feingold .....	P	
Mr. Schumer .....	P	
Mr. Durbin .....	X	
Mr. Edwards .....	P	
Mr. Chairman .....		X

**Vote on:** Durbin Federal Employers' Liability Act (FELA) Amendment removes the FAIR Act's preemption of FELA claims for asbestos injuries, and would leave those claims in the tort system.

Date: July 10, 2003.

[Defeated by a vote of 10 nays, 9 yeas]

Members	Yea	Nay
Mr. Grassley .....		P
Mr. Specter .....		X
Mr. Kyl .....		P
Mr. DeWine .....		X
Mr. Sessions .....		P
Mr. Graham .....		X
Mr. Craig .....		X
Mr. Chambliss .....		X
Mr. Cornyn .....		X
Mr. Leahy .....	X	
Mr. Kennedy .....	P	
Mr. Biden .....	X	
Mr. Kohl .....	P	
Mrs. Feinstein .....	X	
Mr. Feingold .....	P	
Mr. Schumer .....	P	
Mr. Durbin .....	X	
Mr. Edwards .....	P	
Mr. Chairman .....		X

**Vote on: Biden Sunset Amendment** would insert into the bill a provision that requires the FAIR Act to immediately sunset after 90 days if, in the Administrators' annual report, he cannot certify that at least 95% of all of the previous years' claims have been paid. Any applicable statute of limitations for filing asbestos claims will be deemed tolled.

Date: July 10, 2003

[Approved by a vote of 15 yeas, 4 nays]

Members	Yea	Nay
Mr. Grassley .....	.....	P
Mr. Specter .....	X	.....
Mr. Kyl .....	.....	P
Mr. DeWine .....	X	.....
Mr. Sessions .....	.....	P
Mr. Graham .....	X	.....
Mr. Craig .....	X	.....
Mr. Chambliss .....	X	.....
Mr. Cornyn .....	X	.....
Mr. Leahy .....	X	.....
Mr. Kennedy .....	P	.....
Mr. Biden .....	X	.....
Mr. Kohl .....	P	.....
Mrs. Feinstein .....	X	.....
Mr. Feingold .....	X	.....
Mr. Schumer .....	P	.....
Mr. Durbin .....	X	.....
Mr. Edwards .....	P	.....
Mr. Chairman .....	.....	X

**Vote on: Biden Inequity Amendment** would permit an inequity adjustment for a company whose contribution rate, as a percentage of gross revenues, is exceptionally high compared to the median contribution rate for other companies in the same tier.

Date of markup: July 10, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	.....
Mr. Specter .....	X
Mr. Kyl .....	.....
Mr. DeWine .....	X
Mr. Sessions .....	.....
Mr. Graham .....	X
Mr. Craig .....	X
Mr. Chambliss .....	X
Mr. Cornyn .....	X
Mr. Leahy .....	X
Mr. Kennedy .....	.....
Mr. Biden .....	X
Mr. Kohl .....	.....
Mrs. Feinstein .....	X
Mr. Feingold .....	X
Mr. Schumer .....	.....
Mr. Durbin .....	X
Mr. Edwards .....	.....
Mr. Hatch, Chairman .....	X

**Vote on: Feingold Payments Amendment** as modified to ensure all payments should be paid within 3 years, no more than 4 years.

Date of markup: July 10, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

Members	Present
Mr. Grassley .....	.....
Mr. Specter .....	X
Mr. Kyl .....	X
Mr. DeWine .....	X
Mr. Sessions .....	.....
Mr. Graham .....	X
Mr. Craig .....	X
Mr. Chambliss .....	.....
Mr. Cornyn .....	.....
Mr. Leahy .....	X
Mr. Kennedy .....	.....
Mr. Biden .....	X
Mr. Kohl .....	.....
Mrs. Feinstein .....	X
Mr. Feingold .....	.....
Mr. Schumer .....	.....
Mr. Durbin .....	X
Mr. Edwards .....	.....
Mr. Hatch, Chairman .....	X

**Vote on: Leahy Subrogation Amendment that would remove subrogation rights currently permitted under state laws of entities that may have provided benefits to a claimant.**

Date: July 10, 2003.

[Defeated by a vote of 10 nays, 9 yeas]

Members	Yea	Nay
Mr. Grassley .....	.....	X
Mr. Specter .....	.....	X
Mr. Kyl .....	.....	P
Mr. DeWine .....	.....	X
Mr. Sessions .....	.....	P
Mr. Graham .....	.....	X
Mr. Craig .....	.....	X
Mr. Chambliss .....	.....	X
Mr. Cornyn .....	.....	X
Mr. Leahy .....	X	.....
Mr. Kennedy .....	P	.....
Mr. Biden .....	X	.....
Mr. Kohl .....	P	.....
Mrs. Feinstein .....	X	.....
Mr. Feingold .....	X	.....
Mr. Schumer .....	P	.....
Mr. Durbin .....	X	.....
Mr. Edwards .....	P	.....
Mr. Chairman .....	.....	X

**Vote on: Leahy Reimbursable Medical Costs Amendment** would expand the monitoring provision so that the award also covers the claimant's initial diagnosis as well as monitoring regardless of insurance coverage. It would also expand monitoring provision so that award covers other tests that the doctor may deem appropriate for the initial diagnosis under 121, and every three years thereafter.

Date: July 10, 2003.

[Defeated by a vote of 10 nays, 9 yeas]

Members	Yea	Nay
Mr. Grassley .....	.....	X
Mr. Specter .....	.....	X

[Defeated by a vote of 10 nays, 9 yeas]

	Members	Yea	Nay
Mr. Kyl .....	.....	P	
Mr. DeWine .....	.....	X	
Mr. Sessions .....	.....	X	
Mr. Graham .....	.....	X	
Mr. Craig .....	.....	X	
Mr. Chambliss .....	.....	X	
Mr. Cornyn .....	.....	X	
Mr. Leahy .....	X		
Mr. Kennedy .....	P		
Mr. Biden .....	X		
Mr. Kohl .....	P		
Mrs. Feinstein .....	X		
Mr. Feingold .....	X		
Mr. Schumer .....	P		
Mr. Durbin .....	X		
Mr. Edwards .....	P		
Mr. Chairman .....		X	

Vote on: Hatch Technical Amendment 2c that would revise the Durbin/Kyl amendment adopted previously in order to narrow the scope of the Kyl hardship language and ensure it does not place a substantial drain on the fund.

Date of markup: July 10, 2003.

[Approved by unanimous consent—members indicated were present when the motion occurred]

	Members	Present
Mr. Grassley .....		X
Mr. Specter .....		X
Mr. Kyl .....		
Mr. DeWine .....		X
Mr. Sessions .....		X
Mr. Graham .....		X
Mr. Craig .....		X
Mr. Chambliss .....		X
Mr. Cornyn .....		X
Mr. Leahy .....		X
Mr. Kennedy .....		
Mr. Biden .....		
Mr. Kohl .....		
Mrs. Feinstein .....		
Mr. Feingold .....		
Mr. Schumer .....		
Mr. Durbin .....		X
Mr. Edwards .....		
Mr. Hatch, Chairman .....		X

Vote on: Motion to report S. 1125 as amended.

Date: July 10, 2003.

[Reported out by a vote of 10 nays, 8 yeas, 1 voting pass]

	Members	Yea	Nay
Mr. Grassley .....		X	
Mr. Specter .....		X	
Mr. Kyl*			
Mr. DeWine .....		X	
Mr. Sessions .....		X	
Mr. Graham .....		X	
Mr. Craig .....		X	
Mr. Chambliss .....		X	
Mr. Cornyn .....		X	
Mr. Leahy .....			X
Mr. Kennedy .....			P

[Reported out by a vote of 10 nays, 8 yeas, 1 voting pass]

Members	Yea	Nay
Mr. Biden .....	.....	P
Mr. Kohl .....	.....	P
Mrs. Feinstein .....	X	.....
Mr. Feingold .....	.....	X
Mr. Schumer .....	.....	P
Mr. Durbin .....	.....	X
Mr. Edwards .....	.....	P
Mr. Chairman .....	X	.....

\* Voting pass.

#### IV. BACKGROUND AND NEED FOR LEGISLATION

*"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 fails to act."*—Chairman Orrin Hatch, at a March 5, 2003 Senate Judiciary Committee Hearing.

The testimony presented at multiple hearings on this issue, and the recent studies written by independent research organizations confirm the fact that the asbestos litigation crisis in the United States is real. It has failed deserving claimants, who are ill, often fatally ill, because of their occupational exposure to asbestos. First, these claimants must often wait years for compensation, and they may ultimately be denied any compensation at all because the defendant responsible for their injury has been bankrupted by lawsuits brought by others who are not sick. Second, the compensation that claimants do receive is arbitrary and inequitable. People who bring their claims in certain jurisdictions can receive huge awards, even when they are not sick—while people fatally injured by asbestos exposure may receive far less and often nothing. Third, only a small percentage of the amount of money defendants and insurers spend on asbestos litigation reaches the claimants who have been injured. The majority of these funds find their way into the pockets of lawyers on both sides.

The current asbestos litigation system does not serve the public interest. Since 1982, when the Johns-Manville Corporation entered Chapter 11, nearly 70 companies, large and small, have been driven into bankruptcy by asbestos litigation. These bankruptcies have had tragic consequences for employees, who have lost their jobs and often their savings, and for the communities that depended on the bankrupt firms. Moreover, this litigation is no longer confined to a few asbestos manufacturers. Asbestos litigation today touches thousands of companies in almost every sector of the American economy. Many of these companies never made asbestos products and have been drawn into the litigation only because the companies truly responsible for asbestos injuries, the asbestos manufacturers, are no longer available to sue.

Our nation's state and federal courts simply cannot adequately manage the problems in the current asbestos litigation system. As the United States Supreme Court stated in *Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 821 (1999), "the elephantine mass of asbestos cases \* \* \* defies customary judicial administration and calls for national legislation." The Court has called upon the Congress three times since 1997 to address this issue: in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1977), in *Ortiz*, and most

recently a few months ago in *Norfolk & Western Railway Co. v. Ayers*, 123 S. Ct. 1210 (2003). The Committee believes that it is time to answer that call.

Today, asbestos is seldom used in comparison to its widespread use in the early 1970s. Nonetheless, the Committee believes that continued asbestos use, however limited it may be, should be banned except in those instances where it presents no reasonable risk to health and it has no reasonably safe substitute, or where it is necessary to national security.

#### A. HISTORY OF ASBESTOS LITIGATION

Asbestos is a fibrous mineral used in many products due to its resistance to fire, corrosion, and acid. In the early part of the 20th Century, asbestos was regarded as a miracle fiber because it was versatile enough to weave into textiles, integrate into insulation, line the brakes of automobiles, and construct flame-retardant hulls for naval and merchant ships. Annual asbestos production climaxed some 30 years ago, and had been incorporated into thousands of products by this time.

This Committee received testimony from a number of witnesses regarding the scope and effects of asbestos exposure.<sup>3</sup> Asbestos is ubiquitous in the environment, and practically all Americans are exposed to some degree. Such everyday exposures do not usually result in health problems. But, substantial occupational exposure to asbestos can lead to a variety of medical conditions. Some of these conditions—for example, pleural plaques and most cases of pleural thickening—do not measurably interfere with the individual's breathing. Similarly, most cases of asbestosis—scarring of the tissue inside the lung—do not result in impairment. Severe asbestosis, however, can cause very serious breathing impairment and even death. Asbestos-related illnesses also include some kinds of cancer, including mesothelioma and lung cancer (although smoking remains by far the most common cause of lung cancer). At this time, mesothelioma is almost invariably fatal within a short period of time after diagnosis. The diseases caused by asbestos can have long latency periods, sometimes up to 30 or 40 years.

The first wave of lawsuits began in the late 1960s, when victims brought actions against asbestos manufacturers and suppliers. These lawsuits increased significantly in 1973 when the 5th Circuit Court of Appeals decided the *Borel* case, which applied strict liability in asbestos lawsuits. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973). By the early 1980s, the principal asbestos defendant, Johns-Manville, was unable to sustain the onslaught any longer, and in 1982 it filed for protection under chapter 11 of the bankruptcy laws. Six years later, the Manville bankruptcy resulted in the formation of a trust to pay asbestos claims, but after a brief (and disastrous) rush of claims on the trust in 1988–89, the trust was forced to reorganize and reduce benefits to claimants to 10 cents on the dollar in 1995.<sup>4</sup> Today, asbestos claims

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<sup>3</sup> See, e.g., Hearing on Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Dr. James D. Crapo and prepared testimony of Dr. John E. Parker).

<sup>4</sup> <http://www.mantrust.org/history.htm>

have so overwhelmed the Manville Trust that it pays only 5 cents on the dollar.<sup>5</sup>

Experts estimate that nearly 70 more companies have followed Manville into bankruptcy in the last 20 years—with more than a third of them filing in the last three years alone. Some of these bankruptcies have resulted in trusts for the payment of victims, and some have not. None of the existing trusts pay claims at their full value. By now, practically all of the former asbestos industry is bankrupt. As a result, asbestos litigation today affects companies that never made asbestos and often have only the most attenuated connection with it.

The heaviest asbestos exposures occurred decades ago. After the federal government began regulating the use of asbestos in the early 1970s, and with the sharp decline in asbestos use towards the end of that decade, occupational exposures to asbestos have been drastically reduced in recent years. This has greatly reduced the incidence of significant non-malignant disease, especially asbestosis. A leading pathologist of asbestos diseases stated that the “progressive lowering of standards for permitted occupational exposure to asbestos has markedly decreased the incidence and severity of asbestosis.”<sup>6</sup> Dr. James Crapo, a nationally renowned expert in asbestos diseases and former president of the American Thoracic Society, testified before the Committee on June 19, 2003, that in his practice, serious asbestosis cases, which still occurred in the early 1990s, have now become exceedingly rare. At the same time, because of long latency periods, there will be significant numbers of mesothelioma and lung cancer claims for many years to come.

Asbestos claims steadily increased during the 1990s, and then exploded during the end of the decade. The vast majority of those claims, however, were filed by people who claimed non-malignant diseases such as asbestosis—the very diseases that had become less and less common during the 1990s. The RAND Institute for Civil Justice reports that “[a]lmost all the growth in the asbestos case-load can be attributed to the growth in the number of these claims [for nonmalignant conditions], which include claims from people with little or no current functional impairment.”<sup>7</sup> Furthermore, more than 90% of all filings with the Johns-Manville bankruptcy trust in 2001 were brought by individuals with non-cancer claims.<sup>8</sup> The great majority of these non-cancer claims were brought by people with no impairment. This threatens funding available to compensate those who may become sick in the future.

#### B. COURTS UNABLE TO HANDLE VOLUME OF ASBESTOS LITIGATION

The tens of thousands of asbestos claims filed every year have overwhelmed the ability of the courts to provide fair, individualized justice in a timely way. Judges, facing a tidal wave of asbestos cases, have adopted a variety of procedural short cuts to deal with

<sup>5</sup> Id.

<sup>6</sup> Neoplastic Asbestos-Induced Disease, in Pathology of Occupational Lung Disease (Churg & Green, ed., 2nd 1998) at 339, cited in “Babcock & Wilcox Company Report to the Court Regarding Asbestos Developments Generally and The Proofs of Claims Filed Here.” In re: *The Babcock & Wilcox Company, et al.*, Civil Action No. 00-0558, 2000 U.S. Dist. Lexis 5626, Eastern Dist. Louisiana, decided April 17, 2000.

<sup>7</sup> RAND Institute for Civil Justice, “Asbestos Litigation Costs and Compensation: An Interim Report,” September 2002, at 45 (RAND 2002).

<sup>8</sup> Hearing on Asbestos Litigation, Before the Senate Comm. on the Judiciary 107th Cong. (Sept. 25, 2002) (FNS Unofficial Transcript of oral statement of David Austern).

the flood of claims. By reducing the traditional scrutiny given to tort claims, these expedients have encouraged the filing of even more claims. The result has been disastrous for deserving claimants and defendants alike. For claimants, the flood of cases has meant delay, inequitable compensation, and increasing uncertainty that the defendants responsible for their injury will remain solvent and able to compensate their claims. For defendants, the out-of-control tort system has caused companies who never manufactured asbestos and who have little or no connection with it to face the possibility of devastating liabilities against which they have little practical defense. Asbestos litigation has touched almost every sector of American industry, and no company can be sure it is not at risk.

Among distortions in the judicial system that work to deny justice to victims and defendants alike are venue shopping, consolidations, aberrations in individual courts, lax standards, and failures by the courts to provide the resources necessary to consider cases fully:

- Forum Shopping: The evidence before the Committee showed a disturbing nationwide commerce in asbestos cases. These claims are not filed in the courts where claimants live or worked. Instead, they flow to the jurisdictions with the greatest potential for huge settlements and verdicts, even though those jurisdictions may have no connection whatsoever to the parties or to the factual basis of the case.<sup>9</sup> Venue shopping warps the judicial system and results in delays for victims. Many plaintiffs' lawyers only file asbestos cases in jurisdictions they identify as having the most sympathetic judges and juries. Former U.S. Solicitor General Walter Dellinger testified before this Committee that "increasingly one is able to forum shop and go to a jurisdiction, which will allow cases to be brought first of all by people who are not demonstrating that they're sick."<sup>10</sup> Five states—Mississippi, New York, West Virginia, Ohio and Texas—handled 66% of filings between 1998 and 2000.<sup>11</sup> In Jefferson County, Mississippi—population 9,700—21,000 plaintiffs filed asbestos cases between 1995 and 2000.<sup>12</sup> The concentration of a huge number of filings in a small number of jurisdictions only exacerbates the delays and inequities inherent in the current system—forcing victims to wait too long to receive benefits.

- Mass Consolidations: Consolidated cases often compromise justice for individual claimants. The claims of seriously ill asbestos victims are often combined with claims made by people who are not sick into large consolidated cases. As a result, the most seriously injured victims receive less because they are forced to share awards with claimants who are not ill.<sup>13</sup> In a recent West Virginia case, *Mobil Corp. v. Adkins*, 8,000 claimants with varying degrees of ex-

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<sup>9</sup> Hearing on Asbestos Litigation, Before the Senate Comm. on the Judiciary, 107th Cong., (Sept. 25, 2002) (prepared testimony of Steven Kazan at 25–26) (Kazan, Sept. 25, 2003).

<sup>10</sup> Hearing on Asbestos Litigation, Before the Senate Comm. on the Judiciary 107th Cong. (Sept. 25, 2002) (FNS Unofficial Transcript of oral statement of Walter E. Dellinger); see also Kazan Sept. 25, 2002, at 26.

<sup>11</sup> RAND 2002, at 32.

<sup>12</sup> Albert B. Crenshaw, For Asbestos Victims, Compensation Remains Elusive, The Washington Post, Sept. 25, 2002, at E01.

<sup>13</sup> See Kazan, Sept. 25, 2002, at 27.

posure and illness were grouped together for trial against 250 defendants.<sup>14</sup>

- Inequitable Compensation: The vagaries of the courts where victims' cases are filed can have a greater impact on the outcome than the merits of a case. Current asbestos litigation payouts vary significantly by what state victims live in, which court their cases are tried in, and who the judge and jury are that day. For example, in late 1999, attorneys for 18 defendants reached a \$160 million settlement with lawyers for almost 4,000 plaintiffs in cases filed in Jefferson County, Mississippi. Allocation of the settlement money was based on how far plaintiffs lived from the courthouse. The Mississippi residents each received \$263,000, while plaintiffs from Ohio, Pennsylvania, and Indiana, despite having similar conditions, received only \$14,000 each. The Texas plaintiffs recovered \$43,500 each.<sup>15</sup> David Austern, the General Counsel of the Manville Personal Injury Settlement Trust told the Committee that "the amount of victim awards diverge wildly—some victims receive grand slam awards, while others receive little or nothing."<sup>16</sup> The Committee concurs with that conclusion.

- Abrogation of Tort Principles: The rights of defendants are also compromised by failures of the judicial system. First, many courts have made it easier for plaintiffs to pursue claims against companies without demonstrating that the companies' actions or products directly caused a claimant's illness. Causation is traditionally an element of tort law; in other words, a defendant's product must have caused a plaintiff's injury. In asbestos cases, however, "the system rarely accommodates a determination of whether plaintiffs made valid product identification, one of the most basic elements of establishing an asbestos tort."<sup>17</sup> This abrogation of tort principles has led to arbitrary results. Companies that may, in reality, have played minimal or no part in causing a plaintiff's disease are held liable, and in jurisdictions that adhere to joint and several liability rules, may end up responsible for the entirety of the plaintiff's damages.

Relaxed standards of proof enable plaintiffs to sue an ever broader range of peripheral defendants who, under traditional tort standards, would not ever be haled into court. In addition to causing arbitrariness in verdicts, the effective relaxation of standards of proof gives plaintiffs' attorneys who represent large numbers of plaintiffs undue settlement leverage. Because they can choose which companies to bring to trial for plaintiffs with the most serious injuries, counsel have leverage to negotiate large settlements with particular defendants for their entire "inventory" of claims, in-

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<sup>14</sup> See Application to Stay Mandate of the Supreme Court of Appeals of West Virginia and to Stay the Commencement of Trial Pending This Court's Decision on Petition for Writ of Certiorari Or, in the Alternative, Suggestion to Expedite Decision on the Petition, *Mobil Corporation v. Adkins*, (No. 01-C-1847, Cir. Ct. Kanawha Cty, W. Va.), cert. denied, 123 S. Ct. 346 (Oct. 7, 2002) (No. 02-132) (*Application to Stay*).

<sup>15</sup> *David Cosey, et al. v. E.D. Bullard, et al.*, No. 99-60373, 5th Cir. and *Leroy Rankin Jr., et al. v. A-Bex Corporation, et al.*, No. 99-0086, Miss. Super., Jefferson Co., at 3 (Jan. 28, 2000); See Jurisdiction and Injury Basis for CCR Settlement Agreement in Mississippi, Mealey's Litigation Report: Asbestos, Feb. 17, 2000.

<sup>16</sup> Hearing on The Asbestos Litigation Crisis Continues: It Is Time for Congress to Act, Before the Senate Comm. on the Judiciary, 108th Cong. (March 5, 2003) (prepared testimony of David Austern, at 2) (Austern March 5, 2003).

<sup>17</sup> Griffin B. Bell, Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis, National Legal Center for the Public Interest, June 2002, at 15 (Bell).

cluding those of unimpaired plaintiffs. This makes the filing of claims on behalf of the unimpaired persons profitable, which has been a factor in the acceleration of such filings in recent years. Oakland, California, lawyer Steven Kazan testified before this Committee that “we’ve gone from a medical model in which a doctor diagnoses an illness and the patient then hires a lawyer, to an entrepreneurial model in which clients are recruited by lawyers who then file suit even when there’s no real illness. These are not patients, they are plaintiffs recruited for profit.”<sup>18</sup>

Second, defendants’ rights are further compromised when courts lack the resources to monitor medical evidence submitted by plaintiffs. A study by neutral academics showed that in 41% of audited claims of alleged asbestos or pleural disease, the Trust’s physicians found that the claimant either had no disease or a less severe disease than alleged (for example, pleural disease rather than asbestos).<sup>19</sup> Such evidence contradicted the plaintiffs’ experts. This systematic overreading of x-rays by plaintiffs’ experts doubtless figured into the court cases filed by the same claimants.

Third, large consolidated cases compromise the rights of defendants as well as victims. In *Mobil v. Adkins*, the 8,000 cases were consolidated against 250 diverse defendants for trial. Such circumstances offer little chance to present individual defenses. Compounding and exacerbating the unfairness, the court structured the trial essentially backward so that findings of fault and punitive damages would come before the finding of causation.<sup>20</sup> Huge consolidations such as the West Virginia proceeding in *Adkins* put defendants in a “bet-the-company” situation that forces settlements of undeserving cases. But, even much smaller consolidations can make it impossible for juries to sort out the evidence in individual cases, significantly increasing the size of verdicts.<sup>21</sup>

One can only conclude that the current asbestos litigation system is a failure. It is slow, expensive, and inequitable for both plaintiffs and defendants alike. The courts have used a variety of judicial management techniques to cope with the influx of asbestos cases. Attempts to solve the problem within the present tort system have been rejected by the Supreme Court. In one case, the parties agreed to a class action settlement that would have provided an alternative dispute resolution mechanism for asbestos claims against all defendants (who had stopped manufacturing asbestos products some 18 years before the settlement). The Supreme Court rejected the settlement. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The Supreme Court also rejected a class action settlement that would have required all claimants against the defendant company to seek compensation from a fund established by the defendant’s insurer. *Ortiz v. Fibreboard*, 527 U.S. 815 (1999). And recently, the Supreme Court rejected an attempt to limit damages in asbestos cases under federal law, holding that a defendant that played only a small part in the victim’s total exposure could be held liable for the entire damage where the firms primarily responsible

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<sup>18</sup> Hearing on Asbestos Litigation, Before the Senate Committee on the Judiciary, 107th Cong. (Sept. 25, 2002) (FNS Unofficial Transcript of oral statement of Steven Kazan).

<sup>19</sup> Bell, at 18.

<sup>20</sup> Application to Stay, *Mobil Corporation v. Adkins*, at 5.

<sup>21</sup> See Hearing on H.R. 1283, The Fairness in Asbestos Compensation Act, Before the House Comm. on the Judiciary, 106th Cong. (1999) (prepared testimony of William N. Eskridge); Michelle White, The Role of Procedural Innovations in Mass Tort (NBER 2002).

were bankrupt or otherwise unreachable, and that a person with only mild impairment due to asbestosis could receive a very large award based only on fear of developing cancer at some future date. *Norfolk & Western Railway Co. v. Ayers*, 123 S.Ct. 1210 (2003).

In these cases, the Supreme Court recognized that the asbestos problem “defies customary judicial administration and calls for national legislation.” *Norfolk & Western*, 123 S.Ct. at 1228, quoting *Ortiz*, 527 U.S. at 821. As far back as 1997, Justice Ruth Bader Ginsburg wrote for the Court 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.” *Anchem*, 521 U.S. at 628. Specifically, the Court has endorsed the Judicial Conference’s recommendation that “[r]eal reform \* \* \* require[s] federal legislation creating a national asbestos dispute-resolution scheme.” Id. at 598. The FAIR Act is the “real reform” called for by the Supreme Court.

#### C. VICTIMS FACE LONG DELAYS, UNCERTAIN OUTCOMES

Jonathan Hiatt, General Counsel of the AFL-CIO, testified before this Committee in September of 2002 that, compounding the tragedy of asbestos illness, “the legal system has offered lengthy delays, followed by limited compensation, compensation that often comes too late.”<sup>22</sup> A flood of asbestos cases is overwhelming the courts, causing delays for victims. An estimated 300,000 cases are currently pending.<sup>23</sup> More than 600,000 individuals have brought claims.<sup>24</sup> Some experts estimate that as many as 2.7 million additional claims will be filed by people who were exposed to asbestos.<sup>25</sup> While the majority of these claims are expected to be filed by unimpaired claimants, this onslaught will inevitably cause extensive delays.

Some fatally ill victims die before their claims are resolved. As discussed above, one worker whose claim against Avondale shipyard was buried in a consolidated case involving more than 1,000 plaintiffs, died of mesothelioma before the Louisiana trial involving his claim even got underway.<sup>26</sup> While some courts give priority to plaintiffs with mesothelioma, elsewhere plaintiffs with mesothelioma may die before they get to trial.<sup>27</sup> Senator Kohl noted at our September 25, 2002, hearing that, “[s]imply put, some of the most seriously injured are just not getting their day in court quickly enough.”

The flood of asbestos litigation has resulted in nearly 70 bankruptcies, which further diminish the prospect that truly ill victims will be timely and adequately compensated. The average amount of time between filing a bankruptcy petition and approval of a reorganization plan is about six years, during which time victims are not paid.<sup>28</sup>

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<sup>22</sup> Hearing on Asbestos Litigation, Before the Senate Comm. on the Judiciary, 107th Cong. (Sept. 25, 2002) (prepared statement of Jonathan Hiatt, General Counsel, American Federation of Labor and Congress of Industrial Organizations, at 1) (Hiatt Sept. 25, 2002).

<sup>23</sup> Hearing on Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Comm. on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Jennifer Biggs, at 5) (Biggs June 4, 2003).

<sup>24</sup> RAND, at 40.

<sup>25</sup> Austern Sept. 25, 2002, at 4.

<sup>26</sup> 16–7 Mealey’s Litig. Rep. Asb. 2 (May 4, 2001) at 1.

<sup>27</sup> RAND 2002, at 35.

<sup>28</sup> Austern March 5, 2003, at 2.

Not only do victims have to wait too long for compensation, awards are frequently inequitable, with large awards often going to claimants who are not sick. For example, in a recent Mississippi case, six plaintiffs who were not sick were awarded a total of \$150 million. The plaintiffs did not claim to have ever missed a day of work because of asbestos injury, they did not claim any medical expenses related to asbestos, and they did not have asbestos-related physical impairment. One plaintiff told the court he suffers no shortness of breath and walks up to four miles per day for exercise.<sup>29</sup>

Too many seriously ill victims do not fare so well, and many find that the defendants have filed for bankruptcy and will only pay pennies on the dollar, if anything. Senator DeWine noted at our September 25, 2002 hearing that “[t]he status quo is just not fair. It is grossly unfair to the victims. What you find is an inconsistency in how victims are treated—a horrible inconsistency that I don’t think you’ll find anyplace else in our country or our judicial system.”

Asbestos-related bankruptcies severely diminish the prospects that sick victims will be adequately compensated. Overwhelmed by the enormous number of claims by the unimpaired in recent years, the Johns-Manville bankruptcy trust is now paying victims just five cents on the dollar.<sup>30</sup> Moreover, 63% of the funds paid out by the Manville trust have gone toward claims by those with non-malignant conditions.<sup>31</sup> The General Counsel of the Manville Personal Injury Trust, David Austern, testified before this Committee that none of the existing asbestos trusts, nor any of the 20 trusts pending in bankruptcy court, will pay any more than a fraction of the value of claims submitted to them.<sup>32</sup>

According to New York Senior District Judge Jack B. Weinstein, the flood of new claims, the reduction in amounts paid pro rata by the Johns-Manville bankruptcy trust on claims, and the increasing number of bankruptcy filings “suggests that there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos-related injuries.”<sup>33</sup>

Even for those sick victims who are able to recover monies, those awards are diminished by high transaction costs. Plaintiffs’ lawyers fees alone are typically 40% of any settlement, and with expenses can take more than half of the claimants’ recovery.

Today’s system is very costly, and victims could be well compensated under a more efficient system. Tillinghast-Towers Perrin actuary Jennifer Biggs testified before this Committee that the future loss and expense for asbestos liability will amount to \$130 billion (to which might be added the \$70 billion that has already been paid).<sup>34</sup> Of that \$130 billion, roughly \$28 billion (21.5%) goes to defense costs and \$41 billion (40%) to plaintiffs’ attorneys. So, while today’s system has a cost impact of \$130 billion (future), less than

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<sup>29</sup>Bell, at 14.

<sup>30</sup>Austern Sept. 25, 2002, at 2.

<sup>31</sup>Claims Resolution Management Corporation, Hearing Exhibit No. 8 at 5, In Re: *Asbestos Litigation*, (E.D.N.Y. Hearing on Dec. 13, 2001) (Nos. CV-91-875, CV-90-3973).

<sup>32</sup>Austern March 5, 2003, at 2.

<sup>33</sup>Order of Judge Jack B. Weinstein, Senior District Judge, E.D.N.Y., In re: *Johns-Manville Corporation et. al.*, Nov. 7, 2001, Brooklyn, New York.

<sup>34</sup>Biggs, June 4, 2003, at 1–3.

half—\$61 billion—will actually reach claimants. A compensation system that removes these transaction costs could compensate victims while at the same time have the benefit of shepherding more funds to sick victims rather than to legal and other fees. S. 1125 provides for \$108 billion, nearly all of which would go directly to claimants. Contrasting these numbers with the \$61 billion that would actually go to claimants under our current tort system, it becomes evident that S. 1125 is a far superior option.

#### D. ECONOMY, JOBS SUFFER UNDER CURRENT SYSTEM

Almost all of the original asbestos manufacturers were driven into bankruptcy by asbestos litigation. Plaintiffs' attorneys now seek to recoup funds "lost" to bankruptcy by targeting a widening list of solvent companies, thus triggering a new wave of bankruptcies. The growth in litigation against this expanding list of defendants threatens jobs, workers' 401(k) and retirement accounts, and the American economy. As Senator Leahy noted at our March 5, 2003, hearing, "[n]ot 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 the litigation. \* \* \* These bankruptcies created a lose-lose situation. Asbestos victims deserving fair compensation do not receive it and bankrupt companies cannot create new jobs nor invest in our economy."

Given that nearly 70 defendant corporations have filed for bankruptcy related to asbestos litigation, and as many as 2.7 million asbestos claims still may be filed, bankruptcies are likely to continue. More than 20 of the almost 70 bankruptcies have been filed since 2000; as many asbestos-related bankruptcies have been declared in the last two years as in either of the past two decades.<sup>35</sup> Recent bankruptcies include Armstrong World Industries, Owens Corning, Pittsburgh Corning, G-I Holdings Inc. (the successor to GAF Corp.), W.R. Grace & Co., U.S. Gypsum Co., Federal Mogul, Babcock & Wilcox, and Kaiser Aluminum.<sup>36</sup> Asbestos liabilities accounted for 84% of total contingent liabilities for Owens Corning, 67% for W.R. Grace, and 93% for USG.<sup>37</sup>

As the first wave of asbestos defendants filed for bankruptcy and their resources dried up, the number of companies named as defendants in asbestos suits began to rise. Increasingly, companies with a limited link to asbestos liability are being targeted. Senator Hatch noted at our September 25, 2002, hearing that "[b]ecause of this surge in litigation, companies—many of whom never manufactured asbestos nor marketed it—are going bankrupt paying people who are not sick and may never be sick, and who, therefore, may not need immediate compensation." Approximately 8,400 firms have been named defendants in asbestos suits,<sup>38</sup> up from 300 listed in 1983.<sup>39</sup>

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<sup>35</sup>RAND 2002, at 71.

<sup>36</sup>Keith M. Buckley, Asbestos: Impact on the U.S. Insurance Industry, Fitch Ratings, July 25, 2002, at 13.

<sup>37</sup>Joseph E. Stiglitz, The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, Sebag Associates, Dec. 2002, at 10 (Stiglitz).

<sup>38</sup>Hearing on Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Robert P. Hartwig, Insurance Information Institute, at 2).

<sup>39</sup>RAND 2002, at 49.

Asbestos litigation has reached nearly all parts of the U.S. economy. Companies representing 75 of 83 American industries (using the Commerce Department's classifications) have been hit. "Non-traditional" defendants account for 60% of asbestos-related expenditures. Companies ranging from America's largest corporations to small businesses with less than two dozen employees are now the target of asbestos litigation.<sup>40</sup> According to Senior U.S. District Judge Jack Weinstein, "[i]f the acceleration and expansion of asbestos lawsuits continues unaddressed, it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy."<sup>41</sup>

The negative impact of asbestos liability is so serious; the mere specter of it has the effect of chilling or even halting transactions. Goldman Sachs Managing Director Scott Kapnick told this Committee 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."<sup>42</sup> The asbestos problem also has serious consequences for insurers, who now pay about 57% of the cost of asbestos liability.

A national economic research specialist testified before this Committee on the economic effects caused by asbestos litigation: "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."<sup>43</sup>

Asbestos-related bankruptcies have a devastating impact on workers' jobs and their economic security. Companies that have declared bankruptcy related to asbestos litigation employed more than 200,000 workers before their bankruptcies. Asbestos-related bankruptcies led to the direct loss of as many as 60,000 jobs, while each displaced worker will lose an average of \$25,000 to \$50,000 in wages over his or her career.<sup>44</sup> The need for congressional intervention is clear, testified former U.S. Solicitor General Walter Dellinger: "We need to stop the hemorrhaging of hundreds of millions of dollars going to those who are not sick, to protect American jobs, pensions and shareholders."<sup>45</sup>

When asbestos defendant Federal-Mogul declared bankruptcy in 2001, employees reportedly lost more than \$800 million in their 401(k)s.<sup>46</sup> For example, one 82-year-old Federal-Mogul employee saw his \$1 million retirement nest egg shrivel to \$20,000.<sup>47</sup> Bankrupt Owens Corning saw its shares lose 97% of their value in the

<sup>40</sup>Id., at 49–50.

<sup>41</sup>Remarks of Judge Jack Weinstein, at a symposium held by the Bar Association of the City of New York titled: "Asbestos: What Went Wrong?" Oct. 21, 2002, at 12.

<sup>42</sup>Hearing on Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Scott Kapnick, at 2).

<sup>43</sup>Hearing on Solving the Asbestos Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee on the Judiciary, 108th Cong. (June 4, 2003) (prepared testimony of Frederick C. Dunbar, of the National Economic Research Associates, at 1).

<sup>44</sup>Stiglitz, at 3.

<sup>45</sup>Dellinger Sept. 25, 2002.

<sup>46</sup>Hearing on Asbestos Litigation, Before the Senate Committee on the Judiciary, 107th Cong. (Sept. 25, 2002) (FNS Unofficial Transcript of oral testimony of The Honorable Senator Benjamin Nelson, United States Senator, Nebraska) (Nelson Testimony).

<sup>47</sup>Mark Truby, Asbestos Ruined Federal-Mogul, The Detroit News, Mar. 31, 2002.

two years before its filing. Approximately 14% of those shares were held by employees.<sup>48</sup>

The AFL-CIO has told Congress that “[u]ncertainty for workers and their families is growing as they lose health insurance and see their companies file for bankruptcy protection.”<sup>49</sup> Many companies had high unionization rates when they filed for bankruptcy: Johns-Manville, 42%; Eagle-Picher, 33%; Federal-Mogul, 33%; Armstrong, 57%; and Todd Shipyards, 75%.<sup>50</sup>

There is no question that the escalating numbers of claims and costs is a threat to workers’ jobs and retirement savings. The AFL-CIO testified that “[The tort system] is damaging business far more than it is compensating victims.”<sup>51</sup> Businesses with only a remote connection to asbestos are being targeted in the same way that original manufacturers were, despite the differences in culpability.

Six years ago, the Supreme Court endorsed a “national dispute resolution scheme” to remedy this crisis, and the FAIR Act is the vehicle to implement this mechanism. Without it, the current system will continue exacerbating the devastating consequences it has wrought for over 20 years.

#### E. ASBESTOS BAN

Dangers associated with exposure to asbestos fibers are well known, and have prompted efforts to reduce and in some cases ban asbestos use. EPA and OSHA have severely restricted the use of asbestos since 1986. In 1989, EPA attempted to finalize a ban on asbestos use in the United States; however, that ban was subsequently overturned on non-substantive grounds, by the United States Court of Appeals for the Fifth Circuit in 1991. A number of products and processes still use asbestos. Today, asbestos may be present in such products as brake pads and linings, roofing materials, ceiling tiles, garden materials containing vermiculite, and cement products. According to the United States Geologic Survey, approximately 13,000 to 15,000 metric tons of asbestos are consumed in the United States every year. Numerous countries have banned, or are working to ban, the manufacture and importation of asbestos. Despite its continued (albeit limited) use in the United States, some types of asbestos remain a dangerous substance. Therefore, a ban on the import and manufacture of harmful forms of asbestos and asbestos containing products is needed to prevent the well known risks associated with these products, and to reduce the number of future victims of asbestos-related diseases. The only exceptions are for uses that present no unreasonable risks to health (e.g., diaphragms in chlorine solvent) and for national security (e.g., use in missile liners).

#### F. CONCLUSION

It is evident that the asbestos litigation system is fundamentally flawed. Victims and defendants alike face inequity and uncertainty, which will only get worse. The Supreme Court has concluded that

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<sup>48</sup> Hearing on Asbestos Litigation, Before the Senate Committee on the Judiciary, 107th Congress, September 25, 2002. The Honorable Benjamin Nelson, United States Senator, Nebraska.

<sup>49</sup> Hearing on Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Committee on the Judiciary, September 25, 2002, Jonathan Hiatt at 2.

<sup>50</sup> Stiglitz, at 22.

<sup>51</sup> Hiatt at 2, Sept. 25, 2002.

only federal legislation can create a fair and efficient asbestos resolution system. The FAIR Act offers just such a resolution.

#### V. How S. 1125 WORKS

The FAIR Act takes asbestos claims out of the existing broken tort system and processes them through a federally administered trust fund that compensates current and future asbestos claimants on a no-fault basis according to standardized medical criteria and corresponding claims awards. Reduced to its essence, and as discussed further below, the trust fund operates on two fronts: (i) through the collection and management of contributions received from defendant and insurer participants and existing asbestos compensation trusts; and (ii) through the payment of such funds to compensate claimants who can show eligibility based on standardized medical criteria.

The Committee believes that a national trust fund is the best answer to the current asbestos litigation crisis. By funneling existing asbestos tort claims into an administrative funding system, claimants should see quicker compensation while defendants and insurers benefit from increased economic certainty and stability—an outcome that the current tort system is ill-suited to provide.

Claimants would benefit because the FAIR Act eliminates expensive and time consuming litigation. A claimant can recover from the trust fund if that person can meet the Act's standardized medical criteria, which is categorized in various funding levels based on the severity of the asbestos-related disease. Unlike the current tort system, claimants would not be required to prove causation with respect to a pool of defendants or show that their claim was somehow not caused by their own negligence.

Defendants and insurers would also benefit from a trust fund because their future asbestos liabilities become more predictable. The trust fund will be financed through a structured payment scheme involving defendants and insurers with asbestos liabilities. As long as these payments are made into the Fund, these contributing participants are immune from the tort system with regard to asbestos personal injury claims and its inherent pitfalls.

##### A. THE FAIR ACT'S FUNDING MECHANISMS

To first ensure that claimants can be properly compensated, the FAIR Act requires defendant and insurers to capitalize the trust fund. This injection of funds is achieved through four layers of funding that break down as follows: (i) \$108 billion in mandatory contributions from defendants and insurers spread over 27 years; (ii) the Administrator's access to supplemental accounts and borrowing authority; (iii) the contingent call funding vehicle; and (iv) the back-end funding vehicle. Although the Committee believes that the first layer of mandatory funding contributions from defendants and insurers will be more than adequate to pay all pending and future asbestos claims, the FAIR Act contains these three additional layers of funding to ensure that the Fund adequately compensates eligible asbestos victims in the event of unanticipated contingencies.

### *1. The \$108 billion in mandatory funding*

The primary source of funding comes from mandatory annual contributions by defendant participants and insurers during the first 27 years of the Fund's life. The aggregate level of mandatory contributions is established at \$108 billion: \$104 billion shared equally between defendants and their insurers and at least \$4 billion from existing confirmed asbestos trusts.

#### *a. The \$104 billion contribution from defendants and insurers*

The Fund will be financed through allocated contributions of \$52 billion each by defendants and insurers that have been exposed to asbestos claims in the tort system. Although insurers and defendants share this funding obligation equally, the mechanics of how these amounts will be assessed towards each contributing group necessarily differs.

##### **For defendants**

With respect to the defendants, the Administrator must first assign companies into tiers that are defined by prior company expenditures incurred defending asbestos claims in the tort system. These expenditures include defense, indemnity, judgment and settlement costs. In addition, the FAIR Act establishes separate tiers for debtor companies currently in bankruptcy and companies subject to claims under the Federal Employer's Liability Act.

Once companies have been assigned to tiers, the Administrator's next step is to assign companies into subtiers based on revenue levels—amounts calculated by each company's reported earnings for the most recent fiscal year ending before December 31, 2002. After a company is assigned to a subtier, the Administrator can then identify with ease a corresponding annual contribution amount that the assigned company is obligated to pay into the Fund. In other words, each subtier identifies the annual contribution amount into the Fund.

The Committee believes that a dual tiering system that accounts for past asbestos expenditures and company revenues is a fair measure of a company's ability to fund the assessments under the FAIR Act. But in the event a tiering assignment unduly burdens a contributing company, the FAIR Act provides for limited payment adjustments based on severe financial hardship or exceptional cases of demonstrated inequity.

##### **For insurers**

Unlike the assessment formula for defendants, the FAIR Act takes a different approach with respect to the asbestos insurers. Rather than establish an allocation formula, the FAIR Act creates a separate Asbestos Insurers Commission, which holds responsibility to determine the amount that each insurer is obligated to pay into the Fund. The Committee believes that delegating such a task to a separately commissioned entity makes abundant sense given the necessary technical expertise that is required in developing a fair and appropriate allocation formula. The FAIR Act requires the Commission to determine contributions based on several factors, including premiums from asbestos policies, losses paid, reserve levels, and future liability. However, if the insurers agree on a fair divi-

sion of contributions among themselves, such an agreement may be used to determine the insurer allocation. This agreement is subject to approval by the Commission after a finding that the agreed upon allocation formula meets all of the requirements of the Act.

Moreover, to ensure that the Fund receives early funding while the Commission develops an allocation formula, the FAIR Act authorizes the Administrator to collect payments from the asbestos insurers in an amount that does not exceed the ultimate financial obligation of an insurer participant. Such payments are to be assessed on an equitable basis and credited against future payments that may be required after the Commission develops an allocation formula.

*b. The \$4 billion contribution from existing bankruptcy trusts*

The remaining \$4 billion is provided by existing asbestos compensation trusts that have been established to compensate asbestos claims, including but not limited to those established under section 524(g) of the Bankruptcy Code. The Committee understands that the total amount of all existing bankruptcy and other asbestos compensation trusts is valued to be at least \$4 billion. Because the FAIR Act requires that all trust assets be transferred to the Fund within 6 months of the date of enactment pursuant to the provisions of the Act, these trusts represent an immediate source of funding for the Administrator to begin processing claims.

*2. The administrator's access to supplemental accounts and borrowing authority*

To ensure sufficient funds are available to compensate eligible claimants if funding is necessary beyond the mandatory \$108 billion contribution, the FAIR Act provides a second layer of funding that contains three components. First, the Administrator holds access to additional funds through a guaranteed payment account. This account collects a mandatory surcharge (in addition to the assessed amount) on every defendant and insurer contribution made into the Fund. The proceeds from this surcharge are used to cover shortages attributable to the non-payment by any participant. Second, the Administrator holds access to an orphan share account that collects amounts paid in excess of the maximum aggregate contribution by insurers and defendants. These amounts are used to cover losses caused by participants that proceed with Chapter 11 bankruptcies and for losses caused by financial hardship and inequity determinations made in favor of certain participants. Third, the Administrator holds authority to borrow from commercial lending institutions amounts to offset short term losses in an amount that does not exceed anticipated contributions for the following year.

*3. The contingent call funding vehicle*

This funding vehicle is the next line of defense to offset potential, though unlikely, shortages during the first 27 years of the Fund. The contingent call provision gives the Administrator the discretion to withhold step-downs after year 5 of the Fund. As currently structured, the Fund envisions a payment schedule that begins with at least \$5 billion annually during years 1 through 5 with a gradual reduction in the amount of such payment beginning year

6. But if the Administrator certifies that the Fund is encountering financial difficulties in paying claims, the Administrator is authorized to assess participants at the initial year 1–5 minimum contribution levels.

#### *4. The back-end funding vehicle*

As the term suggests, this funding vehicle addresses potential shortages to pay claims that may exist *after* year 27 of the Fund. The back end provision gives participants the option to either continue contributing into the Fund in an aggregate amount not to exceed \$2 billion annually or have the remaining claims resolved in the tort system in Federal Court.

### B. FAIR ACT CLAIMS PROCESS

The FAIR Act creates a no-fault system to compensate those who meet sound, fair and balanced eligibility criteria to establish the existence of a legitimate asbestos-related disease. The eligibility criteria include diagnostic, latency, medical and exposure requirements. Flexibility is built into the system, providing for exceptional claims and special cases. The FAIR Act then provides fair and equitable claim values to eligible claimants. To ensure the integrity of the system, however, auditing procedures and independent reviews by objective, experienced physicians are also provided.

The FAIR Act's nationalized, streamlined claims processing system provides compensation to eligible claimants promptly without creating a new or large bureaucracy. It works as follows:

#### *1. Court procedure*

The compensation system will be administered by the Court of Federal Claims, which will establish and supervise an Office of Special Asbestos Masters (OSAM) to process and make initial decisions on claims for compensation. OSAM will facilitate the claims handling process, so that the Court's docket does not become backlogged as occurs in the current tort system. Claimants begin the process by filing a claim form listing their asbestos exposure, work history, medical records (including diagnoses and test results), tobacco use and prior claims and recovery. Claims are referred to claims examiners for an initial review. If the claim form is complete, a special asbestos master has 60 days to determine the amount of any award to which the claimant is eligible. The special asbestos masters, with recommendations by a Medical Advisory Committee made up of objective and experienced physicians when requested or where required, need only determine whether the claimant meets the diagnostic, latency, medical, and exposure criteria established in the Act. A claimant may appeal a decision to a panel of three Special Asbestos Masters within 30 days of receiving notice of a decision. The panel must make a determination within 60 days after receipt of an appeal. Claimants have 30 days to appeal this panel's decision to a 3-judge panel of the Court of Federal Claims. When such panel is constituted, it is known as the Court of Asbestos Claims ("Asbestos Court"). Claimants then have 30 days to file an appeal to the U.S. Court of Appeals for the Federal Circuit.

Claims must be filed with the Court within 4 years from the date the claimant knew or should have known of the claim, and claim-

ants have the right to seek appeal eligibility determinations. The FAIR Act establishes a claimant assistance program to provide assistance to claimants in preparing and submitting claims, including a legal assistance program to assist them with legal representation issues. Notification is provided of available pro bono legal services.

The purpose of the FAIR Act is to establish an administrative compensation system to replace the tort system for asbestos victims, in much the same manner that workers' compensation systems have replaced tort liability as a means of compensating workplace injuries. In accordance with this purpose, the FAIR Act preempts asbestos personal injury claims made under state or other federal law, including pending claims that have not proceeded to final judgment before the date of enactment. Pursuant to an amendment in committee, the preemption of pending claims will not become effective until the Fund is fully operational and processing claims. However, a participant's contributions to the Fund shall be reduced by the amount of any claims made payable by the operation of this amendment after the enactment of this Act. Workers' compensation and veterans' benefits claims are excepted from preemption, because workers' compensation and veterans' benefits programs generally do not suffer from the uncertainties, unfairness, delay and expense of the tort system.

## *2. Prompt payment of claims*

Unlike the current system, in which results are slow, inequitable and unpredictable, the Fair Act ensures rapid, fair, and predictable payments, while still maintaining the stability of the Fund. In contrast to the long delays associated with current asbestos litigation, payments are expected to be paid over a period of 3 years, and no longer than 4 years. Living mesothelioma claimants are entitled to accelerated payments. Expedited payments also may be provided in cases of exigent circumstances or extreme hardship caused by the asbestos related injury. The reduced transaction costs of the administrative system and the more than adequate funding provided under the FAIR Act ensure that eligible claimants receive the compensation to which they are entitled, unlike current bankruptcy trusts where claimants receive pennies on the dollar or current settlements and awards where claimants often lose more than half of the recovery in attorneys' fees and expenses. Pursuant to an amendment in Committee, if in any year the Administrator is unable to certify that 95% of claim obligations owed in that year are being paid (and after a 90 day period to cure), the fund shall immediately sunset and return claimants to the tort system.

In the event the claimant has a timely filed pending claim, the claimant has 4 years from the date of enactment of this Act to file the claim with the Court. Claimants who meet the statute of limitations under the FAIR Act, and have already received a prior settlement or judgment for their injury, will have any recovery from the Fund reduced by the amount of those prior recoveries.

## *3. Diagnostic and latency criteria*

Claimants must meet diagnostic and latency criteria to be compensated by the Fund. The Committee intends the diagnostic criteria to reflect the typical components of a true medical diagnosis by a claimant's doctor, including an in-person physical examination

(or pathology in the case where the injured person is deceased) and a review of the claimant's medical, smoking and exposure history by the doctor diagnosing an asbestos-related disease. These requirements ensure that the claimant will be given a true diagnosis related to the claimant's condition. The diagnosis must also include consideration of other more likely causes of the condition to ensure that asbestos exposure was the cause of any claimed nonmalignant disease (as opposed to other industrial dust exposure) or a substantial contributing factor in causing a malignant disease.

Because asbestos-related diseases have a long latency period before symptoms begin to manifest, the FAIR Act also requires that the claimant demonstrate that his or her first exposure to asbestos occurred at least ten years prior to the initial diagnosis.

#### *4. Medical criteria*

Claimants must meet medical criteria to ensure that resources are protected for those who are currently suffering from asbestos-related disease. The medical criteria establishes requirements for 10 disease levels, 5 of which relate to nonmalignant asbestos-related diseases, such as asbestosis, and 5 of which relate to malignant diseases, such as lung cancer and mesothelioma. The medical criteria for three of the nonmalignant categories are based on increasing severity of the claimant's impairment. Because these impairments may have other causes, such as other airborne contaminants including cotton dust, medical evidence is required to establish that asbestos exposure is the cause of the claimant's impairment. The medical criteria for the malignant categories similarly reflect the need to have medical evidence to support a finding that the claimant's exposure to asbestos is a substantial contributing factor in causing the claimant's asbestos-related disease.

#### *5. Exposure criteria*

Claimants must meet exposure criteria to be compensated. Because the risk of developing an asbestos-related disease increases with the amount and intensity of exposure to asbestos, the Committee has set exposure requirements for each disease level to ensure that the FAIR Act compensates only asbestos-related diseases. The number of years of occupational exposure are weighted based on industry and occupations and by the dates of exposure, so as to serve as a proxy for approximating the dose of exposure associated with various types of occupational exposures typically associated with asbestos-related diseases. The intensity and regularity of asbestos exposures associated with certain industries and occupations were significantly greater prior to the 1970's, at which time federal regulations limiting its use and for the protection of workers were first put in place. Such exposures often occurred in the manufacture of asbestos. Because mesothelioma can develop, in some instances, from more limited exposure, the exposure requirements for mesothelioma are the least stringent, requiring minimal exposure to asbestos. Nonetheless, the criteria are meant to ensure that only diseases caused by asbestos exposures versus other causes are compensated by the Fund.

#### *6. Exceptional and special cases*

The FAIR Act provides some limited exceptions to the above standards for compensation. Exceptional cases where the medical criteria under the Act cannot be met but the claimant has comparable and reliable medical evidence are eligible for review by a Medical Advisory Committee, made up of objective, experienced physicians, to determine whether the claimant is eligible.

Special provisions are established for review by the Medical Advisory Committee in other unique circumstances, including those related to "take home" exposures where asbestos was brought into the home by an occupationally exposed person and those related to the high levels of environmental exposures of residents and workers in Libby, Montana. Because the medical conditions of the residents of Libby are currently being studied by various agencies, claims filed by Libby claimants are to be automatically designated as exceptional medical claims and referred to the Medical Advisory Committee for review of the claimant's eligibility.

#### *7. Claim values*

The FAIR Act provides for carefully constructed, rational, and fair claims values. Many of the illnesses that are compensated under the Act could be caused or contributed to by factors other than asbestos exposure, such as smoking and other airborne contaminants. Therefore, claims values have been carefully constructed to provide increased compensation in those cases where there is greater confidence that the asbestos exposure was the cause of the claimant's injury. To those ends, mesothelioma and lung cancer claims where the claimant has been diagnosed with underlying asbestosis and is a nonsmoker have been given the highest values. Claims values for claimants with severe asbestosis and other lung cancer claims where the causal connection between the asbestos exposure and the injury is more substantiated similarly reflect the purpose of the Act to direct monies to the most serious injuries caused by exposure to asbestos.

In the case of other cancers and lung cancers where smoking is considered a predominant or likely cause of the cancer, claims values are reduced for smokers. Lifetime nonsmokers and former smokers who had not smoked at least 12 years prior to diagnosis are eligible for increased compensation based on a review of their smoking history by the Medical Advisory Committee. Such claimants, however, bear the burden of providing sufficient evidence of the limits of their smoking behavior. This Fund is not intended to be a compensation system for tobacco-related diseases, which would overwhelm the Fund leaving no money for asbestos victims.

The FAIR Act recognizes that claimants with significant occupational exposure to asbestos may be at risk of developing a serious asbestos-related illness. As such, claimants meeting the minimum exposure criteria will be reimbursed reasonable costs for medical monitoring. In the event these claimants develop into a compensable illness, they may then seek compensation from the Fund.

#### *8. Quality control*

Because of the subjectivity of many of these medical tests and because these illnesses have other causes, including smoking, industrial dusts, aging, etc., provisions are made to ensure the quality

of the medical and exposure evidence submitted to support claims. The FAIR Act is designed to eliminate the abuses found in the current system, where mass screenings conducted by facilities associated with plaintiffs' law firms often result in claims with questionable medical support. The FAIR Act requires the implementation of audit procedures as quality control on the evidence being submitted, which includes independent review by certified B-readers of x-rays submitted in support of claims. Similarly, in light of the history of abuse and the potential for misrepresentations by claimants or their representatives, the FAIR Act authorizes the Court to request additional information, including medical records and blood tests, to review and confirm a claimant's declared smoking history and behavior. Finally, the FAIR Act also provides for criminal penalties in the event a claimant or other person (including contributors) submits false information related to compensation of an asbestos claim under the Fund.

#### C. THE TIMING OF THE FAIR ACT UPON ENACTMENT

##### *1. The funding*

The Fund will start receiving assets at least six months after the date of enactment. Confirmed bankruptcy and other trusts created to pay asbestos claims must transfer the bulk of their assets to the Fund within 6 months of the date of enactment, which is expected to infuse at least \$4 billion dollars into the Fund at the outset. As a result, in less than a year the Fund will have substantial funding to begin the payment of claims

The Administrator begins the defendant assessment process by sending notice within 60 days of appointment. This notice requires all recipients to provide the Administrator within 30 days information necessary to calculate the amount of required contributions into the Fund. Upon the Administrator's receipt of such information, the FAIR Act gives the Administrator 60 days to make a determination assessing defendant contributions. Although a defendant participant has the right to obtain rehearing of the determination and has the right of review, the payment obligation is not stayed during this review.

The Asbestos Insurers Commission, which is established to expedite the assessments of contributions to the Fund from insurers, re-insurers, and run-off entities established to pay costs associated with asbestos claims, is under strict deadlines to assess contributions to insurer participants. Within 30 days of being appointed, the Commission is required to meet to begin the process of developing an allocation formula. Once the Commission develops the allocation formula and assesses contributions to the insurer participants, the insurer participants are given only 30 days to provide a consensus agreement on allocation, which may replace the Commission's determination as long as the Commission certifies that it meets the requirements of the Act.

##### *2. The payment of claims*

The FAIR Act is designed to ensure that claimants are compensated quickly, and under the FAIR Act resolution of a claim can occur in less than a year. Upon filing a claim with the Court of Federal Claims, a claimant should receive an eligibility determina-

tion from a special asbestos master in less than three months. As discussed above, the FAIR Act requires the Court of Federal Claims to refer a claim to the Office of Special Asbestos Masters within 20 days of filing. The Special Asbestos Master must then make an eligibility determination within 60 days after receiving the claim and requisite medical information.

In the event a claimant challenges an eligibility decision by a special asbestos master, the claimant is given a structured appeals process with established deadlines. A claimant may seek further review by a panel of three Special Asbestos Masters within 30 days of receiving notice of a Special Asbestos Master decision. The FAIR Act requires that this panel deliver its decision within 60 days of receipt of an appeal.

The claimant may seek further review of a panel decision by appealing to a three judge panel of the Federal Court of Claims. This panel is referred to as the United States Court of Asbestos Claims and is required under the FAIR Act to make a decision within 60 days of its receipt of an appeal. If the U.S. Court of Asbestos Claims remands the claim for further action, the special asbestos masters is given an additional 30 days to make a determination.

Claimants are also given the option to pursue further judicial review before the United States Court of Appeals for the Federal Circuit upon filing an appeal within 30 days after issuance of a final decision by the U.S. Court of Asbestos Claims. Decisions by the Federal Circuit are subject to review by the United States Supreme Court.

## VI. SECTION-BY-SECTION ANALYSIS AND DISCUSSION

*Sec. 1. Short title*

*Sec. 2. Findings and purpose*

*Sec. 3. Definitions*

## TITLE I. ASBESTOS CLAIMS RESOLUTION

### Subtitle A. United States Court of Federal Claims

*Sec. 101. United States Court of Federal Claims*

*Office of Special Asbestos Masters:* The United States Court of Federal Claims (“Court of Claims”), through the newly created Office of Special Asbestos Masters, shall have the authority to examine asbestos claims and make awards. The chief judge of the Court of Federal Claims appoints Special Asbestos Masters, including one Chief Special Asbestos Master, as necessary to facilitate claims processing. A concurrence of a majority of the court is required on all appointments and reappointments. No more than 20 Special Asbestos Masters may be appointed without Congressional approval.

The Chief Special Asbestos Master serves for a term of 4 years, and may be reappointed for 2-year terms. The Chief Special Asbestos Master, in consultation with the Chief Judge, prescribes rules and procedures for claims processing, and appoints or contracts for services personnel to carry out the duties of the Office of Special Asbestos Masters. All special masters are subject to removal by the concurrence of a majority of the active judges of the court for good

cause. The compensation of special masters is set by the chief judge and cannot exceed Level V of the Executive Schedule.

#### Subtitle B. Asbestos Injury Claims Resolution Procedures

##### *Sec. 111. Filing of claims*

Claimants file claims with the United States Court of Federal Claims (the Court), through the Office of Special Asbestos Masters. The Chief Special Asbestos Masters, in consultation with the Chief Judge of the Court, issues rules as to who may file as a representative of another individual. Claims must be notarized and give detailed information about the claimant, including their asbestos exposure, medical records, tobacco use, collateral sources of compensation and any other information that the Court elects to add. Claims must be brought within 4 years from the time the claimants knew or should have known of their injury. Persons with pending claims in the tort system must file within 4 years of the date of enactment. Claimants who develop an additional condition or disease may file for additional benefits.

##### *Sec. 112. General rule concerning no-fault compensation*

It is the intent of the FAIR Act to provide a process to compensate claimants faster and with more certainty than the current system. The FAIR Act therefore removes the burden a claimant would ordinarily have to overcome of establishing that the injury was the fault of a particular party. Under the FAIR Act claimants need not establish that his/her injury resulted from the negligence or other fault of another person.

##### *Sec. 113. Essential elements of eligible asbestos claim*

Claimants must prove by a preponderance of the evidence that they have an eligible disease or condition, and that they meet the latency and exposure criteria requirements.

##### *Sec. 114. Eligibility determinations*

Within 20 days of filing, claims are referred to a Special Asbestos Master. Claims examiners then make the initial review for each claim under the Special Asbestos Masters' direction. Claims examiners will notify claimants if additional information is needed to determine eligibility, including requiring a medical examination and/or tests. Once a claims examiner has all the necessary information, the claim and a recommendation are sent to a Special Asbestos Master who has 60 days after receipt of a completed claim to provide a written recommendation, including findings of facts.

The Court will establish expedited procedures for exigent cases. Claimants must either waive their right to judicial review or have exhausted their judicial review to receive their award. The Court will establish audit procedures for reviewing the accuracy of the Special Asbestos Master's recommendation.

*Appeal to 3 Special Asbestos Master panel:* Within 30 days after receiving a notice of a decision by the Special Asbestos Master, a claimant may appeal to a panel of 3 Special Asbestos Masters. Such panel may reverse the decision of the individual Special Asbestos Master within 60 days if the decision was based on clear

error or if new, material evidence is available. Accepting a payment extinguishes all claims related to such payment.<sup>52</sup>

*Sec. 115. Medical evidence auditing procedures*

The Court will establish audit procedures for medical evidence submitted as part of claims to ensure accuracy of x-ray readings and pulmonary function tests. If the Court finds certain providers are not complying with prevailing medical practices, records from such providers will be deemed inadmissible for a claim. A provider who is deemed non-compliant may appeal such determination under procedures established by the Court.

*Sec. 116. Claimant assistance program*

This section authorizes the Court to establish a legal assistance program to aid claimants in legal representation issues. As part of this program, the Court will maintain a list of attorneys who are willing to provide their services on a pro bono basis and provide to claimants notice of and information relating to pro bono legal services available to those claimants and any limitations on attorney fees. Before a person becomes a client of an attorney with respect to an asbestos claim that attorney shall provide notice to that person of pro bono legal services available for that claim.

Subtitle C. Medical Criteria

*Sec. 121. Medical criteria requirements*

This section establishes the latency, diagnostic, exposure and medical criteria required to establish an asbestos claim for each of 10 disease levels. Levels I through V include nonmalignant asbestos-related disease or conditions and levels VI through X include malignant diseases.

*Latency:* Although the latency period for asbestos-related disease can be as long as 30–40 years, part of the consensus agreement by the Committee was to require only a 10-year latency period in order to ensure that all potential asbestos victims were being compensated. Claimants must provide a statement from a doctor or a history of exposure that shows at least 10 years elapsed from the date of the initial exposure to the date of the initial diagnosis of any asbestos-related injury.

*Diagnostic Criteria:* This section recognizes that a medical diagnosis is a key component of the eligibility requirements in order to maintain the integrity of the Fund and to fulfill the purpose of the Act to compensate asbestos victims. This section sets forth diagnostic criteria that track the typical elements of a medical diagnosis, such as an in-person physical examination by the claimant's doctor, a thorough review of the claimant's medical, smoking and exposure history by the claimant's doctor, and a review of other potential causes of the claimant's illness.<sup>53</sup> Injuries due to other causes, such as smoking, can present themselves in similar ways as asbestos-related injuries. This Fund, however, is intended to

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<sup>52</sup> See section 141 for claimant's appeal of a decision by panel of 3 Special Asbestos Masters to panel of 3 Judges of the Federal Court of Claims.

<sup>53</sup> See, e.g., The Diagnosis of Nonmalignant Disease Related to Asbestos, Official Statement of the American Thoracic Society, March 1986 (noting that “[a]ll alternative diagnoses must be considered before accepting the presumptive diagnosis of asbestosis”).

compensate injuries caused by asbestos exposure, and, therefore, a diagnosis of an asbestos-related injury is required under the Act.

For levels I through V, a diagnosis must be based on an in-person physical examination by the claimant's doctor providing the diagnosis, an evaluation of smoking history and exposure history before making a diagnosis, an x-ray reading by a certified B-reader, and a pulmonary function test for levels III through V. Deceased claimants may provide a diagnosis supported by physician report based on pathological evidence or an x-ray reading by a certified B-reader. For disease levels VI through X, the diagnosis must be based on a physical examination or on findings by a board-certified pathologist.

*Exposure Criteria:* A claimant must demonstrate meaningful and credible evidence of exposure to asbestos in the United States, or while a U.S. citizen employed by a U.S. company or employed on a U.S. flagged ship. There must be a causal link between the asbestos exposure related to the employment overseas for a U.S. company or on the U.S. flagged ship and the asbestos-related injury. Since asbestos fibers are present in the ambient air and water in very small amounts it is the intent of the committee that any exposure must be in excess of the amount of asbestos in the ambient air.

*"Take-Home" Exposure:* Claimants may alternatively satisfy the requirements under the Act based on exposures to asbestos brought into the home by an occupationally exposed person, i.e., take home exposures, if the occupationally exposed person can satisfy the exposure requirements of the disease or condition claimed and the claimant lived with the occupationally exposed person during the required exposure period. This requirement of "living with" a person requires that the claimant have used the residence of the occupationally-exposed person as his/her regular residence for the time period necessary to satisfy the exposure requirement for the disease level that the claimant is asserting. It is understood that household members may travel to a certain extent for work or vacation and still be considered as "living with" another member of the household. Because take home exposures generally do not rise to the same level and intensity of exposure as the occupationally exposed worker, such claims will be referred to the Medical Advisory Committee for a determination as to whether the take home exposures are sufficient to establish a causal relationship to the claimed disease comparable to that of the occupational exposed person.

*Libby, Montana:* In addition, the unique nature of the exposures to asbestos associated with the vermiculite mining and milling operations in Libby, Montana have resulted in a number of asbestos-related injuries among the residents of Libby. Under the FAIR Act, the occupational exposure requirements are waived for workers in the mining and milling operations in Libby, Montana, and persons who lived or worked within a 20-mile radius of Libby, Montana for at least 12 consecutive months prior to December 31, 2003. The mining and milling operations in Libby ended in 1990, and the United States Environmental Protection Agency, among others, has been working to address and eliminate the environmental and health risks in Libby since 1999.

*Non-malignant Conditions:* For nonmalignant conditions (Levels I to V), the medical criteria generally require a diagnosis of bilateral pleural plaques or thickening, bilateral pleural calcification, diffuse pleural thickening, bilateral pleural disease of grade B2, or asbestosis based on x-ray readings or pathology. Level II includes claimants with mixed obstructive and restrictive disease based on pulmonary function testing and supporting medical documentation that asbestos exposure was a contributing factor to the disease. Mild, moderate and severe impairment is required for Levels III, IV, and V, respectively, based on pulmonary function test results and supporting medical documentation that there are no other more likely causes of the claimant's impairment than the claimant's asbestos exposure. The Committee intends that such medical documentation would be provided by a physician with knowledge and expertise in diagnosing occupational lung disease. With respect to Nonmalignant Levels III, IV, and V the Committee intends to the extent feasible that the documentation would be provided by an appropriately board certified physician in occupational medicine or pulmonary medicine. The Committee recognizes, however, that access to appropriately board-certified physicians may not be feasible for all claimants due to geographical constraints. The exclusion of other more likely causes of the impairment is a typical component of a medical diagnosis due to the fact that there are a number of other potential causes for such conditions which may have similar characteristics of an asbestos-related condition. For example, individuals exposed to other dusts or airborne contaminants may be at risk for silicosis or other diseases which also may show up as an abnormality in the lung.

In addition, Level I requires 5 years cumulative occupational exposure, while levels II through V require 5 years substantial occupational exposure weighted based on time and industry ("weighted years"). Because it is well recognized in the medical community that, except for mesothelioma, asbestos-related diseases are dose dependent, i.e., the risk increases as the amount of exposure increases, the industry and time weighting of years of exposure are necessary to act as a measure of dose. Certain industries and occupations involve higher levels of exposures to asbestos fibers due to the direct handling of the asbestos itself, and is reflected in the industry weighing component. On the other hand, persons who work with asbestos-containing products, such as auto mechanics who work on brakes and related occupations, are generally not exposed to asbestos fibers in harmful amounts in the course of their occupation. Such occupations do not involve the same type of exposure as a person who manufactured products using raw asbestos.

The intent of the weighted exposure requirement is to recognize that federal regulations implemented in the 1970's and 1980's have dramatically reduced asbestos exposures and resulted in significantly less exposures to asbestos that simply do not compare to the levels of asbestos exposures that occurred prior to 1970. As found by the District Courts, "Mesothelioma and asbestos-related lung cancers are expected to result primarily from the sort of direct occupational exposure that was phased out as a result of increasingly

stringent federal regulation.”<sup>54</sup> Also, as noted by the American Thoracic Society in its March 1986 guidance, “[w]ith exposures below the current recommended permissible exposure limit value [under OSHA standards], asbestosis is not likely to be found during the course of a working career. With proper engineering controls, work practice, and where necessary, personal respiratory protective devices, asbestosis should not occur.”<sup>55</sup> These differences in the exposure intensity and amount of exposure to asbestos fibers are reflected in the industry and time-weighting formula.

*Malignant Conditions:* For malignant conditions (Levels VI to X), the medical criteria require a diagnosis of mesothelioma, primary lung cancer, or other cancer. For other cancers, level VI, requirements of a claim include (i) evidence of a bilateral asbestos-related nonmalignant disease; (ii) 15 weighted years of exposure to asbestos; and (iii) supporting medical documentation that the claimant’s exposure to asbestos was a contributing factor in causing the claimant’s other cancer. These claims are referred to the Medical Advisory Committee for a determination that the claimant’s asbestos exposure was a substantial contributing factor in causing the claimant’s other cancer. The intent behind this provision is to reflect the testimony before this Committee, which indicated that a majority of the medical community has found little association between asbestos exposure and other cancers, particularly colorectal cancer. Because there is some evidence that may support an association, the Committee has provided compensation for such cancers. Because of the evidence finding no association, however, the Committee believes it is reasonable to require that a claimant establish a causal connection between his/her asbestos exposure and his/her other cancer. The Committee may review any studies, including the Institute of Medicine study to be commissioned, in making this determination.

*Lung Cancer:* The testimony before this Committee indicated that the majority of the medical community has found that lung cancer is generally not related to asbestos exposure unless the claimant has underlying asbestosis or, at least, sufficient exposure to asbestos to have caused asbestosis.<sup>56</sup> The United States Supreme Court recognized that “studies provide strong support for the notion that asbestosis is crucial to the development of asbestos-associated lung cancers.”<sup>57</sup> Workers with only pleural plaques, on the other hand, have not been shown to be at a higher risk for lung cancer, although pleural plaques are considered a marker of prior exposure to asbestos.<sup>58</sup> The consensus medical criteria established under this section thus provides three levels of lung cancers, with increasing evidence of causation.

For lung cancer I, level VII, evidence of 15 weighted years of exposure to asbestos is required. For lung cancer II, level VIII, the

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<sup>54</sup> *In re Joint E & S Dists. Asbestos Litig.*, 237 F Supp.2d 297, 311 (E. & S.D.N.Y. 2002) (citations omitted).

<sup>55</sup> *The Diagnosis of Nonmalignant Disease Related to Asbestos*, Official Statement of the American Thoracic Society, March 1986.

<sup>56</sup> Testimony of Dr. James D. Crapo, Professor of Medicine, National Jewish Center and University 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, at 6.

<sup>57</sup> *Norfolk & W. Railway Co. v. Ayers*, 123 S. Ct. 1210, 1222 (2003) (citing A. Churg & F. Green, *Pathology of Occupational Lung Disease* 343 (2d ed. 1998)).

<sup>58</sup> 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, at 7.

requirements include (i) evidence of bilateral pleural plaques, bilateral pleural thickening or bilateral pleural calcification, and (ii) 12 weighted years of exposure to asbestos. For lung cancer III, level IX, the claimant must provide either (i) a diagnosis of asbestosis and evidence of 8 or 10 weighted years, depending on the x-ray reading, or (ii) diagnosis of asbestosis by pathology and evidence of 10 weighted years. Supporting medical documentation as used throughout this section refers to a medical diagnosis or opinion related to the claimant's condition and does not include general medical literature related to the claimed disease or condition.

All lung cancer claims are paid pursuant to a matrix of classes for each level which the Administrator develops. This matrix is based on the claimant's smoking history, their age, and the intensity and duration of the exposure. A former smoker is defined as a person who quit smoking at least 12 years prior to date of diagnosis. A nonsmoker is a person who has never smoked at any time during his or her life. Because of the potential for misrepresentations related to one's smoking behavior, the claimant bears the burden of producing meaningful and credible evidence of their smoking history as part of their claim submission.

The intent behind paying less money to smokers is to reflect the fact that smoking also plays an important factor in causing lung cancers. According to the American Lung Association, about 87% of lung cancer cases are caused by smoking.<sup>59</sup> Early studies showing a synergistic effect between smoking and asbestos exposure have not been substantiated by later studies. Studies have also shown that the risk of lung cancer, while diminished for those who quit smoking, never reaches the same levels as those for lifetime nonsmokers.<sup>60</sup> This is particularly true where the claimant smoked 40–50 packs of cigarettes a year for many years prior to quitting. The Fund is not intended to be a compensation system for smokers, which would otherwise overwhelm the Fund leaving no money for asbestos victims.

For mesothelioma, level X, the claimant must provide credible evidence of identifiable exposure to asbestos based on occupational exposures, take home exposures, or exposures from living in the proximate vicinity of a plant or other industrial operation that has emitted asbestos fibers into the air resulting in asbestos being present in the environment well above normal background levels. Claimants may allege any other specific, identifiable exposure to asbestos as the cause of the mesothelioma, but such cases shall be referred to the Medical Advisory Committee for a determination as to eligibility. This identifiable exposure is not intended to include mere exposure to asbestos insulation in homes, except in the unusual circumstance that the claimant was exposed to friable asbestos in large amounts or on a repeated basis, in which case the claim shall be subject to review by the Medical Advisory Panel.

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<sup>59</sup>ALA, Facts About Lung Cancer, available at [www.lungusa.org/diseases/lungcanc.html](http://www.lungusa.org/diseases/lungcanc.html). Radon is considered to be the second leading cause of lung cancer in the United States today. Id.

<sup>60</sup>See, e.g., Donald R. Shopland, et al., Smoking-Attributable Cancer Mortality in 1991: Is Lung Cancer Now the Leading Cause of Death Among Smokers in the United States?, 83 J. of the Cancer Inst. 1142, 1145 (1991); National Cancer Institute, SEER Statistics, Effect of Quitting Smoking on Lung Cancer Risk Among Male and Female Former Smokers, by Length of Time Off Cigarettes and Number of Cigarettes Smoked Daily, (Table 3, based on data in Shopland et al., 1991), available at <http://seer.cancer.gov/publications/raterisk/risks71.html>.

*Study of “other cancers” and causation:* No later than 2 years after the date of enactment, the Institute of Medicine of the National Academy of Sciences must complete a study of the causal link between asbestos exposure and the other cancers: colorectal, laryngeal, esophageal, pharyngeal and stomach cancers. The study must be transmitted to Congress, the Court of Federal Claims and the Medical Advisory Committee. The Court and Medical Advisory Committee may consider the results of the report for purposes of determining whether asbestos exposure is a substantial contributing factor to causing claimant’s other cancer. The Court also may request additional study regarding other cancers if warranted by advancements of science.

*Exceptional Medical Claims:* The FAIR Act recognizes that in some cases, through no fault of the claimant, claimants may not have certain medical tests that are required under the medical criteria, but may have results from comparable tests and that there may be advances in science that result in new testing methods not anticipated by the Committee at this time. As such, this provision allows a claimant to seek designation of his or her claim as an exceptional medical claim if the claimant states that claim does not meet medical criteria requirements or has been found ineligible for compensation based on the failure to meet the medical criteria only. The claimant must provide a report from a physician meeting the requirements of section 121, such as a diagnosis based on an in person physical examination that finds asbestos exposure as a contributing factor to causing the relevant disease, and which includes (i) a complete review of the claimant’s medical history and current condition, (ii) additional material as required by the Court, and (iii) a detailed explanation as to why the claim meets the standard for designating exceptional medical claims.

All applications for designation as an exceptional medical claim are referred to the Medical Advisory Committee, which must find that the claimant, for reasons beyond his or her control, cannot meet the requirements but can through comparably reliable evidence establish a condition similar to one that would satisfy the requirements. The Medical Advisory Committee may request additional reasonable testing, and CT Scans may be submitted in addition to an x-ray. CT Scans are generally used only after an x-ray has already been taken and the physician believes a CT Scan may shed additional light on the claimant’s condition. In such cases, a CT Scan may be used to supplement the submission of an x-ray reading. Because of the lack of any clear, objective standards similar to those for x-ray readings, however, the Committee does not intend that CT Scans become normal practice for the filing of claims, and as such, they are limited to optional use by the Medical Advisory Committee in assessing exceptional medical claims.

If the Medical Advisory Committee certifies a claim as an exceptional medical claim, it must designate the disease category for which compensation may be sought and refer the claim to a special asbestos master for a determination on eligibility on the remaining diagnostic, latency and exposure requirements. A claimant may resubmit application based on new evidence, stating the new evidence that is the basis of the resubmission. The Chief Judge will promulgate rules governing the procedures for seeking designation of a claim as an exceptional medical claim. Because the medical

conditions of the residents of Libby, Montana are currently being studied by various agencies, claims filed by Libby, Montana claimants are to be automatically designated as exceptional medical claims and referred to Medical Advisory Committee for review of the claimant's eligibility.

#### Subtitle D. Awards

##### *Sec. 131. Amounts*

Because there are other causes for many of the illnesses that are compensated under the Act, claims values have been carefully constructed providing increased compensation not only for more severe degrees of illness, but also in those cases where there is increased confidence that the asbestos exposure was the cause of the claimant's injury. Mesothelioma, where asbestos is currently considered the only known cause, and lung cancer claims where the claimant has been diagnosed with underlying asbestosis and is a nonsmoker, have been given the highest values. Claims value for claimants with severe asbestosis and other lung cancer claims where the causal connection between the asbestos exposure and the injury is more substantiated similarly reflect the purpose of the Act to direct monies to the most seriously injured claimants whose injuries were caused by exposure to asbestos.

With this purpose in mind, eligible claims will be paid as follows:

	Disease/condition	Amount of award <sup>1</sup>
Level I .....	Asbestosis/Pleural Disease A .....	Medical Monitoring <sup>2</sup>
Level II .....	"Mixed" Disease .....	\$20,000
Level III .....	Asbestosis/Pleural Disease B .....	\$75,000
Level IV .....	Severe Asbestosis .....	\$300,000
Level V .....	Disabling Asbestosis .....	\$750,000
Level VI .....	Other Cancers .....	\$150,000
Level VII .....	Lung Cancer I .....	\$25,000—\$75,000 <sup>3</sup>
	Former Smokers .....	\$75,000—\$225,000 <sup>3</sup>
	Nonsmokers .....	\$225,000—\$600,000 <sup>3</sup>
Level VIII .....	Lung Cancer II .....	\$125,000—\$225,000 <sup>3</sup>
	Former Smokers .....	\$400,000—\$600,000 <sup>3</sup>
	Nonsmokers .....	\$600,000—\$1,000,000 <sup>3</sup>
Level IX .....	Lung Cancer III .....	\$300,000—\$400,000 <sup>3</sup>
	Former Smokers .....	\$550,000—\$850,000 <sup>3</sup>
	Nonsmokers .....	\$800,000—\$1,000,000 <sup>3</sup>
Level X .....	Mesothelioma .....	\$1,000,000

<sup>1</sup> Scheduled awards will be indexed for future inflation based on a cost of living adjustment.

<sup>2</sup> Claimants meeting Level I requirements are eligible for medical monitoring reimbursement only.

<sup>3</sup> All Lung Cancer values are to be determined based on a matrix which the Administrator must develop. This matrix will reflect different values based on a claimant's smoking history, age and level and duration of exposure. An "ex-smoker" is someone who has not smoked in the 12-year period before diagnosis of lung cancer. A "non-smoker" is a claimant who has never smoked. There are some occupations, such as automotive repair, in which a claimant would meet the definition of "substantial occupational exposure," "moderate exposure," and "heavy exposure" because he or she was working with a product containing asbestos for a sufficient period of time—yet, because of the low level of asbestos fibers to which the claimant would be exposed during this period, the exposure would not in reality be substantial and would not be capable of causing an asbestos-related disease. The bill therefore requires the Administrator to make a determination, based on studies of industrial hygiene and epidemiology, of the industries and occupations in which the airborne fiber levels of asbestos would indeed be at a level where exposure is considered substantial. Claimants whose primary occupation falls outside those industries or occupations where exposure has been determined to be substantial should not be presumed to have met the exposure requirements but such claims may be evaluated by the Medical Advisory Committee as exceptional medical claims.

##### *Sec. 132. Medical monitoring*

Although the intention of the FAIR Act is to direct monies away from the unimpaired and to those truly sick from asbestos exposure, the Committee recognizes that claimants with significant occupational exposure to asbestos may be at risk of developing a serious asbestos-related illness in the future. As such, claimants meeting the criteria for Level I will be reimbursed for all reasonable

costs (which are not covered by insurance) for x-rays, physical examinations, and pulmonary function tests every three years, which will provide the claimant with information as to whether he or she has a compensable illness. Although the claimant may choose which physician conducts such tests, the Administrator will provide eligible claimants with a list of providers in the claimant's area that can provide such services. Filing a claim for reimbursement of medical monitoring costs shall not commence the 4 year statute of limitations for filing a claim for compensation for an eligible condition or disease.

*Sec. 133. Payments*

Payments should be disbursed over a period of 3 years and in no event more than 4 years from the date of final adjudication of the claim, and can be accelerated for mesothelioma claimants who are alive on the date of determination. Claimants may also elect to receive their benefits in the form of an annuity. All benefits are non-taxable and not deemed to be a Medicare benefit.

*Sec. 134. Reduction in benefit payments for collateral sources*

All awards will be reduced by the amount of collateral source a claimant has received, or is entitled to receive. Collateral source is defined in section 3 as compensation that the claimant received or is entitled to receive from a defendant or its insurer, or compensation trust as a result of judgment or settlement for an asbestos related injury that is the subject of a claim filed under section 111. Worker's compensation and veteran's benefits are not included as collateral sources.

## Subtitle E. Panel Review

*Sec. 141. Panel review*

*United States Court of Asbestos Claims:* Claimants may appeal determinations of a panel of 3 Special Asbestos Masters to a panel of 3 randomly-assigned judges from the United States Court of Federal Claims. Such panel shall be known as the United States Court of Asbestos Claims ("Asbestos Court") and may sustain decisions, set aside arbitrary and capricious decisions, or remand for further action. Remands are limited to 30 days. The Administrator may appoint counsel to represent the Fund in oral arguments and to submit briefs. The Court will make its rulings based on the record, and not later than 30 days after oral argument, and in no event later than 60 days after receipt of the notice of appeal. Accepting payment of an award under this Act extinguishes all further right to appeal related to such payment.

## TITLE II. ASBESTOS INJURY CLAIMS RESOLUTION FUND

*Sec. 201. Definitions*

*Sec. 202. Authority and tiers*

The Administrator shall identify all defendants with \$1 million or more in prior asbestos expenditures and assign them to tiers as appropriate pursuant to this Act. Defendants will generally be placed in tiers based on historical expenditures on asbestos claims,

including costs related to defense and indemnity, and further subdivided based on revenues.<sup>61</sup>

*Assessment of Defendant Participant Contributions:* The Administrator shall determine the amount that each defendant participant will be required to pay into the fund to compensate claimants for asbestos injuries based on the following formula:

(1) *Tier I*—Persons with Prior Asbestos Expenditures that have a case pending under a chapter of title 11 of the United States Code, before January 1, 2002, shall be assigned to Tier I if such Chapter 11 filing was caused by asbestos liability.

*Bankruptcies not caused by asbestos liability*—However, it is the intent of the FAIR Act and the Committee that a bankruptcy not caused by asbestos liabilities be permitted to proceed with filing and approval of the bankruptcy reorganization plan. And any asbestos compensation trust established pursuant to such plan, will pursuant to other provisions in this Act, be incorporated in the Asbestos Injury Claims Resolution Fund. Therefore, for any company that filed for chapter 11 protection prior to the date of enactment of this Act and has not confirmed a plan of reorganization as of the date of enactment of this Act, it may petition to proceed with its bankruptcy filing if its bankruptcy was not caused by asbestos liabilities. The presiding bankruptcy court shall make the determination of whether or not the filing was caused by asbestos liabilities after notice and a hearing upon motion filed by the entity within 30 days of the effective date of this Act, which motion shall be supported by an affidavit or declaration of the Chief Legal Officer of the business entity, and copies of the entity's public statements and filing for chapter 11 protection that asbestos liability was not the sole or precipitating cause of the entity's chapter 11 filing. The bankruptcy court shall hold a hearing and make its determination within 60 days of when the motion is filed. Any judicial review of this determination must be an expedited appeal and limited to whether the decision was against the weight of the evidence presented.

If the bankruptcy court's determination is in favor of the entity's motion, that entity may proceed with the filing, solicitation and confirmation of a plan or reorganization, including a trust and channeling injunction pursuant to section 524(g) of the bankruptcy code, notwithstanding any other provisions of this Act, provided that:

(1) the bankruptcy court determines that confirmation is necessary to permit the reorganization of the company and assure that all creditors and the company are treated fairly and equitably;

(2) an order confirming the plan of reorganization is entered by the bankruptcy court within nine months after the effective date of the Act, or such longer period approved by the bankruptcy court for good cause shown. To the extent such company successfully confirms a plan of reorganization including a 524(g) trust and channeling injunction that involves payments by insurers who are otherwise subject to this Act, such insur-

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<sup>61</sup>It is the intent of the Committee that the amounts contributed by defendants and insurers be tax deductible and that claim awards and the growth of the Asbestos Claims Resolution Fund be tax-free, consistent with good public policy. The Judiciary Committee and Finance Committee will work together to insert the appropriate language for Senate floor consideration of this bill.

ers shall obtain a corresponding reduction in the amount otherwise payable by that insurer under this Act.

(2) *Other Tiers*—Except as otherwise provided, Persons or Affiliated Groups shall be assigned to Tiers II, III, IV, V, VI or VII according to their Prior Asbestos Expenditures as follows:

Tier II: \$75 million or greater.

Tier III: \$50 million or greater but less than \$75 million.

Tier IV: \$10 million or greater but less than \$50 million.

Tier V: \$5 million or greater but less than \$10 million.

Tier VI: \$1 million or greater but less than \$5 million.

Tier VII: \$5 million or More in FELA Liability. (Note: Tier VII is discussed in Sec. 203).

*Total Contributions:* Defendants' contributions shall total \$52 billion collectively over a 27-year period, unless otherwise provided.

#### *Sec. 203. Subtier assignment*

Except as otherwise provided, the Administrator shall assess contributions to Persons or Affiliated Groups within Tiers I through VII as follows—

Tier I—The Administrator shall assess an annual contribution to each debtor in Tier I based on a percentage of its revenues, according to the following tiers:

Subtier 1: 1.5184% of its Revenues in years 1–5, declining gradually to .1518% of Revenues in year 27.

Subtier 2: For non-operational companies—all of assets earmarked for asbestos contributed to fund.

Subtier 3: Non-operational and no assets earmarked for asbestos—50% of all unencumbered assets contributed to fund.

For Tiers II through VII—The Administrator shall assess annual contributions to each participant, according to the following allocation:

Tier II—Based on Revenues the Person or Affiliated Group shall be assigned to subtiers and shall pay, on an annual basis, the following:

Subtier 1: \$25 million (those with highest revenues).

Subtier 2: \$22.5 million (those with next highest revenues).

Subtier 3: \$20 million (those remaining).

Subtier 4: \$17.5 million (those with the next to the lowest revenues).

Subtier 5: \$15 million (those with the lowest revenues).

Tier III—Based on Revenues the Person or Affiliated Group shall be assigned to subtiers and shall pay, on an annual basis, the following:

Subtier 1: \$15 million (those with the highest revenues).

Subtier 2: \$12.5 million (those with the next highest revenues).

Subtier 3: \$10 million (those remaining).

Subtier 4: \$7.5 million (those with the next lowest revenues).

Subtier 5: \$5 million (those with the lowest revenues).

Tier IV—Based on Revenues, the Person or Affiliated Group shall be assigned to subtiers and shall pay, on an annual basis, the following:

Subtier 1: \$3.5 million (those with the highest revenues).

Subtier 2: \$2.25 million (those with the next highest revenues).

Subtier 3: \$1.5 million (those remaining).

Subtier 4: \$0.5 million (those with the lowest revenues).

Tier V—Based on Revenues, the Person or Affiliated Group shall be assigned to subtiers and shall pay, on an annual basis, the following:

Subtier 1: \$1 million (those with the highest revenues).

Subtier 2: \$0.5 million (those remaining).

Subtier 3: \$0.2 million (those with the lowest revenues).

Tier VI—Based on Revenues, the Person or Affiliated Group shall be assigned to subtiers and shall pay, on an annual basis, the following:

Subtier 1: \$0.5 million (those with the highest revenues).

Subtier 2: \$0.25 million (those remaining).

Subtier 3: \$0.1 million ((those with the lowest revenues).

Tier VII—In addition to an assignment in Tiers II through VI, persons who are assigned to Tier VII if they are subject to claims under FELA liability and shall pay, on an annual basis, the following:

Subtier 1: Railroad common carriers with revenues of at least \$5 billion shall pay \$10 million.

Subtier 2: Railroad common carriers with revenues of at least \$3 billion but less than \$5 billion shall pay \$5 million.

Subtier 3: Railroad common carriers with revenues of at least \$0.5 billion but less than \$3 billion shall pay \$500,000.

*Revenues:* “Revenues” shall be determined by reported earnings for the year ending December 31, 2002, or, if applicable, the earlier fiscal year that ends during 2002.

#### *Sec. 204. Assessment administration*

*Decreased contributions:* Except as otherwise provided, the Administrator will assess contributions based on the values set forth for each Person or Affiliated Group covered by this subsection for the first five years of the Fund’s operation. After year five, the Administrator shall reduce the contribution amount for each Defendant Participant in Tiers II, III, IV, V, VI and VII.

*Small business exemption:* Persons or Affiliated Groups meeting the definition of “small business” as defined by the Small Business Administration pursuant to the Small Business Act, 15 U.S.C. §632, on December 31, 2002 are exempt from any contribution requirement under this subtitle.

*Exceptions:* Under expedited procedures established by the Administrator, a Defendant Participant may seek adjustment of the amount of its contribution based on severe financial hardship or demonstrated exceptional inequity. The administrator shall appoint two advisory panels—one on financial hardship and one on inequity adjustment—to make recommendations.

*Hardship adjustments*—may not exceed in the aggregate 6% of the total annual contributions otherwise required of all Defendant Participants

*Inequity adjustments*—may not exceed 4% of the total annual contributions otherwise required of all Defendant Participants.

A defendant may qualify for an inequity adjustment by demonstrating that the amount of its contribution under the statutory allocation is exceptionally inequitable when measured against:

(i) that percentage of the prior asbestos expenditures of the defendant that were incurred with respect to claims that neither resulted in an adverse judgment against the defendant nor were the subject of a settlement that required a payment to a plaintiff by or on behalf of that defendant; or

(ii) the amount of the likely cost to the defendant of its future liability in the tort system in the absence of the Fund; or

(iii) the contribution rate of the defendant is exceptionally inequitable when compared to the median contribution rate for all defendants in the same tier (contribution rate for purposes of this section is the contribution amount of the defendant as a percentage of such defendant's gross revenues for the year ending December 31, 2002); or

A defendant shall qualify for a two-tier main tier and a two-tier sub-tier adjustment reducing the defendant's contribution based on inequity by demonstrating that not less than 95% of such person's prior asbestos expenditures arose from claims related to the manufacture and sale of railroad locomotives and related products, so long as such person's manufacture and sale of railroad locomotives and related products is temporally and causally remote. For purposes of this paragraph, a person's manufacture and sale of railroad locomotives and related products shall be deemed to be temporally and causally remote if the asbestos claims historically and generally filed against such person relate to the manufacture and sale of railroad locomotives and related products by an entity dissolved more than 25 years prior to the date of enactment of this Act.

*Term and Renewal*—The adjustments granted under this section shall apply for a period of 3 years and may be renewed.

*Recoupment Authority*—Following expiration of the hardship or inequity adjustment period granted under this section, the Administrator shall annually determine whether there has been a material change in conditions which would support a finding that the allocation was not inequitable or that the defendant that was the recipient of a hardship is now capable of paying its full allocation amount plus past reduction amounts and if so reinstate the original contribution that was not paid during the inequity or hardship adjustment term. The intent of this section is to protect the integrity of the fund by permitting recoupment of prior adjustments. However, it is intended that this recoupment is not mandatory but that the Administrator shall have discretion to ensure that any such recoupment will not result in a hardship on the participant.

*Determination of Prior Asbestos Expenditures*: Payments by indemnitors prior to December 31, 2002 shall be counted as part of the indemnitor's prior asbestos expenditure.

*Statutory Minimum Contributions*: Statutory minimums for the aggregate contributions of Defendant Participants to the Fund in any single year shall be as follows:

(1) For each of the first five years of the Fund, the aggregate contributions of Defendant Participants to the Fund shall be at least \$2.5 Billion.

(2) After year five, the statutory minimum shall be reduced as follows:

(A) For years 6 through 8, \$2.25 billion;

- (B) For years 9 through 11, \$2 billion;
- (C) For years 12 through 14, \$1.75 billion;
- (D) For years 15 through 17, \$1.5 billion;
- (E) For years 18 through 20, \$1.25 billion;
- (F) For years 21 through 26, \$1 billion;
- (G) For year 27, \$250 million.

*Identification of Defendant Participants:* The Administrator shall identify defendants that have paid or been assessed through legal judgment or settlement, greater than \$1 million in defense and indemnity costs relating to asbestos personal injury claims and these defendants shall be mandatory participants in the fund. The Administrator shall directly notify all reasonably identifiable Defendant Participants of the requirement to submit information necessary to calculate the amount of any required contribution to the Fund; and publish in the Federal Register a notice requiring any person who may be a Defendant Participant to submit such information.

*Several Liabilities:* Each Defendant Participant's obligation to contribute to the Fund is several. There is no joint liability and the future insolvency of any Defendant Participant shall not affect the assessment assigned to any other Defendant Participant.

*Application of FOIA and confidentiality of information:* The Freedom of Information Act shall apply to the Office of Asbestos Injury Claims Resolution. Any person may designate any record submitted under this section as a confidential commercial or financial record.

## Subtitle B. Asbestos Insurers Commission

### *Sec. 211. Establishment of Asbestos Insurers Commission*

No later than 60 days after enactment, the President, in consultation with Congress, shall appoint five commissioners with sufficient expertise. The commissioners shall be appointed for the life of the Commission. No member of the Commission may be an employee or immediate family member of an employee of an insurer participant. No member of the commission may be a former employee or shareholder of any insurer participant unless that fact is fully disclosed. However, the meaning of shareholder is defined to exclude a broadly based mutual fund that may from time to time include the stocks of insurer participants. A commissioner shall not be an officer or employee of the Federal Government, except in relation to this commission. The Commission shall select a chairman from among its members. No later than thirty days after all the members have been appointed, the Commission shall hold its first meeting. Subsequently, the Commission shall meet at the call of the Chairman as necessary to carry out the duties. No business may be conducted or hearings held without the participation of all members of the Commission.

### *Sec. 212. Duties of the Asbestos Insurers Commission*

*Subsection (a)(1)—Determination of Insurer Liability for Asbestos Injuries:* The Commission shall determine the amount that each Insurer Participant will be required to pay into the Fund to compensate claimants for asbestos injuries. The terms "Insurer Participant" and "Mandatory Insurer Participant" includes direct insur-

ers, reinsurers and any run-off entity established to review and pay asbestos claims.

Subsection (a)(2)—*Allocation Agreement*: Not later than 30 days after the Commission issues its initial determination, the direct insurers and reinsurers have the option of submitting an allocation agreement that establishes the respective insurer payments into the Fund. The agreement must be approved by all of the participants from both groups and submitted to the Congress. The Commission's authority terminates on the day after the Commission certifies that an allocation agreement meets the requirements of Subtitle B.

Subsection (a)(3)—*General Provisions*: The total aggregate contributions required of all Insurer Participants equals \$52 billion. Unless provided otherwise, the annual contributions from Insurer Participants are expected to decline over time and the proportionate share of each Insurer Participant's contributions will remain the same throughout the life of the Fund. Unless provided otherwise, each Insurer Participant's obligation to contribute to the Fund is several. There is no joint liability and the future insolvency of any Insurer Participant shall not affect the assessment assigned to any other Insurer Participant.

Subsection (a)(4)—*Assessment Criteria*: Insurers that have paid or been assessed through legal judgment or settlement, greater than \$1 million in defense and indemnity costs relating to asbestos personal injury claims shall be considered Mandatory Insurer Participants to the Fund. Direct insurers licensed and domiciled in the United States shall be responsible for a portion of the total insurer fund contribution of \$52 billion. All other Insurer Participants, shall also be responsible for a portion of the \$52 billion in total contributions. In determining the respective allocations among these Insurer Participants, the Commission is required to apply the following factors: historic premium lines for asbestos liability coverage; recent loss experiences for asbestos liabilities; the likely costs to each Insurer Participant of its future liabilities under applicable insurance policies; and other factors the Commission deems relevant and appropriate. This subsection gives Insurer Participants the ability to seek hardship adjustments of the amount of its contribution based on severe financial hardship. This subsection also provides that captive insurers of Defendant Participants should not be assessed a funding obligation as Insurer Participants to the extent that their asbestos exposure remains within the corporate family. Payments are to be made annually into the Fund, however, direct insurers are required to pay 100% of their allocated amount within three years of the effective date of this Act. Unless provided otherwise, Insurer Participants who have fully paid their allocation obligations to the Fund shall have no further responsibilities under the Act. An interested party may obtain judicial review of any final regulation of the Commission with regard to an allocation formula under this subsection.

*Notification to and request for information from Insurer Participants*: Subsection (b)(1)—Within 30 days after its initial meeting, the Commission is required to directly notify all reasonably identifiable Insurer Participants of the requirement to submit information necessary to calculate the amount of any required contribution to the Fund; and publish in the Federal Register a notice requiring

any person who may be an Insurer Participant to submit such information.

*Response to the Commission:* Subsection (b)(2)—Any person meeting the criteria established in the notice shall respond and submit the required information within thirty days after receipt of the direct notice or thirty days after the publication of the notice in the Federal Register. The response shall be signed by a responsible corporate officer, general partner, proprietor, or individual of similar authority, who shall certify under penalty of law the completeness and accuracy of the information submitted.

*Notice of Initial Determination:* Subsection (b)(3)—Not later than 120 days after the initial meeting of the Commission, the Commission shall send each participant a notice of the initial determination assessing a contribution to the Fund. If no response is received from the participant, or if the response is incomplete, the initial determination assessing a contribution from the participant shall be based on the best information available to the Commission.

*Review Period:* Subsection (b)(4)(A)—Not later than 30 days after receiving notice of the initial determination from the Commission, an Insurer Participant may provide the Commission with additional information to support limited adjustments to the assessment received to reflect exceptional circumstances.

*Additional Participants:* Subsection (b)(4)(B)—If before the final determination of the Commission, the Commission receives information that an additional person may qualify as an Insurer Participant, the Commission shall require such person to submit information necessary to determine whether a contribution from that person should be assessed.

*Revision Procedures:* Subsection (b)(4)(C)—The Commission is authorized to adopt procedures for revising initial assessments based on information received under subparagraphs (A) and (B).

*Subpoena Power:* Subsection (b)(5)—The Commission may request the Attorney General to subpoena persons to compel testimony, records, and other information relevant to its responsibilities under this section. This subpoena power shall be enforced in the U.S. district court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business.

*Escrow Payments:* Subsection (b)(6)—Notwithstanding an Insurer Participant's allocation obligation, any escrow or similar account established before the enactment of this Act by an Insurer Participant in connection with an asbestos trust fund that has not been judicially confirmed by the date of enactment of this Act shall be returned to that insurer participant.

*Notice of Final Determination:* Subsection (b)(7)—Not later than 60 days after the notice of initial determination is sent to the Insurer Participants, the Commission shall send each Insurer Participant a notice of final determination of the assessment amount and payment schedule. A participant has a right to obtain judicial review of the Commissions final determination under Title III.

*Determination of Relative Liability for Asbestos Injuries:* Subsection (c)—The Commission shall determine the percentage of total liability of each participant identified under subsection (a).

*Report:* Subsection (d)—Not later than one year after the date of enactment of this Act, the Commission shall submit a report regarding the amount of the assessments and payment schedule of

contributions to the Senate Judiciary Committee, the House Judiciary Committee and the U.S. Court of Federal Claims.

*Sec. 213. Powers of the Asbestos Insurer Commission*

This section authorizes the Commission to conduct rulemakings for the purpose of implementing its authority under the Act. The Commission may hold hearings, sit and act at such times, take testimony and receive evidence as it considers advisable. The Commission may secure directly from any Federal agency such information as the Commission considers necessary to carry out this act, and may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal government. The Commission may not accept, use, or dispose of gifts or donations of services or property. The Commission may also enter into contracts as it deems necessary to obtain expert advice and analysis.

In addition to establishing the powers of the Commission, this section establishes related powers of the Administrator. The Administrator may require Insurer Participants to make payments to the Fund prior to the Commission's establishment of an allocation formula. Such payments shall be assessed on an equitable basis and equal, in total, the funding obtained from Defendant Participants for the same period of time.

*Enforcement*—The Administrator also holds authority to pursue a civil action in federal court against any reinsurer that fails to comply with its obligations under the Act. The Administrator is authorized to seek treble damages and is authorized to seek relief against the direct insurer, an obligated party, if unable to collect from the reinsurer.

*Sec. 214. Personnel matters of the Asbestos Insurers Commission*

Each member of the Commission shall be paid a daily equivalent of the annual rate for level IV of the Executive Schedule. Members of the Commission shall be allowed travel expenses including per diem in lieu of subsistence consistent with that permitted for federal agency employees. The Chairman of the Commission may appoint and terminate an executive director and such other additional personnel as may be necessary to enable the Commission to perform its duties. The employment of the executive director shall be subject to confirmation by the Commission. The Chairman of the Commission may set the rate of compensation of staff but it must not exceed Level V of the Executive Schedule. Any federal government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege. The Chairman of the Commission may procure temporary and intermittent services at rates that do not exceed Level V of the Executive Schedule.

*Sec. 215. Application of FOIA and confidentiality of information*

The Freedom of Information Act shall apply to the Commission. Any person may designate any record submitted under this section as a confidential commercial or financial record.

*Sec. 216. Termination of the Asbestos Insurers Commission*

The Commission shall terminate 60 days after the date on which the Commission submits its report.

*Sec. 217. Expenses and costs of Commission*

All expenses and costs of the Commission shall be paid by the Asbestos Injury Claims Resolution Fund.

Subtitle C. Office of Asbestos Injury Claims Resolution

*Sec. 221. Establishment of the Office of Asbestos Injury Claims Resolution*

The office shall be responsible for administering the Fund, providing compensation from the Fund to asbestos claimants who are deemed eligible for such compensation; and any other activities deemed appropriate. The President shall appoint an Administrator, with the advice and consent of the Senate. The Administrator shall serve for a term of five years and may be removable for good cause.

*Sec. 222. Powers and duties of the Administrator and management of the fund*

The Administrator shall promulgate such regulations as the Administrator deems necessary to implement provisions of this title; appoint employees or contract for the services of other personnel; make expenditures as may be necessary and appropriate in the administration of this subtitle; and take all actions necessary to prudently manage the Fund.

This section also requires the Administrator to refer any information relating to violation of the Toxic Substances Control Act, the Clean Air Act, or the Occupational Safety and Health Act to the Secretary of Labor, the Administrator of the EPA or the United States Attorney for possible civil or criminal prosecution and penalties.

This section also directs the United States Sentencing Commission to review and amend, as appropriate, the United States Sentencing Guidelines regarding environmental crimes relating to asbestos to ensure that the penalties are sufficient to deter and punish future activity and for other reasons.

*Sec. 223. Asbestos Injury Claims Resolution Fund*

There is established in the Office of Asbestos Injury Claims Resolution, the Asbestos Injury Claims Resolution Fund which shall be available to pay claims deemed eligible for compensation for an eligible disease or condition, reimbursement for medical monitoring, principal and interest on amounts borrowing, and administrative expenses under the authority of this subsection. Except as otherwise provided, the aggregate contributions of all mandatory participants to the Fund may not exceed \$5 billion in any calendar year. The Administrator is authorized to borrow, in any calendar year, an amount not to exceed anticipated contributions to the Fund in the following year, for purposes of carrying out this Act.

*Orphan Share Reserve Account:* To the extent the total amount of contributions of the Defendant Participants in any given year exceed the statutory minimum under section 204(h), the excess monies will be placed in an Orphan Share reserve account established

by the Administrator. These excess contributions are not intended to include contributions from contingent call funding. Monies from the Orphan Share reserve account shall be preserved and administered like the remainder of the Fund, but shall be reserved and may be used only (A) in the event that a petition for relief is filed and not withdrawn for the Defendant Participant under title 11 of the United States Code after date of enactment and the Defendant Participant cannot meet its obligations under paragraphs (4) and (5) of sections 202 and 212, and (B) to the extent the Administrator grants a Defendant Participant relief for severe financial hardship or exigent circumstances under paragraph (9) demonstrated inequity under section 204(d).

*Guaranteed Payment Surcharge Account:* The Administrator shall impose on each Mandatory Participant an amount in addition to contributions a reasonable surcharge to insure against the risk of nonpayment of required contributions. These amounts are to be put in a reserve account to be used in the event contribution obligations are not met.

*Lockbox for Severe Asbestos-Related Injury Claimants:* This section authorizes the Administrator to establish four separate lockbox accounts to protect the funds needed to compensate the victims with the most severe asbestos-related injuries: mesothelioma, lung cancer with asbestosis, lung cancer with pleural disease, other cancer and disabling asbestosis. The Administrator shall allocate to each of these accounts a portion of contributions to the Fund to compensate anticipated claimants for each account. Funds will be allocated to these accounts based on the best epidemiological and statistical studies.

*Contingent Call for Additional Mandatory Funding:* This section provides a contingent source of funding during the 27 year mandatory funding period. This contingent call authority is intended to be truly contingent and only used in the event that claims cannot be paid in a timely manner *after* other reserve funds are utilized, including borrowing authority. The section requires the Administrator to certify, before making any reduction adjustments to annual contributions under section 204(a) or section 212(a)(3)(B), that the Fund will have adequate funds available to compensate past, pending and projected future claimants at the scheduled award values provided in section 131(b) of the Act. If the Administrator fails to make such certification for any given 1 year, 3 year, or 6 year reduction adjustment period, the Administrator has the authority to delay or reduce any scheduled step-down. For example, if in year 9 and defendant companies' aggregate contributions are scheduled to go down to \$2 billion from \$2.25 billion. The Administrator has the discretion to allow the step down to go forward as projected to \$2 billion, or the Administrator can reduce the contribution partially to \$2.1 billion or keep the contributions at the year 8 level of \$2.25 billion. To meet the contingent call, defendant companies have a prorated assessment based on their original section 203 subtier funding levels. Insurer funding levels to meet contingent calls will be established by the Insurers Commission.

*Credit for surplus funds*—The section also grants the Administrator the authority to provide contributing participants a credit for surplus funds that may be generated through a contingent call. These credits are applied by authorizing the Administrator to pro-

vide an additional reduction adjustment to participants in addition to any reduction adjustment already made. The total reduction adjustment, however, cannot exceed the amount of additional contributions required under this section.

*Back-End Payments:* This section addresses funding shortages should they occur after expiration of the 27 year mandatory funding period. The section authorizes the Administrator to request annually \$1 billion in the aggregate from Defendant Participants and \$1 billion in the aggregate from Insurer Participants starting in year 28. The Administrator is required to determine, after consulting with appropriate experts, whether additional contributions are necessary to assure adequate funding for claimants eligible to receive compensation under the Act at the scheduled awards and the scheduled rates. Payments are voluntary. But if the participant decides not to make such voluntary payments, that participant would be subject to a civil action in federal court. For civil actions against participants that fail to make voluntary payments under this section, the statute of limitations is tolled until a qualified claimant knows or should have known that the participant failed to make a voluntary contribution.

*Sec. 224. Enforcement of contributions*

If any participant fails to make any payment in the amount and according to the schedule specified in the assessment, after demand and 30 days opportunity to cure the default, there shall be a lien in favor of the United States for the amount of the delinquent payment (including interest). In the case of a bankruptcy or insolvency proceeding, the lien shall be treated in the same manner as a lien for taxes due and owing to the United States. In any case where there has been a refusal or neglect to pay an assessment, the Administrator may bring a civil action in the Federal district court for the District of Columbia to enforce such liability.

*Availability of punitive damages and fines*—In any action involving a willful refusal to pay, the Administrator is authorized to recover punitive damages, including costs and attorneys fees, and may collect a fine equal to the total amount of the liability not collected. In any enforcement proceeding, the participant shall be barred from bringing any challenge to the assessment if such challenge could have been made during the review period specified under section 102(b)(4)204(i)(8) or 112(b)(4), or a judicial review proceeding under Title III.

### TITLE III. JUDICIAL REVIEW

*Sec. 301. Judicial review of decisions of the Asbestos Court (which is within the U.S. Court of Federal Claims)*

The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over any action to review a final decision of the Asbestos Court. Appeals must be filed within 30 days of the final decision of the Asbestos Court. All decisions will be upheld unless deemed to be arbitrary and capricious, in which case they will be remanded to the United States Court of Federal Claims.

*Sec. 302. Judicial review of final determinations of the Administrator and the Asbestos Insurers Commission*

The U.S. District Court for the District of Columbia has exclusive jurisdiction over any action to review the final determinations of the Insurer Commission regarding contribution allocations, and contribution allocation decisions by the Administrator. Final determinations will be upheld unless arbitrary and capricious, in which case it will be remanded to the Administrator or the Commission with instructions to modify. No stays of payments pending appeal are allowed.

*Sec. 303. Exclusive review*

No judicial review other than as set forth in sections 301 and 302 is allowed. Any decision of the federal court finding any part of the FAIR Act to be unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court within 30 days of such ruling.

*Sec. 304. Private right of action against reinsurers*

An insurer participant may bring an action in the U.S. District Court for the District of Columbia against any reinsurer that is contractually obligated to reimburse such insurer for some or all of its costs incurred in an asbestos related claim. Such claims must be decided within 30 days after filing, and will be reviewed under an arbitrary and capricious standard. Appeals may be filed in the Court of Appeals for the District of Columbia and will be reviewed under an arbitrary and capricious standard.

#### TITLE IV. MISCELLANEOUS PROVISIONS

*Sec. 401. False information*

This section amends Title 18, Chapter 63 of the U.S. Code by adding a new section 1348 to impose criminal penalties for fraud against the Asbestos Insurers Commission and the Office of Asbestos Injury Claims Resolution, and false statements made against the Asbestos Injury Claims Resolution Fund by any party.

*Sec. 402. Effect on bankruptcy laws*

Contribution obligations are not dischargeable and may not be stayed when a participant files for bankruptcy. Claims by the Court or U.S. against a participant are allowed even in bankruptcy. Participants' payment pending bankruptcy or in bankruptcy are not avoidable as preferences or executory contract.

*Transfer of Existing Asbestos Trusts:* Existing trusts, including 524(g) trusts, will be incorporated into the Asbestos Injury Resolution Fund. The Administrator shall have discretion when transferring assets of these trusts. This incorporation is estimated to provide an additional \$4–6 billion in contributions to the fund.

*Sec. 403. Effect on other laws and existing claims*

This section provides that there will be no other forum for recovery of an asbestos injury claim other than under S. 1125. Claims pending as of the date of enactment will be preempted by S. 1125, except those “actions for which an order or judgment has been duly entered by a court that is no longer subject to any appeal or judi-

cial review. \* \* \*” Nonfinal settlements and judgments that are still subject to appeal are included in the preemption. If a state court does not dismiss a claim, it may be removed to federal court, which will rule on the motion to dismiss.

As amended in Committee, the preemption, removal and dismissal provisions of this section are not effective until the Administrator determines that the fund is fully operational and processing claims. However, any claims made payable by operation of this amendment will reduce a participant’s contribution obligations under this Act.

*Sec. 404. Administrator’s annual reports*

This section requires the Administrator to submit an annual report to the Senate Committee on the Judiciary and House Committee on the Judiciary concerning the operation of the Asbestos Injury Claims Resolution Fund. The section specifies the contents of the report which includes summaries, estimates and recommendations.

*Fund Sunset provision*—In the Annual Report, the Administrator is required to certify that 95% or more of eligible asbestos claimants who filed claims during the prior calendar year, have been paid and received compensation according to the terms of section 133. If the Administrator fails to make such certification, the Administrator is given 90 days to remedy the situation. But if the Administrator fails to make the required certification after expiration of the 90 days, the Fund will terminate, and claimants will have the opportunity to pursue their claims in the appropriate court.

The Committee is concerned that this Amendment was adopted without a full understanding of the actual language and the harsh consequences, ramifications and implications thereof. The sponsor of the Amendment, Senator Biden, has agreed to work with Members to develop appropriate language to mitigate any unintended consequences of this provision before floor consideration of S.1125.

*Sec. 405. Rule of construction relating to liability of the United States government*

Except as otherwise specifically provided in this Act, nothing in this Act may be construed as creating a cause of action against the United States government, any entity established under this Act, or any officer or employee of the United States government or such entity. In addition it should not be construed in any way to create an obligation of funding from the United States government, other than funds for personnel or support as specifically provided in this legislation.

*Section 406. Effect of insurance and reinsurance contracts*

Because most insurance policies cover multiple liabilities, it was necessary to account for “erosion” of a policy that covers not only asbestos liabilities, but potentially other liabilities such as property or other environmental liabilities when assessing contribution obligations to the fund in order to avoid depriving insureds of coverage for other non-asbestos related claims. This section establishes how contributions to the Fund by insurers and reinsurers reduce the limits of existing insurance policies held by the Defendant Participants. The quantum of erosion is based on the collective payment

obligations to the Fund by the insurer and reinsurer participants, and are deemed as of the date of enactment to erode remaining aggregate product limits available to a Defendant Participant in an amount of 74.51% of each Defendant Participant's scheduled assessment amount. The erosion principles apply to the mandatory payment obligations to the Fund, the contingent call payments and back-end payments.

## TITLE V. PROHIBITION OF ASBESTOS CONTAINING PRODUCTS

This section amends chapter 39 of Title 18 to prohibit the manufacture, distribution and importation of consumer products to which harmful asbestos is deliberately or knowingly added. This section also contains specific exemptions and authorizes the Administrator to hear and grant exemptions on a case by case basis. The Committee found precedence and structured this section in large part on an asbestos ban implemented by the Environmental Protection Agency in 1989. Although this regulatory ban was invalidated by the Fifth Circuit on mainly procedural grounds, this section implements it legislatively and it is the Committee's intent that the Administrator use the 1989 Environmental Protection Agency regulations as a guide towards implementing the ban and relevant exceptions under this section. The Committee recommends that the EPA consider, consistent with its prior regulations, among other issues: (1) whether to create a two-stage ban with a manufacturing ban first and a distribution in commerce ban phased in after a proper time delay; (2) whether to provide a labeling mechanism to identify an asbestos containing product as soon as practicable after date of enactment; and (3) whether to provide an enforcement standard that requires a violation under the ban to be knowing and willful.

## VII. CRITICS' CONTENTIONS AND REBUTTALS

*Critics' Contention No. 1:* Critics contend that the funding provided for in S. 1125 is inadequate to pay all asbestos victims.

*Response:* The FAIR Act as amended obligates defendant and insurer participants to contribute \$52 billion equally to the Asbestos Injury Claims Resolution Fund (hereinafter "Fund"). In addition, at least another \$4 billion would be contributed to the Fund from confirmed bankruptcy and other asbestos compensation trusts, bringing the total level of mandatory contributions to the Fund to \$108 billion. The size of the Fund is based on sound statistical data and economic models, and is more than adequate to compensate all victims of asbestos-related disease. Indeed, a leading actuary with Tillinghast-Towers Perrin, testified convincingly before the Committee on June 4, 2003 that "\$108 billion appears to be more than adequate \* \* \*" <sup>62</sup>

The total estimated cost of ultimate asbestos loss and expense, which includes both past payments and projected future payments, is \$200 billion.<sup>63</sup> The RAND Institute for Civil Justice recently esti-

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<sup>62</sup> Statement of Jennifer L. Biggs, FCAS, MAAA, Tillinghast-Towers Perrin, Hearing Before the Senate Committee on the Judiciary, "Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003," 108th Cong., June 4, 2003, at 7.

<sup>63</sup> Id. at 1.

mated that \$70 billion has already been paid through year-end 2002.<sup>64</sup> By reducing the total estimated cost of asbestos-related loss and expense by the \$70 billion already paid out through 2002, the remaining future cost of asbestos-related loss and expense is an estimated \$130 billion.

One of the most beneficial features of the FAIR Act is that it will significantly reduce the substantial transaction costs of the current tort system—amounts which most experts agree currently consume more than half of the total costs.<sup>65</sup> By substituting the tort system for an administrative no-fault system for compensation, the FAIR Act will wring out these transaction costs and further reduce the future projected costs. Of the \$130 billion of asbestos-related spending remaining outstanding, Tillinghast-Towers Perrin estimates that approximately \$28 billion (or 21.5%) is attributable to defense costs. Of the remaining \$102 billion, Tillinghast estimates that approximately \$41 billion (or 40%) will go to plaintiffs' attorneys. In the current system, as a result of these transaction costs, only \$61 billion of the \$130 billion estimate of future asbestos-related loss and expense, or less than half, is expected to be paid to asbestos victims.<sup>66</sup> Moreover, the FAIR Act will correct the current misallocation of payments being made to unimpaired claimants who are flooding the court system today. Therefore, the \$108 billion to be contributed to the Fund by defendant and insurer participants will be more than double the \$61 billion, thus giving victims the certainty that they will receive compensation under the new system.

As an added protection against the unlikely risk of insufficient funding, the FAIR Act provides several funding safeguards to ensure Fund solvency. First, the Administrator holds access to additional funds through a guaranteed payment account. This account collects a mandatory surcharge (in addition to the assessed amount) on every defendant and insurer contribution made into the Fund. The proceeds from this surcharge are used to cover shortages attributable to non-payment by any participant. Second, the Administrator holds access to an orphan share account that collects amounts paid in excess of the maximum aggregate contribution by insurees and defendants. These amounts are used to cover losses caused by participants that proceed with Chapter 11 bankruptcies and for losses caused by financial hardship and inequity determinations made in favor of certain participants. Third, the Administrator holds authority to borrow from commercial lending institutions amounts to offset short term losses in an amount that does not exceed anticipated contributions for the following year.

In the unlikely event that these funding mechanisms are exhausted, the Administrator next holds access to a significant source of contingency funding. In addition to the obligation of defendant and insurer participants to contribute \$108 billion to the Fund, the Administrator can assess additional contributions from the defendant and insurer participants, unless the Administrator of the Fund certifies that there are adequate funds available to compensate claimants in years six through twenty-seven of the Fund. This

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<sup>64</sup> Steve Carroll, RAND Institute for Civil Justice, "The Dimensions of Asbestos Litigation" presentation at the Spring Meeting of the Casualty Actuarial Society, May 19, 2003.

<sup>65</sup> See *id.*; see also Biggs, *supra* Note 1 at 2–3.

<sup>66</sup> See Biggs, *supra* Note 1 at 2.

“contingency call” authority would provide for up to an additional \$45 billion of funding that would be available to compensate victims, if needed. Moreover, after year twenty-seven of the Fund, the Administrator will also have the authority to request additional contributions of up to \$1 billion a year from both defendant and insurer participants, thereby providing for additional “back-end” contingency funding. But based on all reasonable cost estimates, it is not anticipated that any of the contingency funding will be necessary because the \$108 billion will be more than adequate to meet all future claims. However, in combination with the \$108 billion, these contingency provisions will provide more than enough funding to compensate asbestos claimants.

*Critics’ Contention No. 2:* Critics contend that given the significant amount of time that will be involved in establishing the Fund and getting it funded and fully operational, asbestos victims may have to wait years before they receive any compensation.

*Response:* This argument lacks merit because it completely ignores the FAIR Act’s explicit timing provisions that ensure Fund liquidity and operation. Upon enactment, the Fund will receive within the first 6 months at least \$4 billion in assets from existing bankruptcy and other trusts that have been established to pay asbestos claims. The FAIR Act is also structured so that the Fund can start receiving the mandatory annual contributions from defendant and insurer participants within an estimated five months after the Administrator’s appointment by the President. If so, this source of funding will boost the Fund’s assets to at least \$9 billion within the first year of the Fund’s existence.

As for the insurers, the FAIR Act requires the Insurer Commission to begin developing an allocation formula within 30 days after appointment. In the interim, however, the legislation authorizes the Administrator to assess up-front contributions from insurer participants with the proviso that any amounts paid will be adjusted later to reflect the appropriate allocations formula that is later developed.

To the extent the critics argue that potential delays will be caused by judicial challenges to the assessment decisions by the Administrator or Insurance Commission or constitutional challenges to the FAIR Act itself, these arguments are belied by the legislation’s expedited judicial review provisions. First, any judicial challenges to the assessment decisions of the Administrator or Insurance Commission must be filed within thirty days of a final decision with the United States District Court for the District of Columbia. To avoid further delays, the FAIR Act explicitly prohibits the district court from issuing any stay of payment into the fund. Second, any constitutional challenge to the Act is subject to a direct appeal process to the Supreme Court. The likelihood of a successful constitutional challenge is remote given the hearing testimony from several renowned constitutional experts who have opined on the constitutional validity of the Fair Act.

Finally, these contentions are further undermined when compared with the significant delays that asbestos victims face in our tort system today. Indeed, the Supreme Court has practically begged the Congress to fix the widespread problems in the court system caused by the massive number of filed asbestos tort claims. It is typical for claimants to have to wait years before they are

awarded compensation, if any. In some cases, victims die before receiving any compensation. One of the chief attributes of the FAIR Act is that it creates a streamlined, administratively simple claims processing system that compensates victims in an expedited manner. The specific time deadlines for claims processing included in the FAIR Act enable claims to be resolved in under a year, unlike the current tort system. The FAIR Act drafted specifically to expedite the process of getting the Fund up and running as quickly as possible after the enactment of the legislation.

*Critics' Contention No. 3:* Critics contend that if the Fund runs out of money, asbestos victims will have no place to turn for compensation.

*Response:* As explained in detail in response to Critics' Contention No. 1, based on all reasonable estimates, the Fund will not run out of funds or be unable to meet all of its obligations to all claimants. First, the Fund will have funding of \$108 million in order to process and pay out what has been estimated to be a substantially smaller remaining outstanding liability for all future asbestos claims of \$61 billion, after reducing the substantial transaction costs of the current tort system. Second, the Administrator holds access to supplemental accounts and borrowing authority. Third, although it is fully expected that the \$108 billion will be more than necessary to meet all anticipated claims over the life of the Fund, the Administrator of the Fund will, in years five through twenty-seven, have "contingency call" authority to collect additional funds from defendant and insurer participants if needed, as well as the authority, after year twenty-seven of the Fund, to seek additional, "back-end," contingency funding from the program participants. Therefore, the \$108 billion funding, when combined with the additional contingency funding will ensure that the Fund has more than adequate monies to pay all deserving asbestos claimants.

But in the extremely unlikely event the FAIR Act does not ultimately provide adequate funding to compensate all asbestos victims deemed entitled to compensation, S. 1125 provides victims the right to pursue their claims in the tort system. As amended, the FAIR Act provides that if the Administrator is unable to certify in any year that 95% of the claimants who were determined to be eligible to receive compensation have received the compensation for which they are entitled, and the Administrator is unable to remedy the situation within 90 days, the legislation would sunset and all claimants would be able to pursue their claims in the tort system.<sup>67</sup> Additionally, after year twenty-seven of the Fund, if any participant fails to pay its back-end, contingency contribution determined by the Administrator to be necessary in order to be able to compensate victims, any claimant may pursue an action against that participant in federal court.

*Critics' Contention No. 4:* Critics contend that victims will be paid less under the FAIR Act than they could get in the tort system.

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<sup>67</sup>The Committee is concerned that this Amendment was adopted without a full understanding of the actual language and the harsh consequences, ramifications and implications thereof. The sponsor of the Amendment, Senator Biden, has agreed to work with Members to develop appropriate language to mitigate any unintended consequences of this provision before floor consideration of S.1125.

*Response:* The Committee has adopted S. 1125 in recognition that the tort system is broken and the status quo cannot be sustained for either victims or defendants. Under S. 1125, claimants will receive fair, consistent and equitable compensation without the delays inherent in litigation. Moreover, most appropriately, those that are most seriously ill and whose diseases have the most direct causal link to asbestos will receive the most compensation under the legislation, including up to \$1 million for Level X, Mesothelioma. Those individuals who have been exposed to asbestos but are not impaired will be eligible for medical monitoring, and their claims will be preserved should they later develop impairment.

In sharp contrast to S. 1125, the current tort system is unfair to asbestos victims and plagued with uncertainty. Whether asbestos victims receive compensation at all, and, if so, how much they might receive, depends on where and when they file claims, who the defendants happen to be, whether those defendants are solvent, and the leverage and skill of their trial lawyers. The amount of compensation victims receive diverges widely, with some victims receiving very large amounts, and others receiving little or nothing. And sadly, some victims die before their cases can be heard in court. These distortions in the current tort system are further exacerbated by jurisdictional idiosyncrasies. Only five states had two-thirds of all asbestos case filings between 1998 and 2000. The concentration of an overwhelming number of filings in a small number of jurisdictions only increases the delays and inequities inherent in the current system.

While the tort system bestows large awards for some victims, it all too often leaves the unfortunate without fair compensation, and the system is only getting worse with time. In order for victims to be compensated, they need to be able to look to solvent companies for resources. However, to date, at least 67 companies have declared bankruptcy because of asbestos claims, with more than 20 of these bankruptcies having occurred in the past two years. While bankruptcy trust funds can be an efficient way of compensating victims, 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. Even worse, after a company declares bankruptcy, it has very limited resources with which to compensate victims. The Manville Trust, for example, can only pay victims 5% of the value of their claims. Moreover, not one single existing asbestos trust or any of the 20 or more trusts currently pending in bankruptcy court can or will be able to pay any more than a fraction of the value of the claims that will be presented.<sup>68</sup>

Also, importantly, another benefit of S. 1125 is that most claimants will receive compensation much faster than they would under the current system, where individual need and consideration is too often lost in the trial lawyers' inventory of thousands and thousands of claims that are resolved on a wholesale bargaining basis that often plays out over a period of years.

As noted in the response to Critic's Contention No. 1, by reducing the substantial transaction costs of the current system and direct-

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<sup>68</sup>See Statement of David Austern, General Counsel for the Manville Personal Injury Settlement Trust, Hearing before the Senate Committee on the Judiciary, The Asbestos Litigation Crisis Continues—It is Time for Congress to Act, 108th Cong., March 5, 2003.

ing resources to those who are injured from asbestos related diseases, S. 1125 will deliver more compensation to victims in a timely and certain manner.

The scheduled values of S. 1125 are some of the highest of any federal or state compensation program in existence. The values in S. 1125 compare very favorably to the statutory, maximum disability and death benefits of all other federal compensation programs. The values in S. 1125 are also higher than the benefits offered under state workers' compensation programs. In January of 2002, of the 23 states reporting a calculated, maximum death benefit, the lowest reported amount was \$46,900 in Maryland; the highest reported amount was \$390,000 in Minnesota. By contrast, under S. 1125, the benefit for Level X, Mesothelioma, is \$1 million.

The values in S. 1125 also compare favorably to the other bankruptcy trusts. By example, the Manville Trust provides for a scheduled value of \$350,000 for mesothelioma claimants, and is only able to pay 5 cents on the dollar on all claims. A mesothelioma claimant would, therefore, only receive a payment of \$17,500 from the Manville Trust, but under S. 1125 would receive \$1 million. While claimants typically sue a number of trusts, the results are likely to be similar.

*Critics' Contention No. 5:* Critics contend that S. 1125 is supposed to embody a "no fault" system, but the medical criteria are overly stringent.

*Response:* S. 1125 establishes a truly non-adversarial, no-fault system in which claimants, in sharp contrast to the tort system, will not have to prove fault on the part of defendants or have to provide specific product identification in order to receive compensation. In addition, those individuals that have been exposed to asbestos but are not ill will be eligible for medical monitoring and will remain eligible to receive compensation at a later time should they become ill in the future.

S. 1125's medical criteria, the product of a bipartisan consensus of the Committee, are fair and reasonable and are appropriately designed to provide certainty to claimants. Indeed, the starting point for the medical criteria provided for under S. 1125 were those from the Manville Trust, which were adopted with the overwhelming support of the claimants and their counsel and which have been substantially followed by other bankruptcy trusts because of their credibility.

In exchange for establishing a no-fault, non-adversarial system, however, the criteria in the Act require a medical diagnosis by the claimant's doctor and sufficient evidence to establish that the claimed illness is asbestos related. In such a system, the defendant does not have the opportunity to present contrary evidence or the testimony of its own, competent experts to refute the contentions of experts hired by the plaintiff's attorneys. Such criteria are also necessary to keep the problems associated with mass screenings and the current abuses found in the tort system from being transferred to the Fund. To ensure the integrity of the Fund and to promote the purpose of the bill to direct funds to those claimants who are truly ill from their exposure to asbestos, therefore, the criteria in the bill reflects compromises, yet is based on sound, diagnostic, medical, latency and exposure criteria.

*Critics' Contention No. 6:* Critics contend that smokers are receiving unfair discounts in compensation for lung cancer under S. 1125.

*Response:* The Committee's intention is to compensate victims who are sick as a result of their exposure to asbestos. While exposure to asbestos has been identified as increasing the risk of lung cancer, there are many other causes. Smoking is, by far, the predominant contributing factor to lung cancer, even where an individual has quit smoking for many years. Compensation for lung cancers in this context is particularly difficult to value due to the high incidence of smoking in the population that is estimated to have asbestos exposure. The absence of an underlying asbestos-related nonmalignant disease makes the causal connection between the asbestos exposure and the lung cancer tenuous, and the weight of the medical evidence does not show that risks are increased in the absence of exposures sufficient to have caused underlying asbestosis.<sup>69</sup> Despite this evidence, S. 1125 does provide for a specific disease level, lung cancer one, that does not require an underlying disease for compensation, and lung cancer two, that only requires pleural plaques or thickening or calcification, all asbestos exposure markers. S. 1125, however, is meant to compensate victims of asbestos exposure and is not a compensation fund for tobacco use. It, therefore, appropriately adjusts the claims values for lung cancers based on the claimant's smoking history, especially in the absence of asbestosis.

It is not disputed that there was a high rate of smoking in the blue-collar industries where asbestos exposure was particularly high.<sup>70</sup> There is a vigorous dispute, however, as to whether asbestos exposure alone, without underlying asbestosis, increases lung cancer risks. Critics often cite to early epidemiological studies conducted by Dr. Irving Selikoff or to reports that rely on these early studies for the proposition that there is a strong synergistic relationship between asbestos exposure and smoking, such that smokers with asbestos exposure alone face a multiplicative risk of lung cancer. These early Selikoff studies of lung cancer among smoking asbestos-exposed workers were based on much higher asbestos exposure levels than occur today and in the recent past. The Selikoff studies also did not adequately account or control for other disease risk factors, including smoking.<sup>71</sup> Subsequent studies, particularly of chrysotile, "have shown fewer or no interactions."<sup>72</sup>

More importantly, Dr. Selikoff's study did not look at the presence or absence of asbestosis in the study population. The United States Supreme Court has recognized, and the testimony of Dr. James D. Crapo before this Committee confirmed, that "studies provide strong support for the notion that asbestosis is crucial to the development of asbestos-associated lung cancers."<sup>73</sup> In a letter to Senator Kyl responding to questions on his view of the current

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<sup>69</sup>Testimony of Dr. James D. Crapo, Professor of Medicine, National Jewish Center and University 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 19, 2003, at 6.

<sup>70</sup>RAND, Asbestos Litigation Costs and Compensation: An Interim Report, 2002, at 17.

<sup>71</sup>Testimony of Dr. James D. Crapo, Professor of Medicine, National Jewish Center and University 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 19, 2003, at 44.

<sup>72</sup>Tee L. Guidotti, Case Study 3: Apportionment of Asbestos-Related Disease, in *Science on the Witness Stand* 397, 398 (Tee L. Guidotti, MD, MPH and Susan G. Rose, MPH, JD, eds., 2002).

<sup>73</sup>*Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1222 (2003) (citing A. Churg & F. Green, *Pathology of Occupational Lung Disease* 343 (2d ed. 1998)).

values in the Committee bill, Dr. Crapo expanded on his testimony before the Committee, stating:

From a medical perspective, the trust should not provide compensation to claimants who have lung cancer and exposure, but who do not have asbestosis (i.e., Malignant Levels VII and VIII). The medical literature shows that, while lung-cancer risk increases when significant asbestosis is present, there is no such increase in risk in workers who are exposed to asbestos, with or without pleural plaques, but who do not have asbestosis. [Weiss, W., Asbestos-related pleural plaques and lung cancer. *Chest* 103:1954–1959, 1993; Weiss, W., Asbestosis: a marker for the increased risk of lung cancer among workers exposed to asbestos. *Chest* 115:536–549, 1999.]

The medical literature also shows that asbestos exposed individuals who are at greatest risk of developing lung cancer are those with clinically diagnosable asbestosis. Prospective studies that have focused upon the question whether exposure alone, without accompanying asbestosis, is associated with increased lung cancer risk have found that lung cancer risk is associated with asbestosis and not with asbestos exposure alone. For example, Hughes and Weill separated asbestos cement workers into groups with and without chest x-ray evidence of asbestosis. \* \* \* [W]orkers without asbestosis had no increased frequency of lung cancer while those with asbestosis had a significantly elevated lung cancer frequency.<sup>74</sup>

The results of these studies led Dr. Crapo to conclude that the categories without a requirement of underlying asbestosis will result in a large number of false positives.<sup>75</sup>

For example, one study of power plant workers exposed to asbestos found that “[o]nly when asbestosis was also detected in association with plaques did the risk of cancer increase, thus signifying heavier asbestos exposure as the cause of increased risk, rather than the mere presence of pleural plaques.”<sup>76</sup> Epidemiological studies show that the risk of lung cancer among smokers with asbestosis is much greater than that of non-smokers with asbestosis. The risk of mortality from lung cancer for smokers with asbestosis is 39%, while it is just 2.5% for nonsmokers.<sup>77</sup> As noted, studies also suggest that, while quitting smoking reduces the risk, it will not reduce it to the same risk level as that for an exposed worker who has never smoked.<sup>78</sup>

While these claimants with lung cancer but no asbestosis are regrettably seriously ill, the cause of the injury cannot be shown to be related to asbestos exposure. Paying all lung cancer victims the same amount risks the financial viability of the Fund to pay true victims of asbestos exposure. The Manville Trust and subsequent

<sup>74</sup> Letter from Dr. James D. Crapo, National Jewish Medical and Research Center, to Senator Jon Kyl, July 22, 2003, at 8 (see Additional Views of Senator Jon Kyl).

<sup>75</sup> Id.

<sup>76</sup> Lester Brickman, Asbestos Litigation: Malignancy in the Courts?, 40 Civil Justice Forum 1, 10n.14 (Aug. 2000). (citing Dr. Joseph M. Miller, Benign Exposure to Asbestos Among Power Plant Workers (1990) (unpublished)).

<sup>77</sup> Norfolk & W. Ry. Co., 123 S. Ct. at 1215 n.3.

<sup>78</sup> 29 C.F.R. §§ 1910, 1915.1001, and 1926.1101 (2003).

trusts reduce awards for claimants that cannot show an underlying asbestos-related nonmalignant disease, especially in the case where the claimant is a smoker. Under the Manville Trust, claims under lung cancer one (Level VI), which show no evidence of an underlying asbestos-related nonmalignant disease or significant occupational exposure, are not expected to have any significant value, especially if the claimants are smokers. There is no presumption of validity for these claims. They have no scheduled value, and have a maximum value of \$50,000.<sup>79</sup> Lung cancer two in the Manville Trust (Level VII) requires a showing of both an underlying asbestos-related nonmalignant disease and significant occupational exposure. Claims in this level are not individually evaluated to take smoking into account, but the scheduled value is \$95,000.

In addition, the fund contemplates a no-fault system to reduce the burden on the claimant and to reduce transaction costs. This no-fault system gives claimants a large incentive to file claims. In the litigation context, defendants are able to present evidence regarding causation. Defendants often dispute causation in the case of smokers.<sup>80</sup> Defendants do not have the same opportunity here. Defendants also do not have the opportunity to review or dispute the claimant's evidence that he or she is a nonsmoker or former smoker. Treatment of causation varies by court, and smoking has often been used to reduce awards and/or the percent liability of defendant in a jury trial despite the presence of large verdicts in other jurisdictions. In one case, for example, the jury reduced the claimant's award by 95%, finding that smoking was the cause of the claimant's lung cancer.<sup>81</sup> Similarly, compensation is reduced and even denied in workers' compensation schemes on the basis that smoking was the cause of the lung cancer.<sup>82</sup> The legislation attempts to reach a compromise and adjust this disparity, while ensuring that the Fund remains viable to provide fair and equitable compensation to all victims.

The Fund cannot become a compensation system for smoking related diseases, directing funds away from those who are most clearly sick due to asbestos exposure. Because of the high incidence rates of lung cancers caused by smoking, the absence of an underlying bilateral asbestos-related nonmalignant disease and a claimant's smoking history are appropriate to consider in reducing the compensation, especially for smokers. Otherwise, the Fund could be overwhelmed financially by lung cancer cases that are not attributable to asbestos exposures, but, instead, have other causes, such as smoking.

*Critics' Contention No. 7:* Critics contend that small businesses that rely on their insurance will be harmed under S. 1125 because they will be forced to contribute to the Fund and will not be able to use their insurance in order to do so.

*Response:* Under the FAIR Act, small businesses, as defined under Section 3 of the Small Business Act, are explicitly exempt

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<sup>79</sup> Manville 2002 TDP, at 10–11.

<sup>80</sup> RAND, Asbestos Litigation Costs and Compensation: An Interim Report, 2002, at 17.

<sup>81</sup> See, e.g., *Zarow-Smith v. N.J. Transit Rail Operations*, 953 F. Supp. 581 (D. N.J. 1997). The jury in Zarow-Smith calculated plaintiff's total damages to be \$898,665.00, but then found that 95 percent of the cause of the claimant's illness and death was attributable to his cigarette smoking, reducing the total damages award to \$44,934.00.

<sup>82</sup> See, e.g., *Bath Iron Works Corp. v. Office of Workers' Compensation Programs*, 137 F.3d 673 (1st Cir. 1998) (reinstating denial of claim based on non-causation).

from having to contribute to the Fund, but will receive the very protections provided to all of the other defendant participants under the legislation. Also, small companies that have not incurred asbestos liability-related payments of \$1 million or more before December 31, 2002 are exempt from having to contribute to the Fund. For those companies that are not exempt from having to contribute to the Fund, S. 1125 tiers companies by size and liability, such that no company would have to contribute to the Fund an amount out of line with their resources. In stark contrast, the current tort system provides no protections for small businesses and allows any company of any size, no matter how small, to be sued into bankruptcy. Furthermore, S. 1125 provides the Administrator of the Fund the authority to adjust defendant participants' contributions based on severe financial hardship and demonstrated inequity, further protecting the interests of all businesses of all sizes.

*Critics Contention No. 8:* Critics contend that S. 1125 will primarily benefit businesses and insurance companies.

*Response:* This contention is unwarranted. S. 1125 benefits victims who have been inadequately served by the current tort system while providing economic stability to businesses that have been overwhelmed by abusive litigation in the current tort system, driving many into bankruptcy and impacting the jobs and pensions of their employees.

S. 1125 will benefit victims significantly because they will receive fair, certain and equitable compensation without the delays and uncertainties inherent in the current tort system. Moreover, claimants will not have to worry whether their defendant is or will become bankrupt, and they will not bear the burden to prove liability, causation or to establish product identification as in litigation.

Further, under the funding provisions in S. 1125, more resources will be available to compensate victims than under the current system. As estimated by leading actuaries, because of the substantial transaction costs of the current tort system, only a total of about \$61 billion will go to asbestos victims in the future, while an estimated \$69 billion will go to plaintiff and defense lawyers.<sup>83</sup> In contrast, under S. 1125, \$108 billion, with additional contingency funding, if necessary, will go directly to compensate victims.

Victims will be much better protected once S. 1125 is enacted because the current awards some receive from the tort system are not sustainable into the future. With most of the original asbestos manufacturers bankrupt, companies with little or no connection to asbestos are increasingly targeted with a massive number of cases and often driven into bankruptcy. To date, over sixty companies have been driven into bankruptcy as a result of asbestos liability, and without reform, more companies will be at risk in the future. The Committee's hearing record is replete with the devastating impact the current asbestos crisis is having on businesses, workers, retirees, shareholders and the U. S. economy.<sup>84</sup> S. 1125 will ensure that asbestos victims no longer face the risk that their only re-

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<sup>83</sup> See Jennifer L. Biggs, *supra* at 2.

<sup>84</sup> See Statement of Frederick C. Dunbar, Hearing before the Senate Committee on the Judiciary, "Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003," 108th Cong., June 4, 2003; See also Statement of Robert P. Hartwig, Insurance Information Institute, *supra*.

course will be trusts created out of bankruptcies paying pennies on the dollar.

In short, S. 1125 provides fair compensation to those who are injured by asbestos exposure and ensures that scarce resources will not be spent on the unimpaired at the expense of those with asbestos-related injuries now and into the future. Too often those most deserving do not get their fair share out of the current system. Victims will benefit substantially from the new system.

While defendants and their insurance companies will be provided a certain degree of economic certainty from the stability provided through implementation of the Fund. They will each be required to contribute \$52 billion under S. 1125 and, if deemed necessary by the Administrator, could be required to contribute substantial contingency funding to ensure that victims will receive compensation for future asbestos-related illnesses. This is a substantial obligation by any assessment. For many of these defendants, particularly those with significant amounts of insurance coverage remaining, this represents a substantial increase in their out-of-pocket spending for asbestos liability because they cannot seek insurance coverage for their payments under S. 1125.

Finally, there is an unfortunate misperception by some who believe defendant companies that have announced proposed settlements will be able to walk away from these settlements and pay substantially less under S. 1125. First, the intent of this bill is to fix a system that is broken and badly in need of repair. The vast majority of claimants with pending cases are the unimpaired who may be eligible for monitoring under S. 1125 but will not and should not be compensated at the expense of those who are sick. Second, pending settlements are exactly that, pending, and are as a matter of course contingent on a number of factors, and in some cases, any of the parties to the pending settlements are free to walk away from the settlements at anytime for any reason. Third, in comparing how defendants will fare under S. 1125 versus the current system, for many of the pending or announced settlements, insurance coverage constitutes a significant portion of the funding of the settlement and a portion of these settlements may also cover liabilities other than asbestos claims. Finally, in making comparisons to how asbestos victims would fare under S. 1125 as opposed to pending settlements, opponents of the legislation do not account for the substantial amounts of funding that will be siphoned away towards the costs of the bankruptcy and to plaintiffs' attorneys' fees. In many cases, claimants will be paid more under S. 1125 than they would under their pending settlements.

In conclusion, S. 1125 is fair and balanced and will produce substantial benefits for victims, workers, retirees, shareholders and the U.S. economy.

*Critics' Contention No. 9:* Critics contend that S. 1125 unfairly eliminates settlement agreements, jury verdicts and pending cases.

*Response:* Before addressing the merits of fairness, the Committee believes that it is important to set the record straight concerning the misinformation in the Minority Views. S. 1125 is intended only to preempt those claims, verdicts and settlement agreements that are not final, i.e., no longer subject to appeal. The Minority Views assert that the FAIR Act would "completely negate all legally binding settlement agreements between asbestos manufac-

turers and victims, even settlements that have been made by asbestos defendants with claimants that have already been partially paid would be voided under this legislation.” To the contrary, section 403(d)(2) of S. 1125 specifically excludes from preemption “actions for which an order or judgment has been duly entered by a court that is no longer subject to any appeal or judicial review \* \* \*”. Court-approved settlements with an individual who has begun receiving payments would certainly fall within that exclusion. But to ensure that all such finalized settlement agreements receive the same protection as final judgments, the Chairman agreed during Committee markup that he would work with Members to *clarify* the language of that particular provision of the bill to eliminate any confusion.

The purported unfairness of preempting non-final settlement agreements, jury verdicts and pending cases rests on the faulty premise that the existing system is somehow fair. Nothing could be further from the truth—especially from the perspective of the asbestos victims. Potential claimants who would potentially be awarded a higher dollar amount in a non-final settlement, judgment or existing claim will see their recoveries, if any, reduced significantly by plaintiffs’ attorney’s fees.

S. 1125’s limited preemption of non-final settlements and judgments is important for yet another reason: to bring more stability and reason to the system. Included in the preemption are settlements of “inventory agreements” which are non-final settlement agreements that do not become effective for an individual claimant until they are “perfected.” Perfection occurs when a claimant comes forward and submits the information necessary to substantiate their claim under the criteria set forth in the settlement. The majority of these inventory agreement settlements are entered into with attorneys, not claimants. These agreements are typically not even binding on claimants, who in many instances have not yet been identified.

These types of agreements make the filing of claims on behalf of the unimpaired persons profitable, which has been a factor in the acceleration of such filings in recent years. Steven Kazan, a California lawyer with a long history of representing true victims of asbestos exposure, testified before this Committee that “we’ve gone from a medical model in which a doctor diagnoses an illness and the patient then hires a lawyer, to an entrepreneurial model in which clients are recruited by lawyers who then file suit even when there’s no real illness. These are not patients, they are plaintiffs recruited for profit.”<sup>85</sup> As such, S. 1125’s preemption provision is designed to address these types of non-final settlement agreements.

Moreover, many of these non-final settlement agreements, judgments and pending lawsuits include claims by those who are not even sick. The RAND Institute for Civil Justice reports that: “Almost all the growth in the asbestos caseload can be attributed to the growth in the number of these claims [for non-malignant conditions], which include claims from people with little or no current

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<sup>85</sup> Hearing on Asbestos Litigation, Before the Senate Comm. on the Judiciary 107th Cong. (Sept. 25, 2002) (FNS Unofficial Transcript of oral statement of Steven Kazan).

functional impairment.”<sup>86</sup> More than 90% of all filings with the Johns-Manville bankruptcy trust in 2001, for example, were brought by individuals with non-cancer claims.<sup>87</sup> Using the values cited by the minority for unimpaired claimants (from \$40,000 to \$125,000), allowing pending claims to continue could direct anywhere from \$10.8 billion to \$33.8 billion or more to unimpaired claimants. It simply defies fundamental fairness for the Minority to support a Trust Fund that deprives the truly sick of critical resources.

When compared to what the current tort system provides via proposed settlements, non-final jury verdicts and even existing bankruptcy trusts, legitimately sick claimants will fare much better under the fund created by S. 1125. First, the claim award amounts provided in S. 1125 exceed the amounts provided in bankruptcy trusts and in these proposed settlements. The Manville Trust has a scheduled value of \$350,000 for mesothelioma victims, but is only able to pay 5% of that or \$17,500, both values far below the \$1 million award provided under S. 1125. And what opponents conveniently ignore is that the claim values set forth in the proposed settlements are far below the amounts a legitimately sick claimant would receive under S. 1125.

Second, claimants will have certainty that money will be available to pay their awards. No longer will claimants be left without a remedy because a defendant has gone bankrupt. Because S. 1125 provides a streamlined no-fault process for resolving claims, the awards need not be reduced by large attorney fees, allowing more money to actually go to the claimant. Currently, claim awards may be reduced as much as 40% by attorney fees. It is clear that enforcing proposed, non-final, settlement agreements would not benefit the claimants, but instead benefit their attorneys, whose fees under S. 1125 would likely be drastically reduced.

In addition to providing fairness from a policy perspective, S. 1125’s preemption provision falls squarely within Constitutional mandates. Substantial judicial precedent, dating back to the early part of the 20th century, supports the constitutionality of Congress’ authority to preempt tort claims and to preempt settlement agreements entered under a pre-existing system that Congress has improved. Among others supporting the constitutionality of the Act, Harvard constitutional law scholar Professor Laurence H. Tribe, testifying before the Committee on June 4, 2003, concluded “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.”<sup>88</sup> Congress, therefore, should exercise the full reach of its ability, consistent with the goals of S. 1125 to target available resources toward true victims of asbestos exposure.

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<sup>86</sup>RAND, “Asbestos Litigation Costs and Compensation: An Interim Report,” Sept. 2002, at 45.

<sup>87</sup>Senate Judiciary Comm. Hr’g on Asbestos Litig. (2002), FNS Unofficial Transcript of oral statement of David Austern.

<sup>88</sup>See Statement of Lawrence H. Tribe, Hearing Before the Senate Committee on the Judiciary, “The Asbestos Litigation Crisis Continues—It is Time for Congress to Act,” 108th Cong., March 5, 2003, p. 2.

In a very real sense, the minority would “have their cake and eat it too.” By preserving pending claims and non-final settlements and judgments under the pretext of fairness, the Minority would allow the trial lawyers and the vast majority of unimpaired claimants to continue draining resources out of the system while forcing defendants and insurance companies to pay twice—once to perpetuate the current system through paying pending claims and proposed settlements and then again (through the trust) to compensate those truly ill from asbestos exposure.

The minority would preserve the current inequities of asbestos litigation, where payouts vary significantly by what state victims live in, which court their cases are tried in, and who the judge and jury are that day. For example, in a recent Mississippi case, six plaintiffs who were not sick were awarded a total of \$150 million. The plaintiffs did not claim to have ever missed a day of work because of asbestos injury, they did not claim any medical expenses related to asbestos, and they did not have asbestos-related physical impairment. One plaintiff told the court he suffers no shortness of breath and walks up to four miles per day for exercise.<sup>89</sup> The minority would also preserve the windfalls to plaintiffs’ attorneys that result from these large jury verdicts where 40 to 50% of these recoveries go to attorney’s fees and expenses. As Senator DeWine noted at our September 25, 2002 hearing, “[t]he status quo is just not fair. It is grossly unfair to the victims. What you find is an inconsistency in how victims are treated—a horrible inconsistency that I don’t think you’ll find anyplace else in our country or our judicial system.” It is these inequities that the FAIR Act is meant to address.

As a final note, the Committee would like to respond to the Minority Views’ reference to high profile settlement agreements that have been reported in the media. The Minority’s attempt to equate the total amount of a proposed settlement to a company’s estimated obligations under the Fund is, at best, comparing “apples to oranges,” and at worst, misleading. Contrary to the Minority views’ assertion that these settlement agreements are “legally binding,” they are in fact only proposed, and still contingent upon several factors, including court approval of a bankruptcy plan, a review of claims to determine if they meet the criteria set forth in the proposed agreement, confirmation of necessary financing and receipt of insurance proceeds among other things. In addition, when comparing the size of the proposed settlement to a particular company’s estimated contribution under S. 1125, it is important to recognize that a significant portion of the proposed settlement will be funded by insurers. From these proposed settlements, it is all but certain that the plaintiffs’ lawyers will recover handsome attorneys’ fees and other costs—amounts that victims will never see. As for the victims, it is the Committee’s understanding that most of these claimants who stand to gain from these proposed settlements are unimpaired or suffer from injuries unrelated to asbestos.

*Critics’ Contention No. 10:* Critics contend that S. 1125 is unconstitutional and will lead to years of litigation over its constitutionality.

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<sup>89</sup>Griffin B. Bell, Asbestos Litigation and Judicial Leadership: The Courts’ Duty to Help Solve the Asbestos Litigation Crisis, National Legal Center for the Public Interest, June 2002, at 14.

*Response:* S. 1125 has been very carefully written to avoid running afoul of the U.S. Constitution. Indeed, it is important to note that more than ten years ago a committee of the United States Judicial Conference, appointed by the Chief Justice of the U.S. Supreme Court, 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 \* \* \*.”<sup>90</sup> Since that time, the U.S. Supreme Court has called repeatedly for an administrative solution as provided for in S. 1125. In 1997, in *Amchen Prods., Inc. v. Windsor*, 521 U.S. 628–629 (1997), Justice Ginsburg wrote: “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.”<sup>91</sup> Most recently, in March of this year, in writing for the Court in *Norfolk & Western Ry. v. Ayers*, 123 S. Ct. 1210, 1228 (2003), Justice Ginsburg again stated: “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.’” The Committee has heeded the explicit call of both the U.S. Judicial Conference and the U.S. Supreme Court in establishing the no-fault, publicly-administered, privately-funded administrative claims process provided for in S. 1125.

In reviewing the constitutionality of S. 1125, at the specific request of the Committee, preeminent Harvard constitutional law scholar Professor Laurence H. Tribe, testifying before the Committee on June 4, 2003, confirmed the constitutionality of the legislation:

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.<sup>91a</sup>

With regard to the concerns of some that the preemption of common law tort claims may violate due process or create a claim under the Takings Clause of the Constitution, Professor Tribe testified further on the ability of Congress to preempt common law tort claims:

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 in-

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<sup>90</sup>Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (March 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 \* \* \*”) <sup>91</sup>See also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

<sup>91a</sup>See Statement of Lawrence H. Tribe, Hearing Before the Senate Committee on the Judiciary, Solving the Asbestos Litigation Crisis: S. 1125, The Fairness in Asbestos Injury Resolution Act of 2003, 108th Cong., June 4, 2003, at 2.

jured plaintiffs risk getting little or no compensation at all \*\*\*. 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.<sup>92</sup>

In written testimony submitted to the Committee by former Solicitor General Seth Waxman supports this analysis, he explains that “[t]here 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.”<sup>93</sup>

Nevertheless, should the constitutionality of S. 1125 be challenged, the legislation explicitly provides for an expedited appeal directly to the Supreme Court as a matter of right within thirty days of any decision of a federal court finding any part of S. 1125 to be unconstitutional. This ensures that any such litigation will be resolved quickly.

#### VIII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The cost estimate from the Congressional Budget Office requested on S. 1125 has not yet been received. Due to time constraints, the CBO letter will be printed in the Congressional Record.

#### IX. REGULATORY IMPACT STATEMENT

Pursuant to Rule XXVI, of the Standing Rules of the Senate, the Committee, after due consideration anticipates that S. 1125 will have the following regulatory impact:

A. (i) *Businesses regulated.*—Under S. 1125 companies and insurers with asbestos liability will be required to submit necessary financial documentation to the Asbestos Injury Claims Resolution Fund and the Insurers Commission respectively for proper assessment of contributions. With respect to the ban on certain asbestos containing products in S. 1125, it is anticipated the regulatory burden will be minimal especially in light of regulation promulgated in the late 1970's and early 1980's that limited occupational exposure to asbestos.

(ii) *Individuals regulated.*—Individuals seeking compensation from the Asbestos Injury Claims Resolution Fund will be required to submit necessary documentation to support their claim.

B. *Economic Impact.*—S. 1125 will have a positive economic impact on businesses by providing greater certainty with regard to asbestos liability exposure, which in turn will enable businesses to preserve jobs and pension of employees.

C. *Personal Privacy Impact.*—Claimants must provide written consent for claims examiners to obtain information necessary to evaluate their claim, including their medical and smoking history in order to make a determination of eligibility. It is anticipated that the impact will be comparable to requirements under the current tort system.

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<sup>92</sup>Tribe testimony at 6.

<sup>93</sup>Hearing on Solving the Asbestos Litigation Crisis: S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003, Before the Senate Comm. on the Judiciary, 108th Cong. 4 (2003) (testimony submitted for the record by Seth P. Waxman, Wilmer, Cutler & Pickering).

## X. ADDITIONAL VIEWS

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### ADDITIONAL VIEW OF SENATOR GRASSLEY

Although I support finding a solution to the asbestos litigation crisis, there are a number of problems with this bill as currently drafted regarding the tax treatment of the asbestos fund. These problems affect the tax treatment of the amounts paid into and received from the asbestos fund. If not remedied, there could be serious adverse tax consequences to the companies, the asbestos fund, and, most importantly, the beneficiaries. These tax issues are within the jurisdiction of the Finance Committee. Prior to and during the markup I requested that S. 1125 be referred to the Finance Committee so that we could fix these problems. If the bill is not referred to the Finance Committee, the Finance Committee may report a separate tax title for floor consideration. I will work with the Chairman of the Judiciary Committee, Senator Hatch, on how to proceed with this bill and hopefully address the tax issues raised in it.

CHUCK GRASSLEY.

#### ADDITIONAL VIEWS OF SENATORS GRASSLEY, KYL, SESSIONS, CRAIG AND CORNYN

Although the goal of this legislation to compensate those harmed from asbestos exposure is both noble and necessary, the means chosen are susceptible to abuses that could bankrupt the fund and, ultimately, impose financial obligations upon the taxpayer. It is also troubling that the bill does not contain any limitations on attorneys' fees or mandatory sanctions for abusive filings. The bill could also be underfunded if certain settlements are not accounted for by the fund, and it creates disturbing inequities among defendants and insurers. Finally, the bill includes a provision requiring certification of payment of claims that could prematurely dismantle the fund and return all claims to the tort system. These flaws must be corrected prior to final passage.

The most significant failing of the bill is its medical criteria and claims values. Two categories in particular are ripe for abuse. First, claim level two allows payment of up to \$20,000 for "mixed-dust" cases. Exposure to multiple industrial elements is commonplace. A mixed-dust claimant's respiratory injuries may well have been caused by something other than asbestos, yet under the bill's medical criteria, that claimant can obtain an award simply by showing qualifying exposure. Second, claim levels seven and eight allow current and former smokers to obtain large awards for lung cancer that (according to expert testimony presented to the Committee) medical science conclusively links to smoking, not asbestos. Abuse of these two categories could rapidly bankrupt the fund and deny relief to truly injured claimants. The fact that bystander claimants can also recover from the fund only adds to the risk.

In addition, the fund sets up a non-adversarial process, but does not place any limitation on attorneys' fees. Attorneys will remain over-incentivized, and likely will file frivolous claims and appeals that could unnecessarily stress the fund. While any cap on attorneys' fees must be generous enough to ensure that those who believe they need to hire legal representation are able to entice qualified counsel, it should also maximize award dollars for worthy claimants—and not act as an incentive to file frivolous suits. The majority of claims filed in this no-fault system should be routine and non-controversial, and not require significant legal work. Moreover, claimants may take advantage of pro bono services and the fund's legal assistance office. Reasonable caps should be placed on attorneys' fees to allow maximum recovery of awards for claimants. We are pleased that Senator Sessions offered and won acceptance of an amendment that requires attorneys to notify claimants of the availability of free legal services. This amendment will prevent claimants from being victimized twice—once by asbestos, and a second time by the trial bar.

Limits on attorneys fees alone, however, will not prevent abuse. Appropriate sanctions should be available, and their use encouraged, to thwart abusive practices by attorneys. This is so because even a cap on attorneys fees of, for example, 10%, could provide \$100,000 for an attorney claiming to represent an asbestos victim with lung cancer. The promise of a \$100,000 payday may be too much incentive for an unscrupulous attorney to file a frivolous claim and, accordingly, sanctions will control abusive filings. The bill needs to clarify that sanctions will be mandatory for lawyers who abuse the asbestos fund claims process.

Also, to preserve the integrity of the Fund, it is imperative that the only settlement agreements to be paid outside of the trust be final settlement agreements that are based on a current injury, where there is no contingency other than payment. Questions continue to be raised about what settlement agreements are covered by S. 1125. For example, some argue that inventory or matrix settlements—which bind defendant companies to pay future claims meeting specific criteria—or bankruptcy settlements subject to bankruptcy court approval are not included in the language of the bill. In either of these cases, failure to include the settlement in the trust will expose companies to dual liability and entitle claimants to dual recovery, by forcing defendant companies to both contribute to the Fund and pay settlement costs. As a result, billions of dollars, thousands of claimants, and the fundamental premise of the FAIR Act will be removed from the asbestos trust fund.

The bill also has the potential to create hardships for companies who adequately insured themselves against asbestos litigation exposure. Certain companies could have expected minimal out-of-pocket exposure but, by virtue of previous litigation expenses that insurance covered, will qualify for a more expensive tier. One company, which expected only ten million dollars in out-of-pocket expenses, calculates that its obligation under the bill would be \$500,000,000 over the 27 year life of the fund. During the markup, the Chairman committed to working to resolve this problem prior to floor action because of this type of gross unfairness. Resolution of this issue is critical.

In addition, the bill poses potential inequities particularly in the allocation of contingent call funding between defendant companies and their insurers. The contingent call funding provision of the bill charges additional billions to participants should the Fund run out of money during the mandatory funding period. We must make sure that the ultimate allocation is fair and reasonable between both sides.

The potential of collusive default judgments against insurers under the bill also is troubling. These judgments are entered as a result of a defendant company's agreement not to contest certain asbestos claims, in exchange for plaintiffs' agreement to enforce the judgment only against insurers, not against the defendant company. One company, a distributor of asbestos products, allowed billions of dollars of default judgments to be entered against it in exchange for agreements from plaintiff's counsel that enforcement would be sought only against insurers. The Insurer/Defendant Coverage Claims Amendment proposed by Chairman Hatch would remedy this problem by preempting collection of these judgments

against insurers. In addition to this amendment, language prohibiting all direct actions against insurers should be considered to ensure that insurers enjoy the same kind of certainty that defendant companies and claimants receive under the bill.

Finally, the Biden sunset amendment could seriously jeopardize the relief that the fund is intended to provide victims of asbestos. Senator Biden correctly noted that claimants could be left without recourse in the event that the Fund runs out of money prior to year 27's additional payments. Even those of us who voted for the Biden amendment, however, believe there are better ways to address this problem. The effect of the Biden amendment is to dismantle the Fund and return all claims to the tort system if income in a given year does not meet 95% of all claims—regardless of whether sufficient funds will be available in the next year of the Fund. The Biden amendment thwarts the purpose of the bill, which is to find a viable solution outside of the tort system. This issue should be revisited and corrected in order to allow the Fund to function and claimants to receive payments with some flexibility to address temporary funding shortfalls.

CHUCK GRASSLEY.  
JON KYL.  
JEFF SESSIONS.  
LARRY E. CRAIG.  
JOHN CORNYN.

## ADDITIONAL VIEWS OF SENATORS KYL, GRASSLEY, AND SESSIONS

This bill must meet three criteria in order to be worthy of support: it must provide adequate compensation to persons with asbestos injuries; its cost must be reasonable; and it must provide a permanent solution to the asbestos-litigation crisis.

The bill meets the first criterion. It compensates those who have been made sick by asbestos exposure, though it errs towards compensating many people with no asbestos-related injury. With the inclusion of a lockbox amendment to protect victims with serious asbestos-related injuries, we can be confident that the bill will provide adequate compensation to those who are actually sick from asbestos. A letter from Dr. James Crapo, describing the need for this amendment, is attached to this statement.

It is no longer clear if the committee-reported bill meets the second criterion. With the addition of the contingent-call amendment, the bill now may cost as much as \$139 billion. As noted elsewhere, see *infra* \_\_\_\_, total asbestos tort judgments and settlements to date have amounted to approximately \$70 billion, with much of that amount going to plaintiffs with no injury or impairment. Also, medical professionals agree that actual asbestos injuries have been declining for the last decade, see *infra* \_\_\_\_\_. It is not apparent to us that it is reasonable to pay twice as much in the future as has already been spent in the past to provide compensation for a health problem that peaked more than a decade ago.

This is not to say that we do not think that the Trust Fund will exhaust the entire \$139 billion available to it. Medical professionals already have warned us that much of the disease criteria employed by the bill is medically unsound and will compensate persons who are not sick from asbestos, see *infra* \_\_\_\_\_. Although this bill, unlike past bankruptcy trust funds, requires some evidence of impairment for all compensation levels, it is uncertain how many persons with common, non-asbestos-related diseases and injuries will qualify for awards under this bill's criteria.

Finally, with the addition of the sunset amendment, the bill clearly fails the last test: it does not offer a permanent or even stable solution to the litigation system. That amendment provides that if, in any year, the fund is unable to pay 95% of "eligible" claimants, the entire fund terminates and all claims are returned to the tort system. Particularly given the inflated claim values approved by the committee, and the bill's compensation of people who are not sick from asbestos, it is very likely that "eligible" claims will in some year exceed the resources of the trust fund.

Under the sunset amendment, defendants and insurers could pay into the fund for five years, for a total of \$25 billion dollars, and then, in year six, if claims exceed funds, the whole system would be scrapped and everyone would be back where they started—but

minus \$25 billion. This amendment was adopted during the last hour of four days of Judiciary Committee executive consideration of the bill. It was one of a large number of amendments that had been filed but was never discussed before it was called up. We believe that our colleagues did not consider all of the details and ramifications of this amendment. We are confident that, in the full Senate, a majority will agree that a hair-trigger self-destruct mechanism should not be included in this bill, and will vote to remove the sunset amendment.

JON KYL.  
CHUCK GRASSLEY.  
JEFF SESSIONS.

**ATTACHMENT**

NATIONAL JEWISH MEDICAL AND RESEARCH CENTER,  
*Denver, CO, June 23, 2003.*

Hon. JON KYL,  
*Senate Hart Building,*  
*Washington, DC.*

DEAR SENATOR KYL: You have asked that I elaborate on my reasons for recommending that the proposed asbestos trust fund include a lock box to protect payments to victims with serious asbestos-related conditions

As I stated in my answers to written questions from the Judiciary Committee, I believe that a lock box for the most seriously ill claimants "could prevent depletion of the trust by individuals with asymptomatic asbestos related diseases or processes which are not clearly associated with asbestos exposure." Ideally, the lock box would protect funds needed to compensate claimants with mesothelioma, moderate and severe asbestosis, and lung cancer accompanied by clinically significant asbestosis. As I indicated during last Thursday's hearing, these are the claimants who have a significant impairment that is most likely caused by asbestos. These conditions also have had a fairly steady incidence over the past decade and their frequency should decrease as more time passes since the federal controls on occupational asbestos exposure were implemented in the 1970's and 1980's.

The other categories compensated by the bill, by contrast, either have fluctuated wildly when employed in past trust funds, or are too novel to be reasonably predictable. All of these other categories pay compensation for illnesses that, according to the clear weight of medical evidence, either are not caused by asbestos or do not result in a significant impairment—i.e., are not generally regarded by the medical profession as an illness. Projection of these claims is inherently uncertain. Simply put, when medical research concludes that a condition is not caused by asbestos, or is not an illness at all, medical research will not be able to predict the number of such claims.

While political compromise may require you to compensate these other categories, you should not allow the uncertainty inherent in these claims to prejudice those with serious asbestos-related injuries. In my view, if the other compensation categories are included in the trust fund, a lock box-type mechanism is critical to pro-

tecting the rights of the most seriously ill claimants. The proposed trust fund should include such a guarantee to these claimants.

Sincerely,

Dr. JAMES CRAPO, M.D.

## ADDITIONAL VIEW OF SENATOR KYL

Throughout this Committee's consideration of this legislation, lobbyists for interests that favor the bill frequently have invoked the U.S. Supreme Court's admonitions to Congress to address the asbestos-litigation crisis. Many have noted that in 1999, the Justices characterized asbestos lawsuits as an "elephantine mass" that "defies customary judicial administration and calls for national legislation." (*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).) Supporters also have reminded us that the Court had hinted, two years earlier, that a "sensibl[e]" argument could be made "that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure." (*Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628–29 (1997).) And industry lobbyists surely must have found it propitious when, just four months ago, the Supreme Court elevated its call for federal legislation to a plea that "a national solution is the only answer." (*Norfolk & Western Ry. Co. v. Ayers*, 123 S.Ct. 1210, 1218 (2003).)

I share the sense of urgency over the asbestos-litigation crisis felt by many supporters of this bill. Asbestos lawsuits have descended on the American economy like a plague of locusts. They have grown to include claims by more than 600,000 plaintiffs filed against at least 8,400 businesses, resulted in the payment of more than \$70 billion in legal judgments or settlements, and have devoured at least 78 companies through bankruptcy.<sup>1</sup> Almost every industrial sector has been hit by this phenomenon. And, increasingly over the years and almost exclusively today, the companies being sued are ones that had no direct role in causing any asbestos injuries, and the plaintiffs filing suit do not have any asbestos-related injuries, diseases, or impairments. Yet, despite the size and seemingly unlimited scope of this litigation, many victims who do have serious asbestos-related injuries remain unable to secure adequate compensation. For these reasons, I would support a national legislative solution along the lines proposed by Chairman Hatch. As I explain in another statement issued with Senators Grassley and Sessions, it is only the presence of a few remediable but serious flaws that precludes me from supporting the committee-reported bill.

I write separately here to discuss the asbestos-litigation crisis generally—and to offer a reply to the Supreme Court's several entreaties to Congress. I believe that the Court fails to appreciate the true nature of the asbestos-lawsuit problem. The Court has stated, for example, that "the most objectionable aspects of asbestos litiga-

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<sup>1</sup> Written Statement of Jennifer L. Biggs, FCAS, MAAA, Before the Senate Committee on the Judiciary Concerning S. 1125, The Fairness in Asbestos Injury Resolution Act of 2003 (June 4, 2003); Michelle J. White, Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle, 70 U. Cin. L. Rev. 1319, 1320 (2002) (bankruptcy data); Stephen J. Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report 40, RAND/DB-397-ICJ (2002) (noting that "our total [estimate] of 600,000 claimants to date [i.e., end of 2000] is probably an understatement").

tion” are the fact that “dockets in both federal and state courts continue to grow” and that “trials are too long.” (Amchem, 521 U.S. at 598.) I think that a better description of the most objectionable aspects of asbestos litigation is that provided by law professor Lester Brickman, who states that “asbestos litigation today is, for the most part, a massively fraudulent enterprise that can rightfully take its place among the pantheon of \* \* \* great American swindles.”<sup>2</sup>

This statement of additional views explains why I believe that Professor Brickman appears to be correct in his conclusion. The statement surveys the publicly available evidence that fraud is the predominant feature of asbestos litigation as it is conducted today. This evidence indicates that the large asbestos-litigation plaintiffs firms routinely coach their clients to lie under oath about their exposure to asbestos products; that these law firms routinely rely on fraudulent readings of chest x-rays and pulmonary-function tests, in order to manufacture false evidence of asbestos injury; and that invalid medical testimony routinely is employed in litigation to support the existence of asbestos injuries that do not or could not exist.

In pursuit of the last point, the statement also summarizes the best medical evidence about asbestos injury—including several letters that I have received from the nation’s most respected pulmonary-medicine specialists, explaining what types of injuries asbestos does and does not cause. This evidence also suggests that much of the criteria employed by the present bill for identifying asbestos injuries is medically unsupportable. Indeed, it appears that a majority of the compensation categories created by the committee-reported bill would only be used to pay people who we know are not sick from asbestos.

This statement concludes by returning to the subject of the judiciary’s role in this crisis. Because the Supreme Court has shown such a sustained interest in asbestos litigation, and has even made recommendations for reform to this branch of government, I think it only fair to return the favor and offer some suggestions to the courts. The judiciary’s failure to police its processes has played no small part in this phenomenon. In particular, there are several gross violations of due process that make fraudulent asbestos litigation possible, and that deserve the attention of the highest court in the land. These include the practices of allowing unreliable and invalid medical testimony to be introduced before a jury, and allowing unrestricted intangible damages to distort a civil justice system that was designed only for allocating the costs of actual harms.

#### *The Disconnect Between Rates of Asbestos Injury and Asbestos Legal Claiming*

As an initial matter, in defense of the legislative and executive branches, it bears mention that Congress and the President have acted to address actual asbestos health hazards. Federal legislation and regulations virtually have eliminated the asbestos exposures that cause disease or injury. According to Dr. James Crapo, one of the nation’s leading specialists in pulmonary medicine, “[d]ue to

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<sup>2</sup>Lester Brickman, *Asbestos Litigation: Malignancy in the Courts*, Civil Justice Forum of the Manhattan Institute no. 40 (Aug. 2002), at 7 (hereinafter “Brickman, Malignancy in the Courts”).

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.”<sup>3</sup>

Today, “[i]t has been more than 30 years since the government began imposing strict limits on workplace exposure to asbestos dust,” and “[i]t has been 20 to 30 years since most asbestos-containing products were phased out of production completely.”<sup>4</sup> Therefore, “[b]ased upon the latency periods associated with asbestos-related disease, rates of disease manifestation and claims based on such manifestation should have begun to decline significantly by no later than the mid-1990s.”<sup>5</sup>

With regard to disease manifestation, this is exactly what has occurred. According to the doctors, “the number of new cases of asbestos-related disease has been falling \* \* \*. Very few new plaintiffs have serious injuries, even their lawyers acknowledge.”<sup>6</sup> “John Dement, an associate professor for environmental and occupational medicine at Duke University and the former deputy director for lung disease research at the National Institute for Occupational Safety and Health, [has] said there were far fewer cases of serious asbestosis today than 5 to 10 years ago.” According to Dr. Dement, “What we’re seeing right now is the downswing.”<sup>7</sup> Epidemiological data confirm these observations. “[C]ancer deaths in the United States attributable to asbestos exposure are already falling, and are estimated to have peaked in 1992 at 9700 per year.”<sup>8</sup> Indeed, almost a decade ago—in 1994—“the medical text *Occupational Lung Disorders* describe[d] asbestosis as a ‘disappearing disease.’”<sup>9</sup>

Asbestos-injury legal claims, on the other hand, have “prov[en] impervious to the predictions of medical science.”<sup>10</sup> “Contrary to expectations, the numbers of claims filed increased rapidly during the 1990s.”<sup>11</sup> Only “[a]pproximately 20,000 claims were filed annually against major asbestos defendants in the early 1990s.”<sup>12</sup> But in 2001, at least 90,000 new asbestos claims were filed—a three-

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<sup>3</sup> Written Statement of Dr. James Crapo, Professor of Medicine, Nation Jewish Center and University 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). See also Carroll et al., *supra* note 1, at 13. Dr. Crapo served for more than 20 years on the medical faculty of Duke University; during 17 of those years, he served as Chief of the Division of Pulmonary and Critical Care Medicine. He is a past president of the American Thoracic Society and is the co-author of several leading textbooks on pulmonary medicine.

<sup>4</sup> Roger Parloff, The \$200 Billion Miscarriage of Justice: Asbestos Lawyers Are Pitting Plaintiffs Who Aren’t Sick Against Companies that Never Made the Stuff—And Extracting Billions for Themselves, *FORTUNE*, February 17, 2002.

<sup>5</sup> Lester Brickman, article forthcoming in a Pepperdine Law Review Symposium on Asbestos Litigation (hereinafter “Brickman, Pepperdine Symposium”) (draft on file with the Judiciary Committee).

<sup>6</sup> Alex Berenson, A Surge in Asbestos Suits, Many by Healthy Plaintiffs, *The New York Times*, A1, April 10, 2002.

<sup>7</sup> Id.

<sup>8</sup> White, *supra* note 1 (citing Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 784 (4th ed. 1996)).

<sup>9</sup> Parloff, \$200 Billion Miscarriage of Justice, *supra* note 4.

<sup>10</sup> Brickman, Pepperdine Symposium, *supra* note 5.

<sup>11</sup> White, *supra* note 1, at 1319 (citing S.J. Carroll et al., *Asbestos Litigation in the U.S.: a New Look at an Old Issue*, RAND DB-362.0-ICJ, August 2001).

<sup>12</sup> Biggs, *supra* note 1, at n. 3.

fold increase over the number filed in 1999.<sup>13</sup> Also, “[t]he 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.”<sup>14</sup> Bankruptcies also have increased sharply. Of the 78 firms driven to bankruptcy by asbestos lawsuits since 1982, 30 have filed between 2000 and 2002.<sup>15</sup>

#### *Persuasive Evidence of Fraud*

How is it possible that asbestos-injury legal claims have skyrocketed during a period when rates of actual asbestos injury have declined sharply? An answer might begin with a letter to the American Journal of Industrial Medicine from Dr. David Egilman, a Clinical Associate Professor at Brown University. Dr. Egilman notes that “[f]or the past several years,” he has “served as an expert witness in areas related to state-of-the-art and liability primarily at the request of plaintiff lawyers,” and has “reviewed the medical records and X-rays of workers in the cases in which [he has] testified.”<sup>16</sup> He concludes that “[o]ver the past 2 years, I have noted that many of these individuals could not (due to inadequate latency or exposure) and did not manifest any evidence of asbestos-related disease.”

This phenomenon—of asbestos claims brought by people who are not sick—is quantified in several sources. It has been noted in the experience of the Manville Trust.<sup>17</sup> According to a recent report, “90% of the Trust’s last 200,000 claims have come from attorney-sponsored x-ray screening programs, \* \* \* 91% of all claims allege only non-malignant asbestos ‘disease,’ and these cases currently receive 76% of all Trust funds.”<sup>18</sup> A recent RAND study has identified the same pattern in the tort system as a whole: “Claims for nonmalignant injuries grew sharply through the last half of the [1990s].”<sup>19</sup> The study notes that “[a]lmost all the growth in the asbestos caseload can be attributed to the growth in the number of these claims, which include claims from people with little or no current functional impairment.” These claims grew as a fraction of all claims “through the late 1980s and early 1990s, finally stabilizing at about 90 percent of annual claims in the late 1990s.”<sup>20</sup>

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<sup>13</sup> Brickman, Malignancy, *supra* note 2, at 1.

<sup>14</sup> Biggs, *supra* note 1, at n. 5.

<sup>15</sup> White, *supra* note 1, at 1320.

<sup>16</sup> Dr. David Egilman, Asbestos Screenings, *American Journal of Industrial Medicine* 42:163 (2002) (Letter to the Editor).

<sup>17</sup> The Manville bankruptcy trust pays claims on behalf of the former Johns-Manville Corporation, “which mined virtually all of the asbestos used in the United States and was, by far, the leading manufacturer of asbestos-containing materials.” Brickman, Malignancy in the Courts, *supra* note 2. Johns-Manville declared bankruptcy in 1982. It is generally believed that most—and probably two-thirds—of all asbestos plaintiffs file claims with the Manville bankruptcy trust.

<sup>18</sup> Letter from Steven Kazan to the Honorable Jack B. Weinstein, July 23, 2002 (included as Attachment “A” to this statement). Mr. Kazan is a plaintiffs attorney who specializes in representing asbestos claimants with cancer.

<sup>19</sup> Carroll et al., *supra* note 1, at 45.

<sup>20</sup> Id. at 46. See also id. at 64–65 (discussing Tillinghast-Powers Perrin estimate that “[n]onmalignant claims accounted for about 89 percent of claims and 65 percent of the dollars awarded to asbestos claimants from 1991 to 2000); id. at 20 (citing studies concluding that unimpaired claimants account for two-thirds to 90 percent of all current claimants). See also Thomas Korosec, Enough to Make You Sick, *Dallas Observer*, September 26, 2002 (“You could see as early as a decade ago this unnatural proliferation of nonmalignant cases being filed around the country \* \* \* \* [W]e have 10 times more nonmalignant cases being filed today than in 1990. A nonmalignant asbestos disease is whatever a willing physician says it is, so a lawyer

These data invite the question, how are plaintiffs able to recover money for asbestos claims if they have not been injured? The Supreme Court recently has noted that, “[i]n the 1970’s and 1980’s, plaintiffs’ lawyers throughout the country, particularly in East Texas, honed the litigation of asbestos claims” by “improving the forensic investigation of diseases caused by asbestos” and “refining theories of liability.” (*Ortiz*, 527 U.S. at 822.) The role of several other plaintiffs-lawyers practices and “refinements” also bears mention:

#### *1. Coaching Asbestos Plaintiffs to Lie*

Questions about how asbestos litigation is conducted today can be answered by examining the practices of just a limited number of law firms. A few plaintiffs firms dominate the field. According to a recent RAND study, “[b]y 1995, ten firms \* \* \* represented three-quarters of the annual filings against the[] defendants” from whom RAND was able to obtain data.<sup>21</sup> And one academic expert has estimated that just two law firms—Baron & Budd of Dallas, and Ness Mottley of South Carolina—“probably account for half the asbestos docket in the country.”<sup>22</sup>

Several years ago, a first-year associate at Baron & Budd accidentally produced to defense counsel a memo that provides a startling insight into how asbestos claims are created. The memo, titled “Preparing for Your Deposition,” gives clients detailed instructions how to credibly testify that they worked with particular asbestos products. The memo also instructs clients to assert particular things that will increase the value of their claim, without regard to whether those things are true. The memo even informs clients that a defense attorney will have no way of knowing whether they are lying about their exposure to particular asbestos products.

Baron & Budd has admitted that the memo was produced by its employees, but denies that the memo instructs clients to lie, and has argued that statements from the memo have been taken out of context by the press. In order to allow the reader to draw his own conclusions, I have included the entire memo as Attachment “B” to this statement.

The memo effectively resolves one mystery that has bedeviled asbestos defendants for several years. As the major asbestos producers have gone bankrupt, lawsuits have shifted to defendants with an increasingly minor role in the asbestos industry. These companies often produced only a small volume of asbestos-containing products, yet plaintiffs have been able to identify these products in very large numbers. “Many of the remaining asbestos manufacturers complain that they couldn’t possibly have sold

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and physician can go out and create however many cases they want”) (quoting plaintiffs attorney Mark Iola).

<sup>21</sup> Carroll et al., *supra* note 1, at 30 (emphasis in original).

<sup>22</sup> Samuel Issacharoff, “Shocked”: Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz, 80 Tex. L. Rev. 1925, 1930 (2002). See also Korosec, Enough to Make You Sick, *supra* note 20 (estimating that Baron & Budd and its subsidiaries “control a double-digit percentage of the roughly 250,000 asbestos claims pending nationwide”).

enough product to expose even a fraction of the men who claim to remember seeing their goods.”<sup>23</sup> According to one defense lawyer,

I'd be surprised if [my client] actually sold enough product to expose half the people who claimed to have been exposed. We know, for example, of locations where not only was our product not there, but [it] would have no function there. Yet in case after case, Baron & Budd sues us and gets product ID and comes up with at least three or four co-workers [who identify the products].

#### *A. The Baron & Budd Script Memo*

“Preparing for Your Deposition” shows how Baron & Budd gets that product ID. The first half of this 20-page memo consists of separate sections providing detailed descriptions of the uses of 14 different asbestos products: insulating cement, refractory cement, gun mix, pre-cut gaskets, sheet gaskets, rope packing, pipe covering, block insulation, plastic cement, fireproofing, asbestos boards and panels, joint compound, cloth and felt, and firebrick.

For each of these 14 products, the memo gives a detailed account of which types of workers used the product, for what purposes, in what places, how it was mixed and applied, and what types of containers held the product. Each description goes well beyond what one would think necessary simply to refresh the memory of someone who had actually worked with the product. Instead, the memo appears to anticipate that clients will not have any previous familiarity with the product. For example, the memo reminds clients: “Insulating cement is NOT like sidewalk concrete! \* \* \* It was typically used to insulate steampipes.” The memo provides sufficient information about all aspects of the product to allow any person to credibly testify that he worked with the product.

The memo also repeatedly reminds readers of the importance of memorizing the information about the products. It informs readers from the outset, “How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement.” Later, the memo continues:

Your responses to questions about asbestos products and how you were exposed to them is the most important part of your deposition. You must PROVE you worked with or around the products listed on your Work History Sheets. You must be CONFIDENT about the NAMES of each product, what TYPE of product it was, how it was PACKAGED, who used it and HOW it was used. You must be able to show that you were close to it often enough while it was being applied to have inhaled the fibers given off while it was being mixed, sanded, sawed, compressed, drilled or cut, etc.

You will be required to do all this from MEMORY, which is why you MUST start studying your Work History Sheets NOW! \* \* \* [I]t is best to MEMORIZE all your

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<sup>23</sup>Christine Biederman, Thomas Korosec, Julie Lyons, and Patrick Williams, Toxic Justice, Dallas Observer, August 13, 1998.

products and where you saw them BEFORE your deposition.

\* \* \* \* \*

You must be able to pronounce the product names correctly and know WHICH products are pipecovering, WHICH are insulating cements and WHICH are plastic cements, for instance. Many of the product names should sound very similar to each other (Kaylo and Kaytherm, or Raybestos and Unibestos, for instance), but they might be different products entirely! Have a family member quiz you until you know ALL the product names listed on your Work History Sheets by heart.

“Preparing for Your Deposition” also gives instructions on what to do if defense attorneys suspect that you were coached, on blaming discrepancies on “the Baron & Budd girl,” and on letting the Baron & Budd lawyer fix your mistakes:

You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered! If the defense attorney asks you if you were shown pictures of products, wait for your attorney to advise you to answer, then say that a girl from Baron & Budd showed you pictures of MANY products, and you picked out the ones you remembered.

If there is a MISTAKE on your Work History Sheets, explain that the “girl from Baron & Budd” must have misunderstood what you told her when she wrote it down.

\* \* \* \* \*

If you are answering a question and your Baron & Budd attorney interrupts you, STOP TALKING IMMEDIATELY! Your attorney is trying to fix something you said wrong, or stop you from saying something that contradicts your earlier testimony.

Perhaps the most disturbing parts of “Preparing for Your Deposition” are those that advise clients to say particular things that have clear import for various legal defenses and the value of the plaintiff’s claim. The memo instructs all clients to say these things, without regard to whether they are true. For example:

You will be asked if you ever saw any WARNING labels on containers of asbestos. It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER. \* \* \*

You will be asked if you ever used respiratory equipment to protect you from asbestos. Listen carefully to the question! If you did wear a mask for welding or other fumes, that does NOT mean you wore it for protection from asbestos! The answer is still “NO”!

\* \* \* \* \*

Make sure you concentrate on your exposure to asbestos products in the 1950s, 1960s and early 1970s. Do NOT

talk about what went on at work in the 1980s and 1990s. The reason for this is that by the mid 1970s most insulating products being installed no longer contained asbestos.

\* \* \* \* \*

Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case.

Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another. At some jobs there may have been more of one brand. At other jobs there may have been more of another brand, so throughout your career you were probably exposed equally to ALL the brands. You NEVER want to give specific quantities or percentages of any product names. The reason for this is that the other manufacturers can say you were exposed more to another brand than to theirs, and so they are NOT as responsible for your illness! Be CONFIDENT that you saw just as much of one brand as all the others. All the manufacturers sued in your case should share the blame equally!

\* \* \* \* \*

Unless your Baron & Budd attorney tells you otherwise, testify ONLY about INSTALLATION of NEW asbestos material, NOT tear-out of the OLD stuff. This is because it is almost impossible to prove what brand of material was being torn out, since heat probably destroyed any name printed on the product itself. You can only prove what the product name was when it was being installed in the first place, when the name was clearly marked on the material or on the container it came out of.

But undoubtedly the most damning parts of the script memo are its assurances to the client that defense attorneys will not be able to know if he is lying—and its warnings that no one must know about the memo itself:

Keep in mind that these [defense] attorneys are very young and WERE NOT PRESENT at the jobsites you worked at. They have NO RECORDS to tell them what products were used on a particular job, even if they act like they do.

\* \* \* \* \*

The only documents you should ever refer to in your deposition are your Social Security Print Out, your Work History Sheets and photographs of products you were shown, but ONLY IF YOU ARE ASKED ABOUT THEM AND ONLY IF YOUR BARON & BUDD ATTORNEY INSTRUCTS YOU TO ANSWER! Any other notes, such as what you are reading right now, are “privileged” and should never be mentioned.

Professor Brickman makes the following assessment of “Preparing for Your Deposition.” “In my opinion, \* \* \* this is subordination of perjury.” He also concludes that “[i]t is also a principal, if not the principal, method of processing unimpaired asbestos claims today.”<sup>24</sup>

*B. “What I was doing was fraudulent. There was never any doubt in my mind.”*

After “Preparing for Your Deposition” was discovered, the Dallas Observer, a weekly newspaper in Baron & Budd’s hometown, conducted an investigation of the firm’s practices. The Observer found that “a number of former Baron & Budd employees say that the information and techniques contained in the memo are widely used, even taught to employees. They say the \* \* \* memo was not truly an aberration, but a written example of how the product-identification staff works at Baron & Budd.”<sup>25</sup> The Observer’s investigative stories provide additional insight into how asbestos litigation is conducted. Highlights include:

- “[Two former paralegals who traveled] to upstate New York in the winter of 1991 to do ‘product ID’ interviews \* \* \* both say that a client-coaching system was in place at the firm. Workers were routinely encouraged to remember seeing asbestos products on their jobs that they didn’t truly recall, the women say.”
- “Paralegals say \* \* \* that workers are selectively shown pictures of asbestos products they should identify. [One paralegal] says that in meetings with clients, she would bring a ‘3- or 4- or 5-inch binder with pictures of asbestos products, divided up according to manufacturer. I’d go through page by page and encourage the client to recall the products they used. It would be pretty strong encouragement. Most of the time when I left, I had ID for every manufacturer that we needed to get ID for.’ She already had the answers, she says. [The paralegal] just needed the worker to agree she had the correct ones. Most would wise up pretty quickly, she says. ‘Clients understood that products needed to be ID’d for the manufacturers we sued,’ she says.”
- “[The paralegal] says that in many cases, the client had no specific recollection of some products before she interviewed them. ‘My original caseload was a thousand, but I didn’t interview that many people. It was in the hundreds. I’d say that probably in 75 percent of those cases I had people identify at least one product they couldn’t recall originally.’”
- “[According to the paralegals], their job didn’t stop with implanting memories; there were also the asbestos products they had to encourage clients not to recall. In New York, [the paralegal] says, ‘everybody could remember something from Johns-Manville,’ which was the largest U.S. distributor of asbestos products. But [the paralegal] claims that her supervisors, two lawyers, told her to discourage identification of Johns-Manville products because the Manville Trust was not paying claims rendered against it at the time. \* \* \* Thus, when a client would say he saw, for instance, a Johns-Manville pipe covering, [the paralegal] says, she would hand

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<sup>24</sup> Brickman, Malignancy in the Courts, *supra* note 2, at 6.

<sup>25</sup> Biederman et al., *supra* note 23.

them a line. ‘You’d say, ‘You know, we’ve talked to some other people, other witnesses, and they recall working with Owens Corning’s Kaylo. Don’t you think you saw that?’ And they’d say, ‘Yeah, maybe you’re right.’ Later, she says, Johns-Manville began paying settlements, and she was ordered to go out and ‘meet these guys again’ and get them once again to name Johns-Manville products.”

• “[The paralegal] says she learned some of these methods and techniques from ‘other paralegals I worked with.’ But she has no doubt that her supervisors and at least one of the firm’s partners knew what was going on. ‘I remember specifically there was a case in the Mobile, Alabama, area that was set for trial, and I was specifically sent down there to get product ID. I was basically told, ‘Don’t come back without the IDs.’ [One of two Baron & Budd attorneys] told me that.”

• “[According to the paralegal,] ‘There was at least one time, maybe more, that I went to [a particular Baron & Budd attorney] and said I didn’t think a particular settlement was right. That I can’t believe we’re doing this. I was basically told to be quiet or leave.’ \* \* \* ‘There were clients we were getting money for, and some people just didn’t deserve a dime.’”

• “[Another former paralegal] recalls being asked to falsify product-ID information the very first week she was on the job. ‘They were having me fill out the product IDs [forms that the paralegals had gathered from clients] . . . There was a man, he was some sort of contractor. He had absolutely no exposure to asbestos—none. There was nothing in his work history.’ As she scanned the paperwork, [a Baron & Budd partner] walked by the office she was working in. ‘I got up and walked out and said, ‘I don’t know what to do. This man has not had exposure at all.’ He looked at me and said, ‘Oh you’re a smart lady. Be creative,’ and he turned and he walked away.’ She says she then went to her immediate supervisor, who she recalls also told her to ‘fill it in, make up stuff.’ ‘I was shocked,’ she says. When she refused to fill in product names, the supervisor simply took over the file, she says. ‘I don’t know what happened to the case after that.’”

• “[A former Baron & Budd attorney] describes \* \* \* an atmosphere where attorneys and paralegals were not only taught that manufacturing testimony was their duty, but disciplined if the ‘proper’ testimony was not obtained. She says she lasted a few years. ‘Slowly, you begin to question whether the means you are using to achieve the ends are legitimate. And if not, what is your involvement in that?’ she says. ‘And you either leave or you accept it.’ She still recalls one of the first depositions she ever defended at Baron & Budd by herself. ‘I knew my guy wasn’t prepared to tell the lie,’ she says. ‘This gentleman did not know Kaylo [a product manufactured by an important defendant], had never seen pipe covering and never worked with it. It was on his work-history sheet. And for me not to get the testimony that some paralegal got \* \* \* I’d have caught shit for that if that group went to trial. I pulled him out [of the deposition],’ she says. ‘And I said, ‘Could you just read off your work-history sheet?’ \* \* \* He goes, ‘I don’t know why it’s on there. It shouldn’t be on there. I don’t remember it.’ \* \* \* And I was in fear and feeling totally inadequate and knowing that in getting what I needed to get, I was crossing the line.’

She got the identification. ‘And this was a good man,’ she recalls—though he wasn’t particularly sick.”<sup>26</sup>

- “[Yet another former Baron & Budd paralegal] says he would at times be given rush jobs that took him out of his daily, witness-finding duties. As the firm reached mass settlements with manufacturers, it needed to produce sworn affidavits from every client who had sued, he recalls. The mostly retired workers had to swear they had been exposed, 30, 40 or 50 years ago, to specific products the company made. Industry officials say they require the statements to validate claims and present them to insurers. [The paralegal] says some clients had already identified the products in prior talks with the firm, and sometimes they had not. Frequently, he says, he was the first person to mention the products, and clients who didn’t remember them were hesitant and worried about signing. ‘They’d ask, ‘Do I have to go court? Do I have to come to Dallas?’’ [The paralegal] says he would assure them all they had to do was sign the document, have it notarized, send it in, and money would be coming their way. ‘It was like telephone marketing \* \* \* a marketing approach,’ [the paralegal] says. But it didn’t take much savvy to close the sale. Everyone would sign, he says. ‘When you are offering someone the ability to get money in their pocket when they’re not expecting money for any particular reason, it’s not all that difficult.’”

- “[The former paralegal also] says he was assigned to find witnesses who could support claims by Baron & Budd plaintiffs that they were exposed to asbestos products at various workplaces from the early 1940s until the late 1960s. The problem was, almost nobody could remember these facts without being told what to say, [the paralegal] recalled in an interview earlier this month. It was his job to get them to name 20 or 30 different products from the multiple companies Baron & Budd would typically sue. \* \* \* [The paralegal] says he was pretty good at his job, and he’d usually end up getting many men to say many things they had no idea about before he called. ‘I’d get ‘em to identify every one,’ he says of his list of 20 or more products. Clerical staff managers and a ‘product ID’ paralegal he worked under taught him his techniques. \* \* \* Truth got lost in the process, he says, and [the paralegal] recalls being uncomfortable from the start with telling witnesses how to testify. ‘What I was doing was fraudulent. There was never any doubt in my mind about it.’”<sup>27</sup>

Other documents obtained by the Dallas Observer “appear to track what these former paralegals say about how the firm’s product-identification process works”—and provide instructions similar to those in “Preparing for Your Deposition.” For example, a document titled “P.I.D. Study Sheet,” written by a former paralegal, also contains detailed, deposition-relevant product-use information. In a handwritten 1993 memo to several attorneys, the Baron & Budd paralegal who produced the document “writes that she gives the attached ‘study sheet’ to ‘all my clients who can read [and] ask them to be familiar [with] the information for their deposition.’”<sup>28</sup>

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<sup>26</sup> Biederman et al., *supra* note 23.

<sup>27</sup> Thomas Korosec, *Homefryin’ with Fred Baron*, Dallas Observer, March 29, 2001.

<sup>28</sup> Biederman et al., *supra* note 23.

Another document obtained by the Observer consisted of “handwritten notes apparently taken by [a Baron & Budd attorney] during an internal training session.” The notes state: “Warn [plaintiffs] not to say you were around it—even if you were—after you knew it was dangerous.” Elsewhere, under a section titled “name that product,” the notes state: “Show client filled out sheet showing what [client] picked out. Get him to agree he picked out \* \* \* Products: explain in the context of who will be in depo[sition]—emphasize those products.”<sup>29</sup> Another set of notes obtained by the Observer, which were prepared by a Baron & Budd attorney, simply state: “If client is asked if any other doctors told him about his condition before the diagnosing doctor named in the [interrogatory], client should answer NO.”<sup>30</sup>

Interestingly, statements made by former Baron & Budd employees even confirm what epidemiological studies have projected for asbestos disease generally—that as exposures were eliminated in the 1970s and latency periods lapsed, the number of sick workers diminished. This change was reflected in the composition of the firm’s caseload. One former paralegal noted that “she witnessed how, as the pool of very sick clients shrunk, the firm lowered the bar on which cases it would take.” The paralegal states: “Initially [in the late ‘80s], if somebody just had pleural plaques [benign spots on the pleura, or lining of the lung] or something like that, they wouldn’t take the case. Later on that’s all they had \* \* \* Later on they made these into cases. I could see the shift during my period [with the firm].” Similarly, a former Baron & Budd attorney states: “As the ‘90s went on, you got more and more people with marginal exposure to the stuff. You went from insulators and pipe fitters to having the maintenance guys in the paper mill. Yes, there was asbestos in that mill equipment, but they didn’t work with it, and the medical evidence you get reflects that.”<sup>31</sup> A former paralegal also effectively explains why means like the script memo were used: “Overall, she says, workers in asbestos plants and insulators ‘really did know the products \* \* \*. But when you got to the electricians and carpenters and the brick masons \* \* \* they didn’t work with the products that much.’”<sup>32</sup>

#### *C. A Pattern of Intimidation and Retaliation*

Perhaps as disturbing as the script memo itself, and the statements of Baron & Budd’s former employees, is the firm’s partly successful efforts to suppress any investigation of its activities. After “Preparing for Your Deposition” was discovered, a state district judge referred the matter to the local district attorney’s office for criminal prosecution. According to the assistant district attorney in charge of the matter, local authorities did not act because “our investigation has been taken over federally.”<sup>33</sup> The local U.S. attorneys office, however, gave a different account of why the local DA did not pursue the case: “Because of the politics of it, [the DA’s office] wanted to drop it, and so it ended up here.”<sup>34</sup>

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<sup>29</sup>Id.

<sup>30</sup>Id.

<sup>31</sup>Korosec, Enough to Make You Sick, supra note 20.

<sup>32</sup>Biederman et al., supra note 23.

<sup>33</sup>Id.

<sup>34</sup>Id.

That was in 1998. No federal investigation has ever taken place. In 2001, the Observer provided the following explanation:

Former U.S. Attorney Paul Coggins told the Observer recently he recused himself from participating in his office's investigation of the memo because of a conflict of interest posed by the firm's political contributions to his wife, Regina Montoya Coggins, in her run last year for Congress. He said contributions to his wife from the national trial lawyers group, where Baron earlier served as vice president, also drove his decision to remove himself from making decisions in the case.

Baron's critics question how vigorously Coggins' troops pursued Baron & Budd without support from the top, and whether Baron's massive fund raising for the Democrats, which stepped up in early 1998, might have influenced Coggins' superiors in Washington as well. "In my humble opinion," says one lawyer who provided information to the FBI, "that investigation was a joke."<sup>35</sup>

The Observer also provided the following account of what happened to the Texas state district judge who originally had referred the matter of the script memo to the District Attorney's office:

[Judge John] Marshall, a lifelong Republican who drew no opponents when he ran in 1992 and 1996, found himself the next year in the fight of his life, with Baron leading the charge. Before the 2000 primary, Baron urged a Dallas trial lawyers group to target the judge with campaign money, enlisting the firm's lawyers in his cause. Campaign records show Baron & Budd was an early donor to Marshall's opponent, Mary Murphy, who said Baron was one of the first to urge her to run.

\* \* \* \* \*

Several lawyers interviewed for this story said Marshall's defeat sent a signal that it's hazardous to threaten Baron & Budd. "If I liked my comfortable seat on the bench, I'd think twice about ruling against them on these things," says one attorney, who declined to be named. Says another who was close to the memo case, "No judge in Dallas will cross Baron & Budd after what happened in that election. They are scared to death."<sup>36</sup>

It bears mention, however, that Baron & Budd is not all stick and no carrot. The Observer also reports that Baron & Budd attorneys initiated an effort to hire a lobbyist to represent state judges in their requests for additional funding from the state legislature. Attorneys at the firm also led a drive to buy every civil judge in Dallas County a new personal computer.<sup>37</sup> The firm also has managed to retain a University of Texas legal-ethics professor, who has written law-review articles about the script memo favorable to

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<sup>35</sup> Korosec, *Homefryin'* with Fred Baron, *supra* note 27.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Baron & Budd—without disclosing that he has been hired by the firm.<sup>38</sup>

Some lawyers representing companies sued by Baron & Budd have attempted to pursue the matter of the script memo. Three lawyers who did so quickly found that “Baron & Budd stepped up asbestos litigation against [their] clients.” Two of these lawyers’ clients soon negotiated settlements with Baron & Budd. According to one of the lawyers, Elizabeth Pfifer, “I’ve never seen anything like them in my 17 years of practice. \* \* \* Everyone understood that if we took them on, they would go after our clients.” The third lawyer, Bill Skepnek, eventually lost his client, Raymark Corp., when it went bankrupt. “[W]ithin months, Baron & Budd turned the tables on Skepnek. It filed contempt motions against him in 165 courts \* \* \* [and] tied up Skepnek’s legal fees from Raymark in a contentious bankruptcy fight that itself spawned a crop of lawsuits.”<sup>39</sup>

Another company that has been driven into bankruptcy by asbestos litigation, G-1 Holdings, Inc., of Wayne, New Jersey, also has attempted to investigate Baron & Budd’s use of the script memo. G-1 Holdings has sued Baron & Budd, as well as South Carolina-based Ness Motley and New York asbestos litigators Weitz & Luxenberg, under the federal racketeering statutes in New York federal district court. Judicial opinions summarizing the pleadings in that case provide an excellent overview of the evolution of asbestos litigation, and describe significant additional misconduct by these law firms. Excerpts from two of those opinions are include as Attachment “C” to this statement.

G-1 Holdings also has encountered substantial difficulty in investigating Baron & Budd’s practices. According to the Dallas Observer:

To pursue its allegations that Baron & Budd has suborned perjury and fabricated evidence to produce dubious cases, G-1 dispatched investigators to Dallas in 1999. Baron & Budd met them head-on. The firm obtained a temporary injunction from state District Judge Merrill Hartman, forbidding them from “communicating in any manner” with former Baron & Budd employees. Such information was likely “privileged and confidential,” Hartman ruled.

\* \* \* \* \*

This January [of 2001], after filing its racketeering lawsuit, G-1 employed a new set of investigators, Kroll & Associates, and by the end of the month, they were busy tracking down former employees. On January 30, they telephoned former Baron & Budd lawyer Amy Blumenthal, who in turn telephoned her former firm, which appears to have gone immediately on alert.

\* \* \* \* \*

The next day, state District Judge Ann Ashby granted Baron & Budd’s quickly drafted motion for a temporary re-

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<sup>38</sup>Id.

<sup>39</sup>Id.

straining order. It barred Kroll from contacting the firm's employees and ordered Kroll's investigators to submit themselves to questioning by Baron & Budd about what they had learned.<sup>40</sup>

G-1 Holdings's RICO suit against Baron & Budd still is pending in a New York federal district court—and still is in the discovery phase.<sup>41</sup>

According to a 1994 estimate, Baron & Budd had, by that year, grossed more than \$800 million from asbestos litigation.<sup>42</sup>

## *2. Fraudulent Pulmonary-Function Tests and Fraudulent X-Ray Interpretations*

Asbestos legal claims cannot be manufactured with witness testimony alone. Such claims also require evidence of reduced lung capacity and x-ray evidence of lung damage.

A thorough description of how such evidence is produced is available in a recent law-review article by Professor Brickman.<sup>43</sup> That article, for example, quotes from a complaint brought by Owens-Corning Fiberglass, Inc., against businesses that administer pulmonary-function tests for asbestos plaintiffs lawyers. (A pulmonary-function test gauges lung impairment by measuring the subject's ability to blow on a tube for different intervals.) The complaint describes how these testing companies systematically disregard well-established requirements for conducting a valid pulmonary-function test; charge plaintiffs attorneys "\$700 if the tests were positive for diminished lung function but only \$400 if the tests were negative;" and, on one occasion, have agreed to perform such tests for a 15% contingency fee from the attorney who would be using the results.<sup>44</sup>

Similar practices have infected the reading of chest x-rays:

One doctor who has evaluated 14,000 individuals for two different screening companies admitted under oath that he has no experience in diagnosing asbestosis, and that he is not even practicing medicine. That doctor has concluded that every single person that he has evaluated—all 14,000—had asbestosis.<sup>45</sup>

Another example:

A United States District Court judge, using impartial medical experts and excluding the parties' use of their own experts, determined that of 65 plaintiffs claiming to have contracted asbestosis—who, but for the court's order,

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<sup>40</sup>Korosec, Homefryin' with Fred Baron, *supra* note 27. The Observer's investigative news stories also have drawn Baron & Budd's attention to that newspaper. The Observer has characterized the firm's actions toward the paper as "a pattern of intimidation and paranoia such as the Observer has never seen before." Julie Lyons, *The Control Freak*, Dallas Observer, August 13, 1998.

<sup>41</sup>See, e.g., *G-1 Holdings, Inc. v. Baron & Budd*, 213 F.R.D. 146 (S.D.N.Y. 2003).

<sup>42</sup>See Biederman et al., *supra* note 23.

<sup>43</sup>Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, William and Mary Environmental Law and Policy Review 243, Winter 2001 (hereinafter "Brickman, Aggregative Litigation").

<sup>44</sup>*Id.* at 282 n. 110.

<sup>45</sup>Brickman, Pepperdine Symposium, *supra* note 5 (quoting Written Statement of Steven Kazan (Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise), Hearing on Asbestos Litigation before the Committee on the Judiciary, U.S. Senate, Sept. 25, 2002). See also Egilman, *Asbestos Screenings*, *supra* note 16.

would have offered their own medical experts' testimony in support of their claims and on that basis would very likely have been awarded significant compensation by the jury—only 10 (15%) had in fact contracted asbestosis.<sup>46</sup>

An even more extreme example of consistent misdiagnosis of asbestosis was provided directly to this committee by Mr. Otha Linton, who served for 25 years on the principal staff of the American College of Radiology Task Force on Pneumoconiosis, and Dr. Joseph Gitlin, a faculty member of the department of radiology at the Johns Hopkins Medical Institutions. Mr. Linton and Dr. Gitlin were asked to review over 500 chest x-rays that originally had been provided by an asbestos plaintiffs firm. That firm's medical experts had given 91.7% of these x-rays an ILO score of 1/0 or higher. (Which itself is only marginal evidence of asbestosis, see *infra* Attachment "E" (Letter of Dr. Crapo).) Mr. Linton and Dr. Gitlin arranged for a blind reading of those same x-rays by six consultants in chest radiology who were also B readers. These independent experts gave the same x-rays an ILO score of at least 1/0 in only 4.5% of their reports.<sup>47</sup>

And the Manville Trust's experience, again, has matched that of the wider asbestos-litigation world:

In 1995, the Trust instituted a medical audit program providing for a random audit of 5% of each law firms' claims submitted per payment cycle. The core of the audit program was a process of review of claimants' x-rays by independent medical experts.<sup>48</sup>

The initial results of the Trust's review led it to conclude that it should audit all claims submitted by some law firms. Plaintiffs firms resisted this approach, and instead offered a proposal to audit the doctors directly.

Reasonable though that proposal might sound, [then-Trust Executive Director Patricia] Houser resisted it for \* \* \* eyebrow-raising reasons \* \* \* [that] stemmed from the trust's early analyses of the audit data. In mid-1996, the trust had commissioned biostatisticians at Penn State University and the University of Pennsylvania to help them with that task. Houser quickly discovered that the failure rate of any given doctor often correlated with which law firm that doctor was working for at the time! A physician's failure rate might be markedly elevated when working for one firm, but quite average when retained by another. In fact, the biostatisticians concluded, in a written report submitted to the trust in February 1998, that the particular law firm that submitted any given claim was "a strikingly significant predictor" of whether that claim would fail the audit, and that those findings exhibited "huge levels of statistical significance."<sup>49</sup>

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<sup>46</sup> Brickman, Aggregative Litigation, *supra* note 43, at 284–85.

<sup>47</sup> Mr. Linton's Letter to Senator Grassley, and an abstract of an article submitted for publication that describes his findings, is included as Attachment "D" to this statement.

<sup>48</sup> Brickman, Pepperdine Symposium, *supra* note 5.

<sup>49</sup> Roger Parloff, Mass Tort Medicine Men, *The American Lawyer*, January 15, 2003. See also Parloff, \$200 Billion Miscarriage of Justice, *supra* note 4 (noting that "[j]ust eight screening doc-

Ultimately, the Manville Trust was made to disband its audit program by U.S. District Court Judge Jack Weinstein.<sup>50</sup> But during the time that the program was in place, the Trust was able to collect data on how often different doctors' diagnoses "failed" a review by independent examiners. The failure rate was high. "According to an April 1998 Manville Trust memorandum, the 10 physicians most frequently used by plaintiffs' firms at the time of the audits had an average failure rate of 63 percent. Nine had failure rates ranging from 50 percent to 70 percent, while the 10th failed 36 percent of the time."<sup>51</sup>

In a forthcoming law-review article, Professor Brickman also provides a detailed description of the operations of the testing enterprises that conduct mass screenings on behalf of asbestos plaintiffs firms. These businesses often are full-service providers: they recruit workers for screenings, conduct pulmonary-function tests, and make, develop, and read chest x-rays. These businesses find workers for screenings through labor unions, or sometimes by direct mail and mass advertisements. The article describes several enterprises that were started by individuals with no medical background—or any substantial education of any sort. These screening companies include: a company that produced test results in exchange for a 25% contingency fee from the lawyer using the result; a company that screened eight persons per hour; another company that charged lawyers \$775 for a positive result, but only \$175 for a negative result; a screening company that allowed plaintiffs attorneys to determine what predicted values should be employed in pulmonary function tests; and a screening-company owner who testified that test subjects openly discussed during pulmonary-function tests how failing to fully exhale would "earn" them a settlement check.<sup>52</sup>

Professor Brickman estimates that the number of workers who have undergone attorney-sponsored asbestos screenings since the mid-1980s exceeds 1,000,000 and may approach 2,000,000. He also concludes, based on the evidence that he has collected, that these screening companies identify positive evidence of asbestos-related disease in at least 40% and sometimes as many as 85% of the workers that they screen.<sup>53</sup>

To sum up all that has been discussed so far, I quote another commentator who, having reviewed evidence similar to that de-

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tors accounted for more than 70% of all claims filed with the Manville Trust between January 1995 and April 1998").

<sup>50</sup>For an account of the consequences of Judge Weinstein's actions, see Brickman, *Aggregative Litigation*, *supra* note 43, pp. 290–93.

<sup>51</sup>Parloff, *Mass Tort Medicine Men*, *supra* note 49.

<sup>52</sup>Brickman, Pepperdine Symposium, *supra* note 5 (citing Deposition of Charles Lewis in *In Re: Asbestos Cases* (ACR XXIII Asbestos Cases), No. 89-2-18455-9-SEA, Superior Court, King County, Washington at 14, 29, 159 (Sept. 12, 2002); Deposition of Lloyd Criss in *DeForest et al. v. American Optical*, et al., Dist. Ct., Brazoria County, Tx. (Dec. 10, 2002); Deposition of Charles Foster, in *Morehouse v. North American Refractories Co.*, et. al., Circuit Court, Mobile Cty, Ala. (Aug 6, 2002); Deposition of Dr. Jose E. Roman-Candelaria, in *Koontz and Koontz v. AC&S, Inc.*, et. al., Superior Ct., Marion Cty., Ind., Cause No. 49D02-9601-MI-0001-668 (Oct. 11, 2002); Deposition of Guy Wayne Foster, American Medical Testing, Inc., in *Bentley v. Crane Co.*, Civ. Action No. 11-2064, Circuit Ct., Jasper Cty, Miss. (Dec. 12, 2001). See also *id.* (quoting Andrew Schneider, Asbestos Lawsuits Anger Critics, St. Louis Post-Dispatch, February 9, 2003, at A1).

<sup>53</sup>*Id.* Professor Brickman also notes that it is exceedingly difficult to gather evidence about the positive rates generated by these screening companies. Although such information must be readily available to these enterprises, company representatives and the doctors who make the diagnoses almost uniformly have refused to provide it.

scribed here, has come to the following concise conclusion about the nature of asbestos litigation as it is conducted today: "Among ordinary people, there is a word for this: fraud. This is a legalized fraud."<sup>54</sup>

#### *Medical Facts About Asbestos Injury*

At this point, it is appropriate to examine what modern medicine tells us about what types of injuries asbestos does and does not cause. There has been considerable uncertainty about this question both in this committee and in the legal community generally. For example, one Supreme Court Justice recently noted that "[a]bout half of the [asbestos] suits have involved claims for pleural thickening and plaques—the harmfulness of which is apparently controversial." *Amchem*, 521 U.S. at 631 (Breyer, J., dissenting).

Justice Breyer, of course, is limited to considering only those facts presented to him in the record by the parties. The Senate is not. Thus I have asked Dr. James Crapo, who has provided very helpful and credible testimony to this Committee, to analyze the final committee-reported bill, and to address several issues that have been controversial in this committee. His letter is included as Attachment "E" to this statement. I also have posed three questions to Dr. William Weiss (Emeritus Professor of Medicine, Drexel University), Dr. Michael Goodman (Senior Managing Scientist, Exponent Health Group), and Dr. J. Bernard L. Gee (Emeritus Professor of Medicine, Yale University School of Medicine). Their responses are included as Attachments "F," "G," and "H" to this statement, respectively.

I have selected these three doctors because they are eminent scientists who have done extensive reviews of the literature on asbestos and have written critical reviews that are highly regarded in the field. It is fair to say that no one knows more about the issues raised here than do these doctors.

The three questions posed to all of these doctors are as follows:

1. Do pleural plaques or pleural thickening constitute an injury or impairment? Are they a useful predictor of future injury?
2. If an asbestos exposure was not sufficient to cause clinically significant asbestosis, could it nevertheless have caused lung cancer?
3. Can asbestos exposure cause colorectal cancer, or cancer of the larynx, pharynx, esophagus, or stomach?

Not every doctor addressed every question. The doctors' answers are as follows:

*1. Do pleural plaques or pleural thickening constitute an injury or impairment? Are they a useful predictor of future injury?*

*Dr. Gee:* "[Plaques] generally do not cause impairment of either the lung or breathing apparatus nor cause any disease to the worker."

"In summary, plaques (common) as opposed to diffuse pleural fibrosis (now rare) do not cause disease or impairment. Neither plaques alone nor diffuse pleural fibrosis imply an increased risk of malignancy."

*Dr. Weiss:* "Pleural plaques are an injury which generally does not cause any impairment unless they are very extensive. They do

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<sup>54</sup> Robert J. Samuelson, Asbestos Fraud, Washington Post, November 20, 2002, A25.

not predict an increased risk of lung cancer. Pleural thickening is an injury which varies in degree and impairment from negligible to moderate and even severe.”

*Dr. Crapo:* “Changes of the pleura, such as pleural plaques or pleural thickening, due to asbestos exposure should not be characterized as asbestosis. These pleural changes do not affect lung function unless they are extensive, and they do not increase the risk of an asbestos-related lung cancer.” (Citing studies.)

“When compared to other individuals with similar asbestos exposure but no pleural manifestations, patients with pleural plaques have not been shown to be at increased risk of more serious asbestos-related diseases.”

*2. If an asbestos exposure was not sufficient to cause clinically significant asbestosis, could it nevertheless have caused lung cancer?*

*Dr. Gee:* “[A]sbestosis is clearly quantitatively the major associate of lung cancer risk.”

“Where an asbestos exposure was not sufficient to cause clinical asbestosis, the chances of its being the cause of or a substantial contributing factor to lung cancer in smokers is between small and absent. In the absence of plaques, there is no reason to implicate asbestos in lung cancer.”

*Dr. Crapo:* “From a medical perspective, the [proposed federal] trust should not provide compensation to claimants who have lung cancer and exposure, but who do not have asbestosis (i.e., Malignant Levels VII and VIII). The medical literature shows that, while lung-cancer risk increases when significant asbestosis is present, there is no such increase in risk in workers who are exposed to asbestos, with or without pleural plaques, but who do not have asbestosis.”

“Prospective studies that have focused upon the question whether exposure alone, without accompanying asbestosis, is associated with increased lung cancer risk have found that lung cancer risk is associated with asbestosis and not with asbestos exposure alone.”

“In my view, medical science would support requiring asbestosis before a significant contribution of asbestos exposure to lung cancer risk is accepted.”

*Dr. Weiss:* “No.”

Dr. Weiss cites to his own review of the literature regarding this question, which was published in 1999.<sup>55</sup> In that review, Dr. Weiss analyzed cohort studies that provided evidence bearing on “the hypothesis that excess lung cancer risk occurs only among those workers who develop asbestosis.”

Dr. Weiss’ review concluded that:

Only a few cohort studies have addressed directly the issue of asbestosis as a marker for increased lung cancer among workers exposed to asbestos. What evidence exists supports the hypothesis that asbestosis is such a marker as reviewed in the first section above. Additional circumstantial evidence has been described in subsequent sections: (1) there is no excess risk of lung cancer in co-

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<sup>55</sup> Weiss, W: Asbestosis: A Marker for the Increased Risk of Lung Cancer Among Workers Exposed to Asbestos. Chest 115:536-549, 1999.

horts with no deaths from asbestosis; (2) workers with pleural plaques but no asbestosis have no increased risk of lung cancer in well-designed studies; and (3) the association between asbestosis and excess lung cancer rates is much stronger than the association between cumulative asbestos exposure and the relative risk of lung cancer.

The literature also contributes support for the hypothesis in two other lines of investigation: animal research and epidemiological studies of lung cancer risk in other diseases characterized by diffuse pulmonary fibrosis.<sup>56</sup>

*3. Can asbestos exposure cause colorectal cancer, or cancer of the larynx, pharynx, esophagus, or stomach?*

*Dr. Crapo:* “Compensation by the FAIR Act for forms of cancer other than lung cancer and mesothelioma is not justified by current medical science. While the evidence suggests an association between asbestos and laryngeal carcinoma, no other form of cancer is clearly associated with asbestos exposure. Moreover, the suggested association between asbestos exposure and laryngeal cancer is suspect because of the absence of a dose-response relationship.”

“While it is accepted that exposure to asbestos is associated with mesothelioma and lung cancer, there is no persuasive scientific evidence of meaningful association with cancer at other sites.”

Discussing Dr. Goodman’s study, Dr. Crapo notes that “[b]esides lung cancer and mesothelioma, the only other cancer for which a possible association exists is laryngeal cancer, where the meta-analysis showed an SMR with latency of 1.57. (An SMR of 1.0 would indicate an absence of any increased risk, while an SMR of 2.0 would indicate a doubling of the risk.) However, variance in the studies relating to laryngeal cancer was so large that the possibility of no increased risk could not be excluded, and there was no evidence of a dose-response effect, raising serious question as to whether cancer of the larynx has a true correlation with asbestos exposure.”

*Dr. Weiss:* “For colorectal cancer the evidence indicates no causality between asbestos and colorectal cancer. I have not reviewed the studies on cancers of the larynx, pharynx, esophagus, or stomach so I will not comment on these.”

*Dr. Gee:* With regard to cancer of the larynx and pharynx: “The confounding factors previously mentioned, namely smoking and alcohol, remain major often-unadjusted factors in these diseases. \* \* \* We reviewed 24 prospective and 17 retrospective studies out of which only three or four showed any excess risk. We concluded that asbestos exposure does not cause these cancers, as did Liddell reporting for the U.K. health authorities.”

With regard to esophageal cancer: “[T]here is no evidence relating them to asbestos.”

With regard to kidney cancer, Dr. Gee quotes an analysis summarizing both published data and data from additional inquiries: “this analysis pointed toward a lack of an association between asbestos exposure and renal cancer.”

Discussing Dr. Goodman’s study, Dr. Gee concludes that it “noted an overall excess laryngeal cancer risk rate that was about 1.6 but

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<sup>56</sup> Id. at 546.

there was no dose response, no correlation with increasing mesothelioma rates and importantly, no adjustment in the original cohort data for the confounding effects of smoking, alcohol or their combination. Thus, this value of 1.6 is suspect and the absence of a dose response with asbestos exposure suggests alternative factors cause these cancers. Other data show a correlation between the lung and laryngeal cancer rates that is most likely due to a common smoking origin.”

*Dr. Goodman:* He notes that his 1999 study, Cancer in Asbestos-Exposed Occupational Cohorts: A Meta-Analysis,<sup>57</sup> “confirmed a causal link between asbestos exposure and lung cancer.”

“Data for urinary cancers (bladder, kidney, prostate), gastrointestinal cancers (esophagus, stomach, colon, rectum) and lymphohematopoietic cancers (lymphoma, myeloma, leukemia) failed to demonstrate a consistent statistically significant increase in risk. Analysis for laryngeal cancer was suggestive of a causal association, but not as conclusive as the analysis for lung cancer.”

“With respect to most cancers, the latency period is typically 20 years or more. For this reason, studies that examine latency are considered more reliable and a true causal relationship is expected to become more evident after latency is taken into account. We re-analyzed the data by including only studies that took into consideration latency of at least 10 years. The results for lung cancer showed further elevation in risk, the risk of laryngeal cancer was somewhat higher, but was no longer statistically significant, while the risks of other cancers either decreased or remained essentially unchanged.”

“Another set of analyses in our study examined the exposure-response relationship between asbestos and cancer. If the risk of disease increases with increasing level of exposure, the relationship is more likely to be causal. \* \* \* Our analyses demonstrated that lung cancer risk was strongly associated with and statistically significantly related to the proportionate mesothelioma mortality. However, this observation did not hold true for other cancers including laryngeal cancer and thus, did not support the causal association between asbestos exposure and other cancer sites.”

“It is important to point out that our meta-analysis is not the only publication reviewing the scientific evidence on the association between asbestos exposure and malignancies other than mesothelioma and lung cancer. For example, a 2000 article by Browne and Gee entitled, ‘Asbestos Exposure and Laryngeal Cancer’ concluded that the available evidence does not support the contention that asbestos causes laryngeal carcinoma. According to the authors of this article, their review is in agreement with five or six other reviews of this topic published since 1985. Similarly, a 1994 article entitled ‘Asbestos and Colon Cancer: A Weight-of-the-Evidence Review’ by J. Gamble concluded that asbestos exposure, ‘does not appear to increase the risk of colon cancer.’”

“In summary, the epidemiological literature on balance does not support a causal association between asbestos exposure and the development of cancers other than mesothelioma and lung cancer.”

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<sup>57</sup>Cancer Causes and Control 10:453-465, 1999.

*4. The Medical Criteria Employed by the Committee-Reported Bill.*

The information provided by these doctors casts doubt on this bill's standards for identifying asbestos injury. To all three of the questions discussed above, the doctors overwhelmingly answer "no." But the committee-reported bill appears to assume that the answer to each question is "yes," or at least "maybe."

First, the bill assumes that pleural plaques are meaningful indicia of injury. As Dr. Crapo notes:

The x-ray findings required for compensation in Non-Malignant Levels III, IV, and V are generous. In the first place, it is possible to recover in each of these categories with an x-ray indicating pleural plaques or diffuse pleural thickening that register B2 on the ILO scale. It is rare, however, that people with only pleural conditions of this kind will have a genuine impairment.<sup>58</sup>

Second, the bill assumes that lung cancer can be attributed to asbestos even in the absence of clinically significant asbestosis. Again, Dr. Crapo notes: "From a medical perspective, the [proposed federal] trust should not provide compensation to claimants who have lung cancer and exposure, but who do not have asbestosis (i.e., Malignant Levels VII and VIII)."

Dr. Crapo goes on to warn that the bill's "Malignant Levels VII and VIII will allow a significant number of people to qualify for compensation who do not in fact have a lung cancer caused by asbestos exposure. In other words, there will be a substantial number of 'false positives.'"

Finally, the committee-reported bill assumes that other cancers—including colorectal cancer—are caused by asbestos. Dr. Crapo bluntly notes that "[c]ompensation by the FAIR Act for forms of cancer other than lung cancer and mesothelioma is not justified by current medical science." He goes on to state that "[i]n my view there is a danger that the limited resources of the Fund will be diverted to paying the claims of people with 'other cancers,' many of which are quite common and could give rise to numerous claims in a no-fault system."

The committee-reported bill's inclusion of colorectal cancer is particularly disappointing. The original bill did not include this cancer. Indeed, during the introductory hearing on the bill, Dr. Crapo praised this omission, and specifically warned against awarding compensation for colorectal cancer. He noted that "[a]ccording 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."

Dr. Crapo also noted that including colorectal cancer "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."

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<sup>58</sup> Infra at Attachment "E."

In other words, attributing “other cancers” to asbestos exposure is an argument that even the tort system does not accept. But it is an argument accepted by this bill.

It was to be expected that this committee would give claimants the benefit of the medical doubt when developing a national trust fund that will bar access to the tort system. It was not to be expected that the committee would also cast aside the overwhelming conclusions of the last thirty years of medical research.<sup>59</sup>

One potential consequence of this committee’s inclusion in the trust fund of “other cancers” and other unjustified compensation categories is described in a letter received by Senator Sessions from Dr. E.B. Ilgren.<sup>60</sup> Dr. Ilgren agrees with all of the conclusions reached by the doctors whose opinions are described above. He concurs that: “[t]he medical literature provides very strong evidence that asbestos does not cause or enhance an individual’s risk for cancer aside from mesothelioma and lung cancer,” and that “[t]here is no reason to include pleural plaques amongst the medical criteria of attributable changes that deserve compensation. Pleural plaques do not portend future malignancy.” He additionally notes that an ILO score of 1/0—one of the criteria that the bill relies on as evidence of asbestosis—is also consistent with long-term, heavy smoking.

Dr. Ilgren also notes, however, that “[i]nclusion of pleuro-pulmonary malignancies in the medical criteria potentially undermines present day evidentiary standards.” Stated otherwise, this committee is setting a very bad precedent. Dr. Ilgren also points out—in the spirit of Jonathan Swift—that inclusion of these criteria argues for inclusion of numerous other premalignant conditions for numerous other cancers as well.<sup>61</sup>

#### *Some Suggestions to a Coordinate Branch of Government*

Over the course of this committee’s consideration of this bill, Senators have heard from a large number of manufacturers, doctors, insurance carriers, union officials, and even trial lawyers about their stake in this matter. Each of these groups is divided into sub-

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<sup>59</sup> As for why this committee even began with a bill that compensates any “other cancers”—despite the clear weight of the medical evidence that none of these cancers is caused by asbestos exposure—the explanation is simple: the existing bankruptcy trusts, particularly Manville, are a natural political default for designing a national trust fund, and most of those trusts—including Manville—compensate claimants for “other cancer.” See White, *supra* note 1, at 1324–26 & n. 25. The explanation for why these trusts make awards for “other cancers” and other medically unsupportable claims is even simpler: “[b]ecause an asbestos firm’s bankruptcy reorganization plan must be approved by at least 75% of claimants, the [firm] managers’ [bankruptcy] decision \*\*\* depends on whether more than or less than 75% of claims are fraudulent, i.e., whether the critical voter on the reorganization plan is a fraudulent or a valid claimant.” Id. at 1339. Those who contend that asbestos exposure causes stomach or colon cancer usually rely on studies published in the mid-1960s by Irving Selikoff. Though all subsequent studies were unable to confirm his results, Selikoff dominated the field of occupational medicine during his lifetime, and frequently participated in litigation as an expert witness on behalf of plaintiffs. Any marginal deference due from this committee to Selikoff’s findings certainly is further diminished by the fact that, as one scholar recently has noted, “in terms of medical education and qualification, Selikoff was a fraud.” P.W.J. Bartrip, *Irving John Selikoff and the Strange Case of the Missing Medical Degrees*, *JOURNAL OF THE HISTORY OF MEDICINE AND ALLIED SCIENCES* 28, Vol. 58 (2003). The author discovered that Selikoff lacked the medical degree that he had always represented himself as having—though he did have a PhD, earned in one year, from “an unaccredited school of appalling quality on the verge of collapse.” Id. at 22. The author concludes that “[i]f Selikoff’s evasions had been uncovered [during his lifetime], his credibility would almost certainly have been destroyed.” Id. at 31–32.

<sup>60</sup>This letter is included as Attachment “T” to this statement.

<sup>61</sup>See *infra* at Attachment “I.”

groups, which often have conflicting interests. Plaintiffs lawyers are divided between those who primarily represent cancer victims—and want strict medical limits placed on asbestos claims, in order to preserve funds for their clients—and those who pursue large numbers of manufactured claims, and who oppose any limits on the tort system. Business is divided between those facing massive asbestos liability (and possibly bankruptcy), who want a bill at any cost, and those who only will support legislation within certain limits. Each of these groups has its own story to tell.

Members of this committee have been presented with a vast amount of information about asbestos litigation. We have heard numerous accounts, many of them first hand, about how these lawsuits are conducted. From all these accounts, certain patterns emerge, and certain aspects of the asbestos-litigation crisis come into relief. Two matters call out for the judiciary's attention.

First, it is apparent that the truth-seeking function of a trial is completely undermined when courts allow illegitimate expert testimony to be presented to a jury. As a matter of federal due process, all unreliable expert testimony should be excluded from the courtroom.

Asbestos lawsuits repeatedly have confirmed the finds of Milgram's experiment: that most people will believe what an expert tells them. When an expert testifies about scientific or technological facts, we believe what he says, not because of his credentials, or because we think ourselves obligated to do so, but because we believe that he has access to the truth. We believe that the expert is revealing to us a part of that truth. We are aware that we do not know as much as the expert does, and so we defer to him.

Before an expert is allowed to exercise this power over a jury, the courts must be certain that he is, in fact, presenting the truth. The expert's power over the jury is not diminished when he presents inaccurate information. Rather, it is the trial itself that is compromised.<sup>62</sup>

Had all courts been required to exclude expert testimony that has not been tested for validity and relevance, the asbestos-litigation crisis probably never would have become a crisis.<sup>63</sup> The pleural

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<sup>62</sup>The Judiciary Committee encountered this very phenomenon during the first day of its executive consideration of this bill. In response to a question from a member of the committee, Dr. Laura Welch, a medical doctor affiliated with The Center to Protect Workers' Rights, stated that in her "opinion, there are epidemiologic studies that show that substantial exposure to asbestos raises the risk of colon cancer." This opinion easily could have been persuasive to committee members had Dr. Crapo not been present to respond. He explained: "There is really only one cohort or study that has really significantly shown an association [of asbestos exposure] with colorectal cancer. It was an early one done. The problem with that cohort was that—and it was Selikoff's cohort of insulators—they had an 80 percent smoking incidence in that cohort, and the controls [the study] used to predict the rate of colorectal cancer in the group came from normal American males that had about a 40 to 50 percent smoking rate, and smoking is a major cause of colorectal cancer. So you can raise some concerns of, did they have the right control number when they estimated the increased rate? That epidemiological study has been redone in a total of 14 cohorts, and when you do a meta-analysis, which means [you] take all the cohorts, all the work that has been done on [the subject] \* \* \* and say, is there an increased risk?, the answer is absolutely no. The SMR for that is 1.03, where no risk is 1.00. An elevated risk would be 2 or something. So you are talking about a profound amount of studies that say there is no increased risk if you properly control for smoking. And I would further add that if you go to most major medical textbooks under asbestos and cancers and look it up, they will say colorectal [cancer] is not associated [with asbestos exposure]." See also *infra*, Attachments "E," "F," "G," "H," and "I."

<sup>63</sup>See Patrick M. Hanlon, *Asbestos Legislation*, SH043, ALI-ABA Course of Study Materials (Sept. 2002) ("Only a few thousand cancer cases are filed each year. If the judicial system merely had to resolve those cases, there would be no asbestos litigation crisis"). See also *id.* ("Most

plaques-phase of the litigation, which dominated the mid-1990s, never would have occurred. The clear weight of the medical evidence indicates that pleural plaques are not substantial evidence of either present harm or the threat of future harm. No expert evidence to the contrary should be admissible in an American court. Nor, were invalid expert testimony excluded from the courtroom, would law firms be able to employ slipshod medical diagnoses to identify asbestosis.

Second, it is apparent that for many defendants, going to trial ceases to be an option when unrestricted intangible damages are threatened. By "intangible damages," I refer to punitive damages, pain and suffering, and all other damages that are not based on a measurable harm and that are potentially unlimited in amount.<sup>64</sup>

These types of damages (particularly punitive damages) are at war with the principles and structure of the civil trial.<sup>65</sup> The civil-justice system tolerates low standards of proof because it does not *create* or *impose* harm. Rather, it evaluates *existing* harms and determines which party most appropriately bears their costs. The civil-justice standard of proof is thus proportionate to the potential of compensatory liability. Because the harm at issue exists regardless of whether the court acts, it is appropriate to ask simply who, more likely than not, should bear the cost of that harm.

But when unlimited intangible damages are permitted, the civil-justice system's low standard of proof becomes an invitation to abuse. Now the court creates new harms—and imposes them despite reasonable doubt about the facts. And, unlike even in the criminal justice system, the potential liability is unknowable. In the classes of cases where punitive damages often are awarded, the defendant, in every case, risks putting his entire business at stake.<sup>66</sup> Given the uncertainties of a jury trial, the typical defend-

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defendants, including many of those who have filed for bankruptcy, could manage the problem of compensating cancer victims and people with serious asbestosis. Compensating hundreds of thousands of people who have no breathing impairment whatever is a task not many companies can handle"). See also *infra* Attachment "I" (describing unsound medical theories employed in asbestos litigation) (Letter of Dr. Ilgren).

<sup>64</sup>Common sense and practical experience suggest that these types of damages are interchangeable—where a jury can award one kind, it generally can find ways to award other kinds as well. See, e.g. Adam Liptak, *Pain-and-Suffering Awards Let Juries Avoid New Limits*, The New York Times, October 28, 2002, at A14 (noting that "[a]ll sorts of limitations have recently been placed on punitive damages, creative lawyers have shifted their attention to pain and suffering, a little-scrutinized form of compensation for psychic harm"). See also Parloff, *The \$200 Million Miscarriage of Justice*, *supra* note 4 (describing Mississippi jury award of \$150 million in "compensatory"—not punitive—damages to six asbestos plaintiffs with no injury or impairment).

<sup>65</sup>See also Thomas H. Dupree, Jr. & Theodore J. Boutros, Jr., *Successfully Challenging Punitive Damage Awards: Winning Strategies After State Farm v. Campbell*, National Legal Center for the Public Interest (forthcoming 2003) (noting that punitive damages "do not serve a compensatory function, nor are they awarded with the protections of the criminal justice system").

<sup>66</sup>Just four months ago, for example, a Madison County, Illinois jury awarded an individual asbestos plaintiff \$250 million—an amount that certainly would threaten the viability of most businesses. See Alex Berenson, *2 Large Verdicts in New Asbestos Cases*, The New York Times, April 1, 2002, at C4. For a discussion of punitive damages' predominance in particular classes of cases, see Erik K. Moller et al., *Punitive Damages in Financial Injury Verdicts*, 28 *J. Legal Stud.* 283, 304 (finding, based on review of financial-injury cases in five large jurisdictions, that "[u]niformly, punitive damages represent a large portion of the total damages awarded \* \* \* : from 43 percent of all damages in other contract verdicts to over 70 percent of all damages in insurance verdicts"). For data regarding the frequency with which punitive damages are awarded in particular classes of cases, see Erik K. Moller, *Trends in Civil Jury Verdicts Since 1985* 54 Table A.9 (RAND 1996) (indicating that in some types of litigation, punitive damages are awarded in over a quarter of cases).

ant will not take this risk, even if he believes that he can show that he is not liable.

This clearly is what occurs in much asbestos litigation. The threat of massive intangible damages has vastly magnified the bargaining power of the plaintiffs firms. As a direct consequence, these firms are now able to impose coercive settlements. In exchange for settling its few legitimate claims, a large-inventory firm can demand that defendants also settle thousands of manufactured claims involving no credible evidence of impairment.<sup>67</sup> Even large defendants are afraid (with reason) to go before a jury even on a small number of claims.

The Supreme Court recently again has held that the federal guarantee of due process places limits on the amount of a punitive-damage award.<sup>68</sup> Once again, however, the court's analysis is restricted to formal punitive damages—it ignores other types of punitive-in-all-but-name intangible damages that have grown to massive size in recent years. Moreover, once again, the Court has “eschew[ed] a bright-line limit” even for punitive awards.<sup>69</sup> As commentators have noted, this ambiguity already has been exploited by some courts.<sup>70</sup>

The federal high court should restrict intangible-damage awards to the value of transactions costs—*i.e.*, to the amount of a reasonable attorneys fee. And, where additional damages are authorized by statute, they should be limited to a small multiple of concrete, calculable damages.

Some jurists have taken the view that because exemplary damages were allowed at the time that the Fifth and Fourteenth Amendments were adopted, the due-process guarantee places no limits on such awards today. It thus bears emphasis that truly massive intangible-damage awards are a creature only of the last thirty years. As one commentator has noted, for example, the largest reported punitive-damage award upheld on appeal in California before 1960 was \$10,000.<sup>71</sup> The size of awards allowed at common law was relatively small—in fact, comparable to the limits suggested here. The due-process clauses guarantee no “right” to these types of awards, unless one takes the view that our Constitution acquired its current meaning in the 1970s.

For intangible damages—as for asbestos—it is the dose that makes the poison. The massive awards permitted today overwhelm the civil-justice system and frustrate its truth-seeking function. Unless these awards are cabined within their historical limits, all other process guaranteed to those who are sued becomes illusory.

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<sup>67</sup> For examples of this phenomenon, see Parloff, \$200 Billion Miscarriage of Justice, *supra* note 4 (discussing bouquet trials and David Cosey litigation).

<sup>68</sup> See *State Farm v. Campbell*, 123 S.Ct. 1513 (2003).

<sup>69</sup> Dupree & Boutrous, *supra* note 65.

<sup>70</sup> See *id.* (discussing *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, No. 01-1201, 2003 WL 21205367 (Wis. May 23, 2003), and *TVT Records v. The Island Def Jam Music Group*, 257 F. Supp. 2d 737 (S.D.N.Y. 2003)).

<sup>71</sup> Written Statement of Theodore B. Olson Concerning Civil Justice Reform, Before the U.S. Senate Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism of the Committee on Commerce, Science, and Transportation, 1995 WL 152026 (April 4, 1995). See also *id.* (describing recent decade's exponential growth in size of Alabama and Texas punitive-damages awards); Dupree & Boutrous, *supra* note 65 (describing Kentucky Supreme Court's recent approval of a punitive-damages award “more than twice as large as the aggregate of all punitive verdicts approved on appeal in Kentucky history”) (*emphasis in original*).

To conclude, I think that it is fair to say that asbestos litigation has warped the American civil-justice system. The courts have been used to commit abuses that one would not have thought possible in America. Congress may yet enact this bill, and put an end to asbestos lawsuits. Even if Congress does so, however, the asbestos model of litigation is now too well-practiced to permit hope that it will not reappear in some other form. The problems described here are ones that we will confront again in the coming years.

JON KYL.

ATTACHMENT A

KAZAN, McCCLAIN, EDISES, ABRAMS,  
FERNANDEZ, LYONS, & FARRISE,  
*July 23, 2002.*

Hon. JACK B. WEINSTEIN,  
*U.S. District Court—EDNY,*  
*Brooklyn, NY.*

Hon. BURTON LIFLAND,  
*U.S. Bankruptcy Court—Southern District,*  
*New York, NY.*

Re *In Re Johns-Manville Corp., et al.*, Case Nos. 82 B11656 (BRL) through 82 B11676 (BRL), Inclusive, NYAL Index No. 4000.  
*Bernadine K. Findley, et al. v. Leslie Gordon Fagen, et al.*, E.D.N.Y. 90 CV 9373 (JBW), NYAL Index No. 4000.

DEAR JUDGE WEINSTEIN AND JUDGE LIFLAND: I had the privilege of attending the hearing held in your court on December 13, 2001, and the even greater pleasure of being asked to comment following the presentations by the Manville Trust, the Futures Representative, and counsel for the SCB. At the conclusion of those proceedings, you asked the Trust to meet and confer with Mr. Fagen and the SCB and report back in 30 days. I understand that you gave them at least one additional extension. Although we have heard various rumors about progress in those discussions from time to time, nothing very specific has surfaced.

Seven and a half months have gone by. Nothing has changed. The Trust has received some 40,000 additional cases. Last week, I co-chaired Mealey's "Wall Street Forum: Asbestos" seminar at which Mr. Austern presented some information. He reported that 90% of the Trust's last 200,000 claims have come from attorney-sponsored x-ray screening programs, that 91% of all claims allege only non-malignant asbestos "disease," and that these cases currently receive 76% of all Trust funds.

In my submission for the December hearing, titled "Memorandum by Interested Attorney," I made my own suggestions as to an appropriate revision of the disease matrix value system and also proposed as an alternative that the court consider taking steps to implement a useful and legitimate medical screening program.

I do not write to point fingers at anyone, for I have no idea why nothing seems to have been accomplished to date, but simply to suggest with all respect that the time has come for your Honors to exercise the powers of the Chancellor and take whatever steps you think appropriate to fix this problem. Nothing you can do can make

things worse; any changes you make can only be an improvement  
of the current intolerable situation.

Respectfully,

STEVEN KAZAN.

**ATTACHMENT B**

YOUR NAME: \_\_\_\_\_  
 YOUR CLIENT NO.: \_\_\_\_\_ YOUR GROUP NAME: \_\_\_\_\_  
 THE DATE OF YOUR DEPOSITION: \_\_\_\_\_ THE DATE YOU WERE PREPARED: \_\_\_\_\_

**PREPARING FOR YOUR DEPOSITION**

Attorney Work Product

INTRODUCTION:

Your deposition is probably the single most important part of your lawsuit. It is an opportunity for the lawyers representing the asbestos manufacturers who are defendants in your lawsuit to ask you questions, under oath, about their product. The burden of proof is on you, the Plaintiff, to show how you *know* it was *their* product you were exposed to. How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement. If you are confident and knowledgeable, the manufacturer will be more likely to offer you settlements because they will feel they cannot win if your case goes to trial in front of a jury.

The idea of sitting at a table for several hours while a room full of attorneys asks you to recall specific names and products from thirty or forty years ago can be frightening. But it will be less stressful if you take time now to prepare, which means you must STUDY your work history sheets OVER and OVER and OVER. Not all brand names were stamped on the product itself. Most names were only on the containers it came in. If you cannot say what the container looked like, how can you know what name of the product was?

The things you must be able to do by MEMORY at your deposition are:

1. KNOW WHAT **GENERAL "TYPES"** OF ASBESTOS PRODUCTS YOU WORKED WITH OR AROUND (such as INSULATING CEMENTS, PIPE COVERING, GASKETS, etc.);
2. KNOW THE **NAMES** OF ALL THE PRODUCTS LISTED ON YOUR WORK HISTORY SHEETS (such as A.P. GREEN, KAYLO, GARLOCK, etc.);
3. KNOW WHICH **NAMES** GO WITH WHICH **"TYPES"** OF PRODUCT (for instance GARLOCK made GASKETS and KAYLO made PIPE COVERING, etc.)
4. KNOW WHICH **PRODUCTS** WERE AT EACH **JOB SITE**, according to your work history sheets;
5. KNOW WHAT KIND OF **PACKAGES** THESE ASBESTOS PRODUCTS TYPICALLY CAME IN, (such as INSULATING CEMENT came in BAGS and PIPE COVERING came in BOXES, etc.);

6. KNOW THE TRADE OR CRAFT OF THE MEN WHO TYPICALLY APPLIED EACH TYPE OF PRODUCT at your jobsite (such as PIPEFITTERS installed GASKETS and BRICKMASONS installed FIREBRICK, etc.)
7. KNOW THE NAMES OF YOUR CO-WORKERS, especially those who have been designated as your WITNESSES. You should be able to generally describe their appearance (black or white, approximate height, weight and age, their nicknames and what their TRADES were. Be thinking about how often you worked around each other (several times a year, almost every day, etc. – the more often, the better!) and how closely you worked together (side by side, in the same department, etc. – the closer, the better!). You don't have to be dear friends or even know them very well, but your CO-WORKERS are very important to your case because they may be asked to testify about products you were exposed to which you DON'T recall!

SPECIFIC PRODUCTS AND THEIR APPEARANCE AND APPLICATIONS

**INSULATING CEMENT:** Insulating cement was usually a gray powder which came in large 50 or 100lb sacks. Remember to say you saw the NAMES on the BAGS. Refer to it as "insulating cement" and not just "cement". Insulating cement is NOT like sidewalk concrete! Insulating cement had asbestos in it and sometimes had the word "asbestos" printed on the bag. It was typically used to insulate steampipes. Plain old concrete did NOT contain asbestos!

Insulating cement was mixed with water to make a mud which was then smeared on over pipecovering or at the joints and elbows of steam pipes, water lines and chemical pipes. Insulating cement was usually applied by asbestos workers, insulators or pipefitters who repaired or installed a section of pipe. Insulating cement was usually put on by hand or with trowels. It was dusty when the sacks were being dumped out and when it was mixed with water. Try to remember how close you were when it was being dumped and mixed. The more often you were around it, the better for your case. You MUST prove that you breathed the dust while insulating cement was being used.

Remember, the names you recall are NOT the only names there were. There were other names, too. They are JUST the names that YOU remember seeing on your jobsites.

The INSULATING CEMENTS I remember are: \_\_\_\_\_

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I was close by while INSULATING CEMENT was being used because \_\_\_\_\_

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The specific jobs or types of job I recall INSULATING CEMENT at are: \_\_\_\_\_

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**REFRACTORY CEMENT:** Refractory cement was usually a gray powder which came in large 50 or 100lb sacks. Remember to say you saw the NAMES on the BAGS. Refer to it as "Refractory cement" and not just "cement". Refractory cement was a high temperature cement used to coat the walls of furnaces, cupolas, crucibles and other containers which held molten metal or similar products. Refractory cement was also used to cast molds for forms and as mortar between firebrick in open hearths and furnaces. Refractory cement was used on boilers and whenever high temperature cement was needed.

Refractory cement was mixed with water to make a mud and was usually applied by brickmasons, boilermakers or aluminum workers. They usually put it on with trowels. It was also mixed with dough and poked with a long stick into holes and cracks in furnace walls. Refractory cement was dusty when the sacks were being dumped out and when it was mixed with water. Try to remember how close you were when it was being dumped and mixed. The more often you were around it, the better for your case. You MUST prove that you breathed the dust while refractory cement was being used.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The REFRACTORY CEMENTS I remember are: \_\_\_\_\_

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I was close by while REFRACTORY CEMENT was being used because \_\_\_\_\_

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The specific jobs or types of job I recall REFRACTORY CEMENT at are: \_\_\_\_\_

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**GUN MIX:** Gun Mix was a gray powder which came in large 50 or 100lb sacks. Remember to say you saw the NAMES on the BAGS. Gun Mix was used like refractory cement except that it was dumped into large hoppers, mixed with liquid and then "gunned" onto the walls and ceilings of furnaces, boilers, cupolas, crucibles and other containers which hold molten metal or similar products.

It was dusty when the sacks were being dumped out and when it was mixed with liquid. Try to remember how close you were when it was being dumped and mixed and sprayed. The more often you were around it, the better for your case. You need to prove that you breathed the dust while Gun Mix was being used. When Gun Mix was being sprayed, the air was usually filled with dust!

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsite.

The GUN MIX I remember is: \_\_\_\_\_

I was close by while GUN MIX was being used because \_\_\_\_\_

The specific jobs or types of job I recall GUN MIX at are: \_\_\_\_\_

**PRE-CUT GASKETS:** Pre-cut gaskets were usually installed in high-pressure steam and chemical line fittings. Pre-cut gaskets came in cardboard boxes or in bundles with a name tag. High pressure gaskets needed to make a tight seal, so layers of paper usually separated the gaskets in the box to protect them from scratches or dents. Remember to say you saw the NAMES on the BOXES. Sometimes the name was stamped right on the gaskets, too.

Pre-cut gaskets were not dusty, but they gave off fibers when compressed as a pipe joint was tightened down. Pre-cut gaskets were typically installed by pipefitters and machinists but you may know of other trades who installed them, too. Try to remember how close you were when pre-cut gaskets were being installed. The more often you were around them, the better for your case. You MUST prove that you breathed the fibers while pre-cut gaskets were being used.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The PRE-CUT GASKETS I remember are: \_\_\_\_\_

I was close by while PRE-CUT GASKETS were being used because \_\_\_\_\_

The specific jobs or types of job I recall PRE-CUT GASKETS at are: \_\_\_\_\_

**SHEET GASKETS:** Sheet gaskets usually came on large rolls tied with a name tag. Usually the name or an emblem was stamped right on the sheets. Remember to say you saw the NAMES on the SHEETS! Many trades used sheet gaskets. Pipefitters and machinists used them to seal water lines at pipe joints and valves. Boilermakers used them to make a tight seal around the boiler and furnace

doors. Electricians used them to seal transformer boxes. You may know of other trades which used sheet gaskets, too.

Usually, a section of sheet gasket was cut from the roll with a utility knife. The sheet was then laid on a table and a gasket cutter (caliper) was used to measure the size gasket needed and perforate the edges. Then a blunt object like a ballpene hammer was used to knock off the excess gasket material. Sometimes holes were punched through the gasket where the valve bolts would be tightened down. All these procedures caused fibers from the gasket material to be released into the air. The gaskets were then installed and gave off more fibers as they were compressed into place.

Try to remember how close you were when sheet gaskets were being cut, pounded and installed. The more often you were around them, the better for your case. You MUST prove that you breathed the fibers while sheet gaskets were being used.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The SHEET GASKETS I remember are: \_\_\_\_\_

I was close by while SHEET GASKETS were being used because \_\_\_\_\_

The specific jobs or types of job I recall SHEET GASKETS at are: \_\_\_\_\_

**ROPE PACKING:** Rope packing usually comes on spools packed in cardboard boxes. Remember to say you saw the NAMES on the BOXES or on the ENDS of the SPOOL. Rope packing was dark or light, and was a thick fiber with a waxy or graphite coating. Pipefitters and machinists used rope packing to pack their pipe joints and valves. Boilermakers used rope packing around the boiler doors to make a tight seal. Aluminum workers used rope packing to seal the seams between joints of castable mold forms and troughs. You may be able to think of other craftsmen who used rope packing, also.

When a length of rope was cut from the spool with a utility knife or snips, fibers were released into the air. Try to remember how close you were when rope packing was being used. The more often you were around it, the better for your case. You MUST prove that you breathed the fibers while rope packing was being cut.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The ROPE PACKING I remember is: \_\_\_\_\_

I was close by while ROPE PACKING was being used because \_\_\_\_\_

The specific jobs or types of job I recall ROPE PACKING at are: \_\_\_\_\_

**PIPE COVERING:** Pipe covering usually came in cardboard boxes. Remember to say you saw the NAMES on the BOXES. Pipe covering came in several colors. Some was white or off-white. Some was pink or tan. Some was a dark greenish-brown color. Pipe covering was a stiff fiber-like material which came in different diameters in a half-moon or split-circle shape, usually in 3 foot lengths. Insulators, asbestos workers, pipefitters and plumbers usually applied pipe covering, but you may be able to think of others, too. A handsaw was usually used to cut the length of pipe covering needed. It was then wrapped around steampipes, chemical lines, refrigerated lines or hot water pipes and secured with tape or wire bands until it could be covered with insulating cement, cloth or metal.

Whenever pipe covering was sawed, asbestos fibers were released into the air. Try to remember how close you were when pipe covering was being used. The more often you were around it, the better for your case. You MUST prove that you breathed the fibers while pipe covering was being cut and installed.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The greenish-brown PIPE COVERING was called: \_\_\_\_\_

The other PIPE COVERING names I remember are: \_\_\_\_\_

I was close by while PIPE COVERING was being used because \_\_\_\_\_

The specific jobs or types of job I recall PIPE COVERING at are: \_\_\_\_\_

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**BLOCK INSULATION:** Block insulation usually came in cardboard boxes. Remember to say you saw the NAMES on the BOXES. Block insulation was usually white or tan, but some was dark brownish green color. Block insulation was a stiff fiber-like material which came in different thicknesses and sizes. Many different trades used block insulation. Thin sheets of insulation were glued or riveted to boiler walls. Thick sections were inserted between inner firebrick walls and the outer metal walls of furnaces. Block insulation was often used in awkward areas where pipe covering would not fit. On really big pipes, sheets of block insulation were laid along pipe sections side-by-side, until the whole pipe was covered.

A electric saw was usually used to cut the size of Block Insulation needed. Whenever Block Insulation was cut or sawed, asbestos fibers were released into the air. Try to remember how close you were when Block Insulation was being used. The more often you were around it, the better for your case. You MUST prove that you breathed the fibers while Block Insulation was being cut and installed.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The dark, brownish green BLOCK INSULATION was called: \_\_\_\_\_

The other BLOCK INSULATION names I remember are: \_\_\_\_\_

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I was close by while BLOCK INSULATION was being used because \_\_\_\_\_

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The specific jobs or types of job I recall BLOCK INSULATION at are: \_\_\_\_\_

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**PLASTIC CEMENT:** Plastic cement was a thick, sticky tar, black in color, which came in 5 gallon and 10 gallon cans or pails. Remember to say you saw the NAMES on the CANS. Plastic cement was used wherever a watertight seal was needed. Pipefitters used plastic cement to seal pipe joints and valves and sometimes as a waterproof coating over pipecovering. Plastic cement was NOT used at a heat SOURCE, because it was asphalt-based and MELTED at high temperature. Pipefitters and Electricians often used plastic cement when they had to seal a pipe or conduit penetration through a floor, wall or roof. Millwrights, machinists and roofers used it to seal flashing around machinery and roof vents.

Plastic cement was not dusty when it was being applied, but once it was dry, then sawed or drilled through, fibers from the plastic cement were released into the air. Try to remember how close you were when plastic cement was being used. The more often you were around it, the better. You MUST prove that you breathed the fibers while plastic cement was being applied or drilled through.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The PLASTIC CEMENT names I remember are: \_\_\_\_\_

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I was close by while PLASTIC CEMENT was being used because \_\_\_\_\_

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The specific jobs or types of job I recall PLASTIC CEMENT at are: \_\_\_\_\_

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**FIREPROOFING:** Fireproofing was a gray fiber-like material which came in 25, 50 and 100lb sacks. Remember to say you saw the NAMES on the SACKS. Usually, several bags of fireproofing material were ripped open and dumped into large hoppers at once, which created a lot of dust. Then the fireproofing material was mixed with liquid adhesive and "sprayed" onto steel beams and structural framework of large buildings to prevent the structure from collapsing if the building caught fire. Asbestos workers and insulators applied fireproofing, and outside-contractor "gun crews" were often brought in to spray buildings with fireproofing.

Fireproofing was dusty when the sacks were being dumped out and when the fireproofing was mixed with liquid. Try to remember how close you were when it was being dumped and mixed and sprayed. The more often you were around it, the better for your case. You need to prove that you breathed the dust while Fireproofing was being used. When Fireproofing was being sprayed, the air was usually FILLED with dust and workers all around it were covered from head to toe!

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The FIREPROOFING I remember is: \_\_\_\_\_

I was close by while FIREPROOFING was being sprayed because \_\_\_\_\_

The specific jobs or types of job I recall FIREPROOFING at are: \_\_\_\_\_

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**ASBESTOS BOARDS AND PANELS:** Asbestos Millboard and transite sheets were usually shipped in stacks on pallets with the NAMES stamped on the SHEETS or printed on a label wrapped around the stack. Drywallers, carpenters, millwrights, sheetrock finishers and other trades used asbestos boards and panels to insulate walls of offices, storerooms and control rooms in large industrial plants, as well as to soundproof walls in homes, schools, hospitals and commercial buildings. Shipfitters used asbestos boards in the walls of bulkheads, galleys and living quarters aboard ship.

Asbestos boards and panels were very dusty when sawed, and gave off fibers into the air. Try to remember how close you were when boards were being sawed and installed. The more often you were around them, the better for your case. You need to prove that you breathed the dust while asbestos boards and panels were being sawed and installed.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The ASBESTOS BOARDS AND PANELS I remember are: \_\_\_\_\_

I was close by while ASBESTOS BOARDS AND PANELS were being sawed because \_\_\_\_\_

The specific jobs or types of job I recall ASBESTOS BOARDS AND PANELS at are: \_\_\_\_\_

**JOINT COMPOUND:** Joint compound was white or off-white and came in two different forms. Sometimes it was a powder which came in 5 to 25lb cardboard boxes or in heavy paper bags. It also came in paste form, in small cans or in 5 gallon buckets or pails. Either way, remember to say you saw the NAMES on the BAGS, BOXES or PAILS. Drywallers, carpenters, sheetrock finishers and millwrights usually dumped the powdered joint compound into an empty bucket, added water and then stirred it with a stick or with an auger attached to a drill until it formed a paste. If it came as a paste, they applied it right from the can.

As a paste, joint compound was used to fill in the seams between sheets of drywall, millboard and sheetrock. It was also used to fill nail holes and wall cracks. When it was dry, it was sanded. So joint compound was dusty TWICE, when it was mixed (if it came in powdered form) and again when it was sanded!

Try to remember how close you were when joint compound was being mixed and sanded. The more often you were around it, the better for your case. You need to prove that you breathed the dust while joint compound was being used.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The JOINT COMPOUND names I remember are: \_\_\_\_\_

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The specific jobs or types of job I recall JOINT COMPOUND at are: \_\_\_\_\_

**CLOTH AND FELT:** Asbestos cloth and felt usually came in rolls like carpet or in bundles banded with a name tag. Sometimes the NAME was printed on the CLOTH, and sometimes it was only on the NAME TAG.

Asbestos cloth had many uses and was applied by many different trades. Welders, machinists and pipefitters used asbestos cloth to "wrap their welds" or to protect machinery nearby from sparks and heat. Aluminum workers used heavy felt to cushion the trays onto which metal rods were laid to keep them from getting scratched. Papermakers used felt in the dryer machines at paper mills. Asbestos felt was also used under roofing material, and was sometimes wrapped around steampipes over pipe covering. Electricians used asbestos cloth to line their cable trays.

When asbestos cloth and felt was cut, fibers were released into the air. Try to remember how close you were when asbestos felt or cloth was being cut. The more often you were around it, the better for your case. You need to prove that you breathed the fibers while felt was being cut.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The names of ASBESTOS CLOTH AND FELT I remember are: \_\_\_\_\_

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The specific jobs or types of job I recall ASBESTOS CLOTH OR FELT at are: \_\_\_\_\_

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**FIREBRICK:** Firebrick was larger than regular clay brick and not as dense or heavy. Firebrick came shipped on pallets wrapped with a paper or plastic banner with the NAME on the BANNER. Sometimes the NAME was STAMPED right on the BRICKS. Brickmasons and boilermakers usually sawed and installed firebrick. It was used to line the walls of open hearths, furnaces and kilns.

Firebrick often came shipped with rolls of felt, and brickmakers were instructed to lay felt between the layers of firebrick where it would act as an expansion joint. As the furnaces heated up, the cloth would burn away and leave room for the brick to expand. Firebrick was often custom made to order, with asbestos millboard glued to the ends or sides of each brick, depending upon where in the furnace it would be installed. Like the cloth, the millboard acted as an expansion joint, and burned away when the furnace was heated, leaving room for the brick to expand. Sometimes, firebrick was wrapped in a metal casing, again, leaving room between the brick and the casing for the brick to expand when heated.

Firebrick had to be cut with big masonry blades. This gave off a lot of dust! Try to remember how close you were when firebrick was being sawed. The more often you were around it, the better for your case. You need to prove that you breathed the dust while firebrick was being sawed.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

The names of FIREBRICK I remember are: \_\_\_\_\_

I was close by while FIREBRICK was being sawed because \_\_\_\_\_

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The specific jobs or types of job I recall FIREBRICK at are: \_\_\_\_\_

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**OTHER ASBESTOS PRODUCTS:**

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The coworkers who can testify about products I was exposed to are:

\_\_\_\_\_, whose nicknames is \_\_\_\_\_ and whose city and phone number is \_\_\_\_\_, worked with/around me at: \_\_\_\_\_  
\_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_

\_\_\_\_\_, whose nicknames is \_\_\_\_\_ and whose city and phone number is \_\_\_\_\_, worked with/around me at: \_\_\_\_\_  
\_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_

\_\_\_\_\_, whose nicknames is \_\_\_\_\_ and whose city and phone number is \_\_\_\_\_, worked with/around me at: \_\_\_\_\_  
\_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_

\_\_\_\_\_, whose nicknames is \_\_\_\_\_ and whose city and phone number is \_\_\_\_\_, worked with/around me at: \_\_\_\_\_  
\_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_

\_\_\_\_\_, whose nicknames is \_\_\_\_\_ and whose city and phone number is \_\_\_\_\_, worked with/around me at: \_\_\_\_\_  
\_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_

\_\_\_\_\_, whose nicknames is \_\_\_\_\_ and whose city and phone number is \_\_\_\_\_, worked with/around me at: \_\_\_\_\_  
\_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_

\_\_\_\_\_, whose nicknames is \_\_\_\_\_ and whose city and phone number is \_\_\_\_\_, worked with/around me at: \_\_\_\_\_

\_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_  
 \_\_\_\_\_, whose nicknames is \_\_\_\_\_ and whose city and phone  
 number is \_\_\_\_\_, worked with/around me at: \_\_\_\_\_  
 \_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_

The following are some of the typical questions and issues which will likely be discussed during your deposition, and some suggestions for how to deal with them.

**QUESTIONS FROM THE DEFENSE ATTORNEYS:**

Remember this verse as you answer questions during your deposition:

**K I S S = KEEP IT SHORT AND SIMPLE!**

It might help to pretend you are a “prisoner of war” in an enemy camp where you must only give “name, rank and serial number”. Answer ONLY the question asked and DO NOT VOLUNTEER any information! Let the defense attorney complete his entire question BEFORE you start to give your answer. Do NOT interrupt him while he is talking. Take a moment BEFORE you answer to ask yourself if you can simply answer “YES” or “NO” or “I DO NOT RECALL”. Do not give an explanation for “YES” or “NO” unless the attorney asks. If he wants to know more, he will ask.

Because it is sometimes difficult to determine which questions can be answered “YES” or “NO”, keep this example in mind: If an attorney asks you if you know what products Johns Manville made, you might naturally tell him “insulating cement”. But think about it. He did not ask you to tell him WHICH products, he asked if you KNEW what products were made by Johns Manville. The only correct answer to that question is “YES” or “NO”! You may believe that by volunteering information you think the defense attorney will ask about next, your deposition will go more quickly. Unfortunately, the opposite is often true, since he might not have thought to ask about what you volunteered, until YOU brought it up!

You are NOT being impolite or untruthful when you answer only “YES” or “NO”. You are actually answering his question truthfully, without volunteering information he has not requested. If the defense attorney then asks you “What products were made by Johns Manville?” you can tell him which products you recall. BUT ONLY THEN! See how confusing it can be?

Be sure you understand a question BEFORE you start to answer. It is okay to ask a defense attorney to repeat his question or ask it in a different way if you are not sure you understand. If you begin to get confused or upset, ask your Baron & Budd attorney if you can take a short break. You and your attorney will leave the room for a few minutes. This will give your Baron & Budd attorney a chance to advise you, in private, how you are doing and to explain anything that is confusing or upsetting you. You may ask for a break at any time during your deposition, within reason, and you

should take advantage of these opportunities to talk to your attorney about whatever is on your mind.

Do NOT tell stories about your experiences at work or give long explanations for your answers. Doing so could accidentally provide the defense attorneys with information they can use against you later! Do NOT use swear words or make negative remarks about race, laziness, or poor workmanship when talking about employers or co-workers. Those co-workers might be called upon to help you in your case! Be polite and courteous at all times, and keep your answers BRIEF and to the point.

Remember, if “YES” or “NO” or “I DON’T RECALL” will answer a defense attorney’s question, then that is ALL YOU HAVE TO SAY!

THINGS TO WATCH OUT FOR:

1. LEADING QUESTIONS. Once you have answered a question, a defense attorney may try to trick you into changing your answer by repeating back what you just said using different words and asking if that is what you meant to say. Some examples of this are:

“So, in other words, what you are trying to say is...”

“What you *really* mean to say is...”

“Wouldn’t you agree with me that...”

“Isn’t it a fair statement to say that...”

“Let me see if I understand you correctly. You just stated that...”

When you hear a defense attorney start his question that way, he may be trying to twist your answer to mean something which could be used against you. Do NOT agree with a defense attorney’s restatement of your response unless you are absolutely positive that is what you really meant to say!

2. IMPLICATIONS THAT YOU ARE NOT TELLING THE TRUTH OR ARE MISTAKEN. The questions asked by the defense attorneys are designed to prove that you were NOT exposed to their product. They will try to confuse you and make you unsure about what you remember. Some examples are:

“Do you mean to tell me that you saw plastic cement being used on *pipe* joints?”

“Are you saying you *really* saw fireproofing being sprayed at that hotel?”

“Did you actually *see* pipecovering put on pipes at residences?”

“How can you be so sure it was *that* brand you saw there?”

These questions are designed to make you believe *they* know something different from what *you* recall and what you are saying cannot be true. They may try to make you loose your temper or feel stupid because you have less education than they do. Keep in mind that these attorneys are very young and WERE NOT PRESENT at the jobsites you worked at. They have NO RECORDS to tell them what products were used on a particular job, even if they act like they do.

Your own recollection is your best asset. YOU know what YOU saw. If you begin to doubt your memory or change your answer to "Well, I think so", or "it could have been there", the attorneys will use your uncertainty against you and ask more and more questions about it. Never say "I guess so". The best way to respond to this kind of question is "Yes, I am SURE I saw it there!" or "I KNOW it was that brand because I saw the name on the container!".

Do NOT be disrespectful. Smart aleck responses read later in a courtroom will not make a jury want to take your side. If you get angry or confused, do NOT let it show. Just ask your attorney if you can take a short break. Remember, if you remain CONFIDENT about what you saw, the defense attorneys will move on to another subject and your deposition will be over a lot sooner.

3. QUESTIONS ABOUT "PRIVILEGED INFORMATION". Privileged information includes any and all conversations or written communications you have had with ANYONE at Baron & Budd. They are considered by law to be private, just like information between a doctor and a patient.

The defense attorneys will ask you questions about conversations you have had and documents you have seen. Some examples are:

"Have you discussed your lawsuit with anyone?"

"Do you have any notes or written material with you today?"

"Has anyone told you what to say or not to say at this deposition?"

"Did your attorney tell you to say that during your last break?"

DO NOT RESPOND TO THESE QUESTIONS RIGHT AWAY! Your Baron & Budd attorney will object to the question and will probably instruct you not to answer. Make sure you give your attorney TIME to object before blurting out an answer!

It is important to your case that you NOT discuss your lawsuit or products with co-workers because THOSE conversations are NOT PRIVILEGED, and the person you talked to could be subpoenaed to testify about the conversation!

The only documents you should ever refer to in your deposition are your Social Security Print Out, your Work History Sheets and photographs of products you were shown, but **ONLY IF YOU ARE ASKED ABOUT THEM AND ONLY IF YOUR BARON & BUDD ATTORNEY INSTRUCTS YOU TO ANSWER!** Any other notes, such as what you are reading right now, are "privileged" and should never be mentioned.

4. GENERAL QUESTIONS. You will be asked if you know what your lawsuit is about. You are seeking compensation for your injuries from exposure to asbestos products made by the defendants.

You will be asked WHY you think you have a case against the manufacturers of asbestos products. You are suing the asbestos manufacturers because they MADE a product they KNEW was harmful and they CONCEALED that danger from the public. Think about it. If they had made a dangerous product and TOLD everybody it was dangerous, then it would have been YOUR responsibility to stay away from it. Because they kept the danger a SECRET, they are liable for the harm they caused you.

You will be asked if you know what asbestos is. Listen carefully to the question. At this point, the defense attorneys are NOT asking if you knew asbestos was dangerous, they are just asking if you know what it is. Most people know that asbestos is an insulating fiber, so you would say, "YES". Then, if asked, you would simply say "it is an insulating fiber". Remember, NO long explanations!

You will be asked how you KNOW you were exposed to asbestos. In the 1950s, 1960s and early 1970s, many of the products included the word "Asbestos" in the name or had names that sounded like "asbestos", so it is likely that you knew you were working around it. That does NOT mean you ever saw a WARNING label or KNEW it was dangerous! Just say "I know I was exposed to it because I worked around it!"

You will be asked when you FIRST LEARNED asbestos was dangerous and HOW you found out. Most people learned about the danger when their doctor told them asbestos WAS IN THEIR LUNGS. It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it. The defense attorneys believe that if you KNEW asbestos was dangerous and you continued to expose yourself to it without protection, then you should share the blame for being harmed by it.

You will be asked when you first learned YOU had been HARMED by asbestos. Most people first discovered they were harmed by asbestos when their doctor told them it WAS IN THEIR LUNGS and NEVER before that!

You will be asked if you ever saw any WARNING labels on containers of asbestos. It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER. You might even be asked to spell "WARNING" OR "DANGER" to prove you would know what it meant if you saw it.

You will be asked if you ever used respiratory equipment to protect you from asbestos. Listen carefully to the question! If you did wear a mask for welding or other fumes, that does NOT mean you wore it for protection from asbestos! The answer is still "NO"!

Finally, you will be asked how much YOU think your lawsuit is worth. Do NOT give an amount. Just say it is up to your attorneys to determine that. Remember, THERE IS NO AMOUNT OF MONEY WORTH YOUR HEALTH! You would rather have your health back than all the money in the world, wouldn't you? Then SAY SO!

QUESTIONS FROM YOUR BARON & BUDD ATTORNEY:

Your Baron & Budd attorney is there to help you and will be right by your side throughout the entire deposition. You must trust your attorney completely and listen carefully to everything you are told. Follow ALL your attorney's instructions! Your Baron & Budd attorney will not steer you wrong.

If you are answering a question and your Baron & Budd attorney interrupts you, STOP TALKING IMMEDIATELY! Your attorney is trying to fix something you said wrong, or stop you from saying something that contradicts your earlier testimony.

If your Baron & Budd attorney asks you any questions ON THE RECORD (in front of the other attorneys), listen carefully to your Baron & Budd attorney's suggestion. Some examples are:

"You mean to the best of your recollection, don't you?"

"You meant that insulating cement was used on steampipes, didn't you?"

"You didn't see that product before the 1980s, right?"

Your attorney will not ask you to say something wrong. Be wary ONLY if a DEFENSE ATTORNEY asks you a question like that!

QUESTIONS ABOUT ASBESTOS PRODUCTS:

Your responses to questions about asbestos products and how you were exposed to them is the most important part of your deposition. You must PROVE you worked with or around the products listed on your Work History Sheets. You must be CONFIDENT about the NAMES of each product, what TYPE of product it was, how it was PACKAGED, who used it and HOW it was used. You must be able to show that you were close to it often enough while it was being applied to have inhaled the fibers given off while it was being mixed, sanded, compressed, drilled or cut, etc.

You will be required do all this from MEMORY, which is why you MUST start studying your Work History Sheets NOW! If you are asked what product names you recall, and you know there are several names listed on your Work History sheets, but you can only remember a few of them, name the ones you CAN remember. Say that you know there are MORE names, but you are having trouble recalling them all. YOU MAY ASK to see your Work History Sheets to help refresh your memory, but your Baron & Budd attorney is NOT allowed to ask for you! Be sure to ask to see your "Work History Sheets". Do NOT refer to them as "notes" or "papers". Be aware that the

defense attorneys are allowed to REFUSE to let you look at your Work History Sheets! That is why it is best to MEMORIZE all your products and where you saw them BEFORE your deposition.

Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case.

Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another. At some jobs there may have been more of one brand. At other jobs there may have been more of another brand, so throughout your career you were probably exposed equally to ALL the brands. You NEVER want to give specific quantities or percentages of any product names. The reason for this is that the other manufacturers can say you were exposed more to another brand than to theirs, and so they are NOT as responsible for your illness! Be CONFIDENT that you saw just as much of one brand as all the others. All the manufacturers sued in your case should share the blame equally!

Be very careful about using the word "ONLY". The defense attorneys will ask you if the products you have named are the ONLY asbestos products which were at your jobsites. Of course they were not! There were lots of other names of pipecovering and insulating cement and gaskets, too! You should name all the products YOU RECALL, but be sure to say there were others, too. This way, your co-workers can testify about brands you cannot remember yourself. It is VERY important to say that there were LOTS of other brands. You just cannot recall ALL the names!

You must be able to pronounce the product names correctly and know WHICH products are pipecovering, WHICH are insulating cements and WHICH are plastic cements, for instance. Many of the product names should sound very similar to each other (Kaylo and Kaytherm, or Raybestos and Unibestos, for instance), but they might be different products entirely! Have a family member quiz you until you know ALL the product names listed on your Work History Sheets by heart.

The defense attorneys will ask you if you have ever heard of "Rostibestos" or some other PRETEND name. If a name does NOT sound familiar to you, do NOT say it does! Just say you do not recall that particular name.

The stress of a deposition will make you very nervous, so if you get confused about the names of certain products and which type of product you are being asked about, keep this handy tip in mind:

Let's say a defense attorney asks you to describe joint compound, what it looked like, what kind of package it came in and how it was applied. You give your description, to the best of your ability. Then he asks you to name all the joint compound names you can recall. You name one or two, but can't remember the rest. If he then asks you if you recall the name "TRIKO" and asks you what type of product "TRIKO" was, you can bet it was joint compound!

Whatever type of product was just being discussed will be the name you will be asked about, if you do not recall it on your own. So you can be confident in saying "TRIKO" was joint

compound, for instance, if you are asked in that way. If the defense attorney tries to slip in the name of a different TYPE of product, your Baron & Budd attorney will object. That is another reason why it is so important to ALWAYS HESITATE BEFORE ANSWERING ANY QUESTION, to give your attorney a chance to object and protect you from saying something wrong.

Unless your Baron & Budd attorney tells you otherwise, testify ONLY about INSTALLATION of NEW asbestos material, NOT tear-out of the OLD stuff. This is because it is almost impossible to prove what brand of material was being torn out, since heat probably destroyed any name printed on the product itself. You can only prove what the product name was when it was being installed in the first place, when the name was clearly marked on the material or on the container it came out of.

Make sure you concentrate on your exposure to asbestos products in the 1950s, 1960s and early 1970s. Do NOT talk about what went on at work in the 1980s and 1990s. The reason for this is that by the mid 1970s most insulating products being installed no longer contained asbestos. The public was just beginning to hear reports that asbestos was dangerous for the first time. You want to be PERFECTLY CLEAR ON THE RECORD that you did not expose yourself to asbestos once you learned it was dangerous! The simplest way to do this is to testify about what you recall from earlier years ONLY.

You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered! If the defense attorney asks you if you were shown pictures of products, wait for your attorney to advise you to answer, then say that a girl from Baron & Budd showed you pictures of MANY products, and you picked out the ones you remembered.

If there is a MISTAKE on your Work History Sheets, explain that the "girl from Baron & Budd" must have misunderstood what you told her when she wrote it down. If there has been a CHANGE to your Work History Sheets, explain that you wanted to make the record clear. If you are asked why you certified a first (incorrect) version of your Work History Sheets to be correct are now saying it is NOT correct, explain that the first Work History Sheet is ALSO correct. The second version just makes the record MORE CLEAR.

If you are asked who MANUFACTURED a particular name of product, just repeat the name of the product. It is not your responsibility to know who the manufacturer was, unless the manufacturer's name was part of the trade name. For example:

"Who made Kaylo pipecovering?"

"KAYLO!"

"Who made A.P.Green firebrick?"

"A.P.Green!"

Never say "NEVER"! If a defense attorney asks if you saw a product being used in a certain way, describe how YOU saw it being used, and explain that it certainly COULD have been used in other ways, too.

#### DAMAGES

This part of your deposition is about your health. It is very IMPORTANT that you give concrete examples of how your life has been "damaged" by your exposure to asbestos. While the answers to questions about your work history and the products you were exposed to should be as SHORT as possible, THIS part of your deposition is YOUR opportunity to state, for the record, why you DESERVE to be compensated for damage to your health caused by asbestos. The defense attorneys will not ask as many questions about your health. It will be up to YOU to give as many examples as you can.

SHORTNESS OF BREATH. Think about it. There are very few things in life which are not affected by your ability to breathe. Between now and your deposition, be thinking about all the activities you have given up or must do more slowly because of shortness of breath. Some examples might be:

Do you have trouble sleeping at night because it is difficult to breathe lying down?

Do you sleep propped up with pillows or sitting up in a chair in order to breathe easier?

Do you wake frequently at night to cough or do you wake up in the morning coughing?

Do you take medications for breathing or anxiety or any other health problem? Bring ALL your medications along with you to the deposition so the Court Reporter can type the names onto the record, even if you don't take the medications regularly.

You will be asked how much money you have spent on asbestos-related health problems. Since there is really no way to know exactly, it is best to say that your DOCTOR will have to answer that question.

SMOKING, DRINKING AND DRUG ABUSE: You will be asked about these vices in order for the defense attorneys to establish your character and how well you take care of yourself. You will also be asked if you have ever been arrested and if so, what for. Be sure to tell your attorney BEFOREHAND about all arrests, no matter how long ago. Your attorney will advise you how to answer.

If you drink, you will be asked how much and how often. You will be asked if you have ever had a "drinking problem". If you no longer drink, you will be asked when you stopped and why.

If you smoke, you will be asked how much and what brands you have ever smoked. The defense attorneys will ask why you continue to expose yourself to cigarettes when you KNOW they are harmful! The difference between your exposure to asbestos and your exposure to cigarettes is

this: Cigarettes are ADDICTIVE and you would quit if you could! You didn't KNOW asbestos was harmful when you worked around it. If you did, you would have stayed away!

**WORK:** Your ability to support your family and yourself has always been very important to you. The wages you have lost by not being able to work as long as you would have liked to are solid proof that you have been damaged financially by exposure to asbestos. Some examples of financial "damage" you have incurred from lost wages might be:

Did you have to retire early because you could not keep up with the other workers your age?

Did you take a lower-paying position because you could no longer perform the strenuous tasks that typically pay more money? Have you turned down any overtime? Be thinking about how much money you have lost by having to refuse overtime, retire early or take a lower paying job.

**HOUSEHOLD MAINTENANCE:** The household repairs you can no longer do yourself or must PAY SOMEONE ELSE to do is another way to prove you have been "damaged" by asbestos exposure.

Do you pay someone else to mow your yard? If so, how much do you pay? Did you purchase a rider mower because you just couldn't use a push mower anymore? How big a yard do you mow?

Have you given up growing a vegetable garden? Do you tend a much smaller garden than you used to? How big did your garden used to be? How small is it now? Have you lost any money by not being able to sell the extra produce?

Do you pay SOMEONE ELSE to do household repairs such as plumbing, electrical and roof repairs? Did you have gas heat installed because you can no longer cut firewood? Did you have aluminum siding put on because you don't have the energy to paint anymore? Can you think of more?

**HOBBIES:** The hobbies you once enjoyed gave meaning to your life. You worked all your life looking forward to retirement so you could enjoy them!

Have you given up or cut down on hunting, fishing, camping, boating, softball, golfing, travel, raising animals or any other activities you once enjoyed? Name as many as you can think of.

**FAMILY:** Your relationship with your family is one of your greatest joys in life.

Are you spending less time with young children or grandchildren because they make you too tired or irritable?

Would your spouse and other relatives say that you are short-tempered or easily frustrated because you are not able to do the things you once enjoyed?

Has your sex life been affected by shortness of breath?

ANXIETY: It is natural to be afraid about how your future will be affected by your health. Your fear is caused in part by health problems you might not have had if you had not been exposed to asbestos.

Are you depressed because of all the activities you have had to give up or cut down on?

Are you afraid that your asbestos disease might develop into cancer?

Do you wonder if your life will be cut short by asbestos-related disease and you will leave your family with no one to provide for them?

Have you seen or heard about co-workers who have died from asbestos-related disease? Are you afraid the same thing will happen to you? If you are afraid YOU MUST SAY SO!

These issues are difficult to talk about in front of a Court Reporter and a room full of attorneys who are complete strangers. But you MUST put your feelings aside and discuss exactly how you feel about your future. It is the ONLY way to show the defense attorneys how much DAMAGE has been caused to your life because you were exposed to asbestos.

Can you think of other ways your life has been affected by your exposure to asbestos? This is YOUR DAY IN COURT, so to speak, although you won't actually be in a courtroom. It is YOUR opportunity to STATE FOR THE RECORD how your life has been "damaged" by these asbestos manufacturers.

#### CONCLUSION

You will meet with your Baron & Budd attorney for about an hour before the deposition begins to go over everything we have just discussed, and more. If you have questions about anything you might be asked or what to say or not say, be sure to ask your attorney before the deposition starts.

Bring a suit and tie along to wear during the deposition. All the attorneys at your deposition will be dressed up and it is crucial that you look and feel just as IMPORTANT as they do.

Remember, if you know the names of all the products listed on your Work History Sheets, what they looked like, what kind of containers they came in and how they were used, the defense attorneys will see you as a knowledgeable, confident witness.

If you keep your answers short and to the point, your deposition will go much faster and you will seem very sincere and believable to the defense attorneys.

If you can give good, concrete examples of how your life has been damaged by your exposure to asbestos products made by these manufacturers, they will want to offer you a settlement instead of taking a chance that a jury will award you more money.

Study hard, memorize as much as you can and practice saying all the product the names out loud. The more you practice, the more you will remember when you are under stress at your deposition. Try not to worry. Your deposition will be over before you know it!

IF YOU HAVE QUESTIONS ABOUT YOUR CASE

Below are some of the people to contact at Baron & Budd depending on the type of question you want to ask about your case. Any of us can be reached by calling our toll-free number:

**1-800 222-2766**

The ATTORNEY responsible for your case: \_\_\_\_\_

The ATTORNEY responsible for your deposition: \_\_\_\_\_

The PARALEGAL responsible for your work history: \_\_\_\_\_

The PARALEGAL responsible for your medical history: \_\_\_\_\_

The PARALEGAL responsible for your settlements: \_\_\_\_\_

CAUTION

If you are contacted by ANYONE who asks you questions about your lawsuit, FIND OUT if the caller is from Baron & Budd BEFORE you tell them ANYTHING! Write down their full NAME and the DATE and TIME of the call.

We have been getting reports that defense attorneys are contacting our clients WITHOUT OUR PERMISSION! Attorneys who represent the asbestos manufacturers are NOT ALLOWED to talk to you without your Baron & Budd attorney present. Do NOT answer ANY questions if you are not sure who the caller represents.

If you believe that you have received one of these calls, report it to us right away! Do NOT answer ANY questions about your lawsuit until you are POSITIVE you are talking to someone from Baron & Budd.

**ATTACHMENT C**

*G-I Holdings, Inc. v. Baron & Budd*, 179 F.Supp. 2d 233 (S.D.N.Y. 2001).  
Dec. 11, 2001

\* \* \* \*

[Pages 238-243]

*The Asbestos Litigation*

\* \* \* dozens of companies in the United States manufactured asbestos-containing products. One such manufacturer was the Ruberoid Company. In the 1940's and 1950's, Ruberoid manufactured for the United States Navy, as well as others, in accordance with government specifications, a product called Calsilite – a thermal insulation product used to protect steam lines on ships and other high temperature applications. In 1967, the Ruberoid Company merged with General Aniline and Film Corporation. Prior to the merger, General Aniline and Film Corporation neither manufactured nor sold any asbestos-containing products. Shortly after the merger, all manufacture of Calsilite was halted. The GAF Corporation came into existence in 1987 and in 1989 was liquidated, and its assets and liabilities were thereafter acquired by GAF Building Materials Corporation. GAF has been named as a defendant in tens of thousands of asbestos personal injury lawsuits, and it has defended such lawsuits in its own name.

As the number of asbestos filings grew, certain law firms came to dominate asbestos litigation. Defendants Baron & Budd, Ness Motley, and Weitz & Luxenberg are three law firms that have spent more than twenty years litigating asbestos claims in courts throughout the country.

In 1978, approximately 125 plaintiffs' asbestos attorneys banded together to form and fund the Asbestos Litigation Group ("ALG") in order to promote asbestos litigation. Defendants were active in and effectively controlled the ALG. Acting jointly through the ALG, and through less formal asbestos-related organizations, defendants solicited tens of thousands of asbestos claimants and sued manufacturers without regard for, or in conscious disregard of, the merits of their claims against particular individual defendants such as GAF.

Defendants have received profits from their litigation by, among other things, charging their clients contingency fees, as high as fifty percent in some cases, notwithstanding the fact that many of these cases involve virtually no risk of non-recovery. It is estimated by Holdings that the Defendants have obtained billions of dollars in fees as a result of their role in asbestos litigation.

Defendants have used the profits from asbestos litigation to expand their recruiting network, enabling them to solicit tens of thousands of additional clients on a nationwide basis and through advertising in union and trade publications, which publications were mailed to the

membership of virtually every trade union that ever worked near or within an industry even tangentially associated with asbestos, such as steelworkers and masons. Defendants also have established a local counsel network, which reaches into virtually every jurisdiction in the United States, to file claims on behalf of the claimants so solicited. Pursuant to agreements with each network member, a share of the fees thus generated is typically channeled back to the referring ALG member, and ultimately to the ALG, to be invested in future claimant solicitations, including mailed advertisements in newsletters. This has resulted in the filing of further claims.

Because most American asbestos manufacturers stopped manufacturing friable asbestos products in the 1970's, the most severe instances of asbestos exposure occurred during and immediately after World War II. Given the average gestation period for asbestos-related illnesses of approximately 30 years, the number of seriously ill plaintiffs has substantially diminished over time. Thus, the number of legitimate asbestos claims began to decrease in the late 1980's as did the number of solvent asbestos companies.

In 1982, Johns-Manville Corporation ("Manville"), the largest U.S. manufacturer and supplier of construction products containing friable asbestos fibers, filed for bankruptcy protection. Since then, asbestos litigation has driven some twenty-five additional companies into bankruptcy, including, most recently, such major companies as GAF, Owens Corning, The Babcock & Wilcox Company, Armstrong World Industries Inc., Pittsburgh Corning Corporation, and W.R. Grace and Company. In the wake of the many asbestos-related bankruptcies, the Defendants targeted the solvent companies, by encouraging their clients to identify those companies' products as the source of their primary exposure. For example, after the Manville bankruptcy, asbestos plaintiffs' testimony abruptly appeared to shift from targeting Manville products to targeting the products of other still-solvent manufacturers.

In response to all of the above factors, Defendants resorted to unethical and improper conduct to keep their asbestos litigation machine running at full tilt. After having largely exhausted the supply of plaintiffs who actually became sick as the result of prolonged exposure to asbestos, Defendants increasingly solicited non-sick claimants who can allege, merely, that they were exposed to asbestos at some point in time. Defendants have then tutored these solicited clients to identify the products of the few remaining viable asbestos defendants as the source of their exposure.

Thus, despite the settlement of most of the legitimate asbestos claims, over 150,000 asbestos cases are still pending against GAF and were, prior to January 5, 2001, being filed against the company at a rate of almost 70,000 per year. The vast majority of claimants in these cases do not suffer from cancer or asbestosis and, in fact, have no impairment of lung function at all.

Many of the claims filed by Defendants are or should be known by them to be completely meritless.

It has been and continues to be Defendants' strategy to inundate asbestos defendants with lawsuits regardless of the merits of the allegations so that those companies cannot defend

themselves against each individual claim and are compelled to agree to massive group settlements that include an ever-increasing proportion of non-sick claimants.

In addition to overwhelming the asbestos defendants and the judicial system with a torrent of claims that cannot reasonably be adjudicated on an individualized basis, the Defendants have held the claims of their legitimately sick clients hostage by refusing to settle those claims while assembling huge inventories of non-sick claimants. This practice enables the Defendants to use the claims of sick clients to leverage large aggregate settlements of claims that have no merit. Once such aggregate settlements are concluded, the Defendants take it upon themselves to apportion what is left of the settlement dollars, after their fees and expenses are deducted, among their clients. The clients are not informed as to the basis of the allocation, and the non-sick clients are substantially overpaid relative to their truly sick counterparts.

As a result of these practices, the Defendants' few sick claimants have waited years and some have even died before receiving compensation. Also, by settling on this "book of business" basis, the Defendants effectively make it impossible for their clients to make an informed decision about whether the settlements are fair and reasonable based on their own individual circumstances.

#### *Fabricating False Evidence*

In furtherance of their scheme, the Defendants have also encouraged asbestos claimants and other witnesses to fabricate evidence to overcome the obstacles posed by non-sick plaintiffs, faded memories, meritorious defenses and the reduced number of viable companies that can still be named in asbestos lawsuits. These practices have been utilized in order to enhance the settlement value of asbestos cases and, thus, the amount of fees earned, all at the expense of GAF and the other companies that have been forced to pay out billions of dollars on non-meritorious claims.

Since numerous companies have produced asbestos products, the liability of any particular company depends upon the existence of evidence that the claimant involved actually had been exposed to that company's product. In most instances, this requires that the client testify that he was exposed to the product. To ensure this result, Baron & Budd has used a "Product Identification Department," staffed by "Product ID" paralegals, whose job it is to make certain that the client affirmatively identifies specific products from his purported memory and that the client identify the "right" product, *i.e.*, one that was sold by a still solvent company.

The fabrication of product identification evidence is not limited to Baron & Budd but is a pervasive practice employed by the Defendants and their affiliates. W.R. Grace and Company is but the most recent producer to note that the bankruptcy of one or more former asbestos producers creates a "spike" in claims against those former producers that are still solvent. If product identifications were truthful, the solvency or insolvency of one former producer would have no effect on the assertion of claims against other former producers because a company's solvency cannot legitimately affect a claimant's bona fide recollection as to the products to which he or she was exposed.

Consistent with their efforts to fabricate product identification evidence, the Defendants have also encouraged the fabrication of false testimony to stack the litigation deck in their favor. To that end, Baron & Budd went so far as to author a 20-page script entitled, "Preparing for Your Deposition" (the "Memorandum") to assist the firm's clients in providing helpful deposition testimony. The Memorandum goes beyond providing general tips on how a witness should conduct himself or herself during a deposition and provides specific "facts" that all clients should testify to, specific responses that all clients should give, and specific information all clients should not divulge, regardless of what the truth might be in a particular case. The Memorandum counsels witnesses to memorize the information contained in the "Work History Sheets" created by Baron & Budd paralegals and otherwise coaches clients on hints and signals that will help them determine what the "right" answer is. Nowhere does the Memorandum instruct its reader to tell the truth, and the clear import of the Memorandum is that the helpful, and necessary, "right" answer is all that matters, regardless of the truth.

[This part of the court's opinion describes the contents of "Preparing for Your Deposition."]

\* \* \* \*

Baron & Budd's encouragement of false testimony was not limited to depositions. As a prerequisite to implementation of certain mass settlements with GAF, among others, the Defendants were required to provide sworn affidavits from their clients stating the specific asbestos-containing products to which these clients had been exposed during the relevant time periods. Such affidavits were essential to the consummation of these settlement agreements.

Many Baron & Budd clients were reluctant to sign the affidavits, as they had no recollection of the products to which they had been exposed and were afraid that if they signed the affidavits, they might be required to go to court. Baron & Budd personnel would persuade these clients to sign the affidavits by assuring them that this was a purely mechanical process, that they needed only sign the document, have it notarized, and send it in, and they would then be assured of receiving money.

As a result of this inducement, Baron & Budd clients signed affidavits in which they swore under oath that they were exposed to specific products when they had no independent recollection that they had been. Although Baron & Budd employees were aware that the affidavits were false at the time they were signed, Baron & Budd nonetheless presented these affidavits to asbestos defendants, including Holdings and its predecessors, as true.

In reliance on Baron & Budd's fraudulent assertion that such affidavits were true, asbestos defendants, including Holdings, paid out millions of dollars in asbestos settlements that they otherwise would not have paid, a large portion of which was paid to Baron & Budd in attorneys' fees.

The Defendants' efforts to manufacture favorable testimony was not limited to the scripting of claimants' testimony. Baron & Budd, along with Ness Motley, hired doctors who

attributed virtually any lung abnormality to asbestos exposure, regardless of what the medical evidence actually showed.

Defendant Ness Motley provided a different form of inducement to medical experts to obtain their favorable testimony. Certain of defendant Ness Motley's female secretaries and paralegals were expected to, and did, "entertain" expert witnesses who would visit the firm in connection with pending asbestos litigation. At least one partner of the firm indicated to his secretary that she should have sex with a particular expert witness, and Motley supplied several female employees with cash and encouraged them to "be nice to" certain of the firm's experts and out-of-state co-counsel.

These practices induced false and misleading testimony to be given by expert witnesses in support of claims brought against GAF and others, which resulted in GAF's payment of inflated verdicts and settlements in a number of cases. These inflated verdicts and settlements and, in general, Ness Motley's ability to produce on demand whatever medical testimony it needed, also had the effect of raising the "going rate" for settlement of Ness Motley's cases, thereby causing GAF additional injury.

*G-1 Holdings, Inc. v. Baron & Budd*, 238 F.Supp. 2d 521 (S.D.N.Y. 2002).  
July 17, 2002

\* \* \* \*

[Pages 529-532]

#### *Specific Instances of Falsifications of Affidavits*

Holdings alleges that Baron & Budd filed false affidavits in connection with asbestos litigation. In December 1995, paralegals at Baron & Budd working under the supervision of Melanie Oliver, a Baron & Budd supervisor ("Oliver"), were instructed to gather hundreds of affidavits from Baron & Budd clients for use against GAF and other asbestos defendants for trial and/or settlement purposes. Such affidavits were critical to establish liability against a particular defendant whether they were to be used for trial or settlement purposes.

Under Oliver's supervision, the paralegals gathered the affidavits and began to compile the results in a conference room at Baron & Budd. With their deadline looming, the paralegals realized that approximately 200 of the affidavits were missing necessary information, including: (1) the asbestos product to which the affiant had been exposed; (2) the work site(s) at which the affiant had been exposed-employed; and/or (3) the client's signature.

The paralegals reported these omissions to Oliver, who instructed that the affidavits be "fixed." None of the affidavits was returned to the affiant for completion, correction, review or signature. Instead, at Oliver's direction, the paralegals "filled in" the missing information themselves.

Missing product identification was added without reference to or knowledge of whether the client could truthfully testify that he had been exposed to a particular asbestos product. For example, where a client had failed to identify a particular asbestos product to which he had been exposed, the paralegals would attempt to research which of the manufacturer's products "might" have been used at the identified work site and then simply add that product to the affidavit. Where a client had failed to identify a work site, the paralegals would create that information using the client's social security printout (to identify employment history) and then would deduce an appropriate work site that would match the particular product and the particular asbestos manufacturer. The paralegals also signed clients' names on the unsigned affidavits.

In each case, after a deficient affidavit was "fixed" by Baron & Budd's paralegals, it was filed with the court in which the case was pending or was submitted to the defendants to support a settlement.

\* \* \* \*

#### *The Effects of the Routine Falsification of Product Identification Evidence*

The falsification of product identification was not limited to the events of December 1995 described above. Claim forms filed by the Baron & Budd bankruptcy department also included false product identifications provided by a Baron & Budd employee. A paralegal working under the supervision of Baron & Budd bankruptcy department manager Tiffany Tuggle ("Tuggle") routinely listed products on claim forms for clients that had never been identified by the client or were wholly inconsistent with the information that had been provided by the client. Baron & Budd was made aware of this practice and did nothing to stop it. In fact, the paralegal was promoted.

#### *Backdating Claims and Falsifying Court Records*

Subsequent to the filing of the Second Amended Complaint, Holdings claims to have uncovered additional evidence of wrongdoing by defendant Weitz & Luxenberg. The following eleven paragraphs are alleged on information and belief based on the investigation of private investigators working for Holdings.

In order to pursue claims against asbestos defendants that would otherwise be time-barred, Weitz & Luxenberg has backdated documents filed in asbestos personal injury cases and tampered with and falsified records of the Supreme Court of the State of New York.

In the spring of 2000, Weitz & Luxenberg maintained an office at 120 Wall Street in Manhattan that oversaw the prosecution of asbestos personal injury cases on behalf of clients who had died. In May 2000, Weitz & Luxenberg attorneys recognized that they had failed to amend in a timely fashion a complaint filed in New York County, the effect of which was to bar claims against one or more named or unnamed defendants under applicable statutes of limitations. Weitz & Luxenberg remedied the problem by backdating the amended pleading,

falsifying the filing stamp and altering the books and records of the New York County Supreme Court to reflect the fact that the amendment had been filed long before it actually was filed.

Pleadings filed in the New York County Supreme Court all bear an official court stamp, affixed by court employees, reflecting the date upon which the pleading was filed in the County Clerk's office (the "Filed Stamp"). The filing date, reflected in the Filed Stamp, is relied upon by both the Court and by litigants (including GAF) in calculating the timeliness of the filing. In the spring of 2000, GAF was a named defendant in all, or substantially all, of the asbestos liability actions brought in New York County by Weitz & Luxenberg on behalf of its clients.

Sometime after Weitz & Luxenberg attorneys discovered the error, Weitz & Luxenberg personnel, acting under the direction of Weitz & Luxenberg attorney Marie Ochigrassi ("Ochigrassi"), undertook to ensure that the amended complaint would be filed with a false backdated Filed Stamp and that the court's records would be falsely altered to reflect that the pleading had been filed before it actually was filed. Ochigrassi was the head of a department comprised of two other attorneys and paralegals. The two supervising paralegals in the department were Alicia Ostracher and Vanessa Ostracher, both of whom are daughters of Elba Aguilar ("Aguilar").

Aguilar is and was at that time a court employee at the New York County Supreme Court building at 60 Centre Street in Manhattan. Aguilar's duties at the courthouse are such that she has and at all relevant times had access to the New York County Clerk's Filed Stamp and New York County Supreme Court case records.

Aguilar is the mother of three present or former Weitz & Luxenberg paralegals: the Ostrachers and Mary Jo Sci. In addition, Weitz & Luxenberg is representing Aguilar's former husband (with whom she is now reconciled) in litigation with Nassau County in which Aguilar's interests appear to be aligned with his. Weitz & Luxenberg is handling the litigation at no charge.

Under the direction of Ochigrassi, Weitz & Luxenberg personnel first prepared a back-dated amended complaint. When the new papers were ready, Ochigrassi summoned a paralegal to her office where paralegal Alicia Ostracher was also waiting. Ochigrassi instructed the paralegal that he was "to take something down to Alicia's mother" and "to follow Alicia's instructions." Ostracher handed the paralegal an envelope containing the amended complaint and indicated that she had called her mother who would be waiting to meet him at 60 Centre Street.

Ostracher instructed the paralegal to meet her mother inside the entrance to the courthouse at 60 Centre Street. When the paralegal arrived, Aguilar told him to go downstairs to the records department of the courthouse ahead of her, to make a copy of the document he had brought with him and to fill out a request form for the case file. He did so. As he was being handed the case file, Aguilar appeared by his side and showed the filing clerk her badge so that the file could be removed from the clerk's view. Aguilar also requested a document log book for a certain time period, which the clerk gave her.

Aguilar and the paralegal took the file, the logbook, and the documents to a space near the copy machine. Aguilar stamped the amended complaint with the court's Filed Stamp to reflect falsely that it had been filed at an earlier date, before the statute of limitations ran on the newly added claims. Aguilar then added a false entry to the court's log book. The entry Aguilar placed in the log book falsely indicated that the amended complaint had been filed on the false filing date. At Aguilar's instruction, the paralegal then took the case file to the copy machine, copied a document in it (so as to suggest that was the reason he had requested it) and then placed the falsely stamped pleading in the case file. The log book and case file were then returned to the filing clerk.

This was not an isolated incident. On several other occasions, the paralegal was instructed by Weitz & Luxenberg attorney Ochigrassi or Weitz & Luxenberg paralegal Ostracher to take blue-backed documents to Aguilar so that false Filed Stamps could be affixed on them. Once Aguilar took the paralegal upstairs at the courthouse at 60 Centre Street and made him wait on a bench. She then took the documents into another room and brought them back, all with back-dated Filed Stamps newly affixed. On another occasion, they met at the court's rotunda on the first floor. At that time, Aguilar simply ducked behind a column and quickly stamped the documents with the earlier, but false, filing dates. On yet another occasion, Aguilar met the paralegal outside the side entrance to 60 Centre Street to effectuate the falsification of filing stamps on case documents generated by Weitz & Luxenberg. On every occasion, Aguilar took steps to ensure that her conduct was not being observed by others.

Under Rule 3025 of New York's Civil Practice Law & Rules, amended complaints must be served on each party to the action, including each named defendant, and each named defendant must serve and file a response thereto. Weitz & Luxenberg's filing of fraudulently time-barred claims increased the litigation costs for all defendants in those cases.

**ATTACHMENT D**

Otha W. Linton, MSJ  
11128 Hurdle Hill Drive  
Potomac, Maryland 20854

28 July 2003

The Honorable Charles E. Grassley  
Chairman, Committee on Finance  
United States Senate  
219 Senate Dirksen Office Building  
Washington, DC 20510

Dear Senator Grassley,

For some years, we have been following legal and clinical problems involved in workmen's compensation programs and litigation on behalf of persons claimed to have been exposed to asbestos. One of us, (OL), was for 25 years principal staff to the American College of Radiology Task Force on Pneumoconiosis and a consultant to the National Institute for Occupational Safety and Health, and for most of those years, a member of the International Labor Office (ILO) task force on its chest x-ray classification system. The other, (JG), is a medical imaging consultant, a faculty member of the department of radiology of the Johns Hopkins Medical Institutions and a participant in the design of many studies of x-ray readings.

This letter summarizes a paper prepared by us for submission to a scientific journal on the subject of inconsistencies in the interpretation of chest radiographs required as support for claims of health damages to workers exposed to asbestos products. The abstract is attached along with one table prepared for the article. Ordinarily, we would prefer to share the published article. However, the time required for submission, peer review and eventual publication may be too late to be of assistance to you in your current proposed legislation.

A few comments about the provenance of our effort may be helpful. Since 1996, we have been providing a service to several groups of attorneys involved in asbestos litigation. They approached us seeking a way to go beyond the frequently contrary interpretations proffered by plaintiffs' experts and defense experts, most all of them B readers.

We organized a panel of expert B readers – radiologists and pulmonologists – who agreed to interpret sets of radiographs for us with no knowledge of the patients' identity, the origin of the films or even the purpose of the study. Some of our panelists have read films for attorneys on both sides, some for only defense and some not at all except for participating in our studies. The

films were masked as to patient and source information before being sent to the readers, along with ILO classification forms prepared by the National Institute for Occupational Safety and Health. The full paper describes our efforts to assure the integrity and validity of our study.

The films in the study came originally from plaintiffs' counsel who chose the x-ray facility and the initial readers noted in the attached table. Under legal rules, the 558 films were made available to defense counsel and by defense counsel to us for our proposed study. Our intent was to determine whether or not an objective group of expert readers would concur in the findings of readers selected by plaintiffs' counsel. The table reflects a wide disparity individually and collectively between the conclusions of the initial readers and the consultant readers. Only one initial reader read each film while all six of the consultant readers interpreted each film.

In addition to making the comparisons, we surveyed the world literature on x-ray studies of asbestos-related changes and could find no studies anywhere that reflected the 91.7 percent positivity (1/0 or higher for small opacities on the ILO 1980 classification) reported collectively by the initial readers who read the same set of films prior to the consultants reading them. The cumulative readings of our six experts was 4.5 percent positive.

The reliance of current law and regulations on chest radiographs is based upon the recognition that an x-ray film is a discrete piece of visual evidence which can be examined by many interpreters. The ILO classification system is intended to standardize interpretation and to provide a concise nomenclature for reporting findings. The dilemma is that presumably qualified interpreters may vary in their conclusions. We believe that our study demonstrates that the variation found between initial readers and consultant readers is statistically significant and beyond reasonable inter-reader variability.

If the individuals whose chest radiographs became part of our sample had presented themselves to medical facilities for diagnosis of their claimed respiratory difficulties, a chest radiograph would be only one element in a proper diagnostic workup. Detailed medical histories, careful physical examinations and the performance of pulmonary function tests would be appropriate. We do not argue the perfection of chest x-ray interpretations, even in the hands of unbiased experts. We applaud your effort to improve the adjudication process.

Radiographs are representations of normal and abnormal densities in the body. It is not possible to identify from the radiograph the nature or composition of the inhaled or retained dust which causes an abnormal density. Given the smoking histories of many claimants, tobacco use must be regarded as a strong co-confounding element. The significant exception to the general statement is that pleural plaques, seen on some radiographs are pathognomonic to asbestos exposure.

We offer one suggestion on your proposed language. At the beginning of the current year, the International Labor Office promulgated a new version of its classification system, dubbed ILO 2000, and described in ILO publication 22, "Guidelines for the use of the ILO international classification of radiographs and pneumoconiosis," revised edition 2000. That publication and

the standard sets of reference radiographs are now available from the ILO and, if we may suggest, should be referenced in your language.

We have limited our comments to our own studies and insights. However, it is our general sense that things are broken and need fixing. We commend you and your colleagues on undertaking to fix them.

Sincerely,

Otha W. Linton, MSJ

Joseph N. Gitlin DPH

Comparison of "B" Readers  
July 15, 2003

**Comparison of "B Readers" Interpretations of Chest Radiographs  
for Asbestos Related Changes**

**ABSTRACT**

OBJECTIVE: The purpose of this study was to determine if chest radiographic interpretations by physicians retained by attorneys of persons alleging changes consequent to occupational asbestos exposure would be confirmed in a reading trial by independent consultant readers.

METHODS: 712 chest radiographs interpreted by B readers retained by plaintiffs' attorneys and 558 initial readings were made available to the authors. Six consultants in chest radiology, also B readers, agreed to re-read these radiographs independently without knowledge of their provenance. The film source, patient names and other identifiers were masked. The International Labor Office 1980 Classification of Chest Radiographs (ILO 80) was used with forms provided by the US National Institute of Occupational Safety and Health to record the consultants' findings. The results were compared with initial readings for film quality, parenchymal abnormalities, small opacities profusion, pleural abnormalities, and incidental findings.

RESULTS: Among the many comparisons, the initial readers interpreted the study radiographs as positive for parenchymal abnormalities with a small profusion category of 1/0 or higher in 91.7% of their 551 reports. The consultants interpreted the same set of cases as category 1/0 or higher in only 4.5% of their 3306 reports. Statistical tests of these and other comparable data from the study showed highly significant differences between the interpretations of the 30 initial readers and the findings of the consultants.

CONCLUSION: The magnitude of the differences between the interpretations by initial readers and the reports of the consultants is too great to be attributed to inter-observer differences. There is no support in the world literature for the relatively high level of positive findings recorded by the initial readers.

**ATTACHMENT E**

July 22, 2003

The Honorable Jon Kyl  
Member, Committee on the Judiciary  
United States Senate  
Hart Senate Office Building 730  
Washington DC 20510

Dear Senator Kyl:

You requested that I comment on the medical criteria in the proposed FAIR Act (S. 1125) to assess whether or not the medical criteria would appropriately include valid claims by individuals with diseases or injury caused by asbestos while excluding individuals with diseases or injury that are not causally related to asbestos exposure. As you know, I have testified twice in support of this bill, once at the Judiciary Committee's hearing on June 4 and again at a business meeting of the Committee on June 19. I believed that the medical criteria in the bill as it then stood, while not strictly consistent with medical standards, were a reasonable compromise among the various constituencies involved in this process. After reviewing the medical criteria requirements in the bill as amended and voted out of the Judiciary Committee, I continue to believe that those criteria represent a reasonable compromise.

Medical criteria in an asbestos trust have two general functions. The first, and most important, is to determine who is eligible for compensation. In this regard, there is always a tension between competing goals: in this case, avoiding compensating people who do not have an impairing disease caused by asbestos (i.e., avoiding "false positives") and making sure that those who do have disease are compensated (i.e., avoiding "false negatives"). The second function served by the medical criteria is to distinguish between conditions that should receive different amounts of compensation. Fairness requires compensating people with severe asbestosis more than people with only mildly impairing asbestosis. Fairness may also require providing more compensation where causation is clear, as is usually true in mesothelioma cases, than where it is more doubtful, as it is in lung cancer cases, especially where the claimant is a smoker.

The medical criteria in the current version of the FAIR act resolve the question of eligibility in a way that is generous to claimants. Few, if any, people who are impaired by an asbestos-related disease will fail to receive compensation under these criteria. There will be practically no false negatives. The price of this generosity is that there will probably be a sizable number of people who do not have a disease caused by asbestos who will be compensated under the bill - i.e., there will be a considerable number of false positives. I do not believe that the compromise reflected in the bill is unreasonable for that reason, but it is important to understand that the medical criteria resolves many questions of eligibility in favor of claimants.

I also believe that the bill has made appropriate distinctions among disease categories for the purpose of determining different compensation amounts. This is true both in the non-malignant disease categories and for the various lung cancer categories.

### **Introduction**

The primary diseases that are caused by asbestos exposure are:

1. Asbestosis
2. Lung cancer
3. Mesothelioma

In addition, there are a number of non-malignant pleural reactions which occur in asbestos-exposed individuals but which do not commonly result in significant functional impairment. Some have suggested that other cancers, such as gastrointestinal cancers, may be caused by asbestos, but, as explained below, the medical evidence does not support that causal relationship.

The problem in designing medical criteria to compensate for individuals with these asbestos-related diseases is that there are a number of other disease processes that mimic each of these processes. Our country has a background rate of mesothelioma of about 800-1000 cases each year.<sup>1</sup> These so-called "idiopathic" cases are not caused by exposure to asbestos. Similarly, asbestosis is only one of a large number of causes for interstitial lung disease. Diseases such as idiopathic pulmonary fibrosis, sarcoidosis, hypersensitivity pneumonitis, and other inflammatory lung diseases can mimic many of the findings of asbestosis. Finally, as is well known, the primary cause of lung cancer is smoking, and even in asbestos workers, smoking is the cause of most lung cancers.

### **Non-Malignant Diseases**

#### **Asbestosis**

The American Thoracic Society's recommended criteria for diagnosing asbestosis are shown in the table below. Asbestosis is a presumptive diagnosis based on a number of clinical findings and exclusion of other likely causes. Many other diseases clinically mimic elements of asbestosis. Thus when the criteria for the diagnosis of asbestosis are not met, the risk of an incorrect diagnosis increases.

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<sup>1</sup>Price, B. Analysis of current trends in United States mesothelioma incidence. Am J Epidemiol 145:211-218, 1997.

**Criteria for the Clinical Diagnosis of Asbestosis**

Exposure
Latency
Interstitial Fibrosis of Chest X-ray (1/1)
Restriction on Pulmonary Function Tests
Decreased Diffusion Capacity
Symptoms:
Shortness of Breath
Decreased Exercise Capacity
Signs:
Crackles
Clubbing
Absence of Other Diseases

Asbestosis is a diffuse interstitial fibrosis of the lungs caused by inhalation of high concentrations of asbestos. The common presentation of asbestosis is dyspnea and dry cough and then a medical finding of diffuse bilateral fibrosis on chest radiograph and pulmonary function findings of a restrictive lung disease. Most cases are mild, cause only minor degrees of functional impairment and do not progress if exposure is stopped. A few cases progress to serious disability. These more serious cases occurred primarily with the high occupational exposures to asbestos that occurred in the early and mid part of the 20th century, and - fortunately - this type of serious impairment from asbestosis is becoming quite rare today.

The threshold of exposure to asbestos fibers for the development of clinically detectable asbestosis is approximately 25 fiber cc years.<sup>2</sup> Reaching this threshold of exposure does not necessarily indicate that clinical asbestosis will occur. At approximately 50 to 100 fiber cc years, the risk of contracting clinical asbestosis is on the order of 1 to 2 percent.<sup>3</sup>

**Pleural Reactions and Diseases**

<sup>2</sup> 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; Report of the Royal Commission on Matters of Health and Safety Arising From the Use of Asbestos in Ontario, Deprey JF et al., Toronto, Ontario, Ministry of the Attorney General 1:281, 1984.

<sup>3</sup>Berry G et al., Asbestosis: a study of dose response relationships in an asbestos textile factory. *BJ Ind Med* 36:98-112 (1979); Weill, H., Biological effects: asbestos cement manufacturing, *Annals of Occup. Hygiene*. 38:533-536, 1994; Lacquet, LM et al. Roentgenographic lung changes, asbestosis, and mortality in a Belgian asbestos cement factory, in: Wagner, JD, ed., *Biological Effects of Mineral Fibres* vol. II Lyon IARC 788-792, 1980.

Changes of the pleura, such as pleural plaques or pleural thickening, due to asbestos exposure should not be characterized as asbestosis. These pleural changes do not affect lung function unless they are extensive, and they do not increase the risk of an asbestos-related cancer.<sup>4</sup>

Most pleural reactions are asymptomatic pleural thickening or pleural plaques. These findings are markers of asbestos exposure. In rare cases, pleural fibrosis can lead to entrapment of the lung and cause impairment; however, this disease manifestation is almost nonexistent now since high-level occupational exposures have been virtually eliminated for almost 20 years. The FAIR Act should most appropriately compensate only those individuals with true functional impairment due to extensive pleural thickening and lung entrapment. When compared to other individuals with similar asbestos exposure but no pleural manifestations, patients with pleural plaques have not been shown to be at increased risk of more serious asbestos-related diseases.

#### **The Medical Criteria for Non-Malignant Diseases**

At the outset, I note that the FAIR Act does not provide cash compensation to people who have non-imparing asbestos-related conditions. Those people, in Non-Malignant Level I, receive medical monitoring only. This is an extremely important provision. In my experience, a very large number of people with asbestos-related changes in the lung or pleura are not impaired now, and are unlikely ever to become impaired, by any asbestos-related condition.

The FAIR Act also deals with people who clearly have an impairment, to which asbestosis may contribute in some degree, but which is predominately caused by a variety of other lung diseases that are usually caused by smoking. Thus, people with reasonably strong indications of asbestosis (primarily a 1/1 chest x-ray) and also obstructive disease such as emphysema and chronic bronchitis may qualify for Non-Malignant Level II. I believe that it is possible that a substantial number of people may receive compensation in Non-Malignant Level II for impairment due to obstructive disease without any significant asbestos contribution. However, since the total number of people qualifying at this level is likely to be limited, Non-Malignant Level II provides a means for dealing with people who have both asbestosis and obstructive diseases. From the perspective of fairness, it is certainly better to provide a separate classification, with reduced compensation levels, for people with mixed diseases.

The medical criteria for the remaining levels are straightforward. Basically, Category III includes people with relatively mild impairment, and Categories IV and V include people with progressively more severe impairment. The criteria for impairment are generally based on the AMA Guides to Evaluation of Permanent Impairment. By distinguishing these various levels of impairment, the FAIR Act will allow the more seriously ill people in Categories IV and V to receive substantially more compensation than individuals with minimal asbestos-related impairment.

There are several important safeguards that help ensure that the number of false positives in the non-malignant categories will be manageable. In particular, independent readings of chest

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<sup>4</sup>Weiss, W. Asbestos-related pleural plaques and lung cancer. Chest 103:1854-1959, 1993.

x-rays, submitting evidence that pulmonary function tests were properly administered using proper equipment, and requiring a diagnosis from the claimant's doctor (i.e., a person with a physician-patient relationship to the claimant) which excludes other more likely causes of the claimant's condition, are all valuable. Also valuable is the Fund's ability to audit claims and prevent fraud and abuse.

Nevertheless, the medical criteria in some respects may allow people without an asbestos-related disease to qualify for compensation:

- They allow claimants to succeed with only 5 weighted years of exposure. This is far less than the amount of exposure that is typically required to produce impairing asbestosis or diffuse pleural thickening. Moreover, in the case of people who work directly with asbestos products, only 2.5 actual years of exposure are required because of the weighting system. Many people today work directly with asbestos products that are encapsulated and that release fibers only in very small quantities. Such people cannot realistically develop an impairing asbestos disease based 2.5 years of exposure. I would hope, of course, that doctors would be loathe to make a diagnosis of asbestosis on the basis of such short exposure-periods. Nevertheless, it might have been better to require more exposure than the FAIR Act does as a predicate for compensation for non-malignant diseases.
- The x-ray findings required for compensation in Non-Malignant Levels III, IV, and V are generous. In the first place, it is possible to recover in each of these categories with an x-ray indicating pleural plaques or diffuse pleural thickening that register B2 on the ILO scale. It is rare, however, that people with only pleural conditions of this kind will have a genuine impairment. In addition, the x-ray requirement for asbestosis in Non-Malignant Level III is only an ILO 1/0, which under the present ATS guidelines is not considered persuasive evidence of asbestosis. Requiring an ILO reading of 1/1 in Non-Malignant Level III would greatly reduce the number of false positives.

### **Cancers**

Under the bill's medical criteria, people may qualify for compensation for three kinds of cancer: "other cancers" (i.e., cancer of the colon, rectum, stomach, esophagus, pharynx and trachea), lung cancer, and mesothelioma.

#### **"Other Cancer"**

Compensation by the FAIR Act for forms of cancer other than lung cancer and mesothelioma is not justified by current medical science. While the evidence suggests an association between asbestos and laryngeal carcinoma, no other form of cancer is clearly associated with asbestos exposure. Moreover, the suggested association between asbestos exposure and laryngeal cancer is suspect because of the absence of a dose-response relationship.

While it is accepted that exposure to asbestos is associated with mesothelioma and lung cancer, there is no persuasive scientific evidence of meaningful association with cancer at other sites. Several early epidemiological studies suggested a relationship with malignancies at sites such as the gastrointestinal tract, larynx, kidney, liver, pancreas, ovary and hematopoietic systems. These findings have stimulated a substantial number of additional studies of this issue, and the weight of current medical evidence now suggests an association between asbestos and laryngeal carcinoma but no clear association with other cancers.

The best assessment of this type of risk association is done with cohort studies rather than case-control studies, since exposure assessment in case-control studies is usually derived from questionnaires and is thus frequently inaccurate. In 1999, Goodman *et al.* used a meta-analysis to review fourteen cohorts that had been evaluated for various aspects of gastrointestinal cancer and its relationship to asbestos exposure. Researchers had evaluated three of those cohorts for kidney and/or bladder cancer; two for prostate cancer; and one cohort for leukemia and other lymphatic or hematopoietic malignancies. Goodman's meta-analysis shows that for most of these cancers there is no evidence of a significant association with asbestos exposure and no dose-response effect. The table below summarizes the results of that meta-analysis. Besides lung cancer and mesothelioma, the only other cancer for which a possible association exists is laryngeal cancer, where the meta-analysis showed an SMR with latency of 1.57. (An SMR of 1.0 would indicate an absence of any increased risk, while an SMR of 2.0 would indicate a doubling of the risk.) However, variance in the studies relating to laryngeal cancer was so large that the possibility of no increased risk could not be excluded, and there was no evidence of a dose-response effect, raising serious question as to whether cancer of the larynx has a true correlation with asbestos exposure.

**Pooled Analysis of Studies of The Risk of Cancer  
in Asbestos Exposed Cohorts<sup>5</sup>**

Cancer Sites by Systems and Organs	With Latency of at Least 10 Years		
	No. of Cohorts	Meta-SMR	95% CI
<b>Respiratory</b>			
Lung	37	1.63	1.58-1.69
Larynx	4	1.57	0.95-2.45
<b>Gastrointestinal</b>			
Esophagus	2	-	-
Stomach	9	0.92	0.77-1.10

<sup>5</sup>Goodman M, RW Morgan, R Ray, DC Malloy and K Zhao. Cancer in asbestos-exposed occupational cohorts: a meta-analysis. *Cancer Causes and Control* 10:453-465, 1999.

Colorectal	9	0.89	0.72-1.08
All gastrointestinal	14	1.03	0.95-1.11
<b>Urinary/Reproductive</b>			
Kidney	3	1.20	0.88-1.60
Bladder	3	.98	0.73-1.78
Kidney and Bladder	3	1.07	0.87-1.30
Prostate	2	-	-
<b>Lymphatic/Hematopoietic</b>			
Lymphoma/myeloma	0	-	-
Leukemia	1	-	-
All Lymphatic/Hematopoietic	1	-	-

I realize that some experts continue to believe that a relationship exists between asbestos exposure and other cancers, based largely on early research by Selikoff and other investigators that has not been confirmed by more recent studies. In my view there is a danger that the limited resources of the Fund will be diverted to paying the claims of people with "other cancers," many of which are quite common and could give rise to numerous claims in a no-fault system. I strongly support the provision of the bill requiring a study by the Institutes of Medicine to evaluate the causal connection between asbestos and each of the "other cancers" that is compensable under the bill. I also support the requirement that claimants for "other cancers" demonstrate causation to an expert Medical Advisory Committee, which would be able to take into consideration the IOM study and any other evidence that bears on whether a particular type of cancer is generally caused by asbestos or not. As the recent medical literature is evaluated, I anticipate that recovery for these cancers will become unlikely.

#### **Lung Cancer**

The FAIR act will compensate individuals with lung cancer at 3 levels. Broadly, the bill distinguishes between people who have both lung cancer and asbestosis (Malignant Level IX) and those who have lung cancer and a history of exposure, but who do not have asbestosis. The latter group is divided into two levels: Malignant Level VII includes those who have a history of exposure (15 weighted years) but no non-malignant physical changes resulting from that exposure, and Malignant Level VIII includes claimants with less exposure (12 weighted years) but whose exposure is verified by the presence of pleural markers.

#### A Note on Smoking and Lung Cancer

The largest single cause of lung disease in the United States is smoking. This is also true for asbestos exposed workers. Smoking is a major confounder for many of the illnesses that are related to asbestos exposure. The best example of this is lung cancer. Smoking makes a far more substantial contribution to lung cancer risk than asbestos exposure. In fact most, if not all, of the lung cancer cases in the Malignant Levels VII and VIII should be correctly attributed to smoking. Two major studies of the impact of smoking have been done by the Cancer Prevention Society (CPS). The rate of lung cancer increased dramatically for both men and women between the CPS I and CPS II studies. The typical smoker in CPS I had smoked about 20 pack years whereas the population studied in CPS II had generally started smoking during and after World War II, had started smoking at a younger age, and had been much heavier smokers. The CPS II study shows that the typical male smoker has a more than 20-fold increased risk of lung cancer compared to a nonsmoker (i.e., a "relative risk," RR, of 22.36). As explained below, in contrast to this, a meta-analysis of 69 cohorts of asbestos workers shows that the overall increased risk for an asbestos worker is about 50%.

#### Lung Cancer Risk from Smoking (Current Smokers)<sup>6</sup>

	Men – RR	Women – RR
CPS I (1959-1965)	11.35	2.69
CPS II (1982-1988)	22.36	11.94

#### Compensating People with Lung Cancer But Without Asbestosis

From a medical perspective, the trust should not provide compensation to claimants who have lung cancer and exposure, but who do not have asbestosis (i.e., Malignant Levels VII and VIII). The medical literature shows that, while lung-cancer risk increases when significant asbestosis is present, there is no such increase in risk in workers who are exposed to asbestos, with or without pleural plaques, but who do not have asbestosis.<sup>7</sup>

The medical literature also shows that the asbestos exposed individuals who are at greatest risk of developing lung cancer are those with clinically diagnosable asbestosis. Prospective studies that have focused upon the question whether exposure alone, without accompanying asbestosis, is associated with increased lung cancer risk have found that lung cancer risk is associated with asbestosis and not with asbestos exposure alone. For example, Hughes and Weill separated asbestos cement workers into groups with and without chest x-ray evidence of asbestosis. As the

<sup>6</sup>Reducing the health consequences of smoking - 25 years of progress, a report of the Surgeon General 1989 US DHHS Publication No. (CDC) - 89-8411, pp 148-151, 1989.

<sup>7</sup>Weiss, W. Asbestos-related pleural plaques and lung cancer. Chest 103:1954-1959, 1993; Weiss, W. Asbestosis: a marker for the increased risk of lung cancer among workers exposed to asbestos. Chest 115:536-549, 1999.

table below shows, workers without asbestosis had no increased frequency of lung cancer while those with asbestosis had a significantly elevated lung cancer frequency.

<b>Prospective Studies of Asbestosis and Lung Cancer<sup>8</sup></b>	
	SMR
Hughes and Weill (1991)	
Asbestos Cement Workers	
No Asbestosis	1.06
Asbestosis	4.32

At least 69 cohorts of asbestos workers have been studied for their risk of lung cancer. When all 69 cohorts are considered, the overall enhanced risk of lung cancer is about 50%, as shown in the table below. Eight of these 69 cohorts had no deaths due to asbestosis. This suggests that the overall level of asbestos exposure was somewhat lower than in the other studies and was not sufficient to cause the most severe form of asbestosis that leads to death. It is of interest that the lung cancer risk in those 8 cohorts was not elevated (SMR = 1.0).

<b>Lung Cancer Mortality – Asbestos Cohorts Meta-Analysis</b>	
Asbestos Exposure 69 Cohorts <sup>9</sup>	RR = 1.48 - 1.63
Asbestos Exposure No Asbestosis Deaths 8 Cohorts <sup>10</sup>	RR = 1.00

In my view, medical science would support requiring asbestosis before a significant contribution of asbestos exposure to lung cancer risk is accepted. I realize, however, that there is a view within the medical community that lung cancer can be related to asbestos exposure, even in the absence of asbestosis, if an individual had sufficient exposure to asbestos to cause asbestosis. The medical criteria in the FAIR Act represent a compromise between those who read the medical literature as I do and others who have a more expansive view. Such a compromise is not necessarily inappropriate in a legislative settlement. My point is only that Malignant Levels VII and VIII will allow a significant number of people to qualify for compensation who do not in fact have a lung cancer caused by asbestos exposure. In other words, there will be a substantial number of “false positives.”

<sup>8</sup>Hughes JM and H Weil, Asbestosis as a precursor of asbestos related lung cancer: results of a prospective mortality study. Br J Ind Med 48:220-233, 1991.

<sup>9</sup>Goodman M, RW Morgan, R Ray, DC Malloy and K Zhao. Cancer in asbestos-exposed occupational cohorts: a meta-analysis. Cancer Causes and Control 10:453-465, 1999.

<sup>10</sup>Weiss, W. Asbestosis: a marker for the increased risk of lung cancer among workers exposed to asbestos. Chest 115:536-549, 1999.

#### **Measures To Reduce False Positives in Malignant Levels VII and VIII**

There are two major ways in which the medical criteria in the FAIR act attempt to reduce the frequency of “false positives” in Malignant Levels VII and VIII. First, the bill establishes longer exposure requirements for people who do not have underlying asbestosis -- 15 weighted years of exposure for Malignant Level VII and 12 for Malignant Level VIII. This is a step in the right direction. However, as explained below in my discussion of the weighting formula, many people with low-intensity occupational exposures will be able to meet these requirements, even though they do not have sufficient asbestos exposure to cause asbestosis. Thus, the exposure requirements in Malignant Levels VII and VIII would still allow false positives, even if it is assumed that people without asbestosis but with enough exposure to cause asbestosis have a higher lung-cancer risk.

Second, the bill involves the Medical Advisory Committee in determining causation on a case by case basis in Malignant Level VII. In making that determination, the committee will consider the intensity and duration of exposure, smoking history, and the quality of the evidence relating to exposure and smoking. The burden would fall on the claimant to provide meaningful and credible evidence of smoking history. If implemented in accordance with its intent, this provision should significantly reduce the likelihood of false positives in this category while still ensuring that everyone whose lung cancer is caused by asbestos exposure will qualify for compensation.

From a medical viewpoint, it is regrettable that the Medical Advisory Committee is not also required to make determinations of causation under Malignant Level VIII (where exposure is confirmed by pleural plaques). While claimants are free to request such determinations, those who are most likely to be false positives - i.e., people with relatively few years of exposure, or exposure of very low intensity, or histories of heavy smoking - are least likely to make such requests. Thus, the Medical Advisory Committee is not likely to make the substantial contribution toward reducing false positives in Malignant Level VIII that it should do in Malignant Level VII. This is unfortunate because the underlying risk of false positives is at least as high in Level VIII as it is in Level VII. While Level VIII requires pleural plaques, plaques are not a risk factor for lung cancer but only a verification of exposure - and the underlying exposure requirement is less in Level VIII than it is in Level VII. From my perspective as a doctor, therefore, the bill’s medical criteria would be improved - that is, the bill would allow fewer false positives to qualify without shutting the door to those who should qualify - if Level VIII cases were referred to the Medical Advisory Committee in the same way that Level VII cases are in the bill as written.

I should note that Amendment No. 94 requires the Administrator of the Fund to adopt a matrix of lung cancer values taking into consideration the claimant’s smoking history, age, and level and duration of asbestos exposure. While this matrix does not establish criteria for compensation - that is, it does not establish rules for determining who is entitled to compensation and who is not - it does serve a similar purpose in reducing the burden that false positives may place on the Fund by reducing the amount of compensation in the most questionable categories.

### **Malignant Level IX**

In theory, Malignant Level IX includes those who have asbestosis and lung-cancer. As I have explained, in my view most if not all of the cases in which lung cancer can be attributed to asbestos would fall into this category. I do note that there are two technical aspects of the criteria that could lead to false positives even here. First, the Level IX criteria do not require a diagnosis of asbestosis, but only the submission of “evidence of asbestosis,” based on a chest x-ray or pathologist’s report. In the absence of a full-fledged medical examination that rules out alternative causes, it is inevitable that some claimants will be able to provide evidence of asbestosis sufficient to meet the statutory standard even when they do not in fact have asbestosis. Second, the exposure periods for Level IX are very short - 10 weighted-years in the case of people with pathological evidence of asbestosis or a 1/0 chest x-ray and 8 weighted-years for those with a 1/1 chest x-ray. Moreover, at least in the next few years, people who have direct exposure to asbestos, even if only to a limited extent, will be able to qualify with only half that many years of actual exposure (since their actual years will be doubled in counting weighted years).

### **Mesothelioma**

Although the primary known cause of mesothelioma is exposure to asbestos, not all cases of mesothelioma are caused by asbestos. Even if commercial use of asbestos had never occurred, there would still be a certain background incidence of “idiopathic” mesotheliomas, probably around 800-1000 cases per year, or about 30% of the current annual incidence of mesothelioma.

Amendment No. 95 attempts to distinguish between idiopathic mesothelioma and asbestos-related mesothelioma cases by requiring (a) occupational exposure, (b) take-home exposure, (c) exposure resulting from living or working in the vicinity of a facility that regularly released asbestos into the atmosphere, or (d) some other identifiable exposure to asbestos fibers (in which case eligibility will be determined by the Medical Advisory Committee). While I believe that these requirements are on the whole a reasonable compromise, they will not be perfect in screening out idiopathic mesothelioma cases. Moreover, while the Medical Advisory Committee must determine eligibility when the claimant cannot demonstrate an exposure that falls within one of the categories listed in the statute, there is no similar expert review of claimed exposures which do fall within one of the enumerated categories. For example, a salesman could allege “occupational exposure” as a result of isolated instances of visiting a plant whose operations sometimes released airborne asbestos fibers. Such exposures, though occupational, would probably not be enough to demonstrate that the salesman’s mesothelioma was caused by asbestos.

My point here is simply that, while the statute makes a valiant effort to identify idiopathic mesothelioma cases, a substantial number of mesotheliomas that are not caused by asbestos will nevertheless qualify for compensation. There will, in short, be false positives even in this category.

### **Weighted Years of Exposure**

At several points in this letter, I have raised a concern about the system of weighting years of exposure. That system has two aspects. First, it weights exposure by year, taking into account the rapid decline of exposures in the mid-1970s, when asbestos regulations adopted by EPA and OSHA began to have a significant impact on exposures, and the extremely limited exposures that have occurred since the mid-1980s. These weightings are important and will be extremely valuable in protecting the integrity of the Fund in the future.

Second, the weighting scheme takes into account the exposure setting. The heaviest weight is given to exposures in certain very high-exposure settings - for example, primary asbestos manufacturing and working in World War II shipyards. Except, however, for this very high exposure classification, the weighting system does not look at occupational settings in which exposures may be higher or lower, but simply distinguishes between direct and bystander exposure. Thus, a year of direct exposure is given double weight, even though the claimant may have worked in an occupational setting where exposure is low - as is true of automobile mechanics. In my opinion, the weighting system gives too much weight to direct occupational exposure in low-exposure occupational settings, and therefore will allow a substantial number of claimants to qualify for compensation with unrealistically low levels of exposure.

My understanding is that, in order to address this problem, the bill requires the Administrator to make a determination, based on studies of occupational hygiene and epidemiology, of industries and occupations where exposure to asbestos could be substantial. Claimants who worked in other industries would not be presumed to meet the exposure requirements of the bill, although they would be free to seek Medical Advisory Committee designation of their claims as "exceptional medical claims." I believe that this has the potential of being a useful safeguard.

#### **Conclusion**

The medical criteria in the FAIR Act are intended to provide compensation to people who are physically impaired by a disease caused by asbestos. They properly exclude from compensation people who have bilateral chest x-ray changes associated with asbestos exposure but who are not impaired. For this very large class of claimants, the bill provides medical monitoring. Limiting compensation to those who are impaired is one of the bill's major accomplishments and should not be overlooked as we examine carefully the medical criteria for the conditions that will receive compensation.

The bill provides modest compensation in Non-Malignant Level II to people who have a clear smoking-related impairment but who also have sufficiently strong evidence of asbestosis to support the conclusion that asbestos-exposure also contributes to the impairment. Providing some, limited, compensation to people in this situation seems preferable both to putting them in Level I (which entitles them only to medical monitoring) or putting them in Level III (which would qualify them for the larger awards due to people with clear asbestos-related impairment). While some claimants whose impairment is not due to asbestos at all may receive compensation in Level II, this possibility is taken into account in determining the value of Level II claims.

Non-Malignant Levels III through V enable the Fund to provide differing levels of compensation to people who have increasingly severe asbestos-related impairment. It is, of course, more difficult to qualify for Level V than Level III – the x-ray and pulmonary function requirements are harder in Level V cases – but that is the way it should be. While I have some concern that the exposure requirements are too loose in the non-malignant categories, and while the x-ray requirements for Non-Malignant Levels IV and V seem unrealistically low, I do not believe that there will be an excessive number of false positives in any of the non-malignant levels.

Cancers present a greater challenge. In my opinion, practically everyone who qualifies for compensation in Malignant Level VI (Other Cancer) will be a false positive, since none of the cancers listed in that provision are in fact caused by asbestos. The proposed IOM study on general causation is the best way to resolve this issue, and the FAIR act is structured to allow the findings of the IOM study to be taken into consideration by the Medical Advisory Committee in making determinations on causation.

With respect to lung cancers, I believe that Non-Malignant Level IX (lung cancer with asbestosis) provides the clearest case for compensation, although I am somewhat concerned that this level may rely too much on x-rays alone and may not require enough exposure. Levels VII and VIII provide compensation for people who have lung cancer and a history of exposure, but who do not have asbestosis. This is a reasonable compromise, though not, in my opinion, one that is supported by medical evidence. A number of factors help reduce the number of false positives and their adverse consequences. These include the longer exposure times required in these categories and the requirement for expert determination of causation by the Medical Advisory Committee (in Level VII), as well as the use of a matrix in all of the lung cancer levels to take into account specific facts regarding the claimant's age, smoking history, and intensity and duration of exposure.

With respect to mesothelioma, the medical criteria do a reasonably good job of limiting eligibility to people whose disease is caused by asbestos, although I am somewhat skeptical about the ability of even the best-written medical criteria to distinguish between idiopathic mesothelioma and mesothelioma caused by asbestos.

Notwithstanding some imperfections, I continue to believe that the medical criteria in the FAIR act are a reasonable compromise. I believe that these criteria will exclude from compensation few if any people who have an impairing disease caused by exposure to asbestosis. There will be essentially no false negatives. The cost of this generosity, however, is that in some respects the criteria may allow people to receive compensation even when they do not have a disease due to asbestos exposure. The biggest danger, in this regard, comes from Malignant Levels VI (Other Cancer), VII (Lung Cancer

with Exposure but No Asbestosis) and VIII (Lung Cancer with Exposure, Plaques and No Asbestosis), with Malignant Level VIII providing perhaps the greatest risk.

Sincerely,

James D. Crapo, M.D.  
Professor and Chairman, Department of Medicine  
Executive Vice President for Academic Affairs

**ATTACHMENT F**

**WILLIAM WEISS, M.D.**  
 3912 NETHERFIELD ROAD  
 PHILADELPHIA, PA 19129  
 (215) 849-4971

July 19, 2003

The Honorable Jon Kyl  
 730 Senate Hart Building  
 Washington, D.C. 20510

Dear Sir:

I have been asked by James D. Crapo, M.D., to answer 3 questions posed by [your staff] concerning the asbestos bill, as follows:

1. Do pleural plaques or pleural thickening constitute an injury or impairment? Are they a useful predictor of future injury?

Answer: pleural plaques are an injury which generally does not cause impairment unless they are very extensive. They do not predict an increased risk of lung cancer. See Weiss, W.: Asbestos-related Pleural Plaques and Lung Cancer. CHEST vol. 103: p. 1854-1859, June 1993. Pleural thickening is an injury which varies in degree and impairment from negligible to moderate and even severe.

2. If an asbestos exposure was not sufficient to cause clinically significant asbestosis, could it nevertheless have caused lung cancer?

Answer: No. See Weiss, W.: Asbestosis: A Marker for the Increased Risk of Lung Cancer Among Workers Exposed to Asbestos. CHEST vol. 115: p. 536-549, February 1999.

3. Can asbestos exposure cause colorectal cancer, or cancer of the larynx, pharynx, esophagus, or stomach?

Answer: For colorectal cancer the evidence indicates no causality between asbestos and colorectal cancer. See Weiss, W.: The Lack of Causality Between Asbestos and Colorectal Cancer. Journal of Occupational and Environmental Medicine vol. 37: P. 1364-1373, December 1995. I have not reviewed the studies on cancers of the larynx, pharynx, esophagus, or stomach so I will not comment on these.

Sincerely,

William Weiss, M.D.  
 Emeritus Professor of Medicine  
 Drexel University

**ATTACHMENT G**

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July 21, 2003

The Honorable Jon Kyl  
730 Senate Hart Building  
Washington, D.C. 20510

Dear Senator Kyl:

It is my understanding that you are interested in responses to the question, "Can asbestos exposure cause colorectal cancer or cancer of the larynx, pharynx, esophagus, or stomach?"

I am a physician specializing in preventive medicine with a particular focus on epidemiology. In 1999, I was the principal author of an article entitled, "Cancer in Asbestos-Exposed Occupational Cohorts: A Meta-Analysis." In preparation of this article, my co-authors and I reviewed the epidemiologic literature evaluating the association between occupational asbestos exposure and various cancers.

We summarized the data from 69 asbestos-exposed occupational cohorts reporting on cancer morbidity and mortality. The studies spanned 65 years and included cohorts from North America, Europe, Australia, South Africa, China, and Japan.

Our analysis confirmed a causal link between asbestos exposure and lung cancer. However, with respect to other cancers, the results were less conclusive. Data for urinary cancers (bladder, kidney, prostate), gastrointestinal cancers (esophagus, stomach, colon, and rectum) and lymphohematopoietic cancers (lymphoma, myeloma, leukemia) failed to demonstrate a consistent statistically significant increase in risk. Analysis for laryngeal cancer was suggestive of a causal association, but not as conclusive as the analysis for lung cancer.

When evaluating the epidemiologic literature it is important to consider the concept of latency. Latency is defined as the delay between exposure to a disease-causing agent and the appearance of manifestations of the disease. With respect to most cancers, the latency period is typically 20 years or more. For this reason, studies that examine latency are considered more reliable and a true causal relationship is expected to become more evident after latency is taken into account. We re-analyzed the data by including only studies that took into consideration latency of at least 10 years. The results for lung cancer showed further elevation of risk, the risk of laryngeal cancer was somewhat higher, but was no longer statistically significant, while the risks of other cancers either decreased or remained essentially unchanged.

Another set of analyses in our study examined the exposure-response relationship between asbestos and cancer. If the risk of disease increases with increasing level of exposure, the relationship is more likely to be causal. As mesothelioma is considered a signature disease for asbestos, researchers use mesothelioma mortality as a surrogate for asbestos exposure. Our analyses demonstrated that lung cancer risk was strongly and statistically significantly related to the proportionate mesothelioma mortality. However, this observation did not hold true for other cancers including laryngeal cancer and thus, did not support the causal association between asbestos exposure and other cancer sites.

Based on these findings, we concluded that unlike lung cancer, there was only a suggestion of a causal association between asbestos exposure and laryngeal cancer and that there was no clear causal association with other cancers. Since the publication of our article, we have continued to review the literature on a regular basis. Our literature database now includes more than 10 additional relevant publications. Some of these publications updated existing cohort studies and some presented new data. Inclusion of these new studies in the meta-analysis continues to support our conclusions.

It is important to point out that our meta-analysis is not the only publication reviewing the scientific evidence on the association between asbestos exposure and malignancies other than mesothelioma and lung cancer. For example, a 2000 article by Browne and Gee entitled, "Asbestos Exposure and Laryngeal Cancer" concluded that the available evidence does not

support the contention that asbestos causes laryngeal carcinoma. According to the authors of this article, their review is in agreement with five of six other reviews of this topic published since 1985. Similarly, a 1994 article entitled "Asbestos and Colon Cancer: A Weight-of-the-Evidence Review" by J. Gamble concluded that asbestos exposure, "does not appear to increase the risk of colon cancer."

In summary, the epidemiological literature on balance does not support a causal association between asbestos exposure and the development of cancers other than mesothelioma and lung cancer.

Sincerely,

Michael Goodman, MD, MPH  
Senior Managing Scientist  
Exponent Health Group  
Washington, DC

**ATTACHMENT H**

July 21, 2003

The Honorable Jon Kyl  
730 Senate Hart Building  
Washington, D.C. 20510

I write in response to three questions asked by [your staff], relating to an Asbestos Compensation Bill before the Senate Judiciary Committee.

To introduce myself, I am presently Emeritus Professor of Medicine, Yale University School of Medicine. I received a (first class) B.A. degree in physiology, a M.Sc. degree in respiration physiology, and in 1952 the medical degree of B.M., B. Ch., all from Oxford University, U.K. My subsequent medical training included a two-year pulmonary fellowship at McGill University, Montreal, P.Q., Canada, followed by faculty positions at the medical schools of University of Wisconsin, Madison, and University of Pittsburgh, Pennsylvania. I joined the Yale University Medical School faculty in 1969 and retired as Emeritus Professor of Medicine, late 1999.

Aside from the academic practice of chest medicine, I have had a long interest and extensive studies in occupational lung diseases, notably asbestosis, and have published a number of relevant papers in peer review journals, including Science and The New England Journal of Medicine. In addition to a number of societal aspects of these chest diseases, I have appeared as a defense expert witness in court trials relating to asbestos-related disorders.

I appreciate the privilege of responding to your request concerning the bill whose general purpose I endorse.

Sincerely,

J. Bernard L. Gee, M.D.  
Emeritus Professor of Medicine  
YALE UNIVERSITY SCHOOL OF MEDICINE  
Current Address: 908 Basin Street  
San Pedro, California 90731

July 21, 2003

Response to Senator Jon Kyl's three questions about asbestos concerning the Asbestos Compensation bill now before the Senate and its Judiciary Committee

**Question No. 1:**

Do pleural plaques or pleural thickening constitute an injury or impairment, and are they a useful predictor of future injury?

**Response:**

Pleural changes associated with asbestos broadly take two forms:

1. The most common, termed plaques, comprises variable numbers of initially discrete nodules of scar tissue on the inner lining of the chest wall as opposed to the outer lining of the lung. These may become extensive and calcify some 15-20 years after initial asbestos exposure but the majority remains both localized and discrete. They generally do not cause impairment of either the lung or breathing apparatus nor cause any disease to the worker. Where any abnormality of lung function is found in a person with plaques, other even more common entities (obesity, general medical problems, cardiac disease) should be excluded. The basis for this conclusion is the literature, which others and I surveyed as part of a symposium in Basel, Switzerland published in *Indoor Built Environment*: 6: 63-130, 1997.
2. Diffuse pleural fibrosis – by contrast with the “lumpiness” of plaques, this entity is characterized by a “peel” which can encase the subjacent lung and limit its expansion. This entity probably follows the now rare asbestos induced pleural effusion in which fluid accumulates between the chest wall and the lung lining membrane (visceral pleura). Exclusion of other causes of pleurisy with effusions, e.g., infections, is required. The entity can cause impairment of lung function, which is assessed physiologically, and the

"peel" recognized radiologically, and described by ILO criteria. It is important to distinguish these features from the more common sub-pleural fat accumulation often associated with obesity. This distinction is usually evident on standard chest x-rays and confirmable by CT-scans. Lee, *et al.*, studied Wittenoom (Australia) asbestos miners and controls showing that obesity, as defined by increased body mass index, resulted in 25% - 50% of both lateral chest walls showing lateralized pleural shadows of up to 10 mm thick on standard chest films. Any associated limitation of lung expansion from either obesity or pleural changes can be readily distinguished by full studies of the components of lung volumes. Obesity has a characteristic defect, namely subnormal volumes of air present in the lung at the end of a normal, quiet expiration. By contrast, pleural fibrosis may produce a defect characterized by more general restriction of lung volume. Obesity-induced impairment of lung function becomes increasingly important in older workers where, as with the general population, weight gain is a common feature of "maturity". Recent studies (from U.W.Va.) indicate obesity generated lung function loss approaches the overall decrement associated with smoking!

3. Do plaques presage lung fibrosis (asbestosis)? By the time (15+ years) plaques appear, asbestosis will have occurred where the asbestos exposure was sufficient enough to cause lung fibrosis as determined by the usual radiologic and physiologic criteria. Aside from such clinical observations, pathological studies of autopsied or resected lung specimens have shown a sharp gradient between the asbestos fiber content in persons with plaques only as opposed to those with asbestosis – see Table in Question No. 2. Thus, pathology confirms the clinical impressions.

Do plaques indicate an increased risk of cancer? Based on the results of some 12 published studies of the prevalence of cancers in persons with plaques, I consider there to be no increased risk. Small excess of lung cancers in persons with plaques fall within the error term arising from the adjustment for smoking. Further, Harber *et al.*, J. Occup. Med. 29, 641-4, 1987, did not detect a trend association of pleural plaques with subsequent malignancy. For this reason, we agree with most European practice in which medical follow-up of asbestos workers with plaques rests on a flexible system of health-related education rather than the early detection of cancer.

In summary, plaques (common) as opposed to diffuse pleural fibrosis (now rare) do not cause disease nor impairment. Neither plaques alone nor diffuse pleural fibrosis imply an increased risk of malignancy.

**Question No. 2:**

If an asbestos exposure was not sufficient to cause clinically significant asbestosis, could it nevertheless have caused lung cancer?

**Response:**

The following lung cancer considerations are relevant.

- a. Excess lung cancers certainly occur in many but not all asbestos worker cohorts. Standard mortality ratios (SMRs), which express the ratio of the mortality in the study group to the control population, overall are 1.63 (Goodman v.i.), about 2.3 (insulators) and, after smoking correction in the large U.K. Health & Safety Executive study, 1.7.
- b. There is clearly a “dose response” relationship between asbestos exposures and the SMRs manifested in many studies but there are many cohorts in which no excess lung cancers (see writings of Browne and the Jersey symposium) can be detected, *i.e.*, a threshold. This aspect may be illustrated (see below) by combining in round numbers two separate sets of data, namely the lung asbestos fiber burden in either resected or autopsy lung material reported by Roggli and the Finnish observations of cancer risks noted by Karjalainen. The latter reports the cancer risks in persons with clinical asbestosis and those with plaques only.

	<u>Cancer Risk<sup>11</sup></u>	<u>Fiber Count</u>
Plaques only	1.3 (1.0-1.8)	14,000
Asbestosis (on pathology)	6.7 (5.6-7.9)	253,000

While small lung cancer excesses may occur above 14,000 fiber count, it is clear that the vast majority occur at the high counts associated with asbestosis. This makes the use of asbestosis statistically and quantitatively a most important predictor of lung cancer risk. Furthermore, Roggli has shown that lung fiber burden counts in asbestos-exposed persons without plaques are even lower than in those noted above, so indicating that such exposed persons have no excess lung cancer risk.

- c. A similar argument was ably advanced earlier by Weiss in 1998 (Chest, 115: 536-549, 1999) and presumably will be included in his response which I understand he will be providing to you. He states, “asbestosis is a much better predictor of excess lung cancers than measures of asbestos exposure.”
- d. Adequate smoking corrections are more frequently absent than present in asbestos cohort studies. While differences in prevalence of smoking between worker and “control” populations are the major component of such adjustments (Axelson), other magnifying factors include number of cigarettes smoked, duration of smoking, adolescent smoking and the absence of filters.

The early data of Wynder for the ACS show lung cancer risks as high as 70 in very heavy smokers. The more recent data of Shopland in the JNCI indicate an overall lung cancer smoking risk of 20 rising to 50 at two packs/day. Since lung cancers largely occur in asbestos workers who smoke, the size of the overall asbestos risk (about 2) is far less than

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<sup>11</sup>Not smoking corrected.

the all too common risk of 20-50 fold from smoking. This is still true in workers with sub-asbestosis exposure levels.

- e. So far, we have proposed that the risks of excess lung cancers occur largely if not entirely in the presence of asbestosis. Thus, asbestosis and risk of lung cancer are statistically associated, raising the question, Is there something about asbestosis that causes these cancers? This question has a long history and some support for the affirmative in the early literature. However, strong evidence is now available by the recent report of Hubbard on idiopathic pulmonary fibrosis (IPF). They note an excess lung cancer risk of about 7 in this disease, a value close to that for persons with asbestosis, as cited in the above mentioned Finnish report. IPF and asbestosis are clinically and pathologically identical, both showing end-stage fibrosis. More importantly, the fibrosis is preceded by chronic low-level inflammation, *i.e.*, an alveolitis. Such chronic inflammation involves the continual production of genotoxic oxidizing free radicals and a variety of cell proliferating growth factors. While the direct genotoxicity of asbestos cannot be excluded, these sequelae of inflammation have carcinogenic implications (Rom, *et al.*, Am Rev Resp Dis: 143, 408-422, 1991).

In summary, asbestosis is clearly quantitatively the major associate of lung cancer risk. In smokers, the risk from smoking versus any potential risk from asbestos in persons exposed to asbestos without asbestosis is substantially far more than that from asbestos exposure alone by factors of between 10 and 50. Where an asbestos exposure was not sufficient to cause clinical asbestosis, the chances of its being the cause of or a substantial contributing factor to lung cancer in smokers is between small and absent. In the absence of plaques, there is no reason to implicate asbestos in lung cancer.

#### **QUESTION No. 3:**

Can asbestos exposure cause colorectal cancer, or cancer of the larynx, pharynx, esophagus, or stomach?

#### **Response:**

Early studies of insulators did suggest these cancers to be asbestos related but again, the control population was inappropriate and little adjustments for either smoking or excess alcohol usage or their combination were made in spite of elevated liver cirrhosis rates. Additionally, there may have been some diagnostic confusion between colon cancer and peritoneal mesothelioma.

More recently, the U.K. Health and Safety Executive reported on a large cohort of several asbestos worker trades noting no increases in cancer risks occurring in head and neck, esophagus, colon, rectum and kidney. Follow-up until 1991 showed no excess mortality from cancers in these sites.

Head and Neck: (larynx, pharynx)

We (Chan and Gee) and more recently, Browne and Gee, (*Ann Occ Hyg* 44: 239-50, 2000) reviewed evidence relating asbestos exposure to these cancers. The confounding factors previously mentioned, namely smoking and alcohol, remain major often-unadjusted factors in these diseases. Their interactive combination can cause as high as 40-fold increased risk in these cancers, as is notably the case in the Balangero mine (Italy). Additionally, an excess liver cirrhosis death rate was noted in the initial insulator study. We reviewed 24 prospective and 17 retrospective studies out of which only three or four showed any excess risk. We concluded that asbestos exposure does not cause these cancers, as did Liddell reporting for the U.K. health authorities.

Esophageal:

Historically, these cancers were squamous arising from the esophageal lining with smokers and excess alcohol users showing a sharp rise in this cancer risk. In the last decade squamous cancers have declined in the general population, being replaced by adenocarcinomas (glandular) notably arising in persons with obesity and gastro-esophageal acid reflux disease (GERD). It is this type of cancer that will continue to occur. While there is no evidence relating them to asbestos, smoking probably enhances the risk three-fold.

Kidney Cancer:

Smoking is associated with about a three-fold risk for this cancer. As regards asbestos, there is an important analysis by Sah and Boffetta (*Cancer Causes and Controls*, 11: 37-47, 2000) summarizing both the published data on renal cancer occurrence in asbestos worker cohorts and adding results from inquiries of the authors of these studies who did not include data on renal cancer. They concluded, "this analysis pointed toward a lack of an association between asbestos exposure and renal cancer."

Colo-Rectal Cancer:

The original insulator cohort study suffers from the previously mentioned defects and probably has some diagnostic confusion between these cancers and peritoneal mesothelioma. We follow the Bradford-Hill criteria (below) for analyzing numerous epidemiologic reports on these issues:

- a. Strength of the Association: *Even when present*, the association is weak, *i.e.*, the 1.4 SMR range.
- b. Consistency: The association is more frequently absent than present and in some instances, there is a shortfall of colo-rectal cancer. Indeed, the overall mortality in the literature from colo-rectal cancer is about 430 cases in both asbestos workers and the selected control populations (a national statistic), thus the most consistent finding is the absence of a colo-rectal excess as summarized by Weiss.

- c. Dose Response: The few studies that examine exposure versus excess colo-rectal cancers do not indicate a dose response effect, a feature usually apparent with environmental cancers (Gamble, Environ. Health Persp. 102:1038, 1994).
- d. Confounding Factor Adjustments: Few studies make any corrections for confounding factors such as diet, geographic location or smoking. However, Garabrant (Am J Epidemiol. 135:843, 1992) examined some of these factors and found *no* asbestos-related effect for those cancers. After adjusting for family history, diet, body weight, etc., the risk from asbestos exposure alone was 1.0, *i.e.*, no risk. More recently a three-fold increase in colon cancer in association with smoking has been reported. Colo-rectal cancer rates in asbestos workers are usually compared with National statistics without any admittedly small smoking corrections for the generally recognized higher smoking rates in most asbestos worker cohorts.
- e. Biologic Plausibility: Massive lifelong asbestos feeding experiments in two animal species have repeatedly demonstrated no colo-rectal carcinoma.

General Comments:

Goodman, *et al.*, (Cancer Causes and Control, Vol. 10: 453-465, 1999) provide a detailed "meta-analysis" of an international group of 69 asbestos exposed occupational cohorts. This type of analysis adjusts for population size variation and by using the cohort risk rates (proportional mortality ratio) for smoking independent mesothelioma to provide a better indication of the level of asbestos exposure than does lung cancer rates. This permits an estimation of the dose response for the above-mentioned cancers. They concluded there was no clear association of asbestos with all cancers in the GI tract (including stomach) and kidney. For colo-rectal cancer the overall SMR was in fact one, *i.e.*, no excess risk.

They noted an overall excess laryngeal cancer risk rate that was about 1.6 but there was no dose response, no correlation with increasing mesothelioma rates and importantly, no adjustment in the *original* cohort data for the confounding effects of smoking, alcohol or their combination. Thus, this value of 1.6 is suspect and the absence of a dose response with asbestos exposure suggests alternative factors cause these cancers. Other data show a correlation between the lung and laryngeal cancer rates that is most likely due to a common smoking origin. We note that these two cancers constitute even in the general population the most common form of independent double primary cancers, so yielding even in this unexposed group a correlation between laryngeal and lung cancer incidences.

To summarize the response to your question, it may be concluded that the foregoing evidence fails to show that asbestos exposure causes any of the above cancers.

**ATTACHMENT I**

19 July 03

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The Honorable Jeff Sessions  
335 Senate Russell Building  
Washington, D. C. 20510  
(202) 224 4124

Re - Critique of Medical Criteria

Dear Senator Sessions:

Pursuant to your request, I am providing you with my critical comments concerning some of the medical criteria presented in the Asbestos Bill. Should you have any questions, do not hesitate to call. Thank you.

Yours sincerely,

Dr. E B Ilgren, MA, MD, DPhil,

**Malignant Level VI: Non Pleuro-Pulmonary Cancers:**

The medical literature provides very strong evidence that asbestos does not cause or enhance an individual's risk for cancer aside from mesothelioma and lung cancer. This is based on a total weight of evidence approach that relies in large part on epidemiological studies, but gains additional support from investigations conducted in animals *in vivo* and, to a lesser extent, studies performed *in vitro*.

The list of cancers chosen for potential compensation also fails to include sites alleged to be attributable both in the literature and in the courtroom, including pancreatic cancer, renal cancer, and lymphoma. Presumably, scientific grounds exist to exclude these other sites. To the extent this is so, it would certainly be interesting to know what criteria were used to exclude those sites compared with the criteria that were relied upon to include the cancers presently within the list of compensable sites.

The main basis for saying there is no causal association between asbestos exposure and any site, other than cancer of the lung and mesothelioma, comes from epidemiological observations. Such causal inferences are thus based largely on observations made of large numbers of workers exposed to asbestos under conditions of "known" exposure intensity and duration. Epidemiological analysis of asbestos-related disease is greatly assisted by the fact that asbestos is one of the most studied toxic agents known to man. Dozens of epidemiological studies have been performed on workers exposed to asbestos of different types and in different industries. Most of these studies are presented in tabular form in, amongst other sources, "Asbestos in Public and Commercial Buildings" by the Health Effects Institute [1991]. Most, if not all of these, are "cohort" investigations that are studies of groups of workers in different work settings, e.g. in primary, secondary, and tertiary industries. Some of these investigations have been complemented by "nested" case-control studies that examine the specific details of the cancers found in excess within the cohort studies themselves. This is done to determine if factors other than asbestos could account for the observed cancer excess.

The enormity of the database available for analysis greatly facilitates one's ability to decide if a cancer site is attributable. The HEI [1991] concluded, in a manner similar to many others, that the "excess risks of (tumors of the larynx, oropharynx, and upper and lower digestive tract) have been small" ... even though their frequency has been increased in "some cohorts of workers occupationally exposed to asbestos although not in others" [Doll and Peto, 1987].

Inclusion of the non-pleuro-pulmonary malignancies in the medical criteria potentially undermines present day evidentiary standards. Indeed, the causal associations are tenuous. Few, if any of the criteria set forth by Sir Bradford Hill to establish causation, can be fulfilled.

Pre-malignant conditions [see e.g. the relevant cancer sites in Schottenfeld and Fraumeni, 1996: "Cancer Epidemiology and Prevention" and the Armed Forces Institutes of Pathology Fasicle series] do not appear to have been addressed in the medical criteria. For the most part, these are not an issue in relation to pleuro-pulmonary cancers. Lung cancer and mesothelioma are rapidly fatal. By the time the diagnosis has been confirmed, tumor growth has generally gone very far beyond the "pretumorous phase". This is not the case for many of the sites selected for

inclusion amongst the medical criteria. For example, at least 5% of laryngeal cancers are diagnosed in an “*in situ*” stage while laryngeal papillomas are also pre-malignant lesions. A significant number go on to full malignancy. Therefore, should an “increased risk of malignancy” suffice for inclusion in the medical criteria? The same applies to premalignant dysplasias of the pharynx, esophagus, colon and rectum. For colo-rectal cancers, other disorders may increase the risk of malignancy. For example, ulcerative colitis becomes manifest in early adulthood and leads to an increased risk of cancer of the colon after 20 years or so. Although it is not a very rare condition, are disorders of this kind, along with certain commonplace “atypical colonic polyps”, also going to be included in the criteria? Each nosological category of cancer in the medical criteria has its corresponding set of premalignant conditions, and each of these could possibly produce claims.

#### **Laryngeal cancer**

There have been a number of reviews of the alleged association between asbestos exposure and laryngeal cancer. Most [Edelman, 1989; Liddell, 1990; and Chan & Gee, 1988] concluded that asbestos has a negligible association with laryngeal cancer after adjusting for the effects of tobacco and alcohol consumption. A very recent review by Browne and Gee [2000] updates Chan & Gee [1988] and provides one of the most detailed analyses of the subject:

*“All identified studies of asbestos workers providing data on laryngeal disease were reviewed, together with studies of laryngeal cancers giving epidemiological or experimental evidence of associated exposures.... Confounding due to smoking and alcohol intake, and to a lesser extent diet and socio-economic factors, creates a major difficulty over the identification of any asbestos or other occupational effect. Not only are smoking and alcohol independently associated with large increases in relative risk (RR) of laryngeal cancer, but also have a synergistic effect with each other. Few of the studies provide details of either habit. Among 24 prospective studies for which a standardized mortality ratio (SMR) was available, nine had an SMR at or below unity, and among a further 11 without an SMR for comparison, in only one was there a clear excess risk. In 17 retrospective studies, only two showed a significantly increased RR. Evidence from animal experiments, studies of associations with pleural plaques, and autopsy findings also appear negative or inconclusive.... The evidence does not indicate that asbestos exposure increases the RR of laryngeal cancer.”*

The most recent review by Griffiths et al. [2003] also considered much of the published evidence from post-mortem, cross-sectional, case-control and cohort studies and concluded that, “the weight of evidence does not support a causal association for asbestos with laryngeal cancer.”

The proposed relationship between laryngeal cancer and asbestos exposure first appears to have been suggested in 1973 by Stell and McGill in a case-control study. The authors admitted the weaknesses of their own investigation saying that it was based on a retrospective design (and thus included all the disadvantages associated with this type of study), and it was also based on a small number of male patients that may have been influenced by the prospect of compensation. Stell and McGill [1975] found no association when they stratified for tobacco and alcohol use. Selikoff et al. [1979] reported a relative risk of 1.91 in their insulator study, but neither tobacco nor alcohol was considered. Rubino et al. [1979] found an RR of 3.16 in their Northern Italian

chrysotile miner cohort analysis, but smoking was not considered and alcohol was obviously a major confounder, since the RR for cirrhosis was 3.13. Burch et al. [1981] also found an increased RR for asbestos exposure in a case-control study, but the number in the "definitely exposed" category was too small for meaningful analysis. These authors also pointed out the weaknesses of their study and the other case-control analyses investigating the possible association between asbestos exposure and laryngeal cancer. Newhouse et al. [1969, 1985] conducted two studies of the Barking asbestos manufacturing plant in East London and found RR's of 5.4 and 3.7. Although numerically impressive, these have little meaning since they were only based on two and three cases respectively, and because the combined effects of tobacco and alcohol were not considered. Mc Donald et al. [1980] in their prospective study of over 11,000 chrysotile miners and millers in Quebec, and Hodgson & Jones [1986] in their review of over 30,000 asbestos insulator workers in 1981, found no excess deaths due to laryngeal cancer. Several large, well conducted animal inhalation asbestos studies, such as Davis et al. [1978] and Wehner et al. [1975], also failed to find an excess of laryngeal lesions in any of the animals exposed to exceedingly high concentrations of asbestos fiber for a considerable portion of their lifespan. Again, Browne & Gee [2000] should be consulted for further details. Alternate causation is dealt with in great detail by Schottenfeld and Fraumeni [1996]. This and other sources, e.g. Austin & Reynolds [1996] and Blot et al. [1996], summarize the abundant literature on risk factors for laryngeal cancer, and these should be consulted for further information.

### **Pharyngeal**

The pharynx is the part of the alimentary canal which is located behind the nose, mouth and larynx, according to Gray's Anatomy [1974]. As a musculoskeletal tube, it extends from the base of the skull to the lower border of the sixth vertebra where it meets the esophagus. It is about 5 inches long and may be divided into "oral", "nasal", or "laryngeal" sections. Most simply, each of these contains different structures which may, in themselves, give rise to cancers that should not be considered biologically, and thus etiologically, similar. Such structural variations include the types of lining mucosae, different muscular tissues, and other supporting layers. The heading "pharyngeal" is thus, at the outset over-inclusive and too nonspecific. As "oral" cancers would be considered under "Oropharyngeal", will cancers of the mouth, palate, tongue and lips be regarded as compensable? As noted above, precancerous lesions also exist for most of these sites including oral leukoplakia, a white plaque occurring on the oral mucosal surface that cannot be characterized clinically or pathologically "as any other disease", according to the WHO [1978] definition. This condition is thought to occur in 21 - 43 per 1000 (female - male Americans) over the age of 35. Other precancerous conditions of this location include "oral erythroplasia" and "oral epithelial dysplasia". Are all of these conditions to be compensated?

The assertions of an association between pharyngeal cancer and asbestos exposure are based on weak evidence. Selikoff et al. [1991] reported an RR of 1.73 for cancer of the oropharynx [38:22 cases] but failed to control for alcohol or tobacco, significant risk factors for this disease. By contrast, other large studies that have examined the pharyngeal site, e.g. Lumley et al.'s [1976] investigation of thousands of British dockyard workers and Enterline et al.'s [1987] follow-up of more than 1,000 retirees from an American asbestos company, failed to demonstrate a positive association [SMR ~ 100 for both]. By contrast, as indicated above, there are already very strong risk factors for cancers of this site including tobacco, alcohol, poor diet

and nutrition. Kean et al. [1981] list a variety of agents associated with cancers of the head and neck. Others working in the production of and / or with exposure to mustard gas, nickel, wood crafting, shoe making, and formaldehyde are also thought to be at risk. Schottenfeld and Fraumeni [1996] again provide a detailed description of these risk factors and should be consulted.

#### **Esophageal**

According to Gray's Anatomy [1974] the esophagus starts in the neck as a downward continuation of the pharynx and extends downward through the mediastinum of the thorax to join the stomach over a length of about ten inches. The lower third and the upper two thirds of the esophagus vary histologically and thus take somewhat different risk factors. Precancerous lesions also exist including varying levels of dysplasia. The evidence to suggest that esophageal cancer is associated with asbestos exposure is very weak. Few studies have specifically considered the esophagus alone, usually including it amongst all gastrointestinal sites combined. Selikoff and Hammond [1978] suggested that the risk may be increased [18 case to 7 expected]. Nonetheless, Selikoff et al. [1991] reported a decline in the association [RR = 1.63] in the longer follow-up group. A positive association has also been refuted by a variety of other studies, e.g. Yu et al.'s [1987] large case-control study [RR 0.6], Enterline et al.'s [1987] study of more than 1,000 white male asbestos company retirees [SMR 1.35 ~ 4 v 3 expected], and Acheson et al.'s [1984] study of nearly 6,000 men working in an amosite factory in the United Kingdom [SMR 1.0]. Hodgson and Jones [1986] also failed to find an excess [4 cases v 5 expected] in their large study of workers exposed to asbestos in England and Wales.

In contrast to asbestos, there are strong risk factors for esophageal cancer, as demonstrated most vividly by the demographic epidemiology, e.g. "the Central Asian Esophageal Cancer Belt", and the excesses seen in Brittany, northern Iran, and southeast Brazil. More specifically, tobacco, alcohol in various forms, betel, opium, the ingestion of pickled vegetables and nitrosamines, infectious agents, physical and chemical chronic injury, and bracken fern have been associated with an increased risk. These and other risk factors are described in detail by Schottenfeld and Fraumeni [1996] and clearly demonstrate that the alleged effects of asbestos pale by comparison to known causes of this disease.

#### **Stomach**

In a manner similar to the other cancer sites just mentioned, there are precancerous conditions of the stomach such as gastric ulcer, gastric polyps, atrophic gastritis, and type III intestinal metaplasia. Are these also going to be considered amongst the medical criteria for compensation? The evidence to suggest an association between asbestos exposure and stomach cancer per se is very weak. Even Selikoff et al. [1991] failed to find an excess [RR 1.16] (34 cases v 29 expected) amongst the 17,800 members of the U.S. insulator cohort. Doll and Peto [1987] said that the few reported associations such as those reported by Selikoff et al. in their earlier studies and by others such as Enterline et al. [1987] were largely due to misdiagnosis. Negative associations were also found by Sanden et al. [1987], Acheson et al. [1984], Tola et al. [1988] and Hodgson and Jones [1986] in studies of many thousands of asbestos workers.

Strong risk factors for stomach cancer have also been recognized. Schottenfeld and Fraumeni [1996] again discuss these at length. However, the most important include cigarette smoking, alcohol, radiation, nitrates and related compounds, salted foods and certain host factors.

#### **Colon Rectum**

Carcinoma of the colon and rectum are two of the most common malignant lesions and it was estimated that 150,000 new cases would appear in 1989. As mentioned above, there are also precancerous lesions of the colon, particularly adenomatous polyps and conditions that predispose to these. It is not clear if these precancerous conditions would also be included in the medical criteria list.

There have been a number of critical reviews of the alleged association between asbestos exposure and colorectal cancer. It is beyond the scope of this communiqué to include all of the detailed information but some of the more important bottom-line conclusions can be discussed. Weiss [1990] provided one of the best critical reviews of all human and animal studies performed up to 1988. He describes the literature related to 21 cohorts of workers exposed to asbestos and attempts to determine whether there is a causal association between asbestos and colorectal cancer. The end point was the standardized morbidity or mortality ratio as the measure of relative risk. Two additional cohorts using mortality as the end point were excluded because the authors failed to use comparable diagnostic methods for the asbestos-exposed populations and controls. Weiss [1990] found that the "summary standardized morbidity or mortality ratio for all 21 cohorts was 0.97 and there was no dose-response relationship in the two studies with such data". He therefore concluded that "The evidence does not meet the established criteria for making a judgment that there is a causal relationship between asbestos and colorectal cancer".

In his review, Weiss [1990] noted that various workers prior to his review had alleged a positive association and discussed some of these. He thus stated that "In 1964, Selikoff et al. reported an historical cohort study of 632 insulators who were observed from 1943 to 1962. During the period of 20 or more years after the onset of asbestos exposure, there were 17 deaths of colorectal cancer compared with 5.2 expected on the basis of white male population mortality rates in the United States adjusted for age and calendar period. Selikoff et al. concluded that there may be an etiologic relationship between industrial asbestos exposure and cancer of the intestinal tract". However, while Selikoff et al. [1979] provided causes of death by death certificates compared with "best evidence", the criteria for "best-evidence" diagnoses were not described. Doll and Peto [1985] were "uncertain how to interpret these changes because the expected numbers of deaths were not obtained by best evidence, because most specific cancer sites other than respiratory cancer and mesothelioma showed the same small elevation of risk as gastrointestinal tract sites, and because national death rates were used to calculate the expected numbers of deaths".

Weiss [1990] indicated that since Selikoff et al.'s report, a large number of historical cohort studies of workers exposed to asbestos have been reported; "some show an elevated mortality from colorectal cancer while others do not". He noted that "early reviews favored a cause and effect relationship between asbestos and gastrointestinal cancer." However, as more

information accumulated, "recent reviewers [Morgan et al, 1985; Levine, 1985; Simonato and Sarracci, 1986; Doll and Peto, 1985; and Edelman, 1988] have most commonly stated that an assessment of causality is inconclusive or negative".

Frumkin and Berlin [1988] concluded that an elevated risk of gastrointestinal cancer was associated with asbestos exposure in those cohorts in which the SMR for lung cancer was more than 2.0. Weiss [1990] and others have seriously criticized using "lung cancer surrogate for asbestos disease". Weiss [1990] thus criticized Frumkin and Berlin:

*"In 1988, Frumkin and Berlin [1985] also examined lung cancer SMR as a surrogate for asbestos dose, using "meta-analysis." They applied a statistical model to combine SMR. The validity of their method depends on large sample theory, which was not completely appropriate to all the available data. Furthermore, meta-analysis gave much the same results as summary SMR. For esophageal, gastric, and colorectal cancer in cohorts with lung cancer SMRs in excess of 2.00, the Frumkin and Berlin pooled SMR's were 1.47, 1.46, and 1.68, respectively, whereas summary SMR's obtained by summing observed and expected numbers in the data they used were 1.44, 1.33, and 1.60, respectively. These investigators' analysis led them to conclude that there was a small but statistically significant increase in risk for gastric and colorectal cancer in those cohorts with a lung cancer SMR larger than 2.00. However, they also found a statistically significant elevation of risk (SMR = 1.19) for nonasbestos-related causes of death in cohorts with lung cancer SMR's greater than 2.00. Because the SMR for nonasbestos-related causes of death was a little smaller than those for gastric and colorectal cancers, Frumkin and Berlin concluded that the GI cancer mortality pattern probably reflected the biological effects of asbestos exposure. However, they included in the non-asbestos-related category all causes of death except lung cancer, mesothelioma, gastrointestinal cancer and non malignant respiratory disease instead of including other cancers as Doll and Peto did".*

Weiss [1990] correctly pointed out the important problems in considering all gastrointestinal sites together, which was also done incorrectly in a number of studies:

*"There are reasons to consider the hypothesis regarding causality by individual sites in the gastrointestinal tract. First, the descriptive epidemiology of esophageal, gastric, and colorectal cancers differs; therefore, the causal factors must also differ. Except for clear cut evidence of smoking and alcohol as exogenous causes in esophageal cancer, little is known about the specific causes of gastrointestinal cancers in the general population. This makes it difficult to assess causality in an occupational population because of inability to control for confounding factors. Second, occupational groups are usually limited in sample size. Because colorectal cancer is more common (76,000 cases and 30,000 deaths in men estimated for the United States in 1990 by the American Cancer Society) than either esophageal (7400 cases and 7000 deaths) or gastric (13,900 cases and 8300 deaths) cancer, the analysis of available literature on colorectal cancer in workers exposed to asbestos is probably more fruitful than analysis of the literature on cancer of the two other sites. Therefore, this review is confined to colorectal cancer".*

Weiss' [1990] review analyzed the available cohort studies in two categories according to the method of worker registration namely either as inception cohorts or as cross-sectional

cohorts. Inception cohorts include all workers whose exposure to occupational carcinogens begins in stipulated periods. Cross-sectional cohorts register only those workers who are employed as of a particular date without regard to their previous exposure histories. Weiss [1990] and others have searched for dose-response relationships in inception cohorts; no convincing evidence of an association could be demonstrated. The summary SMR for all eight cross-sectional cohorts examined by Weiss [1990] was 1.14 ( $P > 0.05$ ). Further, if the observed and expected numbers of cases are summed over all 21 cohorts regardless of the type of registration, the pooled SMR is 0.97 ( $P > 0.05$ ). This fully supports the lack of an association. Weiss [1990] also notes the various problems involved in evaluating the evidence of an association, and the Committee should refer to his paper for more details. Among these problems, is the issue of misdiagnosis. Weiss [1990] thus points out that "misdiagnosis of mesothelioma and lung cancer as intestinal cancer may introduce a serious overestimate of colorectal cancer risks. In 1969 Newhouse and Wagner compared autopsy diagnoses to clinical diagnoses and found that gastrointestinal cancer diagnoses were cut in half, and mesothelioma diagnoses were quadrupled by autopsy evidence".

Doll and Peto [1985] analyzed 14 cohorts and found a remarkably good linear correlation between lung cancer risk and gastrointestinal cancer risk (all sites combined) with  $r = 0.95$ ,  $P < 0.001$ . Weiss [1990] noted that they also found "the same good correlation between lung cancer risk and all other cancer risk after excluding lung cancer, mesothelioma, and gastrointestinal cancer ( $r = 0.80$ ,  $P < 0.001$ )". Doll and Peto considered two possible explanations: (1) asbestos causes cancer in practically every organ, or (2) some cases that were really caused by lung cancer or mesothelioma were misdiagnosed as other cancers. They favored the latter explanation as the simplest one".

Weiss [1990] also stated that

*"In 1964, an advisory committee to the Surgeon General of the United States Public Health Service established a number of criteria to assess the causal relationship between exposure to an agent and disease, none of which is all-sufficient. The criteria include: (1) the consistency of the association, (2) the strength of the association, (3) the specificity of the association, (4) the temporal relationship of the association, and (5) the coherence of the association. To these may be added an important criterion included by Hill in 1965; decrease in risk of disease after decrease or cessation of exposure to the agent".*

Weiss concluded that his analyses further supported the conclusion that there was no causal connection and said

*"The evidence ... indicates that the criteria for causality are not met. The association is inconsistent, weak, nonspecific, and incoherent. Only the temporality of the association, when present, is frequently correct. There is no evidence to determine whether the association, in the few cohorts where there appears to be one, decreases after the cessation of exposure".*

Weiss [1990] thus dismissed the need for medical monitoring in such cases:

*"The results of this review have medical and medico-legal implications. Screening for colorectal cancer in asbestos-exposed workers by simple tests is justifiable to the same extent as it is justifiable in the general population; however, any recommendations for annual colonoscopies in such workers is not warranted. In tort litigation involving many thousands of asbestos product users as well as in workers' compensation litigation, some uninformed physicians have testified that asbestos causes colorectal cancer. Governmental bodies have also taken the same position".*

The ATSDR [2002] Toxicological Profile on Asbestos also commented:

*"Cancer at Other Sites: Mortality studies of asbestos workers have revealed small increases in the incidence of death from cancer at one or more sites other than the lung, the pleura, or the peritoneum, mostly in tissues of the gastrointestinal system. ... Reviewers of the available evidence for asbestos-related cancer at sites other than the lung, pleura, and peritoneum appear to concur that the evidence is not strong. For example, Doll and Peto (1985, 1987) concluded from their review of the available epidemiological data and biological evidence that misdiagnosis or chance may be the simplest and most plausible explanation of asbestos-related cancer at any other site than the lung, pleura, or peritoneum".*

The failure to observe an attributable excess of colorectal cancer in animals and humans ingesting significant quantities of asbestos also supports the proposal that these are not causally connected. In this instance, the basic assumption is that "any effect of asbestos on the gastrointestinal tract after inhalation exposure is most likely the result of mucociliary transport of fibers from the respiratory tract to the gastrointestinal tract" [ATSDR, 2002]. "A number of researchers have (therefore) investigated the carcinogenic risk (especially the risk of gastrointestinal cancer) in humans and animals when exposure to asbestos occurs by the oral route". Thus:

*"Human Studies: A number of epidemiological studies have been conducted to determine if human cancer incidence is higher than expected in geographical areas where asbestos levels in drinking water are elevated (usually in the range of 1-300 MFL) (Andersen et al. 1993; Conforti et al. 1981; Howe et al. 1989; Kanarek et al. 1980; Levy et al. 1976; Polissar eml. 1982, 1984; Sadler et al. 1984; Sigurdson et al. 1981; Toft et al. 1981; Wigle 1977). Most of these studies have detected increases, some of which were statistically significant, in cancer death or incidence rates at one or more tissue sites (mostly gastrointestinal) in populations exposed to elevated levels of asbestos in their drinking water. However, the magnitudes of the increases in cancer incidence are usually rather small, may be related to other risk factors such as smoking, and there is relatively little consistency in the observed increases, either within studies (i.e., between sexes) or between studies".*

Most of these human studies are “ecological” and suffer from weaknesses that include difficulties in establishing control populations, accurately estimating exposure levels, and excluding confounders.

The animal data also fail to support a causal connection. Thus

*“Animal Data: Early animal studies on gastrointestinal cancer from ingested asbestos were mostly negative (Cunningham et al. 1977; Gross et al. 1974), although some studies yielded increases in tumor frequency that were not statistically significant (Bolton et al. 1982a; Donham et al. 1980; Ward et al. 1980). More recently, a series of large scale, lifetime feeding studies have been performed by the National Toxicology Program (NTP). In this series of studies, animals were exposed during gestation and lactation (through parental diets) and throughout their lives until spontaneous death occurred. These studies have also yielded mostly negative results”.*

Various reviews [Morgan et al., 1985; Davis, 1994; Bonser & Clayson, 1967; Cunningham et al., 1977; Davis, 1993, 1994; Hilding et al., 1981; Smith et al., 1980; Truhaut, 1989; Working Group, 1987] have concluded that asbestos is not carcinogenic to either animals or humans by the oral route. Weiss [1990] similarly states “there is no support for the hypothesis of causality from animal experiments in which asbestos has been administered orally. Condie reviewed eleven animal experiments and concluded that ingested asbestos fibers did not cause any organ-specific carcinogenic effects”.

The ATSDR [2002] has also stated that there is no evidence from experimental studies to suggest that asbestos ingestion can cause significant non-carcinogenic effects in the gastrointestinal system. This is important since inflammation and injury are often common substrates for the development of cancer, their absence goes against a causal association. Thus:

*“A few studies in rats have described some histological or biochemical alterations in cells of the gastrointestinal tract after chronic exposure to oral doses of 20-140 mg/kg/day of chrysotile (Delahunty and Hollander 1987; Jacobs et al. 1978a, 1978b). Increased numbers of aberrant crypt foci, putative precursors of colon cancer, were induced in rats that were administered by gavage either a single dose (70 mg/kg/day) of chrysotile, a single dose (40 mg/kg/day) of crocidolite, or 3 doses (33 mg/kg/day) of crocidolite, although no dose-response was noted in the single dose of crocidolite regimen (Corpet et al. 1993). Mice that were administered either a single dose (100 mg/kg) of chrysotile or three doses (50 mg/kg/day) of crocidolite did not show increases in aberrant crypt foci (Corpet et al. 1993). However, no excess nonneoplastic lesions of the gastrointestinal epithelium have been detected in a number of other animal feeding studies (Bolton et al. 1982a; Donham et al. 1980; Gross et al. 1974), including an extensive series of lifetime studies in rats and Syrian hamsters in which such effects were carefully investigated (NTP 1983, 1985, 1988, 1990a, 1990b, 1990c). Thus, the weight of evidence indicates that asbestos ingestion does not cause any significant noncarcinogenic effects in the gastrointestinal system”.*

### **Non Malignancies**

#### **Pleural Plaques:**

There is no reason to include pleural plaques amongst the medical criteria of attributable changes that deserve compensation. Pleural plaques do not portend future malignancy. They do not give rise to mesotheliomas. They are generally hard, acellular masses of burnt-out hyaline connective tissue. Histologically, pleural plaques are thus the “opposite” of a cancerous lesion, since the hallmark of cancer is highly cellular growth. Reviews of the relevant epidemiology, e.g. Gaenlser [1991] and Weiss [1999], again demonstrate that plaques do not increase the risks of future malignancy in and of themselves. They are markers of low level amphibole exposure and also occur in individuals with no exposure to asbestos either spontaneously, or following other types of events such as trauma. Indeed, there are large collections of people exposed to amphibole fibers in an area extending in the north from Finland to the south going through Czechoslovakia, Bulgaria, Austria, and parts of northern Greece, with “endemic” plaques and no evidence of an increased risk of mesothelioma. This is the so called Balkan Plaque arc. An entire issue of the Indoor Built Environment was devoted to the clinical, pathological, and etiological features of pleural plaques in 1997. This was based on the collective thoughts of experts in the field, presented at a symposium in Switzerland at that time. I would refer the Committee to that volume and many of the references cited therein.

#### **Costophrenic Angle [CPA] Blunting**

This is a nonspecific, non-attributable finding that does not belong in any category.

#### **Obstructive Pulmonary Disease**

Asbestosis is not a form of obstructive pulmonary disease. This is readily explainable on the basis of the major pathological effects observed in animals and humans. It is primarily a restrictive disorder and should not be categorized amongst the causes of obstruction.

#### **Asbestosis as a Prerequisite for Asbestos-Related Lung Cancer**

Detailed reviews provide ample support for the notion that radiological evidence of asbestosis is required before attributing lung cancer to asbestos exposure in humans [Browne, 1991; Weiss, 2000]. This follows in part from the fact that attribution is assessed largely on the basis of the epidemiology, and the epidemiological data are derived largely from the radiology. Animal evidence also supports the requirement for asbestosis. See e.g. Davis and Conian [1993].

#### **Pathological Evidence of Asbestosis**

The 1982 guidelines for the diagnosis of pathological asbestosis say the

*“minimal features that permit the diagnosis are the demonstration of discrete foci of fibrosis in the walls of respiratory bronchioles associated with accumulations of asbestos bodies ... when only a single asbestos body is found in*

*a histological section, it is necessary to demonstrate additional bodies (either in deeper sections of the same block or in other samples of tissue) to establish the diagnosis of asbestosis".*

The guidelines therefore fail to give clear guidance on the number of asbestos bodies required for the diagnosis (aside from implying that a single asbestos body won't do). This is a critical point since asbestos bodies are commonly found in many normal individuals.

The 1982 guidelines also say that

*"because asbestos bodies are unevenly distributed in tissue, an adequate number of samples should be examined".*

The statement however also fails to give clear guidance on the number of sections that have to be taken aside from saying the number has to be "adequate". The "minimal criteria" are also problematic, since areas of nonspecific focal interstitial fibrosis are not uncommonly found in conditions unrelated to asbestos exposure. Therefore, the potential for misdiagnosis is high unless the guideline criteria are clarified further. It is particularly important to know what grade of pathological asbestosis would be required under the criteria set forth in the Asbestos Bill.

The medical criteria also include a statement referring to "any future revision of the same statement". This is very vague since future "revisions" may also fail to specify the grade and number of asbestos bodies required for compensation.

#### **Radiological Asbestosis**

Nonmalignant level III includes categories of SIO 1/0. However, there are a variety of causes of SIO's of this grade that are not due to asbestos. These occur in the general population and have been described in, amongst others, long-term heavy smokers [see the many papers by Weiss and others in support]. Attribution should require at least a diagnosis of 1/1 [SIO].

#### **Diagnosis of Primary Lung Cancer and Mesothelioma**

The criteria simply state that the diagnosis of primary lung cancer or mesothelioma will be made on the basis of findings of a board-certified pathologist. This really is not an advance over the current diagnostic quandary for these two types of tumors. Many types of tumors metastasize to the lung. What specific criteria will be required to say that the tumor is primary or secondary? Will the evidence be based on autopsy, radiology alone, histology, or some other set of findings? The diagnosis of mesothelioma is one of the most difficult areas in all of human pathology. Expert panels have been established in different parts of the world to assess the diagnostic strengths and weaknesses of this diagnosis. This stems from the fact that the histological appearances of so many tumors not of mesothelial origin can resemble a primary mesothelioma of the pleura and peritoneum. The problem is greatly compounded by the fact that many different types of tumors metastasize to the pleura or the peritoneum. What diagnostic criteria will be applied? What type and size of tissue samples will be accepted? Will histochemical staining suffice or will immunohistochemical stains be required? Today, many

cases require immunohistochemical study (in conjunction with a review of the clinical and radiological features of the case). To the extent this is so, which immunohistochemical stains will be acceptable? None of this is spelled out.

#### **Institute of Medicine Study**

Within two years of the bill's enactment, the Institute of Medicine at the National Academy of Science, shall complete a study regarding asbestos exposure and a large number of related issues. It will then issue a report on its findings on causation, and ultimately the Asbestos Court and the MAC may consider the results to determine if asbestos exposure is a substantial contributor. However, this puts the cart before the horse. The Institute's findings should be used to formulate better criteria and thus be available before the bill is enacted. The Institute should focus on the questions raised in this letter including, though not limited to, those pertaining to exposure (particularly clarifying terms like "significant", "credible", "frequent", "regular"), latency, and "threshold" (in terms of the duration - intensity parameters that characterize the occupational, domestic and pure environmental exposures required to produce pleural plaques, asbestosis, asbestos related lung cancer, and mesothelioma). The ATSDR [2002] and the Final Report [2003] to the EPA concluded that chrysotile was far less potent than amphibole and that fibers less than 5μ long lacked biological potency. Since chrysotile of varying lengths was one of the most common asbestos fibers used in the United States (and is still used in certain products), fiber type and size are major issues that need to be addressed and considered for inclusion in the exposure criteria [see Ilgren and Chatfield, 1997 for review and discussion]. Fiber type and size distinctions, however, do not appear to be recognized within the framework of the medical criteria.

#### **Exposure Indices**

"Substantial Occupational Exposure to Asbestos" includes categories of workers that may *not* be at risk of contracting asbestos-related disease on the basis of fiber type, length, and / or dose, as expressed in terms of "frequency" and "duration". For example, hundreds of miners and millers worked for over thirty years with short, amphibole-free chrysotile in New Idria, California, and yet there has never been a proven case of asbestos-related disease amongst them. Some worked in billows of asbestos dust. Similarly, there have been thousands of men who worked with asbestos-containing brake linings or manipulated asbestos-containing cable and wire but there is no evidence of an attributable cancer excess amongst them. This again goes to key issues of fiber type and dose that are not considered in the criteria statement.

Thousands of men have worked in close proximity to other men repairing asbestos-containing products without contracting disease. Bystander exposures responsible for the induction of asbestos-related disease have thus been seen most often in settings of poor ventilation, high dose exposure, and, in particular, to amphibole asbestos-containing dust clouds. These observations therefore raise the key issues: how "close" is "close"; and how often must the work be to be "regular", "frequent" or "recurring"? A vague "bystander" category may lead to thousands of unjustifiable claims.

The “General” exposure evidence is also difficult to rationalize since it refers to “minimum” exposure to asbestos or asbestos-containing products. With over 3,000 known asbestos-containing products, it is not difficult to qualify for “minimum” exposure.

“General Exposure Requirements” embraces “other credible evidence” of exposure but I do not see what constitutes “credibility”.

Bona fide cases of domestic asbestosis are exceedingly rare. Similarly, there are extremely few cases of domestic peritoneal mesothelioma in the literature and virtually none following exposure to products that are predominantly chrysotile based. Merely living with a person working in a dusty trade does not automatically translate into significant, intense exposure.

There should be no waivers for those that worked within a 20-mile radius of Libby. Personal review of the Libby Recovery Action files failed to demonstrate a single bona fide “environmental” mesothelioma or asbestosis case amongst the residents of Libby, absent domestic exposure. To extend the boundary to a 20-mile radius around Libby cannot be justified. There are no sound scientific indicators of excess asbestos-related disease among the residents of the Town of Libby, absent domestic exposure. The NIOSH workers that did one of the two original studies of the Libby miners and millers [Amandus et al., 1987] concluded that the mesotheliomas were not seen with less than 300 fiber years exposure. That was for the men that actually worked at the mine and the mill. The exposure data generated through simulation studies done at the Town of Libby to assess residential environmental exposures are orders of magnitude below those recognized by the NIOSH group to induce mesothelioma. This why there are no bona fide cases of environmental mesothelioma or asbestosis in the Town of Libby. I have visited towns where genuine environmental disease is found, namely in the blue asbestos mining town of Wittenoom, Western Australia. There, environmental disease arose because long fiber crocidolite was literally everywhere, and the exceedingly dry and windy conditions facilitated the aerosolization of the fiber enormously. Most aspects of Wittenoom were blue: the sand boxes where the babies played, the surfaces of the roads, airport runway, race track, and building walls (including the hospital), not to speak of the significant domestic exposure component. Libby is not Wittenoom.

#### **Latency**

A ten-year latency defies most of the literature on the subject. Selikoff supported a twenty-year latency for mesothelioma and this has been confirmed by various critical reviews. See e.g. Lamphear [1998]. The latency for asbestosis is generally thought to be as long, if not longer, than that for mesothelioma. Thus, a ten year latency is inconsistent with the broad body of scientific literature and could allow large numbers of claims to be falsely allocated compensation.

#### **Medical Advisory Committee and Claims Examiners**

The qualifications for acceptance to the Medical Advisory Committee appear regressive. Thus, any licensed physician in the designated areas of Board Certification actively practicing in a field directly related to their Board certification could qualify. There is no requirement for any

proven knowledge or experience in dealing with matters of diagnosis and causation related to asbestos. It is scarcely believable that some in-depth knowledge is not required. The field of asbestos medicine is very complicated both regarding diagnosis and causation. Moreover, many of our best experts have also retired from their respective fields. Will they be excluded from the MAC? Some have published hundreds of articles on asbestos-related matters, contributed widely to our understanding of the field, and yet are no longer actively practicing in their respective fields.

Mention is also made of "claims examiners". What qualifications will they have? The proposed system will produce thousands of claims, and the claims examiners will have to have some level of knowledge to soundly assess such cases.

#### **Information and Examples of "Unsound" Medical Theories Used to Secure Undeserved Compensation in the Tort System**

##### **"Environmental" Asbestos-Induced Disease**

Fear of cancer concerns have arisen in certain parts of the country based on alleged exposures to natural deposits of asbestos. A significant number of these have arisen in California and most have been totally unfounded due to the lack of dose, the nature of the fiber, and / or fiber size. In one instance, an award was made for an allegedly attributable environmental mesothelioma to a plaintiff driving his car miles away from the New Idria deposit. Plaintiff alleged that significant exposures took place when he drove along the Interstate highway with his windows up and his air conditioning on. On a much larger scale, the EPA IX has undertaken an "abate the earth" approach to dealing with one of the largest mineral deposits in the world, namely the same New Idria deposit. Reasoning that the mining activities which took place at three locations of the deposit from 1960 to 1975 constituted significant sources of human activity-related disturbance, certain parts of the deposit were proclaimed Superfund sites. Remediation of these areas was conducted to prevent asbestos exposure to the residents of nearby towns. This was done despite a failure to show that such activities ever lessened residential exposure significantly over background, and the failure to demonstrate a single example of attributable asbestos disease in any miner, miller, or resident due to occupational, domestic, or environmental exposure to dust from the deposit. Considering the fact that the deposit is estimated to contain nearly one trillion cubic meters of asbestos, the EPA's attempts to remediate the area are tantamount to an "abate the earth" policy. Amongst other effects, the unnecessary remediation efforts have set the stage for potential future large-scale litigation, say from migrant workers annually exposed to the dust in the Central Valley.

##### **Reliance on Data Generated by Unrealistic Animal Models**

Several key plaintiff experts have, for over a decade, offered testimony on the basis of animal studies that are of little relevance to any realistic human exposure scenario. In one such instance, rats exposed to 5000 fml (>5μ long) asbestos concentrations for one hour were said to develop irreversible asbestosis months later. This allegedly demonstrated that workers and even certain residents could be put at permanent risk of asbestos-related disease through single exposures to asbestos. Such opinion lacks scientific foundation since it is based on exposure

parameters that have probably never been encountered in any work setting. Moreover, the claim that a brief exposure to a high concentration is equivalent to the same cumulative dose achieved over a much longer time period, is not biologically sound. Host defense mechanisms are much better able to clear low-dose exposures over long periods of time than brief high-dose exposures of the kind used in some plaintiff studies. Testimony based on such studies has contributed to plaintiff awards amounting to many hundreds of millions of dollars.

#### **Reliance on Data Generated by Unrealistic Hygiene Simulation Testing**

Various experts in their attempts to simulate the manner in which a plaintiff allegedly used an asbestos-containing product, have constructed "supra" worst case scenario simulation studies that are not at all relevant to the case under review. Plaintiff experts have thus attempted to maximize dust generation from asbestos-containing cable and wire by cutting the materials with blunt hack saws and by running blower fans cutting certain asbestos-containing materials. Plaintiff experts commonly rely upon dust wipe samples that attempt to relate surface readings to air concentrations from past activities. Numerous studies have demonstrated the flaws in attempting to make such extrapolations. Plaintiff experts opine that "visible" dust is equivalent to a certain fiber concentration, another claim that lacks foundation. Instead of doing real-time, personal monitoring, some experts rely on machines that "process soil samples". These grind and tumble the soil and place the fibers released from within onto a filter where they are counted. Validation tests, however, have not been done to confirm the correctness of these tests, even though they have been used in various parts of the United States, both by regulatory agencies and in the litigation.

#### **Reliance on Testimony Based Upon "Selected" Data**

Various plaintiff experts have conducted studies on behalf of the U.S. Government but have chosen not to publish their findings in full or discuss them, even when questioned under oath. In this instance, the experts picked and chose the evidence from their studies that best suited their testimony and failed to acknowledge the findings that would have undermined their opinions.

#### **Reliance on Testimony Based on the Single Fiber Theory**

Expert testimony is still given based on the idea that every fiber contributes to the development of disease. Extreme examples exist. Thus, there was the case of a plaintiff who had worked as an insulator throughout WWII on a ship, and then as an insulator contractor in the post-war period, and then latterly as an estimator, a position with little or no exposure potential. The last defendant in the case was brought in on the grounds that plaintiff allegedly incurred a one hour bystander exposure to a "dirt pile" in defendant's refinery that might have contained asbestos. The case was thus based on the claim that bystander exposure to workers cleaning up the pile 50 feet away was a significant contributor to the development of plaintiff's mesothelioma. This claim was made even though virtually all of his true exposures had preceded that event and included thousands of hours of occupational high-dose exposure.

## ADDITIONAL VIEWS OF SENATORS FEINSTEIN AND KOHL

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.

DIANNE FEINSTEIN.  
HERB KOHL.

## XI. MINORITY VIEWS

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### MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, BIDEN, KOHL, FEINGOLD, SCHUMER, DURBIN, AND EDWARDS

#### I. INTRODUCTION

After weeks of Committee consideration of legislation to enact a national trust fund for victims of asbestos-related disease, we are disappointed that the Committee failed to reach consensus on S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003 (“FAIR Act”). We had hoped a bipartisan dialogue over the past several months would result in the best means for providing fair and efficient compensation to the current victims and those yet to come, and we thank Senators on both sides of the aisle who have been working with us in good faith to try to achieve common ground.<sup>93</sup>

We have all learned a great deal about the harms wreaked by asbestos exposure since Senator Leahy convened the first hearing on the asbestos litigation crisis last September. What we face first and foremost, as Senator Kennedy reminded the Committee during our final markup, is an asbestos-induced disease crisis—and the much publicized “litigation crisis” has arisen only because thousands of workers and their families have suffered debilitating disease, and death, due to asbestos exposure.

Asbestos is the most lethal substance ever widely used in the workplace. Between 1940 and 1980, more than 27.5 million workers in this country 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 has irrevocably changed many of their lives. Each year, 10,000 of these victims 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, not only will the damage done by asbestos continue for decades but many of the exposed live in fear of a premature death due to asbestos-

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<sup>93</sup> We are particularly disappointed that the majority that passed the FAIR Act out of Committee has demanded that these minority views must be filed less than 24 hours after the text of the amended bill was available from legislative counsel. This has been a tremendously difficult piece of legislation to develop, and the long and involved mark-up in Committee included dozens of amendments and numerous agreements to work further on a variety of provisions. While it is not clear why the majority is forcing us to issue our views before we are permitted to carefully read the revised bill, it is clear that it makes no sense to do so. Nonetheless, we have drawn on the reserves of good will and energy that have characterized our efforts throughout the work on this legislation, and have drafted our views to the best of our ability given the extremely limited time the revised bill has been before us.

induced disease. These are the real victims of the asbestos nightmare and must be the first and foremost focus of our concern.

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 created by this litigation. More than 60 companies have filed for bankruptcy because of their asbestos-related liabilities. As Senator Leahy observed at the Committee's March 5, 2003, hearing on asbestos litigation: "These bankruptcies created a lose-lose situation. Asbestos victims deserving fair compensation do not receive it and bankrupt companies do not create new jobs nor invest in our economy."

Working with Chairman Hatch and others, we encouraged representatives from organized labor and industry to help us reach consensus on a national trust fund to fairly compensate asbestos victims and to provide financial certainty for asbestos defendants and their insurers. After much hard work, however, we have yet to craft a complete bill to create an effective and fair national trust fund.

A successful trust fund—which would provide fair and adequate compensation to all victims and would bring reasonable financial certainty to defendant companies and insurers—includes four essential components: appropriate medical criteria, fair award values, adequate funding, and an efficient, expedited system for processing claims that enables eligible claimants to obtain prompt payments without the complications, time and expense of a traditional lawsuit. Of course, there are many other important aspects of such a fund, including a functional administrative system, but these four components are the core requirements necessary to the foundation of a fair fund.

During the first full mark-up session of the Committee on the FAIR Act, we unanimously adopted the Leahy-Hatch amendment on medical criteria, as well as a number of other bipartisan amendments. We then tackled the issue of solvency and, again, were able to make a bipartisan improvement by adopting a proposal by Senator Feinstein, Senator Kohl and Senator Hatch. More remains to be done on this issue, but an auspicious beginning left us hopeful of future agreements.

That hope turned to disappointment when we next turned to the critical issue of determining award values for victims of asbestos-related diseases. Although the changes made to award values in the FAIR Act as introduced constitute movement in the right direction, the Committee did not move far enough toward providing fair compensation to all impaired victims of asbestos exposure. Indeed, seriously ill victims of asbestos exposure would receive less compensation, on average, under the current version of the FAIR Act than they would in the tort system. The FAIR Act is not yet fair. We are extremely disappointed that Senators from both parties have yet to reach consensus on this fundamental aspect of a fair and effective national trust fund.

At times over the last month, we had genuine reason to believe that the Committee might agree upon a real solution to the asbestos crisis. We invested ourselves completely in a good faith effort to reach consensus. But that movement toward consensus stalled

just as we addressed this fundamental issue of whether we were truly willing to compensate asbestos victims fairly.

Since the first hearing on this issue, we have emphasized one bedrock principle: We cannot support a bill that gives inadequate compensation to victims. We will not adjust fair award values into some discounted amount just to make the final tally come within a pre-determined, artificial limit. Senator Leahy summed up this basic tenet during our markup of the FAIR Act: "We will have failed if we leave those poisoned by asbestos without fair compensation."

Of course, other aspects of the bill need correction and modification. We must be certain that the administrative system we establish is a fair, no-fault process. In our zeal to remove cases from the tort system, we do not want to create a process that leaves victims facing years of delay before the new system is operational. It would be cruel to lock the doors to our courthouses before the administrative process is ready to award compensation to victims. And, we must determine a way to avoid the administrative process being swamped by 300,000 claims on the day it theoretically opens its doors, and thus delay victims' compensation for years.

Given these serious problems, we believe that forcing the Act through the Senate, in its present form, would prove counter-productive, even fatal, to this legislative effort. The near party-line vote within the Committee on this legislation was more of a setback than a step forward. Proceeding without consensus would open this matter to weeks of debate on the floor, just as it has required weeks of consideration before the Judiciary Committee. Proceeding without consensus would likely result in numerous amendments and extended debate with no agreement emerging at the end of the process.

We need to continue our work to achieve the common ground needed to enact a good law. Acting together through consensus remains, in our view, the best way to move a bill through the legislative process and into law.

## II. BIPARTISAN IMPROVEMENTS TO S. 1125

The Committee adopted more than 35 bipartisan amendments to improve S. 1125. We thank Chairman Hatch and other members of the Committee for working with us to achieve consensus on these improvements to the FAIR Act.

### *A. Collateral Sources, Indexing Awards For Inflation, Banning Asbestos and Other Bipartisan Agreements*

During our first full mark-up of S. 1125, the Committee adopted numerous amendments to correct some of the unnecessarily harsh provisions in the original bill. For example, we unanimously adopted a Hatch-Leahy amendment to strike offsets to compensation for asbestos victims from previous payments from disability insurance, health insurance, Medicare, Medicaid, and death benefit programs. Left unchanged, these offsets would have marked a dramatic change from current law, and would have resulted in a cost shift of millions, or perhaps billions, of dollars from defendants and their insurers to other insurance companies, health care plans, and the federal government.

Just as important, the use of these “collateral sources” in the original bill would have reduced or eliminated 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 award under the original bill because of these collateral source offsets. Senator Durbin, Senator Feinstein, Senator Leahy and others pointed out this flawed approach at our June 4th hearing on the FAIR Act. We could not support reducing compensation to asbestos victims simply because they survived, or because they had the good fortune and foresight to purchase insurance. We are pleased that this section of the original bill has been revised to only offset past judgment or settlement payments for the same asbestos-related injuries from any awards made under the national trust fund.

That first day of consideration of S. 1125, the Committee also adopted another bipartisan amendment authored by Senator Leahy, Senator Kohl and Senator Hatch to index the award values to asbestos victims for future inflation as a matter of basic fairness in a 50-year fund.

We also announced an agreement by Senator Feinstein, Senator Kohl, Senator Hatch and Senator Murray that would ban the commercial manufacture, use and distribution of asbestos, which we were all pleased to support. Though many people believe asbestos is banned, it is in fact still commercially used today. As the Committee and the full Senate consider creating an alternative compensation system to address past exposures to asbestos, it is only sensible that we also prevent future asbestos-related illnesses from occurring by banning asbestos use.

This bipartisan amendment directs the Environmental Protection Agency, within two years of enactment of the FAIR Act, to promulgate final regulations prohibiting the manufacture, processing, or distribution in commerce of asbestos-containing products. The provision allows affected companies to petition for an exemption from the ban for individual products if the product does not pose an unreasonable health risk and if there is no safer alternative.<sup>94</sup> This ban will bring the United States into line with the 25 other countries that have already banned asbestos and with the European Union, which is slated to implement a similar ban in 2005.

The Committee also adopted an amendment by Senator Leahy to ensure future accountability of corporate participants in the Fund that are sold, or otherwise change hands. The Leahy amendment defines participants in the trust fund to include so-called “successors in interest” based on the “substantial continuity test” to determine whether it is fair and appropriate to require a company to take on the obligations of its predecessor. This amendment adopts the precedent of number courts that have generally looked to a

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<sup>94</sup>In addition, roofing cements that are totally encapsulated with asphalt are exempt, subject to an EPA review. The amended bill would direct the EPA to review the exemption for roofing sealants within 18 months of passage of the Act in order to determine the risks posed by these products and whether there are reasonable alternatives. The amendment would also give the EPA the authority to revoke the exemption for these products based on the findings of its review. In 2001, 62% of the asbestos consumed in this country was in roofing products. That is why it is so important to direct EPA to revisit this question through a study within 18 months of passage of the Act and to give EPA the authority to revoke this exemption if EPA deems it appropriate to do so.

number of factors in determining “substantial continuity”: whether the new company retains the same assets and facilities, the same employees and supervisors, the same jobs and working conditions, the same products and services, and the same customers and investors.<sup>95</sup>

The Committee also adopted an amendment by Senators Durbin and Kyl, and later, a similar amendment offered by Senator Biden, to expand and clarify the scope of the financial hardship and inequity adjustments allowed for defendant participants’ contribution to the Fund. The Durbin-Kyl amendment doubled the annual cap for the financial hardship adjustment from 3% to 6% of the total annual contributions required of all defendant participants, and likewise from 2% to 4% for inequity adjustments.

In determining who qualifies for an inequity adjustment, the Durbin-Kyl amendment distinguishes costs incurred defending claims that were lost or settled out of court from costs incurred defending claims that neither resulted in an adverse judgment against the defendant company nor settled requiring a payment to a plaintiff by that defendant company. The amendment mitigates the inequitable effect upon a defendant company with an exceptionally strong record of successfully defending asbestos claims that would be placed in a relatively high payment tier under the legislation only because significant defense costs were incurred in order to dispose of claims which ultimately turned out to be without merit. The amendment also recognizes that some corporate connections to the use of asbestos in manufacturing may be so remote, yet the impact of the FAIR Act may be so disproportionate that, as applied, it might have Due Process or Takings Clause implications. The amendment thus addresses this potential constitutional problem.

The Biden amendment permits an inequity adjustment for a company whose contribution rate, as a percentage of gross revenues, is exceptionally high compared to the median contribution rate for other companies in the same tier, thereby bringing companies that are statistical outliers in terms of their contributions within the range of their peers. The amendment thus addresses the unfairness of the FAIR Act that allows large wealthy companies to receive a windfall, while smaller companies are asked to pay more than they would have spent in the tort system.

In addition, the Committee adopted a number of other bipartisan amendments that address other matters in the bill, such as providing for annual Congressional oversight of the asbestos fund, imposing criminal penalties for false or fraudulent statements against the fund, establishing penalties for corporations that fail to make their contributions to the fund, establishing procedures for the families of deceased asbestos victims to apply for compensation, and applying the Freedom of Information Act to the new entities that will act like executive branch agencies—the Asbestos Insurance Commission and Office of Asbestos Injury Claims Resolution.

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<sup>95</sup>This “substantial continuity” rule has been routinely applied in cases involving tort plaintiffs and the beneficiaries of federal statutes, such as the NLRA (labor relations), the Family Leave Medical Act (FMLA), CERCLA (environmental crimes), Title VII (EEOC) and the Veterans’ Readjustment Assistance Act.

*B. Consensus Medical Criteria*

While pursuing a legislative solution to the asbestos crisis, all Senators have been sounding a consistent theme: fair compensation to the truly sick. At the beginning of our third week of consideration of the FAIR Act, we were pleased that the Committee unanimously adopted an amendment by Senators Leahy and Hatch establishing medical criteria requirements with the national trust fund to identify legitimate victims of asbestos exposure. This amendment properly defined the truly sick, dividing them into appropriate categories on the basis of sound medical diagnoses. Senator Graham declared that coming to this bipartisan agreement on medical criteria was a "breakthrough" for the Committee. We agree.

We are grateful for the generosity of Dr. Laura Welch and Dr. James Crapo, who presented to the Committee an invaluable tutorial on the medical aspects of the asbestos problem during the Committee's initial mark-up session on the FAIR Act. Our bipartisan medical criteria amendment reflects the Committee's good use of their expertise. It defines ten categories of asbestos-related disease, five levels of non-malignant disease and five levels of cancer, which are described in the table below.

TABLE OF MEDICAL CATEGORIES

Level	Scheduled disease	Description of disease and symptoms
I	Asbestosis/Pleural Disease A .....	These individuals clearly have asbestos-related disease with a history of exposure to asbestos, but their pulmonary function tests are within the normal range. They experience non-malignant conditions in which asbestos fibers are breathed into the lungs and (i) are transported to outside of lungs, causing scars to form on the pleural lining (the thin lining that surrounds the heart), or (ii) which remain inside the lungs, causing scarring, while retaining at least 80% of lung capacity.
II	Mixed Disease With Impairment .....	Every individual in this group has a medically significant impairment, as defined by the American Medical Association. They are impaired due to a combination of asbestosis and other causes, such as smoking or silicosis. The requirement for a 1/1 ILO reading on a chest x-ray ensures that asbestos exposure is an important contributing factor to the lung diseases and impairment. Victims experience increased scarring on lungs, with varying levels of impairment, ranging from shortness of breath to being homebound and requiring oxygen treatments.
III	Asbestosis/Pleural Disease B .....	These individuals have impairment that is primarily due to asbestosis. They develop asbestos-related respiratory disease with increasing losses of pulmonary function, with lung function decreasing to as low as 60% of normal. Victims with this level of impairment will not be able to continue working if they have a physically demanding job. Approximately half of these sick patients were in construction trades, e.g., plumbers and pipe fitters, and are prevented from continuing these jobs.
IV	Severe Asbestosis .....	These individuals have impairment that is primarily due to asbestosis. They experience significant loss of pulmonary function, with lung function between 50% and 60% of normal. Victims with this level of impairment will not be able to continue working, and will not be able to perform some activities of daily living.

TABLE OF MEDICAL CATEGORIES—Continued

Level	Scheduled disease	Description of disease and symptoms
V	Disabling Asbestosis .....	These individuals have impairment that is primarily due to asbestosis. They experience severe loss of pulmonary function, experiencing loss of more than 50% of normal lung capacity. Victims with this level of impairment will not be able to perform most activities of daily living. These claimants will be unable to perform activities of daily life, such as getting dressed, taking a shower, cooking dinner, or doing even minimal work around the house. This category often becomes fatal.
VI	Other Cancer .....	The level of disability for this group is determined by the extent of the cancer. Victims suffer from colon, laryngeal, pharyngeal, stomach (i.e., non-lung) cancers, the risk of which is increased by asbestos exposure. While some cancers may be cured, many of the individuals in this group will undergo surgery, radiation, chemotherapy, and still eventually die of their cancer.
VII	Lung Cancer One .....	These individuals suffer from asbestos-related lung cancer. For those not diagnosed early, the life expectancy is 12 to 18 months. These individuals develop progressive shortness of breath, loss of appetite, coughing up blood, chest pain, and severe fatigue, as well as other side effects of radiation or chemotherapy.
VIII	Lung Cancer With Pleural Disease .....	These individuals suffer from asbestos-related lung cancer with pleural scarring outside the lung. For those not diagnosed early, the life expectancy is 12 to 18 months. These individuals develop progressive shortness of breath, loss of appetite, coughing up blood, chest pain, and severe fatigue, as well as other side effects of radiation or chemotherapy.
IX	Lung Cancer With Asbestosis .....	These individuals suffer from asbestos-related lung cancer with pleural scarring inside the lung. For those not diagnosed early, the life expectancy is 12 to 18 months. These individuals develop progressive shortness of breath, loss of appetite, coughing up blood, chest pain, and severe fatigue, as well as other side effects of radiation or chemotherapy.
X	Mesothelioma .....	These individuals suffer from a rare and fatal cancer of the chest lining (the pleura) and abdomen lining. Virtually all instances of mesothelioma in the U.S. are a result of past exposure to asbestos. This cancer is impossible to treat and usually fatal within 18 months of diagnosis. The symptoms of this disease are similar to those of lung cancer—progressive shortness of breath, loss of appetite, coughing up blood, chest pain, and severe fatigue, as well as other side effects of radiation or chemotherapy.

The Leahy-Hatch medical criteria amendment explicitly recognized that victims suffering from colorectal cancer related to asbestos exposure should be fairly compensated under a national trust fund in the Level VI, Other Cancer, category. The FAIR Act, as introduced, excluded colorectal cancer victims from any compensation, no matter how much exposure to asbestos those victims suffered. This surprised many members of the Committee given the fact that colorectal cancer is among one of the cancers that merit compensation in all of the asbestos trusts, including the Manville Trust. Indeed, the American Thoracic Society wrote to the Committee urging us to correct this injustice, which we are pleased was done as part of the consensus medical criteria with a strong presumption of eligibility for the scheduled value of compensation in this category.<sup>96</sup>

<sup>96</sup> Letter from Homer A. Boushey, Jr. MD, President, American Thoracic Society, to Senator Hatch and Senator Leahy, June 19, 2003: "The ATS notes that stomach cancer is listed as a qualifying disease, but that colon cancer is not. Evidence supporting the link between asbestos exposure and colon cancer is at least as strong or stronger than evidence linking asbestos expo-

The Leahy-Hatch medical criteria provision also provides a mechanism for comparing various years of exposure, in various industries, on a correctly weighted basis. The amendment distinguishes between three time periods of asbestos exposure (pre-1976, 1976–1986, and post-1986). This recognizes that asbestos use in the workplace was much more prevalent in the mid-20th Century than in more recent years. The amendment also delineates three levels of exposure defined by occupation, which acknowledges that some workers (e.g., insulators) experience much more exposure to asbestos than others (e.g., mechanics). Thus, the amendment officially creates a nine-segment grid, assigning greater weight to years spent in high exposure trades and earlier time periods, and lesser weight to more recent years of exposure and those spent in trades with less asbestos exposure generally. Thus, the years a shipyard worker worked during World War II—which were among the heaviest of asbestos exposures—will be counted as four times a normal year of exposure. Our “weighted occupational exposure” provision fairly accommodates the many scenarios that the victims of asbestos exposure will present to the fund to determine appropriate compensation. This weighting calculation will result in a significant assurance that victims receiving compensation from the Fund have experienced an indisputably harmful level of exposure, ensuring a medically sound basis for the classification of the victims into various disease categories.

The Leahy-Hatch medical criteria amendment also requires in-person physician examinations to support the diagnoses of each victim, which will eliminate the mass screenings that have garnered so much attention in the asbestos litigation debate. The Leahy-Hatch medical criteria amendment also requires the use of the diagnostic tests and standards that the medical community agrees upon for diagnosing these lung diseases, to ensure the accuracy of the evidence presented to the Fund. Furthermore, it also permits the Fund Administrator to audit the doctors whose diagnoses are used by claimants, and to refuse to accept submissions from doctors whose diagnoses are not trustworthy.

Finally, the amendment includes a “take home exposure” provision to allow recovery for spouses and family members who were exposed to asbestos from the work clothes of their loved ones and provides eligibility for compensation for victims of the community poisoning cases in Libby, Montana. During our June 4th hearing on the FAIR Act, we 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. We agree wholeheartedly with Senator Murray and Senator Baucus and we were pleased to include these provisions in the consensus medical criteria.

### *C. Safeguarding The Solvency of the Trust Fund*

In our fourth week of Committee consideration, we began to address the critical questions of maintaining the solvency of the fund, and related issues of ensuring that claimants are paid in full in a

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sure and stomach cancer. We strongly urge the Committee to consider the data linking asbestos exposure and colon cancer in drafting the list of qualifying diseases.”

timely manner. As passed out of Committee, this bill still shifts the financial risk of the trust fund approach from defendants and insurers to asbestos victims. Before a final bill is passed we must determine what will be done if the trust fund runs out—or runs short—of money at any time during the next 50 years. The one constant in our experience with projections of asbestos liabilities is that they have invariably been too low. The risk of insolvency in a national trust fund—and the risk of inadequate funding short of insolvency—must be addressed in order to provide certainty to asbestos victims as well as to defendants and insurers.

Indeed, there is no more fundamental concern underlying this bill. 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. What has doomed earlier efforts is the fact that they were all unfunded or drastically under-funded.

We must be wary of the Committee Report's repeated and erroneous assertions that the trust fund will reach \$108 billion in mandatory contributions from defendants and insurers. That \$108 billion figure gained a life of its own in the mark-up of this bill, but we should remember that it is simply an analyst's projection of the likely payments into the fund, not a guaranteed minimum funding. What the bill does provide is a schedule of contributions, broken out into tiers for the defendant companies, with determinations about those companies' obligations to the fund depending on their revenues and their history of asbestos-related expenditures. But we do not even know which specific companies fall into these tiers since the amount of asbestos-related expenditures of most defendant companies is not publicly disclosed and efforts by members of the committee to obtain this information from representatives of the defendant companies has been futile to date. If analysts' projections are correct, the resulting contributions may reach \$108 billion, but if the analysis is in error—or if the dire predictions of more bankruptcies among defendant companies come true—then that number may well be lower.

Successful legislation cannot be predicated on a false promise. There must be money to compensate the victims. As Senator Feinstein pointed out during the markup: "If you just take the experience of the Manville Trust, which is paying 5 cents on the dollar, you know that this is not just pie in the sky, that this is real, and that the worry about inadequate funding is a real worry."

Addressing a key part of this critical issue, Senators Feinstein and Kohl joined together to craft an amendment that would create a contingent funding mechanism to bring in up to \$45 billion in the first 27 years of the fund in case there is an unanticipated surge of claims. Defendant and insurance companies would split the responsibility (\$22.5 billion each) for providing this contingent funding. These funds would only be called for in the event that the basic funding proved to be inadequate.

In addition, the Feinstein-Kohl amendment permits the Administrator of the fund to request up to \$2 billion annually to cover any funding shortfalls, beginning in year 28 of the fund. Up to \$1 billion would come from insurer contributions and up to \$1 billion

would come from defendant company contributions. Companies and insurers could make the voluntary payments requested by the Administrator or instead could choose to opt-out of the fund and be subject to claims in Federal court under a compromise reached with Chairman Hatch.

We supported the ultimate Feinstein-Kohl-Hatch amendment to help address the risk of trust insolvency, giving the trust Administrator limited authority to request additional funds from contributing insurers and defendant companies throughout the life of the fund. As a whole, this amendment gives victims of asbestos exposure greater certainty that they will receive compensation for their injuries.

However, as discussed in Section III of these views, we are still concerned that the trust fund may become insolvent before providing all victims of asbestos exposure with fair compensation for their injuries. If Congress is to prevent an entire group of claimants from seeking justice in our courts, we must guarantee that a no-fault system established by this bill will not deplete its funds before the promise of this legislation can be fulfilled.

#### *D. Fairer Compensation for Asbestos Victims*

The third cornerstone of federal asbestos compensation legislation must be fair, timely, and certain compensation for victims of asbestos-related diseases. During the mark-up, the Committee reached unanimous agreement on the Leahy-Hatch medical criteria, which established ten categories of disease. The Committee also reached an agreement on the principle that the legislation should provide monetary compensation to claimants who had suffered impairment, and should provide medical monitoring to those individuals with less serious asbestos-related conditions. Having reached agreement on disease criteria and on the principle that only those who are ill should receive a monetary award—and bearing constantly in mind that the exposed but less impaired claimants are often receiving substantial sums in settlements of tort suits—it is imperative that the legislation provide fair levels of compensation to impaired individuals who develop the covered diseases.

All of the individuals who qualify for monetary awards under S. 1125 will have significant impairment from their asbestos-related disease. For many individuals these diseases will be fatal. Measured against the health impact and economic impact on victims and their family members, the compensation provided in the bill for many victims clearly is unfair.

During the course of the markup, Senators Feinstein and Graham proposed, and the Committee approved, an amendment that increased claims values for most diseases over those originally proposed in S. 1125. We commend Senators Feinstein and Graham for working in a bipartisan manner to improve compensation values to asbestos victims. As discussed in Section III of these views, we believe the award values proposed by Senators Leahy and Kennedy, discussed in Section III of these views, would provide more appropriate levels of compensation for victims who meet the criteria established under this bill, and that for a number of diseases, and for most victims, the Feinstein-Graham amendment still does

not provide fair compensation. We supported the Feinstein-Graham amendment, however, as a move towards the goal of providing fair and adequate compensation to victims.

Following adoption of the Feinstein-Graham amendment, Senators Leahy and Kohl immediately proposed another amendment, to ensure that the increased promises of the new award values were not empty promises. The Feinstein-Graham schedule of award values would require another \$14 billion in funding, so the Leahy-Kohl amendment provided a corresponding \$14 billion of mandatory contributions—\$7 billion each from defendant companies and insurers—and struck an illusionary section in the original bill that anticipated obtaining \$14 billion in voluntary contributions from additional, unidentified participants that were “likely to avoid future civil liability as a result of this Act.” It is both the intention and the effect of this amendment that the contingent funding mechanism adopted in the Feinstein-Kohl amendment remain unchanged. As Senator Leahy said of the amendment, which was adopted by the Committee, “This just puts the money in the bank to cash the check that we just signed on the amendment of Senator Feinstein and Senator Graham.”

#### *E. Certainty for Asbestos Victims*

At our final markup, Senator Biden offered an amendment to complement the Feinstein-Kohl amendment adopted on June 26th. The Feinstein-Kohl amendment was a positive development to ensure solvency of the trust fund, with periodic checks of the funding levels, starting in 2010. As amended by Feinstein-Kohl, however, the FAIR Act requires a determination of the sufficiency of the trust’s funding prospectively only eight times, beginning in 2010.

Senator Biden’s amendment would require a check on the funding of the system retrospectively every year by providing a sunset to the Act—and reverting asbestos claims to the tort system in the appropriate state or federal court—if the Administrator of the fund fails to certify for any given year that:

- 95% or more of the asbestos claimants who filed claims in that year, and who were determined to be eligible to receive compensation, have received the compensation, and
- 95% or more of the total obligations of the Fund owed to eligible claimants in that year have been paid.

We supported the Biden sunset amendment, which the Committee adopted by an overwhelming vote of 15–4, because we believe this bill must ensure compensation for victims every bit as much as it provides certainty for corporations and insurers facing asbestos liability. If this legislation fails to achieve that goal, it is only fair to allow victims back into the tort system, seeking justice in state or federal court as appropriate under the applicable law before enactment of this Act.

In essence, we agree with Senator Specter, who during consideration of the Biden amendment summed up the need for certainty for asbestos victims:

We are taking away a right to jury trial, which is very substantial, it is a fundamental right, and I think in the interest of the workers who are injured and not being compensated that it is a tough balancing act \* \* \* But I want

to be sure, Mr. Chairman, that if the companies do not put up the money, or whatever point the trust is out of money and there is no more money to be collected by injured people, at least at that stage, they have access to the courts.

This principle received validation by the Committee, with only four Senators refusing to concede that if the trust proves an ineffective solution in paying deserving victims, the legislation must sunset so workers can attain just judgments in our state and federal courts.

### III. MORE IMPROVEMENTS NEEDED TO S. 1125

Senator Specter captured precisely the challenges we face, when he spoke so eloquently of the need for fair and effective alternative evaluative processes if we are to approve legislation that restricts the rights of those harmed by asbestos. Unfortunately, the FAIR Act as reported by the Committee falls short of achieving fairness for all asbestos victims.

Perhaps Senator Biden made the point most aptly at the Committee's first markup session on S. 1125: "Whenever we deny an American citizen a right they now possess under the law, the burden should be on us to make the case overwhelmingly why we are denying that right. Therefore, the benefit of the doubt should be given to the party whom you are about to disenfranchise in some way."

While we agree with the evaluation that, in the case of asbestos, meaningful change in the system is needed, we believe that the benefit of the doubt has not been given to asbestos victims under this legislation.

#### *A. Inadequate Compensation For Asbestos Victims*

Although the Committee improved the award values for asbestos victims on a bipartisan basis, and with our support, we believe the bill still fails to provide fair compensation to all victims of asbestos-related diseases.

The key test of any legislative proposal on asbestos claims is whether, by reducing transaction costs, it would put more money into the pockets of seriously injured workers and their families than under the current system.<sup>97</sup> As a Washington Post editorial noted just prior to the final day of the mark-up, "The more fully Congress can ensure that the average asbestos victim will do better under the trust than in court, the more credibility this important reform will have."<sup>98</sup>

We believe that a properly designed and implemented trust fund can move us toward that goal. Such a trust must not only use medical criteria that cover all workers who have sustained real injuries, but must provide fair levels of compensation for all those injured workers. Moreover, the alternative system must guarantee that all injured workers who qualify for awards will receive that full compensation on a timely basis.

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<sup>97</sup> Dr. Mark Peterson, one of the foremost analysts of asbestos litigation, testified at the Committee's June 4, 2003 hearing on the FAIR Act, on the following average recoveries for asbestos-related diseases in the tort system:

<sup>98</sup> The Washington Post, "An Asbestos Accord," p. A22, July 10, 2003.

As it stands today, this legislation satisfies only one of these three criteria. Even with the Feinstein-Graham amendment, the bill sets levels of compensation that are substantially below what victims, especially those who are seriously ill, currently receive for their injuries. Furthermore, the current funding plan may well be inadequate to fully compensate all eligible victims in a timely manner.

Proponents of this bill argue that in the tort system, too much money finds its way to victims who are not really impaired and not enough money is awarded to those who are truly sick. But their concern for the truly sick certainly finds no real expression in this bill. Lung cancer victims are "truly sick" by anyone's definition and many of them will have their lives cut short by these diseases. Yet, even in these, the most compelling cases, S. 1125 provides grossly inadequate compensation. We are deeply troubled by the way this legislation treats those with the most severe illnesses.

As we have already noted, victims of asbestos with lung cancer who smoked receive particularly inappropriate treatment. As reported by the Committee, this legislation unfairly holds victims accountable for the synergistic effects of smoking and asbestos. When smoking and asbestos are combined, the likelihood, as well as the severity of the resulting disease, is greater than the sum of its parts. Numerous medical experts—in person and in writing— informed the Committee of this harmful combination, and the mutually aggravating effects of smoking and asbestos exposure have been demonstrated at the highest levels of medical science.

**AVERAGE VALUE OF ASBESTOS CLAIMS BY DISEASE CATEGORIES**  
 [Estimated total compensation across all asbestos defendants]

\$40,000 to \$70,000 .....	Pleural plaques and thickening.
\$50,000 to \$125,000 .....	Asbestosis, without loss of lung function.
\$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.

As Dr. Laura Welch discussed in her testimony, the epidemiological studies conducted by Dr. Irving Selikoff have shown that for the more heavily exposed individuals (such as insulation workers), the risk of lung cancer from asbestos exposure is increased five times. Because there is a synergistic relationship between asbestos exposure and smoking, smokers who meet the bill's exposure requirements face a risk of lung cancer that is up to 50 times greater than that of individuals without a history of asbestos exposure or smoking. Moreover, because of this synergistic relationship, the risk of lung cancer for asbestos-exposed workers who smoked is far greater than the risk of lung cancer among those with a similar smoking history who were not exposed to asbestos.<sup>99</sup> In addition, the American Thoracic Society noted in a letter to Chairman Hatch

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<sup>99</sup>Testimony of Dr. 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.

and Senator Leahy, "Asbestos-related lung disease may aggravate or complicate a second disorder, making it more severe than it might be otherwise or tipping a claimant with poor lung function into serious impairment."<sup>100</sup>

Had defendant corporations disclosed to workers the harmful effects of their occupations, victims would have been able to make more informed decisions about their lifestyles. As Doctors L. Christine Oliver and Edwin C. Holstein noted, "If workers had been informed that dust, specifically in the case of asbestos, in their place of work could cause pulmonary impairment \* \* \* we would not be writing this letter."<sup>101</sup> But in S. 1125 as passed by the Committee, a smoker diagnosed with Disease Level VII—an illness that requires 15 weighted years of occupational exposure to asbestos—might receive just four percent of the award granted to a non-smoker. While we support award values that provide greater values where the causation is clearest, we cannot endorse the notion that smokers should find their awards unfairly reduced.

The manner in which this bill treats smokers is particularly onerous in light of the association between asbestos exposure and the most dangerous jobs. As RAND's analysis of asbestos litigation points out, "There were high rates of smoking in the blue-collar industries where asbestos exposure was particularly high."<sup>102</sup> Yet this legislation automatically reduces awards for smokers, and thus fails to meet its stated goal of providing the most compensation to the sickest victims.

We disagree with the claims made in the majority views on the scientific evidence establishing the relationship between asbestos exposure and lung cancer. Specifically, citing the testimony of Dr. James Crapo, the majority views state that "the majority of the medical community has found that lung cancer is generally not related to asbestos exposure unless the claimant has underlying asbestosis or, at least, sufficient exposure to asbestos to have caused asbestosis." The majority views go on to claim "[e]arly studies showing a synergistic effect between smoking and asbestos exposure have not been substantiated by later studies." As noted above, numerous medical experts who testified and wrote to the Committee do not share this view. Similarly, the current body of scientific evidence and scientific consensus on asbestos does not support these statements and claims.

The Tenth Report on Carcinogens issued in December 2002 by the Department of Health and Human Services National Toxicology Program clearly and unequivocally found that exposure to asbestos causes lung cancer and that there is a synergistic relationship between asbestos exposure and lung cancer:

Asbestos and all commercial forms of asbestos are known to be human carcinogens based on sufficient evidence of carcinogenicity in humans (IARC 1982, 1987). Occupational exposure to chrysotile, amosite, anthophyllite, and mixtures containing crocidolite has resulted in a high

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<sup>100</sup> Letter from Homer A. Boushey, Jr. MD, President, American Thoracic Society, to Senator Hatch and Senator Leahy, June 19, 2003, 2.

<sup>101</sup> Letter from Dr. L. Christine Oliver and Dr. Edwin C. Holstein, February 7, 2003, 2-3.

<sup>102</sup> RAND Institute for Civil Justice, "Asbestos Litigation Costs and Compensation: An Interim Report," 17.

incidence of lung carcinomas \* \* \* Both cigarette smoking and occupational exposure to asbestos fibers increase lung cancer incidence independently. When present together, they act multiplicatively (IARC 1973, 1977, 1979, 1982).

This is also the view of the National Cancer Institute, which in its Cancer Facts—Asbestos Questions and Answers, states that asbestos exposure increases the risk of lung cancer, pointing out that “although it is known that the risk to workers increases with heavier exposure and longer exposure time, investigators have found asbestos-related disease in individuals with only brief exposures.” The NCI document also states: “many studies have shown that the combination of smoking and asbestos exposure is particularly hazardous. Smokers who are also exposed to asbestos have a greatly increased risk of lung cancer.”<sup>103</sup>

This is also the consensus scientific view internationally. The International Agency for Research on Cancer (IARC) in its 1987 supplement to the monograph on asbestos found:

The studies of the carcinogenic effect of asbestos exposure, including evidence reviewed earlier [ref: 1], show that occupational exposure to chrysotile, amosite and anthophyllite asbestos and to mixtures containing crocidolite results in an increased risk of lung cancer, as does exposure to minerals containing tremolite and actinolite and to tremolitic material mixed with anthophyllite and small amounts of chrysotile \* \* \* The relationship between asbestos exposure and smoking indicates a synergistic effect of smoking with regard to lung cancer [ref: 1]. Further evaluations indicate that this synergistic effect is close to a multiplicative model [ref: 52,109].”<sup>104</sup>

The Leahy-Kennedy award values amendment offers a more reasoned and fair approach for compensating victims—smokers and non-smokers alike—throughout all ten disease levels established under the bill. The vast majority of claimants, those with Level I sickness, would receive only medical monitoring. While these individuals have clearly suffered the impact of asbestos exposure, the only compensation most will receive is the peace of mind in knowing that if their disease should become more serious, they will be able to seek both treatment and compensation quickly.

The Leahy-Kennedy award values for the other nine levels provide more appropriate measures of compensation than those numbers calculated in the Feinstein-Graham amendment in the midst of the Committee’s markup. For example, those claimants suffering from Class II (Mixed Disease) would receive only \$20,000 under the reported bill. These victims have real impairment, suffering from both restrictive disease and obstructive disease caused by a combination of asbestosis and other causes, such as smoking. Some of the people in this class will be totally disabled, unable to conduct activities of daily living. Providing only \$20,000 for these victims and their families is just not right. Though this value is consider-

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<sup>103</sup> National Cancer Institute, Cancer Facts—Asbestos Questions and Answers (updated July 10, 2003) <http://cis.nci.nih.gov/fact/—21.htm>) (emphasis in original).

<sup>104</sup> IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans. Overall evaluations of Carcinogenicity. Supplement 7., IARC 1987.

ably higher than nothing at all, which is what an earlier Hatch amendment would have granted these impaired victims, the award is far lower than what might be attained in the tort system, with payments on average of \$35,000 to \$50,000. The Leahy-Kennedy amendment proposes compensation at the low end of this range, offering \$35,000 for these victims.

It is estimated that more than 100,000 victims will file claims that will qualify for Level III compensation, which covers asbestosis or pleural disease that has resulted in a 20% to 40% loss of lung function. For these claimants, the Leahy-Kennedy amendment would pay \$110,000. As introduced, S. 1125 set an award of \$40,000, which the Feinstein-Graham amendment increased to \$75,000—a step in the right direction, to be sure, but which will still leave victims to bear much of the cost of their asbestos exposure and its consequences. This is a group of workers with impairment so severe they might not be able to perform their labor-intensive jobs. Available claims data from the Manville Trust and the results of the Sheetmetal Workers asbestos disease screening program provided to the Committee by the AFL-CIO show that more than 40% of the individuals in this group are less than 57 years old, meaning that that many will lose years of employment and have significant economic loss.<sup>105</sup>

Level IV claimants suffer from severe asbestosis, and we think it only fitting to increase the \$300,000 currently offered by S. 1125 to the more reasonable \$400,000 award under the Leahy-Kennedy values. For some reason, the Feinstein-Graham amendment actually lowered the award values for this disease as compared to the original bill. For many with severe asbestosis, their disease will prevent even the most basic daily activities, and these victims will in many cases require regular oxygen in order to alleviate the physical discomfort.

For the sickest non-malignant victims, those in Level V disease, with very severe asbestosis, the Leahy-Kennedy Amendment proposes an \$850,000 award. This category consists of individuals who are totally disabled. Many will die from their disease. They are quite literally suffocated by the asbestos fibers in their lungs and, without question, they deserve more than the \$750,000 approved by the Committee.

Level VI disease—Other Cancers—should have resulted in easy compromise in Committee. The Feinstein-Graham Amendment sets the compensation for these cancer victims at \$150,000. Remarkably, this is less than the \$200,000 award set in the bill as introduced. Many of the other asbestos-related cancers, including stomach cancer, will often be fatal or cause significant disability. In cases where there is a determination that asbestos caused or significantly contributed to the cancer, victims should be appropriately compensated.

The gravest injustice done by the bill is to lung cancer victims. All of the medical categories established by the bill are for asbestos-related diseases, including the lung cancer categories. For each of these lung cancer categories, a significant history of asbestos ex-

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<sup>105</sup> Supporting Documentation for AFL-CIO Disease Distributions, Average Age Assumptions and Incidence projections, April 24, 2003.

posure is required, and for two of the lung cancer categories, underlying non-malignant asbestos disease must also be present, confirming that significant asbestos exposure has occurred. These individuals suffer due to their exposure to this toxin. For the lung cancer and mesothelioma disease levels (VII, VIII, IX, and X), the award values in the Leahy-Kennedy amendment are more in keeping with the severity of the illness and with what claimants would receive in the tort system. If the worker smoked—and unfortunately most of these workers did—the combination of tobacco and asbestos exposure dramatically increases the likelihood of contracting lung cancer.

All of the individuals who would qualify for lung cancer compensation under S. 1125 are at greatly increased risk of lung cancer as a result of their asbestos exposure, and it is more likely than not that asbestos exposure significantly contributed to, or primarily caused, their lung cancer. Because there is a synergistic relationship between asbestos exposure and smoking, smokers who meet the bill's exposure requirements face a risk of lung cancer that is 20 to 90 times greater than that of individuals without a history of asbestos exposure or smoking. Moreover, because of this synergistic relationship, the risk of lung cancer for asbestos-exposed workers who smoked is far greater than the risk of lung cancer among those with a similar smoking history who were not exposed to asbestos.

The compensation values for lung cancer claimants, in the bill as reported out of Committee, are woefully inadequate, particularly for individuals who smoked. S. 1125 as reported established three different categories of lung cancer—lung cancer with exposure (Level VII), lung cancer with pleural disease (Level VII), and lung cancer with asbestosis (Level VIII). For the victims with lung cancer who smoked, which is the vast majority of asbestos lung cancer claimants, awards are set at \$25,000–\$75,000 for Level VII, \$125,000–\$225,000 for Level VIII, and \$300,000–\$400,000 for Level IX. These award levels are unfair. For the majority of lung cancer victims, the disease will be fatal, usually within two years. Many of these victims will have significant medical costs associated with hospitalization, surgery, or chemotherapy. For some victims, S. 1125 compensation awards will not even cover these medical costs, let alone provide compensation for a life-ending disease and financial assurance to those left behind.

While it is reasonable to pay smokers less than non-smokers, they should receive substantial awards which reflect the devastating effect that the disease has had on their lives. The lung cancer compensation levels in the Fair Act as reported are shamefully low. The Leahy-Kennedy Amendment would increase them to more reasonable levels. These values are fair for the victims, and with the financial security offered by a trust, defendants and their insurers will be more than capable of paying these sums.

Our medical criteria have already eliminated what businesses contended were the most troublesome claims. We all say that we need to compensate the truly sick. But fair compensation is not free. We now need to ensure fair compensation for all 10 categories of asbestos-related disease, the five levels of non-malignant disease

of increasing severity and the five levels of cancer, including colorectal cancer, lung cancer and Mesothelioma.

The Committee's bipartisan agreement on medical criteria will be meaningless if we, in effect, rewrite the categories by failing fairly to compensate many who fall within them. Even with consensus on medical criteria, if the award values are unfair, the bill will be unfair and unworthy of our support.

The Leahy-Kennedy proposal on awards values addresses the shortcomings of the bill as approved by the Committee. No payment, from a tort suit or a trust fund, can ever really make someone who has lost their health, or their life, "whole" again, but we should be both compassionate and reasonable as we set these values. We believe the Leahy-Kennedy award values, discussed in Section III of these views, better accomplish this goal. If we fail to achieve fair award values for victims, the Committee's bipartisan agreement on medical criteria will lose all meaning—determining who is truly sick is only useful inasmuch as it provides guidelines for adequately compensating those who suffer from asbestos-induced disease. We now know who is truly sick. We must next make certain that their compensation is fair.

#### *B. Disease, Claims, and Cost Projections*

Developing sound and effective public policy and legislation on asbestos compensation requires an assessment and understanding of the extent of future asbestos related disease, numbers of expected claims for compensation and the resulting costs. During our consideration of the FAIR Act, various projections were made about possible future disease incidence, claims and costs. While attempts were made to harmonize these different estimates and reach agreement on a common set of expected and possible high-end projections, unfortunately, this did not happen. This lack of an agreement on a common set of projections has resulted in constantly changing estimates, which has caused great confusion and impeded reaching a consensus on asbestos compensation legislation.

Projected estimates of future asbestos disease claims provided to the Committee have generally ranged between 1 million and 2.5 million future claims, with the large majority of these claims involving non-malignant asbestos-related disease with no impairment. Many of these estimates are based upon a model developed by Nicholson and Perkel in 1982 to estimate asbestos related cancer mortality. The estimates use this model to develop projected incidence of asbestos-related cancer mortality from mesothelioma, lung cancer and other cancers and based upon claims filing experience, develop estimates of numbers of expected claims. Estimates for non-malignant disease have come from ratios of the number of claims for non-malignant disease to claims for malignant disease.

The major factor that drives all of the estimates is the assumption about filing rates, which has been based upon historical filing experience. As the number of claims for asbestos-related disease has increased over the years, so has the projected number of future claims. There is general agreement that the asbestos disease epidemic is now peaking, and that the number of future disease cases will decrease in coming years. What is less certain, however, is how many of these future cases will result in future claims.

In developing cost estimates for national asbestos compensation legislation, the majority relied upon cost estimates developed by Goldman Sachs based upon projections and assumptions provided by the Asbestos Study Group (ASG) and the insurance carriers. Early in the process, there appeared to be agreement between the ASG, carriers and labor unions on a common set of projections and assumptions that allowed for comparison of alternative proposals and claim values. Unfortunately as the mark-up proceeded, the projections and assumptions provided by the ASG and insurance carriers changed, in some cases dramatically and with no apparent justification, with great impact on projected costs and claim values for asbestos victims.

For example, on July 8 Goldman Sachs provided cost estimates for the Leahy-Kennedy and Graham proposed amendments on claims values that estimated 48,023 total future lung cancer claims for the most likely scenario, and 90,092 for the "stress" case based upon modified projections from the ARPC. Two days later, on July 10, Goldman Sachs provided cost estimates for the Feinstein-Graham claims values amendment that projected future 115,385 lung cancer claims for the most likely case and 139,672 for the "stress" case. No explanation was provided for this change, other than a footnote in the July 10 cost estimate that for the Lung Cancer VII category the cost estimate was utilizing projections provided by Navigant Consulting, not ARPC. This change more than doubled the number of estimated lung cancers. Since the Graham-Feinstein amendment was constructed based upon a fixed fund of \$108 billion, the effect of this change was to significantly lower the award values that could be paid to claimants.

Before final action is taken on any asbestos compensation legislation, it is imperative that a consensus be reached on a common set of disease, claims and cost projections for both the likely case and the high-end case. It is not possible or appropriate to make sound policy decisions or to craft responsible legislation without agreement on the fundamental issue of the extent of future asbestos-related disease and expected claims. With such an agreement, we can move to develop legislation that provides adequate funding to ensure payment of fair compensation for the expected number of claims and contingent funding in the event that the number of expected claims is exceeded.

#### *C. Retroactive Preemption of Settlement Agreements, Jury Verdicts and Pending Cases*

As presently written, the FAIR Act would completely negate all legally binding settlement agreements between asbestos manufacturers and victims, even settlements that have been made by asbestos defendants with claimants that have already been partially paid would be voided under this legislation. In other words, if a victim agreed to take payment of a settlement over a period of time from a defendant in return for dismissing the case, even though the settlement agreement is an enforceable contract, the defendant gets the right to walk away from their obligation under this bill. Needless to say, this result is of questionable constitutionality and will undoubtedly result in expensive, lengthy litigation over its va-

lidity. Victims are punished under this statute for agreeing to settlement terms proposed by asbestos defendants.

Thousands of asbestos claimants entered into such settlement agreements with asbestos manufacturers and have released their claims against asbestos defendants in pending lawsuits. In executing these releases, asbestos victims waived their right to have their claim heard before a judge and jury in exchange for monetary payment. These settlement agreements constitute binding and enforceable contracts, but the FAIR Act negates them all.

Most settlement agreements in asbestos litigation provide for payment terms. Defendants are routinely given a year or more after the cases are settled to pay the claims and installment payments are often made. The FAIR Act would totally absolve defendants from their obligation to honor their contractual commitments and reward double-dealing and delay. That is hardly fair. During markup, several members of the majority joined us in voicing their strong concerns on the inclusion of these unfair provisions in the bill, and Chairman Hatch committed to addressing the bipartisan objections.

Absolving defendants of their contractual obligation to pay settled claims would confer a windfall upon some corporate defendants by absolving them of responsibility to pay for a benefit they already received. An example of this unfairness is the financial windfall conferred on the Halliburton Corporation under the bill as currently written.

On December 18, 2002, Halliburton announced a global settlement of its entire asbestos liability, which would resolve over 150,000 asbestos cases and involved agreements with more than 75 law firms. Under the terms of the settlement Halliburton would pay \$2.8 billion in cash to present victims of asbestos disease and turn over 59.5 million shares of stock to a trust established to care for asbestos victims in the future. In exchange, the plaintiffs have agreed to provide Halliburton and its affiliates with complete release from each of the 150,000 plaintiffs with pending cases and an injunction under section 524(g) of the bankruptcy code barring any future cases against Halliburton and its affiliates.

But now it appears that Halliburton is refusing to implement the settlement in an attempt to bide time to determine whether Congress will enact legislation which gives it a better deal. A June 6, 2003 press release from the company stated that:

Halliburton continues to track legislative proposals for asbestos reform pending in Congress. In determining whether to proceed with the global settlement, Halliburton's board of directors will take into account the current status of these legislative initiatives.<sup>106</sup>

The enactment of the FAIR Act would confer a windfall on Halliburton's bottom line. Jim Wicklund, an analyst at Banc of America Securities was quoted in Reuters as opining that Halliburton's total liability under S. 1125 was \$450 million. When one considers that Halliburton's \$450 million commitment is amortized over a 27-year period, the present value of Halliburton's li-

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<sup>106</sup>See also The Wall Street Journal, "Halliburton to Request Extension on Stay for Asbestos obligations," p. A3, July 21, 2003.

ability under S. 1125 is around \$360 million. Because Halliburton is committed to pay \$4.2 billion under the December 18, 2002 agreement, enactment of S. 1125 would result in a 92% reduction of Halliburton's asbestos liability.

One does not have to be a securities analyst to predict what will occur to Halliburton's stock if S. 1125 is enacted. If S. 1125 as currently drafted becomes law, Halliburton will be suddenly relieved of 92% of its contractual liability and its stock price will skyrocket. In all likelihood, the increase in Halliburton's market capitalization accompanying the enactment of S. 1125 will greatly exceed Halliburton's \$360 million liability under the bill.

Thus, S. 1125 not only represents a 92% bailout of Halliburton's acknowledged and agreed to liability, but it will also enable Halliburton and its executives to enjoy a windfall as the company's stock price shoots upward. Not only will S. 1125 enable Halliburton to pay 92% less than it agreed to; passage of the FAIR Act, as reported by the Committee, will result in a windfall for its executives and shareholders. Again, that is hardly fair.

The FAIR Act would also retroactively extinguish all pending asbestos cases regardless of the stage in the litigation. Asbestos cases currently in trial, or on the verge of trial, would immediately be brought to a halt, case with jury verdicts would end, and all appeals suspended. Again, this is hardly fair.

#### *D. Front-End Funding and Payment Problems*

We are concerned that the FAIR Act, as presently written, fails to provide financial certainty for asbestos victims because of the structure of trust fund contributions and the wide fluctuations in projected estimates of future asbestos victims. As we have repeated again and again, financial certainty for asbestos victims is a fundamental foundation for an effective trust fund.

In addition, the start-up of the national asbestos trust fund presents significant problems both from an administrative and a financial perspective. Unless the bill is amended to significantly contract the universe of claims pending in the tort system and in the bankruptcy trusts that will be extinguished under the bill as written, an estimated 300,000 pending claims will be transferred to the trust. Each will have to be processed regardless of their current status in the tort system. This may result in long delays in payments to victims and perhaps the administrative and financial collapse of the system within a short period.

It will take at least several years for the trust fund to process the 290,000–300,000 asbestos cases that are currently pending. According to expert testimony before the Committee, under the current funding scheme, it might take at least 8 years to fully pay pending claims, even with the inadequate values provided in the reported bill.<sup>107</sup> During this period an additional backlog of 200,000–300,000 cases may develop as new claims come into the system. Many of these victims may never be paid.

Professor Eric Green, who testified at the Committee's June 4th hearing on the FAIR Act on behalf of all representatives of future asbestos victims in bankruptcy trusts, recently wrote to Senator

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<sup>107</sup>See testimony of Dr. Mark Peterson, June 4, 2003 hearing on S. 1125.

Leahy about this potential front end problem in the trust fund. Professor Green wrote:

Another extremely important issue to us is the timing of the contributions to the Fund under the Act. We believe that the Act will be seriously underfunded from the outset and will never catch up. Our experience shows us that approximately 40% of the total funding under a 524(g) trust is needed within the first five years after the trust is established. The Act, on the other hand, calls for only 18% of the total funding to be available in the first 5 years. This will result in a payment backlog beginning on day one and increasing for years to come. Payments to future asbestos victims will be seriously delayed, if not put at risk entirely.<sup>108</sup>

If this solution is to work, it cannot be predicated on a false promise. There must be money to compensate the victims. We cannot allow the money to simply dry up, with the victims left holding the bag.

#### *E. Truly No-Fault Administrative System*

Any alternative compensation system must be truly no-fault to be fair to asbestos victims who will no longer have recourse to the courts. An effective, no-fault, non-adversarial system for processing compensation claims is as vital to the success of this legislation as ensuring adequate funding and fair compensation values, since if the claimants are unable to obtain the awards to which they are entitled in a timely and efficient manner, the system will fail.

In its original version, S.1125 would have created an entirely new court, the U.S. Court of Asbestos Claims, to adjudicate claims for compensation from the Asbestos Injury Claims Resolution Fund. Under the bill as introduced, the President would have nominated a new slate of judges and the Senate would have needed the requisite time to review their backgrounds and consider them for confirmation. The time involved in appointing, confirming and funding a new court would have contributed to delays in processing victims' claims. We appreciate the efforts of Senators Feinstein, Grassley and Sessions who joined us in striking these provisions from S. 1125. On a bipartisan basis, we agreed that a different approach was more desirable than merely clogging a new court with adversarial litigation proceedings.

As amended, the FAIR Act would establish an Office of Special Asbestos Masters under the supervision of the existing U.S. Court of Federal Claims. These special masters are charged with making eligibility determinations within 60 days of receiving a completed file. An individual special master determination is initially reviewable by a panel of three Special Masters and subsequently reviewable by a panel of three judges from the Court of Federal Claims. These special asbestos masters would be under the supervision of the Court of Federal Claims. This structure mirrors the processing of claims under the Vaccine Injury Compensation Program. Only

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<sup>108</sup>July 7, 2003 letter Dr. Green to Senator Leahy.

appeals from determinations of special masters' rulings would be heard in the court system.

The FAIR Act as reported out of Committee, although an improvement over the bill as originally proposed, still falls short of providing an adequate administrative system for the following reasons. First, the proposed court-based system does not allow for centralized, uniform policy development. There is neither a representative board nor an administrator authorized to oversee the system, engage in substantive rulemaking, or guide policy development. Instead, there is only a chief special asbestos master, whose administrative authority is limited to prescribing procedural rules, contracting for necessary personnel and making expenditures necessary for the office to fulfill its functions. While the system is ostensibly intended to provide fair compensation in a non-adversarial manner, nothing in the structure appears to encourage or even permit the special masters or other personnel to engage in a consultative process that would assist individuals in filing claims and securing any compensation to which they are entitled.

Second, delegating important rule-making authority to officers of the Court of Federal Claims is not the best method to ensure the unique goals of the FAIR Act. The court-based system in the existing bill does not involve a representative board or an administrator authorized to oversee the claims processing system. The same judicial officers who would be considering the victims' claims would also be promulgating rules that might dramatically affect victims' access to recovery. While the system is explicitly intended to provide fair compensation in a nonadversarial manner, nothing in the structure appears to encourage or even permit the special masters or claims examiners to engage in a consultative process that would assist individuals in filing claims and securing any compensation to which they are entitled.

The Court of Federal Claims is not well-suited to develop methods for auditing medical evidence, to prescribe rules for implementing diagnostic criteria requirements, or to develop rules for identifying presumptive industries for significant occupational exposure determinations as is expressly required by the bill's language. Nor is it an appropriate body for performing other administrative functions integral to the overall compensation system, including, for example, outreach activities, management of the trust fund, and rulemaking when, as a result of recommendations from the Medical Advisory Committee, it is necessary to update the medical or diagnostic criteria.

To ensure a truly "no-fault," non-adversarial system, with minimized transaction costs, this legislation should establish an independent agency or trust fund to administer the compensation program. The hallmarks of such a system would include:

- (a) Policy leadership by a board comprised of representatives of the parties to this process—i.e., claimants, defendant corporations and insurance companies, labor representatives, and public health professionals;
- (b) Centralized oversight of claims handling, to provide quality assurance, to ensure that claims are processed in a manner consistent with the fund's objectives and are processed expeditiously;

(c) A non-adversarial, “user-friendly” process, in which personnel are charged with assisting the claimants in presenting their claims and securing necessary documentation, and decision makers are authorized to engage in a consultative process with claimants;

(d) An independent process within the administrative system to resolve disputes arising from claims determinations; and

(e) A final opportunity for judicial review on the record at the court of appeals level.

If the goal of the FAIR Act is to resolve the vast majority of claims without clogging the courts, an administrative review process is a better solution. Amending the current legislation to include an administrative process would resolve more claims in less time. In addition, an administrative agency would be in a better position to adopt standards consistent with the express purpose of an alternative to the tort system and to manage the initial consideration of the large volume of claims.

Inserting an administrative review process would uphold the consensus goals of claims resolution in a no fault, non-adversarial system. Judicial review would remain available but the need for such court-based resources would be reduced with the addition of an administrative process.

#### *F. Other Unfair Provisions in S. 1125*

The Committee-reported bill, while establishing a presumption that awards will be paid within three years, does not require that any portion of a claimant’s award be paid before the three years are up. Consequently, nothing in the bill would prevent the Fund from forcing claimants who have been determined to be eligible for an award to wait a full three years—and in some cases four years—before they are paid a penny of what they are due. If payments are to be spread out over a period of three years, there must be protections to ensure that they are spread at least evenly over that period, and that claimants begin receiving their compensation immediately upon receipt of a determination of eligibility. To enact this legislation without such protections would make a mockery of the bill’s promise of prompt compensation.

If the FAIR Act were enacted in its current form, railroad workers would lose their only recourse against an employer for compensation for injuries resulting from exposure to asbestos while all other workers would see their injury compensation program remain intact. Under S. 1125, railroad workers would be unfairly singled out because the bill preempts The Federal Employers’ Liability Act (FELA).

The FELA is both an injury compensation statute as well as a safety statute. Congress established the FELA for two primary reasons: (1) to provide compensation for injured railroad workers; and, (2) to provide an incentive to American railroads to operate safely by holding them accountable for the safety of their workers.

The legislative effort to find a solution to the current asbestos crisis is laudable; however, any legislation aimed at providing a remedy should not come at the expense of one group of workers. S. 1125, as introduced, unfortunately does that by singling out railroad workers and treating their injury compensation rights dif-

ferently than all other workers. S. 1125 should be amended to remove this obvious inequity for railroad workers.<sup>109</sup>

In addition, we believe that the provisions for medical monitoring in the FAIR Act need to be improved to be both effective and fair. We agree that medical monitoring is appropriate compensation for Level 1 disease victims, and if these victims become sicker, they will be compensated according to their illness as it progresses and their health declines.

But to be effective and fair to these victims of asbestos exposure, medical monitoring should not be offset by a victim's health insurance as is currently required by S. 1125. These costs are properly borne by the defendant and their insurers, and a worker should not be penalized because he or she had the foresight and means to purchase health insurance. Medical monitoring compensation by the Fund should also include the cost of the initial diagnosis of asbestos-related disease as a matter of basic fairness.<sup>110</sup>

Another clear unfairness in S. 1125 is that victims suffering from asbestos-related diseases may have their awards reduced to repay any insurance carrier, or any provider of workers' compensation. The failure to protect compensation awards from this subrogation is contrary to many existing victim compensation programs. For example, the Radiation Exposure Compensation Act of 1990, the Energy Employees Occupational Illness Compensation Program Act, and the Ricky Ray Hemophiliac Relief Fund Act of 1998 all contain strong anti-subrogation language to protect awards to victims under these compensation programs.<sup>111</sup>

In addition, this bill fails to provide medical screening for high-risk workers. More than 27 million workers have been exposed to asbestos on the job. For an asbestos compensation program to be successful and truly serve workers, the program must provide a way to identify those workers at high risk and provide them information and medical screening and easy access to the system. The FAIR Act provides medical monitoring for individuals who have been diagnosed with pleural disease or asbestosis, but who are not yet ill, to evaluate if their conditions have worsened and if further medical treatment is needed. The bill, however, fails to provide medical screening of high risk workers to determine if they have developed disease.

Medical screening of high-risk workers who have been exposed to toxic substances is an established practice. Virtually every health standard issued by the Occupational Safety and Health Administration requires medical surveillance of workers who are currently exposed above specified levels of toxic substances. The Mine Safety

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<sup>109</sup> During Committee consideration of S. 1125, Senator Durbin offered an amendment to strike the preemption of FELA from the bill. Unfortunately, this amendment was defeated on a party-line vote, with all members of the majority voting against it and all members of the minority voting for it.

<sup>110</sup> During Committee consideration of S. 1125, Senator Leahy offered an amendment to strike the requirement that the victim first resort to his or her health insurance to pay monitoring costs and to include the cost of the initial diagnosis of asbestos-related disease as part of medical monitoring compensation. Unfortunately, this amendment was defeated on a party-line vote, with all members of the majority voting against it and all members of the minority voting for it.

<sup>111</sup> During Committee consideration of S. 1125, Senator Leahy offered an amendment to add the same anti-subrogation provisions from these three existing federal compensation programs to this bill. Unfortunately, this amendment was defeated on a party-line vote, with all members of the majority voting against it and all members of the minority voting for it.

and Health Administration requires routine medical screening of coal miners to determine if they have developed coal workers pneumoconiosis. In 1993, the Department of Energy (DOE) established an outreach and screening program for former workers who had been employed at the DOE atomic weapons facilities who are at high risk of disease due to exposure to beryllium, radiation and other workplace hazards. Such initiatives are intended to identify possible health changes or disease as early as possible, so that steps can be taken to reduce exposures and risk and to facilitate appropriate medical treatment. While OSHA requires medical surveillance of workers currently exposed to asbestos, there is no requirement for medical screening for workers who were formerly exposed to asbestos and now at an increased risk of asbestos-related disease.

Final asbestos compensation legislation should include provision for the establishment of an outreach and medical screening program for workers at high risk of disease. This program should be funded by the asbestos trust fund, but to ensure quality and independence should be overseen by the National Institute for Occupational Safety and Health (NIOSH), the government agency responsible for worker safety and health research. NIOSH should establish the medical protocols and standards for the screening program and identify those groups that should be included in a screening program due to their high levels of past exposures. In addition, NIOSH should identify and enter into contracts with qualified providers to carry out this screening. These providers should be organizations or institutions with experience and expertise that have the ability to reach individuals at high risk.

Medical screening of workers who have had significant occupational exposure to asbestos and medical monitoring of claimants who meet the exposure and medical requirements for Category 1 will help to ensure that these individuals receive timely diagnosis and treatment and are educated about actions they can take to reduce their future health risk. The public health benefits of these measures will, however, be undermined if workers who take advantage of these opportunities are discriminated against by health plan or health insurers because their participation in these programs identifies them as being at high risk for serious asbestos disease.

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA), to prohibit health plans and health insurers from discriminating against individuals on the basis of health status and various enumerated health status-related factors. Although we believe that participation in medical screening or medical monitoring is a "health-related factor" that falls within the protection of that Act, there is some ambiguity in the statute. Therefore, we strongly support adding provisions to the FAIR Act to clarify that workers participating in any monitoring or screening program established in this bill cannot be denied or lose their health coverage for that reason.

Moreover, we believe this legislation should exempt investment income in the fund from federal income tax in order to increase the funds available to compensate victims, much as the investment income in a 401(k) savings plan is currently treated under the Inter-

nal Revenue Code. This tax incentive is particularly appropriate given the federal government's role in exposing so many veterans to asbestos-related products. Under current law, trusts established for the sole purpose of compensating asbestos victims are taxed at the high rate of 38%, thus limiting the funds available to asbestos victims.<sup>112</sup> We also believe that defendant and insurer contributions and awards to claimants should be exempt from taxation. We look forward to working with Chairman Grassley and Ranking Member Baucus of the Finance Committee to increase asbestos victim compensation through appropriate tax treatment of the trust fund, contributions and awards.

#### IV. CONCLUSION

Although we have authored and supported many bipartisan improvements to this legislation—from medical criteria to solvency safeguards to higher award values—this bill still has many problems that need to be worked out before we can support it.

Our undertaking is complex and unprecedented. It has not been 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. We want to make every effort to solve this crisis, and we commend and encourage all who are working in good faith to help do that.

Certainty for defendants and insurers is a fine objective but it must be coupled with fairness to the asbestos victims whose rights this bill takes away. We have emphasized again and again one basic, bedrock principle throughout this process: We will not support a bill that contains inadequate compensation for victims.

As it currently stands, this is not a bill that reduces the high transaction costs in the current system, and 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. For these reasons, we must vote “no.” We can do better than this.

Because consensus remains the best hope for us to pass a bill this year, and because this matter is so important, as disappointed as we are in the final product of the Committee’s deliberations, we intend to continue working for a fair solution to this problem. We seek a bill that we can support and that we can in good conscience urge our colleagues to support. We are discouraged, but not resigned.

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<sup>112</sup>Indeed, in response to questions at Committee’s hearing on asbestos litigation last September, David Austern, President of the Manville Trust, estimated that exempting investment income from federal taxation would increase the funds available to pay asbestos victims by \$100 million for the Manville Trust alone.

We need to continue our bipartisan work to achieve the common ground needed to enact a good law. Acting together through consensus remains, in our view, the only way to move a bill through the legislative process and into law.

PATRICK J. LEAHY.  
EDWARD M. KENNEDY.  
JOSEPH R. BIDEN, Jr.  
HERBERT KOHL.  
RUSSELL D. FEINGOLD.  
CHARLES E. SCHUMER.  
RICHARD J. DURBIN.  
JOHN EDWARDS.

## MINORITY VIEW OF SENATOR BIDEN

Senator Biden joins in the minority views of Senators Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, Durbin and Edwards, but finds it necessary to express separate views with regard to the majority's discussion of the sunset provision in Section 404 of S. 1125 (the "Biden Sunset"), as well as footnote 67's discussion of the same provision. As accurately described in Senator Leahy's minority views, the Biden Sunset complements the Feinstein-Kohl provision to ensure solvency of the trust fund, which provides periodic checks of the funding levels, starting in 2010. The Biden Sunset will check solvency every year and permit reversion to the traditional tort system, including state and federal courts, the year after the fund fails to make its payments. It is only fair to return the victims to where they were beforehand—the tort system.

Specifically, the Biden Sunset amendment would sunset the fund and revert asbestos claims to the traditional tort system if the Administrator of the Office of Special Asbestos Masters fails to certify for any given year that: (1) 95 percent or more of the asbestos claimants who filed claims in that year, and who were determined to be eligible to receive compensation, have received the compensation, and (2) 95 percent or more of the total obligations of the Fund owed to eligible claimants in that year have been paid.

S. 1125 would abridge victims' rights as they currently exist under the tort system. If Congress abridges those rights, it must be certain that the solution it creates will work 100% as planned. The Biden Sunset makes certain that this legislation ensures compensation for victims to the same extent that it aids corporations facing asbestos liability. Just as corporations are to be granted certainty, victims must be granted the certainty that they will receive the compensation to which they are entitled. Under the Biden Sunset, if the legislation fails to achieve that goal, even after the various backstops and safety nets created by the fund have come into effect, it is only fair to put the victims back in the position they would have been in absent the legislation.

Thus, the Biden Sunset serves as the ultimate backstop to insure fairness in the system, whether in year 1, or in year 29 when the fund continues to operate only on a voluntary basis.

Senator Biden strongly disagrees with the following statement in the majority report's discussion of Section 404:

The Committee is concerned that this Amendment was adopted without a full understanding of the actual language and the harsh consequences, ramifications and implications thereof. The sponsor of the Amendment, Senator Biden, has agreed to work with Members to develop appropriate language to mitigate any unintended consequences of this provision before floor consideration of S. 1125.

First, this provision was more carefully debated and analyzed than virtually all other provisions of the bill. Indeed, in a very rare move, the roll call vote on the amendment was suspended so that all Senators could fully understand the provision. When the vote resumed, it passed by an overwhelming, bipartisan margin of 15–4. Second, the consequences of the provision are fairness, justice, and certainty, attributes that Senator Biden finds neither “harsh” nor “unintended.” Third, as the majority well knows, Senator Biden has not “agreed to work with Members to develop appropriate language to mitigate” the effects of the Biden Sunset. He has consented to no changes in the provision, but, in a private conversation with Chairman Hatch and Senator Graham of South Carolina, agreed to consider possible proposals to modify the way the Biden Sunset is applied at the outset of the Fund.

JOSEPH R. BIDEN.

## XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1125, as reported, are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

# UNITED STATES CODE

\* \* \* \* \*

## TITLE 11—BANKRUPTCY

Chapter	Section
1. General Provisions .....	101
3. Case Administration .....	301

\* \* \* \* \*

### CHAPTER 3—CASE ADMINISTRATION

#### Subchapter Commencement of a Case

\* \* \* \* \*

#### Subchapter IV—Administrative Powers

361. Adequate protection.  
363. Automatic stay.

\* \* \* \* \*

#### § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

\* \* \* \* \*

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

\* \* \* \* \*

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff

of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any sway agreement or against cash, securities, or the property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; [or]

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition[.]; or

(19) under subsection (a) of this section of the enforcement of any payment obligations under section 204 of the Fairness in Asbestos Injury Resolution Act of 2003, against a debtor, or the property of the estate of a debtor, that is a participant (as that term is defined in section 3 of that Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

\* \* \* \* \*

### **§ 365. Executory contracts and unexpired leases**

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

\* \* \* \* \*

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p) If a debtor is a participant (as that term is defined in section 3 of the Fairness in Asbestos Injury Resolution Act of 2003), the trustee shall be deemed to have assumed all executory contracts entered into by the participant under section 204 of that Act. The trustee may not reject any such executory contract.

\* \* \* \* \*

## **CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE**

### **Subchapter I—Creditors and Claims**

Sec.

501. Filing of proofs of claims or interests

\* \* \* \* \*

503. Allowance of administrative expenses.

\* \* \* \* \*

### **§ 503. Allowance of administrative expenses**

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

\* \* \* \* \*

*(c)(1) Claims or expenses of the United States, the Attorney General, or the Administrator (as that term is defined in section 3 of the Fairness in Asbestos Injury Resolution Act of 2003) based upon the asbestos payment obligations of a debtor that is a Participant (as that term is defined in section 3 of that Act), shall be paid as an allowed administrative expense. The debtor shall not be entitled to either notice or a hearing with respect to such claims.*

*(2) For purposes of paragraph (1), the term “asbestos payment obligation” means any payment obligation under subtitle B of title II of the Fairness in Asbestos Injury Resolution Act of 2003.*

\* \* \* \* \*

## **Subchapter II—Debtor’s Duties and Benefits**

521. Debtor’s duties.

\* \* \* \* \*

523. Exceptions to discharge.

\* \* \* \* \*

### **§ 523. Exceptions to discharge**

(a) A discharge under section 724, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

\* \* \* \* \*

(e) Any institution-affiliated party of a<sup>1</sup> insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

*(f) A discharge under section 727, 1141, 1228, or 1328 of this title does not discharge any debtor that is a participant (as that term is defined in section 3 of the Fairness in Asbestos Injury Resolution Act of 2003) of the payment obligations that is a debtor under subtitle B of title II of that Act.*

### **§ 524. Effect of discharge**

(a) A discharge in a case under this title—

\* \* \* \* \*

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<sup>1</sup> So in original. Probably should be “an”.

(h) Application to existing injunctions.—For purposes of subsection (g)—

\* \* \* \* \*

(i) *PARTICIPANT DEBTORS.*—

(1) *IN GENERAL.*—Paragraphs (2) and (3) shall apply to a debtor who—

(A) is a participant that has made prior asbestos expenditures (as such terms are defined in the Fairness in Asbestos Injury Resolution Act of 2003); and

(B) is subject to a case under this title that is pending—

(i) on the date of enactment of the Fairness in Asbestos Injury Resolution Act of 2003; or

(ii) at any time during the 1-year period preceding the date of enactment of that Act.

(2) *TIER 1 DEBTORS.*—A debtor that has been assigned to tier I under section 202 of the Fairness in Asbestos Injury Resolution Act of 2003 shall make payments in accordance with sections 202 and 203 of that Act.

(3) *TREATMENT OF PAYMENT OBLIGATIONS.*—All payment obligations of a debtor under sections 202 and 203 of the Fairness in Asbestos Injury Resolution Act of 2003 shall—

(A) constitute costs and expenses of administration of a case under section 503 of this title;

(B) notwithstanding any case pending under this title, be payable in accordance with section 202 of that Act;

(C) not be stayed;

(D) not be affected as to enforcement or collection by any stay or injunction of any court; and

(E) not be impaired or discharged in any current or future case under this title.

(j) *ASBESTOS TRUSTS.*—

(1) *IN GENERAL.*—A trust shall assign a portion of the corpus of the trust to the Asbestos Injury Claims Resolution Fund (referred to in this subsection as the “Fund”) as established under the Fairness in Asbestos Injury Resolution Act of 2003 if the trust qualifies as a “trust” under section 201 of that Act.

(2) *TRANSFER OF TRUST ASSETS.*—

(A) *IN GENERAL.*—Except as provided under subparagraphs (B) and (C), the assets in any trust established to provide compensation for asbestos claims (as defined in section 3 of the Fairness in Asbestos Injury Resolution Act of 2003) shall be transferred to the Fund not later than 6 months after the date of enactment of the Fairness in Asbestos Injury Resolution Act of 2003. Except as provided under subparagraph (B), the Administrator of the Fund shall accept such assets and utilize them for any purposes of the Fund under section 223 of such Act, including the payment of claims for awards under such Act to beneficiaries of the trust from which the assets were transferred. After such transfer, each trustee of such trust shall have no liability to any beneficiary of such trust.

(B) *AUTHORITY TO REFUSE ASSETS.*—The Administrator of the Fund may refuse to accept any asset that the Admin-

*istrator determines may create liability for the Fund in excess of the value of the asset.*

(C) ALLOCATION OF TRUST ASSETS.—*If a trust under subparagraph (A) has beneficiaries with claims that are not asbestos claims, the assets transferred to the Fund under subparagraph (A) shall not include assets allocable to such beneficiaries. The trustees of any such trust shall determine the amount of such trust assets to be reserved for the continuing operation of the trust in processing and paying claims that are not asbestos claims. Such reserved amount shall not be greater than 3 percent of the total assets in the trust and shall not be transferred to the Fund.*

(D) SALE OF FUND ASSETS.—*The investment requirements under section 222 of the Fairness in Asbestos Injury Resolution Act of 2003 shall not be construed to require the Administrator of the Fund to sell assets transferred to the Fund under subparagraph (A).*

(E) LIQUIDATED CLAIMS.—*A trust shall not make any payment relating to asbestos claims unless such claims were liquidated in the ordinary course and the normal and usual administration of the trust consistent with past practices before the date of enactment of the Fairness in Asbestos Injury Resolution Act of 2003.*

(3) INJUNCTION.—*Any injunction issued as part of the formation of a trust described in paragraph (1) shall remain in full force and effect.*

\* \* \* \* \*

### Subchapter III—The Estate

541. Property of the estate.

\* \* \* \* \*

546. Limitations on avoiding powers.

\* \* \* \* \*

#### § 546. Limitation on avoiding powers.

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

\* \* \* \* \*

(h) *Notwithstanding the rights and powers of a trustee under sections 544, 545, 547, 548, 549, and 550 of this title, if a debtor is a participant (as that term is defined in section 3 of the Fairness in Asbestos Injury Resolution Act of 2003), the trustee may not avoid a transfer made by the debtor pursuant to its payment obligations under section 202 or 203 of that Act.*

## CHAPTER 11—REORGANIZATION

### Subchapter I—Officers and Administration

\* \* \* \* \*

## Subchapter II—The Plan

1121. Who may file a plan.	*	*	*	*	*	*	*
1129. Confirmation of plan.	*	*	*	*	*	*	*

### § 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

\* \* \* \* \*

*(14) If the debtor is a participant (as that term is defined in section 3 of the Fairness in Asbestos Injury Resolution Act of 2003), the plan provides for the continuation after its effective date of payment of all payment obligations under title II of that Act.*

## TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Part		Section
I. CRIMES .....	*	1

### PART I—CRIMES

Chapter		Section
1. General provisions .....	*	1
39. Explosives and combustibles .....	*	831
39A. Ban of asbestos containing products .....	*	838

### CHAPTER 39—EXPLOSIVES AND OTHER DANGEROUS ARTICLES

Sec.		
831. Prohibited transactions involving nuclear materials.		
[832 to 835. Repealed.]		
836. Transportation of fireworks into State prohibiting sale or use.		
[837. Repealed.]		
838. Ban of asbestos containing products.	*	

### CHAPTER 39A—BAN OF ASBESTOS CONTAINING PRODUCTS

#### § 838. Ban of asbestos containing products

(a) *DEFINITIONS.—In this chapter:*

- (1) *ADMINISTRATOR.—The term “Administrator” means the Administrator of the Environmental Protection Agency.*
- (2) *ASBESTOS.—The term “asbestos” includes—*
  - (A) *chrysotile;*
  - (B) *amosite;*

- (C) crocidolite;
- (D) tremolite asbestos;
- (E) winchite asbestos;
- (F) richterite asbestos;
- (G) anthophyllite asbestos;
- (H) actinolite asbestos;
- (I) any of the minerals listed under subparagraphs (A) through (H) that has been chemically treated or altered, and any asbestosiform variety, type or component thereof.

(3) ASBESTOS CONTAINING PRODUCT.—The term “asbestos containing product” means any product (including any part) to which asbestos is deliberately or knowingly added or used because the specific properties of asbestos are necessary for product use or function. Under no circumstances shall the term “asbestos containing product” be construed to include products that contain de minimis levels of naturally occurring asbestos as defined by the Administrator not later than 1 year after the date of enactment of this chapter.

(4) DISTRIBUTE IN COMMERCE.—The term “distribute in commerce”—

(A) has the meaning given the term in section 3 of the Toxic Substances Control Act (15 U.S.C. 2602); and

(B) shall not include—

(i) an action taken with respect to an asbestos containing product in connection with the end use of the asbestos containing product by a person that is an end user, or an action taken by a person who purchases or receives a product, directly or indirectly from an end user; or

(ii) distribution of an asbestos containing product by a person solely for the purpose of disposal of the asbestos containing product in compliance with applicable Federal, State, and local requirements.

(b) IN GENERAL.—Subject to subsection (c), the Administrator shall, after consultation with the Assistant Attorney General for the Environmental and Natural Resources Division of the United States Department of Justice, promulgate—

(1) not later than 1 year after the date of enactment of this chapter, proposed regulations that—

(A) prohibit persons from manufacturing, processing, or distributing in commerce asbestos containing products; and

(B) provide for implementation of subsections (c) and (d); and

(2) not later than 2 years after the date of enactment of this chapter, final regulations that, effective 60 days after the date of promulgation, prohibit persons from manufacturing, processing, or distributing in commerce asbestos containing products.

(c) EXEMPTIONS.—

(1) IN GENERAL.—Any person may petition the Administrator for, and the Administrator may grant an exemption from the requirements of subsection (b), if the Administrator determines that—

(A) the exemption would not result in an unreasonable risk of injury to public health or the environment; and

(B) the person has made good faith efforts to develop, but has been unable to develop, a substance, or identify a mineral that does not present an unreasonable risk of injury to public health or the environment and may be substituted for an asbestos containing product.

(2) **TERMS AND CONDITIONS.**—An exemption granted under this subsection shall be in effect for such period (not to exceed 5 years) and subject to such terms and conditions as the Administrator may prescribe.

(3) **GOVERNMENTAL USE.—**

(A) **IN GENERAL.**—The Administrator of the Environmental Protection Agency shall provide an exemption from the requirements of subsection (a), without review or limit on duration, if such exemption for an asbestos containing product is—

(i) sought by the Secretary of Defense and the Secretary certifies, and provides a copy of that certification to Congress, that—

(I) use of the asbestos containing product is necessary to the critical functions of the Department;

(II) no reasonable alternatives to the asbestos containing product exist for the intended purpose; and

(III) use of the asbestos containing product will not result in an unreasonable risk to health or the environment; or

(ii) sought by the Administrator of the National Aeronautics and Space Administration and the Administrator of the National Aeronautics and Space Administration certifies, and provides a copy of that certification to Congress, that—

(I) the asbestos containing product is necessary to the critical functions of the National Aeronautics and Space Administration;

(II) no reasonable alternatives to the asbestos containing product exist for the intended purpose; and

(III) the use of the asbestos containing product will not result in an unreasonable risk to health or the environment.

(B) **ADMINISTRATIVE PROCEDURE ACT.**—Any certification required under subparagraph (A) shall not be subject to chapter 5 of title 5, United States Code (commonly referred to as the “Administrative Procedure Act”).

(4) **SPECIFIC EXEMPTIONS.**—The following are exempted:

(A) Asbestos diaphragms for use in the manufacture or chlor-alkali and the products and derivative therefrom.

(B) Roofing cements, coatings and mastics utilizing asbestos that is totally encapsulated with asphalt, subject to a determination by the Administrator of the Environmental Protection Agency under paragraph (5).

(5) **ENVIRONMENTAL PROTECTION AGENCY REVIEW.**—

(A) *REVIEW IN 18 MONTHS.*—Not later than 18 months after the date of enactment of this chapter, the Administrator of the Environmental Protection Agency shall complete a review of the exemption for roofing cements, coatings, and mastics utilizing asbestos that are totally encapsulated with asphalt to determine whether—

- (i) the exemption would result in an unreasonable risk of injury to public health or the environment; and
- (ii) there are reasonable, commercial alternatives to the roofing cements, coatings, and mastics utilizing asbestos that is totally encapsulated with asphalt.

(B) *Revocation of exemption.*—Upon completion of the review, the Administrator of the Environmental Protection Agency shall have the authority to revoke the exemption for the products exempted under paragraph (4)(B) if warranted.

(d) *DISPOSAL.*—

(1) *IN GENERAL.*—Except as provided in paragraph (2), not later than 3 years after the date of enactment of this chapter, each person that possesses an asbestos containing product that is subject to the prohibition established under this section shall dispose of the asbestos containing product, by a means that is in compliance with applicable Federal, State, and local requirements.

(2) *EXEMPTION.*—Nothing in paragraph (1)—

- (A) applies to an asbestos containing product that—
  - (i) is no longer in the stream of commerce; or
  - (ii) is in the possession of an end user or a person who purchases or receives an asbestos containing product directly or indirectly from an end user; or
- (B) requires that an asbestos containing product described in subparagraph (A) be removed or replaced.

\* \* \* \* \*

## **CHAPTER 63—MAIL FRAUD**

Sec.

1341. Frauds and swindles.

\* \* \* \* \*

1347. Health care fraud.

1348. *Fraud and false statements in connection with participation in Asbestos Injury Claims Resolution Fund.*

\* \* \* \* \*

### **§ 1348. Fraud and false statement in connection with participation in Asbestos Injury Claims Resolution Fund**

(a) *FRAUD RELATING TO ASBESTOS INJURY CLAIMS RESOLUTION FUND.*—Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice to defraud the Asbestos Insurers Commission or the Office of Asbestos Injury Claims Resolution under title II of the Fairness in Asbestos Injury Resolution Act of 2003 shall be fined under this title or imprisoned not more than 20 years, or both.

(b) *FALSE STATEMENTS RELATING TO ASBESTOS INJURY CLAIMS RESOLUTION FUND.*—Whoever, in any matter involving the Asbestos

*Insurers Commission or the Office of Asbestos Injury Claim Resolution, knowingly and willfully—*

- (1) *falsifies, conceals, or covers up by any trick, scheme, or device a material fact;*
- (2) *makes any materially false, fictitious, or fraudulent statements or representations; or*
- (3) *makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the award of a claim or the assessment of contributions under title I or II of the Fairness in Asbestos Injury Resolution Act of 2003 shall be fined under this title or imprisoned not more than 10 years, or both.*

\* \* \* \* \*

