S. HRG. 106–931

FINDING SOLUTIONS TO THE ASBESTOS LITIGATION PROBLEM: THE FAIRNESS IN ASBESTOS COMPENSATION ACT OF 1999

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 758

TO ESTABLISH LEGAL STANDARDS AND PROCEDURES FOR THE FAIR, PROMPT, INEXPENSIVE, AND EFFICIENT RESOLUTION OF PERSONAL INJURY CLAIMS ARISING OUT OF ASBESTOS EXPOSURE, AND FOR OTHER PURPOSES

OCTOBER 5, 1999

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FINDING SOLUTIONS TO THE ASBESTOS LITIGATION PROBLEM: THE FAIRNESS IN ASBESTOS COMPENSATION ACT OF 1999

TUESDAY, OCTOBER 5, 1999

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Also present: Senators Sessions, Ashcroft, Torricelli, and Schumer.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Good morning, everybody, I welcome you all to the hearing on the Fairness in Asbestos Compensation Act.

My interest in this legislation stems from a desire to make sure that justice is being done and that people stuck in the current system who are truly sick can get compensated as quickly as possible. Asbestos litigation has bedeviled the Federal and State court system for almost 30 years. In the last decade, however, a crisis has developed and there appears to be no end in sight to the filings.

The Administrative Office of the U.S. Courts says the number of asbestos suits filed between 1997 and 1998 has increased 27 percent. The current judicial rules and procedures do not appear to have resolved these claims in an effective manner. There are, of course, staggeringly high costs to asbestos litigation. Moreover, huge payments paid out to nonsick claimants and plaintiffs' lawyers have bankrupt many of the defendant companies, and that has essentially prevented many of the genuinely sick from ever receiving appropriate compensation.

The problem is not new. The courts and the Congress have been struggling with this for some time. In the early 1990's, the Judicial Conference convened an Ad Hoc Committee on Asbestos Litigation and this is what they had to say about it, "Dockets in both Federal and State courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over again; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether."

At House and Senate Judiciary Committee hearings, witnesses reiterated their concerns with the ability of the judicial system to deal with the morass of asbestos cases, and urged Congress to find a national remedy.

Even the U.S. Supreme Court itself has directly called upon Congress to formulate a legislative solution. In the 1997 *Amchem* decision, Justice Ginsburg suggested that, ''a nationwide administrative claims processing regime would provide the most secure, fair and efficient means of compensating victims of asbestos exposure.''

In that case, the Supreme Court rejected the settlement because the class failed to satisfy rule 23(b)(3) requirements. The group of plaintiffs was too dissimilar. Some members of the class had manifested symptoms of asbestos exposure, while others had not. So the Court concluded that the disparities among plaintiffs precluded class certification.

Just this past June, in the *Ortiz* case, the Supreme Court again called for a national solution. Justice Souter said that, ''the elephantine mass of asbestos cases * * * defies customary judicial administration and calls for national legislation * * * to date Congress has not responded.'' Rehnquist then echoed, ''The elephantine mass of asbestos cases cries out for a legislative solution.''

Today, we will hear about the problems and whether S. 758 provides us with an efficient, equitable remedy. Clearly, the current system is not working. This bill before us today would create a nationwide administrative claims resolution process to compensate victims.

Although I believe that most everyone would agree something needs to be done to fix the problems, people disagree about how to do it. Today we will hear from our colleagues from the other body about the bill currently being considered are going on before the House Judiciary Committee, but even they are suggesting changes in their original bill as originally introduced which was essentially identical to the Senate version introduced in the Senate.

For the sake of the victims and their families, we need to carefully analyze the unique problems presented to devise the most fair process possible so compensation gets to those that have been truly injured by asbestos. Because of the different interests involved and the complexity of issues, crafting a balanced solution to the problem will take a lot of work and compromise, and we need to ensure that no one is unfairly disadvantaged by what we come up with. So I look forward, of course, to this hearing process to work through some of these issues and to seek a fair resolution of the problem.

I now go to panel one. We have Congressman George Gekas, chairman of the House Judiciary Subcommittee on Commercial and Administrative Law. He is from the State of Pennsylvania. Congressman Jim Moran from the State of Virginia. Congressman Christopher Cannon, who isn't here yet, a member of the House Judiciary Committee from the State of Utah, will also testify. And we do have with us Representative Robert Scott from the State of Virginia. I would ask that we go in that order.

STATEMENT OF HON. GEORGE W. GEKAS, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. GEKAS. Senator Grassley, we all wish to thank you for convening this special hearing so that we can discuss the mounting problem of the asbestos suits. Actually, I discerned a special reason that you and I are involved in this. We want to prevent bankruptcies among the companies that are dealing in asbestos, and we want to do so even before we pass the bankruptcy reform bill, on which we are acting as expeditiously as we can, because that is an important feature of the opening statement that the Senator has made.

Looming bankruptcies among the very companies that deal with asbestos—if they are to proceed with abandon, these bankruptcies, jobs are lost. The economy suffers collaterally because of it. And at the same time, and most importantly for what we are trying to achieve here, less money is available. Because there will be fewer sources, less money would be available for an eventual pot from which the victims of asbestos and potential victims can garner some compensation.

So the opening statement of Senator Grassley is the definitive foundation for this entire process, and I think it is worthy of wide publication. It covers all the salient problems and features of the massive problem that we have.

I want to note that the hearing to which the Senator alluded that occurred in the House Judiciary Committee resulted largely, I felt from some of the witnesses, a critique, some of it nit-picking, I felt, on what the then bill contained as the medical standards which should be generally followed in the proceedings that were contemplated by the bill.

In engaging in a colloquy with one of the witnesses, I ascertained at least to my satisfaction that the medical standards should not be cause for delaying or for obstructing completely the enactment of this type of legislation. And so I am happy to report that the members of the House Judiciary Committee, not all of them, but some, are daily working out the problems of the language that might be employed to further define the medical standards and make them more universally acceptable to those who opposed the original version or who oppose any kind of solution by the Congress to this massive problem.

With that, the other portion of the opening statement centered on something that was very meaningful to me, and that was the dicta and actual statements issued by the Supreme Court relative to these cases, that indeed the sheer number of them cry out, as the Justices themselves have said, for a national solution. That is what we are about.

Too often, we are criticized for offering a national solution, and we hear the cries also too often that in doing so we are running squarely into the face of the Supreme Court and previous decisions and what they might do with it. Well, here they are inviting us, practically. The Supreme Court is saying that national policy is required on that peg. I am willing to do those extra efforts that are required to pass the legislation that you have introduced and which we gratefully acknowledge has been introduced by the chairman of

the Judiciary Committee, Henry Hyde. I think we are on our way to at least a full debate on this mammoth issue.

Thank you very much, Senator.

Senator GRASSLEY. Thank you, Congressman Gekas.

[The prepared statement of Mr. Gekas follows:]

PREPARED STATEMENT OF REPRESENTATIVE GEORGE W. GEKAS

SENATOR GRASSLEY, Thank you very much for the opportunity to appear before you here today. I am looking forward to again working with you on the Bankruptcy Reform bill once the Senate completes its action on that legislation.

This morning, however, I am testifying in support of Senate Bill, 758, the companion to H.R. 1283.

The House Judiciary Committee held a hearing on the problems posed by asbestos on July 1, and on the companion legislation to S. 758, H.R. 1283. That hearing made it clear to me that this is indeed an urgent problem, and that there is an opportunity for compromise that we cannot afford to squander. Indeed, the simple dictates of justice, as well as the command of the Supreme Court, propel us to act, and to do so quickly.

There are over 200,000 asbestos cases pending in our federal courts, and an additional 20,000 cases are filed every year. This problem not only clogs our federal courts, increasing the time that it takes other litigants to get through the system, but results in efforts to simply move these cases, treating asbestos plaintiffs as mere statistics, often with little regard for the reality that every single one of these "cases" is really just a person or a family who has been exposed to asbestos.

Further, over 15 asbestos companies have declared bankruptcy, not only resulting in lost jobs for their employees, but also in less money being available for sick plaintiffs. Additionally, a reduction in the number of defendant companies increases the liability faced by those companies that remain, increasing their chances of going bankrupt, resulting in a possible vicious cycle, leaving plaintiffs with decreased settlements. For example, the Manville Trust, which has over 400,000 cases pending against it, went bankrupt as a result of the liability that it faced from asbestos claims, and only pays plaintiffs pennies on the dollar for their injuries. These unfortunate workers deserve better treatment than that.

This is a system that is crying out for reform. And this responsibility rests squarely at our feet. In fact, the Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist in 1990, stated: "The committee recognizes that virtually all of the issues relating to a so-called 'national solution' *are primarily matters of policy for the Congress.*" (Emphasis added.) This sentiment was reiterated last year, when the Supreme Court's *Fiberboard* decision called the asbestos system an "an elephantine mass" which "defies customary judicial administration and *calls for national legislation.*" (Emphasis added.) We in the Congress who recognize a responsibility to act must take heed of this admonition.

Any proposed solution must, at the very least, ensure that victims are compensated quickly, fairly and efficiently. That is one of the reasons that I agreed to cosponsor H.R. 1283/S. 758. The system that is set up under this legislation ensures that impaired claimants will receive compensation much faster than in any jury trial or any private settlement.

However, let me be clear—I am not tied to any particular proposal. There are ongoing, bipartisan discussions over different approaches, and I would like to commend Chairman Hyde and his staff for their diligent work in trying to forge a solution to this problem. I am optimistic that a compromise solution can be crafted, and that it can be enacted into law this session—even during an election year. This issue is too important to our federal courts, to the companies that have to deal with this morass, and, most importantly, to the victims, who face tremendous delays in receiving just compensation for their injuries, and then often witness a third or more of their settlement getting eaten up by lawyers fees and transactions costs.

Thank you for your time today, and I hope that one day, I will have the opportunity to work on the Fairness in Asbestos Compensation Act of 1999 with you, just as I look forward to completing our efforts on the bankruptcy bill.

Senator GRASSLEY. Now, to Congressman Moran.

STATEMENT OF HON. JAMES MORAN, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. MORAN. Thank you very much, Mr. Chairman, for having this hearing. It is necessary, as Chairman Gekas has said, for the Congress to act on this issue. As I will say in my testimony, the judicial system is not capable or prepared to resolve the complexity and the number of cases that are pending. It cries out for a legislative solution, and the people whose cries should be heard the loudest are the actual victims of asbestos-related illnesses who are now receiving only pennies on the dollar.

As Chairman Gekas said, over 15 asbestos companies have now declared bankruptcy, primarily as a result of the asbestos claims. So our legislation is designed to compensate true victims fairly while there is still an opportunity to do so. This legislation, S. 758 and H.R. 1283, is the way to do this. That is why I am an original cosponsor of the legislation in the House.

I am glad to see Mr. Schumer here, who shows the bipartisan nature of the bill, as I am hoping to do with Mr. Gekas. This is not a partisan issue. This is an issue that screams out for a reasonable, responsible settlement.

You have got nearly 200,000 cases pending in State and Federal courts, and tens of thousands of new cases are filed each year. There is no end in sight. The present asbestos litigation system contradicts every notion of how justice should be properly served.

Imagine a courtroom where judges no longer preside over actual cases or sit in judgment over right and wrong, guilt or innocence, where claims are referred to, in the aggregate, as inventories and are forced to be paid without regard to whether the plaintiff has any impairment at all. Consider a system where a seemingly unlimited supply of claimants brings suit long before they are actually sick, often because of the running of the statute of limitations or because of the concern that available funds for compensation will be exhausted long before any disease manifests itself. Consider further a system of justice where two-thirds of every dollar spent goes to transaction costs rather than to the victims, and where the truly sick have to wait years to receive compensation.

Mr. Chairman, this is the face of the current asbestos litigation crisis, a system where the truly sick, the defendants, and the courts themselves all suffer unnecessarily because of the overwhelming number of cases brought by the nonsick. With the promise of tens of thousands of additional cases to be filed just this year, we can only expect this problem to get worse.

As my colleagues are aware, the Supreme Court ruled on a class action settlement in 1997 that would have largely solved the problem of compensating individuals with asbestos-related illnesses based on objective and fair medical criteria which would allow the true victims of asbestos to recover compensation whenever they are sick.

The settlement was agreed to by industry, by members of the plaintiffs bar, and by key components of organized labor. Bob Georgine, president of the Building and Construction Trades Union, even lent his name to the agreement. But the Supreme Court said that while the *Georgine* settlement was a long-overdue

and rational solution to the asbestos crisis, the class was too large and complex to certify.

But it is the consensus of the judicial system today that the present system is indeed broken and that a congressionally-mandated solution is needed. Justice Breyer has concluded that Congress is the only body with the authority to create an administrative claims process to solve this crisis. Justice Breyer went further in his concern over the current system, a system where the victims of asbestos will be short-changed unless something is done. Justice Breyer echoed comments of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Rehnquist in 1991. That has been quoted, but it is the key quote.

Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses. The ensuing 5 years have seen the picture worsen—increased filings, larger backlogs, higher costs, more bankruptcies, and poorer prospects that judgments, if ever obtained, can be collected.

I will try to wrap this up now because I know we are going to start getting repetitive. But, in addition, on the last day of its session this past June, the Supreme Court once again, as you referred to, Chairman Grassley, called on the Congress to legislate a solution to the asbestos litigation crisis. The Court's ruling in *Ortiz* v. *Fibreboard* emphasizes the tremendous and immediate need for Congress to act on S. 758 and H.R. 1283. Justice Souter wrote the majority opinion and referred to asbestos litigation as an "elephantine mass." He said the problem of asbestos cases defies customary judicial administration and calls for national legislation.

This, as I said when I began my testimony, requires a legislative solution. The opponents are resorting to tactics, I think, of confusion and intimidation because they simply cannot make sound policy arguments against this legislation. Their argument that the legislation should be voluntary, where claimants can elect to either opt in or opt out, is superficially attractive, but it would only generate new problems for the system.

Experts predict anywhere from 50 to 80 percent of the current claims filed are by individuals with no physical impairment. So you can see how a voluntary system would work. The people with legitimate claims would elect to go to the new system. They would go through the medical screen and would receive an award quickly. But individuals with no impairment would elect to file a claim in court, doing little to alleviate the tens of thousands of cases filed by the unimpaired every year.

This legislation addresses the fundamental flaws of the present system and offers commonsense solutions that preserve a sick claimant's right to sue, requires defendant companies to make good-faith settlement offers, relieves trial court judges of their role as claims examiners which they shouldn't be having to do, and ensures that the victims and not their lawyers receive as much of the award as possible. That is what this is all about.

If we can get this legislation through, the true victims of asbestos will get a much greater share of what they truly deserve and our judicial system will be better served. It is good legislation. We need

it immediately, and I thank you for having a hearing on it, Mr. Chairman.

Senator GRASSLEY. Congressman Scott.

STATEMENT OF HON. ROBERT SCOTT, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you and my former colleague on the Judiciary Committee, Mr. Schumer. I am the Representative from the 3d Congressional District of Virginia and appear here as a Member who has been involved in legislative issues surrounding asbestos litigation for more than 15 years, and as a Representative of a district whose citizens have experienced firsthand the devastation which decades of corporate deceit has imposed on victims and families.

I am here to speak in opposition to S. 758, and to urge in the strongest possible terms that this subcommittee reject a bill that is nothing more than a bailout for an industry responsibility for the disability and death of millions of Americans.

First, we have to square the rhetorical claims of the problem with the realities of asbestos litigation today and the language of the bill. Supporters of 758 have said that the bill is necessary to relieve the burden of asbestos litigation in State and Federal courts. The plain fact of the matter is the crisis that did exist in the 1980's is clearly behind us. Today, only a handful of cases go to trial each year and thousands are settled under the present system.

In the State of Virginia, I am only aware of one case that has gone to trial in the last 7 years. Yet, we have settled thousands of cases. In the early 1980's, Virginia, like many other States, did have a large asbestos case backlog. The legal struggle over the industry's attempt to avoid liability and the delaying tactics of the defense in court, which were encouraged by Virginia law, led to lengthy trials, multiple complex appeals, and little, if any, justice for the victims.

We enacted two pieces of legislation, one involving the statute of limitations and another a consolidation bill, which resolved those. The consolidation bill allowed consolidation on issues such as when a particular company learned of the risk asbestos posed to workers, when they first warned workers of the risk, and whether the warning was adequate under the law. Those questions were well-known and did not require endless and repeated litigation.

Following the enactment of those two bills, the State court judges ordered consolidation on these issues, and almost immediately and well before those cases could begin, virtually every manufacturer settled virtually every asbestos case with virtually every plaintiff in Virginia. And the framework for all future settlement agreements which apply in our State to this day were established.

Unfortunately, S. 758 would undo all of that work. It would undo it, first, because the bill would eliminate all of the powers of consolidation which have been authorized by the courts, and would remove the incentives to settlement which have proved so beneficial to victims in Virginia and across the country.

Second, it would create a new Federal bureaucracy with complex procedures that no one can navigate in order to achieve a prompt

settlement, regardless of how sick they are or how compelling their case is. Today's plaintiffs can go into a lawyer's office and know almost immediately what they are going to get and when they are going to get it, many times as quickly as 6 months, without any complexity. With this bill, there is no telling when you would get any money or if you would get any money.

Now, we have heard suggestions that the litigation expenses are expensive now. Right now, there are virtually no litigation expenses. The corporations are doing this with in-house counsel. There is no discovery or anything like that. It is a very streamlined situation.

Also, Mr. Chairman, the bill's strict medical criteria will eliminate 50 to 80 percent of the claims now being compensated, and will make those victims ineligible to file a lawsuit, much less receive a settlement. It would permit asbestos companies to avoid their existing settlement agreements, denying victims money they may be currently receiving and companies have already agreed to pay, or in cases like they have agreed to pay, may not be able to get that.

If you have a plaintiff who is unable to satisfy the bill's strict medical criteria, the bill shifts the cost of paying to those bills from the manufacturer to the employers who are strictly liable under workers compensation laws. For example, our Newport News Shipyard receives payments in subrogation averaging about $6 million a year because of subrogation agreements under the asbestos litigation. That is why many corporations like the Newport News Shipyard and business organizations like the Virginia Peninsula Chamber of Commerce do not support the bill. I strongly suspect that employers who have no-fault liability under workers comp laws will have the same reaction once they find out what is going on in this bill.

The asbestos issue has a long and complex history. It is entirely appropriate that the committee look for new and perhaps innovative approaches. But great care must be taken to avoid recreating problems that have essentially been resolved to the benefit of asbestos victims, and there is no excuse for providing a windfall to this industry or for passing legislation like S. 758.

Senator GRASSLEY. Thank you, Congressman Scott.

I have no questions of this panel. Does Senator Torricelli or Senator Schumer?

Senator TORRICELLI. I do not, Mr. Chairman.

Senator GRASSLEY. Well, we thank you very much for participating.

Mr. SCOTT. Mr. Chairman.

Senator GRASSLEY. Yes, Congressman Scott?

Mr. SCOTT. I would like to submit for the record a letter from the Virginia Peninsula Chamber of Commerce, if I could.

Senator GRASSLEY. It will be received.

[The letter referred to follows:]

VIRGINIA PENINSULA CHAMBER OF COMMERCE,
Hampton, VA, June 22, 1999.

RE: The Hyde Bill—H.R. 1283

Mr. KEITH HOLMAN,
U.S. Chamber of Commerce,
Washington, DC.

DEAR KEITH: The Virginia Peninsula Chamber of Commerce is familiar with asbestos product liability litigation and its effects on our Peninsula communities. Dining the past (20) twenty years, several thousand local shipyard workers have developed asbestosis, lung cancer and mesothelioma from asbestos exposure that occurred in the 1940s to the 1970s. Hundreds of these workers have died (approximately 400 from mesothelioma alone), and asbestos deaths and disabilities are continuing due to the long latency period associated with these illnesses.

Plaintiffs in these lawsuits are routinely and regularly receiving prompt settlements from the asbestos manufacturers pursuant to a broad-based settlement agreement that has been negotiated with substantially all of the asbestos manufacturers who are defendants in these lawsuits. The efficiency of the settlements that have been reached between the asbestos manufacturers and plaintiffs' counsel for these claims is demonstrated by the fact that there has not been a jury trial in an asbestos lawsuit in this area for (7) seven years; during this period of time, hundreds of asbestos victims have been promptly and voluntarily compensated with settlements; transaction costs of the defendants have been virtually eliminated; and there is no burden on the courts because most of the lawsuits are settled before they are even served on the defendants.

Virginia employers have been a major beneficiary of the broad-based settlement agreements which exist in this jurisdiction because every dollar that is received by the asbestos worker reduces the liability of his employer to pay workers' compensation benefits for that asbestos-induced illness or death. For example, during the past three years, the Newport News Shipyard has received credits from hundreds of these settlements each year. The lawyers who represent the asbestos victims in this area are well known and respected for the work they have done in proving the liability of the asbestos industry and providing compensation for deserving victims.

The Virginia Peninsula Chamber of Commerce opposes the Hyde Bill as it is deemed unnecessary legislation. In Virginia the parties have voluntarily resolved this litigation on terms that are acceptable to both the clients and the manufacturers. The qualified claimants are receiving prompt and certain payments, the settlement agreements have minimum medical and exposure criteria which assure that only legitimate claims are compensated, and there is no burden on the courts.

In the event the Hyde Bill is made law, it will provide a windfall to asbestos manufacturers by first permitting them to void their settlement agreements and then by creating eligibility requirements that are so strict that more than one-half of the claimants who are now being voluntarily compensated will be ineligible to file a lawsuit much less receive any settlement. Additionally, it will create a new and burdensome federal bureaucracy which is clearly designed for one purpose and one purpose only—to delay and/or prevent asbestos victims from being compensated. These procedures will also drastically increase the transaction costs for all parties and eliminate the efficiencies that have been designed by the courts and the parties to resolve this litigation.

We urge you to find a middle ground of common sense and avoid any action that will impact the current agreements in the Commonwealth of Virginia.

Cordially,

CLYDE R. HOEY II,
President and CEO.

Senator GRASSLEY. We look forward to working with you. Obviously, if we move this bill in the Senate, we will see you somewhere in conference.

I am going to put in the record the statements from Senators Orrin G. Hatch, Chairman of the full Judiciary Committee and Patrick Leahy, ranking minority member of the full Judiciary Committee, on this issue. I will put them in the record now.

[The prepared statement of Senator Hatch follows:]

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

Good morning, and welcome to today's hearing on finding solutions to the asbestos litigation problem. I first would like to thank Senator Grassley, Chairman of the Judiciary Committee's Subcommittee on Administrative Oversight and the Courts for his leadership and hard work in holding this hearing so that we may begin to examine the issues presented by the asbestos litigation crisis.

I also would like to thank all of our witnesses today for their time and cooperation. Let me extend a particular welcome to my colleagues from the House of Representatives who are here today. Representatives Gekas, Moran, Cannon, and Scott: thank you for being with us to share your views.

I am hopeful that this hearing will help us better understand the asbestos issue, and will give us an opportunity to examine S. 758, the Fairness in Asbestos Compensation Act of 1999." As an original sponsor of S. 758, I have been very concerned about the asbestos crisis, which has had a profound impact on individuals who were injured by asbestos exposure, as well as on the court system and on industry.

I am very pleased that today's hearing will enable us to begin to address the problems presented by the current system. As S. 758 makes its way through the legislative process, I look forward to working with my colleagues to achieve the maximum public benefit from this legislation.

I. INTRODUCTION

Mr. Chairman and members of the Subcommittee, I am Sheila F. Anthony, a Commissioner of the Federal Trade Commission ("FTC" or "Commission"). I am pleased to have this opportunity to describe the Commission's consumer protection activities in the area of scholarship services.[1] The Commission applauds Senator Abraham and Senator Feingold for focusing on the serious law enforcement issues raised by fraudulent purveyors of scholarship services.

II. THE COMMISSION'S CONSUMER PROTECTION MISSION

The FTC is a law enforcement agency whose mission is to promote the efficient functioning of the marketplace by protecting consumers from unfair or deceptive acts or practices and increasing consumer choice by promoting vigorous competition. The Commission's primary legislative mandate is to enforce the Federal Trade Commission Act ("FTCA"), which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] The FTCA generally provides the Commission with broad law enforcement authority over entities engaged in, or whose business affects, commerce and with the authority to gather information about such entities.[3] The Commission also has responsibility under approximately forty additional statutes governing specific industries and practices.[4]

III. PROJECT SCHOLARSCAM

In the fall of 1996, the Commission launched "Project Scholarscam," a joint law enforcement and consumer education effort aimed at fraudulent purveyors of so-called "scholarship services." At that time, the Commission announced six law enforcement cases against companies we alleged falsely promised scholarships to students and their parents nationwide. In November 1997, the Commission followed up with two additional cases known as ScholarScam II. The Commission obtained the most recent settlements in the fall of 1998.

These companies employed similar tactics: the sales pitch usually started with a postcard proclaiming "FREE MONEY FOR COLLEGE" and providing a toll free number for students or their parents to call. A telemarketing sales pitch ensued whereby told students and parents that, for an up-front fee $100 to $400, the defendant would guarantee that the student would get a scholarship or the company would refund the up-front fee. To further entice the students, telemarketers claimed the student had prequalified for scholarships and that the com-

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[1] This written statement presents the views of the Federal Trade Commission. Responses to questions reflect my views and do not necessarily reflect the views of the Commission or the other Commissioner.

[2] 15 U.S.C. § 45(a).

[3] 15 U.S.C. §§ 45(a), 46(a).

[4] These include, for example, the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, which mandates disclosures of credit terms, and the Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et. seq.*, which provides for the correction of billing errors on credit accounts. The Commission also enforces over 30 rules governing specific industries and practices.

pany would "do all the work" necessary to obtain the scholarship. Getting the scholarships was easy, the telemarketers explained, because the company would match the student's qualifications with a database of scholarships and would send the student a list of sources tailored to that student. The telemarketers proclaimed that the company had "information you can't get anywhere else."

Naturally, the telemarketer would impress upon the student the need to act quickly and typically would press the student or parent to provide over the telephone a credit card number or checking account number. Once students and their parents paid the up-front fee, they would complete a questionnaire detailing their interests, school activities and other personal information. Subsequently, they would receive a list of available scholarships and sources of money—but the list was hardly "tailored" to the student's qualifications. In fact, as the Commission alleged, it was a useless list—containing outdated information, scholarships whose deadlines had passed, entries that were not even scholarships but were student loan programs, and scholarships that the student clearly could not qualify for (for example, a scholarship for children of veterans or residents of a particular state when the student was neither).

When consumers sought refunds for these useless lists, the defendants foiled their attempts by putting hurdles up at every turn instead of honoring their much-heralded and unconditional "money-back guarantee." Students were required, the defendants said, to apply to each and every source on the list and to obtain and send to the company all rejection letters received. In reality, this was an impossible condition to fulfill because scholarship organizations typically notify only those who are selected as recipients. In addition, because the list contained scholarships for which the students could not qualify, students had no reason to apply to those sources. In one FTC case, the defendant stopped providing any lists at all—leaving consumers to write futile complaint letters to a nonexistent "scholarship foundation."

These cases were filed in federal district courts in Florida, Georgia, Maryland, and New York. A summary of these cases is provided to the Committee as an Appendix to my written statement. The Commission sought and obtained temporary restraining orders with asset freezes and, in some cases, the appointment of a receiver over the corporate defendants. All Commission litigation has been concluded with permanent injunctions obtained either through settlements or ordered by the court. The orders obtained either ban defendants from engaging in telemarketing or providing scholarship services or require defendants to post performance bonds in significant amounts to protect consumers from future fraudulent practices should defendants resume telemarketing of scholarship services.

In several instances, the Commission obtained partial or complete redress for consumers. In two cases, the defendants posted $100,000 telemarketing bonds pursuant to Florida law, which requires all telemarketers to make such commitments. We worked with the Florida Department of Agriculture and Consumer Services to revoke the bonds and, for the first time, Florida consumers received refunds derived from a Florida telemarketing bond. In another case, as part of the settlement, the defendant relinquished mail containing checks from almost 500 consumers which enabled the Commissioner to provide full refunds to those consumers. In many FTC cases, however, the defendants have depleted the monies received, leaving little, if any, for consumer redress. In addition, FTC defendants frequently attempt to use bankruptcy laws to avoid paying consumer redress required by our orders.

We estimate that the companies involved in these cases scammed, in total, approximately 175,000 consumers to the tune of $22 million. In addition, one of the Scholarscam defendants, Christopher Nwaigwe, was criminally prosecuted by the U.S. Attorney's Office in Baltimore, Maryland. Commission staff provided substantial assistance to the U.S. Attorney's Office, including having a staff attorney testify at trial. Nwaigwe was convicted of seven counts of mail fraud in March of this year and in June was sentenced to 36 months in prison. Tough penalties are needed for these scam artists. The civil remedies afforded by an FTC action can deprive defendants of their ill-gotten gain through restitution, but only if the victims' money can be found. The penalties resulting from criminal prosecutions by the U.S. Department of Justice and state authorities send the strongest possible message, which is particularly needed because there is a never-ending pool of potential victims: college-bound students and their parents.

The Commission has undertaken extraordinary efforts to educate consumers about scholarship scams. As part of this effort, we teamed up with a variety of private and public partners, including:

- Sallie Mae
- College Parents of America
- Who's Who Among American High School Students

- The College Board
- Educational Testing Service
- National Association of Student Financial Aid Administrators
- National Association of Secondary School Principals
- National Association of College Stores

Our consumer education materials include bookmarks, posters, and consumer alerts warning students and their parents of the red flags to look for when evaluating scholarship service sales materials and sales pitches. We have distributed over 2 ½ million pieces of our consumer education materials, including a mass mailing of bookmarks to 2,000 college bookstores across the country and have the materials posted on our Web site. In addition, we posted a Web page of a fictitious scholarship service company that had the typical claims we saw in our cases and, when consumers clicked to sign up for the service, they were warned that they could have been scammed. We call this a "teaser Web site" and have used it to help disseminate our message on the Internet.

The Commission continues to monitor the industry and to provide both consumer and business education. In May, we issued a new Consumer Alert to inform consumers about a recent trend: the seminar for financial aid or scholarships. We warn consumers to take their time when attending these seminars and to avoid high-pressure sales pitches that require them to buy now or risk losing out on the opportunity. Consumers should investigate the organization by 5 talking with a high school or college guidance counselor or financial aid advisor before spending money—many colleges and universities are offering Web-based scholarship searches for free to potential students. Consumers shouldn't rely solely on "success stories" or testimonials of extraordinary success offered by the seminar company. Instead, they should ask for a list of three local families who have used the service in the last year and then contact them to find out if they were satisfied with the products and services received. As always, consumers should keep in mind that they may never recoup the money they give to an unscrupulous operator, despite stated refund policies.

IV. Proposed Legislation

S. 1455, the "College Scholarship Fraud Prevention Act of 1999," provides some useful tools to help combat scholarship fraud. It would enhance criminal penalties for fraud in connection with the obtaining or providing of scholarships. Also, it would prevent purveyors of college scholarship fraud from using the bankruptcy laws to shield their ill-gotten gains while their victims go without recompense. The Bankruptcy Code allows debtors to retain certain property even when their creditors receive little or no recompense. In particular, debtors can use state-law exemptions, including homestead exemptions that in some states can have no dollar limit, to shield their assets. S. 1455 would deny these exemptions to the extent that debts resulted from college scholarship fraud.

V. Conclusion

The story of Project ScholarScam has garnered tremendous coverage in the media. Through this coverage and by enlisting those who are on the front lines—financial aid advisors and guidance counselors—we have spread the word about these pernicious scams. The Commission's strong record of enforcement and education has served as an effective deterrent in this industry. But, as education costs continue to rise and, given the unlimited supply of potential victims, fraudulent operators will always have an interested audience and an enticing sales pitch. Thus, we will continue our efforts and will also continue to provide cooperation to any criminal investigation or prosecution of "ScholarScam" defendants.

[The prepared statement of Senator Leahy follows:]

Prepared Statement of Hon. Patrick J. Leahy, a U.S. Senator From the State of Vermont

I am concerned that the Fairness in Asbestos Compensation Act S. 758, unfairly sacrifices the legal rights of hundreds of thousands of workers and their families.

This complex legislation transfers the legal rights of asbestos victims and their families to a new byzantine bureaucracy in a quasi-governmental entity called the Asbestos Resolution Corporation (ARC). An asbestos victim, under the bill, would be forced to file his or her asbestos-related claim with the ARC instead of a court of law of the victim's choice. Then, the legislation: prohibits any form of asbestos-

related class action lawsuit unless all defendants agree; bans any award of punitive damages; caps the victim's attorney's fees; and fails to provide any funding for the asbestos victim or the ARC.

In short the bill is an asbestos defendant's dream. It is not balanced or fair to plaintiffs. Instead of enacting one-sided legislation, I believe Congress can play a more constructive role in helping to find more equitable solutions for all the parties involved in asbestos litigation.

I agree with Supreme Court Justice Ruth Bader Ginsburg in the *Amchem Products* decision that Congress can provide a secure, fair and efficient means of compensating victims of asbestos exposure. I believe the appropriate role for Congress is to provide incentives for private parties to reach settlements, not to take away the legal rights of asbestos victims and their families. For example, Congress should consider enacting tax incentives for private parties involved in asbestos-related litigation to reach global settlements and to guarantee that asbestos victims and their families receive the full benefit of the incentives. This is an approach that encourages fair settlements while still preserving the legal rights of all parties.

I commend Chairman Henry Hyde of the House Judiciary Committee for working with all the parties involved in asbestos litigation to try to reach consensus. I look forward to working with Mr. Hyde, Chairman Hatch, Senator Grassley, Senator Torricelli and others to fashion an appropriate Congressional response to encourage fair settlements for asbestos victims and the asbestos industry.

Senator GRASSLEY. Now, I will turn to Senator Torricelli to make an opening comment.

STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator TORRICELLI. Thank you very much, Mr. Chairman. First, I want to thank you for holding this hearing. This Congress has a responsibility to look at the asbestos issue in some depth, to do expeditiously, and we are all very grateful for your leadership in bringing us together today.

I would also note that soon we are going to hear from a variety of witnesses. In particular, I would like to welcome Sam Heyman, of the GAF Corporation that is located in the State of New Jersey, and Rich Middleton, the president of ATLA. They will be joined by other distinguished witnesses, but to these individuals in particular I would like to welcome them before the committee today.

I think, Mr. Chairman, we have all watched with some dismay the torrent of asbestos cases that are now before the Federal courts. We have a system which it appears to me is not working for anyone. There are 200,000 cases now clogging State and Federal courts, with 50,000 new cases being added every year. Victims have been waiting years to receive compensation, and it appears to me that there is very little relationship between the degree of injury or illness and the compensation that is actually being received. The truly sick are waiting up to 3 years to receive compensation for their illnesses compared with other product liability cases where the average is 18 months.

It is very difficult to mount a defense of the current system. Twenty-five of the largest manufacturers representing the majority of the defendents have already filed for bankruptcy. We are therefore facing a system in which the very sick are waiting a long period of time to mount cases against an industry which is dwindling, where those who have liability may no longer be in business and truly may not survive to ever recognize compensation, with a compensation that doesn't seem to have any relationship between the amount of the award and the amount of the injury. It would be dif-

ficult to design a system that is worse, less fair, or less likely to produce a result.

As we know, in 1994 a class action settlement in the *Georgine* case did lead to a system which provided for a national facility to resolve the claims of future plaintiffs. We also know that it did not survive. I think, though, we have been led by the courts to recognize the potential and the need to succeed the *Georgine* settlement.

It was instructive, I think, by Justice Ginsburg writing in that case when she 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. Congress, however, has not adopted such a solution." That, Mr. Chairman, was, in my judgment, an invitation for this Congress to provide some leadership.

If there was any doubt, this summer, in the *Ortiz* case, once again the Court signaled its beliefs. Justice Souter wrote, in describing the asbestos cases as "an elephantine mess which defies customary judicial administration and calls for national legislation." It would be difficult to describe how the Court in any clearer manner could have described the need for the Congress to take some action.

The bill we are looking at today is a first attempt to provide exactly such an answer. It establishes a national claim facility to provide fair and prompt compensation for persons suffering from asbestos-related illness. Eligibility for compensation would be determined by objective, predetermined criteria. I do not, Mr. Chairman, as one of the cosponsors of the legislation, believe it is a final answer. We are not closed to other suggestions on how to deal with an extraordinarily complex situation.

I think we should simply recognize that the current system is not working for anybody. I do not believe it is fair for the attorneys involved. Clearly, it is not fair for those potential victims involved. It is not providing a timely or rational means of distributing benefits to people. It is damaging to the industry.

I genuinely believe through these hearings, after hearing from the representatives of ATLA and the industry, this committee is in a position to fashion a fair and reasonable solution. I don't think any of us come to this hearing with a closed mind, but recognizing something must be done. Legislation is going to evolve from the House. This Senate should take leadership as well, and I am very grateful that you have, probably against all common sense and personal wisdom, put yourself in this position to provide leadership on this issue. Thank you for doing so.

Senator GRASSLEY. Let me associate myself with part of your remarks, and that is that I think you have given a very careful analysis of the parliamentary situation, and probably one in which, if we do move in any way, would have to be bipartisan. Obviously, you and I have been able to do that before and we would obviously explore doing that in this instance as well.

Senator TORRICELLI. And, Mr. Chairman, if we do not, our extensive collaboration in legislation on bankruptcy will prove to be relevant.

Senator GRASSLEY. Very relevant.

Senator TORRICELLI. The two issues will merge in the future.

Senator GRASSLEY. Yes; Congressman Gekas had already touched on that issue.

Now, we will move on to our first panel, and you will see as I introduce them that we have a very impressive list of witnesses, very impressive backgrounds, and all well-qualified to testify in this area.

We have Harvard Law School professor of administrative law and civil rights, Mr. Christopher Edley. We have the general counsel of the AFL–CIO, Jonathan Hiatt. Already introduced is Samuel Heyman, chairman and CEO of GAF Corporation. Ms. Karen Kerrigan, chairman of the Small Business Survival Committee, and Mr. Richard Middleton, Jr., president of the Association of Trial Lawyers of America. He is also a senior trial attorney with the firm Middleton, Adams and Tate in Savannah, GA. And then we are honored to have the Hon. Conrad Mallett, former chief justice of the Michigan Supreme Court, and currently chairman of the Coalition for Asbestos Resolution.

We will proceed as I introduced the witnesses, so we go to Professor Edley.

PANEL CONSISTING OF CHRISTOPHER EDLEY, JR., PROFESSOR, HARVARD LAW SCHOOL, CAMBRIDGE, MA; JONATHAN P. HIATT, GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, WASHINGTON, DC; SAMUEL J. HEYMAN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, GAF CORPORATION, WAYNE, NJ; KAREN KERRIGAN, CHAIRMAN, SMALL BUSINESS SURVIVAL COMMITTEE, WASHINGTON, DC; RICHARD MIDDLETON, JR., PRESIDENT, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, WASHINGTON, DC; AND CONRAD MALLETT, CHAIRMAN, COALITION FOR ASBESTOS RESOLUTION, WASHINGTON, DC

STATEMENT OF CHRISTOPHER EDLEY, JR.

Mr. EDLEY. Thank you, Mr. Chairman. I am Christopher Edley, Jr., a professor at Harvard Law School.

Senator GRASSLEY. Before you start, something that will avoid all of us some embarrassment later on, particularly me, who finds it very difficult to wield a gavel, I am sorry to say. It is a weakness; I like to hear people.

But today the caucuses of our respective parties are scheduled, so we have to get done by a certain time. As such, we have asked for you all to have your entire written statements submitted for the record and for you to summarize your oral testimony in 5 minutes, please. If anybody didn't hear that, is that going to cause problems for anybody?

[No response.]

Senator GRASSLEY. OK; would you please proceed, Professor Edley?

Mr. EDLEY. Thank you, Mr. Chairman. I am Christopher Edley, Jr., a professor at Harvard Law School, where I have taught administrative law for 18 years.

Two years ago, the Supreme Court noted the continuing seriousness of the asbestos litigation crisis and called for legislation. They

repeated that message to you just this past June in *Ortiz* v. *Fibreboard,* holding again that class action rules are not flexible enough to fix the mess.

S. 758 provides a fair, efficient means of compensating victims. Is it complicated? Absolutely not. The critics confuse complexity with careful design. There are just three steps: step one, a simple, nonadversarial administrative procedure for determining medical eligibility, keyed to objective clinical and pathological criteria for impairment and with safeguards making it easy to say yes to the claimant and hard to say no; step two, an aggressive alternative dispute resolution process, faster and less expensive than courts; and step three, access either to arbitration or to court at the claimant's option. That is it—3 to 5 months instead of 3 or more years in today's tort system.

Here are just a few of the several policy goals that I think are achieved by the bill. No. 1, claimants who are impaired—that is, sick—get tortlike compensatory damages from the defendants, including pain and suffering, and they get it quickly.

Point No. 2: claims by the nonsick are deferred until they actually become sick, and most don't. Point No. 3: the bill reduces transaction costs by using ADR and expert administrative decisionmaking. If mediation fails, however, claimants can opt out to the court, and this helps police administrative discretion and ensures that over time the awards are aligned with tort damages. Finally, defendant companies bear all the costs of compensating victims and of administering the system. No taxpayer funds are necessary.

Now, why can't the courts sort all this out? Senators, it has been tried, but State and Federal judges themselves are telling you it can't work. Such expedients as case consolidations help somewhat to clear dockets, but only at the expense of the quality of individual justice. Plaintiffs' lawyers package hundreds and often thousands of claims, combining sympathetic sick claimants with unimpaired claimants, and refusing generous settlement offers for those who are sick unless defendants also make substantial payments to those who aren't.

Alternatively, plaintiffs' counsel threaten to litigate every case, facing the defendants with a "bet the company" jury lottery that can quickly involve hundreds of millions in awards to people who are not sick and never will be sick. And these coerced payments to nonsick claimants stimulate further waves of filings, diverting resources that should be focused on today's sick victims and on those who will need help tomorrow.

Now, some have complained that this bill is not voluntary, like the hundreds of private deals that plaintiffs' attorneys have signed with companies over the years. But please look carefully. The private deals don't last and they make no sense as a national solution. Those deals haven't prevented a doubling in this decade of the backlog, a growing flood of claims, still long delays for victims, and more and more bankruptcies to boot.

Moreover, you can't make voluntary the statutory medical criteria which draw the line between the sick and the nonsick because the nonsick, egged on by contingent fee counsel, would ignore the line, file their suits, clog the system, continue to drain the defendants, and leave themselves with no recourse in the future, if and

when they become sick. The voluntariness that does make sense is in the bill—the claimant's choice of administrative arbitration versus court litigation once the medical line is drawn.

This bill benefits almost everyone. Impaired claimants get fair compensation in months, not years. The nonsick who will eventually get sick benefit because the bill eliminates statute of limitations defenses. No one need file their claims prematurely or enter into inadequate settlements.

Our courts will benefit, as will everyone who uses them. Defendant companies will benefit. With this litigation nightmare behind them, they can, consistent with their oft-stated wish, focus their resources on compensating the sick. And, finally, workers, shareholders, families and communities will benefit from the reduced risk of asbestos-driven bankruptcies. The only losers are a few lawyers and those individuals who are not now sick who never will become sick in the future and who would have won the jury lottery under our current tort system.

As a matter of public policy, as a matter of sensible resource allocation for our courts and society at large, I urge you to move forward quickly to answer the Supreme Court's repeated call for action. Give victims and companies, shareholders and families a better justice. Fix the mess.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Professor Edley.

[The prepared statement of Mr. Edley follows:]

PREPARED STATEMENT OF PROFESSOR CHRISTOPHER EDLEY, JR.

SUMMARY

The Supreme Court has, twice in two years, noted the continuing seriousness of the asbestos litigation crisis and called for Congress to adopt a legislative solution. The courts have said they cannot handle the flood of cases fairly and efficiently. And the flood is worsening, exacerbating each of the problems associated with asbestos litigation, including the growing number of claims by the unimpaired. Only half of all claimants are sick; the remaining half of claimants are not sick, and most will never become sick.

S. 758 provides an imaginative and effective means of compensating victims of asbestos exposure. It features: (1) objective medical review, administered by doctors, (2) an aggressive alternative dispute resolution process to promote settlement, and (3) an optional streamlined arbitration process. The right to go to court is preserved for all impaired claimants. Compensation goes to *impaired* victims, while claims by the *unimpaired* are deferred until they become sick. The efficiencies of expert decisionmaking and of alternative dispute resolution are fully exploited to reduce litigation costs. Finally, defendant companies bear all the costs. No taxpayer funds are used.

Other issues concerning S. 758 that are addressed in the statement include—

- *A lack of trials does not mean all is well.* Cases generally settle, but only after years of depositions, discovery, and pretrial motions—which is nothing new. Trials were never the major burden imposed by asbestos litigation.
- *Private plans are no substitute for legislation.* They are unenforceable, and do not bind future claimants.
- *A collective fund for all asbestos liability is unworkable.* The enormous diversity of asbestos defendants, and uncertainty regarding insurance coverage, make one seemingly attractive approach—a collective fund—unworkable in practice.

I appreciate the opportunity to testify concerning S. 758, the Fairness in Asbestos Compensation Act.[1] Asbestos litigation has long been a scandal, which poorly serves the interests of victims, as well as defendants and the employees and communities that depend upon them. Several years ago I published an article with Paul Weiler, my colleague at the Harvard Law School, advocating an administrative system for compensating people who are impaired by asbestos-related diseases.[2] Since then, my conviction that an administrative compensation system would do a better job of compensating the sick has grown even stronger. It is for that reason that I welcome S. 758.

My testimony today will make three points. First, the asbestos litigation crisis not only remains with us, but has in important respects grown worse in the late 1990s. Second, S. 758 provides an innovative and practical administrative alternative to tort litigation which would be far more fair, prompt, and inexpensive than the present system. Third, after reviewing a number of concerns that have been expressed about the bill, I conclude that S. 758 is a necessary and effective response to the challenge of asbestos compensation.

THE ASBESTOS LITIGATION PROBLEM

By the early 1970s, the widespread use of asbestos in shipbuilding, insulation and other industries without adequate precautions or warnings had led to what can only be termed a public health disaster. The tort system responded well to the tragedy. After years of struggle, imaginative trial lawyers established industry liability for the asbestosis and cancer that ruined the health and shortened the lives of workers. They were assisted in this by legal rulings from far-sighted judges that established many of the basic principles of modern product liability. The Fifth Circuit's decision in *Borel* v. *Fibreboard Corp.*, 493 F.2d 1076 (1974), which elaborated the theory of strict liability for failure to warn users of the hazards of an inherently dangerous product, is just one example.

In the 1980s, however, the defects of the tort system began to outweigh its advantages. The courts were flooded with asbestos claims, in which the same issues were litigated again and again. In 1982, the leading manufacturer of asbestos products, Johns-Manville, went bankrupt, and the Manville bankruptcy was followed by two dozen others, essentially wiping out much of the former asbestos industry. As the pool of available assets grew smaller, the asbestos trial bar sought to involve more companies, and more products, in the litigation. At the same time, the momentum of the tort system led to an ever increasing number of claimants who had pleural plaques and other non-impairing conditions. By the end of the decade, the focus had shifted from proving the asbestos defendant's responsibility for the harm their products had caused to ensuring that funds would be available to compensate workers when they became sick.

In 1991, the Judicial Conference of the United States noted the seriousness of the problem:

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process, and future claimants may lose altogether.[3]

The Judicial Conference strongly recommended that Congress create "a legislative dispute resolution system to resolve asbestos personal injury disputes.[4] That was my view as well.

Congress did not act in response to the Judicial Conference's recommendation. However, leaders of the plaintiffs' bar and a group of 20 defendants attempted to achieve a similar result through a creative use of the class action device under the Federal Rules of Civil Procedure. The parties negotiated a settlement class action, the heart of which was medical criteria that provided compensation for people who were impaired by asbestos-related conditions and deferred the claims of the unimpaired. The settlement was approved as fair and reasonable by a federal dis-

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[1] The Coalition for Asbestos Resolution has compensated me for my time and expenses in preparing this statement. My statements express my own views on the subject, which may in some respects differ from those of the bill's proponents. Please note that I am not the recipient of any federal grant or contract.

[2] *See* Christopher F. Edley, Jr. and Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383 (1993).

[3] *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 3 (Mar. 1991).

[4] *Id.* at 27.

trict judge in *Georgine* v. *Amchem Products, Inc.,* 157 F.R.D. 246 (E.D. Pa. 1994). But, though the Third Circuit described the settlement class action as "arguably brilliant," it held that the device was not authorized by the Federal Rules of Civil Procedure. *Georgine* v. *Amchem Products, Inc.,* 83 F.3d 610 (1996). The Supreme Court, too, recognized that the "settlement-class certification [it confronted] evolved in response to an asbestos-litigation crisis." *Amchem Products* v. *Windsor,* 521 U.S. 591 (1997). But, it too invalidated the settlement on procedural grounds, while calling for Federal legislation. Justice Ginsberg, speaking for the Court, said: "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." *Id.* at 628–29. This summer, in *Ortiz* v. *Fibreboard Corp.,* 119 S. Ct. 2295 (1999), the Court returned to the same theme. Justice Souter wrote for the Court that "the elephantine mass of asbestos cases * * * defies customary judicial administration and calls for national legislation. * * * To date Congress has not responded." *Id.* at 2302 & n.[5]

The flood of asbestos cases is worsening, In 1991 there were 100,000 pending cases. Despite hundreds of thousands of settlements, the backlog has grown unexpectedly to well over 200,000 and the pace of new filings is even greater than before. Indeed, over 40,000 asbestos cases are filed each year in both state and federal courts; the nineteen defendants who are members of the Center for Claims Resolution report over 40,000 claims against them for the first eight months of 1999 alone. Thus, today more cases are filed each year than were pending in the federal courts in 1991, when the Judicial Conference Ad Hoc Committee sounded the alarm.

This stream of cases has exacerbated other defects of the tort system. First, bankruptcies have increasingly cast doubt on the ability of asbestos defendants to compensate people who contract cancer or disabling asbestosis in the future. For example, the Manville Trust, after protracted litigation in which all claims were barred, now pays only 10 cents on the dollar for claims against Johns-Manville. The record of many other trusts is worse.

Second, the pace of justice remains agonizingly slow—with typical cases taking several years to reach settlement and many cases languishing for much longer.

Third, lawyers' fees and other transactions costs continue to consume nearly two dollars for every one dollar paid to claimants. These transactions costs, in the words of Chief Justice Rehnquist, "consume more and more of a relatively static amount of money to pay [asbestos] claims." See footnote 5.

Fourth, as Justice Breyer noted in his separate opinion in *Amchem,* 521 U.S. at 631–32, half of all claimants are not sick, and most will never become sick. Instead, they sue (often because they must, to avoid the statute of limitations) seeking compensation for pleural conditions which are a mere marker of asbestos exposure. Although these conditions can be detected by medical tests, they generally do not cause any impairment to lung function and they are not early warning signs of more serious conditions such as cancer. The substantial compensation some are receiving in the tort system threatens to exhaust all resources for future, seriously ill claimants.

All of these problems impact our courts and create uncertainty for defendant companies and the employees and communities that depend upon them. Perhaps more importantly, however, these problems also have seriously impaired the ability of those injured by asbestos disease to recover compensation, creating what the Judicial Conference termed "a massive denial of justice."

THE FAIRNESS IN ASBESTOS COMPENSATION ACT: AN INNOVATIVE SOLUTION

S. 758 provides an imaginative framework for compensating people who are impaired by asbestos-related diseases faster and at a lower cost than litigation. The bill establishes an independent public agency, the Asbestos Resolution Corporation (ARC), to resolve asbestos claims. The ARC would administer a process for determining medical eligibility, keyed to, objective medical criteria for asbestos-related impairment, and an aggressive alternative dispute resolution process to ensure timely resolution of claims.

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[5] Chief Justice Rehnquist's concurring opinion noted that the "massive impact of asbestos-related claims on the federal courts" had frustrated judicial efforts to resolve the asbestos crisis, despite "the near-heroic efforts of the District Court in this case to make the best of a bad situation." "Under the present regime," he observed, "transactional costs will surely consume more and more of a relatively static amount of money to pay these claims." Noting the need to "devis[e] a system for handling these claims on a clean slate," Chief Justice Rehnquist too concluded, "the 'elephantine mass of asbestos cases' cries out for a legislative solution." *Id.* at 2323–24.

The administrative process has three simple steps. First, the claimant presents medical information sufficient to show that he has an asbestos-related disease. In most cases, compliance with the objective medical criteria in the bill will be obvious, and the claimant's application can be approved by a claims examiner without further review. Second, the ARC will gather together the defendants that are allegedly responsible for claimant's impairment and will require the defendants to engage in mediation to settle the claim. Mediation is subject to a strict 60-day time limit, and defendants are penalized if they do not make an adequate offer at its close. Finally, if the claimant is not satisfied with the defendants' settlement offers in mediation, the claimant can choose either to invoke arbitration under the auspices of the ARC or to go to court. In either case, S. 758 eliminates traditional defenses—such as "state of the art"—allowing the adjudicator to focus on a few narrow questions—medical eligibility, causation, and damages.[6] The normal claim should be resolved in a few months rather than the years required in the tort system today.

In addition, the bill contains a number of provisions, especially in the medical review process, that protect claimants' rights and ensure that no claimant who suffers impairment from an asbestos-related disease will be deemed ineligible. Claimants may appeal adverse decisions by claims examiners to a panel of two doctors, with a third added to the panel if there is a disagreement. Claimants would also have the chance to qualify for compensation before an exceptional medical claims panel, composed of a number of qualified specialists, even if they failed to meet the standard medical criteria. Denials would be subject to judicial review in the federal courts. It is important to note that these procedures, which are essential to guarantee fairness to claimants, could not be abused by defendants in order to delay the proceedings, because the medical review process would involve only the claimant and the government's physicians. The defendants would not even be named until later.

The bill achieves critical policy goals. Impaired claimants are assured full compensatory damages, now and into the future. Unlike workers' compensation and many other administrative programs, claimants need not be disabled from employment and are not limited to economic damages, but can recover for their pain and suffering as well. Compensation goes to *impaired* victims, while claims by the *unimpaired* are deferred. The efficiencies of expert administrative decision-making and of alternative dispute resolution are fully exploited, reducing litigation costs. Claimants, however, have meaningful access to courts as a check on administrative discretion and to ensure that, over time, the awards are "aligned" with tort damages as determined by a jury. The resources of the defendants are focused where they should be: on compensating those who are impaired from exposure to their asbestos-containing products, not on awards for the unimpaired, wasteful punitive awards, or on litigation costs. Transaction costs are controlled by limiting contingent fees to 25 percent. Finally, defendant companies bear all the costs of compensating victims and of administering the system. No taxpayer funds are used.

This bill strikes an appropriate balance that benefits almost everyone. The most important benefits go to claimants. The impaired gain a streamlined and fair system which provides them full compensatory damages in months, not years. Moreover, the elimination of many defenses and the presumption of correctness accorded to the ARC's medical determination would make it much easier for impaired claimants to recover. On the other hand, most of the unimpaired also benefit from the increased assurance that the funds will be there to compensate them if they become impaired by an asbestos-related disease.

Of course, the bill will benefit defendants too. By focusing resources on the sick, reducing transactions costs, and eliminating bet-the-company consolidations, the bill reduce the likelihood of bankruptcies. This is good news not only to the defendants, but also to shareholders, including pension funds, employees and their families, and to the communities that depend on these business for their prosperity.

Finally, the public benefits. The burden of asbestos litigation will be lifted from the courts, freeing them to dispose of their other business more effectively. And asbestos defendants, rather than taxpayers, will pay the administrative costs of the new system.

As in any legislation, there will be some who are better off under the status quo. Yet the only losers under this legislation are lawyers and those individuals who are

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[6] In this respect, S. 758 differs from its House counterpart, H.R. 1283. In my view, the broad elimination of defenses contained in S. 758 is appropriate only for "core claims," and not, for example, for claims against distributors or premises owners. The Coalition for Asbestos Resolution has acknowledged the need to find a middle ground between the narrow limitation of defenses in the House bill and the much broader Senate provision. Although the issue is difficult, I am confidant that an appropriate solution can be found.

not now sick, who will never become sick in the future, and who are able to navigate the "jury lottery" and obtain substantial compensation under the current system.

QUESTIONS THAT HAVE BEEN ASKED ABOUT THE BILL

During the legislative process, several thought-provoking questions have been asked about the bill. In my judgment, further reflection merely confirms the need for S. 758.

Doesn't the relative scarcity of trials mean there is no asbestos litigation problem? Some maintain that, despite the repeated calls for reform by the United States Supreme Court, all is well in the tort system. They point to the fact that the vast majority of cases settle—according to Mealey's Asbestos Litigation Reporter, only 55 asbestos trials went to verdict in 1998. Leaving aside for a moment that one of those trials was part of a complex, multi-phase mass consolidation involving thousands of plaintiffs, it is misleading to suggest that the rarity of trials indicates that the tort system is efficiently handling asbestos claims. While asbestos cases settle, they often do so on the court house steps, after years of pretrial proceedings, involving document requests, depositions, procedural motions, substantive motions, and sometimes appeals. In my testimony before the House Judiciary Committee, I described how a recent review of asbestos litigation dockets in several states continued to show a disturbing pattern of long delays, and I explained how the need for expensive legal services in our highly technical, highly adversarial legal system continued to swallow the lion's share of resources devoted to asbestos litigation. Indeed, when the Rand Corporation conducted a series of important studies on asbestos litigation in the 1980s—still the most comprehensive data on asbestos litigation available—they concluded that about two thirds of every dollar spent on asbestos litigation went to lawyers and other litigation expenses. At the time of the Rand Corporation studies, there were only about 50 asbestos trials a year, just as there are today, yet the expense of lawyers' fees and other costs was scandalously high. The number of trials has never been an accurate indicator of the resources consumed by asbestos tort litigation.

Could the goals of legislation be achieved through private settlement plans, like Owens-Corning's National Settlement Plan? Some have suggested that settlement arrangements, created by contracts or other understandings between defendants and the relatively small number of key plaintiffs' asbestos firms, might resolve the asbestos litigation crisis without the need for federal legislation.[7] To be sure, these arrangements have been around for some time and been of some use in managing a bad system. They do not, however, establish anything like an alternative to legislation.

I note at the outset that agreements such as Owens Coming's are not new. Other defendants have entered into such agreements throughout the 1990s. These deals have not prevented the backlog of cases from doubling in 8 years; nor have they restrained the rate of new filings.

The reason for the ineffectiveness of these agreements is not hard to find. In the absence of a settlement class action like *Amchem,* it is impossible to bind future claimants. The best defendants can do is to enter agreements with plaintiffs' counsel requiring them to recommend the settlement to their future clients. Agreements like these raise serious ethical questions, which is why Owens Corning has conditioned its agreement on receiving a favorable opinion from an ethics expert and a judge chosen by the parties. But, even if the ethical problems can be overcome, such agreements are highly unstable. They can work in a region with a small number of lawyers who are willing to join together to limit asbestos plaintiffs' access to legal services (and who can prevent other lawyers from poaching on their territory). These conditions are rarely met, however. If the economics of asbestos litigation makes it profitable for lawyers to bring cases on behalf of the unimpaired, counsel who have signed futures agreements will find a way to withdraw from them, or the business will be captured by new entrants, who have not signed the previous agreement.

This idea is proven by experience. In connection with the *Georgine/Amchem* settlement, lawyers for plaintiffs signed side letters promising to recommend to their future clients a settlement framework which required impairment for compensation,

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[7] 1t is important to keep clearly in mind that Owens Corning's National Settlement Plan has two parts—a series of massive batch, or "inventory" settlements resolving pending claims and standing offers to future claimants, subject to significant restrictions. While the settlement of Owens Corning's 235,000 case backlog is dramatic because of its size (which, in turn is due to Owens Corning traditionally aggressive litigation strategy), it does not provide a means for resolving cases in the future. That depends on its "futures agreements" with the plaintiffs' trial bar.

promised tolling of the statute of limitations for unimpaired claimants and offered alternative dispute resolution to sick claimants. The plaintiffs' lawyers promised to recommend this framework even if the *Georgine/Amchem* class action were rejected by the courts. Nevertheless, most of the lawyers who signed those agreements have either repudiated or ignored them.

Shouldn't legislation establish a fund, from which claimants are compensated, and to which defendants would contribute in accordance with an estimate of their liability?[8] A global fund for asbestos claimants is an idea that has been included in previous legislative proposals and that I have favored in the past. In theory, a fund could reduce transactions costs by eliminating the issue of individual liability from each case, and would provide greater security by guaranteeing compensation in the event that all defendants responsible for a victim's injuries went bankrupt. I have come to believe, however, that a fund of this type is completely impractical.

First, as a result of OSHA regulation and the drastic reduction of asbestos use in the 1980s, practically all asbestos liability arises out of conduct that occurred long ago. For this reason, a simple assessment or taxation scheme, in which producers pay a tax into a fund or (as in workers compensation programs) provide insurance to cover their future liabilities, would not work. Rather, the ARC would be required to estimate the appropriate share of liability of hundreds of potentially responsible parties, participating in many different product and geographical markets as manufacturers, wholesalers, or distributors. Moreover, many companies will be defendants as a result of their ownership of premises, which does not involve product liability at all. This would be an endlessly complicated task.

Second, the ARC would have to address the responsibility of liability insurance companies (with their complex patters of reinsurance). Insurance contracts cover "damages for personal injury" for which a particular insured company is found liable, and there is no guarantee an assessment for a government-created fund would be held to fit this definition. It is, of course, unthinkable to shift the burden of compensation from insurance companies to policy holders. That would not only be unfair to the policy holder but would drastically shrink the assets available for compensation of asbestos victims. On the other hand, a legislative fiat requiring insurance companies to make payments not founded by contract would ensure drawn out—and highly uncertain—constitutional litigation.

Finally, because of the dynamic nature of asbestos litigation, even if these obstacles could be overcome, the agency would be required to update and adjust the shares formula constantly. This task could prove as costly as, or more costly than, case-by-case adjudication.

It is not an accident that previous administration systems that have established a compensation fund which assesses a tax on companies, such as the Black Lung Disability Trust Fund, assigned liability to the fund only prospectively.[9] Although I continue to believe that in a perfect world a legislative compensation scheme would include a fund to avoid case-by-case adjudications of liability and to guarantee payments, such a fund is impractical in the real world. I note, in this regard, that the legislation preserves joint and several liability, which effective ensures full payment by a solvent defendant of an insolvent defendant's share even without a fund.

Is the system in S. 758 too complicated? The short answer is no. Most claimants will file their application, obtain determination of eligibility, and quickly settle their claim with the help of a mediator. The few claims that are not resolved in this way could be tried in a court, of the plaintiffs choice, or in a streamlined arbitration process. Nothing could be simpler.

Obviously, the process would be more complex in a hard case. Fairness requires claimants to have a right of appeal to medical experts; and claimants who do not meet the standard criteria may have to demonstrate to an exceptional claims panel that they have a qualifying condition. These rights of appeal are perfectly straightforward and are required for fairness.

Why not make the system wholly voluntary for claimants? S. 758 places a strong emphasis on voluntariness. Thus, every claimant who demonstrates to the ARC that he has an eligible medical condition can freely choose whether to obtain an adjudication from an ARC arbitrator or to exit to the tort system. Indeed, the fact that ARC would always have to compete with the courts for the claimant's "business" would help ensure the quality of justice dispensed by the ARC. In this respect, administra-

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[8] Some have maintained that this is a difference between S. 758 and *Georgine/Amchem*. This is not the case. *Georgine/Amchem* did not establish a fund. Instead it established a *cap* on total liability, and further caps on the amounts that could be paid each year—a very different thing.

[9] Liability for cases of black lung for past workers was assigned to the taxpayers under Part B of the program. No one suggests that solution for asbestos liability.

tive claims process established by the bill is far more voluntary than the private agreements that have been touted as an alternative by some of the bill's opponents.

The one thing that cannot be voluntary, however, is the medical criteria. No solution to the asbestos litigation mess is possible unless the claims of the unimpaired are deferred. If the medical criteria were voluntary, claimants who met the criteria would use the cheaper and faster administrative system, while the unimpaired would proceed to court. The stream of asbestos cases would be unstaunched, and dissipation of resources to pay claimants with no physical impairment would continue unabated.

CONCLUSION

S. 758 recognizes that social resources for the asbestos problem are not inexhaustible. The bill reflects a judgment that those resources should be spent on delivering full and prompt compensation to those who are, and will become, impaired by asbestos disease, and not dissipated on payments to those who are not sick and may never become sick, on punitive damages that seek retribution for the decisions of long-dead executives for conduct that took place decades ago, and on extraordinary transactions costs. I am convinced that that is the right judgment. The proposed Fairness in Asbestos Compensation Act is a truly innovative response to a crisis that has long evaded a solution. It deserves your careful consideration.

PROFESSOR CHRISTOPHER EDLEY, JR.

Professor Christopher Edley, Jr. has taught at Harvard Law School since 1981. His book, *Not All Black & White: Affirmative Action, Race and American Values* (Hill & Wang), grew out of his work as special counsel to President Clinton, and director of the White House review of affirmative action. He is also the author of a treatise, *Administrative Law: Rethinking Judicial Control of Bureaucracy* (Yale University Press). He is founding co-director of The Civil Rights Project, a think tank based at Harvard University. Edley's academic work is primarily in administrative law, and in the role of law in the policymaking process, but has also included civil rights, federalism, budget policy, defense department procurement law, public interest litigation, and national security law. In June 1997 he was named, in a consulting capacity, Senior Advisor to President Clinton for the Race Initiative, and consultant to the President's Advisory Board on Racial Reconciliation. In May 1999, he was appointed to the United States Commission on Civil Rights by Representative Richard Gephardt, House of Representatives Democratic Leader.

Following graduate school, Edley served in the Carter Administration as Assistant Director of the White House Domestic Policy Staff, with responsibility for welfare reform, social security and other antipoverty measures. He joined the Harvard Law School faculty in 1981, and later served in the Dukakis presidential campaign as National Issues Director.

Prof. Edley served in 1992 as a Senior Advisor on Economic Policy for the Clinton-Gore Presidential Transition, and then for two-and-one-half years in the Clinton Administration. First, as Associate Director for Economics and Government at the White House Office of Management and Budget, he oversaw development of the budget and participated in most major legislative and policy initiatives for a broad portfolio of agencies, including the departments of HUD, Justice, Treasury, Transportation, Commerce, and over 40 autonomous agencies, among them the Securities & Exchange Commission, the Small Business Administration, the Federal Emergency Management Agency, the District of Columbia, the EEOC, the U.S. Commission on Civil Rights and the bank regulatory agencies.

Then, in February of 1995, he was asked to delay his return to Harvard in order to serve as Special Counsel to the President of the United States. In that capacity he led the White House review of affirmative action programs and participated in developing the President's July 1995 "Mend it, don't end it" speech on affirmative action. Shortly thereafter, he resumed his professorship at Harvard Law School. Among his past activities, Professor Edley served for a time as a member of the editorial board of the *Washington Post,* and as vice chairman of the board of the Congressional Black Caucus Foundation. Among his current activities: member, Council on Foreign Relations; executive committee of the board of People for the American Way; Adjunct Scholar at the Urban Institute; member, National Academy of Public Administration; member, Board of Testing and Assessment of the National Research Council.

Professor Edley is a 1973 graduate of Swarthmore College, where he received high honors in mathematics and economics; and a 1978 honors joint-degree graduate-of-the Kennedy School of Government (M.P.P.) and of Harvard Law School, where he

was an editor of the *Harvard Law Review*. In May 1999, he received an Honorary Degree from Swarthmore College.

Senator GRASSLEY. Mr. Hiatt.

STATEMENT OF JONATHAN P. HIATT

Mr. HIATT. Thank you, Mr. Chairman and members of the subcommittee. The AFL–CIO's member unions represent, we believe, over 1 million active and retired workers who have been exposed to asbestos. Hundreds and thousands of America's working families are living with the deadly consequences of this exposure, acquired often by working in defense industries. Compounding this tragedy, the legal system has offered lengthy delays, followed by limited compensation, compensation that often comes too late.

Nonetheless, the AFL–CIO, as well as the Building and Construction Trades Department of the AFL–CIO, are opposed to S. 758 because we strongly believe that the approach of this bill would not constitute an improvement, but would instead make matters even worse. Building and Construction Trades Department President Georgine has written a letter to that effect which is attached to my written testimony.

The AFL–CIO, its member unions, and its affiliated State federations of labor have been actively involved in efforts over the last 10 years to craft solutions to the tragedy of asbestos. We have sought to work with responsible elements among the asbestos manufacturers, and we continue to be ready to engage with the industry.

There is, we believe, a broad recognition that the plight of asbestos victims might be eased by developing alternative methods of resolving their claims. Certainly, there is a real need for innovative approaches to obtaining justice for asbestos victims.

Let me begin by outlining why the bill before the subcommittee today takes us in the wrong direction, and then briefly describe what we believe to be a more promising approach.

Any asbestos legislation should meet certain basic fairness tests. Among those are, first, that the legislation should preserve asbestos victims' access to the courts. Alternative dispute mechanisms should be just that, voluntary alternatives to the courts, a right to opt out, as you had in the *Amchem* and *Fibreboard* settlements.

Second, any alternative claim procedure should be structured to lessen the delay and uncertainty facing all parties, not increase those matters. Third, any alternative claims procedures should be minimally adversarial and minimally legalistic. Any provisions that seek to alter the financing of asbestos liability should be comprehensive, transparent, and should add to victims' recoveries. And a bill should not substitute a new set of major transaction costs for the existing set.

S. 758 is at odds with these principles. First, it restricts both asbestos victims' access to the courts and their substantive rights under State law. It requires asbestos victims to file a claim with a new quasi-governmental agency and only allows victims to proceed once they have obtained a certificate of medical eligibility.

But having obtained the certificate wouldn't be enough. The bill would then impose mandatory mediation and would require that the asbestos victim obtain a release from mediation certificate.

Once a victim reached a court, he or she would be barred from bringing class actions, joining parties, consolidating actions, or aggregating claims—all standard procedures for lessening the costs and time involved in tort litigation—unless they obtained the defendant's consent.

Finally, victims would be barred from seeking punitive damages or relief for emotional distress, medical monitoring or surveillance, increased risk of cancer or other diseases. Ironically, as the bill shuts the courthouse door to asbestos victims, it creates a new Federal cause of action for asbestos manufacturers to allocate dispute administrative costs. It also threatens to transfer a new set of transaction costs, allowing, for example, companies to start litigating issues that for years have been considered resolved—liability issues, product identification issues, and others. Further, the procedures provided for are highly adversarial, allowing the companies to challenge claimants at virtually every stage.

There has been much discussion of the relationship of S. 758 and its predecessors to the *Amchem* settlement, the so-called *Georgine* settlement. The crucial difference between the two is that the *Amchem* settlement was voluntary. This legislation is not. The AFL–CIO affiliates who were involved in *Amchem* settlement negotiations oppose this bill. Rather than proceed in the direction laid out here, we believe the committee would be better served by examining the approach now being worked out between the industry and plaintiffs' representatives in Louisiana.

In that State, representatives of some of the major asbestos manufacturers like Owens Illinois, Owens Corning, and the attorneys representing a majority of Louisiana claimants have worked out a voluntary case resolution system. It defines levels of claims. It does include the medical criteria. It sets payments for levels of each type of claim. It creates certainty for all parties that is absent from these procedures. And though it is entirely voluntary, it allows for victims to receive certain and immediate payments, and for defendant companies to accurately estimate their exposures to claims.

Finally, the GAF Corporation and its many representatives have been expressing their frustration at what they describe to be having to pay money to people who are not sick. The description of the unimpaired as people who are not sick can easily leave the mistaken impression that these people have not been injured.

When GAF talks about the nonsick, they mean workers who have been exposed to asbestos and have suffered a medically-detectable effect—for example, the presence of pleural thickening—but whose bodies don't yet display the outward sign of disease such as impaired breathing. But make no mistake, these people have, in fact, been damaged by exposure to asbestos and there are testing procedures that can and should measure that damage.

We believe that the not yet impaired have been injured and should be entitled to some form of compensation under any alternative system. In some States such as Louisiana, the industry and responsible elements within the plaintiff's bar have worked out settlement procedures that provide the unimpaired with regular testing and modest compensation, while preserving their claims if they have been impaired. In contrast, this bill is designed to prevent the

unimpaired from receiving any compensation of any kind from the asbestos industry.

The subcommittee, in considering whether to create exceptions to State tort law, should be mindful of the incentives it creates for industrial decisionmakers. I am sure the subcommittee would not want to suggest to business executives making decisions in the future that if the scale of the risk their product poses is truly awe-inspiring, Congress will step in in the form of single-industry tort reform to save them from the consequences of their actions under State tort law.

Thank you.

[The prepared statement of Mr. Hiatt follows:]

PREPARED STATEMENT OF JONATHAN P. HIATT

SUMMARY

The AFL–CIO is opposed to S. 758, the Fairness in Asbestos Compensation Act of 1999 as is the Building and Construction Trades Department of the AFL–CIO, which has been actively involved over the years in representing workers exposed to asbestos. However, the AFL–CIO does not believe the current state of asbestos litigation is ideal and is committed to working with all interested parties to seek solutions to problems of delay and inequities in the treatment of victims of asbestos.

The AFL–CIO believes any asbestos legislation should meet certain basic fairness tests. Among these are:

- The legislation should preserve asbestos victims' access to the courts—alternative dispute mechanisms should be just that—voluntary alternatives to the courts.
- The legislation should preserve asbestos victims' access to counsel.
- Any alternative claims procedure should be structured to lessen the delay and uncertainty facing all parties.
- Any alternative claims procedure should be minimally adversarial and minimally legalistic.
- Any provisions that seek to alter the financing of asbestos liabilities should be comprehensive, transparent and should add to victims' recoveries.

The AFL–CIO believes that there is considerable promise in voluntary, state-based settlement agreements such as that worked out in Louisiana between leading asbestos manufacturers and the plaintiffs' bar in that state. These arrangements should be looked at carefully as models for any Congressional action.

Good morning, Chairman Grassley. My name is Jonathan Hiatt, I am the General Counsel of the American Federation of Labor and Congress of Industrial Organizations. I would like to thank the Subcommittee for the opportunity to testify on the issue of federal legislation addressing the rights of workers suffering from exposure to asbestos.

The Subcommittee has before it S. 758, the Fairness in Asbestos Compensation Act of 1999. The AFL–CIO is opposed to S. 758, as is the Building and Construction Trades Department of the AFL–CIO, which has been actively involved over the years in representing workers exposed to asbestos. I have attached to my written testimony a copy of a letter from Robert Georgine, the President of the Building and Construction Trades Department of the AFL–CIO, to Congressman Conyers, expressing his opposition to last year's House version of this bill, and a copy of a letter from William G. Bernard, President of the International Association of Heat & Frost Insulators and Asbestos Workers, to Chairman Hyde of the House Judiciary Committee expressing that union's opposition to H.R. 1283, the House version of S. 758.

The AFL–CIO's member unions represent, we believe, over 1 million active and retired workers who have been exposed to asbestos. Hundreds of thousands of America's working families are living with the deadly consequences of this exposure, acquired often while working in defense industries. Compounding this tragedy, the legal system has offered lengthy delays followed by limited compensation, compensation that often comes too late.

The AFL–CIO, its member unions, and its affiliated state federations of labor have been actively involved in efforts over the last ten years to craft solutions to the tragedy of asbestos. We have sought to work with responsible elements among the asbestos manufacturers, and we continue to be ready to engage in dialogue with the industry. There is, we believe, a broad recognition that the plight of asbestos victims might be eased by developing alternative methods of resolving their claims. Currently efforts are underway among the parties to asbestos litigation to craft innovative voluntary alternative claims procedures at the state level. One such agreement has been entered into in Louisiana. These efforts should be allowed to develop and be tested.

The exposure of millions of working Americans to asbestos is one of the largest torts in the nation's history. It has led to hundreds of thousands of claims, and will lead to more. The judiciary has asked several times for Congress to consider how this case load might be managed, most recently in last summer's *Fibreboard* decision.[1] However, the need for innovative approaches to obtaining justice for asbestos victims must not be the basis for denying those same people effective access to our courts. The AFL–CIO is eager to work with the Subcommittee to craft such an innovative approach, but we must begin by outlining why the bill before the Subcommittee today takes us in the wrong direction.

Any asbestos legislation should meet certain basic fairness tests. Among these are:

- The legislation should preserve asbestos victims' access to the courts—alternative dispute mechanisms should be just that—voluntary alternatives to the courts. The legislation should preserve asbestos victims' access to counsel.
- Any alternative claims procedure should be structured to lessen the delay and uncertainty facing all parties.
- Any alternative claims procedure should be minimally adversarial and minimally legalistic.
- Any provisions that seek to alter the financing of asbestos liabilities should be comprehensive, transparent and should add to victims' recoveries.

I would like to briefly discuss why S. 758 is at odds with each of these principles.

S. 758 dramatically restricts both asbestos victims' access to the courts and their substantive rights under state law. It requires asbestos victims to file a claim with a new quasi-governmental agency, the Asbestos Resolution Corporation ("ARC"), and only allows victims to proceed once they have obtained a "certificate of medical eligibility." Without this certificate, a victim cannot seek justice in the courts. But having obtained a certificate would not be enough. S. 758 would then impose mandatory mediation and would require the asbestos victim obtain a "release from mediation" certificate. Once a victim or, more likely in view of the delays these procedures would create, the victims' estate reached a court, they would be barred from bringing class actions, joining parties, consolidating actions, or aggregating claims—all standard procedures for lessening the costs and time involved in tort litigation—unless they obtained the defendants' consent.

These procedural barriers significantly diminish asbestos victims current rights under state law. But the bill goes further. It would bar any recovery unless victims could prove they had the specific medical criteria listed in the bill. And finally, victims would be barred from seeking punitive damages or relief for emotional distress, medical monitoring or surveillance, increased risk of cancer or other diseases.

Ironically, as the bill shuts the courthouse doors to asbestos victims, it creates a new federal cause of action for asbestos manufacturers to bring to allocate disputed administrative costs.

As to the right to counsel, we are not supportive of excessive attorneys' fees, but we are all too well aware that unless assured of adequate risk-adjusted compensation, attorneys will not represent clients who are unable to pay hourly rates. S. 758 limits attorneys' fees to levels below those customarily awarded by courts in contingent litigation and the bars on consolidating cases effectively act as a barrier to economical representation of low-paid workers in asbestos cases. This would be appropriate if the bill envisioned a voluntary, non-adversarial process that allowed asbestos victims to obtain justice with limited assistance from counsel and limited fact finding.

But S. 758 does just the opposite. The certification procedure is substantively rigid and technically demanding, and the mediation and arbitration procedures are

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[1] *Esteban Ortiz et. al* v. Fibreboard Corporation et. al. No. 97–1704 (1999). See *The Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* (March 1991); *Amchem Products, Inc.* v. *Windsor*, 138 L. Ed. 2d 689, at 716 (1997).

highly adversarial and procedurally dense, with financial penalties for taking certain procedural and substantive positions in the process. No one would be well advised to enter into such proceedings without counsel.

To take one example, to get through mandatory mediation, the asbestos victim would have to provide a detailed, company-specific exposure history, which would be subject to challenge by industry counterparties. This procedure, rather than eliminating a major cause of litigation expense, adds to it, by requiring asbestos victims to prove their exposure histories twice—once in mediation, then again in court if mediation fails. Ironically, this procedure appears to make no sense if the Act's intention is to address the enormous transaction costs of attempting to precisely prove all the sources of each individual victim's asbestos exposure.

Finally, as to financing, to the extent S. 758 acts to limit the liability of asbestos manufacturers, it may merely succeed in transferring that liability to employers under the workers' compensation system, and to workers' health funds. Where the federal government is the employer, as is the case in federal shipyards, this will result in a direct transfer of financial responsibility from the asbestos manufacturers to the federal government. Where the employer is a federal contractor, such as in the private shipbuilding industry, the transfer will be indirect, but just as real. While there may be a role for the federal government in assisting asbestos victims, it should not be to use federal dollars to substitute for asbestos manufacturer dollars. In addition, S. 758 does not meet the comprehensiveness test to the extent that it fails to address issues such as the failure of the insurance industry to honor its contractual commitments to the asbestos manufacturers.

There has been much discussion of the relationship of S. 758 and its predecessors to the *Amchem* settlement. The crucial difference between the two is that the *Amchem* settlement was voluntary, this legislation is not. The AFL–CIO affiliates who were involved in the *Amchem* settlement negotiations oppose S. 758.

The AFL–CIO's opposition to S. 758 should not be interpreted to mean that we believe the current state of affairs in asbestos litigation is optimal. We are deeply concerned about the collusion of certain attorneys and asbestos manufacturers in "screening programs" that settle cases for workers exposed to asbestos before they know whether they will suffer serious health consequences.

But rather than proceed in the direction laid out in S. 758, the AFL–CIO believes the Committee would be better served by examining the approach now being worked out between the industry and plaintiffs' representatives in Louisiana. In that state, representatives of some of the major asbestos manufacturers like Owens-Illinois and Owens-Corning and the attorneys representing a majority of Louisiana claimants have worked out a voluntary case resolution system. This system defines three levels of claims, and sets payment levels for each type of claim, together with provisions allowing for higher level claims if the applicants' condition worsens. It creates certainty for all parties that is absent from the procedures in S. 758. Though entirely voluntary, it allows for victims to receive certain and immediate payments, and for defendant companies to accurately estimate their exposure to claims.

We believe a program like this would be the appropriate context for limiting attorneys fees, since participants in this program would not need extensive adversarial representation or need to engage in time-consuming discovery. Similarly, the Louisiana program should do much to address the screening abuses, as it provides rights to additional compensation to those who have been exposed to asbestos but have not yet become ill.

A copy of the Louisiana agreement is attached to my written testimony.

Any voluntary national program along these lines would have to address certain issues that do not arise in a single state-such as the variation in award levels from state to state. It would also need to be constructed on the understanding that for a voluntary ADR program to succeed, it must offer value to both sides in potential litigation—value in the form of mutually reduced costs and reduced uncertainty. Such a program cannot merely be a vehicle for irresponsible elements in the industry to continue to fight core liability issues that have really long been settled in the hope of winning incremental victories through delay.

Finally, the GAF Corporation and its many representatives have often expressed their frustration at what they describe as "having to pay money to people who are not sick." The description of the unimpaired as "people who are not sick" can easily leave the mistaken impression that these people have not been injured. When GAF talks about the "non-sick" they mean workers who have been exposed to asbestos and have suffered a medically detectable effect—for example the presence of pleural thickening—but whose bodies do not yet display the outward signs of disease such as impaired breathing. But make no mistake—these people have in fact been damaged by exposure to asbestos and there are testing procedures that can measure that damage.

The AFL–CIO believes that the "unimpaired" have been injured, and should be entitled to some form of compensation. In some states, including Louisiana, the industry and responsible elements within the plaintiff's bar have worked out settlement procedures that provide the unimpaired with regular testing and modest compensation, while preserving their claims if they become impaired. In contrast, S. 758 appears designed to prevent the "unimpaired" from receiving any compensation of any kind from the asbestos industry.

Before I close, I would like to make two larger systemic points. This Subcommittee in considering whether to create exceptions to state tort law, should be mindful of the incentives it creates for industrial decision makers. I am sure the Subcommittee would not want to suggest to business executives making decisions in the future that if the scale of the risk their product poses is truly awe inspiring, Congress will step in to save them from the consequences of their actions under state tort law.

In addition, the AFL–CIO has always opposed efforts to deny working families access to state courts. One such effort was defeated last year in the Senate.[2] S. 758's mandatory

In conclusion, the AFL–CIO and its affiliates are ready to work with all concerned parties, and especially with this Subcommittee, to seek creative solutions in this area that are respectful of the rights of asbestos victims. We thank you for the opportunity to testify here today.

BUILDING AND CONSTRUCTION TRADES DEPARTMENT,
AMERICAN FEDERATION OF LABOR,
Washington, DC, August 10, 1998.

Hon. JOHN CONYERS, JR.,
House of Representatives,
Washington, DC.

DEAR CONGRESSMAN CONYERS: Your statement in the Congressional Record of June 25, 1998 agreeing to cosponsor H.R. 3905, the "Fairness in Asbestos Compensation Act of 1998", has been brought to my attention. For the reasons set forth in the enclosed list of "Objections to H.R. 3905", the Building and Construction Trades Department, AFL–CIO, strongly opposes this bill.

It is apparent to me that erroneous information was provided to you concerning our position on the issues addressed by H.R. 3905 and its relationship to the settlement agreement reviewed by the Supreme Court in *Amchem Products. Inc.* v. *Windsor.* The settlement agreement in the *Windsor* case was voluntarily negotiated by several members of the plaintiffs' trial bar who over the years have represented thousands of building trades union members. The agreement applied only to those members who wished to be covered by its terms. Many members made the decision to be included in the covered class, and by lending my support to the settlement agreement I felt I was supporting their decisions while, at the same time, not interfering with the decisions of members who decided not to be included and, thereby, to retain all their rights in the tort system. Many members also decided not to be included. I did not directly participate in the negotiation of that settlement agreement, and to the best of my recollection, organized labor became involved only after the main agreement was negotiated between plaintiffs' attorneys and attorneys for the CCR companies. This involvement resulted in certain amendments to the agreement which provided organized labor with a role in the implementation and monitoring of the agreement.

H.R. 3905 is a completely different matter. In the first place, it is, obviously, a piece of federal legislation rather than the settlement of a law suit, and it addresses certain issues, such as particularized medical criteria, which, in my view, should not be addressed by federal legislation. Second, H.R. 3905 is not voluntary. It would apply to every occupational asbestos victim in the future. It would even apply to those victims who already have filed lawsuits which are pending in the federal and state courts. Third, H.R. 3905 substantially curtails victim' tort rights and remedies. Fourth, it requires victims who wish to use the tort system to pursue first an administrative process which is lengthy, costly, adversarial, cumbersome and technical. Our objections in these regards are set forth in the enclosure.

I do not disagree that asbestos victims deserve, at their option, an alternative to the tort system because the tort system can often be lengthy, costly, adversarial, cumbersome and technical. However, I also know that many thousands of asbestos

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[2] The Products Liability Reform Act of 1997, S. 648. provisions are in effect an effort at tort reform one class of plaintiffs at a time. We oppose so-called tort reform both in aggregate and in bite sized pieces.

victims have received justice by reason of this tort system, and that many more victims will do so in the future.

The Building and Construction Trades Department is prepared, as always, to discuss with any well-meaning person, organization, or group viable voluntary alternatives to the tort system for asbestos victims which will promote their interests in securing timely and adequate compensation for their injuries.

With best wishes, I am.

Sincerely,

ROBERT A. GEORGINE,
President.

OBJECTIONS TO H.R. 3905 ("FAIRNESS IN ASBESTOS COMPENSATION ACT OF 1998")

1. The bill eliminates a claimant's right to sue in the tort system unless the claimant first files a claim with the Asbestos Resolution Corporation (ARC), submits information to ARC, and awaits a determination by ARC on medical eligibility.

2. The bill eliminates a claimant's right to sue in the tort system unless the claimant is successful in having ARC issue a "certificate of medical eligibility". This is true even with regard to pending civil actions which have not gone to trial prior to the "operational date" of the Act (the date on which ARC certifies that it is operational or the first business day following the seventh month after the date of enactment whichever comes first).

3. The bill legislates specific and detailed medical criteria to govern ARC's determination.

4. Even if a claimant is issued a certificate of medical eligibility, the claimant cannot sue in the tort system unless he first goes through a lengthy mediation procedure, and is successful in having ARC issue a "release from mediation".

5. In the mediation procedure, the claimant is required to provide a detailed and company-specific exposure history. This defeats the purpose of having an alternative, expeditious compensation system which compensates claimants with asbestos-related diseases, regardless of their ability to identify the manufacturer of the asbestos to which they were exposed, or to recall the particulars about each and every job at which they were exposed.

6. The mediation and voluntary arbitration procedures established by the bill are adversarial, cumbersome and extremely technical. This will make the process costly and time consuming and will require every claimant to be represented by an attorney. It would be preferable to make such an optional alternative process non-adversarial and streamlined by having companies pay monies into the facility on the basis of some formula (perhaps size and ability to pay and/or the formula set forth in the bill governing the assessment of administrative costs) for distribution to the claimants. This way, the companies would not participate in the proceedings, the proceedings would not be adversarial, cumbersome, or technical, and proof of particularized exposure histories would be unnecessary. Also, perhaps the claims facility can have on staff an independent group of attorneys who are available at the option of claimants to assist claimants at no cost or a minimal cost.

7. The bill details each and every procedure in the administrative claims process. It would be better to leave the function of establishing rules of procedure to the administrators of the process.

8. The bill allows companies to join forces in the claims process but bars consolidation of the claims of a group of claimants.

9. Under the medical criteria established in the bill, exposures below OSHA PELs which were in effect in prior times but were later discredited by new scientific knowledge are disregarded in whole or in part.

10. Under the medical criteria for lung cancer established in the bill, the installation, repair or removal of asbestos products in a shipyard during World War II is given more credit than the installation, repair or removal of asbestos products on a construction project.

11. The bill establishes a new civil action in the courts of the United States to handle disputes between companies, or between companies and ARC, regarding the assessment of administrative costs. These new civil actions are likely to consume resources which should be applied to the purpose of the claims process (i.e. compensation to claimants).

12. To succeed in their civil actions, claimants are required to prove (a second time) the existence of the medical criteria set forth in the bill.

13. Even in pending civil actions that have gone to trial, but have not resulted in final non-appealable judgments, claimants are required to prove the existence of the legislated medical criteria.

14. Courts entertaining civil actions by claimants are precluded from utilizing well-established procedures to expedite the handling of multiple-claimant cases, including class actions, joinder of parties, consolidation of actions, aggregation of claims, and extrapolations.
15. Courts are restricted in providing damages or other relief to claimants for emotional distress, or any other form of mental or emotional harm, or for medical monitoring or surveillance.
16. Courts are precluded from providing damages or other relief to claimants based on valid state law claims for increased risk of cancer or other diseases.
17. Courts are precluded from providing punitive damages to claimants in appropriate cases.
18. The doctrine of joint and several liability may be adversely affected by the Bill.

INTERNATIONAL ASSOCIATION OF HEAT &
FROST INSULATORS & ASBESTOS WORKERS,
OFFICE OF THE GENERAL PRESIDENT,
Washington, DC, May 20, 1999.

The Hon. HENRY HYDE, Chairman,
House Judiciary Committee,
Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN HYDE: The International Association of Heat and Frost Insulators and Asbestos Workers strongly opposes H.R. 1283, the "Fairness in Asbestos Compensation Act of 1999 for the following reasons:

1. The bill eliminates a claimant's right to sue in the tort system unless the claimant first files a claim with the AsbestosResolution Corporation (ARC), submits information to ARC, and awaits a determination by ARC on medical eligibility.
2. The bill eliminates a claimant's right to sue in the tort system unless the claimant is successful in having ARC issue a"certificate of medical eligibility". This is true even with regard to pending civil actions which have not gone to trial prior to the "operational, date" of the Act.
3. The bill legislates specific and detailed medical criteria to govern ARCs determination.
4. Even if a claimant is issued a certificate of medical eligibility, the claimant cannot sue in the tort system unless he first goes through a lengthy mediation procedure, and is successful in having ARC issue a "release from mediation".
5. In the mediation procedure, the claimant is required to provide a detailed and company-specific exposure history. This defeats the purpose of having an alternative, expeditious compensation system which compensates claimants with asbestos-related diseases, regardless of their ability to identify the manufacturer of the asbestos to which they were exposed, or to recall the particulars about each and every job at which they were exposed.
6. The mediation and voluntary arbitration procedures established by the bill are adversarial, cumbersome and extremely technical. This will make the process costly and time consuming and will require every claimant to be represented by an attorney. It would be preferable to make the process non-adversarial and streamlined by having companies pay monies into the facility on the basis of some formula (perhaps size and ability to pay and/or the formula set forth in the bill governing the assessment of administrative costs) for distribution to the claimants. This way, the companies would not participate in the proceedings, the proceedings would not be adversarial cumbersome, or technical, and proof of particularized exposure histories would be unnecessary. Also, perhaps the claims facility can have on staff an independent group of attorneys who are available at the option of claimants to assist claimants at no cost or a minimal cost.
7. The bill details each and every procedure in the administrative claim process. It would be better to leave the function of establishing rules of procedure to the administrators of the process.
8. S. The bill allows companies to join forces in the claims process but bars consolidation of the claims of a group of claimants.
9. Under the medical criteria established in the bill, exposures below OSHA PELs which were in effect in prior times but were later discredited by new scientific knowledge are disregarded in whole or in part.
10. Under the medical criteria for lung cancer established in the bill, the installation, repair or removal of asbestos products in a shipyard during World War II is given more credit than the installation, repair or removal of asbestos on a construction project.

11. The bill establishes a new civil action in the courts of the United States to handle disputes between companies, or between companies and ARC, regarding the assessment of administrative costs. These new civil actions are likely to consume resources which should be applied to the compensation of claimants.

12. To succeed in their civil actions, claimants are required to prove (a second time) the existence of the medical criteria set forth in the bill.

13. Even in pending civil actions that have gone to trial, but have not resulted in final non-appealable judgments, claimants are required to prove the existence of the legislated criteria.

14. Courts entertaining civil actions by claimants are precluded from utilizing well-established procedures to expedite the handling of multiple-claimant cases, including class actions, joinder of parties, consolidation of actions, aggregation of claims, and extrapolations.

15. Courts are restricted in providing damages or other relief to claimants for emotional distress, or any other form of mental or emotional harm, or for medical monitoring or surveillance.

16. Courts are precluded from providing damages or other relief to claimants based on valid state law claims for increased risk of cancer or other diseases.

17. Courts are precluded from providing punitive damages to claimants in appropriate cases.

Asbestos victims deserve, at their option, an alternative to the tort system because the tort system can often be lengthy, costly, adversarial, cumbersome and technical. However, it is also true that many thousands of asbestos victims have received justice by reason of this tort system, and that many more victims will do so in the future.

Our Union is prepared, as always, to discuss with any well-meaning person, organization, or group viable *voluntary* alternatives to the tort system for asbestos victims which will promote their interests in securing timely and adequate compensation for their injuries.

With kind regards, I am

Sincerely yours,

WILLIAM G. BERNARD,
General President.

Letter to go to all members of the Senate and House Judiciary Committees and sponsors of the bills as follows:

Senate Sponsors:

Ashcroft Judiciary
Hatch Judiciary
Dodd
Sessions Judiciary
Lieberman
Grassley Judiciary
Torricelli Judiciary
Robert Smith, NH Judiciary
Schumer Judiciary

House Sponsors:

Hyde Judiciary
James Moran, VA
Richard Armey
Tom DeLay
James Sensenbrenner Judiciary
Gekas Judiciary
Dan Burton, IN
Manzuloo
Stenholm
Hostettler
Bonilla
Norwood
Folley
Deal
Calvert
Brady, TX (no Bradley of TX)
Weller
Cannon
J.C.Watts, OK

January 9, 1998

Agreement Providing Administrative Alternatives for Claimants with Asbestos Related Conditions

TABLE OF CONTENTS

Agreement Providing Administrative Alternatives for Claimants with Asbestos Related Conditions

I Purposes.

(A) To provide individuals with evidence of asbestos-related conditions, as defined herein, a method of expeditiously, fairly and reasonably resolving personal injury and wrongful death claims (collectively, "personal injury claims") arising from such conditions through a consensual, administrative alternative to traditional tort litigation.

tolling (B) To protect individuals with evidence of asbestos-related conditions from the operation of statutes of limitation and repose (collectively, "statutes of limitations") which would either prevent financial recovery in deserving cases or necessitate litigation.

(C) To provide individuals with evidence of asbestos-related conditions but no evidence of impairment with a mechanism by which to resolve claims relating to such conditions.

(D) To reduce court docket congestion and minimize the expenditure of judicial resources and transaction costs associated with traditional asbestos litigation.

II Preamble.

(A) Effective Date. This Agreement is made and entered into as of January 9, 1998, by and between Plaintiffs' Counsel Signatories (as defined below) and Company Signatories (as defined below), all parties acting by and through their respective undersigned counsel.

(B) Background.

1. Members of the Louisiana AFL-CIO and affiliated unions (collectively, "Louisiana AFL-CIO") -- both active and retired -- have worked with and around asbestos-containing products in the course of their union-related occupations. The Louisiana AFL-CIO wishes to ensure, to the greatest extent possible, that its active and retired members who are impaired as a result of occupational exposure to asbestos are better able expeditiously to obtain fair compensation for such impairment.

2. The Plaintiffs' Counsel Signatories have over the course of more than two decades represented tens of thousands of asbestos claimants, including serving as court-appointed class counsel. The Plaintiffs' Counsel Signatories expect in the future to represent active and retired members of the Louisiana AFL-CIO in connection with personal injury claims arising out of exposure to asbestos-containing products arguably manufactured and/or

distributed or otherwise placed in the stream of commerce by one or more of the Company Signatories or installed or otherwise present in their facilities.

3. The asbestos litigation has resulted in extensive discovery concerning the potential liability of the Company Signatories and other defendants, as well as full consideration of the legal and factual bases, including medical issues, underlying such asbestos claims.

4. The vast majority of the asbestos personal injury claims brought against the Company Signatories and other defendants in the past twenty years have been resolved without trial. A small percentage of such lawsuits have been tried to verdict, with plaintiffs prevailing in some cases and defendants prevailing in others.

5. The volume of asbestos personal injury lawsuits filed in Louisiana and in other states has been and continues to be high. The volume of new case filings has taxed court systems throughout the country, undermining their ability to process asbestos cases promptly, efficiently and fairly.

6. The transaction costs and delays associated with resolving asbestos personal injury claims in the traditional tort system have been substantial for both plaintiffs and defendants, and the large number of pending cases will likely cause increased transaction costs and longer delays in the future.

7. After nearly twenty years of traditional tort litigation, the undersigned parties desire to provide an expeditious method for the fair and reasonable resolution of asbestos personal injury claims through a consensual, administrative alternative to traditional tort litigation. The procedures set forth in this Agreement provide a fair, flexible, speedy, cost-effective and assured method of compensating claimants who have been exposed to asbestos-containing products manufactured and/or distributed or otherwise placed in the stream of commerce by one or more of the Company Signatories or installed or otherwise present in their facilities. The Agreement provides substantial financial and other benefits to eligible, participating claimants, while avoiding the cost, uncertainty and delay associated with traditional asbestos tort litigation.

(C) Best Interests. Based on their extensive analysis of the law and facts of thousands of asbestos cases filed in the courts and their participation in extensive discovery conducted in such cases, the Plaintiffs' Counsel Signatories have concluded that the terms of this Agreement with Company Signatories are and will be in the best interests of their existing clients and potential future clients. The Company Signatories similarly have concluded that this Agreement is in their best interests because it will (i) reduce transaction costs, (ii) provide greater certainty with respect to the number of claims and aggregate settlement payments, and (iii) ensure uniform treatment of unimpaired non-malignancy cases.

(D) Covered Persons and Claims. Subject to the provisions herein, including Section VIII, Effectuation of Agreement, this Agreement is designed to offer the benefits described herein to those persons who retained the undersigned Plaintiffs' Counsel Signatories -- or any counsel now or in the future affiliated with the undersigned Plaintiffs' Counsel Signatories -- to timely file personal injury claims arising from the exposure of Claimant or Claimant's decedents to asbestos-containing products for which Company Signatories are or reasonably could be alleged to be legally responsible under any theory, and (i) who are residents of the State of Louisiana, or (ii) whose exposure to asbestos or asbestos-containing products occurred predominantly in the State of Louisiana, or (iii) who otherwise have a valid personal injury claim that could be asserted in the Louisiana courts under applicable Louisiana laws and who have elected to assert such a claim in the Louisiana courts against companies who are not signatories to this Agreement. This Agreement shall apply to all persons in the above categories whose asbestos related personal injury claims against a Company Signatory were not on file in court as of the earlier of the effective date of the Company Signatory's Individual Company Specific Settlement Agreement or the date of this Agreement.

III Definitions.

(A) "Claimant" means a Covered Person who files a Notification of Representation under this Agreement.

(B) "Company Signatories" means the undersigned corporate entities, their parents, subsidiaries, officers, directors and employees and such additional corporate or other entities as may in the future, and with the consent of a majority of the companies and a majority of the plaintiffs' counsel executing this Agreement, agree to be bound by the terms and conditions of this Agreement.

(C) "Designated Representative" means a person listed on Exhibit I who is designated by a Company Signatory to receive Notifications of Representation, Proofs of Claim and other materials under this Agreement.

(D) "Individual Company-Specific Settlement Agreements" Each individual Company Signatory shall negotiate with the Plaintiffs' Counsel Signatories an Individual Company-Specific Settlement Agreement to define and/or resolve issues specific to that Company Signatory. Such issues might include, for example, exposure criteria, whether and, if so, on what terms, to accept for administrative resolution claims, claim submission and payment rates and claim values (with consideration given to factors such as historical and jurisdictional values as well as the value and savings resulting from the claims resolution process established by this Agreement).

(E) "Level One Claim" means a Level One Claim as defined in Section VI(A) hereof.

(F) "Level One Claimant" means the person on whose behalf, or on behalf of whose decedent, a Level One Claim is asserted.

(G) "Level Two Claim" means a Level Two Claim as defined in Section VI(D).

(H) "Level Two Claimant" means the person on whose behalf, or on behalf of whose decedent, a Level Two Claim is asserted.

(I) "Level Three Claim" means a Level Three Claim as defined in Section VI(E) hereof.

(J) "Level Three Claimant" means the person on whose behalf a Level Three Claim is asserted.

(K) "Plaintiffs' Counsel Signatories" means the undersigned plaintiffs' counsel and any counsel now or in the future affiliated with the undersigned plaintiffs' counsel with respect to "Covered Persons and Claims", and such additional plaintiffs' counsel as may in the future, and with the consent of a majority of plaintiffs' counsel and a majority of the Company Signatories executing this Agreement, agree to be bound by the terms and conditions of this Agreement.

(L) "Procedural Referee" means an individual named by the Representative Committee and empowered to provide a second level of dispute resolution for disputes arising hereunder. Should the Representative Committee be unable to resolve a dispute arising hereunder, it shall appoint a Procedural Referee from the list on Exhibit G hereto.

(M) "Representative Committee" means a committee comprised of an equal number of the undersigned Plaintiffs' Counsel Signatories and Company Signatories, or their designees, agreed upon by a majority of their respective signatories, and empowered to meet to resolve informally any disputes arising under this Agreement concerning the administrative procedures under which Claimants may proceed. The initial members of the Representative Committee shall be as designated in Exhibit F hereto.

(N) "Trust Agreement" means the agreement creating a trust fund ("Trust Fund") to pay the benefits enumerated in this Agreement to Level Two Claimants.

(O) "Trustee" means the Trustee of the Trust Fund created in the Trust Agreement.

IV Limitations On Agreement.

(A) Right to Cancel. It is expressly understood and agreed among the signatories hereto that any signatory may unilaterally and without consent terminate its participation in this Agreement at any time after 18 months from the date of execution by that Signatory. Such a determination shall not be contested by the other signatories, and shall not be subject to review by the Representative Commit-

18 mos

tee or the Procedural Referee. A terminating signatory must provide two-weeks written notice of its intention to terminate to each of the other signatories. A Company Signatory's decision to terminate shall not affect its obligations to Level One or Level Two Claimants who have signed releases pursuant to this Agreement or to existing Level Three Claimants with respect to the tolling of statutes of limitations. A terminating Company Signatory may elect at the time of its termination to (i) continue its obligations to existing Level Three Claimants who have filed a Notification of Representation or (ii) to limit its obligations to continuing the tolling agreement and allowing such Level Three Claimants to proceed in the tort system should they develop a Level One or Level Two condition. A Plaintiffs' Counsel Signatory's decision to terminate shall not affect the rights and obligations of any Level One or Level Two Claimant represented by such Counsel who has executed a release pursuant to this Agreement, or to the Company Signatories with respect to such Claimants who have executed a release.

(B) Critical Mass of Claimants. It is expressly understood and agreed that Company Signatories require a critical mass of eligible Claimants who agree to be bound by the terms of this Agreement. The number of Claimants constituting a critical mass may vary among the Company Signatories, and each Company Signatory shall set forth the necessary critical mass in its Individual Company-Specific Settlement Agreement.

(C) Critical Mass Of Company Signatories. It is expressly understood and agreed that Claimants will require a critical mass of Company Signatories to participate under this Agreement. Likewise, in order to recommend the alternatives set forth in this Agreement to individual Claimants, the Plaintiffs' Counsel Signatories will require a critical mass of Company Signatories to participate in the Agreement. The Plaintiffs' Counsel Signatories shall, on behalf of themselves and Claimants, set forth the necessary critical mass of Company Signatories in the Individual Company-Specific Settlement Agreements.

(D) Critical Mass Of Plaintiffs' Counsel Signatories. It is expressly understood and agreed that the Company Signatories will require a critical mass of Plaintiffs' Counsel Signatories to participate in the Agreement, and each Company Signatory shall set forth the necessary critical mass of Plaintiffs' Counsel Signatories in its Individual Company-Specific Settlement Agreement.

(E) Individual Company Liability. No Company Signatory will be jointly responsible for any other Company Signatory's obligations under this Agreement.

V **Participation Under This Agreement.**

(A) Notification of Representation. Each Covered Person who desires to obtain the benefits of this Agreement shall file a Notification of Representation form as set forth in Exhibit C. That form shall be filed with the Designated Representative of each Company Signatory and with the Trustee. Claimants who file a Notification of Representation form will receive the immediate benefit, as of the filing date, of

having all applicable statutes of limitation as to asbestos-related personal injury claims tolled as to each of the Signatory Companies. In consideration therefore, each Claimant shall acknowledge on the Notification of Representation form the Claimant's obligation to proceed under this Agreement with respect to any asbestos personal injury claims against Company Signatories.

(B) Level One Proof of Claim. After filing the Notification of Representation form, those Claimants with a good faith belief that they qualify as Level One Claimants shall file a Level One Proof of Claim form as set forth in Exhibit E with the Trustee. That form, along with any materials required by Individual Company-Specific Settlement Agreements, shall be filed with the Designated Representative of each Company Signatory against whom a Level One claim is asserted.

(C) Level Two Registration. After filing the Notification of Representation form, those Claimants with a good faith belief that they qualify as Level Two Claimants shall file a Level Two Registration Form in the form set forth in Exhibit D. That form shall be filed with the Designated Representative of each Company Signatory and with the Trustee.

(D) Level Three Registration. Those Claimants who file a Notification of Representation form automatically are registered as Level Three Claimants in the absence of qualifications as a Level One or a Level Two Claimant.

(E) Right to Additional Compensation for Later-Developing Condition. A Level One Claimant who has been compensated for a non-malignant condition under this Agreement and its related Individual Company-Specific Settlement Agreements may obtain additional compensation, as provided in each Individual Company-Specific Settlement Agreement, subject to credit for amounts previously paid by such Company Signatory, if the Claimant thereafter develops an asbestos-related malignancy. A Level Two Claimant who has received benefits hereunder may obtain additional benefits under this Agreement and its related Individual Company-Specific Settlement Agreements , subject to a credit for amounts previously paid to the Claimant on behalf of the Company Signatories from the Trust Fund, if the Claimant thereafter develops a Level One condition. Specific criteria governing the payment of additional compensation for any such qualifying later-developing malignant or non-malignant condition shall be set forth in the Individual Company-Specific Settlement Agreements.

(F) Opt Outs. At such time as a Level Three Claimant may have a Level One or Level Two Claim, and prior to receiving compensation from the Trust Fund or directly from a Company Signatory, the Claimant may file an election with the Designated Representatives and with the Representative Committee to opt out of the Agreement. On the basis of their extensive experience in the asbestos litigation, the Plaintiffs' Counsel Signatories anticipate that no more than fifty (50) Covered Persons will exercise the right to opt out of the operation of this Agreement or to refuse to participate in this Agreement in the first instance in any twelve month period, no more than five (5) of which will be malignancies. If more than fifty (50)

Covered Persons or more than five (5) malignancies elect to not participate in the Agreement or to opt out of the Agreement in any twelve month period, the Representative Committee shall meet to discuss what if any steps should be taken in response. Nothing in this paragraph should be construed as limiting any Company Signatory's right hereunder to terminate its participation in this Agreement under the terms of Paragraph IV(A) above.

VI Claims Levels and Requirements.

(A) Level One Claims. Claimants who submit a Level One Proof of Claim form and who satisfy the medical criteria set forth herein and in Exhibit A or Claimants who bring loss of consortium or other derivative claims based on their relationship to a person who satisfies such medical criteria shall be considered Level One Claimants.

(B) Qualifying Medical Conditions For Level One Claims. Level One qualifying medical conditions as defined in Exhibit A include:

1. Mesothelioma.
2. Lung cancer.
3. Other cancers.
4. Asbestos-related nonmalignant disease.

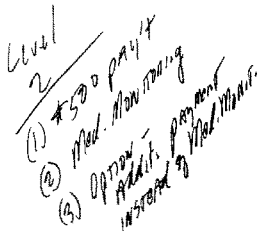
(C) Release for Level One Claims. Upon approval of an individual Level One Claim, and prior to receipt of any financial compensation by the Claimant, the Claimant shall execute and deliver to the applicable Designated Representatives a release and any necessary supporting documents in the form required under each applicable Individual Company-Specific Settlement Agreement as may be supplemented from time to time to comport with applicable requirements of law. Such releases and supporting documents shall provide a full release of all actual and potential asbestos-related personal injury claims, except that a Level One Claimant shall be eligible to receive additional compensation if so provided for under Individual Company Specific Settlement Agreements for any later-developing compensable malignant condition and may submit an additional Level One Proof of Claim for the purpose of seeking to obtain such additional compensation.

(D) Level Two Claims. Claimants who submit a Level Two Registration form and meet the Level Two medical criteria set forth in Exhibit A or Claimants who bring loss of consortium or other derivative claims based on their relationship to a person who satisfies such medical criteria, but who do not meet the medical criteria for classification as Level One Claimants, shall be classified as Level Two Claimants.

1. Level Two Claimants who file a Notification of Representation form shall, as of the filing date, have all applicable statutes of limitation as to asbestos-related personal injury claims tolled as to each of the Company Signatories.

2. Subject to the provisions of paragraph VI(D)4. each Level Two Claimant shall be entitled to receive compensation under this Agreement should the Claimant subsequently develop a qualifying Level One condition.

3. The Trust Fund shall make certain payments, described below, to Level Two Claimants. Each of the Company Signatories shall make a quarterly contribution to the Fund. The aggregate contributions to the Fund shall not exceed $_____ per quarter. Trust Fund assets shall be used for the following purposes:



a. To make a payment to each Level Two Claimant not to exceed $500 which payment shall be made at such time as the Claimant submits an executed release as provided for herein;

b. Each Level Two Claimant may choose to undergo periodic pulmonary function tests ("PFTs") and x-rays to determine whether the Claimant has developed a qualifying Level One condition. At three-year intervals while a Level Two Claimant is below age 65 and at five-year intervals thereafter, the Trust Fund, on behalf of the Company Signatories, shall, upon presentation of qualifying PFTs and/or x-rays by the Claimant undergone for the purpose of determining whether the Claimant qualifies for a Level One condition, reimburse the cost of such qualifying PFTs and x-rays, provided they were not rendered free of charge or otherwise subject to reimbursement from another source. Such reimbursement shall not exceed $200 per occasion, unless the Representative Committee agrees, in writing, to a greater amount. Reimbursement for such expenses will be provided on no more than three occasions for any Level Two Claimant. If such tests demonstrate that a qualifying Level One condition has developed, the Claimant shall be compensated as a Level One Claimant consistent with the terms of this Agreement and the Individual Company-Specific Settlement Agreements;

c. To provide to Level Two Claimants who become eligible for Compensation as Level One Claimants any additional payments funded by a Company Signatory's prior contribution to the Trust Fund and made pursuant to such Company Signatory's Individual Company-Specific Settlement Agreement; and

d. To pay the costs of administration of the Trust Fund.

4. Each Level Two Claimant shall have the option of receiving from the Trust Fund, on behalf of the Company Signatories, an additional payment in lieu of the Claimant's rights to receive reimbursement for qualifying PFTs and /or x-rays and the Claimant's right to receive additional compensation if such Claimant develops a condition that meets the medical criteria for a

Level One Claim other than mesothelioma. A Level Two Claimant wishing to exercise this buy-out option may do so at the same intervals the Claimant would be eligible to receive reimbursement for PFT's and/or x-rays as provided for hereunder. The amount of such additional payment shall be equal to the present value of the remaining Level Two benefits to which the Claimant is entitled under this Agreement. — $600. ?

5. The total sum to be paid into the Trust Fund by the Company Signatories as a group to cover all of the payments and benefits to Level Two Claimants identified in this Section VI(D) shall not exceed $_____ per year, or an aggregate of $10,000,000. The amount that each Company Signatory shall contribute for this purpose shall be agreed upon by the Company Signatories in a separate "Trust Agreement". The dollar limits specified herein shall be subject to review and revision by the Representative Committee at one year intervals after the signing of this Agreement to determine whether any modifications should be made in order to preserve the purposes and effectiveness of this Agreement.

6. Release for Level Two Claims. Upon approval of an individual Level Two Claim by the Medical Review Committee, and prior to payment of any amount to the Claimant, such Claimant shall execute and deliver to the Designated Representative for each Company Signatory and the Trustee a release in the form attached hereto as Exhibit J and any necessary supporting documents, as may be supplemented from time to time to comport with applicable legal requirements. Those releases and supporting documents shall provide a full release of all actual and potential asbestos-related personal injury claims, including the right to opt-out of this Agreement and seek compensation through the traditional tort system, except that a Level Two Claimant may subsequently submit a Level One Proof of Claim, as provided for herein, for any progressive or later-developing compensable condition which would qualify the Claimant for compensation as a Level One Claimant hereunder, provided, however, that a Level Two Claimant who exercises the buy-out option described in Paragraph VI(D)4 above shall forever waive and forfeit any right to receive compensation for all compensable conditions other than mesothelioma.

Level 3
1) No med. monitoring
2) Tolling of SOL
3) Right to upgrade upon progression

(E) Level Three Claims. Those Claimants who do not qualify as either Level One or Level Two Claimants under this Agreement, but who meet the criteria for Level Three non-malignant disease contained in Exhibit A, shall nonetheless obtain a substantial package of benefits hereunder, including the tolling of any applicable statute of limitations as to their claims for asbestos-related personal injury, the right to receive Level Two benefits at such time as they qualify as Level Two Claimants, the right to participate in the compensation program for Level One Claimants at such time as they qualify as Level One Claimants, and the right to submit a future claim for a qualifying malignant disease, despite receiving earlier compensation for a qualifying non-malignant disease. Level Three Claimants,

while they remain such, shall not, however, qualify for either cash payments or reimbursement payments.

(F) Approved Medical Providers and Pulmonary Testing Facilities. Except in unusual circumstances, Plaintiffs' Counsel Signatories shall have all medical procedures and medical tests for purposes of this Agreement performed by those physicians, hospitals and laboratories listed on Exhibit B. Pulmonary function testing facilities used for any purpose contemplated by this Agreement shall be required to comply with all of the requirements -- including the pulmonary testing standards -- set forth in Exhibit B. All such facilities must agree in writing to be subject to periodic inspection for compliance with all applicable testing standards. Medical reports containing medical data prepared in whole or in part by Glenn E. Pitts, Jewell D Pitts, Larry M. Mitchell, Leon Hammonds, Pulmonary Advisory Services, Inc., Pulmonary Advisory Services of Louisiana, Inc., Pulmonary Testing Services, Inc., William T. McNeese and/or Pulmonary Function Laboratory, Inc. shall not be accepted hereunder.

VII Resolution of Disputes and Exceptional Claims.

(A) Procedural Disputes Hereunder. To resolve conflicts concerning the interpretation of this Agreement, the signatories shall use the Procedural Referee and Representative Committee mechanisms described in Paragraphs III(L) and III(M) above.

(B) Medical Review and Dispute Resolution. The Company Signatories hereto will designate a committee which shall have responsibility for the review of all Level One and Level Two Claims submitted hereunder for the purpose of determining, on behalf of all Company Signatories hereto, whether such claims satisfy the medical criteria set forth in this Agreement and to provide notice of such determination to the Designated Representative for the Company Signatories, the applicable Plaintiffs' Counsel Signatory and, in the case of Level Two Claims, to the Trustee. In the event that a dispute arises on this issue between the Company Signatories and a Claimant, such dispute shall be determined in the first instance by a panel composed of two members of the committee created in this section and two persons appointed by the Plaintiffs' Counsel Signatories' designees on the Representative Committee. In the event that this panel is unable to resolve the dispute the matter shall be referred to the Representative Committee and if necessary to a Procedural Referee.

(C) Disputes Under Individual Company-Specific Agreements. Each of the Individual Company-Specific Settlement Agreements shall provide for a streamlined Alternative Dispute Resolution ("ADR") mechanism designed to provide fair and rapid resolution of Claimant-specific disputes (as to issues such as individual product identification or company-specific medical classifications) arising thereunder. If the ADR mechanism does not require binding arbitration and is not successful in resolving such a dispute, the Representative Committee shall appoint a Procedural Referee.

(D) Exceptional Claimants. In cases where a Level One Claimant wishes to proceed under this Agreement and its related Individual Company-Specific Settlement Agreements but, because of unique circumstances such as exceptional economic loss or other distinguishing factors, believes that the compensation provided under one or more Individual Company-Specific Settlement Agreements is not adequate, such Claimant may elect to petition the Representative Committee to participate in mediation as set forth herein and binding arbitration pursuant to the terms of Exhibit H hereto. If the Representative Committee determines that the claim is properly treated as an exceptional claim as to one or more Company Signatories then the Representative Committee shall appoint a Procedural Referee to assist the parties in resolving the claim. All information disclosed to the Procedural Referee regarding the terms of any Individual Company-Specific Settlement Agreement shall be treated as confidential by the Procedural Referee and not disclosed to any other Company Signatory. If the claim is still unresolved the Representative Committee shall schedule such claim for binding arbitration. The Representative Committee shall not schedule more than ten such claims for arbitration in any twelve month period, no more than five of which shall be for malignancies.

(E) Conflicts. In the event that the dispute resolution provisions of this Agreement and those set forth in an Individual Company-Specific Settlement Agreement are not consistent or conflict in any manner, the provisions of the Individual Company-Specific Settlement Agreement shall be controlling. In the event an Individual Company-Specific Settlement Agreement provides for medical criteria less stringent than those contained in this Agreement, this Agreement shall control.

VIII Effectuation of Agreement.

(A) Validity and Enforceability of Agreement. All parties hereto and their counsel agree to advocate to state and federal courts the appropriateness, validity and enforceability of the provisions of this Agreement. Furthermore, all parties to this Agreement and their counsel shall exercise their best efforts to effectuate this Agreement.

(B) Nature of Benefits Provided Hereunder. By this Agreement, the parties hereto have created a unitary, three-level process outside the traditional tort system by which to resolve all claims that might otherwise be asserted by eligible persons in the tort system. Within the context of this unitary process, the Company Signatories have agreed to provide Level Two and Level Three Claimants with specified benefits. In exchange for these benefits, Level Two and Level Three Claimants agree to participate in this process, which includes the resolution of any eventual claim for compensation for medical impairment under Level One pursuant to the terms of this Agreement. The unitary approach prescribed in this Agreement is not, and should not be construed as, a medical monitoring scheme or a pleural registry. The parties agree that they shall not in any judicial or administrative

proceeding, or elsewhere, characterize any aspect of this Agreement as creating or endorsing a medical monitoring scheme or pleural registry.

(C) New Signatories. Additional plaintiffs' counsel and/or companies that request permission to participate in the administrative process created hereby may become signatories to this Agreement and participants in the administrative process upon (i) receiving the approval of a majority of the then-participating Plaintiffs' Counsel Signatories and then-participating Company Signatories, (ii) additional plaintiffs' counsel agreeing in writing to contribute an agreed-upon share of the Plaintiffs' Counsel Signatories' administrative costs for processing cases through the system, (iii) additional Company Signatories agreeing in writing to contribute an agreed-upon share of the financial contributions made by the Company Signatories hereunder, and (iv) entering into an Individual Company-Specific Settlement Agreement with the Plaintiffs' Counsel Signatories.

(D) Application of Agreement Outside Louisiana. The structure of this Agreement may be applicable to jurisdictions and/or to plaintiff law firms outside Louisiana. To the extent any Plaintiffs' Counsel Signatory and/or Company Signatory wishes to expand this administrative structure to counsel and/or jurisdictions outside Louisiana, the parties agree that any such expansion will be subject to consideration first by the Representative Committee and second by all Signatories to ensure uniform and efficient application of this Agreement beyond Louisiana.

IX **Signatures.**

This Agreement may be executed in any number of counterparts and by different signatories hereto in separate counterparts, each of which, when so executed, shall be deemed to be an original and all of which when taken together shall constitute one and the same Agreement.

PLAINTIFFS' COUNSEL SIGNATORIES

COMPANY SIGNATORIES

EXHIBIT A - MEDICAL CONDITIONS

A. Level One asbestos-related non-malignant diseases:

1. Level One Asbestosis means either:

a. a diagnosis of pulmonary asbestosis by a board-certified internist or pulmonary specialist based on the following minimum objective criteria:

(1.) chest x-rays for which a B-reader report is furnished showing small irregular opacities of ILO Grade 1/0 and pulmonary function testing and physical examination that shows either:

a. FVC <80% of predicted with FEV-1/FVC ≥75% (actual value);

or

b. TLC <80% of predicted, with either DLCO ≤76% of predicted or bilateral basilar crackles, and also the absence of any probable explanation for this DLCO result or bilateral basilar crackles finding other than the presence of asbestos lung disease; or

(2.) chest x-rays for which a B-reader report is furnished showing small irregular opacities of ILO Grade 1/1 or greater; and pulmonary function testing that shows either:

a. FVC <80% of predicted with FEV-1/FVC ≥72% (actual value) or, if the individual tested is at least 68 years old at the time of the testing, with FEV-1/FVC ≥65% (actual value).

or

b. TLC <80% of predicted.

or

(3.) A statement by a board-certified pathologist that more than one representative section of lung tissue otherwise uninvolved with any other process (e.g., cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies, and also that there is no other more likely explanation for the presence of the fibrosis.

2. Diffuse Pleural Thickening: Bilateral pleural thickening with a B-reading of ILO Grade B-2 or higher and restrictive impairment as defined in A 1(a) or (b) of Level One Asbestosis as defined in this Exhibit.

B. Level Two asbestos-related non-malignant diseases:

1. Fibrosis: A positive B-reading of at least ILO Grade 1/0 that does not meet criteria for Level One.

2. Pleural Thickening: A positive B-reading of bilateral pleural thickening of ILO Grade B-2 or higher with PFT examinations that do not meet the criteria of Level One.

C. Level Three asbestos-related non-malignant changes:

1. Fibrosis: A positive CXR B-reading that demonstrates an asbestos-caused abnormality that is less than an ILO Grade 1/0.

2. Pleural Changes: Any pleural change that does not meet criteria for Level two and is related to past exposure to asbestos.

D. Mesothelioma: Mesothelioma means a diagnosis by a board certified pathologist of a malignant tumor caused or contributed to by exposure to asbestos originating in the mesothelial cells of the pleura, peritoneum or like tissue, or reasonable equivalent clinical diagnosis in the absence of adequate tissue for pathological diagnosis.

E. Lung Cancer: Lung cancer means a diagnosis by a qualified physician of a malignant primary bronchogenic tumor of any cell type caused or contributed to by exposure to asbestos. As part of the Individual Company Specific Settlement Process each Company Signatory shall negotiate the qualifying criteria for compensation of lung cancer. In such negotiations the parties will consider the relevance of the following items:

1. Whether the Claimant can demonstrate by medical report the existence of primary asbestos-related cancer of the lung; and

2. Whether the Claimant can demonstrate at least fifteen (15) years of heavy occupational exposure to asbestos-containing materials in employment regularly requiring work in the immediate are of visible asbestos dust; and

3. Whether the Claimant can demonstrate a ten (10) year latency period between the date of first exposure to asbestos and the date of diagnosis of the cancer; and

Proof of exposure to that company's asbestos products.

4. Whether the Claimant is a non-smoker (has not smoked cigarettes for at least fifteen (15) years prior to diagnosis).

5. Whether the Claimant can demonstrate by medical report the existence of one of the following:

a. Bilateral interstitial lung disease,

b. Bilateral pleural disease (thickening or plaques); or

c. Pathological evidence of asbestosis.

F. Other Cancers: "Other Cancer" means a malignant primary tumor of the larynx, oral-pharynx, GI tract, or stomach, caused or contributed to by exposure to asbestos, accompanied by Level One non-malignant disease either clinically or pathologically as defined in A 1(a) or (b) above, either clinically or pathologically.

"Primary" refers to the place the cancer originated. For example, if a cancer begins in the liver and metastasizes to the lung, this would not be considered a primary lung cancer case related to asbestos exposure. However, if the cancer began in the lung and spread to other organs, it is a primary asbestos-related lung cancer. If there is any indication that the original site was not the relevant organ, or if there is a dispute as to where the primary site was, this may prevent the case from being categorized as a compensable cancer.

EXHIBIT B - APPROVED MEDICAL PROVIDERS AND PULMONARY FUNCTION TESTING FACILITIES

1. Approved B-Readers: Subject to periodic review, ILO readings from the following B-Readers shall be presumed to be valid for purposes of implementing this Agreement:

_____

_____

_____

_____

_____

Plaintiffs Counsel Signatories agree that, except in unusual circumstances, they will refer Covered Persons to these B-Readers for interpretation of chest x-rays under this Agreement.

If the Medical Review Committee believes that an approved B-Reader is submitting an appreciable number of readings which are not properly graded on the ILO scale, the Medical Review Committee may notify the Plaintiffs' Counsel Signatories and the Trustee of that fact and request submission of x-rays graded by such B-Reader for review. The Medical Review Committee may request resolution of the B-Reader's status by the Representative Committee and, if necessary, resolution under the provisions of this Agreement, including referral to a Procedural Referee.

In the event that a Claimant submits a report by a non-approved reader for use under this Agreement, the Company Signatories shall be entitled to have the chest x-rays read by one of the B-Readers listed above, selected in rotating order by the Trustee, and such readings shall be determinative under this Agreement.

2. Approved Hospitals and Laboratories: Subject to periodic review by the Representative Committee, Plaintiff's Counsel Signatories and Claimants shall have pulmonary function and lung volume tests performed by the following hospitals and laboratories for purposes of this Agreement:

_____

_____

_____

_____

3. Tests Performed: The pulmonary function tests to be performed should include, as necessary, tests for forced vital capacity, lung volume subcompartments and diffusion studies. All spirometry tests including those for forced and slow vital capacity should comply with the American Thoracic Society's 1994 update. See American Thoracic Society, Standardization of Spirometry, 1994 Update, Am. J. Respir. Crit. Care Med., 152:1107-36 (1995). The diffusion studies should comply with the American Thoracic Society's Single Breath Carbon Monoxide Diffusion Capacity -- 1995 Update, Am. J. Respir. Crit. Care Med., 152:2185-95 (1995). The reports for these tests should identify, among other items, the name and social security number for the individual tested, the physician responsible for the tests, the technician who conducted the tests, the date of the tests, the testing lab and its location, the equipment used, and the predicted values used. Values for all attempts or trials, including the designated "best test," should be reported. Both volume time graphs and flow volume loops for all attempts or trials should be attached to the PFT report. The predicted values used should be corrected for race, age, ethnic origin and other relevant factors, as appropriate. The tested individuals actual height should be measured. His age should be ascertained from a driver's license or comparable document.(*Note: If spirometry alone produces a result that would qualify for Level I; then further TLC, etc., tests are not necessary.)

4. TESTING EQUIPMENT: The tests should be performed on computerized spirometry equipment which is properly calibrated and maintained in conformity with the American Thoracic Society's and NIOSH's standards. See American Thoracic Society, Standardization of Spirometry: 1994 Update, Am. J. Respir. Crit. Care Med., 152:1107-36 (1995) 20 C.F.R. § 410.430; § 718.103 and Appendix B to § 718.

5. TESTING PERSONNEL: Testing personnel need to meet the ATS's training requirements, including successfully completing a NIOSH approved pulmonary function testing course. See American Thoracic Society, Standardization of Spirometry: 1994 Update, supra; 29 C.F.R. § 1910.1043 and Appendix D thereto. A trained medical director for the testing laboratory should oversee the testing process and be responsible for all testing practices pursuant to the ATS's 1994 update.

EXHIBIT C - NOTIFICATION OF REPRESENTATION FORM

Claimant's Name_____

Claimant's
Residential Address_____

_____

_____

Claimant's Social Security No._____ _____

Spouse's Name _____

Spouse's Social Security No._____

If Deceased, Date of Death _____

Personal Representative's Name _____

Personal Representative's Social Security No. _____

Alleged Years of Exposure to Asbestos 1st _____ Last _____

Disease Alleged _____

Date Counsel Retained _____

Date Submitted _____ Claimant's Counsel _____

Date Acknowledged _____ Company's Designee _____

Forms to be submitted in duplicate; one copy to be returned as Acknowledgment

Acknowledged By: _____ Date: _____

_____
Attorney for Claimant

EXHIBIT D - LEVEL TWO REGISTRATION FORM

State: _____

Last Name _____

First Name _____ Middle Name_____

Residential Address _____

_____

_____

Social Security No._____ Date of Birth _____

Marital Status _____ Spouse's Name_____

Spouse's SSN _____

CLAIMANT'S EXPOSURE

Occupation(s):

_____

Exposure to Asbestos: 1st Yr _____ Last Yr _____

Company Signatory Exposure: 1st Yr _____ Last Yr _____

Company Signatory Products: (Attach additional sheets if necessary)

Jobsites _____ Dates _____

Product _____ Date of Exposure _____

Product _____ Date of Exposure _____

Company Signatory Premises: (attach additional sheets if necessary)

Company Signatory:_____Location:_____

Dates of Exposure:_____

Company Signatory:_____Location:_____

Dates of Exposure:_____

Company Signatory:_____Location:_____

Dates of Exposure:_____

EXHIBIT D

(Level Two Registration Form Continued)

OTHER ACTIONS FILED BY CLAIMANT FOR ASBESTOS PERSONAL INJURY

State Court, Caption, Case Number

Please attach additional sheets if necessary.

I declare under penalty of perjury, under the laws of this State, that the foregoing is true and correct.

Signature of Claimant or Claimant's Attorney

Date

EXHIBIT E - LEVEL ONE PROOF OF CLAIM FORM

State: _____

Last Name _____

First Name _____ Middle _____

Name_____

Residential Address _____

_____

_____

Social Security Number _____ Marital Status _____

Date of Birth _____ Spouse's Name_____

If Deceased, Date of Death _____ Spouse's SSN _____

CLAIMANT'S EXPOSURE

Occupation(s):

_____

Exposure to Asbestos: 1st Yr _____ Last Yr _____

Company Signatory Exposure: 1st Yr _____ Last Yr _____

Company Signatory Products: (Attach additional sheets if necessary)

Jobsites _____ Dates _____ Dates _____

Product _____ Date of Exposure _____

Product _____ Date of Exposure _____

EXHIBIT E

(Level One Proof of Claim Form Continued)

Company Signatory Premises: (attach additional sheets if necessary)

Company Signatory:_____Location:_____ Dates of Exposure:_____

Company Signatory:_____Location:_____ Dates of Exposure:_____

Company Signatory:_____Location:_____ Dates of Exposure:_____

OTHER ACTIONS FILED BY CLAIMANT FOR ASBESTOS PERSONAL INJURY OR DEATH

State Court, Caption, Case Number

_____

_____

_____Please attach additional sheets if necessary.

I declare under penalty of perjury, under the laws of this State, that the foregoing is true and correct.

_____ _____

Signature of Claimant or Claimant's Attorney Date

Please also attach:

1) Three (3) signed copies of a release and authorization to obtain medical, social security and/or employment records;

2) all medical reports relied on for the diagnosis of alleged asbestos-related disease.

EXHIBIT F - REPRESENTATIVE COMMITTEE

The Representative Committee, as defined above, which shall perform various duties in conjunction with the resolution of disputes which may arise among signatories to this Agreement, shall consist of the following individuals:

1) _____

2) _____

3) _____

4) _____

5) _____

6) _____

7) _____

8) _____

Notwithstanding any other provision in this Agreement, this Exhibit F to the Agreement Providing Administrative Alternatives for Claimants with Asbestos Related Conditions may be amended according to the following procedure. If all signatories to this Agreement execute a dated revision to Exhibit F, it shall supersede and replace this Exhibit F.

EXHIBIT G - PROCEDURAL REFEREES

When a Procedural Referee is required by the provisions of this Agreement for the purposes of settling a dispute between signatories to this Agreement, the Representative Committee shall appoint one of the following individuals to serve in that capacity and shall designate the powers and duties of that Procedural Referee at the time of his designation.

1) _____

2) _____

3) _____

4) _____

5) _____

6) _____

EXHIBIT H - BINDING ARBITRATION PROCEDURES

FOR EXCEPTIONAL CLAIMANTS

In the event that a Claimant cannot agree to accept the compensation offered under this Agreement, and providing that such Claimant has not already entered into, received benefits, and agreed to be bound by the terms of this Agreement, he may elect binding arbitration under the following provisions:

The number of arbitrations under this section shall not exceed ten (10) per year, no more than five (5) of which shall be for malignancies.

a. The Claimant shall undergo an independent medical examination by a doctor or doctors selected by Company Signatories within ninety (90) days of the date the individual undersigned Plaintiffs' Counsel Signatory notifies the Company Signatories that such person will not accept the terms of the Agreement. Such independent medical examinations may consist of chest x-rays, pulmonary function testing, and exercise testing (unless such testing is determined to be detrimental to the health of the Claimant) as may be required by the doctors selected by Company Signatories.

b. The Claimant shall submit to voluntary mediation of the alleged claim by a Procedural Referee.

c. Following mediation, if it is unsuccessful, and prior to choosing arbitration, the Claimant shall submit in writing to each participating Company Signatory a good faith dollar demand and the supporting documentation for that demand. Within thirty (30) days, Company Signatories shall respond in writing. The Claimant may, after the passage of at least thirty (30) days from receipt of the Company Signatories' offers, make a written demand for arbitration. Ten (10) days prior to arbitration, the parties must exchange in writing the final dollar amounts they would accept or pay in the claim. If the claim is not resolved, arbitration shall proceed.

d. Unless the parties agree otherwise, these arbitrators shall be from the Center for Public Resources. Within thirty (30) days after the Claimant makes a written demand for arbitration, the parties shall request the Center for Public Resources to name a panel from which the arbitrators shall be selected. A three person panel shall be selected by the parties. The Claimant shall pick one panel member; the Company Signatories shall pick another panel member, and those two shall pick a

third. The dispute shall be presented to the three person panel with each side having no more than five (5) hours, including cross-examination, to present their evidence using the Federal Rules of Evidence. Claimant shall bear the burden of proof.

e. The arbitrators shall not be made aware of the final dollar amount the Claimant would accept (demand) or Company Signatories would pay (offer). At arbitration, the decision of the arbitrators will be either for the Claimant or for Company Signatories, and the arbitrators shall place the settlement value on the claim. The Claimant shall receive the dollar amount of the offer or demand that is closer to the arbitrators' value. If the offer and demand are equidistant from the arbitrators' value, then the Claimant shall receive the dollar amount of the arbitrators' value.

f. Arbitration shall be binding in the absence of dishonesty or fraud.

g. Each side shall pay half of the cost of the arbitrators including their expenses and fees.

h. The parties may agree to a single arbitrator.

i. In the event a Claimant is eligible to and wishes to proceed under the provisions of this paragraph and elects to arbitrate as set forth above, no evidence shall be presented by the Claimant concerning exposure history or medical condition beyond that which existed as of the date the claim was submitted to Company Signatories for consideration for compensation unless such additional medical or exposure evidence is submitted to Company Signatories at least sixty (60) days prior to arbitration. Company Signatories shall have the right, within such sixty (60) days, to have the Claimant reexamined by doctors of their choosing, and to use the results of such reexamination at arbitration.

j. In any such arbitration, the issues to be arbitrated shall be:

(i) Whether the claim is fairly compensable under the ordinary terms of this Agreement;

(ii) Whether the Claimant suffers from an asbestos related disease of which exposure to asbestos containing products arguably manufactured and/or distributed or otherwise placed in the stream of commerce by one or more of the Company Signatories or installed or otherwise present in their facilities was a proximate cause; and,

(iii) The amount of actual damages to which the Claimant is entitled.

k. Except as otherwise provided herein, the rules governing an arbitration shall be those of the Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes.

EXHIBIT I - DESIGNATED REPRESENTATIVES

COMPANY	NAME AND ADDRESS

EXHIBIT J - RELEASE FOR LEVEL TWO CLAIMANTS

Senator GRASSLEY. Mr. Heyman.

STATEMENT OF SAMUEL J. HEYMAN

Mr. HEYMAN. Good morning. GAF's involvement as an asbestos defendant is typical of the story of hundreds of companies who find themselves enmeshed today in this asbestos nightmare. GAF's only connection to the production of asbestos insulation occurred when it acquired in 1967 Ruberoid, which included at the time a small noncore business which produced an asbestos insulation product, Calcilite.

In point of fact, the U.S. Navy had asked Ruberoid during World War II to develop this product for use as an insulation material in its ships. After the U.S. Public Health Service concluded that Calcilite was safe, Ruberoid began to supply the product to our country's Naval shipyards pursuant to requisition in accordance with Government specifications, and a not insubstantial portion of GAF's Calcilite sales were made to the U.S. Government.

After publication in the late 1960's of medical studies concerning the dangers of asbestos, GAF designed an asbestos-free product, but the Navy rejected it. Whereupon, GAF closed its Calcilite operation and has not produced these products for some 30 years now.

Although there is no one with our company today who had responsibility for the production of this product, we have taken responsibility for what went before. We regret more than I can say the harm caused, and we are committed to fair, full and prompt compensation for the sick.

Since the 1970's, GAF has paid out as a result of the Ruberoid acquisition whose asbestos insulation business has profits over a 30-year period, 3 years under the GAF ownership and 27 years under the Ruberoid ownership, no more than $1 million and sales of only $30 million—we have paid out now more than $1.3 billion in asbestos claims and expenses, a substantial portion of which has gone to legal fees and people who are not sick.

We come here to Congress today not in search of a bailout or to avoid responsibility, but because our experience has underscored that asbestos litigation has defied all other solutions. One might logically ask, why do we settle the nonsick cases. And I would cite for you an example which is typical of what we face.

We currently have some 5,000 cases which have been consolidated in one local courtroom. By way of background, you should know that GAF and other co-defendants, after having attempted to settle, went to trial on 12 other cases in this same courtroom over a year ago. And the 12 plaintiffs, most of whom were not sick, received a jury award of $48 million. Now, emboldened by that result, asbestos lawyers are looking for $1 billion to settle the remaining cases.

Let's assume, which I think is not far from the fact, that of the 5,000 cases, 1,000 involve sick claimants, while the balance are not sick. Asbestos lawyers take the position that if the defendants are not willing to settle the nonsick cases, they will take the sick cases to trial. And your lawyer reports that there is a high probability of the jury awarding punishing compensatory awards to the nonsick, and even the possibility of a punitive damage award, which could bankrupt any defendant. What would you do? Would

you pay legalized blackmail and settle the nonsick cases, or would you bet the company and the jobs and careers of your more than 3,400 employees around the country on what happens in a courtroom in any one of dozens of hostile jurisdictions around our country? Let me just share with you that whatever the choice may be, given the real world of asbestos litigation today, it will be a wrong one.

The coalition has in recent months published in the media a series of reports which have outlined in some detail a pattern of the most serious asbestos lawyer misconduct, which incidentally have gone unrebutted to date, often at the expense of their own clients. We have done this in order to provide a sense of what happens in the asbestos world today and why asbestos victims and defendants can no longer afford the status quo.

I should like to thank Chairman Grassley and ranking member Torricelli for inviting me to testify here this morning. Finally, there is a reason why this legislation has been gaining extraordinary momentum in the Congress and bipartisan support. We have an asbestos litigation system today where no one is being accorded due process. This is not a Republican, Democratic, liberal, or conservative issue. Rather, it is a question of elemental fairness.

And there is a clear policy decision to be made. At the end of the day, do we want our duly-elected Congress to resolve this critical national problem or should we leave it to a handful of asbestos lawyers to continue to bend the system to their own ends?

Thank you.

Senator GRASSLEY. Thank you, Mr. Heyman.

[The prepared statement of Mr. Heyman follows:]

PREPARED STATEMENT OF SAMUEL J. HEYMAN

SUMMARY

GAF Corporation's involvement as an asbestos defendant is typical of the story of the hundreds of companies, ranging from the largest Fortune 500 corporations to small, local businesses, who today find themselves enmeshed in the asbestos litigation crisis. GAF's only connection to the production of asbestos insulation occurred when it acquired, in 1967, a company engaged primarily in the manufacture of roofing materials but which also operated a small non-core business which produced an asbestos insulation product, Calcilite, a product GAF ceased manufacturing entirely several years after this acquisition.

Although this asbestos insulation business had profits, we would estimate, of no more than $1 million aggregate over the 30 year history of the business, GAF has now paid out over $1.3 billion in claims and expenses, a substantial portion of which has gone to people who are not sick. Although there is no one left with our Company today who had responsibility for the acquisition of the business or the manufacturing or marketing of the product, you should know that we take full responsibility for what went before at GAF. We regret, more than I can say, the harm these products have caused thousands of Americans, and we are absolutely committed to making sure that anyone who may become genuinely sick as a result of our products will be fairly, fully, and promptly compensated.

We come here today not in search of a bailout or to avoid responsibility for any harm our products have caused. Nor do we seek legislation which would impose caps on our liability or provide the right to continue to manufacture and market a dangerous product. Rather, our former industry has taken the position that it accepts its responsibility to fully, fairly, and promptly compensate those who are sick and were exposed to its products.

Our extensive experience in litigating, and dealing with, these hundreds of thousands of claims over the past quarter century has now clearly revealed that the only solution to this crisis lies in congressional legislation.

Finally, while our focus is primarily on the critical importance of reform, for sick claimants both now and in the future, we make no bones about the fact that this legislation will also be helpful for the many hundreds of companies caught up in this asbestos litigation mess. Companies currently facing asbestos litigation are estimated to employ more than 5 million Americans, have payrolls in the billions of dollars, and we would hope that the interests of defendants, their employees, shareholders, the communities who depend on them, and elemental fairness are worthy of Congress' consideration as well.

Good morning. My name is Samuel Heyman. I'm Chairman and Chief Executive Officer of GAF.

GAF's involvement as an asbestos defendant is typical of the story of hundreds of companies, who today find themselves enmeshed in this asbestos nightmare. GAF's only connection to the production of asbestos insulation occurred when it acquired, in 1967, Ruberoid, which included at the time a small, marginally profitable, non-core business, whose sales were no more than 1 percent of the Company's total sales or approximately $1 million per annum, which produced an asbestos insulation product, Calcilite.

In point of fact, the United States Navy had asked Ruberoid during World War II to develop this product for use as an insulation material in its ships. After the United States Public Health Service concluded that Calcilite was safe, Ruberoid began to supply the product to our naval shipyards around the country, pursuant to requisition in accordance with government specifications, and a not insubstantial portion of GAF's total Calcilite sales over the years were made to the United States Government.

Shortly after the Ruberoid acquisition, GAF designed an asbestos-free product, but the Navy rejected it. And finally, after an important medical study by Dr. Selikoff was published in the late 60's outlining the dangers of asbestos, GAF promptly closed its asbestos insulation operation and has never produced asbestos insulation products again.

I do not recount this background to justify in any way our Company's manufacture of asbestos products. For although GAF has not produced these asbestos products for almost 30 years, and there is no one left with our Company today who had responsibility for the acquisition of the business, or the production or marketing of the product, you should know that we have taken full responsibility for what went before at GAF. We regret, more than I can say, the harm these products have caused thousands of Americans, and we are absolutely committed to making sure than anyone who may become genuinely sick as a result of our products will be fairly, fully, and promptly compensated.

Since the late 1970's, when asbestos litigation as we know it today began, GAF has paid out, as a result of the Ruberoid acquisition, whose asbestos insulation business had profits over a 30 year period of no more, we would estimate, than an aggregate total of $1 million, and sales of only approximately $30 million during the same period, more than $1.3 billion in asbestos claims and expenses, a substantial portion of which has gone to people who are not sick and will never become sick. Despite both GAF and the industry having settled almost 300,000 cases, more than 200,000 asbestos cases remain pending nationwide, 100,000 of which involve claims against GAF, with new claims being filed now at the rate of 50,000 per annum—with more to come and no end in sight.

We are here today not in search of a bailout in any way, shape or form. Nor do we seek legislation that would impose caps on our liability or provide the right to continue to manufacture and market a dangerous product, like another industry sought to do here in the Senate last year. Rather, asbestos co-defendants have taken the consistent, simple, straightforward position that they accept their responsibility to fully, fairly, and promptly compensate those who are sick and were exposed to their products, with the proviso that those who are not sick be required to wait until they become sick. And we come here to the Senate because our experience over the last 20 years has underscored that asbestos litigation has defied all other solution.

In this connection, we have tried, on the one hand, resisting the non-sick claims through litigation and, at other times, aggressively settling these claims in an attempt to substantially reduce the backlog of cases against our Company—each of which strategies I might add have proven disastrous and have only encouraged the further escalation of non-sick claims.

We have been asked by members of the Senate over the last year—why do we settle the non-sick cases? Why don't we just draw aline in the sand and refuse to settle these cases? And in response, I would cite for you a concrete example of a

current situation we face, which by the way is not unlike others we have encountered before, and ask you all to think what you would do if you were a CEO.

We currently have some 5,000 cases, which have been consolidated in one state courtroom in Mississippi. By way of background, you should know that, after attempting unsuccessfully to settle with the sick plaintiffs, GAF and other co-defendants went to trial on 12 other cases in this same courtroom only a year ago, and the 12 plaintiffs, a number of whom were not sick, received a jury award of $48 million. And now, emboldened by that result, the asbestos lawyers are looking for a billion dollars to settle the remaining cases. And now let's assume—and I do not know this for a fact, but it can't be far from the truth—that of the 5,000 cases, no more than 2,500 involve sick claimants, while at least 2,500, and probably more, are unimpaired.

In a recent effort to settle the cases on the courthouse steps before trial, the asbestos lawyers take the position, consistent with others they have taken in similar situations around the country, that if the defendants are not willing to settle the 2,500 non-sick cases, they will insist on taking to trial the 2,500 sick cases. And your lawyer relates, let's suppose, that there is a high probability of the jury awarding punishing, compensatory awards to the non-impaired, as well as the sick, and even the possibility of a punitive damage award which could bankrupt any defendant. And given that situation, what would you do? Would you settle the non-meritorious cases, which are inherently worth nothing, or would you "bet the company", and the jobs and careers of your more than 3,400 employees around the country, on what happens in one of thousands of potentially hostile jurisdictions across the country.

Let me just tell you that whatever the answer of a CEO in this situation is, it will be wrong—because of the simple fact that both choices are simply intolerable. All of which underscores that short of legislation, asbestos litigation defies all conventional solution.

As you may know, the Coalition for Asbestos Resolution has published, in Roll Call and other publications, 10 well researched and documented pieces. We have disclosed in these articles a pattern of the most serious misconduct on the part of asbestos lawyers (which incidentally has gone unrebutted to date), often at the expense of even their own clients, in order to provide some sense of what happens in the asbestos world today and why neither plaintiffs nor defendants can any longer afford the status quo.

First, and undoubtedly most important to this Committee, because this legislation is primarily a victims' rights bill, is that these asbestos lawyers regularly exploit their own clients in violation of their professional and ethical obligations, including:

(1) Charging their own clients exorbitant contingent legal fees (usually 40 percent of the recovery) in cases where there is little or no contingency or risk of non-recovery. This has resulted in effective hourly rates of sometimes more than $10,000 per hour, thereby contributing to a system today where more than 60 cents of every dollar spent on asbestos litigation is consumed by legal fees and transaction costs.

(2) Holding their own genuinely sick clients "hostage" without their knowledge or consent, often for years, by refusing to settle their cases (resulting in many sick claimants dying before receiving compensation) while assembling huge inventories of non-sick claimants, as in the Mississippi situation to which I have previously referred.

(3) Arbitrary allocation by asbestos lawyers of aggregate settlement amounts among their clients. These allocations, carried out without oversight or review, are made often with little regard to individual conditions or damages, creating a situation rife with cronyism, favoritism, and exploitation.

(4) Since the pool of resources available to claimants is limited, asbestos lawyer schemes to extort huge settlements for non-sick claimants constitute an enormous diversion of resources from those claimants who are sick, or may become sick in the future, thereby jeopardizing compensation for the truly deserving.

Finally, while our focus is primarily on the critical importance of reform for sick claimants, we would hope that the interests of these businesses, their employees, shareholders, the communities who depend on them, and elemental fairness are worthy of the Senate's consideration as well.

Senator GRASSLEY. Now, Ms. Kerrigan.

STATEMENT OF KAREN KERRIGAN

Ms. KERRIGAN. Good morning, Chairman Grassley and other members of the subcommittee. On behalf of the Small Business Survival Committee and its more than 50,000 members nationwide, let me express my appreciation for giving our organization, and more significantly small business, a voice and an opportunity to testify before this subcommittee today on the Fairness in Asbestos Compensation Act of 1999.

SBSC is a national nonprofit, nonpartisan small business advocacy organization dedicated to advancing policies and legislation that encourage entrepreneurship, economic opportunity, job creation and innovation. Again, my name is Karen Kerrigan and I chair SBSC.

Twice since 1997, in *Amchem Products* v. *Windsor* and *Ortiz* v. *Fibreboard Corp.*, the Supreme Court has called for national legislation to address the asbestos litigation quagmire. Twenty-five companies have gone bankrupt or are in reorganization as a result of the massive caseload, leaving defendants with an increasingly tenuous relationship to asbestos holding the bag.

Pressure to maintain a full and steady stream of money for what appears to be an unending flow of asbestos claims and lawsuits will inevitably force plaintiffs' attorneys to cast a wider net in an effort to identify additional companies to support the exorbitant financial requirements of current and future tort claims.

It is only a matter of time that the asbestos litigation crisis is directly extended to America's small business sector. Already in some jurisdictions, automobile distributorships and repair shops, construction contractors, and other types of small businesses are routinely named in asbestos cases. Let me also add that many small businesses and their economic health are directly tied to the health of larger defendants whose bankruptcy would seriously disrupt small business operations, as well as their workforce.

The perpetuation of this serious legal problem will lead to the snaring of many more small businesses into a system that has been deftly manipulated and abused, which has led to an overburdening of the court system, unacceptably high transaction costs, and most unfortunately nonsick claimants benefiting at the expense of the truly sick.

Our membership consists of very hard-working men and women, family-owned businesses and the like who generate jobs in their communities and provide a solid financial and tax base in those communities. I fail to understand how potentially bankrupting these businesses equates to justice. Should the small hardware shop owner be forced into bankruptcy because they unknowingly sold a small amount of an asbestos-containing product 25 or 30 years ago? Again, is bankrupting these small firms and the loss of jobs for their employees really an act of justice?

The members of my organization, as is the case with most small businesses throughout the country, do not have the luxury of counsel at the ready, nor can many of them afford the insurance coverage that would be necessary to fend off an asbestos lawsuit. Similar to tactics used by the asbestos trial lawyers where the court system is overwhelmed to force case consolidation and then settle-

ment, small businesses too are forced into a corner. They simply do not have the resources to fight costly and protracted legal battles.

For this reason, we strongly support S. 758. This legislative remedy, whose concept has been strongly supported and suggested by the U.S. Supreme Court, represents a fair and efficient claim and recovery program, a system in which the true victims of asbestos can receive speedy compensation, the claims of people who are not sick can be deferred, courts can be unburdened, and defendant companies can remain solvent long enough to pay individuals who may become sick in the future.

Again, no less than the Supreme Court of the United States has expressed strong support for the creation of a national asbestos claims facility to solve the asbestos litigation crisis. The "elephantine mass"—I guess our two favorite words at the committee hearing today—as described by the Supreme Court, needs to get out of the courts. People who are victims need to be addressed on an individual basis for justice to be properly administered and served.

Unless this solution is enacted, I have no doubt that more and more small businesses will become targets and unwilling players in the currently dysfunctional system. Currently, 60 cents of every dollar spent on asbestos litigation goes toward attorneys' fees and transaction costs instead of victims. Moreover, many victims wait years to receive settlements that have little or no relation to their specific illness.

The Fairness in Asbestos Compensation Act is an effective approach to address the current crisis. The bill creates a win/win situation. It is provictim, procommon sense, good for the U.S. Court System, and a sound approach for American business, both small and large.

I have been working with dozens of associations representing hundreds of thousands of businesses nationwide to increase the visibility of this issue. The momentum is on our side, and I urge the committee to act quickly on this issue.

Thank you very much.

Senator GRASSLEY. Thank you, Ms. Kerrigan.

[The prepared statement of Ms. Kerrigan follows:]

PREPARED STATEMENT OF KAREN KERRIGAN

SUMMARY

Mr. Chairman and members of the committee, I am Karen Kerrigan, Chairman of the Small Business Survival Committee (SBSC). On behalf of SBSC and its more than 50,000 small business members across the nation, I appreciate this opportunity to testify before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts regarding the Fairness in Asbestos Compensation Act of 1999 (S. 758). SBSC is a national nonpartisan small business advocacy organization dedicated to advancing policies and legislation that encourages entrepreneurship, economic opportunity, job-creation and innovation.

Twice since 1997—in *Amchem Products* v. *Windsor* and *Ortiz* v. *Fibreboard Corp.*—the Supreme Court has called for national legislation to address the asbestos litigation quagmire. Moreover *Amchem* Justice Breyer observed that over 50 percent of all asbestos claims involved pleural plaques which do not affect a person's breathing in any way. Although tens of millions of Americans have been exposed to asbestos, medical experts have testified before Congress that most will not contract an asbestos-related ailment. Despite this fact, tens of thousands will seek to recover damages this year even though they are not sick. Twenty-five companies have already gone bankrupt or are in reorganization as a result of the massive caseload,

leaving defendants with an increasingly tenuous relationship to asbestos holding the bag.

For this reason, the Small Business Survival Committee strongly supports S. 758, the Fairness in Asbestos Compensation Act of 1999. Our membership consists of hard-working men and women who generate jobs in their communities. More than 90 percent of our members have less than 50 employees. Why should they wake up each morning fearing thousands of meritless lawsuits filed against them? Should mom-and-pop hardware stores in the heartland be forced into bankruptcy because they sold a small amount of an asbestos-containing product twenty-five years ago? Is bankruptcy really justice? Already in some jurisdictions automobile distributorships and repair shops, construction contractors, and other small businesses are routinely named in asbestos cases. The handwriting is on the wall for small businesses everywhere. The U.S. legal system should not be abused and manipulated in such a way that allows for the perpetuation and potential deepening of this legal quagmire.

BACKGROUND INFORMATION

SBSC believes there is a better way to resolve these cases—a way in which the true victims of asbestos can receive compensation; the claims of people who are not sick can be deferred; courts can be unburdened and defendant companies can remain solvent long enough to pay individuals who become sick in the future. The members of my organization typically do not have an army of lawyers at the ready, nor do they have the insurance coverage necessary to fend off thousands upon thousands of asbestos lawsuits. Yet they know that the asbestos lawyers will not stop until they can no longer find anyone to sue.

The Committee does not need to take my word for it, however, nor the words of the defendant companies. They need only look to the Supreme Court, where on two occasions, strong support was expressed for the creation of a national asbestos claims facility to solve the asbestos litigation crisis. In 1997's decision on *Amchem* v. *Windsor,* Justice Ginsburg has stated that *''the argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.''* In the recent *Ortiz* v. *Fibreboard* ruling, the justices went so far as to refer to asbestos litigation as an *''elephantine* mass'' which *''defies customary judicial administration and calls for national legislation.''*

The drain on the court system is a problem in its own right, with 200,000 asbestos cases pending and 50,000 additional claims filed each year. Simply screening out the non-sick claimants would alleviate part of the administrative burden, allowing resources to be used for matters more pressing. The current process affords a great deal of power to asbestos trial attorneys, who reap a windfall by overwhelming the court system. They file hundreds or even thousands of cases in individual state courts and use these caseloads to leverage massive settlements from defendant companies. Instead of encouraging defendant companies to focus settlement dollars on sick claimants, the true victims of asbestos exposure, plaintiffs' attorneys force defendants to settle thousands of non-sick claims or risk going to trial in mass consolidations in which a company's survival may be at stake. Using sick claimants as a trap to collect billions of dollars for the non-sick does a great disservice to the true victims and to the system.

After more than 30 years of constant litigation, claims against the former asbestos manufacturers can be considered a mature tort. The question before us today is how to put a system in place to differentiate between who is sick and who is not sick and to make sure that those who are impaired by asbestos-related diseases receive just compensation.

Unless a solution is enacted, I have no doubt that more and more small businesses will become targets. Currently, 60 cents of every dollar spent on asbestos litigation goes toward attorneys fees and transaction costs instead of the victims. Moreover, many victims wait years to receive settlements that have little relation to their specific illness. It is a system that the Supreme Court has emphasized is beyond judicial repair and one that only Congress has the authority to fix.

S. 758 is designed to answer the court's calls. Based on the tenets of the *Amchem* settlement, S. 758 incorporates medical criteria to determine the claimants who have impairments resulting from asbestos exposure. As a result, this legislation would correct today's most pressing problem relating to asbestos litigation—the high volume non-sick clogging the system. To eliminate pressures to file cases prematurely, S. 758 waives the statute of limitations. Moreover, it outlaws general releases that require people with asbestosis to give up their right to further compensation if they contract cancer in the future.

The decades long history of asbestos litigation has proven that litigating 200,000 cases is not an option. Similarly, creating massive class action settlements is also off the table. The only viable alternative is the creation of a system outside of the courts, a system where victims are screened by objective medical criteria and paid promptly for their specific illnesses.

The Fairness in Asbestos Compensation Act is an effective approach to address this crisis. This bill creates a win-win situation: it is good for asbestos victims, the U.S. court system and American businesses both large and small. I have been working with dozens of associations representing thousands of businesses nationwide to increase the visibility of this crisis. The momentum is on our side and I urge this committee to act expeditiously on S. 758.

Again, thank you for the opportunity to appear before you today in strong support of this measure. I look forward to your questions.

Senator GRASSLEY. Now, Mr. Middleton.

STATEMENT OF RICHARD MIDDLETON, JR.

Mr. MIDDLETON. Thank you, Mr. Chairman. Members of the committee, central to the civil justice system is the idea that corporations always want to be considered the same before juries as individual persons. The incongruity that we are faced with is that we have here in this age of personal responsibility a few corporations, led by GAF, who want to avoid their personal responsibility for what they did.

With regard to betting jobs that we heard from the other member of the panel, Mr. Heyman, in fact, GAF and its predecessor bet the jobs of their employees when they hid medical reports on how sick they were and didn't tell them so that they would continue to work and continued to be exposed to those products for years. Juries all over this country have listened to the evidence against GAF and other corporations and have decided that, in fact, the companies were wrong, that they were guilty of gross misconduct, gross negligence, and, in fact, deceit and hiding of the truth.

With regard to this legislation, one thing that I haven't heard any discussion of today is the dormant docket situation. State and Federal courts all across this country have set up dormant dockets so that the people who met medical criteria in the specific States who are being diagnosed with asbestos-related diseases have their cases filed to preserve the statute. They are then placed in a dormant situation which is no expense to the court. No administrative delays are encountered, and they get to come back when they become sick, this allowing the truly very serious cases to be heard by the courts, except for the fact that there is no logjam because in 1998 we know, and it has gone undisputed, that only 55 cases were, in fact, tried to a jury nationwide. So there is no problem in getting cases before a jury and, in fact, the cases are being settled.

Throughout this country, jurors and courts, both State and Federal, have established product exposure levels, what would be allowed in as evidence concerning liability, what shares of liability the various companies have in different locales based upon their product sales, and the amount of damages that are appropriate.

Many manufacturers such as Owens Corning and Owens Illinois and Babcock and Wilcox, who were the largest boiler manufacturer in World War II, have recognized their responsibility to compensate victims. In fact, Owens Corning settled 217,000 cases by private means, not through resort to Government interference or any bureaucratic development that has to take place. They did it because

they recognized where they were in the litigation and they decided to settle those claims. It was good for employers and it is good for the manufacturers because these settlements that are private and that are ongoing allow the companies to continue in existence.

The other problem is that employers who have to, under State workers compensation systems, pay out workers comp benefits, the criteria is different than what is under this bill. If you take the State of Virginia, the largest employer, Newport News Shipbuilding and Dry Dock Company, they have to pay out on cases that would not be considered to be legitimate claims under this bill. Those are medical expenses that are paid.

Under the private agreements that have been achieved in this case, and not as a result of any clogging of the court system, those employers not only receive reimbursement for medical expenses already paid, they also receive credits for medical expenses that will be possibly incurred in the future.

With regard to the *Ortiz* case, the Supreme Court, if you look at the entire case, made the quote and it came out of Chief Justice Rehnquist's panel from 1992. That panel found, based on a RAND study of 1985 that included statistics from 1981 through 1983, that the courts were clogged. Those statistics are 16 years stale.

This system works. The dormant dockets that have been set up by the courts allow the serious cases to go forward. The truth is that the green-carding system, the dormant docket system, works at the State and the Federal levels. The serious cases go first.

GAF is virtually alone in refusing to accept its responsibility. What they are trying to do is to change the focus; engage in personal attacks on individuals; deny the medical truth that is established according to State law, State by State; eviscerate the laws of those States; and turn the concept of federalism completely on its head. I have to wonder, in light of cases that the Supreme Court has already stated they are going to review this term, if Congress has any ability to act in this particular area. And the women and violence legislation which they are going to review is but one example.

The difference in the *Amchem* settlement is it was voluntary. There was money actually put on the table and there was prompt payment to be considered. Under this system, Mr. Chairman and members of the panel, in fact, there is no money on the table. This creates restricted medical criteria that violates the State laws. It creates longer delays before the people can then go into the court system they should have access to. It puts no money on the table. It blames others through the art of deflection for the harm that they caused, and it keeps these cases away from the jurors and the citizens of this country.

In conclusion, what it does is create artificial, and indeed superficial barriers to the administration of true justice. I would state this, that ATLA, the Association of Trial Lawyers of America, has published three very flexible criteria which says if there is a system that should be considered, that system should be voluntary. It should put money on the table. It should result in the consideration of absolute liability by the manufacturers, not the reservation of all of their defenses while this bureaucratic administrative procedure

is gone through. In fact, it should be something other than a full employment bill for the lobbyists here in the Beltway.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Mr. Middleton.

[The prepared statement of Mr. Middleton follows:]

PREPARED STATEMENT OF RICHARD MIDDLETON, JR. ON BEHALF OF THE ASSOCIATION OF TRAIL LAWYERS OF AMERICA

Mr. Chairman and members of the Committee, my name is Richard Middleton, Jr., and I am a practicing attorney from Savannah, Georgia. I am a senior trial attorney in the firm of Middleton, Mathis, Adams & Tate, P.C., with offices in Atlanta and Savannah, Georgia. I also have the very high honor of serving presently as the President of the Association of Trial Lawyers of America (ATLA). Mr. Chairman, thank you very much for this opportunity to present ATLA's views in opposition to S. 758, the proposed asbestos compensation legislation.

ATLA believes that an objective evaluation of the history and present state of asbestos litigation will lead the Committee to conclude that:

1. Workers who have been injured by exposure to asbestos in the workplace are entitled to receive compensation in the court system. There is no basis for providing legal relief to the companies who are responsible for their injuries.

2. S.758 does not, as its proponents suggest, codify the settlement agreement in the *Amchem* litigation, and the bill is not supported by the parties who participated in that settlement.

3. S. 758 is a bad bill that would deny compensation to tens of thousands of workers with cancer and disabling lung disease from workplace asbestos exposure and would provide a financial windfall to companies which willfully mislead the public about asbestos problems.

4. The courts are well equipped to handle the pending and future asbestos cases that will require trial. A litigation crisis, as that term is usually understood, does not exist. In 1998, only 55 asbestos trials, involving 125 individuals, were completed in all the states and federal courts, a 45 percent decline from 1997. 5.

5. Both the state and federal courts, and the parties themselves, have, over time, devised a variety of mechanisms for processing and settling asbestos cases in a timely fashion. Over 25,000 cases were resolved last year by voluntarily negotiated settlement agreement, providing much needed relief to victims and their families. These private settlement agreements will continue to provide compensation to tens of thousands of victims each year and keep the docket burden of the courts to a minimum well into the future, unless Congress reduces or eliminates the incentive for defendant companies to settle.

6. S. 758 would negatively impact and, in many cases, overturn the various state laws that have induced settlements. The bill's restrictive medical criteria would eliminate compensation for thousands of cases that are presently compensable under state laws. It would also delay the processing of all pending cases for many months, if not years, and bring all existing settlement activity to a standstill.

7. It would be a mistake to interpret the Supreme Court's call last term in *Ortiz* v. *Fibreboard* for a "national asbestos dispute resolution scheme" as support for anything like S. 758. What the Court made reference to in *Ortiz* was a system modeled on the recommendations of the Judicial Conference's Ad Hoc Committee on Asbestos Litigation. That panel suggested creation of an administrative compensation mechanism that would control all of the defendants' available assets and apply principles of absolute liability in order to compensate claimants. Such a model bears no resemblance to the system proposed in S. 758, which provides no compensation to any asbestos victim.

8. There are serious 10th Amendment problems with any federal legislation which, like *S. 758,* rewrite selective portions of state tort law and eliminate a claimant's existing right to seek compensation through the tort system without providing an alternative remedy. Although a constitutionally permissible comprehensive federal asbestos compensation program could be written, compensation levels approximating the value of litigated claims would require tax and spending decisions by Congress which it has been loath to undertake in the past.

Twenty years ago, thousands of injured claimants had difficulty obtaining relief in the courts because the asbestos industry was involved in a lengthy and complex legal struggle with plaintiffs over responsibility for the diseases caused by their

products. The issues that animated that litigation have long ago been resolved in favor of the claimants. Liability of the defendant companies is no longer seriously disputed. Juries across this country have demonstrated time and again that they will find the defendant companies liable at trial and impose substantial damages for their conduct.

The last time Congress looked at this issue, in 1991–1992, the concept of a "litigation crisis" received support from a number of academic and official sources, notably from the Rand Institute of Civil Justice and later from the U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation. During the period in the 1980s that these groups studied asbestos litigation, the courts were, in fact, having difficulty handling the caseload or providing adequate and timely compensation for victims. This problem was caused by intense litigation over issues of causation, insurance coverage and apportionment of liability.

Today the problems which the courts confronted during the last decade have largely been eliminated and the industry and the claimants have by and large accommodated themselves to the risk of litigation. Most of the major defendants have entered into master settlement agreements, jurisdiction by jurisdiction, that establish criteria for settlement based on the law, the medical standards of proof in each jurisdiction and the historical record of trial success. Tens of thousands of cases are settled every year, providing compensation to victims and their families in a fraction of the time it would take to process claims under the labyrinth proposed in S. 758.

As a result, it is simply inaccurate to any longer claim that asbestos litigation is placing an undue burden on the courts. As the statistics clearly show, claims filed do not translate into cases tried. The vast majority of cases do not take up the time of the courts. Although many new cases are filed each year, large numbers are placed on inactive dockets and most other claims are settled under private agreements. In fact, according to Mealys Asbestos Litigation Reporter, during 1998 only 55 asbestos cases involving 125 individuals proceeded to verdict in the fifty states and all federal courts, a 45 percent decline from 1997—and clearly a negligible number.

The best way to ensure the continued orderly processing of future asbestos cases is to leave matters to the parties and to the state and federal courts under existing law. The way to end progress, produce an administrative nightmare, and create new and lengthy delay for injured victims is to consolidate all asbestos claims in one federally mandated facility.

UNIMPAIRED CLAIMS

The lynchpin of the argument for the mandated medical criteria and other devices to limit access to the courts contained in S. 758 is that too many of the new claims filed each year involve conditions that have not yet met the defendants' definition of impairment—a definition of impairment that is less favorable to workers than accepted medical standards and the standards that have been adopted by most of the state and federal courts. By seeking to classify all claims filed by asbestos workers diagnosed with pleural plaques, pleural thickening or pleural calcification, and even many cases of asbestosis as unimpaired, this argument inaccurately suggests that none of these claims are deserving of compensation. Adoption of the medical criteria in S. 758 is not medically justified and would do great injustice to a significant number of claimants.

Virtually all of the states permit recovery only by those asbestos workers who have been diagnosed with physical symptoms of disease. In *Metro North Commuter Railroad Company* v. *Buckley* (521 U.S. 424, 1997), the Supreme Court held that mere exposure to asbestos without manifesting injury would not support a recovery under federal law. More recently, the Texas State Supreme Court similarly ruled that compensation is not available without a physical injury. *Temple—Inland Products* v. *Carter* (1999 W.L. 254718). These courts identified only two jurisdictions where lower courts permit such claims.

Elsewhere, the courts, by local rule or otherwise, and the parties have consistently taken steps to prioritize and manage the asbestos cases on their dockets. In the federal courts, the area of primary responsibility of this Committee, all asbestos cases are consolidated before a single federal judge who has administratively resolved tens of thousands of cases and remanded only a nominal number back to transfer courts for trial. Obviously, these cases do not impose a burden on the federal courts. Finally, in many other jurisdictions claims by these workers are placed on inactive dockets or pleural registers which prevent them from becoming a drain on the resources of either the courts or the defendants.

S. 758 AND THE AMCHEM SETTLEMENT

S. 758 does not, as its proponents suggest, codify the settlement agreement in the *Amchem* litigation, and the bill is not supported by the parties who participated in that settlement. *Amchem Products, Inc., et al.* v. *Windsor, et al.,* 117 S.Ct. 2231 (1997).

The basic consideration for the *Amchem* class action settlement was that if the settlement criteria were met, the claimant would receive prompt payment from the settling defendants. The defendants established a fund in excess of $1 billion to immediately pay claims to qualified claimants.

In contrast, S. 758 fails to ensure prompt payment of any money to asbestos victims. The bill provides no guarantee of any payment at all to any injured worker. *Amchem* required that every qualified asbestos claim be paid within nine months. S. 758, however, includes no time period guaranteeing any resolutions or prompt payment of claims. Furthermore, *Amchem* applied to only a small portion of defendants (less than 25 percent) who agreed to share liability. Joint and several liability remained available as to defendants not included in *Amchem*. But, S. 758 eliminates joint and several liability for all asbestos claims.

S. 758 is also less favorable to asbestos victims than *Amchem* and will unreasonably restrict access to the courts. In *Amchem,* plaintiffs waived the right to seek punitive damages in exchange for defendants' waiver of all traditional defenses to asbestos claims. S. 758, on the other hand, eliminates plaintiffs' right to seek punitive damages but provides plaintiffs nothing in exchange for these lost legal rights. Defendants retain the right to raise virtually all of their traditional defenses, including state of the art, comparative negligence, contributory negligence, intervening negligence, superseding negligence, employer fault, notice, and others. *Amchem,* in addition, applied only to those asbestos manufacturers and plaintiffs who agreed to it. Existing plaintiffs who did not agree to its terms were free to opt out of the settlement and to rely on the tort system for redress. Indeed, over 170,000 workers filed opt out notices from the settlement. S. 758 contains no such opt out provision. Its restrictions apply to all cases, both present and future. In fact, the bill applies retroactively to all cases pending in federal or state courts for which a final judgment has not been entered, including jury verdicts and unpaid settlements.

In short, S. 758 stands the *Amchem* settlement on its head. It eliminates all of the benefit of the bargain that was offered to claimants, but grants none of the benefit that was provided in that settlement.

S. 758—THE FAIRNESS IN ASBESTOS COMPENSATION ACT OF 1999

The Fairness in Asbestos Compensation Act of 1999 is little more than an attempt by a small minority of the asbestos defendants to limit and, in most cases, eliminate their liability for payment of damages to both present and future victims of asbestos disease. S. 758 requires every claimant to meet the bill's medical criteria before compensation may even be demanded and before he or she has the right to file a lawsuit in any jurisdiction in the United States, even though such claims may meet state law requirements. As such, the bill represents an unprecedented assault on American citizens' common law right of access to state courts.

By design, this legislation would eliminate most of the pending claims in the United States, create procedural delays for those claims that remain, impose numerous legal obstacles in the path of any claimant who is bold enough to prosecute a claim, and would, at the same time, obliterate existing incentives for defendants to settle cases.

The bill creates the Asbestos Resolution Corporation, which is not a compensation board but simply a screening device to decide who may file law suits against asbestos defendants. Unless a claimant obtains a certificate of medical eligibility, access to the courts is completely foreclosed. Even when an individual receives a certificate of eligibility, no award or benefit is paid. That certificate merely entitles a claimant to participate in a lengthy and inconclusive mediation and arbitration procedure after which the claimant will likely be left with nothing—no money, no good faith, no timely settlement offer. The Corporation's procedures are open-ended and certain to provide almost endless opportunity for delay.

The medical criteria themselves are arbitrary, do not represent. mainstream scientific opinion, and would leave thousands of desperately ill individuals with no legal remedies whatsoever. Most draconian is Section 203, which requires 15 years of exposure to asbestos prior to 1979 for eligibility for non-asbestosis lung disease. OSHA standards did not adequately protect workers from significant asbestos cancer risk until 1994, and millions of workers continue to be exposed to this day. Yet the bill conclusively determines that asbestos exposures after 1979 are not harmful.

Lung cancer victims are denied eligibility unless twelve years have elapsed from their first exposure. In addition, a cancer victim must show either asbestos or bilateral pleural thickening before a certificate of eligibility is awarded. This is contrary to the mainstream medical literature on this issue. The consensus view is that asbestosis is not a precondition required before lung cancer can be attributed to asbestos. Numerous scientific studies indicate that less than five years latency to asbestos can cause asbestos-related lung cancer. A twelve year latency period is required to establish eligibility for non-malignant asbestos-related diseases. This is particularly unfair in light of the heavy exposures that have occurred in recent years as workers have removed asbestos from public buildings, and since the scientific literature has established that de minimis exposure to asbestos can cause the most lethal disease.

Finally, even victims who successfully run the gauntlet of the bill's procedures and meet its medical criteria get nothing but the right to re-litigate their case in court under highly prejudicial procedural rules. Moreover, because the legislation applies to any case that has not gone to final judgment by the date of enactment, the bill would retroactively nullify awards in cases that have already been resolved by jury verdict or which are on appeal.

Taken together, the administrative labyrinth established under the bill and the highly prejudicial changes in tort law will make pursuing asbestos-related damage claims substantially more time consuming and expensive, will greatly reduced the number of claims that defendants face and will significantly reduce the value of those claims.

It is most important for this committee to realize that procedural changes in S. 758 inevitably will condemn the courts to relive the problems that created courthouse gridlock in the 1980s. In the early 1980s, the courts were unable to resolve asbestos cases because the industry used procedural tools available to it at that time to delay trials and avoid settlement. It is axiomatic that delay serves the interests of the industry defendants. It allows firms to pay very few claims and permits them to use their superior economic power to force claimants to accept discounted settlements. Backlogs of thousands of cases are the inevitable result when legislation tips the scale in favor of the defendants' side of the bargaining table. By superimposing a bureaucratic, adversarial administrative mechanism on top of a reconstituted, prodefendant court regime, S. 758 will recreate a court crisis which the parties themselves have already resolved. To cite but one of many concrete examples, by eliminating the risk of joint and several liability S. 758 will encourage each defendant to litigate its individual market share liability in individual cases, thereby greatly increasing the number and duration of litigated claims.

In short, S. 758 would eliminate any incentive for defendants to continue their negotiated settlement agreements. These agreements ensure prompt, voluntary payment to tens of thousands of presently-impaired victims. Although this year's bill (in contrast to last year's version) appears to preserve the ability of the parties to enter private settlements, it nevertheless destroys the incentives for defendants to do so.

ORTIZ V. FIBREBOARD—THE SUPREME COURT DID NOT ASK CONGRESS TO PASS S. 758

Proponents of S. 758 suggest that the Supreme Court decision in *Ortiz* v. *Fibreboard* (No. 97–1704, June 23, 1999) constitutes an endorsement of their proposal.

What the court had in mind in asking Congress to consider "* * * creating a national asbestos dispute resolution scheme * * *" is a far cry from the legislation we are considering here today. In fact, a full reading of the opinion makes it clear that S. 758 is wholly inconsistent with the goals enumerated by the court.

In *Ortiz,* the court spelled out its views by reference to the report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, a panel of federal judges appointed by Chief Justice Rehnquist to study the problem. Among other things, that panel recommended consolidation of all asbestos claims and defendants assets before a single judicial forum, called for elimination of burdensome proof requirements and for imposition of absolute liability on the defendants—all in order to increase and accelerate plaintiff compensation. In contrast, S. 758 purposely creates new time-consuming procedural and bureaucratic hurdles, and erases existing legal rights—all in order to avoid paying compensation. Clearly, the administrative scheme proposed in S. 758 bears no resemblance to the Judicial panel's recommendations or the goals of the *Ortiz* court.

CONSTITUTIONAL PROBLEMS

In *Ortiz,* the Supreme Court also made clear that it would not countenance any scheme that compromises America's Seventh Amendment right to trial by jury or the sovereignty of the states under our federal system.

The peculiar structure of S. 758 requires this Committee carefully to consider its potential constitutional defects. The most serious areas of concern include the rewriting of state tort law and those provisions which eliminate the right to seek compensation through the courts without providing an alternative remedy such as a fund for the payment of claims. As the Supreme Court indicated in *Duke Power Co.* v. *Carolina Environment Study Group,* 428 U.S. 59, 86–87, 91–93 (1978), and in other decisions, the abolition of common law tort remedies without providing alternative means of redress for injury violates due process. That appears to be precisely what S. 758 does.

A second serious constitutional defect involves the rights of those asbestos victims who surmount the bill's procedural obstacles, obtain a certificate of medical eligibility and file a civil action. When they finally arrive at state court, they will find that their state's tort law has been rewritten specifically to limit their rights and that these changes were imposed by Congress, rather than their state courts or legislatures. While Congress may create a federal asbestos cause of action, it cannot write state tort law that must be applied by the states. As the Supreme Court Stated in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938), the cornerstone of federalism in our civil justice system:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or part of the law of torts."

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Senator GRASSLEY. Now, Mr. Mallett.

STATEMENT OF CONRAD MALLETT

Mr. MALLETT. Mr. Chairman, thank you very much. My name is Conrad Mallett. I appreciate the subcommittee's invitation to testify on Senate bill 758. This bill answers the U.S. Supreme Court's call for national legislation to address the elephantine mass of asbestos cases and provide a fairer, less expensive, more certain and faster way of providing compensation to people who are impaired by asbestos-related disease.

I am appearing today in my capacity as the chairman of the Coalition for Asbestos Resolution. The Coalition encompasses over 200 companies and organizations nationwide interested in asbestos reform, including the U.S. Chamber of Commerce, the Small Business Survival Committee, the National Roofing and Contractors Association, Citizens Against Government Waste, the Business Council of Alabama, and the Petroleum Makers of Iowa, among hundreds of others.

The breadth of the Coalition bears witness to the fact that asbestos litigation is no longer the problem of 10 or 20 core defendants. Any business, from a local automobile distributor to a giant oil or chemical company, can find itself a defendant in an asbestos case. Indeed, some who never thought of themselves as asbestos defendants, like a small hardware store owner in Saginaw, MI, can face virtually overnight the threat of compensatory and punitive damages amounting to tens of millions of dollars.

Last February, I agreed to serve as the Coalition's chairman in part because of my abiding commitment to improve this Nation's justice system. I served the people of the State of Michigan for 8 years as a justice of the Michigan Supreme Court, the last 2 as the chief justice. During my tenure on my State's highest court, I was

keenly aware of my responsibility to be sure the court system functioned efficiently and fairly.

The Coalition's mission is to support congressional legislation to enact a workable administrative solution to the asbestos litigation crisis. And make no mistake, the enormous volume of asbestos cases is now more than ever impacting the quality of justice in our Federal and State court systems.

In 1991, the year before I was first elected to the Michigan Supreme Court, the Judicial Conference of the United States estimated a backlog of 90,000 cases. The problem has grown worse. The current backlog of asbestos cases is well over 200,000, and as many as 50,000 new cases are already filed this year. The problem is not getting better, but is indeed getting worse.

Since the Judicial Conference's report, there have been innovative efforts to resolve this case crisis. Perhaps the most creative of these efforts was the 1994 class action settlement in what was then called *Georgine* v. *Amchem Products.* This settlement, which was negotiated by leading trial lawyers and endorsed by the AFL–CIO, would have provided for a national administrative claims resolution facility to resolve the claims of future plaintiffs against the participating defendants quickly and fairly.

Eventually, however, the U.S. Supreme Court overturned the agreement on procedural grounds. Writing for the U.S. Supreme Court, 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. Congress, however, has not adopted such a solution.''

The Supreme Court returned to this theme only last June. Writing for the majority in *Ortiz* v. *Fibreboard,* Justice Souter said, ''[T]he elephantine mass of asbestos cases * * * defies customary judicial administration and calls for national legislation * * * to date Congress has not responded.''

Justice Souter's call for national legislation has been echoed in other Federal and State courts. For example, the fifth circuit said, ''There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.''

The Florida Supreme Court sounded the same note: ''Any realistic solution to the problems caused by the asbestos litigation in the United States must be applicable to all fifty states. It is our belief that such a uniform solution can only be effected by federal legislation.''

One key problem that has resulted from asbestos litigation has been the inability to cope with the disturbing quantity of claims that have been filed by individuals who are not now, and quite likely never will be impaired by any asbestos-related disease. This is a problem noted by numerous impartial observers, including U.S. Supreme Court Justice Stephen Breyer.

Because the caseload prevents the trier of fact from delving into the medical condition of each of the thousands of plaintiffs, it becomes impossible to separate those who suffer from serious injury from those who are exposed but do not suffer any impairment.

Sophisticated national asbestos law plaintiff firms have exploited the asbestos litigation crisis by filing waves of unimpaired claims

together with claims by those who are seriously ill. Trial court judges are often forced to batch settlements, hoping to clear their dockets. In doing so, the system simply encourages another wave of unimpaired claims in an unending spiral, threatening the availability of funds for those who become seriously ill in the future.

Champions of the status quo sometimes maintain that lawyers for plaintiffs and defendants can resolve the asbestos morass through private agreement. I strongly disagree. In *Amchem*, defendant and plaintiffs entered into many such agreements in 1993 and 1994. Those agreements committed plaintiffs' lawyers to recommend individual settlements to their clients based on criteria for impairment by nonmalignant disease that were essentially the same as the *Amchem* criteria. Five years later, very few, if any, of those agreements are still being observed by the plaintiffs' lawyers who signed them.

How can anyone be opposed to a system that fully compensates the impaired within 6 months of the date the claim is filed? To be sure, compensation will be, under Senate bill 758, connected to present impairment, not just exposure. It should not be enough to say that all those who can collect from the system today have some right in perpetuity to collect from the system always.

Let those who defend the current system explain why it is appropriate that persons who are not in any way impaired be compensated, thereby threatening more companies with bankruptcy that will not only cause great disruption to the companies, their employees and communities, but will seriously impair the ability of those companies to compensate those who become sick in the future.

The time has come for Congress to recognize its duty to help overburdened courts and the parties to do a better a job of allocating costs and ensuring speedy and generous recovery for those who suffer illness from asbestos-related disease.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Mr. Mallett.

[The prepared statement of Mr. Mallett follows:]

PREPARED STATEMENT OF HON. CONRAD MALLETT

SUMMARY

Former Chief Justice Conrad Mallett, of the Michigan Supreme Court, testifies today in his role as Chairman of the Coalition for Asbestos Resolution. The "elephantine mass of asbestos litigation" is seriously impacting the quality of justice in our state and federal courts, leading the Supreme Court of the United States, consistent with similar statements by numerous state supreme courts and other courts across the country, to call on Congress to enact a national legislation.

A disturbing pattern of filings by unimpaired claimants has overwhelmed the system and threatens the ability of those with serious illness to recover. Although only a few cases go to trial, enormous resources are spent in pretrial litigation and victims must wait years to obtain a resolution of their claims. In fact, the lack of trials is itself a disturbing symptom of the problem. To manage their caseload, courts must aggregate thousands of cases in a way designed to avoid individual adjudication of any of them. Understandably, trial judges put great pressure on defendants to enter into mass settlements, but these settlements typically lack safeguards to ensure that compensation is focused on those who actually suffer from serious illness.

Finally, Chief Justice Mallet expresses skepticism regarding private settlement plans that some have touted as an alternative to legislation. These plans have, in the past, proved ineffective as there is a powerful incentive for lawyers to continue

to file unimpaired claims if the rules of the asbestos litigation system are not changed through legislation.

I appreciate the Subcommittee's invitation to testify on S. 758, the "Fairness in Asbestos Compensation Act of 1999." This bill answers the Supreme Court's increasingly insistent calls for national legislation to address the "elephantine mass" of asbestos cases and provides a fairer, less expensive, more certain and faster way of providing compensation to people who are impaired by asbestos-related-diseases.

I am appearing today in my capacity as the Chairman of the Coalition for Asbestos Resolution. The Coalition encompasses over 150 companies and organizations interested in asbestos reform, including United States Chamber of Commerce, the Small Business Survival Committee, the National Roofing Contractors Association, the Automobile Parts and Accessories Association, the Associated Builders and Contractors, Citizens Against Government Waste, GAF Corporation, and many other groups across the country. The breadth of the Coalition's membership bears witness to the fact that asbestos litigation is no longer the problem of ten or twenty core defendants. Any business, from a local automobile distributor to an giant oil and chemical company, can find itself a defendant in an asbestos case. Indeed, some who never thought of themselves as asbestos defendants can face, virtually overnight, the threat of compensatory and punitive damages awards amounting to tens of millions of dollars.

Last February, I agreed to serve as the Coalition's Chairman because of my abiding commitment to improving the quality of this nation's justice system. I served the people of the State of Michigan for eight years as a justice of the Michigan Supreme Court, the last two years as the Chief Justice. During my tenure on my state's highest court I was keenly aware of my responsibility to be sure the court system functioned efficiently, and I have always approached justice system modification cautiously. The Coalition's mission is to support Congressional legislation to enact a workable administrative solution to the asbestos litigation crisis, and is in keeping with my philosophy.

THE ASBESTOS LITIGATION PROBLEM

Make no mistake—the enormous volume of asbestos cases is now, more than ever, impacting the quality of justice in our federal and state court systems. In 1991, the year I was first elected to the Michigan Supreme Court, the Judicial Conference of the United States estimated a backlog of approximately 90,000 cases in federal and state courts. The result was not pretty:

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.[1][2]

These problems have grown worse. The current backlog of asbestos cases is well over 200,000, and as many as 50,000 new cases are filed every year.

Since the Judicial Conference's report there have been innovative efforts to resolve this torrent of cases. Perhaps the most creative of these efforts was the 1994 class action settlement in what was then called *Georgine* v. *Amchem Products.* This settlement, which was negotiated by leading trial lawyers and endorsed by the AFL–CIO, would have provided for a national administrative claims resolution facility to resolve the claims of future plaintiffs against the participating defendants quickly and fairly. After an exhaustive hearing, the federal district court approved the class settlement as fair and reasonable. *Georgine* v. *Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994). Eventually, however, the Supreme Court overturned the agreement on procedural grounds. While the Court recognized that the settlement addressed a critical problem with an innovative solution, it ruled that only Congress had the power to enact that solution. Writing for the Court 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. Congress, however, has not adopted such a solution.

Amchem Products, Inc. v. *Windsor,* 521 U.S. 591, 628–29 (1997).

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[1] *Report of the Judicial Conference AdHoc Committee on Asbestos Litigation* 3 (Mar. 1991).

The Supreme Court returned to this theme only last June. Writing for the majority in *Ortiz* v. *Fibreboard Corp.*, 119 S. Ct. 2295 (1999), Justice Souter said:

> [T]he elephantine mass of asbestos cases * * * defies customary judicial administration and calls for national legislation. * * * To date Congress has not responded." *Id.* at 2302 & n. 1.

Justice Souter's call for national legislation has been echoed in other federal and state courts. For example, according to the United States Court of Appeals for the Fifth Circuit:

> There is no doubt that a desperate need exists for federal legislation in the field of asbestos legislation." *Cimino* v. *Raymark Industries, Inc.*, 151 F.3d 297, 313 (1998).

The Supreme Court of West Virginia agrees:

> Congress, by not creating any legislative solution to these problems, has effectively forced the courts to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active dockets. * * * "[T]hese efforts have failed to expedite a substantial fraction of the caseload. Nor do they appear to have brought about significant reduction in transaction costs." *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304 & n.8 (1996).

The Florida Supreme Court sounds the same note:

> Any realistic solution to the problems caused by the asbestos litigation in the United States must be applicable to all fifty states. It is our belief that such a uniform solution can only be effected by federal legislation." *W.R. Grace & Co.—Conn.* v. *Waters*, 638 So. 2d 502, 505 (1994).[2]

All of this, of course, was hardly news to me. As a justice of my state's highest court, and as head of our state judicial system during my tenure as Chief Justice, I was well aware that asbestos claims have presented an unparalleled nationwide court management problem for at least twenty five years. In Michigan, we were forced during the late 1970s and 1980s to redesign many of our court service delivery systems to handle the huge number of asbestos cases filed. The Michigan Supreme Court, through the State Court Administrators office, tried to cope with the caseload by assigning these cases to some of our best, most experienced trial court judges. The system moved cases, but some of our best judges were managing case flow as opposed to making reasoned decisions regarding difficult facts and complex areas of the law. Taxpayers, both individual and corporate, therefore, were deprived of the services of some of our best and brightest judges. The problem, of course was (and is) that the trial courts of this land are not designed to handle thousands of cases filed at the same time against the same defendants. It is no accident that administrative systems like workers compensation, unemployment compensation and the Social Security Administration function in place of the courts when the caseload strips the trier of fact of her ability to do her job appropriately. The judge's central function is to assist society to discover, as best it can, the truth of the matter before the court. In the Michigan court system, like other state court systems facing the onslaught of asbestos claims, we did not then and do not now have the person power to run, in effect, a workers' compensation system.

THE VICIOUS CYCLE OF UNIMPAIRED CLAIMS

One key problem that has resulted from these caseload pressures in Michigan and around the country has been an inability to cope with the disturbing quantity of claims that have been filed by individuals who are not now, and quite likely never will be, impaired by any asbestos related disease. This is a problem noted by numerous impartial observers, including Justice Stephen Breyer. Such cases include well over half the total.[3] Because the caseload prevents the trier of fact from delving into the medical condition of each of thousands of plaintiffs, it becomes impossible to separate those who suffer from serious injuries—many of whom receive inadequate or no compensation—from those who were exposed but do not suffer any impairment. Moreover, the rush of non-impaired cases diverts the limited resources of defendants

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[2] See also Appendix B of my statement, listing courts that have called for legislative action.

[3] *See Amchem*, 521 U.S. at 631 (Breyer, J., concurring in part and dissenting in part) ("About half of the suits have involved claims for pleural thickening and plaques—the harmfulness of which is apparently controversial. (One expert below testified that they 'don't transform into cancer' and are not 'predictor[s] of future disease.')").

away from compensating the victims of asbestos related disease—including, tragically, cancer cases that will be with us well into the next century.

Sophisticated, national asbestos plaintiffs' law firms have exploited the asbestos litigation crisis by filing waves of unimpaired claims together with claims by those who are seriously ill from asbestos disease. Knowing that trial judges simply do not have the resources to screen the claims on a case-by-case basis, the law firms refuse to settle the sick cases without substantial compensation for their unimpaired cases. Trial judges are often forced to encourage such "batch settlements," hoping to clear their dockets. In doing so, the system simply encourages another wave of unimpaired claims in an unending spiral—threatening the availability of funds for those who will become seriously ill in the future.

THE LACK OF TRIALS: A SYMPTOM, NOT A REMEDY

Despite the crushing caseload, long delays, high transaction costs, and deep-seated inequities in the current asbestos litigation system, some will tell you that all is well. Some—primarily those with a financial interest in the present system—will say that there is no crisis in the courts because almost all asbestos cases eventually settle. According to Mealey's Asbestos Litigation Reporter, only 55 asbestos trials went to verdict in 1998.[4]

The obvious answer to this observation is that trials are only the tip of the iceberg. Many cases settle on the courthouse steps, after substantial resources have been spent in pretrial document requests, depositions, procedural motions, substantive motions (including appeals), and the like. This is nothing new. The burden that asbestos litigation imposes on federal and state courts has never been the court time devoted to trials but rather the enormous judicial energy required to manage these cases through the pretrial stage. The 55 trials in 1998 are comparable to the number of trials each year in the early 1980s, when Johns-Manville and the other big targets in the first wave of asbestos litigation began to crumble before the onslaught.

The extraordinarily high settlement rate in asbestos cases is really a symptom of the underlying problem. Just think about a system that is supposedly adversarial, where 99 percent of the case settle. That settlement rate is duplicated nowhere else in the justice system (if we exclude family law and prisoner related cases). According to a survey conducted in 1992 by the National Center for State Courts, of the total civil cases filed, the settlement rate was only 61 percent. According to a survey of federal cases disposed of in fiscal year 1996 and fiscal year 1997, the rate was only 35 percent.

To some extent the extraordinary settlement rate in asbestos cases is the result of judicial pressure. Think about a trial judge who has dropped on her 5,000 asbestos cases all at the same time in 1999. At one case per week, she would need until the year 2095 to try all 5000 cases. The judge's first thought then is "How do I handle these cases quickly and efficiently?" The answer, of course, is to manage the cases to *ensure* that they do not go to trial. The judge does not purposely ignore fairness and truth, but the demands of the system require that certain values be sacrificed. I am a defender of trial court judges. I know the pressures under which they work. But no judge could stand for her courthouse to be consumed by one set of cases that threatens its entire operation.

Recent litigation in Mississippi provides a vivid example of the pressure that trial courts can place on defendants to settle cases through improper mass adjudication of asbestos claims. *Cosey* v. *E.D. Bullard Co.*, Civ. No. 95–0069 (Miss. Cir. Ct. Jefferson Cty.) was filed in July 1995. The case eventually included thousands of plaintiffs and 178 defendants. Trial of such an unwieldy group of claims raised obvious management problems. The court's solution was to schedule a series of mini-trials. The first trial involved 12 plaintiffs selected by plaintiffs counsel. The jury returned an extraordinary verdict of $48.5 million in compensatory damages—including multimillion dollar verdicts for some plaintiffs who were admittedly "asymptomatic," i.e., not sick.

Faced with this verdict on compensatory damages, the defendants rushed to settle before the jury could return a verdict on punitive damages. The trial judge then twisted the arm of the defendants to settle the remaining several thousand cases—in most cases sight unseen. Since the plaintiffs' attorneys would not allow the defendants to settle each case on its merits, the defendants were forced either to settle wholesale or risk potentially crippling verdicts. And there was no way to know how

[4] Of course, as often occurs, one of those trials represented one phase of an exceedingly complex consolidated case involving thousands of claims. And many other trials involved multiple claims and multiple defendants.

the mass settlement would be divided between the plaintiffs—no way to ensure that the most seriously injured received appropriate compensation.

This is one vivid example of the harmful affects of case consolidation. Confronted with a system that *demands* settlement, regardless of the merits, and taking into account the huge risks associated with imposition of punitive damages, rational company decision makers usually opt to settle all of their cases, as opposed to betting the company by settling none at all. This, of course, simply fuels the filing of new cases on behalf of the unimpaired. The only corrective response that will create balance and efficiency is the creation of the administrative entity called for in the legislation.

THE ROLE OF PRIVATE SETTLEMENT AGREEMENTS

Champions of the status quo sometimes maintain that lawyers for plaintiffs and defendants can resolve the asbestos morass through private agreements. That claim is wrong, however, for at least three reasons.

First, private settlements, including settlements that have established more or less formal, criteria-based claims processing systems for future cases, have been with us throughout the 1990s. The recently announced settlement agreements between Owens Coming and a hundred plaintiffs' lawyers are merely a recent instance of a long-standing practice. These agreements have not, however, prevented the asbestos caseload from doubling in the last seven years. They have not even slowed the pace of new filings. Most importantly, they have not focused resources on the sick—lawsuits by unimpaired claimants are at an all time high.

Second, the root cause of the ineffectiveness of these agreements is that they cannot bind future plaintiffs or non-signatory asbestos plaintiffs lawyers. This was precisely the problem that the parties attempted to address in *Amchem*. If that class action settlement had been upheld by the Supreme Court, the medical criteria in the agreement would have applied to all future claimants, and the claims facility would have been able to produce quick and even-handed settlements for everyone. In the absence of a class action, defendants had to depend upon the promises of signatory asbestos plaintiffs' lawyers to recommend settlements based on the medical criteria to their future clients—not only when those clients qualify under the criteria, but also when they do not.

In fact, the *Amchem* defendants and plaintiffs' lawyers entered into many such agreements in 1993 and 1994 while the *Amchem* class action settlement was being litigated in federal district court. Those agreements committed plaintiffs lawyers to recommend individual settlements to their clients based on criteria for impairment by non-malignant disease that were essentially the same as the *Amchem* criteria. Five years later, very few, if any, of those agreements are still observed by the plaintiffs' lawyers who signed them. And there is no practical way for the defendants to enforce such agreements, because the asbestos claimants were never parties to them.

Third, as a judge, I find agreements such as the recent Owens Corning settlements disquieting. Serious questions are raised under the rules of professional responsibility when 9 lawyers agree with defendants to recommend a settlement to their future clients—that is why the Owens Corning agreements are conditioned upon the approval of ethics experts and judges selected by the parties. The agreements have to strike a delicate balance between protecting the future plaintiff's right to make his own decision on whether to settle, based on his lawyer's unfettered professional judgment, and the interest of the defendant in channeling future plaintiffs into the administrative framework established by the agreement. Moreover, these Owens Corning agreements can only work if practically all experienced plaintiffs' lawyers observe what is essentially an agreement not to represent clients who do not wish to participate in their National Settlement Plan—and if no one else enters the field to take their place. In any event, as long as the asbestos litigation system provides economic incentives for lawyers to file claims on behalf of a mass of unimpaired claimants, it is unlikely that any agreement that prevents some from doing so will long survive.

CONCLUSION

How can anyone be opposed to a system that fully compensates the impaired within six months of the date the claim is filed and preserves the right of all claimants to seek compensation whenever they are sick? To be sure, compensation will be connected to present impairment, not just exposure. It should not be enough to say that all those who can collect from the system today thereby have some right in perpetuity to collect always. Let those who defend the current system explain why it is appropriate that persons who are not in any way impaired be com-

pensated—thereby threatening more bankruptcies that will not only cause great disruption to the companies (and their employees and communities), but will seriously impair the ability of companies to compensate those who actually become sick in the future.

The Coalition for Asbestos Resolution agrees with the Supreme Court, numerous other federal courts and state supreme courts, the Judicial Conference of the United States, and countless independent observers that the resolution of this asbestos litigation crisis lies not with the judiciary and certainly not with the attorneys alone, but with Congress. Both those who are sick from asbestos exposure and the companies deserve the creation of a mutually fair system. The time has come for Congress to recognize its duty to help overburdened courts and the parties do a better job of allocating costs and ensuring speedy and generous recovery for those who suffer illness from asbestos-related disease.

STATEMENT OF HON. JOHN ASHCROFT, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator GRASSLEY. We will each have 5 minutes of questions, and I would like to do it in this way if it is no problem—me, Senator Torricelli, Senator Schumer, Senator Sessions, and Senator Ashcroft. Is that OK?

Senator ASHCROFT. Mr. Chairman, I want to thank you for doing this today. I have had a terribly conflicted schedule today. I may not be able to stay. I want to thank all these individuals. I want to indicate that I am very eager to go over their testimony. I want to thank you, and if I don't get a chance to stay for my questions, you can make that as my remarks.

Senator GRASSLEY. We will also have the usual process of accepting questions for answer in writing. So you can submit those in writing if you aren't able to do it orally.

Before I start to ask questions, I have statements here from Louis Sullivan, President, Morehouse School of Medicine, and former Secretary of HHS; Susan Pingleton, President-elect of the American College of Chest Physicians. And Senator Baucus has asked us to submit a statement from Roger Sullivan, of the law firm of McGarvey, Heberling, Sullivan and McGarvey.

[The statements referred to are located in the appendix.]

Senator GRASSLEY. We also are going to have coming, it is my understanding, other interested parties that might want to be filing some statements, like Owens Corning; Myles O'Malley, with the New Jersey White Lung Association; Paul Safchuk, of the White Lung Association. Their comments are very important to us as we address this legislation.

My first question will be to Professor Edley. Some have expressed concern that S. 758 does not require the establishment of a trust fund from which victims are compensated. Thus, there is no guarantee that claimants will ever receive any money. I would like to have your response to that.

Mr. EDLEY. Thank you, Mr. Chairman. There are a couple of things I should point out. First, let me note that Mr. Middleton, with respect, misspoke when he suggested that the class action settlement in *Georgine* included the creation of a fund. It did not. In fact, that settlement created a cap of $1 billion per year that the 19 defendants who settled in *Georgine* would be obligated to pay. So there were flow controls on the amount of money that would be flowing to claimants from the defendant companies.

There is no such cap in this bill, and to that extent, and others, this bill is more favorable to claimants than was the settlement in *Georgine*.

More generally, here is the problem. First of all, in asbestos, unlike other products liability situations such as tobacco, we are not talking about defendant behavior that is going to continue into the future. You can't simply impose a tax on an industry to cover the costs of compensation that will arise going forward. Instead, we are focused on conduct that occurred in the past and there is no easy way—in fact, it is difficult to even contemplate a complicated way to assign liability to particular companies and then tax them in some way to have the money flow into a Government fund.

The black lung program, for example, was created, in which there was a tax on coal companies to cover the prospective costs of the work and the injury that would result in the future. But liability arising out of previous conduct was not imposed on the industry through an industry tax, but was instead imposed on the taxpayers.

Similarly, in this situation it simply isn't feasible to figure out what the shares would be. Remember, we are talking about hundreds of different kinds of defendants in scores of different lines of business whose liability arises from a myriad of different contexts. They may have been manufacturers, they may have been distributors, they may have simply owned the premises on which some asbestos exposure occurred. Calculating year by year, facility by facility, industry by sub-industry, what the appropriate share would be just boggles the mind—impossible.

The second—and I will stop with this—the second, and to me absolutely conclusive reason why a fund of the sort that is often mentioned wouldn't work here is that it is critical that insurance companies continue to be at the table. Many defendants continue to have some insurance company coverage for their liabilities to asbestos exposure, and the question is how to make sure that insurance companies continue to pay on contracts which make them obligated to help defendants with the costs arising from tortlike compensation.

Insurance companies for the most part probably would not be liable to contribute to a fund, and if you try to make them liable through some kind of legislative fiat, not only will there be a jihad in terms of the insurance company coming up here to try to tell you why that is wrong as a matter of the theology of the insurance industry, but I think there would be serious constitutional issues as well with tampering with their insurance contracts.

Senator GRASSLEY. Thank you very much. Now, I would ask Mr. Hiatt, but I would ask Mr. Mallett to listen to the questions I am going to ask Mr. Hiatt because I would like a response from you after his answer.

Could you expand on what you consider to be the specific merits of the Louisiana plan and why you believe it might be a better approach than the Asbestos Resolution Corporation; specifically, what is your judgment of the success of the Louisiana plan, how many cases have been settled under this model, and then have all parties agreed to participate in that agreement?

And then you might respond to that, Mr. Mallett, based on the effectiveness and its merits as compared to the process that we propose in S. 758.

Mr. HIATT. Thank you, Senator Grassley. Let me start with the second half of your question. My understanding at this point is that the virtues of the Louisiana plan are mainly on paper, that the program itself has not really had an opportunity to get off the ground in large part because very soon after the parties to that agreement, which included a large number of companies, trial lawyers, claimants' groups, including unions down there, had reached an agreement, word got around that some of the companies were going to seek a national legislative solution. And that sort of has put the implementation of that program pretty much on hold.

The reason I think that the plan, at least as it is intended to work, makes a lot of sense is that it does contain several of the elements that are missing here. It is a very nonadversarial approach. The issues which have been litigated for years and years and now have been acknowledged by all parties to be resolved—the liability issues, the product identification issues, and others—are not raised anew. There are no attempts to bring in the hardware stores and other small businesses that Ms. Kerrigan cites. It is a very nonadversarial process.

There are medical criteria that are there. Somebody either is found to be impaired and entitled to a certain dollar amount or they are found to be exposed, but not yet impaired, in which case they are entitled to subsidized testing and monitoring and a smaller amount of damages. And they have not waived their rights to come back with a claim if they are ultimately impaired.

So I think, on balance, it is a much better approach and does give individuals the right to opt out if they choose. The unions down there believe that because it is such a superior approach, very few individuals would be inclined to exercise opt-out rights, just as would have been the case presumably under the *Fibreboard* and *Amchem* settlements.

Senator GRASSLEY. Mr. Mallett.

Mr. MALLETT. Mr. Chairman, there are a couple of things that I want to point out and make sure that the committee is well aware of. Mr. Hiatt and I agree that medical criteria are indeed a necessity. To the degree that you have a system whose foundation is indeed a line of demarcation between those persons who are sick and those persons who are not, the Coalition would leap to support that and be very enthusiastic in its endorsement.

On the concept of voluntariness, again, as far as we look at 758, it is voluntary to the degree that a person who goes through a 1, 2, 3-step system, indeed should they be disappointed by the offers that have been placed on the table by the defendant companies, can opt to go to court.

Now, in terms of dropping out of the system, which is I think how some persons would define voluntariness, the important point, Mr. Chairman, is this. Either the medical criteria is going to apply to every single person involved in the system or it is not. You can't gather people effectively in a system designed to organize a solution to this kind of problem and allow people to say, I will choose from aisle A but not from aisle B.

The important point is that if there is agreement, and I think that I heard agreement that medical criteria should be assigned as the foundation upon which any program that you design rests, if we build from there, the imposition upon every person who comes to solve a particular personal health crisis—are you sick or are you not—should be the same for everybody, a critical point.

On the voluntariness of the private agreements, all I can say is it has been the experience of the companies who are part of the Coalition that because they are voluntary, because the plaintiffs themselves do not sign the agreement, it is a wisp of paper upon which the defendants prayerfully hope that the agreements will be met. We are dealing with a nonregulated circumstance, and what we are asking for and what I think the bill is designed to provide is predictability.

Senator GRASSLEY. Mr. Heyman, and then I will go to Senator Torricelli.

Mr. HEYMAN. Yes; Chairman Grassley, if I could make just one comment, the Louisiana settlement experience is a dramatic illustration that this notion of voluntary actions doesn't work at all because Louisiana has been set up 2 years ago and there hasn't been a single case, I understand, that has been settled pursuant to the arrangement. Only a handful of lawyers have agreed to enter into the arrangement.

Major asbestos lawyers have refused to join it. It hasn't been replicated in a single other jurisdiction. And if this is labor's solution to the matter, it is pretty sad because it is not a constructive alternative. And the whole gist of Mr. Hiatt's testimony, as I understand it—and we ought to make this clear at the outset—is that he is in favor of what you would call a voluntary system. In other words, we should set up this administrative facility to compensate sick people and pay them promptly. But then with regard to nonsick people, they ought to be free to sue in the tort system.

Well, unless you solve by means of this legislation the problem of the nonsick cases and the nonsick people filing claims and finite resources being squandered on nonsick people, thereby jeopardizing the ability of sick people to collect, you haven't accomplished, in my view, anything. And it is very interesting that this Louisiana settlement would be raised by Mr. Middleton and Mr. Hiatt as a classic example of what they would like to see. Let's talk about the success or failure of that settlement.

Senator GRASSLEY. Mr. Middleton, go ahead.

Mr. MIDDLETON. Thank you. I would like to respond to the problem with setting up artificial medical criteria, if I might, Mr. Chairman. The problem is that State workers compensation laws control who is going to be paid by the employers and by the employers' insurance companies when a person is diagnosed with disease.

Those criteria, as established under State law, require that companies pay out medical benefits under the comp laws before they would qualify under this system. As it is currently in place, the employers and their insurers are properly reimbursed. This is the point that Congressman Scott was trying to make.

You have this huge open area where employers are paying out the medical benefits, but under these artificial criteria there is no reimbursement, there are no credits available. And so the system

that now allows for the proper payment to end up in the hands of the victims of this disease and for the payers of the medical benefits is prevented under this system because there is no way to dovetail the medical criteria which are completely artificial and out of whack with what the medical community sees with the State compensation laws and what it requires those companies to pay out.

So it is really harmful to employers, and the Newport News Shipbuilding Company, the largest employer in Virginia, is a prime example. That is why they are so adamantly opposed to this bill because it takes away millions of dollars that they have actually paid out in benefits that they get reimbursed, and on Federal work the U.S. Government properly gets reimbursed for.

Thank you.

Mr. MALLETT. Mr. Chairman, just for the record, I strongly disagree categorically with 99.9 percent of what Mr. Middleton just said. You can, in fact——

Senator SCHUMER. Would you tell us the .1 percent? [Laughter.]

Mr. MALLETT. That is that somehow, under workers compensation, the system can be rationalized. Very quickly, Mr. Chairman, the medical criteria under State law can easily be matched with the medical criteria of Federal law. We see that every single day, and that which is going on now should not prevent a rational solution to the problem in the future.

Senator GRASSLEY. Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman.

Mr. Hiatt, I am somewhat unaccustomed to having positions that are at significant variance with the AFL–CIO, and a good deal of that reason is I think we identify our constituencies similarly. And I would like to explore whether indeed our differences are as wide as they might appear.

In Mr. Georgine's correspondence that you have submitted for the record, he says, "I do not disagree that asbestos victims deserve at their option an alternative to the tort system, because the tort system can often be lengthy, costly, adversarial, cumbersome, and technical."

That is a broad statement. Does it necessarily mean that this alternative must be privately agreed upon, or that there is, if somewhat differently designed, a congressionally-designed system that could be fair to the workers?

Mr. HIATT. If this is all it takes to put our position back into a consistent line with your own, Senator, I don't think there is much of a problem. We have made it clear that we aren't opposed to the notion of a legislative solution, per se. In fact, I think that is where Mr. Heyman misunderstands the comparison we keep making with the Louisiana approach.

We are not saying that a Louisiana-type approach would have to be done on a completely voluntary basis, and have indicated an openness to a legislative solution. But I think the key in that portion of Mr. Georgine's letter that you read was that it be at the individual's option, just as——

Senator TORRICELLI. I have to guard my time here jealously. So, indeed, Mr. Georgine is open to an alternative system, and even open to it being a congressionally-designed system. It is a question that it be optional.

You recognize that as we have written this legislation, if at the end of the day the worker is displeased and can meet certain criteria in the system, there still is a court option.

Mr. HIATT. Well, I mean there are two fundamental problems with saying that this bill is a voluntary approach. First of all, the number of hoops and the complexity of the hoops that workers have to go through, that claimants have to go through, to get back into the tort system, and then second there are all kinds of modifications to the existing tort system.

Senator TORRICELLI. I understand that, but if indeed we do not philosophically disagree on there being a congressionally-designed system and if we both recognize that if the system is not working properly, there should be an option to return to the courts, then it would appear to me that what were our considerable differences have not narrowed to simply the criteria by which you reenter the tort system at the end of the process. So what began here as a significant gulf, to me, has just considerably narrowed to a writing of criteria and definitions.

Mr. HIATT. Well, I almost agree with that. I think that a lot has to do with——

Senator TORRICELLI. Well, is it better than 99.9? [Laughter.]

Mr. HIATT. It is not just the criteria, but also what is that process that people are forced to go through before the criteria let them back into the tort system, and then what has been modified in the tort system itself.

Senator TORRICELLI. But for all of us to recognize—I see a situation with 200,000 cases and 50,000 new filings, where a significant number of these workers' lives may expire before they ever reach settlement. You and I have a similar objective here to get this done.

Mr. HIATT. Absolutely, Senator.

Senator TORRICELLI. Do you actually have the numbers of these workers whose lives are expiring before their cases are heard?

Mr. HIATT. I don't offhand. We can try to get that information for you.

Senator TORRICELLI. Do you know the average award that the workers are receiving and the percentage of that that is not going to them or their families, but to costs?

Mr. HIATT. Not in dollars, but we certainly agree with the point that many of the companies make that it is an unfortunately high amount.

Senator TORRICELLI. As you look at why this bill is bipartisan and crosses philosophical lines, just so we understand each other, that is what is going on here. I mean, I understand the Supreme Court's concern with the courts being overworked. Frankly, I think a lot of Federal judges could work a little bit harder. That doesn't bother me. What bothers me is that people who deserve this help may not get it, and when they finally reach an award they are not keeping their own money.

Mr. HIATT. We do agree and we are most willing to explore alternatives. We just don't want to substitute a system that is going to be even worse than the one that we have right now.

Senator TORRICELLI. Mr. Heyman, a rather significant statement was made about you that I think you should respond to. If I get

this right, "GAF hid medical information so employees would keep working."

Mr. HEYMAN. There is no evidence of that that I know of, Senator, and I am sure the asbestos lawyers would have produced it in the 300,000 cases they have brought against us.

We held the company business for 3 years. I think we acted pretty darn responsibly in shutting the business down as soon as the medical studies were published. And for us to be assumed to have more information on a business that had $1 million of sales a year than the U.S. Public Health Service which was requisitioning this product is really not credible.

Senator TORRICELLI. So in addition to there being no evidence of this, you categorically state that this is simply not true. You were unaware of it?

Mr. HEYMAN. Absolutely.

Senator TORRICELLI. Why, Mr. Heyman, as a business judgment, given the potential liability, did GAF simply not adopt the Owens Corning model of a national settlement program?

Mr. HEYMAN. Well, I would say that, in my view, Owens Corning has made a serious mistake in connection with that settlement. So that we all understand it, what the company has done essentially is to settle almost all its pending cases, about 250,000 cases in all, most of which involved nonsick claimants, for about $2.5 billion in upfront cash. About $1 billion will go to the asbestos lawyers, which incidentally will make this one of the biggest pay days for lawyers in the history of tort litigation.

Now, what Owens Corning is banking on in return is that they are receiving promises from 100 major asbestos firms around the country that these firms will use their best efforts to persuade nonsick claimants in the future not to file lawsuits against OC, and sick claimants to enter into prearranged settlement agreements. Obviously, the settlement does not bind the thousands of other lawyers who are not entering into these agreements, nor does it bind future claimants.

And let me make three simple points about this settlement. First, and most important, the OC settlement is about as antithetical to the philosophy embodied in the proposed legislation as you can get, for it perpetuates rather than corrects all the flaws of the current litigation system by squandering finite resources on huge upfront cash payments to lawyers and current nonsick claimants at the expense of future sick claimants whose payments under the arrangement will be discounted from normal values and deferred over time, if, of course, there are sufficient financial resources left to satisfy them.

Under the proposed Senate legislation, claimants, on the other hand, will receive full value—sick claimants, that is, will receive full value paid in a timely fashion. Second, GAF and 19 other codefendants have been there, done that, and it doesn't work. In 1993, we entered into agreements with 50 of the Nation's leading asbestos firms, and this was aside from the *Georgine* settlement which was obviously subject to approval by the court. But this was supposed to be independent of the *Georgine* settlement.

We entered into agreements with 50 of the Nation's leading asbestos firms to settle 50,000 cases for $750 million, and we received

promises similar to those given to OCF under their settlement today. And as soon as the check cleared for the $750 million, the lawyers, including Mr. Middleton, I might add, repudiated the agreements and began filing nonsick claims at an even faster and more furious pace than ever.

Finally, there is just not enough money in the world to buy off all the asbestos lawyers. And what is to stop a lawyer with an asbestos firm who signed the agreement from going off on his own, opening a law office across the street, and making a specialty of bringing asbestos cases against Owens Corning?

Senator TORRICELLI. Thank you. Mr. Chairman, I didn't get to ask Mr. Middleton anything. I had hoped that we might have a brief second round, if that is possible.

Senator GRASSLEY. We will take care of your concerns.

Senator TORRICELLI. Thank you.

Senator GRASSLEY. Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. I want to thank the witnesses for their testimony. Before I ask my questions, I guess I would like to just lay out a little scenario here.

There are two levels that this legislation is debated at. One is the specific level which I would like to get to. The other is the larger level of what is the balance between litigation and—well, the litigation side and the corporate side. I have been sort of moderate on those issues because it seems to me that while the trial lawyer system we use is messy and inefficient and leads to frivolous suits, there are many, many instances where without it nothing would happen and real injustices would not come to light, that the legislature is not able to do it, that individuals alone are not able to do it, et cetera.

So there is a real balance here and you have to weigh them, and it is one of the issues I think that this Congress has been struggling with. But it seems to me in this situation we have been through that, and the corporations who may have done wrong here, or at least injured people, have been basically brought to the realization they have to do something to compensate people. We are not at the first stage where people say, no, no, no, we did nothing wrong, we shouldn't have to pay a nickel.

And once we get to that stage, it seems to me that settlement is the right way to go. To continue the litigation and continue everything, this is not the time that that is needed, and that is why on this issue I think there ought to be a strong lean in favor of settlement because the 75 or 60 percent that will not go to the victims is necessary at the beginning to prove damage and to prove illness and to prove all these other things. But we have done that, and most of the industry in one way or another is willing to settle and pay out large amounts of money to truly injured people.

So in these sort of mature claims, I think it is different than in the early stages. It is sort of like, I guess, in a certain way the tobacco settlement. The tobacco companies resisted and resisted and resisted, but then there was a time for settlement. And because probably there was a fewer number, or whatever reason, settlement at least in part came about, although these settlements are difficult.

So my strong lean in this is to come to a settlement because the endless litigation which, Mr. Middleton, I have to—you say that it won't clog the courts, but all the Supreme Court Justices say it, and the number of potential cases is enormous. But that is not my issue. If it were to clog the courts and there were no alternative to producing justice for people who suffered, so be it.

So then the nub of the issues boils down to once you believe that there ought to be some kind of settlement, the question is—Is it a fair settlement? And this relates to Mr. Hiatt's discussion with Mr. Torricelli. It seems to me the nub of it here is this, not how much of the settlement should go to lawyers versus victims—that is always out there and we are not going to settle all of that—but how much should go to victims who truly have been hurt by this system, as opposed to victims who might be hurt by the system.

As I look at this settlement, it seems to me to do a darn good job of getting money to the people who are truly hurt, and getting it to them quickly and without delay, or without too much delay. It will never be without delay. And for those who might have something called pleural hardening, which has no effects on the person and has no cure, if, God forbid, that pleural hardening develops into something that makes someone sick, they can opt into that system even if it is 10 or 15 years from now.

So I think the settlement seems to me to be a good settlement. And, yes, if you want to say that every person who might get sick should retain their right to sue on a voluntary basis, I think you have to say that at the expense, because you are not going to get the corporations who settle to say, OK, we will pay all the people who are sick and we will let everybody who might become sick sue us—that is not a settlement at all, so what you are saying basically is we will make sure that everyone who truly is sick gets compensated in a fairly generous way, as I read the legislation, and keep everyone who might get sick in line, but now allow people who will not get sick, even though they have been exposed to asbestos, to just collect claims right now. That seems to me to be a pretty fair tradeoff.

So my first question comes to Mr. Hiatt. I understand that there are people whom you represent, and ably represent, who might say, look, I would like to get some money now. But what is wrong with a basic compensation system that says we are going to put our first dollars, and they are limited, to those who are sick, and since this happened during World War II, much of it, may not be around in future years? That is where I have problems with this. That is why I thought *Georgine* was a good settlement because it did bring most everyone in, although it didn't have all the restrictions.

But if you could answer for me why you—do you disagree with that premise, No. 1? And, No. 2, if you don't, then why aren't you supporting this type of settlement?

Mr. HIATT. Not only do I not disagree with the premise, but we do support that premise. At the risk of raising Mr. Heyman's hackles in mentioning Louisiana again, let me just say that I recognize the difficulty of a Louisiana settlement that applies only in Louisiana. But the notion behind the Louisiana settlement is exactly what you have just described. It does provide for a reallocation of

the benefits to the people who are already impaired, who are truly impaired, but it does not——

Senator SCHUMER. Doesn't this settlement do the same?

Mr. HIATT. Maybe and maybe not. It purports to want to do that. We would argue, first of all, that the difficulty that claimants with real impairments have in processing those claims makes it questionable about whether they will have an even harder time in having claims satisfied—I am talking about the truly impaired—here than they do under the present system.

But the other disadvantage is that we are not saying that the exposed but not yet impaired are entitled to the same kind of claims that the truly impaired are, but they should have their testing and monitoring provided for as they did in *Georgine* or in the *Amchem* settlement, as they do in Louisiana. They should have some kind of nominal damages because in many States this is recognized as a tort. What the companies don't like is the bundling of these claims of the nonsick or the not yet impaired and the impaired, where the not yet impaired are getting excessive settlements.

Senator SCHUMER. Mr. Hiatt, wouldn't it be reasonable not to bundle those claims?

Mr. HIATT. Yes, yes. We agree with you.

Senator SCHUMER. Forgetting that each side has its own economic interests which they are pursuing, it seems to me when you are trying to make policy, it would be a good idea not to bundle the two claims together. And as I understand it, one of the major problems in all the suits that are brought is that they do bundle the two claims together.

Mr. HIATT. Absolutely; we are in total agreement with you on that, and that is why we agree that one should look for a new approach. And the approach of distinguishing between the not yet impaired and the impaired in terms of damage entitlement is completely reasonable, but this bill is the wrong approach. This bill is not going to do that.

Senator SCHUMER. Let me ask you, if we didn't have this bill, wouldn't all the things you say are wrong continue—the bundling together of the impaired and unimpaired; like Mr. Torricelli brought out, the continued attrition, if you will, or people dying who are ill?

It seems to me at this stage of the game, as I mentioned earlier, this does the most good compared to not an ideal solution, but to the practical solutions out there for the people who are truly ill.

Mr. HIATT. Well, I guess we disagree at the point that we do not believe that this bill would represent an improvement. We believe this bill would make things even worse, but we do believe that one could fashion an approach, even a legislative approach, that would be better certainly than this bill, and certainly than the existing system.

Senator SCHUMER. Could I just ask one of the people on the other side to respond?

Senator GRASSLEY. Yes.

Senator SCHUMER. Mr. Heyman.

Mr. HEYMAN. If I could say one thing, I just want to underscore something that you alluded to, Senator Schumer. This legislation is much better for nonsick people who will become sick in the fu-

ture than under our current situation. There is no question about it. Under our current tort system, because of statute of limitations defenses, and so forth, nonsick people must bring premature lawsuits, which is one of the major problems here, before they get sick. And they are supposed to be compensated, of course, according to their physical condition at the time of the trial, and if they get sicker later on, they can't come back. Under our system, you can.

The only people who lose here, as Professor Edley said, are the people who are not sick now and who will never become sick. And the question I think we are getting down to with Mr. Hiatt is if someone has a freckle on their lung because of asbestos exposure and there is no ailment, there is no physical symptom, there is no disability, and so forth—and believe me, three-quarters of America was exposed to asbestos. There is not enough money in the world to compensate everybody because they were exposed to asbestos, whether or not they are injured or not.

Now, Mr. Hiatt would say, well, if he has a freckle on the lung, I want him to be able to continue to file a lawsuit in the tort system. And that is what is ruining this system, the inundation of these cases of people who are not sick. There is just not an unlimited amount of money to give to everybody.

Mr. HIATT. That is not what we have said. We have said that the not yet impaired, even if we could come up with an alternative dispute system, should be entitled to testing and monitoring. These people have been exposed and many of them will come down with impairments. It is fine for them to say that the statute of limitations is tolled and they will be able to come back in with claims. But most of these people won't know if and when their claims have matured and they do start having serious asbestos-related diseases if they do not have some kind of testing and monitoring system, which most of those people do today under the existing system. They know right now that many of their tort lawyers have provided free testing and monitoring. That is not going to be available anymore.

Senator SCHUMER. Let me ask you a question. If they were to add to their proposal free testing and monitoring, which I understand is about $200 a test, which is far less than the sums we are talking about, would you support it?

Mr. HIATT. That is one of a number of things in our testimony, Senator, that we have said needs to be changed in this bill. On that one issue, that is an important aspect. It is not the only one.

Senator GRASSLEY. Here is what I want to do. I want to go to Senator Sessions, then I want to give Senator Torricelli an opportunity to ask a second round of questions, and then I hope that I can dismiss this panel and get on to the third panel.

Senator Sessions.

Senator SESSIONS. Mr. Chairman, I thank you for having this hearing. As a person who has spent a large portion of my professional life actively in a courtroom, and as a believer in the rule of law, a believer in justice and fairness, I think we have got to fundamentally look at what is happening in asbestos from that basis. We have got to ask ourselves is what is happening today just and fair for people who are dying from asbestos-related diseases.

Now, we know the basic history of it; it is not complicated. Asbestos is a very effective substance for a lot of different reasons. Plaintiffs' lawyers determined and were able to prove in court that manufacturers of asbestos had learned that it had adverse health consequences, and they were able to then allege and prove that it was sold to distributors without any warning on it and that people's health had been damaged by it.

We have now had over 200,000 lawsuits of this kind filed; over 200,000 apparently are pending, and maybe another 200,000 expected. What we know from the numbers Ms. Kerrigan was using is only 40 percent of the money paid out by the asbestos defendants actually got down to sick people, or sick or not, actually got to the recipients of the payments.

Now, as a person who believes in the rule of law and justice in America, that is not it, that is not acceptable. I do not condemn the lawyers who file the lawsuits because, in fact, they uncovered a big, bad problem in America and have gotten some people compensated for it.

But as Senator Schumer indicated, we are not at the beginning of these cases anymore. We are past that point. We now have a situation in which who knows how many other people may have been damaged by asbestos, and how will they be compensated?

Now, we have methods of compensation; we do it with workers compensation. We say precisely by legislation how monies should be distributed. I think we now have all the facts we need to know. Asbestos is bad for you; it causes sickness. The asbestos company manufacturers, many of them, deliberately hid the dangers when they were shipping it out and people are having serious problems with it.

So I really feel strongly that this is a rational way to go about getting money to the people who need it. I don't see why we can't, in short order, get 90 percent of the money paid out by defendant companies directly to a sick person. And it was pointed out to me recently—when I said only 40 percent was getting to the victims, it was pointed out to me that a lot of the money is going to people who have not yet become sick. So, really, even less is going to people who have become sick as a result of this disease.

So I am delighted that we have a bipartisan effort to analyze the problems that we are dealing with and see if we can't come up with a method to distribute justly and rationally proceeds to sick people.

Mr. Edley, I think you have observed this fairly objectively as a person who cares about the system, you teaching at Harvard and all. Would you comment? Am I off base about this?

Mr. EDLEY. Not at all, Senator. I think that you hit the nail on the head. I will say that much of the opposition to this legislation, I have to say regretfully, is kicking dust in the air. For example, the workers compensation issue that was raised by Congressman Bobby Scott—frankly, I think that the logic is somewhat tortured.

The medical eligibility criteria in this bill are more generous to the victim than State workers comp laws. State workers comp laws hinge on disability, whereas the impairment line drawn by this test—people will receive compensation under this legislation who would not be eligible for compensation under workers comp. So I

think that the argument that somehow this legislation is going to chase claims into workers comp is specious.

I should also point out that the alleged complexity of the administrative process suggested in this statute strikes me as missing the ball completely. Three steps: medical eligibility, ADR, and your choice of arbitration versus litigation. Now, if the AFL–CIO or others want to eliminate a 60-day mandatory period of ADR, fine. I doubt that the defendants would have much objection to that.

But I have got to tell you it sounds to me like that is a bad idea for victims because it is the period of mediation that forces the companies to come to the table, put a good-faith offer in front of the victim, and then face a penalty if it turns out that that offer was too low. That is good for victims. But if, for some reason, in a rush to get to the courthouse people want to dispense with that and make that completely optional, it doesn't seem to me it is the end of the world. But I just question whether that is a provictim change.

With respect to the first step, determining medical eligibility, we are talking about simply submitting your tests to a set of independent people, claims examiners who would review it, independent doctors who would have to approve a denial, so it is easy to say yes to the victim and hard to say no. And that, it seems to me, is also beneficial to the claimant and not at all the kind of burdensome process that Mr. Hiatt described.

And at the end of that medical eligibility system determination, what the victim gets is a certificate that is presumptively binding, unless clearly erroneous, in any subsequent litigation. It is not spinning wheels, it is not burning up time. It is producing something that is of value that will drive defendants to the bargaining table and that will be useful in any subsequent litigation. It is a simple 1, 2, 3-step system, Senators.

And I think that there are things that can be worked out that may be of more liking to the AFL–CIO. There are several things that are being discussed in, I think you call it the other body, but the elements of a consensus are certainly before you.

Mr. MIDDLETON. Might I respond briefly, Mr. Senator?

Senator SESSIONS. All right, yes, sir.

Mr. MIDDLETON. If the rule of law is to be observed, then you have got to look at the complete language in the *Ortiz* case. What the court in *Ortiz* said—that is, the *Fibreboard* decision—was that any ADR resolution at all must ensure the seventh amendment right to trial by jury. By openly stating that this bill will knock out 50 to 80 percent of the claims that would otherwise be deemed eligible under State law, State case law, State statutory law, you are denying them that seventh amendment right if you administratively knock out that claim.

I happen to agree with Senator Schumer that we have been there and done that. That is why for years the transaction costs were high because there were insurance coverage disputes. In every case, regardless of what the court ruled with regard to what was evidence and what was not, the defense lawyers came in, and time and time again, at the direction of their employers, the insurance industry, came in and disputed the same documents over and over and over.

That is why the Owens Corning settlement is indeed so good because it knocks that out. The transaction costs now are nowhere near what they were in the early 1980's, where the figures that were quoted—and if you extrapolate backwards the 1981 to 1983 figures that became the basis finally of the Supreme Court dicta in *Ortiz,* that is where those figures came from, when everybody was fighting every issue, the carriers were fighting coverage.

Finally, Mr. Senator, I would like to say this to all the members of the committee. Many of the manufacturers actually want to pay the pleural disease claims. What is called a freckle by Mr. Heyman is indeed considered under State laws to be asbestos disease and recognizes the progressive nature of the problem. Therein lies the reason they want to settle now and pay those claims because they may have insurance problems which will preclude them from being able to handle those liabilities later on if their coverage ceases to exist.

Senator SESSIONS. Mr. Chairman, I think we as a Congress can craft constitutionally a system to disburse benefits to people who need it. I don't think we can go along with a system that continues to have almost half of the money go to lawyers, plus additional costs, and only $1,700 out of $5,000 actually getting to the victim. That is just not acceptable.

I know you will work with that. If we can work with Mr. Middleton and others to make sure that we are consistent with the request, Judge Mallett, of multiple courts that we do pass legislation—courts are begging us to do—I believe we can do it and I think it will be a good thing for those who have been injured.

Senator GRASSLEY. Senator Torricelli.

Senator TORRICELLI. Did you want to ask something about that, Chuck?

Senator SCHUMER. I was just going to ask Mr. Middleton a question. Do you disagree that the proposed settlement, if that freckle, so to speak, develops into full-fledged asbestosis, would compensate the person at that point for their illness, and compensate them rather well?

Mr. MIDDLETON. I don't agree, Mr. Senator, that this is a settlement of anything because if we have been there and done that, and if all those issues should have been resolved, then why, in crafting this bill, don't we waive the defenses that have already been resolved that you, Senator Schumer, acknowledge? Why don't we include putting the money that is available on the table?

The Supreme Court stated that the resolution has got to be voluntary; they have to put money on the table and there has to be prompt payment. There is no money in this bill and all defenses are preserved. Every defense is preserved, so if you go through this 5-month—and that is very optimistic—procedure, then they still get to raise them if the person gets to go to court if he is one of the 30 to 50 percent that is not knocked out and his constitutional rights are not prevented in this case.

Senator GRASSLEY. Senator Torricelli.

Senator TORRICELLI. Thank you very much.

Mr. Middleton, if it is unusual for me to have a difference of view with the AFL–CIO, it is only somewhat less unusual for me to be

at variance with the trial lawyers, and I wanted to see whether we couldn't also in some way narrow our differences here.

As Senator Schumer had pointed out, this is a peculiar area for such a conflict. We have a situation where there is no dispute as to the cause of the problem. There is no dispute of a willingness to pay. There is no dispute over the people who are responsible. We are only talking about process. That is very unusual when the stakes are so high and the situation is so complex. The Supreme Court having made clear in very unusual terms that the Congress bears a responsibility to establish an orderly process, it would not be responsible for Congress not to deal with this issue, in my judgment.

Now, I am a believer in the tort system. I am a believer in the system of contingencies as the only means of keeping the courthouse door open for indigent, or even middle-income people. I believe in the process, but you cannot expect this Congress to be idle, with 200,000 cases and an additional 50,000 filed a year, and the Supreme Court on two occasions challenging us to act.

Now, I want to narrow here is in my conversation with Mr. Hiatt, if we have an administrative procedure that nevertheless provides for claimants a chance to return to the court system if justice is not done and a threshold is not met, is our only dispute about the criteria by which you get a second bite at the apple to return to the system, or do you simply dismiss that there is any administrative procedure defined on any basis that we could have, no matter how we defined a return to the traditional tort system?

Mr. MIDDLETON. Senator, we have arrived at three principles—and when I say "we" I speak for the Association of Trial Lawyers of America—in conjunction and which have to dovetail with the Supreme Court's decision, not their dicta but the decision in *Ortiz*, and those recognize that any ADR mechanism must not trample the Seventh Amendment right to trial by jury. That gets into the inadequacy of the artificial medical criteria that are developed here.

But here are the three principles. We believe that any ADR system has got to be voluntary and it has got to be non-exclusive. That was the *Amchem* settlement; it was voluntary. It should not interfere with a victim's access to the court system. It should not foreclose the available of any common law remedies or limit the victim's access to counsel.

Number two, any alternative claims procedure must actually reduce delay and uncertainty for the victims. The only way that can be done is if you get rid of the defenses which this bill allows them to preserve. It has got to be minimally adversarial and legalistic. And so the substantive as well as the procedural defenses that Senator Schumer recognized that have been litigated and litigated and litigated and that have been established have got to be waived.

The time period for eligibility determinations should absolutely be specific, and compensation amounts obviously should be fair. But in order to do that, the payment schedules should also be specified and fully disclosed to all the claimants so that they know what they are getting into before they enter into this voluntary process so they can judge whether they have to waste five months, which I believe is extremely optimistic under any program, or they

can resort to the tort system which is compensating the most serious people now because of the docket.

And finally I have a third point.

Senator TORRICELLI. Excuse me. The chairman is being very generous with my time. However, his mood may change.

Mr. MIDDLETON. I understand. Finally, the third principle that we believe is critical is that financing provisions have got to be comprehensive. In other words, the funding has got to be sufficient to handle the projected flow of the cases and the allocation of that financial responsibility has got to be determined for the defendants and all the insurers, and that should be legislatively determined.

Senator TORRICELLI. Mr. Middleton, under no circumstances would this committee design legislation that violated the seventh amendment right for people to access to these courts. That will not happen. We have provided for a return to the system. That is why I am suggesting that there may be less difference here than it appears.

We are only debating the criteria by which a person gets back and what needs to be established. We recognize that ultimately we can put people into an administrative system, but we cannot take away, and do not seek to take away, their right to ultimately get to the courts if that is required.

I would prefer that all parties to this work with us and try to design a system that meets everybody's obligations and is ultimately fair. It is not as if everyone now is getting their day in court and getting this settled. Waiting three years for a result on an application to the courts, 55 cases going to jury trials out of 200,000 that are pending—people are seeking settlement remedies, I suspect, in large measure because they do not think the courts in a timely fashion can deal with this or they can be dealt with fairly.

Mr. Chairman, if I could just very quickly, Mr. Hiatt and then Mr. Edley, I know, wanted to respond. Mr. Hiatt, I simply also want to leave you with this. We have another area of common interest and it is the goose that laid the golden egg. Fifty corporations have gone bankrupt. If indeed we do not reach some settlement, we are not only going to lose the employment of the remaining corporations, but more importantly there is going to be no one left to make these claims.

I have a responsibility to the GAF Corporation as a company in New Jersey with 3,000 employees. It is one of the larger employers in my State. I would regret to lose those 3,000 employees in my State. I would regret even more if the 1,000 claimants who have nothing else in life to pay their medical bills or future medical bills lose the source of that.

I only urge then, finally, to work with us in trying to fashion something that is fair because the people we care about the most are going to be victimized again if these corporations are lost and seek bankruptcy protection and there is no one left to pay. I think that is an obligation on all of us.

Mr. Edley, did you want to respond to a comment that was made?

Mr. EDLEY. I did, Senator. Thanks very much. Just quickly, I think Mr. Middleton's discussion about the waiver of defenses is just flat wrong. He is describing some other piece of legislation on

some other planet. This bill contains a broad waiver of defenses. The only thing that companies under this bill would be left to litigate are is the claimant really sick, and as to that there is a presumption from the medical eligibility determination that is all but binding; the product I.D., like was my product even in Seattle; and the amount of damages. I mean, that is called providing a little bit of due process to the defendants in this. There is a very broad waiver of defenses, as there was in the *Georgine* v. *Amchem* settlement.

The basic problem here, I think, is that Mr. Middleton doesn't want to draw a line at all between the sick and the nonsick. The fundamental policy choice to which Mr. Hiatt agreed is not something that ATLA is willing to agree to. So make no mistake about it, if you want to compromise this out in a way that would be agreeable to ATLA, I think you have got a fundamental policy issue there about are you willing to draw a line.

The argument with Mr. Hiatt, as best I can understand it, is less with where the line is drawn, because I think that drawing the line where it is drawn in Louisiana is only infinitesimally different from drawing the line where it is in this legislation and that is important.

The question is, for the people who don't quite make the impairment line, will there be some extra provision, for example, to subsidize their costs of medical testing. That seems to me to be a somewhat separable issue from the basic one of will you draw a line.

Finally, I just want to point out that the issue of voluntary ADR that Mr. Middleton spoke about—as it happens now, with the huge bundling of thousands of cases that can occur at the behest of plaintiffs' counsel, what goes on is that there is ADR between the plaintiffs' lawyers and the defendants. No one polices the way in which the plaintiffs' counsel then turn around and distribute the money to their hundreds and thousands of clients. No one polices it.

So if you were to ask the question, what is the average amount that is paid to people with mesothelioma or people with pleural plaque under these voluntary arrangements that Mr. Middleton talks about, the answer is who knows? We don't know because the plaintiff's counsel basically has to make a deal and is trading off the interests of the sick and the nonsick in order to keep their client base, to keep their, quote, "inventory" going. There is no volunteerism to that because claimant victims don't really have all the information about what is going on. This is system in that respect is a major improvement in the ability of claimants to determine their fate in the adjudication of the damages that they deserve.

Senator TORRICELLI. Thank you.

Senator GRASSLEY. Mr. Heyman.

Mr. HEYMAN. If I could just make one comment, first, I wanted to endorse Senator Torricelli's notion that we ought to try to reach some constructive resolution if we can, and we have been endeavoring to do that. With regard to Mr. Hiatt's suggestion with regard to medical monitoring, we certainly would—I am only one member of the Coalition, but we certainly would be willing to consider that. The only problem is every time Jon has a suggested change and we

meet it, there is another problem. But we live in hope and we would like very much to——

Mr. HIATT. I really resent that. That is not——

Mr. HEYMAN. We would like very much to resolve this with you. We have discussions underway at the House Judiciary Committee and we are hopeful of doing that, but I would just way one thing. We have been working on this since, I think, 1992, when we first began to negotiate the *Georgine* settlement. And this legislation, if you look at it on all fours with Georgine, is really much more favorable than Georgine. In fact, some of the features like the cap on annual payments, and so forth, were deleted in this legislation.

So we have been at this process for 7 or 8 years. We are delighted to entertain any constructive solutions to see if we can reach legislation, but I think that time is of the essence here. Thank you.

Senator GRASSLEY. Mr. Hiatt, can you say something in 30 seconds?

Mr. HIATT. Yes. I just want to say for the record that I did not understand that the purpose of this hearing was to get into discussions that have been going on in the House or anywhere else about concerns we have and possible changes that the parties would be willing to make in the bill. But we certainly have expressed to the companies a large number of areas that we find greatly deficient in this legislation and, with very few exceptions, GAF indicated a willingness to address that.

Now, I can't say the companies because GAF is one company. There are many other asbestos companies out there that are much closer to our point of view on the deficiencies of this legislation than GAF, and I don't think that point should be lost, Mr. Chairman.

Thank you.

Senator ASHCROFT. I want to again thank Senator Grassley for holding this hearing today on this important issue. Unfortunately, pressing matters require that I be elsewhere so I must excuse myself. I would just like to thank all of the witnesses for coming here to help us understand this problem better, and to express my hope that during the discussion today that some attention will be paid to the importance of explicitly protecting the stability of settlements in any cases that have settled prior to the enactment of any administrative regime. I look forward to reviewing the transcript of today's proceedings.

Senator GRASSLEY. I thank the panel very much for their participation, and I will call the next panel. Thank you all very much.

Mr. EDLEY. Thank you, Mr. Chairman.

Mr. HEYMAN. Thank you.

Senator GRASSLEY. Congressman Cannon is going to come to the table because he was not here when we first started. And I am going to let Congressman Cannon go first, but I want the other panelists to come as I introduce them.

We have Prof. Michael Green, a professor at the University of Iowa School of Law, where he teaches torts, product liability, complex litigation, and mass torts. Then Mr. Nagareda is an associate professor of law at the University of Georgia Law School. He teaches administrative law, evidence, and torts. And then lastly we have

Mr. Paul Verkuil, currently serving as dean and professor of law at Benjamin Cardozo Law School, where he teaches also administrative law and economic regulation.

So, Mr. Cannon, we will probably have you give your testimony and if you want to stay and listen to all the rest of it, you can do that, but we want to go through the entire panel before we ask any questions.

STATEMENT OF HON. CHRIS CANNON, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. CANNON. Thank you, Mr. Grassley. I have other things I need to do, so I will leave after my testimony.

Mr. Chairman, I appreciate the opportunity to appear before you in support of the Fairness in Asbestos Compensation Act. This is important legislation designed to solve a substantial problem for people who are sick from asbestos.

Part of the problem is that litigation is causing a disproportionate burden on our court system. I am one of the original cosponsors of the House companion bill, H.R. 1283. This legislation solves the asbestos litigation crisis in our courts.

The first point I would like to make today is that our current asbestos litigation system is just not working. The system is not equitable to either the victims of asbestos or the defendant companies. Our State and Federal courts are clogged with over 200,000 pending cases and over 50,000 new cases being filed each year. The volume of cases is creating a tremendous backlog in our courts and it can take years for a victim to have his day in court. The Fairness in Asbestos Compensation Act will provide a speedy resolution that allows those whose health is affected by asbestos quicker remuneration.

Over the last three decades, the courts have established the factual threshold for asbestos compensation, but we have a dire situation before us. The former asbestos manufacturers are willing to compensate the sick, but due to the sheer volume of cases before them, the courts have simply become inefficient claims processors.

The courts are not designed for this overwhelming task, and as a result two-thirds of every settlement dollar is being diverted from deserving victims to lawyers and court costs. The courts have responded by encouraging the consolidation of cases. As a result, settlements do not take into account the strengths or weaknesses of an individual's claims, but rather lump the sick and nonsick together.

This sets up a lose/lose situation in which the true victims of asbestos unnecessary wait years and receive less compensation than if their claims are addressed individually. The Fairness in Asbestos Compensation Act provides for an administrative claim system for those individuals who meet objective medical criteria. These criteria determine whether or not they have an asbestos-related impairment. They are administered in a nonadversarial manner by medical experts.

It is important to note that the medical criteria in the legislation are virtually identical to the criteria in the *Georgine* settlement which was agreed to by defendant companies and key components

of the plaintiffs' bar and organized labor. These criteria were also approved by the Federal courts as being fair and reasonable.

In recent years, the Supreme Court has been asked to rule on two proposed asbestos class actions and on both occasions concluded that an administrative system would best serve the victims of asbestos. On the last day of its session this past June, the Supreme Court ruled in *Ortiz* v. *Fibreboard*. Justice Souter, speaking for the majority, held that asbestos litigation is an elephantine mass which defies customary judicial administration and calls for national legislation.

Chief Justice Rehnquist stated in his concurring opinion that the current asbestos litigation system cries out for a legislative solution. Justice Ginsburg similarly stated in the *Amchem* decision which dealt with the *Georgine* settlement in 1997 that an administrative claims process would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.

Mr. Chairman, S. 758 is a good piece of legislation that would speed up and pay more to the sick as opposed to the current inequitable system. It would ensure that those who are truly sick from asbestos get paid in a timely manner, while preserving their right to go to court. And it would allow healthy victims back into the system if they get sick in the future. In addition, the bill would help keep the defendant companies financially able to continue compensating those who become impaired with asbestos-related ailments for decades to come.

Twenty-five of the largest asbestos manufacturers have already filed for bankruptcy, leaving the peripheral asbestos players to continue paying the sick. This has cost thousands of jobs across the country. A bankrupt company cannot compensate victims. This legislation will allow a fair solution for companies and provide speedy compensation to those who are sick, while bypassing those who really aren't affected by asbestos-related infirmities. I support S. 758 and compliment this committee for its consideration of this legislation.

Thank you.

Senator GRASSLEY. Thank you, Congressman Cannon.

Now, Professor Green.

PANEL CONSISTING OF MICHAEL D. GREEN, PROFESSOR OF LAW, UNIVERSITY OF IOWA COLLEGE OF LAW, IOWA CITY, IA; RICHARD A. NAGAREDA, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF GEORGIA SCHOOL OF LAW, ATHENS, GA; AND PAUL VERKUIL, DEAN, BENJAMIN CARDOZO SCHOOL OF LAW, NEW YORK, NY

STATEMENT OF MICHAEL D. GREEN

Mr. GREEN. Thank you, Senator Grassley. The asbestos litigation system is broken. There is no reasonable observer of what is going on today that could conclude otherwise. I have heard a lot of mention of the Supreme Court's decisions in *Ortiz* and *Amchem* and their call for national legislation. In addition to the Supreme Court, dozens of Federal courts and State court judges, including trial judges who are down in the trenches and dealing with these repet-

itive cases, have criticized the current system and called for a legislative scheme.

The goals of any legislative solution, I think, have been well articulated. We need to minimize administrative costs. They are far too high today. We need to preserve assets for future claimants. We need to ensure so far as possible payment for all asbestos victims, including those that develop asbestotic disease in the next century, and there will be some. We also need to speed the compensation process. We need to get dollars to people who are suffering impairment as a result of asbestos exposure.

Well, how might we obtain those goals? I think one way is to simplify and minimize the criteria for recovery. Ideally, recovery would only require a showing of asbestos-induced disease and impairment. And upon showing of that, a claimant would be able to recover. Keep the parties out of court so far as possible. Litigation is far too expensive for the limited remaining resources available to compensate asbestos victims. Expert witnesses are being paid $7,500 and $10,000 a day to testify in asbestos cases about the same state-of-the-art defense over and over and over again.

Cease compensating those who are asymptomatic. Resources need to be preserved for those who are truly sick. And the repeated and duplicative awards of punitive damages—even though cases are being settled, the prospect of punitive damages is reflected in those settlements. We need to stop paying punitive damages in order to preserve the assets that exist for future claimants.

So how well does S. 758 accomplish these goals? In some respects, I think quite well. It seeks to screen out the unimpaired and it ends punitive damages. It does away with a number of tort law issues that drain resources. It does away with the statute of limitations, which has a perverse effect on encouraging premature claims. It does away with state-of-the-art claims. It does away with the questions of the defendant's culpability in order to recover.

In some respects, though, S. 758 could be improved because it retains too much tortlike rules. The bill will not provide a lean administrative compensation system. It continues to require proof of exposure to each defendant's asbestos products. It encourages controversy over noneconomic damages. It requires resolution of the comparative fault of each defendant named in a claimant's case. Resolution of the comparative fault of each defendant in some States, given joint and several liability rules—and I am getting into details here, but I think there is a devil in some of the details—could require resolution of the comparative fault of all members of the asbestos industry; that is, nonparties. We really don't want to do that.

All of those concerns could be resolved by getting the asbestos defendants together and creating a fund, resolving once and for all globally their liability. Will it be difficult, as Professor Edley suggested? Absolutely. Is it impossible? I think not. There are a number of ideas that might be explored in a way to get the fund in and to have a true compensation system. In short, the goal here should be to replace the elephantine masslike current system with a feline, lean, and quick compensation system.

Thank you.

Senator GRASSLEY. Thank you, Professor Green.

[The prepared statement of Mr. Green follows:]

PREPARED STATEMENT OF MICHAEL GREEN

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: My name is Michael Green, and I am a Professor of Law at the University of Iowa. I have taught and written about toxic substances and their treatment in the tort system for almost 20 years. I represent no one in providing this statement and my testimony. I have never represented nor consulted for an asbestos victim or an asbestos defendant, and no one has compensated me for preparing this statement or testifying. I'm sure that, like all of us, I have my personal biases, but I am not an advocate for any of the parties interested in this legislation.

There are three things I'd like to address in this Statement

- The State of Asbestos Tort Litigation
- The Goals Critical to an Asbestos Compensation Statute
- How S. 758 Measures up Against Those Goals

Asbestos compensation through the tort system is broken-seriously, irreparably, and incontrovertibly.

- Everyone knows that the systems is broken, judges know it, commentators know it, asbestos victims know it, their families know it, the experts who testify over and over and over again know it, and, the lawyers who are litigating these cases know it.
- The Federal Judiciary for over a decade has hinted, requested, and implored Congress to take up the matter of asbestos compensation and enact a comprehensive system. State judges have also joined in the chorus seeking legislative resolution of the court-clogging, compensation-delaying, over bloated and underfunded system in place now. I have appended to my Statement an annotated bibliography of courts that have, in reported opinions, criticized various aspects of asbestos litigation and called for a solution from the only institution with the authority to provide it, the United States Congress.
- Perhaps the most persuasive evidence that a compensation statute is required is to appreciate that that is precisely what the plaintiffs' and defendants' lawyers have been attempting to craft within the tort system for the past decade in the form of class action settlements.
- Those class actions settlements are nothing more than asbestos compensation systems dressed up in litigation clothes. But the courts institutionally cannot craft compensation systems, as the Supreme Court has made plain in both *Amchem Products Inc.* v. *Windsor*[1] and *Ortiz* v. *Fibreboard Corp.*[2]
- This is an important point to appreciate. The failure of Congress to enact a legislative compensation scheme has placed enormous pressure on the courts to develop not only creative and unusual procedures and rules to deal with the mass of asbestos cases that were presented, but, in many respects, the judiciary has been involved in activism in inventing partial and imperfect compensation schemes that, from a separation of powers perspective, are appropriate for Congress not the courts.
- The solution, if it is to occur, is in the hands of Congress. Congress, and Congress alone, has the institutional authority and capacity to develop a rational, fair asbestos compensation system. I urge this Subcommittee, and each member, to work toward that goal.
- For more specific explanation of why the current system is broken, the proposed findings in section 2 of S. 758 capture the situation well.

PRINCIPLES OR GOALS FOR A COMPENSATION SYSTEM

Minimize Administrative Costs: The tort system is an enormously expensive one for getting dollars from the asbestos industry to injured victims, with somewhere between 50 and 63 cents of every dollar paid by asbestos defendants being eaten

[1] 521 U.S. 591 (1997).
[2] 119 S. Ct. 2295 (1999).

up in administrative Costs,[3] not to mention the burden on taxpayers who pay for the court resources required to resolve asbestos lawsuits.[4]

In a day when the resources available to the remaining tens of thousands of legitimate asbestos victims are dwindling, that administrative expense is simply unacceptable and unconscionable.

Keep Parties out of Court. There is no system like litigation to consume administrative expense. It requires expensive lawyers and experts and, because contested issues of fault, causation, exposure, and others must be resolved using these costly personnel, the tort system is the most expensive scheme for compensation in existence. Any legislative compensation system should consciously be constructed to minimize the instances when claimants have to go to court. Social security is an example of such a system. Age and payment into the system are the only conditions for qualification. And Social Security is an enormously efficient scheme for transferring dollars from those who pay in to those who are eligible.

Some limited opportunity for court review must be provided, but incentives should be structured in a way to keep claimants from employing this option except in the most serious cases of error.[5] There are many creative ways to do this—but the key is a fair and simple compensation system based on a minimum of objective and easily verifiable criteria.

Reduce the Number of Contestable Issues to a Minimum. There are a number of specific aspects to this subgoal:

- Simple qualification criteria: suffering from asbestos-induced disease.
- Do away with requiring claimant to prove which company's asbestos products he or she was exposed to. This means a global resolution of the asbestos industry's contribution to the compensation scheme.[6]
- Damage awards scheduled based on simple, objectively verifiable criteria: type of disease, lost income, age, etc. In fact, this already occurs in asbestos mass settlements and it was part of the plan in the settlement class actions to which plaintiffs' attorneys agreed.[7] It is no secret that the ideal of individualized adjudication, with respect for the parties and attention to the details of the claim, the attorneys reflecting the interests and desires of their clients, and the arbiters listening carefully to the claims and stories of the parties is a myth.[8] An asbestos compensation statute could have a range of awards within each category and leave discretion in the administering agency to adjust the award upward or downward within the authorized range based on the specific and unusual circumstances of a given case.

Speed the Compensation Process: Compensating the heirs of an asbestos insulation worker who contracted asbestosis at 48, was incapacitated and unable to work at 55, and died at 60 because of mesothelioma, ten years after the death is a cruel hoax. There is evidence that asbestos cases take considerably longer to resolve than other civil cases, which is not surprising given the large number of cases backlogged in a number of jurisdictions.[9]

End Punitive Damages. The repetitive award of punitive damages for essentially the same industry conduct has been criticized by just about everyone familiar with the current situation. Deterrence and expressing society's disdain for the industry's conduct have more than been accomplished. No court or jury is situated to make

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[3] *See* Peter Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 558 (1992); JAMES S. KAKALIK, ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (Rand 1984). The Rand Study, which was the most comprehensive, is based on early litigation in asbestos. That litigation likely was significantly more administratively inefficient than the situation today.

[4] *See In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 749 (E.D. & S.D.N.Y. 1991) (estimating that 70 percent of all funds expended for asbestos claims are for administrative costs, including the costs of court resources).

[5] A very good model for resolving the vast majority of claims through an administrative scheme, while providing a limited right to seek court review is the Dalkon Shield Trust, which was established in A.H. Robins bankruptcy proceedings. *See* Georgene Vairo, *The Dalkon Shield Claimants Trust: Paradise Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992) Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 L. & CONTEMP. PROBS. 79 (1990).

[6] While estimations of total liability based on future claims are not easy, this task was successfully accomplished in the Dalkon Shield Trust. *See* Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 L. & CONTEMP. PROBS. 79, 89 (1990).

[7] *Amchem Products Inc.* v. *Windsor*, 521 U.S. 591 (1997); *see also* Hearings Before the House Judiciary Committee on H.R. 1283 (July 1, 1999) (Opening Statement of Maura J. Abeln, Senior Vice-President, General Counsel and Secretary of Owens Corning).

[8] Mark A. Peterson & Molly Selvin, Mass Justice: *The Limited and Unlimited Power of Courts*, 54 L. & CONT. PROBS. 227 (Summer 199 1); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 96.

[9] Judicial Conference Report at 10–11.

a judgment that, however heinous the conduct of industry members, we are well past any further need to express society's disapproval of this conduct. Especially with compensation resources running dry, there is no justification for providing windfalls to current victims at the risk of leaving future victims without compensation. Because of our system of federalism, the state and lower federal courts cannot solve this problem. Either Congress acts or we will continue to squander the opportunity to assure compensation for all.

Cease Compensating Those who Have Suffered No Loss. For perfectly understandable reasons-fear of running afoul of the statute of limitations and fear that the asbestos well will run dry in the future, we have created a situation in which claimants with no present disease, no present impairment, and no present monetary loss bring suit because physicians can detect abnormalities in their chest x-rays. These non-impairment cases are a significant majority of currently filed cases, and they constitute an increasing proportion of the asbestos caseload.[10] While one can understand why those suits have been brought, it is difficult to fathom why some jurisdictions have permitted them to go forward, especially when there are victims with lung cancer, mesothelioma, and other serious diseases who wait behind them in line to pursue their claims.[11]

Ensure, So Far as Possible, Payment for all Asbestos Victims, Including Those in the Future. This may be the most difficult goal to meet, but a good start would be to end the squandering of industry resources on punitive damages, conserve what funds are available by reducing administrative costs—by taking the lawyers and litigation out of the process—and by ceasing to provide compensation to those who, while they can be diagnosed as having abnormal chest x-rays, are not suffering any impairment in their activities or abilities.

Fairness. Of course, any compensation system should be fair. But fairness, like beauty, is often in the eye of the beholder and, like raising children, to do the right thing, sometimes one must say "No."

- What's important in any statutory scheme enacted is *balance.* None of the parties can have everything, but some modest compromises by each can produce substantial social good for all, especially the unfortunate victims of asbestotic disease, who, even with compensation, cannot be made whole for their losses.
- A compensation system would enhance *fairness for victims* by getting compensation more quickly to injured victims and spreading the available resources to more victims, especially those who develop disease in future decades. The pot is not unlimited and a day will arrive when it is empty. I can think of nothing more unfair than leaving future victims uncompensated.

Will some claimants have to give up punitive damages or their theoretical—the asbestos settlement rate reveals that the right to trial for asbestos claimants is largely a mirage—day in court? Yes. Will those who might recover some compensation today for abnormal x-rays (pleural plaque) have to wait until they suffer real losses? Yes. Will overall fairness be furthered despite these sacrifices? Absolutely and unquestionably.

The Asbestos Industry and other defendants resist a compensation scheme because members do not want or think that they cannot agree on an overall resolution of their respective liability for asbestos claims, which is how any compensation scheme should be funded. But a compensation scheme would end the distraction of asbestos litigation, the disruption to company financial planning and operations, and provide a global resolution that would enable them to get on with their businesses instead of the business of litigation.[12]

Will it be difficult to determine shares of liability among industry members for all future claims? Of course. Is there a risk of inaccuracy in that determination? Absolutely. Would the industry pay less and be better off with a compensation scheme that wraps up their involvement in asbestos litigation? No Question.

Plaintiffs' Lawyers have made an important contribution. They took on Significant risk, undertook to represent asbestos victims in the early days when it was quite uncertain whether the courts would make the necessary adjustments to tort law to accommodate those claims, and uncovered a tale of reckless indifference to the

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[10] *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?,* 13 CARDOZO L. REV. 1819, 1853 (1992).

[11] Schuck, *supra* note?

[12] *See* Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust,* 53 L. & CONTEMP. PROBS. 79, 81 (1990) (discussing loss of productivity of company involved in protracted, mass tort litigation).

health of generations of asbestos workers and active suppression of danger.[13] They deserve to be well compensated for the risks that they took and the social good that they accomplished. Business schools will teach the asbestos matter as a case study, and corporate executives will think hard before engaging in such a massive exposure of workers to risk of this magnitude.

Will a compensation system reduce what plaintiffs' attorneys receive? Yes—necessarily and by design. But has the compensation obtained by the plaintiffs' bar for this work been less than handsome? No. Are we at risk of lawyers turning down the next victim of a toxic substance and refusing to pursue an industry? Emphatically Not. Indeed, what we have today in large part because of the recoveries in asbestos is a very will-financed plaintiffs' bar that is sophisticated, organized, and ready and anxious to attend to the next toxic disaster that may occur.

There are a number of successful models for a compensation scheme that could serve as a template for an asbestos compensation scheme. Since the turn of the century, we have employed a no-fault compensation system for workplace injuries. The National Childhood Vaccine Injury Act[14] was enacted by Congress when there was a temporary crisis in the availability of childhood vaccines and has worked quite well. The Dalkon Shield Trust set up in the A.H. Robins bankruptcy proceedings provides a number of lessons about how to develop and administer a toxic compensation fund in a successful and fiscally responsible manner.[15]

Enacting an Asbestos Compensation System would not set a precedent for Congress regularly and precipitously enacting compensation schemes for every new mass tort that comes down the road. Asbestos is unique in its quantity of victims, demands on the judicial system, and complexities.[16] The common legal and factual issues have been litigated and relitigated, throughout the country in court after court in eye-glazing and mind-numbing fashion. No other mass tort has had the same impact on driving numerous, substantial, including Fortune 500, companies into bankruptcy. This is a true crisis, far more severe than what existed when the Childhood Vaccine Act was enacted or when the Black Lung Benefits Act was enacted in 1969.[17] A number of mass toxic litigations have been resolved by the courts, if not perfectly, at least acceptably in the past several decades.

Asbestos stands in stark relief to DES, Bendectin, the Dalkon Shield, and similar mass torts.

There is a certain "closing the barn door after the horses have escaped" quality to S. 758. Hundreds of thousands of claims have been resolved, billions of dollars have been paid (and billions more wasted in administrative expense), untold millions, nay billions, have been paid in punitive damages, and the number of asbestos victims who had to wait years and years before obtaining compensation or who died before their cases were resolved is unconscionable. But the number of pending claims is in excess of a hundred thousand, at least that many are likely to be filed in the next several years, and there will be seriously injured asbestos victims in the future, although the number is tapering off. But Congress must act now—in another decade there will be nothing left with which to try to fashion a compensation scheme.

HOW WELL DOES S. 758 MEET THE GOALS THAT I HAVE OUTLINED?

It does an excellent job in certain respects:

- Punitive Damages would cease, thereby preserving assets for future claimants.
- Claimants with only pleural plaque and no clinical symptoms would be required to wait until they developed real injury-clinical symptoms—before being permitted to pursue claims.
- It ends unnecessary and costly wrangling over "discovery" of disease for statute of limitations purposes by abolishing this defense and, it thereby ends the unfairness of barring asbestos victims from recovery because they waited too long to file suit, even though the delay has little or no impact on the availability of evidence.[18]

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[13] PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985).

[14] 42 U.S.C. §§ 300aa-33 et seq. (1997).

[15] *See supra* note?

[16] *See, e.g.*, Christopher F. Edley, Jr. and Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 386 (1993).

[17] 30 U.S.C. §§ 901 et seq. (1997).

[18] § 502; *see* Michael D. Green, *The Paradox of Statutes of Limitations in Insidious Disease Litigation*, 76 CALIF. L. REV. 965 (1989).

- It ends the need to try to predict the future under the single judgment rule, which requires that all damages-whether yet incurred or not—be awarded in a single proceeding.[19]

It does a mediocre to poor job in certain other respects:

- Administrative efficiency: This Bill retains too much of the adversarial-tort law framework, but privatizes initial phases within the corporation and attempts to use a liberal dose of ADR to lubricate the process of reaching a settlement.

Certain requirements of tort law are retained-including proof of historical exposure to each defendant's asbestos products,[20] the causal role of those products, and individual determinations of damages. Defendants' fault or product defect is eliminated from the determination of whether the plaintiff can recover, and any affirmative defenses based on the claimant's conduct are eliminated—and that is positive.

However, in order to apportion liability among asbestos defendants, the Bill requires determination of the comparative fault of each defendant. So, even though the fault of a defendant is not relevant for purposes of liability to the claimant, we have injected into every case a potential dispute, requiring litigation, among the defendants as to their comparative share of fault for purposes of apportionment. And, as I understand it, that would occur in the mediation process, arbitration, if it occurs, and in any lawsuit that might occur.

Another consequence of case-by-case defendant apportionment along with the adoption of the joint and several liability or several liability rule employed by the governing jurisdiction's law is the potential for requiring apportionment of comparative fault to nonparty asbestos defendants to whose products the plaintiff was exposed. Most jurisdictions that have adopted some form of several liability—a majority of jurisdictions in the United States—permit the submission of nonparties to the fact finder for purposes of apportioning comparative fault and determining the several liability share of each defendant.[21] This is, quite frankly, a terrible idea: asbestos defendants or potential tortfeasors seeking to minimize their liability by pointing to asbestos manufacturers or distributors, who are not parties because they are outside the jurisdiction, or dissolved and liquidated. We might also see efforts to assign comparative responsibility to nonparties who are immune from suit, such as the federal government and plaintiffs' employers.

The adversarial nature of the mediation and arbitration procedures along with the tort framework for qualifying for compensation and the procedural requirements of the Act virtually mandate that claimants be represented by counsel and the cap on attorneys fees of 25 percent will be a floor as well. Twenty-five percent is better than 33 or 40 percent but even more of these costs could be squeezed out with a simpler, less adversarial, compensation system. This Bill should eliminate as much of the waste that bloats the current system as possible.

The success of the ADR provisions will depend to a large extent on the response of asbestos defendants, at least some of whom in the past have taken a position of not settling until the right before trial.[22] At best, this procedure might provide a modest reduction in transaction costs. At worst, it could increase certain inefficiencies in the current system by adding additional layers.

- Creating incentives to keep the parties out of court. A 10 percent penalty for making a settlement offer that is less than 75 percent of the actual award[23] is a very modest stick, indeed. Much more powerful incentives need to be imposed on both sides to avoid resort to the courts and to encourage *early* resolution of claims. Pennsylvania, for example, imposes a 10 percent per year penalty for delay against defendants who fail to settle a case.[24]
- Balance. The Bill tilts the current playing field a bit too much toward defendants' interests at the expense of current claimants. It ends punitive damages

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[19] § 504.

[20] In response to an inquiry in the House hearings on the companion Bill to S. 758, HR 1283, Richard H. Middleton, President of the American Trial Lawyers Association, explained why lawyers are still charging contingency fees of 33–40 percent: "Because you still have to prove the very complex work histories of these individuals who worked at many job sites, perhaps throughout the country. You have to prove the medical diagnostic requirements. You have to bring in all of their medical records. And so, it requires a great deal of staff time * * *" Hearings on HR 1283 Before the House Judiciary Committee (July 1, 1999).

[21] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§28A–28E, cmt. a, reporters note (Proposed Final Draft (Revised) March 22, 1999).

[22] *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L. REV. 659, 663–64(1989).

[23] § 307(j).

[24] PA. R. CIV. PRO. 238.

and asymptomatic claims, imposes medical screening criteria for all diseases, and bans joinder, consolidations, and class actions that might be permitted under current law and which have some potential to reduce administrative costs. It does bar statute of limitations defenses, a very sensible proposition and it provides current claimants a unilateral right to binding arbitration and the potential of mediation, which may, depending on defendants' response, or may not be a benefit to claimants. Defendants gain substantially from this Bill—pushing them to remove the tort-like framework for compensation and requiring global resolution of defendants' liability is not too much to ask in exchange for eliminating punitive damages—which affect the settlement value of every case. Global resolution would save substantial attorneys fees and other administrative costs and provide a wrap on asbestos litigation once and for all.

APPENDIX

Asbestos Litigation Reform: State and Federal Courts' Commentary About the Asbestos Litigation Crisis

I. FEDERAL COURTS

A. United States Supreme Court

A United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by THE CHIEF JUSTICE in September 1990, described facets of the problem in a 1991 report: "[D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991). Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See id., at 3, 27–35; see also id., at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.

In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. * * *

Amchem Products, Inc. v. *Windsor,* 521 U.S. 591, 599 (1997).

* * * We noted in *Amchem* that the Judicial Conference Ad Hoc Committee on Asbestos Litigation in 1991 had called for "federal legislation creating a national asbestos dispute-resolution scheme." Ibid. (citing Report 3, 27–35 (Mar. 1991). To date Congress has not responded. * * * Thus, when "calls for national legislation" go unanswered * * * judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice.

Ortiz v. *Fibreboard Corporation,* 119 S.Ct. 2295, 2303, 2325 (1999).

B. United States Courts of Appeals

[R]eform must come from the policy-makers, not the courts. Such reform efforts are not, needless to say, without problems, and it is unclear through what mechanism such reform might best be effected. The most direct and encompassing solution would be legislative action. * * * In a different vein, Congress might enact compensation-like statutes dealing with particular mass torts * * * Congress might enact a statute that would deal with choice of law in mass tort cases, and provide that one set of laws would apply to all cases within a class, at least on issues of liability. Such legislation could do more to simplify (and facilitate) mass tort litigation than anything else we can imagine.

Georgine v. *Amchem Prods., Inc.,* 83 F.3d 610, 634 (3d Cir. 1996).

It is clear that the enigma of asbestos litigation is not readily susceptible to resolution under the standards and practices representative of traditional tort litigation (citations omitted). * * *

What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively. * * * This case also illustrates the need for a legisla-

tive response to the asbestos litigation crisis. As the majority opinion in this case notes, there is a dire need for legislative intervention in the arena of the asbestos litigation crisis.

Cimino v. *Raymark Industries, Inc.*, 1512 F.3d 297, 336 (5th Cir. 1998).

The Supreme Court, as the only institution other than Congress capable of imposing the uniformity necessary to resolve this problem in a just manner, should be afforded the chance to deal with the singular problem presented by these cases. That Court has the power to formulate federal common law which will ensure equitable compensation for all claimants. Its ability to address the controlling issues with a single voice is not only necessary for just resolution of pending litigation; it is even more important to expeditious and equitable settlement of claims. A uniform set of rules would not only protect the rights of individual claimants and the effective functioning of the judicial system, but would also aid the efforts of the asbestos companies and their insurers to develop an effective procedure for resolving these disputes on a rational basis without resorting to the courts. The potential for disparate outcomes in the different states could encourage many plaintiffs to remain in the courts rather than resorting to a unified nationwide facility for resolving these disputes. * * *

Jackson v. *Johns-Manville Sales Corp.*, 750 F.2d 1314, 1333 (5th Cir. 1985).

[T]he court is frustrated by lack of congressional action. A number of legislative solutions has been proposed for the problems we must confront today and tomorrow throughout America because of yesterday's production and use of asbestos. None has been enacted. Clearly the powers of Congress to tax and regulate give that forum the interstate reach and flexibility needed to allocate the relatively scarce resources that must be available to present and future claimants to achieve the greatest good for society. * * * Congress can refuse to act while the court cannot abstain from resolving a case presented.

Jackson v. *John Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir. 1986).

The national dimensions of the problem have led to calls for congressional action. Although the subject has attracted the attention of individual representatives and senators, no legislative response has garnered enough support to be enacted.

In re *School Asbestos Litigation*, 789 F.2d 996, 1001 (3d Cir. 1986).

There has been a lot of talk in Congress and even a little action—about unclogging the courts by setting up some sort of out-of-court claims-handling facility to resolve product liability problems involving substances that have injured hundreds, or thousands, of people. Much of the Congressional concern was prompted by the more than 20,000 asbestos-related lawsuits now swamping the courts. In both the House and the Senate, legislation has been introduced to take those cases out of the courts and instead handle them through a fund offering fixed payments for different levels of injury. Those proposals are stalled, but there is some movement on separate legislation that would create an out-of-court mechanism to compensate people injured by toxic substances.

In re *A.H Robins Co., Inc.*, 880 F.2d 709, 744 (4th Cir. 1989).

This kind of single-state action, however, is an ineffectual response to the problem, because one state cannot control what happens in other jurisdictions.

Dunn v. *HOVIC*, 1 F.3d 1371, 1387 (3rd Cir. 1993).

In both cases we expressed our view that relief from multiple punitive damage awards should not be sought from a federal court sitting in a diversity action but, rather, from the legislature under whose law the action is decided.

Cantrell v. *GAF Corp.*, 999 F.2d 1007, 1017 (6th Cir. 1993).

[T]he problem is one better suited for solution by state legislatures, state courts, and Congress rather than through the creation of some federal "presumption" by federal courts sitting in diversity cases only.

Backston v. *Shook and Fletcher Insulation Co.*, 764 F.2d 1480, 1486 (11th Cir. 1985).

[F]ederal common law may at times be a "necessary expedient," under our federal system Congress is generally the body responsible for balancing competing interests and setting national policy. There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation. * * * Congress' silence on the matter, however, hardly authorizes the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions. Displacement of state law is primarily a decision for Congress, and Congress has yet to act.

Woessner v. *Johns-Manville Sales Corp.*, 757 F.2d 634, 648 (5th Cir. 1985).

A fully satisfactory solution would require properly crafted federal legislation.

Jackson v. *Johns-Manville Sales Corp.,* 727 F.2d 506, 529 (5th Cir. 1986).

C. Federal District Courts

At this point it would be highly desirable to remove these types of mass tort cases from the courts entirely. One proposal that has been advanced is to consolidate the various trusts established to handle asbestos liability, and to turn over their claims processing functions to private companies. The most significant benefit of moving in this direction would be the potential to reduce transaction costs and possibly the courts' oversight functions. * * *

In re *Joint Eastern and Southern Dist, Asbestos Litigation,* 878 F. Supp. 473, 573 (E.D. & S.D.N.Y. 1995).

Given the dimensions of the perceived problem in federal asbestos litigation, it is not surprising that no ready solution has emerged. The Judicial Conference Asbestos Committee concluded that the only true solution lies in Congressional legislation.

In re *Asbestos Products Liability Litigation* (No. VI), 771 F. Supp. 415, 420 (J.P.M.L. 1991).

Asbestos litigation in the federal and state courts has reached crisis proportions. Over 100,000 pending asbestos * * * cases have backlogged the courts—preventing many injured persons from obtaining much needed compensation in a timely and efficient manner. * * * A fundamental tenet of our legal system—equal treatment—no longer exists for asbestos victims.

The national war over asbestos has produced unnecessary casualties. Many of the persons harmed by asbestos-containing products have been injured once again by our legal system's method of litigating tort cases. Case-by-case adjudications for each injured person has both delayed payment and consumed the bulk of the monies available for those injured. * * * Much of the billions of dollars in transaction costs going to attorneys could be used to compensate the suffering and injured. Judicial resources now unnecessarily tied up in these cases could be used for other pressing needs.

In re *Eastern and Southern Dist. Asbestos Litigation,* 134 F.R.D. 32, 34 (E.D. & S.D.N.Y. 1990).

The courts and legal profession are under unacceptable pressures preventing attention to other matters. More than a hundred thousand present claimants will wait indefinitely for relief and an equitable share of the assets available to aid them under the present system of case-by-case adjudication. Two-thirds or more of the amounts paid for the injured are used for transaction costs, most in legal fees and expenses (some of it borne by the taxpayer supported court system). Business as usual in the law offices and courts is not possible in the case of the asbestos disaster. * * * A clearer fix on the extent of the problem and the assets available is necessary if a rational and workable compensation scheme is to be developed.

Development of a broad-based consensus concerning the nature and extent of the problem is a fundamental step in planning.

In re *Joint Eastern and Southern Dist. Asbestos Litigation,* 1990 WL 115785, at * 1–2 (E.D. & S.D.N.Y. July 20, 1990).

[T]he complexity of asbestos cases makes them expensive to litigate; costs are exacerbated when each individual has to prove his or her claim de novo; high transaction costs reduce the recovery available to successful plaintiffs; and the sheer number of asbestos cases pending nationwide threatens to deny justice and compensation to many deserving claimants if each claim is handled individually. * * *

In re *Joint Eastern and Southern Dist. Asbestos Litigation,* 129 B.R. 710, 750–751 (E.D. & S.D.N.Y. 1991).

The [asbestos litigation] situation continues to deteriorate. * * * Despite an overall decrease in civil filings, there was a dramatic increase in the number of asbestos personal injury product liability filings in 1990. Despite the large number of cases terminated in the last two years and extensive efforts to increase efficiency and devote substantial resources to asbestos cases, the number of unresolved cases continues to escalate.

The national dimensions of the asbestos problem has generated multiple calls for congressional action. * * * Although the subject has attracted the attention of individual representatives and senators, no legislation has garnered requisite support for enactment.

In re *Joint Eastern and Southern Dist. Asbestos Litigation,* 129 B.R. 710, 812–813 (E.D. & S.D.N.Y. 1991).

The courts, attempting to provide fair, systematic relief to the parties litigant while other powers of government and sectors of society turn away from the problem, have become so overburdened as to risk denying justice in asbestos cases as well as other types of cases. On December 31, 1984, there were approximately 893 personal injury asbestos cases involving over one thousand plaintiffs pending in this District. This backlog persists despite such creative judicial efforts as master filings, detailed standing orders, and large-scale consolidations. * * *

Jenkins v. *Raymark Industries, Inc.,* 109 F.R.D. 269, 271 (E.D. Tex. 1985).

There is no projection as to when Congress will resolve the asbestos problems facing the federal judicial court system * * * It is not at all clear to me that congressional action or the Wellington Facility are functionally inconsistent with the class action mechanism proposed here. We can no longer allow asbestos litigation to creep in its petty pace from day to day.

Jenkins v. *Raymark Industries, Inc.,* 109 F.R.D. 269, 287 (E.D. Tex. 1985).

[T]he serious social problem presented by these many claims cry out for legislative resolution, not court imposed socio-economic solutions.

Owens-Illinois, Inc. v. *Aetna Cas. and Sur. Co.,* 597 F. Supp. 1515, 1521 (D.D.C. 1984).

Experience indicates that these features of mass torts conspire to hinder efficient judicial disposition. While in some instances legislative solutions have been proposed and adopted * * * our political system has left primary responsibility with courts and state legislatures to establish practicable and just rules for compensating mass tort victims.

The litigation complexities raised by mass torts are legion. The place and manner of exposure to the alleged harm-producing agents are often impossible to determine for purposes of establishing a "locus" state. Very complex-questions as to jurisdiction, choice of law, liability, causation and damage apportionment typically result.

In re *DES Cases,* 789 F. Supp. 552, 562 (E.D.N.Y. 1992).

Because of the vast numbers of asbestos personal injury and property damage suits which have been and are expected to be filed in state and federal courts throughout the country * * * [t]he problems associated with awarding exemplary damages in successive asbestos litigations are thus nationwide problems and call for a uniform solution. Resolution of this problem is better dealt with either by the federal legislature or through legislation on a state-by-state basis, with the proviso that all states adopt a uniform system for handling these claims, than on the judicial level.

Leonen v. *Johns-Manville Corp.,* 717 F. Supp. 272,285 (D.N.J. 1989).

II. STATE COURTS

The civil court calendar in Philadelphia cannot cope with the volume of over 3,000 asbestos cases that have been filed. * * * Sick people and people who have died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars.

The asbestos litigation often resembles the casinos sixty miles east of Philadelphia more than a courtroom procedure. And just as the casinos are the winners in Atlantic City, the lawyers are the winners in asbestos litigation since the costs of litigation far exceed benefits paid to claimants.

The Philadelphia court system has focused a great portion of its civil resources on the asbestos litigation, devised methods of disposition of cases that have won national acclaim, and has processed record numbers of major civil cases. But the new cases are filed faster than any court system of Philadelphia's size can dispose of them.

Ideally, the federal or state legislatures should address the problem. But even if legislation is enacted some time in the future, it may not solve the problems of the thousands of cases which have already been filed.

Since legislative remedies seem remote, the courts should recognize that application of traditional tort law to the "creeping disease" situation is often like trying to fit a square peg into a round hole.

Doe v. *Johns-Manville Corp.,* 471 A.2d 1252, 1256 (Pa. Super. Ct. 1984).

[S]ingle-state action * * * is an ineffectual response to the problem, because one state cannot control what happens in other jurisdictions. In fact, the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims, a situation that hardly provides much law reform incentive for state legislators. [T]hese formulas, which give the lion's share of the punitive award to the first victim able to win a judgment against a particular defendant, are unfair to subsequent plaintiffs and concomitantly risk providing too little deterrence to behavior of this type. American Law Institute, Enterprise Responsibility for Personal Injury 261 (1991). As an alternative to state action, the Study supported a federal legislative solution "to authorize mandatory class actions for multiple punitive damages arising out of large-scale mass torts." *Id.* at 263.

Owens-Corning Fiberglass Corp. v. *Malone,* 972 S.W.2d 35, 50 (Tex. 1998).

[T]he last decade of the 20th Century, our judicial system faces an apocalypse in the guise of asbestos cases. As did the "Apocalyptic beast," * * * asbestos rose up "as from the depths of the sea," after having lain dormant for decades, to plague our industries initially and our judicial system consequentially, spreading cancer and asbestosis to thousands of workers along the way. * * * [I]t seems quite possible that our dockets shall be visited with asbestos litigation well into the next century, each case presenting its unique yet similar tragic scenario.

Eagle-Pitcher Industries, Inc. v. *Balbos,* 578 A.2d 228, 231 (Md. Ct. Spec. App. 1990).

We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damage awards in mass tort litigation. Other courts have reached this same conclusion. * * * [B]oth state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products.

Spaur v. *Owens Corning Fiberglass Corp.,* 510 N.W.2d 854, 866 (Iowa 1994).

Congress, by not creating any legislative solution to these problems, has effectively forced the courts to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active dockets.

Appalachian Power Co. v. *MacQueen,* 479 S.E.2d 300,303 (W. Va. 1996).

Any realistic solution to the problems caused by the asbestos litigation in the United States must be applicable to all fifty states. It is our belief that such a uniform solution can only be effected by federal legislation.

W.R. Grace & Co. v. *Waters,* 638 So.2d 502, 505 (Fla. 1994).

We can perceive of no problem more in need of a legislative solution [i.e., the insurmountable problem of proof for victims of asbestos exposure].

Sutowski v. *Eli Lilly & Co.,* 696 N.E.2d 187, 196 (Ohio 1998).

While we recognize that there are numerous cases that have been decided and numerous cases are pending concerning damages claims based upon exposure to asbestos, this Court cannot dictate policy in a mass tort context, but can only decide the cases involved in the present suit. Such broad policy considerations are left to the Supreme Court of this state and the United States and to the appropriate legislative bodies. * * * We * * * conclude that the higher courts and the appropriate legislative bodies should resolve such policy considerations.

Keene Corp. v. *Kirk,* 870 S.W.2d 573, 582 (Tex. App. 1993).

At the state court level we are powerless to implement solutions to the nationwide problems created by asbestos exposure and litigation arising from that exposure.

Fischer v. *Johns-Manville Corp.,* 512 A.2d 466, 480 (N.J. 1986).

We commend the problem to the Legislature for imposition of a more rational solution than dissipating the defendant's corporate assets for the private enrichment of random fully-compensated victims.

Ripa v. *Owens-Corning Fiberglass Corp.,* 660 A.2d 521, 534 (N.J. Super. Ct. App. Div. 1995).

The solution to the complex of issues generated by asbestos litigation is more within the province of the legislature.

Goldman v. *Johns-Manville Corp.,* 1986 WL 7374, at *11 (Ohio App., June 30, 1986).

Despite the fact that the current system sometimes provides what seems to be, and at times doubtless is, a less-than-adequate remedy to those who have been disabled on the job, all policy arguments regarding any ineffectiveness in the current compensation system as a way to address the problems of industrial diseases and accidents are within the exclusive province of the legislature.

Millison v. *E.I. du Pont de Nemours & Co.*, 501 A.2d 505, 515 (N.J. 1985).

Senator GRASSLEY. Now, Professor Nagareda.

STATEMENT OF RICHARD A. NAGAREDA

Mr. NAGAREDA. Thank you, Mr. Chairman. Since joining the legal academy in 1994, I have dedicated my career to studying the mass tort litigation problem, including the asbestos litigation. I think that a useful way to frame the discussion of this particular bill is to think about what would happen in a world in the absence of national legislation.

It seems to me that a comprehensive nationwide solution of the sort that is set forward in this bill would be vastly superior to the patchwork quilt of private compensation plans that I would expect to arise in the absence of Federal legislation. Absent Federal legislation, I think the incentives of plaintiffs' law firms and the defendants will remain the same.

Plaintiffs' law firms will have every reason to continue to bring forth claims on behalf of unimpaired persons, and defendants will have every reason to resist the expeditious resolution of those claims, at least without some assurance about the future. So without Federal legislation, my expectation is that the major plaintiffs' law firms in the area and at least the remaining asbestos defendants would each be on their own to seek to cut as advantageous a deal with their counterparts on the other side as they could manage.

What is likely to emerge, in other words, is, I think, a patchwork quilt of agreements between particular firms and particular defendants, some of which might be more favorable or less favorable in some respects than the legislation currently before this committee.

The significant practical advantage to S. 758 is that it would create a forum for one-stop shopping on the part of plaintiffs who are seeking redress from asbestos defendants. The compensation that they would receive would not depend upon sheer chance. It wouldn't depend upon the particular firm they go to. It wouldn't depend on whether or not that firm had an agreement in place with a particular defendant. It would depend instead upon an assessment by neutral medical and legal experts in the field, drawing upon standards that would be agreed upon in the legislative process.

Now, to provide a chance for preserving the limited assets of defendants, there have to be some difficult value choices made. I do believe that this legislation makes the right value choice. The major point for present purposes that I wanted to underscore is that those sorts of value choices to prefer the impaired over the unimpaired, should be made openly through a process amenable to democratic discussion and oversight.

It seems to me that a patchwork system of private agreements would neither be practicable nor desirable, not practicable because there are simply too many defendants in too many exposure situations that we are dealing with in this area. It is not one where you

can have two or three defendants pursue these sorts of private arrangements and solve the problem that way.

In addition, I am convinced that a patchwork quilt of agreements involving particular plaintiffs' firms and defendants would only to the confusion and the frustration of asbestos victims. I would describe it as a full employment bill for lawyers on both sides because only the lawyers would know the terms of the various deals which would not be matters of public record, and only they would have the legal expertise to manage their way through the multiple agreements that would be implicated in most asbestos cases which characteristically involve multiple defendants.

It seems to me that the legislation before this committee makes a lot of sense. It does not impose a bureaucratic solution to the asbestos problem, but instead seeks to replicate private agreements that have already been fleshed out by experienced attorneys in the private sector. That, it seems to me, makes this bill a desirable piece of legislation that is long overdue.

Senator GRASSLEY. Thank you, professor.

[The prepared statement of Mr. Nagareda follows:]

PREPARED STATEMENT OF RICHARD A. NAGAREDA

SUMMARY

S. 758 represents a fair, practicable, and innovative solution to the asbestos litigation—one that merits enactment by this Congress.

In the absence of federal legislation, the essential features of the asbestos litigation will not somehow go away: Plaintiffs' lawyers will continue to have a powerful economic incentive to bring forth large number of claims on behalf of unimpaired persons, having already expended the fixed costs to develop legal and factual expertise concerning asbestos in earlier phases of the litigation. At the same time, defendants have no reason to resolve expeditiously asbestos claims, absent some set of ground rules to govern the quality of claims to be presented for compensation in the future. The upshot is a kind of litigation gridlock, accompanied by what, to date, has been a fruitless search for some legal vehicle by which to resolve future asbestos claims.

The framework established by this Act would be vastly superior to the legal environment likely to emerge in the absence of federal legislation. Specifically, a comprehensive solution to the asbestos litigation effected by way of federal legislation would be superior—from the standpoint of both asbestos victims and democratic accountability—to the patchwork quilt of private compensation plans likely to emerge otherwise. In addition, federal legislation to address specifically the asbestos litigation would reduce the pressure for dramatic, and potentially unwise, changes to general principles of civil procedure and bankruptcy law.

The Act represents an appropriate—indeed, necessary—exercise of federal power. It places the federal government in the position of a facilitator and coordinator of private dispute resolution. It does not impose a bureaucratic solution to the asbestos problem but, rather, seeks to replicate arrangements already fleshed out by experienced attorneys in the private sector. Any workable national solution to the asbestos litigation will necessarily entail some degree of intrusion upon matters that otherwise would remain subject to state authority. This Act does so only as much as necessary to implement its underlying priorities for compensation and, even then, only as a last resort.

Finally, the priorities set by the Act are right on the merits. The Act appropriately seeks to maximize the resources available for compensation of impaired persons by barring claims on behalf of persons who do not meet specified criteria for medical impairment as well as claims for punitive damages. The Act prefers private dispute resolution to the dead weight loss of continued litigation in the tort system; and it prefers to put money in the hands of asbestos victims rather than the pockets of their lawyers.

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MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: My name is Richard A. Nagareda, and I am an Associate Professor of Law at the University of Georgia. Since joining the legal academy in 1994, I have dedicated my teaching and research to the subject of mass tort litigation. As indicated in the attached c.v., I have published three articles in major law reviews on the subject, addressing class action settlements in the asbestos area [1] as well as ongoing litigation over silicone gel breast implants and tobacco products.[2] My objective in these writings has been to examine comparatively the many vehicles—class actions, bankruptcy, federal regulation, and national legislation, among others—advanced in recent years to effect comprehensive solutions for particular areas of mass tort litigation. In addition to my academic writings, I regularly teach a seminar in which my students discuss a set of reading materials assembled by me on the subject of mass tort litigation and then proceed to prepare research papers under my supervision on unresolved legal issues in the area.

At the outset, let me emphasize that I seek to assist the Committee from the standpoint of an academic commentator interested in finding fair and practicable solutions to mass tort problems. At no point since joining the academy have I done any consulting work for any party, law firm, court, or other organization with respect to asbestos cases or any other area of mass tort litigation. Nor have I otherwise accepted, either directly or through my law school, any financial support from any such persons in connection with my academic research and writing. My views are, quite simply, my own.

I have reviewed S. 758, the Fairness in Asbestos Compensation Act of 1999, and urge you strongly to enact it into law. In this era of divided government, I applaud the bipartisan effort to move forward this legislation. Indeed, I believe that S. 758 represents the last, best hope for a fair and comprehensive solution to the problems posed by asbestos litigation, not only for asbestos victims and defendants but also for the judicial system as a whole.

The history and essential facts behind the asbestos litigation are both well known and ably documented in the testimony presented in favor of the legislation during the July 1, 1999 hearing before the House Judiciary Committee. The experience gleaned from the asbestos litigation over the span of recent decades establishes several starting points for the discussion of S. 758. After noting these points, I set forth the reasons for my conclusion that S. 758 stands as a fair and practicable solution—in particular, one superior to the legal environment likely to emerge in the absence of federal legislation.

STARTING POINTS

There are three significant starting points for any debate over federal legislation in the asbestos area:

- *Currently-pending asbestos cases involve large numbers of persons with little or no physical impairment. This feature of the asbestos litigation not only is likely to continue in the future, it also forms the basis for a kind of litigation gridlock capable of being broken only on a comprehensive basis.*

Leading commentators have observed that "up to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired." [3] These claims, moreover, have considerable settlement value when bundled together in large numbers with claims brought on behalf of persons who are genuinely impaired.[4] This feature of the ongoing litigation over asbestos is the predictable consequence of two underlying phenomena: the nature of latent disease and the economic incentives for both plaintiffs' law firms and defendants.

Asbestos-related impairments can result from both cancerous and non-cancerous diseases—mesothelioma being a classic example of the former and asbestosis a common illustration of the latter. The crucial feature of these diseases consists of a latency period—typically, extending over decades—between asbestos exposure and the

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[1] *See* Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899 (1996).

[2] *See* Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 Geo. L.J. 295 (1996); Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, Mich. L. Rev. 1121 (1998).

[3] Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. Legis. 383, 393 (1993).

[4] *See* Prepared Statement of Professor William N. Eskridge, Jr., Hearing on H.R. 1283 Before the House Comm. on the Judiciary (July 1, 1999).

onset of physical impairment.[5] The result is that, at a given time, there will be a group of persons with asbestos-related impairments and a comparatively larger group of persons who merely have been exposed to asbestos, only some of whom will ever become impaired.

From the standpoint of a plaintiffs' law firm, the economics of asbestos litigation are such that there is every reason to push forward not merely the claims of those who are physically impaired but also those of persons who merely have been exposed to asbestos and may never become impaired.[6] This economic incentive flows from the repetitive character of the factual and legal issues in mass tort cases generally. To put the point briefly: The fixed costs associated with winning a few path breaking early victories in mass tort litigation are considerable, but the marginal costs of pursuing additional claims—that is, claims that raise similar legal and medical issues and that flow from similar factual situations—are comparatively low. Having expended the time and resources to win an initial set of victories, in other words, plaintiffs' law firms have every reason, from an economic standpoint, to attempt to spread their fixed costs over an ever-increasing number of claims.

It bears acknowledgment that early asbestos lawsuits—undertaken at considerable risk and personal expense by the plaintiffs' attorneys involved served to bring to light the misconduct of the asbestos industry more quickly and in greater depth than those misdeeds would have emerged in the absence of such innovative litigation. But acknowledgment of the considerable social good achieved by early asbestos lawsuits—now, decades in the past—should not blind one from the recognition that current asbestos litigation is increasingly focused upon unimpaired persons.

All of this creates the makings for what can best be described as a form of litigation gridlock. In the absence of a long-term, comprehensive approach to the disposition of asbestos cases as a whole, defendants have little reason to seek the expeditious resolution of claims short of the approach of actual trial dates. From defendants' standpoint, settlements in pending cases—particularly, settlements in cases brought on behalf of as-yet-unimpaired persons—serve no purpose but to enhance the economic attractiveness of still more lawsuits with ever-decreasing merit. Defendants, in other words, have little reason to seek the resolution of current cases absent the development of ground rules for the types of claims that can be brought forward for payment in the future. Thus, the gridlock: Plaintiffs' law firms have economic incentives to bring more cases, which defendants have no incentive to resolve expeditiously absent some form of assurance about the quality of future claims.

- *Reliance upon litigation in the ordinary tort system has resulted in an unconscionable dead weight loss of resources that could be better devoted to the compensation of asbestos victims.*

The litigation gridlock described above has genuine costs. The Judicial Conference Ad Hoc Committee on Asbestos Litigation reported in 1991 that, for each dollar expended in asbestos litigation, only 39 cents were paid to asbestos victims. The remainder was consumed by transaction costs—principally, attorneys' fees.[7] In addition, the Committee reported that asbestos cases were subject to delays twice the length of those experienced by other civil litigants.[8]

I am aware of no empirical research on transaction costs in asbestos litigation during more recent years an era in which the medical and legal issues involved in such cases have become familiar to the point of rote repetition. There is reason to doubt, however, that transaction costs have dropped precipitously from those observed earlier by the Ad Hoc Committee. Neither the influx of claims on behalf of unimpaired persons nor the economic incentives of plaintiffs' lawyers or defendants have changed in the interim.

At the very least, there is considerable reason to doubt that transaction costs are anywhere, near as low as they could be. Notwithstanding that plaintiffs' law firms increasingly have assigned much of the day-to-day handling of asbestos claims to lower-cost paralegals[9] and have developed a working knowledge of which sorts of claims have genuine settlement value based upon prior dealings with their defense counterparts, there is no indication that plaintiffs' law firms have correspondingly reduced the contingency fees that they retain from any compensation payments ultimately made by defendants. The result is a contingency fee system predicated upon

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[5] For a concise overview of the medical aspects of asbestos, see, e.g., *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 737–42 (Bankr. E. & S.D.N.Y. 1991) (Weinstein, J.).

[6] This discussion summarizes the analysis presented in Nagareda, supra note 1, at 904–14.

[7] *See* Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 13 (Mar. 1991) (crediting the findings of the Rand Corporation Institute for Civil Justice).

[8] *See id.* at 10–11.

[9] *See* Nagareda, supra note 1, at 935.

the presence of substantial litigation risk but applied in a context in which such risk is no longer present.[10]

Apart from the costs borne by those actually involved in the litigation, the influx of asbestos cases in state and federal courts imposes a burden upon the judicial docket—one that affects not merely the handling of asbestos lawsuits but also the expeditious resolution of all other pending litigation in the court system.

- *There is today a compelling need for a comprehensive solution through federal legislation, as previous efforts by the private sector alone have met with failure on legal grounds or with only modest practical success after lengthy delay.*

It comes as no surprise that the private sector would have tried to use existing legal mechanisms to put into place the kind of ground rules capable of breaking the litigation gridlock: namely, ground rules that limit the sorts of cases that can legitimately be presented for compensation in exchange for commitments from defendants to pay expeditiously legitimate claims. The principal vehicles for these kinds of ground rules have consisted of settlements in either mandatory class actions under Rule 23)(b)(1) of the Federal Rules of Civil Procedure or in opt-out class actions under Rule 23(b)(3). Recent Supreme Court decisions, however, have invalidated those efforts as inconsistent with the terms of Rule 23 in its current form.[11] But, in so doing, the, Court has called upon Congress to consider the enactment of measures similar in substance through the more legitimate vehicle of federal legislation.[12]

Apart from the class action arena, several firms within the asbestos industry—most prominently, Johns Manville—have sought to resolve their outstanding liabilities through reorganization proceedings in bankruptcy. The academic literature on these bankruptcy proceedings has long documented both substantial delays in the actual payment of compensation to asbestos victims and, more generally, formidable structural reasons to believe that such proceedings will systematically undercompensate future claimants.[13] In addition to these significant practical problems, there remains uncertainty over the extent to which current law empowers the bankruptcy courts to resolve future mass tort claims at all.[14]

In sum, wholly private vehicles short of federal legislation have sought to achieve comprehensive solutions for the asbestos litigation with only minimal success.

A FEDERAL SOLUTION, COMPARED TO WHAT?

Consideration of S. 758 must begin with an informed assessment of what the world would look like in the absence of such legislation. Not even the most expert observer can predict the future with complete accuracy but, based upon the incentives of plaintiffs' law firms and defendants, one can advance two central points:

- *A comprehensive solution to the asbestos litigation effected by way of federal legislation would be vastly superior—from the standpoint of both asbestos victims and democratic accountability—to the patchwork quilt of compensation plans likely to emerge otherwise.*

Absent federal legislation, the underlying economic incentives described earlier will not somehow go away. Rather, plaintiffs' law firms will have every reason to continue to bring forth claims on behalf of unimpaired persons, and defendants will have every reason to stonewall, absent some system of ground rules for future claims. Without federal legislation, the major plaintiffs' law firms in the asbestos area and the remaining asbestos defendants each would be on their own: Each would seek to cut as advantageous a series of deals with its counterparts as it could, simply as a way to break the litigation gridlock. What is likely to emerge, in short, is a patchwork quilt of agreements between particular plaintiffs' firms and particu-

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[10] This problem is not unique to asbestos litigation. *See generally* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?,* 37 UCLA L. Rev. 29 (1989).

[11] *See Amchem Products, Inc.* v. *Windsor,* 521 U.S. 591 (1997); *Ortiz* v. *Fibreboard Corp.,* 119 S. Ct. 2295 (1999).

[12] *See, e.g., Ortiz,* 119 S. Ct. at 2302 ("[T]he elephantine mass of asbestos cases * * * defines customary judicial administration and calls for national legislation.") (footnote omitted); *id.* at 2324 (Rehnquist, C.J., concurring) (emphasizing that the asbestos litigation "cries out for a legislative solution").

[13] For background on the Johns Manville proceedings in particular, see Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future,* 17 Cardozo L. Rev. 583 (1996). On the structural biases of the bankruptcy process with regard to future claims, see Mark J. Roe, *Bankruptcy and Mass Tort,* 84 Colum. L. Rev. 846 (1984).

[14] The ongoing debate is reflected in the recent report of the National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years 323–26 (1997).

lar defendants—some deals, perhaps, more favorable to asbestos victims in certain respects and some less favorable in others than S. 758.

The significant advantage to S. 758 is that it would create a forum for one-stop shopping on the part of persons seeking redress from asbestos defendants. The compensation that any given victim ultimately receives would not depend upon sheer chance—namely, the particular plaintiffs' law firm that happened to represent the person and the particular deal that the firm might have in place with those defendants to whose products the person happened to be exposed. Instead, compensation would turn upon an assessment made by neutral medical and legal experts, drawing upon standards that would be debated in the ordinary legislative process, or—if the plaintiff ultimately chose to sue—upon an individualized determination by a jury.

To provide the best chance for the preservation of resources to compensate those persons who happen to become impaired later rather than sooner, many difficult value choices are needed. As I detail later, I am confident that S. 758 makes the right value choices—most importantly, in its preference for the compensation of impaired persons over the unimpaired. The major point for present purposes is that these value choices should be made *openly* through a process amenable to democratic discussion and oversight, not through an intricate matrix of agreements insulated from the public eye.

The notion that a patchwork quilt of compensation plans would emerge in the absence of federal legislation is not simply a matter of guesswork or speculation. In the aftermath of the Supreme Court's invalidation of the opt-out class settlement in *Amchem Products* v. *Windsor*, one prominent asbestos defendant—Owens Corning—announced the creation of a "national settlement program" precisely of the sort described: namely, a series of agreements between that company and particular plaintiffs' law firms, setting forth various means for the submission and payment of asbestos claims in the future.[15] Were the asbestos litigation confined to a small number of defendant companies, agreements of the sort pursued by Owens Corning might make for a workable solution—one that would forestall the need for federal legislation. The simple fact, however, is that the asbestos litigation is not nearly so confined; rather, recent years have witnessed ever-expanding attempts to implicate still-solvent companies with only tangential involvement, if that, in the manufacture or sale of asbestos-containing products.[16]

Rather than effect a viable solution, a patchwork quilt of agreements involving a myriad of plaintiffs' firms and defendants would only add to the confusion and frustration of asbestos victims. Indeed, *such a patchwork system would amount to a full-employment bill for lawyers on both sides:* Only they would know the terms of the various deals, which would not be matters of public record. And only they would have the legal expertise needed to wind their way through the multiple agreements that would be implicated in most asbestos cases, which characteristically involve multiple defendants.

- *Federal legislation to address specifically the asbestos litigation would reduce the pressure for dramatic, and potentially unwise, changes to general principles of civil procedure and bankruptcy law.*

In addition to a multitude of private compensation plans, the legal world without S. 758 likely would include a second, and potentially more troubling, feature: namely, intensified efforts to revamp in fundamental ways the legal principles that govern class action settlements and the treatment of future claims under the Bankruptcy Code. I mentioned earlier the legal obstacles encountered in recent years by those who have attempted to use class actions and bankruptcy proceedings as ways to impose a set of ground rules for asbestos claims. Confronted with the Supreme Court's unfavorable decisions in *Amchem Products* and *Ortiz*, those who would seek so to use class action settlements would have every reason to redouble their efforts to modify Rule 23 to permit such vehicles. In fact, that effort would not have to start from scratch, as the Advisory Committee on Civil Rules already has put forward a proposal that would loosen the strictures upon class certification under Rule 23 for

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[15] For a general description of the Owens Coming national settlement program, see Janet Morrissey, *Owens Corning Fends Off Asbestos-Issue Worries*, Wall St. J., Sept. 20, 1999, at B9A—See also http://www.owenscorning.com/owens/settlement.html.

Although the enactment of federal legislation would—desirably—eliminate the need for a patchwork quilt of compensation plans, such legislation would not require the dismantling of those plans already in place. Rather, § 804 specifically provides that "[n]othing in this Act shall prohibit any claimant, plaintiff, respondent, or defendant from entering into a settlement agreement or any other agreement concerning a claim covered, in whole or in part, under this Act."

[16] *See* Prepared Statement of Professor Christopher Edley, Jr., Hearing on H.R. 1283 Before the House Comm. on the Judiciary (July 1, 1999).

purposes of settlement.[17] Likewise, the National Bankruptcy Review Commission has advanced a proposal to amend the Bankruptcy Code to provide explicitly that reorganization proceedings may resolve future claims[18]—a move that prompted substantial criticism from one Commission member currently serving on the federal bench.[19]

It is beyond the scope of the present hearing to address the legal intricacies of these reform proposals. The central point, for present purposes, is that the pressure upon plaintiffs and defendants to find some viable vehicle by which to establish ground rules for asbestos claims will not disappear in the absence of S. 758. To the contrary, that pressure will continue to build and could manifest itself in demands for far more sweeping changes in the law.

From the standpoint of one who has studied mass tort litigation in its various recent forms, I remain open to the prospect that, over time, general lessons might be drawn from experience in multiple areas of mass tort litigation—lessons that might lead to worthwhile proposals for change in generally applicable bodies of law like Rule 23 and the Bankruptcy Code. Whatever direction that process of legal reform might take, however, it should be based upon experience over a broad range of contexts—indeed, experience not confined simply to mass tort litigation but encompassing other problematic areas of the civil docket.

There is a familiar adage in the legal world that "great cases make bad law." Here, it would be exceedingly unwise and short sighted to set in motion a process of reform in generally applicable federal law based simply, or primarily, upon the unique experience of the asbestos litigation. The beauty of S. 758 is that it would enable this Congress to address the problem of asbestos litigation but to leave for another day the larger question of whether to reform in fundamental ways the law of class actions or bankruptcy.

THE APPROPRIATE ROLE OF THE FEDERAL GOVERNMENT

In an era of widespread skepticism over the use of federal power, Congress rightly should take care before enacting national legislation in an area as hotly disputed as the asbestos litigation. Here, however, there are substantial reasons to consider federal legislation an appropriate—indeed, necessary—exercise of federal power.

- *The Act places the federal government in the position of a facilitator and coordinator of private dispute resolution. It does not impose a bureaucratic solution to the abestos problem but, rather, seeks to replicate arrangements already fleshed out by experienced attorneys in the private sector.*

The fundamental policy choices and structure of S. 758 stem not from the mind of a federal bureaucrat—much less some law professor—but, instead, from arrangements hammered out through intensive negotiations between leading asbestos plaintiffs' and defendants' lawyers. Specifically, the determination to focus the limited remaining resources of defendants upon the compensation of impaired persons as well as the detailed medical criteria spelled out in the Act stem from the nationwide class action settlement entered into by some twenty defendants in *Amchem Products.*

After an extensive hearing at which prominent opponents presented their strongest case against the settlement terms, the United States District Court for the Eastern District of Pennsylvania nonetheless approved those terms as fair.[20] Subsequent decisions from the Third Circuit and ultimately the Supreme Court have made clear that a class action under Rule 23 is simply an impermissible means for such a settlement.[21] But in so holding, both courts remarked upon the bold, innovative character of the compensation system crafted by class counsel and defendants.[22] If anything, the need for fundamental value choices to be made about the allocation of

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[17] *See* Advisory Committee on Civil Rules, Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23 (May 17, 1996), *reprinted in 117* S. Ct. 352 (1996).

[18] *See* National Bankruptcy Review Commission, supra note 14, at 316–17.

[19] *See* Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?,* 76 Tex. L. Rev. 1695 (1998).

[20] *See Georgine* v. *Amchem, Products, Inc.,* 157 F.R.D. 246 (E.D. Pa. 1994).

[21] *See Georgine* v. *Amchem Products, Inc.,* 83 F.3d 610 (3rd Cir. 1996); *Amchem Products, Inc.* v. *Windsor,* 521 U.S. 591 (1997).

[22] *See, e.g., Amchem Products,* 521 U.S. at 628–29 ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.") (footnote omitted); *Georgine,* 83 F.3d at 617–18 (noting that "[t]he resolution posed in this settlement is arguably a brilliant partial solution to the scourge of asbestos" but ultimately opting to "leave legislative solutions to legislative channels").

compensation amongst asbestos victims underscored for these appellate courts the need for legislative action.

- *The Act displaces state authority only as much as necessary to implement its underlying priorities for compensation and, even then, only as a last resort.*

In order to focus the resources of defendants upon the compensation of impaired persons, S. 758 necessarily bars those who have not met its impairment criteria from suing in state or federal court (§ 402)—As an additional safeguard against the bundling of stronger claims with weaker ones, S. 758 also prohibits—in the absence of defendants' consent—the use of procedural devices that would "determine asbestos claims on a collective basis" (§ 402). These measures undoubtedly tread upon matters of tort law and litigation procedure that, absent S. 758, would remain within the province of state law. *Any* viable comprehensive solution for the asbestos litigation, however, must operate at both the state and the federal level. Limitations applicable only in the federal courts would simply have the effect of channeling the claims of unimpaired persons to the state court system.

S. 758 displaces state authority only to the extent needed to implement the value choices that underlie the medical criteria therein. If anything, S. 758 reflects an abiding respect for state tort law, directing arbitrators in proceedings under § 307(f) to "apply the law * * * that would be applied by a court designated by the claimant which would have jurisdiction" over the particular asbestos defendant whose liability is at issue.

Whatever might be said about S. 758, one cannot claim that the federal government has rushed in to take charge of the asbestos litigation in preference to the states. Rather, the experience of recent decades has made it abundantly clear that reliance upon the traditional dual system of courts is prescription for continued chaos in this area.

MAKING THE RIGHT VALUE CHOICES

Even if federal legislation would be preferable to the legal world that likely would emerge absent such action, it remains crucial for any federal legislation to make the right value choices in its compensation framework. I am confident that S. 758 does so.

- *The Act appropriately seeks to maximize the resources available for compensation of impaired persons by barring claims on behalf of persons who do not meet the criteria for medical impairment as well as claims for punitive damages.*

The many bankruptcies that have already befallen member of the asbestos industry underscore dramatically that the goal of compensating asbestos victims must be pursued with sensitivity to the limited resources available for that purpose. Rather than risk a shortfall of resources for those persons who happen to manifest impairment later rather than sooner, S. 758 makes the safe and prudent choice to focus the available resources of defendants upon those persons who are actually impaired. Likewise, S. 758 focuses available resources upon compensation rather than punitive damages that—from the standpoint of asbestos victims—serve simply as a lottery-like windfall for a small number of individuals in the near term.

- *The Act appropriately prefers to put money into the hands of asbestos victims rather than to enrich unduly their lawyers.*

A key feature of S. 758 consists of its § 503(a), which limits to 25 percent the contingency fee that a plaintiffs' lawyer may obtain from compensation payments to asbestos victims. This limitation is entirely appropriate in the context of a mature mass tort, like asbestos. Here, there simply is not the level of legal or factual uncertainty that supports the use of higher contingency fee percentages in other areas of mass tort litigation. Upon enactment of S. 758, the ground rules for the bringing of asbestos claims in the future will be well known, such that the plaintiffs' bar—indeed, non-lawyers as well—can easily determine whether a given asbestos claim has merit. Under such circumstances, a failure to place a cap on contingency fees would amount to a substantial and unmerited transfer of wealth from future claimants to lawyers.[23]

- *The Act expresses an appropriate preference for private dispute resolution over litigation in the tort system. At the same time, the Act preserves asbestos victims' ultimate right to sue in court.*

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[23] On the intensive, behind-the-scenes effort of the asbestos plaintiffs' bar to deter defendants from supporting national legislation, see Holman W. Jenkins, Jr., *Now on Video: America's Scariest Special Interest*, Wall. St. J., Apr. 21, 1999, at A23.

S. 758 seeks to preserve the civil litigation system for those cases that raise novel factual or legal issues and, in so doing, to avoid the consumption of scarce judicial resources in the handling of repetitive claims in large numbers. Hence, the emphasis upon mediation as a necessary predicate to the filing of a lawsuit. In this respect, the mediation framework set forth in S. 758 does not differ markedly from common practice in other areas of civil dispute, where efforts at private dispute resolution routinely precede a trip to court.

The essential deal embodied in S. 758 is that asbestos victims must meet the medical criteria for impairment and, in exchange, defendants must stop stonewalling. Specifically, once appropriately identified under § 303, defendants—no less than asbestos victims—must participate in mediation, during which both sides are obligated to make "good faith offers" to resolve the claim in question (§ 306(e)). And the entire mediation process takes place under specified time limits, unlike the settlement process in the ordinary tort system. For defendants, in particular, the mediation process is not merely another avenue for delay rather, in the event that the plaintiff thereafter elects to submit his claim to arbitration, the arbitrator is empowered to penalize defendants for inadequate offers in mediation (§ 307(j)). Arbitration, however, is completely voluntary on the plaintiff's part (§ 306(f)(2)); one instead may proceed directly to litigation if unsatisfied with the results of mediation.

The preservation of the plaintiff's ultimate right to sue serves to induce genuine compromise by defendants at the mediation stage. Likewise, the limitation of recovery to compensatory damages—and, of course, the prospect of further delay while a lawsuit works its way through the judicial docket—serve as appropriate inducements for plaintiffs to consider seriously the offers made to them in mediation.

- *The absence of specific dollar amounts for compensation stands as a realistic response to the complexity of the compensation determination and will leave asbestos victims no worse off in terms of the resources available for redress.*

Some observers have criticized S. 758 for its failure to set forth particular compensation amounts for each asbestos-related disease or otherwise to specify an overall dollar amount to be set aside by defendants to compensate victims. Under this line, of reasoning, the Act forces victims to relinquish the opportunity to Seek compensation in the absence of impairment but does not give victims a "sure thing" in return.

There are two major flaws in this reasoning. First, the recitation of specific dollar amounts is meaningless in practical terms in the absence of resources on defendants' part to compensate those who meet the medical criteria of the Act. As to the resources that any given defendant has available for this purpose, the Act certainly will have no negative effect. If anything, the opposite is likely to be true: Because the Act will enhance the predictability of the asbestos litigation in the years to come and otherwise will reduce the need for continued expenditures in defense costs, the Act will enable defendants to draw more effectively upon the capital markets to support their ongoing business enterprises[24]—a development that can only enhance their ability to pay compensation in the future.

Second, the complaint that the Act sets forth no "sure thing" in dollar terms dramatically underestimates the complexity of the compensation determination. The class action settlement in *Amchem Products* was able to include a detailed set of dollar amounts only because that settlement was limited to a relatively modest number of defendants (willing to share their historical settlement data) and concerned only occupational exposures to those particular defendants' products. S. 758 quite rightly describes a comprehensive framework for the asbestos litigation—one applicable to all defendants and all exposure settings. It simply is not possible—or, for that matter, desirable—to specify in advance a compensation grid when the potential combinations of defendants and factual circumstances are effectively infinite. That said, however, any determination of compensation for a particular victim—whether achieved through mediation, arbitration, settlement agreement, or judgment at trial—would remain just as enforceable in the courts as before the Act.

CONCLUSION

S. 758 represents a fair, practicable, and innovative solution to the asbestos litigation—one that merits enactment by this Congress. Indeed, in this instance, federal legislation is long overdue.

[EDITOR'S NOTE: The Curriculum Vitae of Richard A. Nagareda is retained in Committee files.]

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[24] The district court in the *Amchem Products* settlement so found. *See Georgine*, 157 F.R.D. at 291 (crediting testimony from expert witness presented by settling parties).

Senator GRASSLEY. Now, Mr. Verkuil.

STATEMENT OF PAUL R. VERKUIL

Mr. VERKUIL. Thank you, Senator. I have been working in the field of administrative law and constitutional law and separation of powers for many years beyond my colleagues here or Professor Edley, I must say, who has 18 years in. But let me focus for you on what I think are the crucial issues of constitutional concern, since they were raised by Mr. Middleton. And the two issues, I believe, that come most to the fore are the matter of federalism and the seventh amendment.

First of all, you must appreciate that the Asbestos Resolution Corporation is a government corporation. As such, it is like any other administrative agency created by this Congress, if it were to do so, under its article I power. It is no different constitutionally from the Federal Trade Commission or the Federal Communications Commission or from Amtrak which, of course, is bound by the same constitutional constraints as a government corporation.

Federalism concerns might be seen to arise because Congress would be acting under the Commerce Clause to grant powers to the ARC, the Asbestos Resolution Corporation, that partially preempts State authority. But there is no question that the asbestos industry affects interstate commerce. Indeed, all we have heard today is about the number of cases being brought in a number of States, and the number of businesses that are involved and the number of individuals that are involved. So there is no issue, it seems to me, that interstate commerce is implicated.

That distinguishes us from the *Lopez* case and perhaps also from the case that was mentioned by Mr. Middleton concerning the women's rights case which will be an issue of interstate commerce, realizing that *Lopez* was the first case of its kind in the last 60 years. We are surely beyond and clearly beyond any issue there.

Now, there is another issue with regard to the exercise of Federal power, and that is under cases such as *Printz*, the Brady bill case, and *New York* v. *United States*, which question the use of Federal power validly exercised under the Commerce Clause otherwise because it commandeers State officials. And the commandeering of State executive officials also has been rejected by the Court in the Brady case, for example.

Well, these are not executive officials that are being commandeered here at all. The only thing that is going on is that the State judiciary will be required to hear these cases, and the judges in the States have to hear Federal claims. And, of course, to the extent this bill became law, it would be a Federal claim.

Cases since *Testa* v. *Katt* more than 50 years ago have made it plain that State courts must hear Federal claims. Indeed, no other outcome would be acceptable to the constitutional plan drawn up over 200 years ago which contains the Supremacy Clause.

As to the seventh amendment which was also mentioned by Mr. Middleton, the issue becomes whether the right to a jury trial which is available under State tort law can somehow derail the administrative solution proposed by S. 758 through the ARC. The key inquiry is whether Congress can validly establish this regime con-

sistent with article III. If it does, as a practical matter the seventh amendment issue goes away.

Ever since *Crowell* v. *Benson*, decided over 60 years ago, it has been plain that, "public rights cases" are valid exceptions to the seventh amendment. This is such a case. In fact, the application of the medical criteria is a classic exercise of a public rights doctrine at work. And I think later cases like *Thomas* v. *Union Carbide* and *CFTC* v. *Schor* would also support the notion that the intrusion upon the article III power is reasonable and not vast and broad, such as it was in the bankruptcy context earlier discussed by the Court. So these cases, it seems to me, are very clearly valid.

I realize that ATLA mentions the seventh amendment a lot. Of course, they live by the seventh amendment. You can appreciate that, but these are not seventh amendment problems with this legislation, in my firm judgment. I think the legislation works.

I think the Supreme Court, by the way—and I take comfort from *Ortiz*. I do not see in *Ortiz* a seventh amendment concern which Mr. Middleton mentioned. He cited that case in connection with that. I don't even see it there. I am very confident that Justice Souter in that opinion said, much like Senator Schumer said earlier, that we have been through that; we, the Court, want to see a solution. And an administrative solution which has been on the table since 1991 when the Judicial Conference Ad Hoc Committee first proposed it as a first choice is what the Court is now looking for, I really believe.

My time is up. Thank you very much. I will be pleased to answer any questions.

[The prepared statement of Mr. Verkuil follows:]

PREPARED STATEMENT OF PAUL R. VERKUIL

SUMMARY

S. 758, the "Fairness in Asbestos Compensation Act of 1999," is consistent with principles of federalism enshrined in the Tenth Amendment and with the Seventh Amendment of the Constitution.

Federalism. Under the Commerce Clause, Congress may enact a national solution to the asbestos litigation crisis, which is both a consequence of and affects interstate commerce. Because of their special role in our federal system, state courts have the obligation to apply such federal law. S. 758 is thus fully consistent with recent Supreme Court decisions protecting state legislatures and administrative personnel from commandeering by the Congress.

Seventh Amendment. The administrative scheme established by S. 758 is consistent with the Seventh Amendment. Since the right to a jury trial applies only in judicial proceedings, the key question is whether Congress can establish an administrative claims resolution process without violating Article III of the Constitution. The answer to that question is clearly yes. Under the public rights doctrine, Congress can confer upon administrative tribunals the power to decide cases involving "public rights" under a Federal regulatory program. Medical eligibility determinations under S. 758 clearly fall within this doctrine, since they involve a Federal regulatory program and since the government is a participant in the proceeding. In this respect, such determinations are comparable to similar determinations made by the Social Security Administration and the VA in disability cases. Moreover, arbitrations under the statutory scheme (which are optional to the claimant in any event) are also acceptable as long as there is no threat to separation of powers. There is no such threat here.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: My name is Paul Verkuil. I appear today in my personal capacity.[1] I currently serve as Dean and Professor of Law at Benjamin N. Cardozo Law School in New York, which is part of Yeshiva University. I am also President Emeritus of the College of William & Mary, was dean of the Tulane Law School, and taught at the law schools of the University of North Carolina, University of Pennsylvania and Duke University. The subjects I teach include administrative law and economic regulation, both of which deal with the constitutional issues raised in my testimony. I have written (with colleagues) a treatise and casebooks on administrative law and regulatory issues, and I have also published more than 60 law review articles on these and related subjects, as my resume, attached hereto, describes in detail. Over the years, I have testified before House and Senate committees on several occasions, including the bill to provide Article I court review of Veterans Administration disability decisions which raised substantive issues similar to those involved in S. 758.

I appreciate the opportunity to discuss the constitutionality of S. 758, the proposed "Fairness in Asbestos Compensation Act of 1999." I shall focus on two issues. The first is whether the bill's modifications of state law are consistent with principles of federalism enshrined in the Tenth Amendment and with the substantive due process rights of claimants. The second issue is whether the bill violates a claimant's right to a jury trial under the Seventh Amendment. As we shall see, the answer to that question is intertwined with the question whether the use of an expert, non-adversarial administrative process to determine medical eligibility impermissibly vests the "judicial Power of the United States" in something other than an Article III court. I conclude that S. 758 is plainly constitutional.[2]

I. THE FAIRNESS IN ASBESTOS COMPENSATION ACT DOES NOT VIOLATE TENTH AMENDMENT PRINCIPLES OF FEDERALISM

This past June, the Supreme Court repeated its call for a congressional solution to the asbestos litigation crisis: "[T]he elephantine mass of asbestos cases * * * defies customary judicial administration and calls for national legislation." *Ortiz* v. *Fibreboard Corp.*, 119 S. Ct. 2295, 2302 (1999) (emphasis added). The Court's call for national legislation on its face presupposes at least some preemption of state law. S. 758 strikes a balance between state and federal interests that is in my view entirely consistent with constitutional principles of federalism.

The threshold question is whether Congress has the power under the Constitution to adopt comprehensive legislation addressing the asbestos litigation crisis.[3] Under our federal system,

Nevertheless, the power of Congress to override state rules of law to address a national litigation crisis, with serious and severe effects on interstate commerce, is beyond controversy. Article I, Section 8 of the Constitution gives Congress the power to regulate interstate commerce. Ever since Chief Justice Marshall's decision in *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) I (1824), the Supreme Court has emphasized the necessity for Congress to protect national markets. Even in *United States* v. *Lopez*, 514 U.S. 549 (1995), a recent decision recognizing the *limits* of the Commerce Power, the Supreme Court explained that Congress may "regulat[e] the use of the channels of interstate commerce," "persons or things in interstate commerce," and "activity that substantially affects interstate commerce." *Id.* at 558, 559. Asbestos litigation is a consequence of the interstate commerce in asbestos-containing products. Each case affects parties from numerous states, and the litigation is highly

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[1] I note for the record that I have been compensated by the Coalition for Asbestos Resolution for advice on issues of administrative and constitutional law. My testimony, of course, is based on my own experience, knowledge, and views, resulting from and reflected in work done over almost thirty years of academic activity. Please also note that I am not the recipient of any federal grant or contract.

[2] I treated these and other issues at greater length in my Prepared Statement to the House Committee on the Judiciary, submitted for that Committee's hearing on the Fairness in Asbestos Compensation Act of 1999, H.R. 1283, held July 1, 1999.

[3] The legislation makes several changes to the substantive law of torts, long sought by proponents of asbestos litigation reform. First, the bill adopts medical criteria to separate those who are impaired by asbestos-related disease from those who are not. Second, the Senate bill, S. 758, adopts the waiver of defenses contained in the *Georgine/Amchem* stipulation, limiting the issues in asbestos tort cases to medical eligibility, product identification, and damages. Third, the legislation abolishes the statute of limitations and punitive damages and bars consolidation of cases without the consent of all parties.Congress' powers are limited to those enumerated under Article I, Section 8 of the Constitution. Article I, Section 8 does not give Congress any specific authority over the common law of torts, which is entrusted in the first instance to the States, nor does Article III give Congress or the federal courts any power to make common law in cases under the jurisdiction of the federal courts because of the diversity of the parties. *See Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938).

mobile as a relatively small number of sophisticated and highly profitable national law firms seek state courts that, at any given time, are considered favorable to plaintiffs. The bankruptcy of over twenty former asbestos producers, with serious consequences for workers, communities and future victims nationwide, makes it clear beyond doubt that this litigation substantially affects interstate commerce.

Of course, even if Congress has the power to legislate in an area, it must use means that are consistent with the Tenth Amendment, i.e., "it must respect the sovereignty of the States." *Alden* v. *Maine*, 119 S. Ct. 2240, 2268 (1999). The provisions of S. 758 that affect state court procedures are entirely consistent with this principle. Under the Supremacy Clause, state courts have an obligation to enforce federal law. *Testa* v. *Katt*, 330 U.S. 386 (1947). That obligation includes a duty to apply the purely substantive provisions of the bill. To be sure, the Tenth Amendment does not allow Congress to "commandeer" state officials, institutions or resources as agents or instruments of federal law or policy. *See Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). But Congress does not "commandeer" state courts when it requires them to enforce rules of federal law. As the *Printz* Court noted, "[T]he Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions. * * *" *Printz*, 521 U.S. at 907.

Of course, some provisions of the bill—e.g., requirements that asbestos claimants obtain a certificate of medical eligibility and release from mediation before filing or maintaining a tort action—are arguably procedural. While state courts are bound under the Supremacy Clause to enforce federal law, it is sometimes said that "'federal law takes the state courts as it finds them.'" *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)). I do not believe, however, that this principle forbids Congress from requiring state courts to respect these provisions of the bill.

The Supreme Court has held that the Constitution's Supremacy Clause authorizes Congress to establish procedures that affect the operation of state courts, if Congress does so expressly. See *Johnson* v. *Fankell*, 520 U.S. 911, 921 n.12 (1997). Given the obligation of state courts to enforce federal substantive law, Congress may require the use of specialized federal procedures that are intertwined with the substantive provisions of federal legislation. A central goal of the legislation is to ensure that medical criteria are applied in an objective, medically appropriate, and consistent way. Requiring claimants to exhaust a federally-established, expert, non-adversarial medical review process as a prerequisite for filing suit is vital if that goal is to be achieved. In this sense, application of the medical criteria is really a substantive rather than a purely procedural requirement.[4] Similarly, the requirement that claimants must exhaust the medical review process before filing suit is bound up with the achievement of the bill's core substantive goal. The exhaustion requirement in S. 758 is analogous to the exhaustion requirement in Title VII of the Civil Rights Act. Under Title VII, plaintiffs may not file suit in a state court for employment discrimination without first exhausting a prescribed administrative claims process. *See* 42 U.S.C. § 20OOe-16(c). State courts have for many years enforced this federal exhaustion requirement under Title VII.[5] So far as I am aware, no one has ever seriously maintained that it is beyond Congress's authority to impose such an exhaustion requirement on state courts.

Finally, the legislation's bar on consolidations without the consent of all parties does not violate the Tenth Amendment as interpreted in *Printz* and *New York*. The legislation does not force the states to create any new court nor does it require them to expand the jurisdiction of existing courts—the principal boundaries on congressional power over state courts that the Supreme Court has identified. *See Howlett*, 496 U.S. at 372. Indeed, the legislation does not regulate state court procedures at all. Rather, it gives an objecting party the right to remove a state court-ordered consolidation to federal court. As Professor Laurence Tribe observed in testimony before the Senate Judiciary Committee regarding a similar provision in last year's bill implementing the global tobacco settlement, Congress has broad power to regulate the jurisdiction of the federal courts, and may make cases removable so long as the case

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[4] By way of analogy, under *Erie*, states are not permitted to make purely procedural rules for federal courts, but state statutes that require medical malpractice claims to be submitted to state screening panels are sufficiently "substantive" that the federal courts must respect them. *See Wray* v. *Gregory*, 61 F.3d 1414, 1417–18 (9th Cir. 1995); *DaigLe* v. *Maine Med. Ctr., Inc.*, 14 F.3d 684, 689 (1st Cir. 1994); *DiAntonio* v. *Northampton-Accomack Mem'l Hosp.*, 628 F.2d 287, 291 (4th Cir. 1980). State courts would likewise be obliged to respect the federal rule requiring claimants to submit to the ARC medical review process.

[5] *See, e.g., Duplessis* v. *Warren Petroleum, Inc.*, 672 So. 2d 1019 (La. Ct. App. 1996); *Roache* v. *District of Columbia*, 654 A.2d 1283, 1284 n.1 (D.C. 1995); *Patrowich* v. *Chemical Bank*, 470 N.Y.S.2d 599 (App. Div.), *aff'd*, 483 N.Y.S.2d 659 (N.Y. 1984).

is within the federal judicial power under Article III.[6] I agree with Professor Tribe on this point. There is, of course, no question that Congress may, under Article III, confer jurisdiction over these removed cases on the federal courts. Under S. 758, a central element of the plaintiff's case—medical eligibility—would be governed by federal law.

A final objection to the creation of a national asbestos dispute resolution system is the argument that Congress may not displace state tort systems without providing claimants with an adequate alternative remedy.[7] This is not strictly a federalism issue, but instead raises the question whether the legislation's effect on common law rules invades the substantive due process rights of claimants. In *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978), the Supreme Court explained that "'[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object[]' * * *" *Id.* at 88, n.32 (citations omitted).[8] In light of this principle, the Court strongly suggested (although it was not required to decide) that Congress is not required to provide *any* substitute for common law rights of action, as long as it has a rational basis for its changes to common law rules.[9] Certainly, no court has ever suggested that Congress must provide a substitute remedy "approximating the value of litigated claims" for all affected parties (as the trial lawyers argue)[10] so long as the remedy it provides is reasonable in general.

In any event, the Fairness in Asbestos Compensation Act does provide a reasonable, and in many ways, superior remedy for victims than the current tort system. A federal court has already determined, after exhaustive hearings, that a settlement containing many of the basic provisions of S. 758 were fair and reasonable and offered substantial advantages over the tort system. *Georgine* v. *Amchem Prods.*, 157 F.R.D. 246 (E.D. Pa. 1994). The appeals court praised the alternative system proposed by the settlement as "arguably [] brilliant," *Georgine* v. *Amchem Prods.*, 83 F.3d 610, 617 (3d Cir. 1996), and the Supreme Court noted that "a nationwide administrative claims processing regime" could well "provide the most secure, fair and efficient means of compensating victims of asbestos exposure." *Amchem Prods.* v. *Windsor*, 521 U.S. 591, 628–29 (1997).

II. THE FAIRNESS IN ASBESTOS COMPENSATION ACT DOES NOT VIOLATE THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Finally, the medical eligibility process established in S. 758, and the provisions concerning alternative dispute resolution, do not violate the Seventh Amendment. The Seventh Amendment issue turns on the question whether Article III allows Congress to create a nationwide dispute resolution process for asbestos cases that would permit adjudication of those cases, in whole or in part, by a non-Article III tribunal. If it does, there can be no Seventh Amendment objection to administrative resolution of asbestos cases without a jury trial. The Supreme Court has determined that, where Congress properly places adjudicative authority in a non-Article III tribunal, there is no Seventh Amendment jury trial right. As the Supreme Court has observed, "'the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication.'"[11]

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[6] *A Review of the Global Tobacco Settlement: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 160 (1997) (Prepared Statement of Prof. Laurence H. Tribe, Harvard Law School).

[7] Statement of Richard Middleton, Jr., President-Elect of the Association of Trial Lawyers of America, before the House Committee on the Judiciary, July 1, 1999, at 3, 11.

[8] This is true even when legislation changes the application of the law to already-accrued, and even to already filed causes of action, as long as no final judgment has obtained. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976); *United States* v. *Heinszen & Co.*, 206 U.S. 370, 387 (1907).

[9] *Id.* at 88 & n. 32 ("[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. * * * Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." (citing cases)).

[10] Statement of Richard Middleton, Jr., at 3. Indeed, even during the now-discredited *Lochner* era, when the Supreme Court routinely invalidated congressional enactments that modified common law rules, the Court would uphold statutes that substantially affected common law liability if the government provided a "reasonably just substitute" for common law rights. *See New York Cent. R.R.* v. White, 243 U.S. 188, 201 (1917).

[11] *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 454 (1977) (quoting *Pernell* v. *Southall Really*, 416 U.S. 363, 383 (1974)); *see Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 52 (1989).

Over the years, Article III has been interpreted to permit adjudication of a variety of claims by non-Article III federal tribunals. In particular, Article III has always been interpreted to permit adjudication of disputes between an individual and the government under the "public rights" doctrine. That doctrine is grounded in the understanding that, because Congress is free to commit certain matters "arising 'between the Government and persons subject to its authority'" to non-judicial executive determination, it may also employ the "less drastic expedient of committing their determination to a legislative court or an administrative agency." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50, 68 (1982) (citing *Crowell* v. *Benson,* 285 U.S. 22, 50 (1932)). Because the question whether to issue a medical eligibility certificate is a matter "arising between the Government and persons subject to its authority," rather than a dispute involving private parties, there is no question that it can be committed to administrative resolution. The medical review process is entirely non-adversarial, involving only the claimant and the ARC, a government body; defendants do not participate at all in this stage. Although the review process will, at a later stage, affect the resolution of a private dispute, the process itself has the form and structure of a traditional "public right" involving only the claimant and the Government. In this sense the medical review process is like such programs as Social Security disability determinations, veterans' benefits, and workers' compensation programs.

The alternative dispute resolution process brings in the defendants as additional parties, but is still permissible under Article III. I note at the outset that, under S. 758, eligible claimants are not required to submit to any non-Article III adjudication and that they fully retain a right to a jury trial in the courts of their choice. But, even if this were not the case, there would be no constitutional problem. The Supreme Court has expanded the traditional conceptualization of public rights to include a variety of what it has characterized as "seemingly 'private'" rights that are related to a public administrative scheme. *Thomas* v. *Union Carbide Agric. Prods. Co.* 473 U.S. 568, 594 (1985). The leading decisions are *Thomas* and *Commodity Futures Trading Comm'n* v. *Schor,* 478 U.S. 833 (1986). In both of those cases the Court emphasized pragmatic flexibility—and its own openness to administrative adjudication—in applying Article III.

In *Thomas* the Court upheld federal environmental legislation that required companies to disclose and share proprietary data, and that required arbitration of disputes regarding appropriate compensation for doing so. The Court held that when Congress creates a "right that is * * * closely integrated into a public regulatory scheme," Congress may also select "a quasi-judicial method of resolving matters" arising under that scheme. *Thomas,* 473 U.S. at 589, 594. In *Schor* the Court upheld the Commodity Exchange Act's grant of authority to the Commodity Futures Trading Commission ("CFTC") to decide state common law counter-claims to reparations complaints brought under the Act. The Court reasoned that "limited * * * jurisdiction over a narrow class of common law claims as an incident to the [agency's] primary, and unchallenged, adjudicative function" did not create a "substantial threat to the separation of powers." *Schor,* 478 U.S. at 854. The *Schor* Court stressed that it has reviewed Article III challenges "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Id.* at 851.

The provision of mediation and arbitration, entirely at the claimant's option, is linked to the medical eligibility process, and serves the legislation's public purpose of providing alternative resolution of asbestos disputes. In this respect, it resembles the arbitration provisions upheld in *Thomas.* Although the Supreme Court noted the voluntary nature of the process at issue in *Schor,* a claimant's consent to federal administrative adjudication is not necessary to make such adjudication constitutional. The Court has never held that a federal legislative scheme that involves legitimate regulation limited to a narrow class of cases—and which therefore poses no threat to the judiciary's co-equal role—must be invalidated because it provides a non-consensual administrative process.

To be sure, the Court's willingness to accept administrative adjudication is not unlimited. In the extreme situation presented by *Northern Pipeline,* for example, the Court invalidated a statute granting broad powers to a bankruptcy court. The Court found that the legislation removed an essentially unlimited category and number of cases from the federal courts to a non-Article III tribunal, posing a credible threat to the federal judiciary's role under the Constitution. The Court also held that because the claims at issue arose "entirely under state law," their adjudication by a non-Article III court could not be justified under the doctrine of "public rights." *Northern Pipeline,* 458 U.S. at 90. The Court reached a similar result in *Granfinanciera, S.A.* v. *Nordberg,* 492 U.S. 33 (1989)—again, in the bankruptcy context—holding that the Seventh Amendment prohibited the adjudication without a

jury (in a non-Article III forum) of a fraudulent conveyance claim that the Court deemed "'[w]holly private'" in nature. *Id.* at 51, 55 (citations omitted). In my view, these cases involving the bankruptcy courts involved a far broader category of cases, potentially touching on all areas of law, rather than the narrow class of cases in which claimants seek compensation for injury from asbestos products.

Under *Schor,* the ultimate issue is whether the non-Article III adjudication poses a threat to the separation of powers. Where the "'essential attributes of judicial power' are reserved to Article III courts," *Schor,* 478 U.S. at 851 (citation omitted), the legislative scheme will generally be constitutional. Here, as in other administrative programs, those attributes are reserved to the judiciary through judicial review of the ARC's decisions.[12] Striking down the scheme would celebrate purely formal concerns at the expense of pragmatic federal legislative problem-solving, a course that would be both foreign and contradictory to the Supreme Court's current jurisprudence. Indeed, the Supreme Court has, twice in the last two years, described asbestos claims as particularly unsuited to judicial resolution and appropriate for administrative resolution.[13] In light of this history, I do not believe that the Supreme Court would now decide that confining review of asbestos claims for compensation to a nationwide dispute resolution process would pose a serious attack on the judicial power.

In conclusion, I believe that proposed legislation is plainly consistent with the Seventh Amendment and Article III requirements for the following reasons:

- *First,* the medical review process involves only the claimant and the government—thus fitting squarely within the traditional category of "public rights" cases where administrative resolution is unquestionably constitutional.
- *Second,* the alternative dispute resolution process, including mediation and arbitration at the claimant's option, is closely linked with the medical eligibility process and serves the government's public goal of providing compensation to eligible claimants.
- *Third,* the legislation narrowly circumscribes the impact that its requirement of medical eligibility review has on the federal judiciary. The legislation affects only cases involving claims of injury or death flowing from asbestos exposure. That category does not involve anything like the wholesale displacement of federal jurisdiction involved in the bankruptcy cases and will, moreover, involve fewer cases over time as the class of those exposed or injured shrinks relative to the population as a whole.
- *Fourth,* the nationwide dispute resolution process provided in the bill is a solution to an urgent problem which the Supreme Court has said is particularly suited to administrative resolution. The Court's own pronouncements strongly suggest that the administrative process established by S. 758 would not be considered congressional aggrandizement at the expense of the judiciary's co-equal role in our constitutional system.
- *Finally,* because assigning the task of determining medical eligibility to the ARC, and the related alternative dispute resolution process, is valid under the "public rights" doctrine, it is also necessarily consistent with the Seventh Amendment.

CONCLUSION

The Fairness in Asbestos Compensation Act is sound as a matter of constitutional law. Eight years ago, the Judicial Conference's Ad Hoc Committee on Asbestos Litigation recommended replacing tort litigation with a nationwide dispute resolution process in order to provide quicker and fairer resolution of asbestos claims and to shield the courts from a tide of asbestos cases. When Congress did not act, the parties to the *Amchem* class action settlement attempted to create an administrative claims processing system by voluntary agreement within the judicial system. In *Amchem* and, more recently, in *Ortiz,* the Supreme Court made it clear that the responsibility for creating an alternative system rested with Congress, not the courts. Congress has ample constitutional authority to do so.

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[12] *See generally* Paul Verkuil, *Congressional Limitations on Judicial Review of Rules,* 57 Tulane L. Rev. 733, 739–43 (1983) (discussing the relationship between judicial review and due process).

[13] *See Ortiz* v. *Fibreboard Corp.,* 119 S. Ct. 2295, 2302 (1999); *Anchem Prods.* v. *Windsor,* 117 S. Ct. 2231, 2252 (1997); *see also Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 27 (Mar. 1991).

Senator GRASSLEY. Thank you all very much. We will take 5-minute rounds and see how far we go, but we will have to be out of here very shortly.

Professor Green, you indicate that S. 758, and these are your words, "tilts the current playing field a bit too much toward the defendant's interest at the expense of current claimants." So I would like some suggestions on how you might rewrite the bill to improve that imbalance, or at least some suggestions.

Mr. GREEN. Well, I think the difficult issue for the asbestos defendants right now, Senator Grassley, is to try and resolve to apportion liability among them, and that is something this bill does not resolve. This bill leaves that open. It will have to be resolved in the mediation, the arbitration, or litigation in each individual case.

Now, what we are trying to do here, what this bill does go a ways toward is to create a system that will not eat up I have heard estimates of anywhere from 50 to 75 cents of every dollar. But what the failure of the asbestos defendants to come forward and try to work out a system by which we can globally resolve apportionment among them—that, I think, is the critical deficiency in this bill. That is something that, if I were rewriting it, I would try and come up with a mechanism to do that.

Senator GRASSLEY. Professor Nagareda, S. 758 establishes threshold medical criteria that need to be met before a plaintiff can enter the Resolution Corporation and then get compensation. Some have argued that this mechanism substantially curtails the victim's tort rights and remedies available in our system. Do you agree? Also, do you believe that the mandatory rather than voluntary nature of the program is problematic?

Mr. NAGAREDA. No, I don't believe those are problematic, Senator. I think that there is a fundamental value choice that needs to be made in this legislation, and the choice that this legislation makes, I believe, is the right one to preserve resources for the payment of those who are genuinely impaired and not to devote resources to those who either aren't impaired or to fund punitive damages in a sort of lottery-like fashion. So I am comfortable with the underlying value choice that is made in the legislation.

In terms of the notion of abridging or limiting some sort of rights that exist in the present system, it is true that people who are unimpaired can in some jurisdictions file certain sorts of tort claims. And that is why I am saying that a value choice does need to be made by this body under the commerce power to say that those claims are not preferred to the claims of those who are legitimately impaired and who meet the criteria set forward in the legislation. I think it is a question of prioritization, and I think that the legislation sets forward the right priorities.

Senator GRASSLEY. Mr. Verkuil, I would like to have a response from you in regard to his answer.

Mr. VERKUIL. To Mr. Green and to Mr.——

Senator GRASSLEY. No, no, just to Mr. Nagareda.

Mr. VERKUIL. Well, I think he is on the right track.

Senator GRASSLEY. OK; Professor Green, you criticized S. 758 for retaining the adversarial nature of the tort system by requiring a determination of comparative fault for each defendant, essentially

creating a potential issue which could be disputed at all phases of the Corporation's process.

How would you change the process to address those concerns?

Mr. GREEN. Well, one idea is for Congress to enact a compensation fund that would be voluntary for asbestos defendants. They could opt into it or not. If they didn't, they would be subject to suit in the tort system. If such a scheme were set up, I would venture to say every asbestos defendant would opt in. Once they opted in, we could then attempt to devise a mechanism, either arbitration or administrative process, that would resolve among all of them their respective liability for the claims that are made.

Would it be difficult? Of course. But would it save an enormous amount of money over litigating comparative fault or resolving comparative fault in every case that comes down under this statute? I think unquestionably.

Senator GRASSLEY. What I was hoping to do was in regard to this same issue, to ask both Professor Nagareda and Professor Verkuil, if you share Professor Green's concerns, and whether there are any improvements that you believe can be made in this proposed process to alleviate concerns expressed by witnesses on the first panel?

Mr. VERKUIL. Well, let me say this, that the comparative fault problem could be fixed on one way that Congress could declare a Federal standard of liability that would apply in the States. But that would be more intrusion upon the States and the State courts than I think might be desirable.

But we have to go back to the purpose of this bill. Most of these cases that come through, assuming you have your medical certificate and you had been declared to be sick and qualified to be entitled to reimbursement, will be settled. I mean, the great hope here is that return to State courts will be the occasional case rather than the massive cases. So, that is one answer.

And if the medication is mandatory, or even if it is voluntary and if there is arbitration that follows, there will be a lot of incentive to settle these cases. And I think the Asbestos Resolution Corporation can begin to get a sense of values of settlements. They will have rulemaking power; it could determine rules over time. So a lot of the mystery will be taken out of these settlements, and I think maybe resort to the State court and the problem of definitions of fault will not be as great a problem over time.

The other difficulty, though, with having a fund is, as I think Professor Edley said, it is just so hard to identify. It is either going to be overinclusive or underinclusive because there are so many potential defendants who have marginal connections to the asbestos world that if you draw them too broad, they have claims, I think, maybe undertaking due process issues. I mean, the defendants would have some interests, too, not to be brought in. And if you draw them too narrowly, you are letting people out.

But bigger than that is the potential problem of insurance, and that would have to be fixed as well because otherwise it may be that the insurance carriers would no longer be liable, and certainly that would be an outcome none of us would want.

Senator GRASSLEY. Professor Nagareda, do you have anything to add?

Mr. NAGAREDA. Yes, Mr. Chairman. It seems to me that the sort of regime that Professor Green is talking about is, I think, desirable in theory, but I think very, very difficult, possibly impossible, for this Congress to work out in a piece of legislation.

We are dealing here in the asbestos area with multiple defendants, multiple exposure settings. This is unlike situations like, for example, in the breast implant litigation. We are dealing with a smaller number of defendants in which the exposure settings are very similar. So I think it would be very complicated as a practical matter to set forward the sort of fund that Professor Green would advocate.

The other point that I would raise is simply as a matter of experience, when even individual asbestos manufacturers have tried to take this sort of approach of setting aside particular money and trying to decide in advance what their liabilities will be, projected over many decades, that has not proven very successful. That is the enterprise that courts pursue in the bankruptcy context, and I think that the results there have been quite mixed as a practical matter.

Senator GRASSLEY. After they have commented now, Professor Green, do you have any rebuttal to the point of view that they just expressed?

Mr. GREEN. Well, I agree with Professor Nagareda that Congress probably cannot write this into a bill, that apportionment of global liability among defendants would require some sort of process outside of the statute, an administrative resolution or arbitration among the defendants. You often see defendants who avoid in cases deciding their respective liability and then they agree to arbitrate it afterwards. Binding arbitration might be a mechanism.

I am becoming more and more enamored of the notion of leaving this optional with asbestos defendants. If they are really peripheral and they want to stay out, let them stay out. They would be subject to tort suit, and if they wanted to defend those, my guess is that this compensation scheme, leaned down, would be so attractive both to asbestos defendants and to their insures that all of the viable, realistic defendants that are paying money today would opt into it on a voluntary basis, including their liability insurers.

Senator GRASSLEY. Well, I thank you all very much. That is the end of my questioning. Let me ask this panel to be cognizant of a point I made to the first panel, that for members who were here or members who weren't here, there might be questions submitted to you for answer in writing. Hopefully, they will do that right away. We would like to keep the record open for about 15 days for that purpose.

Thank you all very much.

[Whereupon, at 12:41 p.m., the subcommittee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF PROF. CHRISTOPHER EDLEY, JR. TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. Does S. 758 provide the necessary incentives or dis-incentives for plaintiffs and defendants to resolve their claims promptly with the Asbestos Resolution Corporation? For example, Owens Corning argues that there are no set settlement values or payment schedules which would encourage plaintiffs to forgo court action and enter into settlements with asbestos defendants. Owens Corning proposes that tax incentives might be incorporated to encourage defendants to settle, while Professor Green suggests that penalties might encourage the early resolution of claims. What is your opinion?

Answer 1. I believe that S. 758 is carefully drafted to encourage both plaintiffs and defendants to settle early in the process, and that adjudication, whether in the ARC or in the tort system, will be rare.

The ARC system is designed to encourage settlement shortly after a claim is filed, and to facilitate the private negotiation of settlement schedules or ranges between defendants and plaintiffs' attorneys that will allow for routine payment of claims after a claimant has been found medically eligible and produces some evidence of exposure to the defendant's product. There is no need for the legislation to mandate a particular set of values. I believe that would work to claimants' disadvantage by capping their recovery at a particular value, rather than allowing those values to be continually "aligned" with the recovery available in the tort system. Instead, there is every reason to expect that major defendants would, in essence, establish "standing offers" for medically eligible claimants, thereby disposing of a great many cases—assuming the figures are reasonable.

Defendants have important incentives to settle, and to settle early. As soon as a claimant completes the medical review process, the claimant has an opportunity to identify defendants who are responsible for the claimant's injury. Defendants have an incentive to settle with claimants at that point, because they bear the costs of mediation if that becomes necessary. At the close of mediation, defendants are required to make good faith settlement offers, and face a financial penalty if their offers are 25 percent less than the damages ultimately assessed by an arbitrator or a jury. If there is no settlement, defendants know that claimants will come into court or arbitration with a presumption that they are impaired by an asbestos-related disease. Thus, it will be greatly in defendants' interest to pursue a strategy of settling cases as soon as possible after medical review.

I have not had the opportunity to review Owens Coming's tax incentive proposal and cannot comment intelligently about it. However, I do believe that defendants will have ample incentives to settle cases fairly, and early, without any additional tax incentives. Moreover, attaching tax provisions to this legislation will fuel delay in the Congress, invite criticism that the bill has become a "corporate bailout", draw objections from fiscal conservatives, and create points of order against the legislation under the Budget Enforcement Act.

Question 2. Mr. Middleton and others have criticized the Asbestos Resolution Corporation to be a time-consuming process by which sick plaintiffs will be "Jumping through hoops" with no guarantee of timely compensation. Is this an accurate assessment of the process set up in S. 758? Does S. 758 create an open-ended procedure which provides endless opportunities for defendants to delay any compensation to the victims, as suggested by Mr. Middleton?

Answer 2. No fair examination of the ARC process can lead to that conclusion. The process is really very simple for the vast majority of claimants. First, a claimant presents medical information to the ARC to show that he satisfies the medical criteria. In most cases, compliance with the objective criteria will be obvious, and the claim can be approved as a matter of routine by a claims examiner. Second, the ARC gathers together the defendants alleged to be responsible, and, if necessary, appoints a mediator to encourage all parties to settle. But this is key: Mediation cannot be used as a delaying tactic because it is subject to a 60-day time limit. Finally, a claimant can choose either (1) streamlined arbitration under the auspices of the ARC, or (2) traditional litigation in state or federal court, but now armed with a valuable certificate of medical eligibility.

Of course, some cases will be harder than the typical case, such as cases where the claimant seeks designation as an exceptional claim because he cannot meet the statutory criteria. There are also appeals from a denial of medical eligibility. Fairness to the claimant requires this. But this does not allow any opportunity for delay. The entire medical review process is non-adversarial. Defendants are not involved in the medical review process at all. It is impossible for defendants to use the medical review process for delay. Most important, the various special procedures and appeals are all for unusual cases, all designed to benefit the victim, and all created to make it easy to say "yes" to eligibility and hard to say no.

It is misleading to paint this process as "jumping through hoops" or just burning time. Qualified claimants will emerge from the medical review process with a strong presumption that they are impaired by an asbestos-related disease. Defendants may only overcome that presumption only with "clear and convincing evidence," which, in the real world, will probably require something like clear evidence of fraud.

In addition, despite Mr. Middleton's confusion or misstatement at the October 5 hearing, S. 758 takes away all traditional defenses for asbestos defendants. Given this, virtually all defendants will settle quickly. If defendants insist on litigating, they are limited to contesting (1) medically eligibility (in the face of a strong presumption of correctness from the medical review certificate), (2) individual causation (usually, product identification), and (3) damages. This will virtually ensure compensation for any eligible plaintiff who was exposed to a solvent defendant's product. While I have reservations about applying this broad waiver language to non-core defendants (that is, premises defendants and others who are not among the major players), I do support the waiver in the Senate bill with respect to the principal defendants in this litigation.

Finally, this system, which will provide compensation after only a few months, must be compared with the length and complexity of the process that occurs today in the tort system. Cases often languish for years before settlement, usually on the eve of trial, and are subject to the whims of court scheduling decisions. The ARC process, by contrast, is designed to promote settlement right away, as soon as the medical review process is concluded.

Question 3. At the House Judiciary Committee hearing, a representative from Owens Corning expressed concern about the applicability of the bill's provisions to lawsuits pending at the time of enactment, specifically that Congress would be preempting state substantive law causes of action which have already been filed. In addition, Owens Corning objected to the provisions requiring that all funding be collected from existing asbestos defendants in proportion to the number of claims against them. Are these concerns valid and, if so, how can the bill be remedied?

Answer 3. I do not believe that these concerns are valid. As far as the first question is concerned, it is important to keep in mind that well over 200,000 asbestos cases have been filed and that more are being filed at a rate approximating 50,000 per year. Any solution to the asbestos litigation problem must apply to these cases—the "elephantine mass," as the Supreme Court calls them—as well as to future cases. Otherwise, the defendants' resources will continue to be misdirected until after the mass of pending claims is finally resolved—which will not occur until well into the next century.

An effective solution requires that some changes be made to existing tort law for all pending claims. These include the abrogation of traditional defenses in favor of absolute liability (at least for core defendants), statutory medical criteria that focus resources on the impaired, the elimination of punitive damages, the guarantee of additional compensation for cancer if a claimant has been compensated for non-malignant disease ("come-back rights"), and the abolition of the statute of limitations. These changes will affect both plaintiffs and defendants, are appropriate, and are entirely within congressional authority under the Commerce and Due Process

clauses of the Constitution.[1] Of course, handling the transition to the new system requires care, in order to deal fairly with those who have already been waiting too long under the old system. Plaintiffs with early trial dates are permitted to forgo going into the administrative system and can remain in court if they choose.

As far as the second question is concerned, I believe that defendants who use the new system should be required to pay reasonable user fees and assessments to defray its costs. I regard this aspect of the legislation as one of its strengths. Taxpayers should not have to bear the costs of the asbestos tragedy. (The legislation does not affect sovereign immunity for the governments role in promoting—indeed commanding—the use of asbestos in ships and other requisitioned products.) The legislation's cost-assessment formula is fairly straightforward. It charges administrative and medical review costs to defendants based on the number of cases in which they are named, subject to a *de minimis* exclusion for defendants named in only a few cases. It would charge the costs of mediation and arbitration to defendants who participate, while excluding defendants who are dismissed early in the process. These assessments are entirely fair. If a defendant, such as Owens-Corning, is able to resolve cases early, it will pay correspondingly smaller user fees. If a defendant can resolve cases without the need for the administrative system at all, it will not be named, and will not have to pay administrative assessments for medical review for those cases.[2]

Question 4. Some have criticized S. 758 because they say that it forces claimants into a program in which they may not want to participate. Is this a problem? What are your thoughts on including an "opt out" provision or allowing participation on a voluntary basis?

Answer 4. An "opt out" provision that permitted claimants to excuse themselves from the substantive medical standards in the program would render the legislation entirely ineffective. A critical aspect of the legislation's reform of asbestos litigation is to draw a line, based on objective medical criteria, between those who are impaired by asbestos-related diseases and those who are not. Under an "opt out" system, those who satisfy the bill's medical criteria would file claims in the new system, leaving the unimpaired to continue to flood federal and state courts with a mass of filings. The bill provides expedited compensation for the sick and defers the claims of the unimpaired until they become sick. It is impossible to relieve the burden of asbestos litigation on the courts or to focus defendants' resources on compensating the sick without deferring the claims of the unimpaired. This is critical to resolving the crisis. If the system is made voluntary, the crisis in our courts will continue unabated, and future claimants may, as the Judicial Conference predicted, "lose altogether."

There is another sense of voluntariness which relates to the use of the administrative system of the ARC. That is, claimants might be permitted to file tort actions in an appropriate court and have that court, or jury, apply the substantive medical criteria in the statute as a "rule of decision" preempting state tort law to that extent. There are serious problems with the procedural opt-out, however. The objective medical criteria are exceedingly complex for lay jurors to apply, making the advantages of expert administrative decisionmaking, in my view, quite compelling. It would not be possible to create a mechanism analogous to the exceptional medical claims panel in courts throughout the nation, and vesting such "exceptional" authority in those courts for lay decisionmaking would remove the decision from medical science and invite jury nullification that would undermine the statutory purpose. Victims would inevitably rely quite strongly on advice of counsel concerning the relative attractiveness of court-centered litigation versus the administrative system, and the likelihood of balanced and objective advice on this point is far from clear.

I view this approach, which has been called a "front-end administrative opt out," as a boon to lawyers. From the perspective of typical victims, however, it is mischief.

Question 5. One of the concerns that has been raised by Owens Corning is that the administrative solution offered by S. 758 would adversely impact the settlement that they have negotiated with the plaintiffs, and that in effect, they would have

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[1] In *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.* 438 U.S. 59 (1978), the Supreme Court explained that "'[a] person has no property, no vested interest, in any rule of the common law.'" *Id.* at 88, n.32 (citations omitted); *see also Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 16 (1976) (principle applies so long as no final judgment has obtained); *United States* v. *Heinszen & Co.,* 206 U.S. 370, 387 (1907) (same).

[2] The Supreme Court has upheld analogous user fees that defray the cost of the Iran Claims Tribunal. *See United States* v. *Sperry Corp.,* 493 U.S. 52 (1989) (rejecting Takings Clause and due process challenges to a 1–2 percent "user fee" on prevailing plaintiffs before the Iran-United States Claims Tribunal).

to "pay twice." What is your opinion? How can we make sure that we do not hamper successful private settlements, such as the one crafted by Owens Corning?

Answer 5. It is perhaps helpful to explain what the National Settlement Plan is. It is *not* a single settlement agreement, but rather a single label for a variety of agreements with different plaintiffs' lawyers in different states. Since the terms of the individual agreements vary, it is difficult to make any generalizations. All of the agreements, however, involve settlement of a plaintiffs' lawyer's inventory of pending cases, usually with relaxed medical criteria, and a standing offer by Owens Corning to settle future cases on set terms. There are much stricter medical criteria for the future cases. The agreements impose a moratorium on the payment of future claims until after 2001, when payment on the pending cases is supposed to be concluded. The agreements also have various "flow" provisions that protect Owens Corning from being inundated with claims in future years that may threaten its financial stability.

The NSP agreements are all between Owens Corning and plaintiffs' *lawyers*. The lawyers agree to recommend the settlement to their clients, but no case is finally settled until the claimant shows to Owens Corning's satisfaction that he meets the requirements of the applicable agreement and until a release is provided. Both future claimants and claimants with pending claims accordingly have a right to opt out of the agreement if they believe (contrary to the advice of their lawyers) that the agreement is not good for them individually.

S. 758 will certainly not undo Owens Corning's National Settlement Plan. Section 804 of the bill is drafted specifically to ensure that the legislation would not override or invalidate any settlement agreement entered into by Owens Corning or anyone else. Therefore, claims that have been paid, or that have been accepted for payment, prior to the date of enactment cannot be reopened. I can see no basis for Owens Corning's assertion that it might have to pay twice.

With respect to futures cases, and pending cases where the plaintiff has not yet agreed to the settlement worked out with his lawyer, the National Settlement Plan itself contemplates the possibility of opt-outs. Owens Corning has expressed concern that plaintiffs will be unwilling to accept the amount that Owens Corning has offered if they do not have to fear inordinate delays in the courts. As a matter of public policy, however, it would be undesirable to maintain the current level of delays to allow Owens Corning to benefit from discounted settlement values. Moreover, it is not clear that reduction of delay, by itself, would induce many plaintiffs (on the advice of counsel) to abandon the Owens Corning agreements. For example, structured pay-outs to ensure that asbestos claims do not undermine Owens Corning's ability to pay future claims would still be desirable.

Basically, the National Settlement Plan will continue to be viable if plaintiffs who have not settled continue to believe that the plan is in their own best interests. It would make no sense deliberately to preserve the flaws of the present system in order to encourage plaintiffs to accept Owens Corning's offers. But, assuming that the NSP is in the interest of future claimants, there is nothing in S. 758 that would undermine its viability.

Question 6. Mr. Middleton testified that the Supreme Court's ruling in *Ortiz* v. *Fibreboard* for a "national asbestos dispute resolution scheme" is nothing like what is provided in S. 758. Mr. Middleton testified that the *Ortiz* decision made reference to a system modeled on the recommendations of the Judicial Conference's Ad Hoc Committee on Asbestos Litigation, which he says suggested the creation of an administrative compensation mechanism that would control all of the defendants' available assets and apply principles of absolute liability in order to compensate claimants. How do you respond?

Answer 6. The Supreme Court in *Ortiz* v. *Fibreboard* rejected the view of the Association of Trial Lawyers of America (ATLA) that consolidations and other judicial management techniques could establish a national dispute resolution scheme that would solve the asbestos litigation problem. The Court said that the mass of asbestos cases "defies customary judicial administration" and "calls for national legislation." 119 S. Ct. at 2302. Likewise, the Judicial Conference Ad Hoc Committee on Asbestos Litigation stated "no adequate procedures exist to enable the justice system to deal with the unique nature of asbestos cases." Report, at p. 26. Its primary recommendation for meeting the challenge was

> a national legislative scheme to come to grips with the impending disaster * * * with the objectives of achieving timely appropriate compensation of present and future victims and of maximizing the prospects for the economic survival and viability of the defendants.

Report, at p. 27. S. 758 establishes absolute liability, contains a broad waiver of defenses, expedited claims procedure, and focuses defendants' limited resources on the sick. The legislation is specifically designed to achieve the Committee's objectives.

Finally, as to whether a fund could be created to control defendants' assets, many observers, unfamiliar with the practical complexities of such an approach, have advocated that solution. I also considered such a fund to be attractive, so it is not surprising that the Judicial Conference recommended that Congress consider this solution. I discuss in my written statement and in my answer to Senator Feingold's questions why such a fund is simply not feasible, could jeopardize the availability of assets for recovery rather than protect them (by jeopardizing insurance coverage), and is not necessary.

RESPONSES OF PROF. CHRISTOPHER EDLEY, JR. TO QUESTIONS FROM SENATOR THURMOND

Question 1. In your prepared testimony, you discuss S. 758's elimination of traditional defenses, such as "state of the art—allowing the adjudicator to focus on a few narrow questions. "Why do you believe that the elimination of traditional defenses is a necessary component of the solution to the asbestos litigation problem, and how would it affect defendants?

Answer 1. I have always regarded the elimination of traditional defenses to asbestos litigation to be an important part of a fair resolution to the asbestos litigation crisis. The waiver of defenses in S. 758 focuses an asbestos case on only three questions. First, is the claimant impaired from an asbestos-related disease? Second, who is responsible for that impairment? Third, what damages should be awarded? In the House hearing, Congressman Nadler said,

> [A]ll you have to answer [in most asbestos litigation] are really three questions. One, is this person sick? Two, how sick is he, how damaged is he, and therefore how much should he be paid? And three, who should pay it?

I agree with Representative Jerry Nadler that a system that focused on only these questions could reduce transaction costs and delay, thus ensuring more compensation for victims. This is what the waiver in S. 758 seeks to accomplish.

I also believe, however, that a waiver of defenses must be carefully targeted to cover only "core" asbestos defendants—mainly, large-scale manufacturers of insulation and other asbestos products. For this group of companies, the issue of their liability has been largely settled by decades of tort litigation. However, since the collapse of Johns Manville, the largest manufacturer of asbestos products, in the 1980's, asbestos lawyers have sought to expand the liability net as far as possible, in a search for "deep pockets" to supplement the dwindling assets of the principal wrongdoers. These new, peripheral defendants include large and small businesses—from IBM and General Motors to local hardware stores—which may have valid defenses to asbestos lawsuits. It would be unfair to strip defenses from these defendants. This is the reason that the House version of the legislation, H.R. 1283, did not contain the waiver of defenses contained in the *Georgine/Amchem* settlement.

For this reason, I favor a compromise between the House version of the bill—which contains no waiver at all—and the Senate version, which goes too far by waiving defenses for all companies. The compromise should preserve the Senate waiver, but limit its application to "core claims," i.e., claims against the principal asbestos defendants.

Question 2. In your prepared testimony, you state that "the only losers under this legislation are * * * those individuals who * * * are able to navigate the jury lottery and obtain substantial compensation under the current system." Could you elaborate on this point and explain whether and how people have been able to obtain compensation who did not truly deserve it?

Answer 2. The inhaling of asbestos dust can cause a variety of conditions, some of which cause impairment and some of which do not. The impairing conditions include cancer and various non-malignant conditions which impair lung function, including asbestosis and some forms of pleural thickening. The benign conditions include most pleural plaques and mild pleural thickening. S. 758 contains objective medical criteria designed to separate those asbestos-related conditions which cause impairment to lung function from those that do not.

Our current tort system is not designed to make this distinction. Instead, juries and judges are asked to determine whether a given asbestos-related condition has produced an "injury"—generally defined not by impairment but merely by whether

the condition has produced a physical change in the body, regardless of impairment—and whether to award damages. Compounding this, cases involving pleural conditions are often bundled together with cases involving very serious injury, such as cancer or advanced asbestosis. Juries are instructed to award damages not only for the benign condition, but also for the risk of future injury, as the law may not allow a plaintiff with a pleural condition to file a second lawsuit for additional compensation if the plaintiffs condition worsens. Both judges and juries, who feel sympathy for the seriously ill plaintiffs, award large amounts to the unimpaired as well, both out of confusion and out of a mistaken belief that the unimpaired will inevitably become sick—when most, in fact, do not.

Whether the unimpaired "deserve" immediate compensation depends on the alternative. In the current system, many unimpaired plaintiffs, worried about the statute of limitations and the prospect that there may be no one left to compensate them in the future, feel compelled to file lawsuits now, even if they will lose their chance to receive a more generous recovery later if they become ill, when they and their families will need the money. This is perfectly understandable. Under the system established by S. 758, however, plaintiffs will have the statute of limitations abolished, will have the right to additional compensation for cancer even if they have already been compensated for non-malignant disease, and will have greater assurance that defendants will not go bankrupt in the interim. In that system, asking the unimpaired to defer their claims until they become sick seems fair and reasonable, particularly in light of the many deficiencies and even dangers (such as delays for the sick, and additional bankruptcies) in the present system.

Question 3. Please explain in more detail why as your prepared testimony suggests, "the economics of asbestos litigation makes it profitable for lawyers to bring cases on behalf of the unimpaired?"

Answer 3. Plaintiffs' attorneys routinely sponsor "mass screenings" among healthy industrial workers to uncover usually benign pleural conditions. Although these screenings have no medical purpose, many workers, worried about asbestos exposure, take part. When the screenings uncover evidence of unimpairing pleural conditions, lawyers sign up the workers and add them to their "inventories" of plaintiffs. Asbestos lawyers then file mass complaints with hundreds or thousands of plaintiffs, mixing the cases of the seriously ill together with those of the unimpaired. When defendants are faced with settlement demands, asbestos lawyers generally give them no choice but to make substantial payments to all plaintiffs, both the impaired and the unimpaired. Advertisements of plaintiffs' attorneys and direct mail solicitations are straightforward about the economic purpose of the screenings. They ask, "Do you have million-dollar lungs?" [3]

Although cases involving unimpairing conditions generally settle for far less per case than cases involving genuine illness, they can produce millions of dollars in mass settlements for a law firm when aggregated into large inventories. The Judicial Conference Ad Hoc Committee on Asbestos Litigation estimated that up to 21 million Americans were exposed to asbestos. Report, at page 7. There are far more potential claimants who are not impaired than those who will develop serious illness. As long as a system continues in which large groups of unimpaired claims can generate millions in contingency fees, simply with a modest investment in a screening program and paralegal time, plaintiffs' lawyers will continue to bring such cases.

Question 4. Please evaluate the relative strengths and weakness of S. 758's compensation and dispute resolution system compared with the so-called voluntary alternative dispute mechanisms that Mr. Hiatt and Mr. Middleton discuss in their testimony.

Answer 4. Because of the economic incentives I discussed in my last answer, I am skeptical about the ability of private settlement plans to solve the asbestos litigation crisis. In these plans, plaintiffs lawyers often agree to a settlement in exchange for a promise not to bring unimpaired cases in the future. In the *Georgine/Amchem* litigation, leading asbestos law firms signed such agreements, which were to remain effective even if the *Georgine* class action was rejected by the courts. Many law firms have refused to honor these agreements. Even if they did, nothing prevents an enterprising lawyer or law firm which did not sign the agreement from arranging mass screenings and amassing a formidable inventory of mostly unimpaired claims in order to force a large settlement.

Secondly, these private settlement plans are not really voluntary. The Owens Corning plan, for example, relies on an agreement by a critical mass of asbestos plaintiffs' firms to recommend a settlement framework to their future clients and not to

[3] See attached advertising materials for mass screenings, and a labor notice warning against them.

represent claimants if they reject the settlement framework. There are serious ethical issues involved when a lawyer agrees not to represent a future client, which is why the Owens Corning agreement is hinged on obtaining an ethics opinion from a court or ethics expert. Assuming the agreement is approved, however, the intent of the agreement is plainly to exert some pressure on claimants to use the system by depriving claimants of the services of their preferred lawyers if they choose not to use it.

In his statement, Professor Nagareda observed that

> A comprehensive solution to the asbestos litigation effected by way of federal legislation would be vastly superior—from the standpoint of both asbestos victims and democratic accountability—to the patchwork quilt of compensation plans likely to emerge otherwise.

I agree.

Question 5. How do you respond to critics of S. 758, who argue that the bill's certification procedure is "substantively rigid and technically demanding, "that its mediation and arbitration procedures are "highly adversarial and procedurally dense, with financial penalties for taking certain procedural and substantive positions in the process?"

Answer 5. I think they must be reading a different bill. First, the medical review process is entirely *non-adversarial*—defendants are not even allowed to participate in this stage. The process is designed to make it easy to say yes to the claimant, but hard to say no. A claimant simply presents the results of medical tests showing that he satisfies the objective medical criteria in the legislation. Compliance with these standards should generally be obvious, and most eligible claims will be approved as a matter of routine, with no additional steps needed.

If a claim is rejected, or if the claim is exceptional in some way, there are additional opportunities for review in fairness to the claimant. (Because defendants do not participate, these steps cannot be used by defendants to delay eligible applications, but are at the plaintiffs' option only). A claimant can appeal a denial to a panel of two doctors, with a third added to break the tie if there is a disagreement. A claimant can apply for relief to an exceptional medical claims panel, if the claimant has an asbestos-related illness that is not covered by the standard criteria. All of these decisions are subject to judicial review under the Administrative Procedures Act.

Once a claim is approved, there is an immediate alternative dispute resolution process, which is neither technical nor complex. Following a grace period for voluntary settlement, the ARC will require all parties to engage in good faith negotiations under the auspices of a mediator, and defendants will have to make good faith offers. If defendants' offers later turn out to be less than 25 percent of the ultimate liability, the defendants face a penalty. Plaintiffs face no penalty for a failure to make a good faith offer other than an additional 60-day period of mediation. If mediation fails, plaintiffs have the choice of arbitration or court action. All of these provisions are designed to maximize the plaintiff's opportunity for receiving a fair settlement.

The attacks by ATLA and others on this dispute resolution mechanism are very troubling to me because they fly in the face of more than 25 years of experience in courts and agencies in which ADR methods have been developed, tested, and expanded to the point of widespread acceptance as a critical alternative and adjunct to judicial process. Many courts now require some process of conciliation as a precondition for using scarce trial resources. These criticisms of S. 758 would turn back the clock on decades of progress in creating more efficient dispute resolution tools.

RESPONSES OF PROF. CHRISTOPHER EDLEY, JR. TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. In your prepared statement, you write: "Impaired claimants are assured full compensatory damages, now and into the future." How does the bill "assure full compensatory damages" when the bill does not guarantee that a qualified claimant will receive any compensation at all?

Answer 1. The legislation creates very powerful incentives for defendants to settle cases immediately after the medical review stage. Qualified claimants will receive a "certificate of medical eligibility" from the ARC, a certificate that they suffer an asbestos-related condition, which is presumed correct absent clear and convincing evidence to the contrary. Claimants then have the opportunity to name particular defendants who are responsible for their condition, and defendants are required to make good faith offers or face a financial penalty if they are later found liable. Fi-

nally, issues are limited so that defendants may only contest medical eligibility, individual causation (generally, exposure to the defendant's product), and damages. Facing these pressures, defendants will seek to settle virtually all cases in which they are identified soon after the medical review stage, usually even before mediation.

If defendants refuse to settle in a timely fashion, plaintiffs can obtain a binding arbitration award in far less time than the tort system requires, or, at their option, take defendants to court. In pursuing a settlement strategy, defendants will seek to build upon settlement schedules and ranges they have negotiated with plaintiffs' attorneys, ranges which will be continually adjusted in light of tort awards, and which are not artificially limited by a schedule mandated by legislation.

Although I am confident that the legislation will assure full compensatory damages for the vast majority of claimants, I believe the legislation could be amended to provide additional assurance of payment. A "global fund" in which all liability is apportioned up front is not feasible (see below). However, a more modest fund which permits a claimant to receive a settlement from the fund immediately after the medical eligibility phase, where the fund is then reimbursed by responsible defendants, is a viable idea. Because defendants remain jointly and severally liable to the fund for the full value of plaintiff's claim, the bankruptcy of one or another defendant will not deprive a plaintiff of compensation. If Congress appropriates funds to pay the claims of those few plaintiffs who only have claims against bankrupt defendants, as part of an "orphan share program" within the fund, no medically eligible plaintiff will ever go without appropriate compensation.

Question 2. During your testimony, you stated that asbestos litigation can take several years to conclude. Could the long delays be due in part to the inactive docket system alluded to in Mr. Middleton's testimony?

Answer 2. Delay in asbestos cases are a scandal. The Judicial Conference Ad Hoc Committee on Asbestos Litigation concluded that "[t]he volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice * * *: speedy and inexpensive resolution of cases." Report, page 10. The Judicial Conference concluded that asbestos cases, unlike other civil cases "does not come close to meeting the 18-month standard" for resolution of cases set by the Civil Justice Reform Act of 1990. Instead, the Judicial Conference concluded, asbestos cases took almost twice as long, on average, to resolve as other civil cases in federal court. This was not the result of an "inactive docket system," but of the "complexity of asbestos litigation" as it is conducted in the tort system. Report, at page 11. A recent review of state court dockets in several key asbestos states, which was conducted in 1998 and described in my testimony to the House Judiciary Committee, shows a pattern of delays which is even more disturbing than the figures cited in 1991.

In *Cimino* v. *Raymark Industries,* a consolidated trial in the Eastern District of Texas, over four hundred eighty-eight plaintiffs died during the pendency of the litigation. "Under these circumstances, the principle of 'justice delayed is justice denied' has added meaning." Report, at page 12.

Question 3. In your prepared statement, you write: "lawyers' fees and other transaction costs continue to consume nearly two dollars for every one dollar paid to claimants." What evidence do you have, aside from the RAND study of 1991, that transaction costs continue to consume more than 60 cents of every dollar paid to claimants?

Answer 3. For evidence that transaction costs in asbestos litigation remain outrageously high, one need look no farther than the recent invoice exhibited at the Senate hearing on October 5. A plaintiff who received a settlement of $5,000 from one asbestos defendant was left with only $1,700 dollars after fees and expenses were subtracted. This includes, of course, only the plaintiff's side of the ledger; additional money was obviously paid for defense fees.

After decades of litigation, asbestos cases have gone from difficult, risky tort cases to no more than case processing for most lawyers. Nevertheless, plaintiffs' lawyers do not charge correspondingly lower attorney's fees—fees of 40 percent or more (plus expenses) remain the norm. These contingency fees remain excessive for cases with little or no real contingency, or risk of non-recovery. When Mr. Middleton was asked to justify these fees in the House Judiciary Committee hearing, his only answer was that the cases required paralegal time. Cases that can be processed with paralegals cannot justify contingency fees that are typical of litigation requiring substantial attorney involvement and risk. While I believe that defendants' litigation costs have declined since 1982 (as I discussed in my statement to the House Judiciary Committee), there is no question that transaction costs remain much too high, and much higher than they would be under the bill. The cap on attorneys' fees is a consumer protection measure, and the evidence suggests that it is plaintiffs who are most in

need of protection. Ultimately, it is the claimant who suffers from the excessive transaction costs of the current system.

Question 4. In your testimony, you stated that you no longer support the idea of a "global fund "for asbestos claimants. One of the reasons you give is that estimating the appropriate share of liability for defendants would be "an endlessly complicated task." However, under the proposed system, liability must be apportioned on a case by case basis. Why do you think it is more efficient to do this complicated assessment thousands of times per year rather than once?

Answer 4. There are several reasons why I have come to believe that a "global fund" which apportions liability among defendants in the aggregate, rather than case-by-case, would not be feasible. First, it would not be possible to apportion liability "once." Because asbestos products do not constitute a single market with a few big players (such as some drugs, or tobacco products), but rather involve many different products made by hundreds, even thousands of companies which are alleged to cause harm in a myriad of ways, one could not use "market share" as an easy proxy for liability. Moreover, many defendants are not even product manufacturers, but are allegedly liable because they distributed asbestos, or asbestos products were used on their premises. A sharing formula that attempted to capture these nuances would not be very different in cost or complexity from case-by-case adjudication.

Second, it is critical than any reform of asbestos litigation does not jeopardize the availability of insurance proceeds—a critical source of compensation for victims. Insurance contracts cover "damages for personal injury," and insurance companies will say that this does not cover assessments for a government fund. Any attempt to require insurance companies to contribute money for a tax by legislative fiat would be subject to constitutional challenge.

Finally, and perhaps most importantly from the claimants' perspective, *a fund simply is not necessary to ensure compensation.* Another approach, which I advocate, is to leave joint and several liability in place. Legislation would create a fund from which victims can be compensated immediately, and which can seek reimbursement from defendants, in accordance with principles of joint and several liability and comparative fault. From the plaintiffs' perspective, this is identical to a "global fund," but it eliminates the problems that make a global fund impractical. Most importantly, it preserves the availability of insurance coverage as a source of assets for compensating victims.

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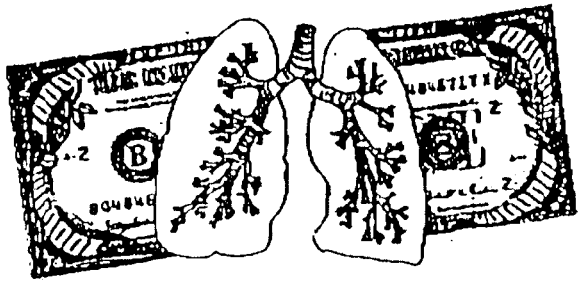

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BACOSH — Bay Area Committee on Safety and Health
WORKSAFE! NEWSLETTER

SUE NOW -- LOSE LATER?

A recent California Court of Appeal decision threw out a dying man's lawsuit against an asbestos manufacturer for mesothelioma because he had already sued for "breathing difficulties, asbestosis, and/or other lung damage." The court said that in California there already is a special Statute of Limitations designed to protect workers. That Statute allows workers to wait until they are actually disabled before the time to sue starts to run. For men and women still working, that means you don't lose your right to sue until one year from the time you are actually disabled and can no longer work. For retirees it means you can delay for an indefinite time.

You don't, however, get two bites of the apple. You have a right to sue earlier based on a lesser problem, but if you do and are later diagnosed with lung cancer or mesothelioma, your lawsuit against the same defendant will be barred. The court said, "when [you elect] to file suit, [you give up] the statutory option of waiting longer, [you have made] the choice and cannot sue again after one year passes." There is no exception for a late-developed cancer injury like mesothelioma. See *Mitchell v. Asbestos Corporation, Ltd.* (1997) 69 Cal.Rptr. 2d 164.

So beware of asbestos screenings — beware of those companies and lawyers that approach unions and councils with offers of "free" asbestos screenings. They make their money on diagnosing and bringing lawsuits based on minimal evidence of asbestos lung changes, usually without any evidence of disability or impairment. You can sue now and win something, but **you may ultimately lose** — lose the right to a lawsuit for significant damages if you are diagnosed later with a serious life-threatening or disabling illness. Cases brought after screenings, when there is no significant disability, result in practically no recovery despite the wrong doing of the asbestos industry and despite the pain and suffering you and your family may endure later on should tragedy strike. This case makes clear that taking a few thousand dollars now may cost millions later, when you and your family really need it.

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RESPONSE OF JONATHAN P. HIATT TO A QUESTION FROM SENATOR GRASSLEY

Question 1. Does S. 758 provide the necessary incentives or disincentives for plaintiffs and defendants to resolve their claims promptly with the Asbestos Resolution Corporation? For example, Owens-Corning argues that there are no set settlement values or payment schedules which would encourage plaintiffs to forgo court action and enter into settlements with defendants. Owens-Corning proposes that tax incentives might be incorporated to encourage defendants to settle, while Professor Green suggests that penalties might encourage the early resolution of claims. What is your opinion?

Answer 1. We are very concerned that the structure of S. 758 would destabilize existing settlement incentives. We are also concerned about the allocation of any gains that could be realized from reducing transaction costs in asbestos litigation. From the victims' perspective, statutory changes that reduced transaction costs by radically weakening victims' rights would lead to decreased recoveries for victims even if victims were able to capture significant portions of the transaction cost savings.

Specifically, the provisions of S. 758 that would bar punitive damages, consolidations, and class actions would considerably diminish the uncertainty defendants face when considering whether to litigate claims. Additionally, the opportunities the medical certification and mandatory arbitration processes provide for further delay and expense and would add to the uncertainties faced by victims seeking compensation, particularly those victims who are running out of time. These provisions might not only decrease settlement rates but might lead to the reassertion of defenses in litigation that have practically ceased to be raised by manufacturers.

Thus while the settlement schedules suggested by Owens-Corning could be a helpful component of an alternative dispute resolution system for asbestos claims, their addition to S. 758, would not address what we believe are the primary disincentives to settlement within the bill. Similarly, tax incentives for settlement, while a positive step in several ways, would also not fundamentally alter the disincentives embedded in the remainder of the bill.

Professor Green's suggestion is more disturbing. When combined with the bill's more general tilting of the playing field toward asbestos manufacturers, imposing penalties on asbestos victims for failing to settle would lead to even lower settlement amounts. While settlements can reduce transaction costs and lead to more funds being available to victims, if asbestos manufacturers have the ability under the bill to leverage low-ball settlements, the net result will be that victims will have been disadvantaged to the benefit of the companies that poisoned them.

RESPONSES OF JONATHAN P. HIATT TO QUESTIONS FROM SENATOR THURMOND

Question 1. Your prepared testimony states that S. 758 dramatically restricts * * * asbestos victims access to the courts. How do you respond to Professor Edley's contention that claimants who are "not satisfied with the defendants' settlement offers in mediation * * * can choose either to invoke arbitration * * * or go to court?"

Answer 1. S. 758 requires that all asbestos victims go through lengthy, adversarial administrative proceedings replete with deadlines and penalties for failing to comply with those deadlines before they can even enter the courthouse doors. Large numbers of victims—people with evidence of damage to their lungs caused by asbestos—will be absolutely barred from the courts until their conditions worsen. These people—often and inaccurately referred to as the unimpaired—may never be compensated for real, measurable injuries under S. 758. Finally, under S. 758, "impaired" victims would be barred from exercising a number of rights typically available to victims in tort cases—punitive damages, the right to consolidate cases and to bring class actions—that make access to the courts a reality for individual tort victims. The combination of these features in S. 758 amounts to a dramatic restriction of asbestos victims' legal rights as compared to current law in most states.

Of course, Professor Edley is correct in noting that S. 758 contemplates that the victim (or that victim's estate) who manages to obtain a certificate of medical eligibility will eventually be able to file a tort case under its truncated tort regime. However, the substantive, procedural and economic barriers that S. 758 places in the way of that victim vindicating her rights in court in a timely manner are so numerous and material in their impact that the phrase "dramatically restricts * * * access to the courts" is an accurate description of the efforts of the bill as proposed.

Question 2. Your prepared testimony states that "[c]ompounding this [tragedy], the legal system has offered lengthy delays followed by limited compensation, compensation that often comes too late." Do you agree that, in view of your own assess-

ment of the state of the asbestos litigation problem, some procedural modification of victims' access to the courts is necessary to ensure that truly asbestos-impaired people get timely compensation?

Answer 2. The AFL–CIO believes that in the decade since the data the Supreme Court cited in its *Fibreboard* decision much progress has been made in both routinizing settlements between asbestos victims and asbestos manufacturers and in speeding payments to victims. However, we are concerned primarily about two features of the current asbestos litigation environment—first, and most importantly, we are concerned that asbestos victims with real but less serious symptoms, the so-called unimpaired, are entering into settlements that prevent them from seeking additional compensation if they later develop serious or life-threatening asbestos related conditions. Second, we are concerned about the length of time that asbestos victims wait before receiving payment in settlement—delays that may to some extent be the result of settlement structures. But we cannot see how the solution to delay in compensation to victims should be the creation of it multi-layered adversarial structure that appears to have the potential for further delays at every step.

As we noted in our response to Chairman Grassley's question, we believe the incentives for settlement at fair values, whether through unstructured negotiations between the parties or through a structured alternative dispute resolution process, are heavily bound up with the availability of tort litigation as a viable though risky alternative. Consequently, we favor legislative models that have a voluntary structure.

Furthermore, it is of great importance to the AFL–CIO that all asbestos victims be compensated for their injuries. We believe terms like the "non-sick" and "truly asbestos impaired" suggest that persons who have suffered real lung damage as a result of exposure to asbestos, damage that may very well increase with the passage of time, somehow have not been injured and are not deserving of compensation. Obviously, however, levels of compensation should be commensurate with levels of injury.

Finally, the question as posed suggests an assumption that the resources of the defendants and their insurers in asbestos litigation today are so clearly limited in relation to the value of claims brought by asbestos victims that a sort of triage approach to compensation must be adopted by the federal government. It is our view that neither the testimony at the Subcommittee's hearing nor at the House's recent hearings on the same subject demonstrated that the current value, of these claims dramatically exceeds the value of the defendant companies' assets or future cash flows.

In the course of discussions that we have been engaged in with a broad range of interested parties under the auspices of the House Judiciary Committee, we have become convinced that currently both we and the Congress have inadequate information about this and other critical questions to craft constructive, broadly supportive legislation. We, believe we need more information about the existing court dockets and settlement structures, about the variety of medical conditions that result from asbestos exposure, their impact on the lives of victims and the causal connections among these conditions, about the assets of the manufacturers and other defendants, including their insurance coverage, and the trends in all these areas. To take just one example, it would seem a precondition to any action in this area to have current data on the size of asbestos dockets by state and some information on how many of those cases are active and how many have simply been filed to preserve litigation rights.

Let me conclude by emphasizing that while we are eager to work with the Subcommittee and any interested parties to craft solutions to the problems in asbestos litigation, the AFL–CIO completely rejects the notion that the appropriate response to the barriers asbestos victims' face in obtaining justice in the courts is to deny large numbers any ability to obtain compensation at all, and then to place substantial obstacles in the way of all asbestos victims'—including the desperately ill and the dying—obtaining compensation through the courts.

RESPONSE OF SAMUEL J. HEYMAN TO A QUESTION FROM SENATOR GRASSLEY

Question 1. Does S. 758 provide the necessary incentives or dis-incentives for plaintiffs and defendants to resolve their claims promptly with the Asbestos Resolution Corporation? For example, Owens Corning argues that there are no set settlement values or payment schedules which would encourage plaintiffs to forgo court action and enter into settlements with asbestos defendants. Owens Corning proposes that tax incentives might be incorporated to encourage defendants to settle,

while Professor Green suggests that penalties might encourage the early resolution of claims. What is your opinion.

Answer 1. S. 758 does provide necessary incentives for both plaintiffs and defendants to resolve asbestos claims promptly and fairly within the Asbestos Resolution Corporation (ARC), Under the bill, once a claimant receives his certificate of medical eligibility, a process that ordinarily should take only a few weeks, he enters a settlement stage that culminates, if necessary, in mediation that is subject to a 60 day time limit. At the end of the mediation stage, each identified defendant is obligated to make a good faith offer of settlement to the claimant. Any defendant who does not make such a good faith offer, defined as being an offer which, after being rejected by a particular claimant, falls more than 25 percent short of what that claimant ultimately recovers either by way of arbitration or in the courts, is subject to a penalty paid directly to the claimant.

In addition, a defendant who does not reach a fair settlement with a claimant in this mediation stage would have to face the claimant either in arbitration or in the court system, at the claimant's election, with the claimant having a certificate entitling him to a strong presumption of asbestos-related disease and the defendant having most defenses waived. Furthermore, the costs of the mediation and arbitration components of the system are assessed to those defendants who use them, providing a further incentive to resolve cases early, once the ARC has determined that the claimant indeed is sick. These are strong incentives for defendants to resolve the cases quickly and fairly either during the mediation stage or even earlier. In addition, because the ARC provides this administrative system for claimants to recover fair settlements at full "tort system" compensatory values in a matter of months, rather than the years that cases can grind on in the tort system, plaintiffs as well would be incentivized to settle cases promptly within this administrative framework.

RESPONSES OF SAMUEL J. HEYMAN TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. In your testimony, you refer to the "bundling" of sick and non-sick claimants. Have you encountered any suits by non-sick claimants alone? If so, how often and what was the outcome?

Answer 1. It is extremely rare to encounter claims which proceed to trial on behalf of non-sick claimants alone, and we at least are unaware of any non-sick claimants who have proceeded to trial on their own against us. As reflected in my testimony before the subcommittee, asbestos lawyers almost always seek to bundle non-sick claims with sick claims—either in order to use the sick claims as leverage to obtain settlement of the non-sick claims or, in the case of trial, to confuse the jury and elicit sympathy for the non-sick claimants.

Question 2. In your testimony, you argue that claimants who have developed medically detectable injuries from asbestos exposure and face increased chances of other more serious diseases such as mesothelioma, other cancers, and asbestosis, should not receive any compensation. Why isn't it fair to give these claimants modest compensation and to pay for medical monitoring for those conditions they are more likely to contract? Would you support a system that provided claimants with modest compensation and/or medical monitoring?

Answer 2. I disagree with the premise of the question—that persons who have pleural plaques or diffuse pleural thickening but no impairment of lung function, have an increased chance of contracting serious diseases such as mesothelioma, other cancers or asbestosis compared to persons with comparable levels of asbestos exposure. Pleural changes, which can be caused by very low exposure, me just a marker of such exposure and by themselves do not increase the risk of cancer or other serious disease at all. In fact, given the same amount of exposure, there is no greater risk of cancer or other serious disease with regard to those who have pleural changes compared with those who do not. In any event, there is no dispute that the vast majority of people with pleural changes will never become sick.

The purpose of S. 758 is to insure that people who are actually *impaired* by asbestos disease receive fair compensation. Providing compensation for the unimpaired would defeat this purpose, since if the defendants continue to spend billions of dollars paying claims of people who are exposed but not impaired, the true asbestos victims may be left without any recourse.

With regard to medical monitoring, a substitute bill is being considered by the House Judiciary Committee providing for partial reimbursement of medical testing expenses for claimants who demonstrate certain asbestos related fibrosis or pleural changes but no impairment. I understand the criteria for reimbursement of such testing expenses under the substitute bill are based upon the so-called "Louisiana

agreement" which the AFL–CIO endorsed at the hearing on S. 758. We may consider supporting such a provision.

Question 3. In your testimony, you strongly condemn exorbitant plaintiffs' fees. In the RAND study on asbestos litigation costs, defendants' legal fees were 50 percent higher than plaintiffs' fees. Do you have any evidence that this situation has changed? If not why is it fair to limit plaintiffs' fees and not defendants' fees?

Answer 3. As a preliminary matter, I would note that comparisons of aggregate plaintiffs, fees with aggregate defense fees really are comparing apples to oranges since for every plaintiff, there generally are dozens of defendants named, most of whom ordinarily have their own counsel. In any event, the real issue is not who spends more for lawyers, but how to reduce the transaction costs that exceed recoveries by a factor of two to one.

First, the issue of plaintiffs' fees is not a financial issue for asbestos defendants in that they are not paying these fees but rather the claimants. Nevertheless, we have been supportive of the cap because:

(1) The legislation seeks to track the *Georgine* settlement, where the 23 percent cap was a pan of the settlement;
(2) This is essentially a victims' rights bill, and it is our hope that sick claimants as a result of the legislation will be able to maximize their after cost recoveries;
(3) Since it is expected that most cases brought after an enactment of this legislation will be settled in the administrative claim facility, where far less legal work will be required, a 25 percent cap does not appear very onerous; and
(4) In the proposed administrative claims facility, where it will be immediately clear as to whether a claimant is sick or not, and if so the lawyers will not have any downside as they now have in the tort system, a 25 percent fee ought to be regarded as very attractive.

Second, with respect to defense fees and costs, it should be borne in mind that asbestos defendants are highly sophisticated consumers of legal services, whereas asbestos claimants are often financially unsophisticated and are regularly taken advantage of by asbestos lawyers. Moreover, asbestos legal fees are invariably contingent on the outcome of the case, with asbestos lawyers receiving 40± percent of the recovery. As most cases today are consolidated in a single action sometimes involving groups of literally thousands of claimants, asbestos lawyers are able to leverage their efforts time, and overhead over more and more cases. Defendants' lawyers, on the other hand, are paid at hourly rates, and therefore have not enjoyed the huge financial rewards that plaintiffs' asbestos lawyers have.

Finally, courts and commentators have made it clear that there are currently no effective controls on the legal fees paid by asbestos claimants, as evidenced by the fact that asbestos lawyers continue to extract 40± percent contingent fees on cases where there is little or no risk of non-recovery. As a very concrete example of the scandalous attorney fees which continue to be extricated from asbestos claimants, I would refer you to the recent example referenced at the hearing where a claimant filing a routine administrative claim against the Manville Trust was forced to pay over 60 percent of his claim in attorneys fees and expenses.

Question 4. S. 758 is often characterized as a victims' rights bill by its supporters. Are you aware of any significant support among asbestos victims for the bill? If not, how do you explain the lack of support?

Answer 4. We believe that S. 758 is properly characterized as a victims' rights bill. Claimants who have asbestos related disease will receive full compensatory damages, with no caps or other limits, promptly. Those who have been exposed to asbestos, but are not sick today, may bring their claims whenever they may become sick without regard to the statute of limitations, and may then recover compensation fairly and promptly.

While we would love to talk directly with asbestos victims, asbestos lawyers have gone to great lengths to prevent us from doing so. Given the refusal of asbestos lawyers to consent to such contacts, there are ethical constraints concerning communicating directly with asbestos clients represented by counsel. Notwithstanding these impediments, it is fairly clear that asbestos victims support this bill. First, physicians across the country, who care and speak for asbestos victims, wholeheartedly support the legislation. You have before you the written testimony of Dr. Susan Pingleton, the president-elect of the American College of Chest Physicians ("ACCP"), the largest association in the world of chest physicians, expressing her unequivocal opinion that this legislation is good for asbestos victims and that it will protect the best interests of these victims. In addition to Dr. Pingleton, seven past presidents of The ACCP have expressed in writing their unequivocal support of the bill as well.

The doctors agree with the fundamental concept underlying the legislation—namely that the system is broken and these cases can no longer be handled by the traditional judicial system. Many of the doctors have expressed the patent frustration of their patients over the fact that their cases and compensation seem mired in continual difficulty and delay. One doctor told of a patient who suffered from mesothelioma for years and recently died—without receiving any compensation despite having had a lawyer and a case filed for years. His widow expressed to the physician extreme frustration with the entire process. Other doctors have told us of patients who have had exposure, but are not presently ill, and are fearful that if they become ill the statute of limitation will have run, or there will be no money left for them, and they will not be able to receive compensation for themselves or their families.

It is important to emphasize that many physicians view this bill as a public health bill and a victims' rights bill—and not a fundamental alteration of the tort system. Dr. Louis Sullivan referred in his testimony to the need to prevent a legal crisis from becoming a public health crisis. The doctors clearly recognize the ramifications of this legislation, and they are clearly focused on the serious ways in which their patients are disadvantaged by the present system.

Finally, the Coalition has received numerous unsolicited messages from asbestos victims who have called, or contacted our website, indicating that they are upset with the current asbestos litigation system and/or endorsing of the legislation.

Question 5. Would you be willing to support a bill that apportioned liability "up-front and created a global trust fund from which claimants would be compensated upon receiving a certificate of medical eligibility?

Answer 5. It simply is not possible to apportion liability "up front" among defendants to create a single fund from which plaintiffs would be compensated. There are today more than 2,600 different asbestos defendants who are named in lawsuits. The number and identity of defendants is subject to tremendous variability depending on where the case is brought, the nature, place and time of the exposure, and the basis of liability. It must be recognized that asbestos liability can arise out of exposure to hundreds of products for which there was no single market, so it would not be possible to use market share as a proxy for estimated liability. The creation of a fund also could jeopardize the availability of insurance proceeds as a source for compensation of asbestos victims. Insurance companies would maintain that their contracts do not require them to cover an assessment or tax to a government fund that is not related to individual company liability. It simply is not possible, therefore, to come up with an up front sharing formula.

I understand that a compromise bill being considered by the House Judiciary Committee, which we could perhaps support, provides for the creation of a fund from which a special master will provide sick claimants with the option of receiving a total award as soon as they receive their certificate of medical eligibility without themselves having to pursue individual defendants. The fund would then seek reimbursement from defendants, either by way of settlement or litigation in the administrative forum. In this way, a claimant would be able to seek a total settlement from a single fund, or pursue individual defendants in either the administrative system or in court, without their having to be an up-front apportionment of liability.

RESPONSE OF KAREN KERRIGAN TO A QUESTION FROM SENATOR GRASSLEY

Question 1. Does S. 758 provide the necessary incentives or dis-incentives for plaintiffs and defendants to resolve their claims promptly with the Asbestos Resolution Corporation? For example, Owens Corning argues that there are not set settlement values or payment schedules which would encourage plaintiffs to forgo court action and enter into settlements with Asbestos defendants. Owens Corning proposes that tax incentives might be incorporated to encourage defendants to settle, while Professor Green suggests that penalties might encourage the early resolution of claims. What is your opinion?

Answer 1. We believe that S. 758 does provide adequate incentives for settlement of cases brought by individuals with impairing diseases. First, the bill would require plaintiffs' lawyers to make serious efforts to settle cases as soon as medical review is completed. Today, although the plaintiffs themselves have an interest in early settlement, their lawyers may be distracted by the challenge of managing hundreds, or even thousands of cases, and frequently do not focus on settlement until the lost minute.

Second, the bill would facilitate (as well as require) early officers by defendants. For example, as a result of the non-adversarial medical review process, the medical condition of the plaintiff will be essentially established at the outset of the case, and

information on product identification would be available much earlier than is the case today. This will enable defendants to formulate a reasonable settlement offer at the outset of the proceeding.

Third, mediation under the auspices of the ARC should help bridge differences between parties who tire unable to reach agreement on their own. The provision of the bill requiring mediation takes advantage of the emergence of ADR in recent years as a means of promoting efficient and inexpensive resolution of disputes.

Finally, in accordance with Professor Green's suggestion, the bill provides it penalty for defendants whose offers in mediation prove to be too low.

Of course, S. 758 would eliminate the use of mass consolidations and the threat of punitive damages to coerce the settlement of cases regardless of their merits. From the prospective of the nation's small businesses, that can only be construed as a plus.

Relative to the proposal that tax incentives be incorporated to encourage defendants to settle, I would tend to take a rather dim view of this approach for several reasons. As you know Senator Grassley, SBSC is a vocal proponent of tax relief and providing American business with tax incentives to maintain a high level of investment, job creation, and innovation. But it strikes me that the use of tax incentives to mask or correct abuses in our legal system is not sound public policy—nor will it solve the underlying problem in this current crisis. In addition to further complicating the tax code (and charges that such tax incentives amount to "corporate welfare") I would assert that using tax incentives to encourage defendants to settle might, in fact, skew the settlement process. I would encourage the Congress to leave the tax code out of the asbestos litigation quagmire.

SBSC prefers Professor Green's approach.

RESPONSE OF KAREN KERRIGAN TO A QUESTION FROM SENATOR THURMOND

Question 1. Do you believe that the current trend of asbestos litigation is to target, as you put it, "defendants with an increasingly tenuous relationship to asbestos?" If so, why in your opinion is this happening, and how many of such defendants have actually been held liable for harm to victims of asbestos exposure?

Answer 1. I do believe that today's trend is to target those companies with an increasingly tenuous relationship to asbestos. Twenty years ago, asbestos cases were brought against such companies as Johns-Manville, Raybestas Manhattan, Celotex, Eagle-Picher and the like. These are the companies that come to mind when one thinks of asbestos defendants. Asbestos litigation has destroyed those companies, reducing the assets available to compensate plaintiffs. At the same time the flood of cases brought on behalf of unimpaired claimants has put more pressure on the assets that, are left.

Plaintiffs' lawyers have therefore sought to expand the resource base by naming more and more peripheral companies. The list of peripheral companies that could someday find themselves trapped in such lawsuits is extensive. A reading of standard complaints shows many small businesses among the over 6,000 defendants that have been named. Small businesses such as automobile dealerships, hardware stores and car repair shops have found their way onto the standardized complaints filed by plaintiffs counsel.

Few of these peripheral defendants have gone to trial. Rather, faced with huge defense costs, distraction of management attention and time, and the possibility of crushing awards, most small businesses settle.

However, just last week a small family-owned business in Vermont was, pushed into bankruptcy by asbestos claims. This company was owned by the same family for five generations. It manufactured furnace and woodstove repair cements and ceased using asbestos in its products in the early 1970s. Nevertheless, the company was subjected to over 50,000 claims 37,000 of which are currently pending. With combined assets of less than $3 million, the company's president estimated that current and future claims against the small company total more than $67 million. It is a small wonder that this onslaught of litigation pushed the company over the edge.

While most individual settlements are "small" by beltway standards, collectively they amount to a significant drag on small businesses as a whole. Individually these smaller settlements still place great economic hardship on small firms where cash flow and cash availability is less flexible than it is for larger firms.

RESPONSE OF KAREN KERRIGAN TO A QUESTION FROM SENATOR FEINGOLD

Question 1. Specifically, how many of the more than 50,000 small business in the Small Business Survival Committee have asbestos claims filed against them? How many have had asbestos-related judgments assessed against them? How many have paid to settle asbestos claims?

Answer 1. Presently, we currently do not know how many of our members have been named as defendants in asbestos lawsuits. But we do know that the types of small businesses that have been named as defendants in asbestos lawsuits are well represented in the ranks of those members who belong to the Small Business Survival Committee (SBSC).

A reading of standard complaints shows many small businesses among the over 6,000 defendants that have been named, Among those—car dealerships, car repair shops, hardware stores and others—have found their way into standardized complaints filed by plaintiffs' counsel. As you may or may not recall, I have personally visited your office with small business leaders who belong to the Independent Business Association of Wisconsin (IBAW), an affiliate of SBSC whose broad-based small business membership includes the type of businesses that are appearing with more frequency in asbestos lawsuits.

As you know from your interaction with IBAW, and other small businesses in Wisconsin, most small businesses cannot afford to defend these claims. Even apart from litigation costs and possible judgments, small businesses do not have the personnel to devote attention to mass tort litigation. They need to focus their attention on doing business.

Just last week, a small family-owned business in Vermont was pushed into bankruptcy by asbestos claims. This company was owned by the same family for five generations, It manufactured furnace and woodstove repair cements, and ceased using asbestos in its products in the early 1970s. Nevertheless, the company was subjected to over 50,000 claims 37,000 of which are currently pending. With combined assets of less than $3 million, the company's president estimated that current and future claims against the Small company total more than $67 million, it is a small wonder that this onslaught of litigation pushed the company over the edge.

Even one such bankruptcy is too many for the small businesses that belong to SBSC. Legislation such as S. 758 is vitally needed to ensure that the real victims of asbestos exposure are compensated while leaving America's small businesses free to contribute to economic growth and jobs.

RESPONSES OF CONRAD MALLETT TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. Does S. 758 provide the necessary incentives or dis-incentives for plaintiffs and defendants to resolve their claims promptly with the Asbestos Resolution Corporation? For example, Owens Corning argues that there are no set settlement values or payment schedules which would encourage plaintiffs to forgo court action and enter into settlements with asbestos defendants. Owens Corning proposes that tax incentives might be incorporated to encourage defendants to settle, while Professor Green suggests that penalties might encourage the early resolution of claims. What is your opinion?

Answer 1. S. 758 encourages all parties to settle the cases as soon as possible after the medical review process has been completed. Defendants have important incentives to settle the cases and to settle them early. In the first place, defendants are given a short grace period for settling without the need for mediation. They have every incentive to do so, because they pay the mediator. As a practical matter, I would expect most of the major defendants would settle at this stage pursuant to futures agreements they have negotiated with plaintiffs' counsel in advance. Second, a mediator will assist the parties to settle cases that could not be resolved in the grace period. Mediators will be especially helpful in unusual cases, or cases in which the parties disagree on the strength of the evidence. Third, defendants face a significant penalty if their offers in mediation turn out, in hindsight, to be too low. Finally, defendants have an added incentive to settle without arbitration, because they bear the costs of arbitration.

If they do not settle, defendants will face plaintiffs with a certificate of medical eligibility that is presumed correct and will be limited to contesting just three issues. These issues are (1) medical eligibility (again, with defendants having to overcome the presumption of correctness that attaches to the certificate), (2) individual causation (which for most defendants means product identification), and (3)

damages.[1] In many cases, defendants will want to settle because, under the new rules established by the bill, there is no point in doing anything else.

The plaintiff's incentive to settle early is obvious. He gets his money quicker. Moreover, by tightening liability rules and eliminating punitive damages, the results of a trial or arbitration become more predictable and the temptation to gamble on a trial is thus reduced. I do not understand the suggestion that plaintiffs would not settle without a legislatively established schedule. In my long experience as a judge, I have seen plaintiffs settle every day without such schedules.

I do not believe that tax incentives are necessary for the legislation to work. The Coalition has consistently maintained that the costs of S. 758 should be borne by the defendants, and not the taxpayer. Beyond that, I have not seen Owen Corning's tax proposal and have no comment on it.

Question 2. As former Chief Justice for the Michigan Supreme Court, you have unique insight into what is going on in the state courts with respect to these asbestos claims. Could you explain the effect of the asbestos litigation crisis on the state court systems? Do you believe that this bill presents a Tenth Amendment problem? Also, what would be the effect if this legislation only operated at the federal level?

Answer 2. In my written testimony, I described the experience that the Michigan Supreme Court had in handling the tremendous impact that asbestos claims had on the Michigan Court system. We designed a system whose main goal was to process the cases through our docket as quickly as possible. It became impossible in this environment for the cases to be treated on their individual merits.

Our experience is hardly unique. Other courts, throughout the country, have been inundated with claims that they have been ill-equipped to handle. The reason for this is quite simple. Our state and federal court systems are not designed to handle thousands of claims filed at the same time against the same defendants. When caseload pressure strips the trier of fact of the ability to handle each case on a case-by-case basis, we generally assign cases to an administrative system. This is why workers compensation, Social Security disability decisions, black lung, and other repetitive injury cases are assigned to administrative programs. A similar administrative approach is necessary to handle asbestos litigation.

I do not believe that this legislation presents any significant Tenth Amendment problems. Judges in state courts apply federal law every day. That is part of their job in our federal system. Moreover, if there were ever an area in which national legislation is desirable, it is asbestos legislation. Indeed, "national legislation" is exactly what the United States Supreme Court called for in *Ortiz* v. 119 S. Ct. 2295 (1999), thus adding its voice to those of state judges themselves. For example, the Florida Supreme Court has said, "Any realistic solution to the problems caused by the asbestos litigation in the United States must be applicable to all fifty states. It is our belief that such a uniform solution can only be effected by federal legislation." *W.R. Grace & Co.* v. *Waters*, 638 So.2d 502, 505 (Fla. 1994).[2] In my mind, there is no question that the rules of law established in S. 758 are well within Congress' power under the Commerce Clause and are necessary reforms that must be uniform across the states, as the state courts have said.

Finally, as to the third question, I believe that this legislation could not work if applied on the federal level alone. In 1991, the Panel on Multidistrict Litigation consolidated federal asbestos cases for pretrial purposes in the Eastern District of Philadelphia. The district court gave priority to claimants and severed punitive damages claims for future trials. As a result, plaintiffs' lawyers fled the federal system and filed record numbers of asbestos cases in state courts. The lesson is simply that asbestos litigation is not susceptible to partial solutions. Legislation must be national—applicable in all states and all courts—or it will be ineffective.

Question 3. Mr. Middleton and others have criticized the Asbestos Resolution Corporation to be a time-consuming process by which sick plaintiffs will be "jumping through hoops" with no guarantee of timely compensation. Is this an accurate assessment of the process set up in S. 758? Does S. 758 create an open-ended procedure which provides endless opportunities for defendants to delay any compensation to the victims, as suggested by Mr. Middleton?

Answer 3. Mr. Middleton has distorted the process by which a plaintiff goes through the system and obtains timely compensation. The process is really quite simple.

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[1] The Coalition for Asbestos Resolution believes that the waiver of defenses contained in S. 758 is not appropriate for all defendants, but only for "core claims" involving the principal players. CAR stands ready to work with the Senate to craft an appropriate compromise waiver.

[2] See also *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304 & n.8 (W. Va. 1996).

First, the claimant will obtain medical certification from the ARC. This is a simple, non-adversarial process. The defendants will not even be parties at this stage. Usually there will be no question about the plaintiff's compliance with the medical criteria, and medical approval will occur in a matter of days.

Second, the ARC will gather the defendants together and encourage settlement, as I have described in my answer to Senator Grassley's first question. Most cases will end here. Plaintiffs will receive prompt compensation reflecting values established by the tort system.

Finally, for the few cases that cannot be settled, the plaintiff has his choice of taking the defendant to court, or choosing streamlined arbitration under the auspices of the ARC.

This is a simple and straight-forward process. There is no point at which defendants can manipulate the ARC's procedures for the purpose of delay. Defendants are not involved at all in the medical review process, and alternative dispute resolution is subject to strict time limits. Moreover, there are, as I have explained in my answer to Senator Grassley's first,question, substantial penalties for defendants who fail to make objectively reasonable settlement offers at the mediation stage.

Question 4. At the House Judiciary Committee hearing, a representative from Owens Corning expressed concern about the applicability of the bill's provisions to lawsuits pending at the time of enactment, specifically that Congress would be preempting state substantive law causes of action which have already been filed. In addition, Owens Corning objected to the provisions requiring that all funding be collected from existing asbestos defendants in proportion to the number of claims against them. Are these concerns valid and, if so, how can the bill be remedied?

Answer 4. Well over 200,000 claims are pending in court today alleging injuries due to asbestos-related disease. The asbestos litigation crisis is not something which will happen in the future; it is something that has already happened. Any legislation which did not cover those pending case applied only to cases which are filed in the future, would be a missed opportunity for reform.

Of course, the transition to a new system has to be handled with care. It is important to apply the medical criteria to as many cases as possible, in order to stop the diversion of resources from the sick to the non-sick. The bill therefore makes the criteria applicable to all pending cases. However, it would be unfair to apply the requirement that a plaintiff obtain a certificate of medical eligibility from the ARC who have waited for a long time, and are getting near a trail date. For these transitional cases, the legislation excuses claimants whose cases are ready for trial before the ARC is operational from this requirement.

In answer to the second question, one of the objectives of S. 758 is to solve the asbestos litigation problem without burdening taxpayers. The Coalition believes that the provisions of S. 758 regarding allocation of costs are sensible and sufficiently flexible to take into account usage of the system. For example, if Owens Corning is named in few cases (because its National Settlement Plan functions as intended), its share of the costs will be low. And, of course, if Owens Corning settles without the need for mediation or arbitration, it will not have any responsibility for those costs.

Question 5. Some have criticized S. 758 because they say it forces claimants into a program in which they may not want to participate. Is this a problem? What are your thoughts on including an "opt out" provision or allowing participation on a voluntary basis?

Answer 5. Observers of the asbestos litigation problem have uniformily come to the conclusion that it is critical to make a distinction between those plaintiffs who are sick from asbestos disease, and those who are not sick. Otherwise, the resources of defendants will not be focused on compensating the "elephantine mass" of asbestos cases will continue to clog court dockets. A voluntary system could not effectively address the problem of lawsuits brought by the unimpaired. Under such a system, plaintiffs who lack any current impairment, and therefore could not satisfy the medical criteria, would continue to file cases in court, thus frustrating the purpose of the legislation.

RESPONSES OF CONRAD MALLETT TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. In your testimony, you refer to S. 758 as "a system that fully compensates the impaired within six months of the date the claim is filed." The bill, however, does not guarantee that an impaired person will receive any compensation nor that the claim will be settled within six months. How then do you support your contention?

Answer 1. S. 758 contains important incentives for defendants to settle cases with all plaintiffs who have an asbestos-related disease. Once claimants have been granted a certificate of medical eligibility, a presumption of correctness attaches to that finding which defendants can overcome only with clear and convincing evidence. All traditional defenses are waived; the only questions that need to be answered in an asbestos case will be medical eligibility, individual causation, and damages. Defendants will be required to make good-faith offers during mediation sponsored by the Asbestos Resolution Corporation or face significant financial penalties. And it is to be expected that most major defendants will have futures agreements providing for routine settlement of medically eligible claims even before a mediator is appointed. It is therefore likely that the vast majority of claimants will be ensured full recovery very shortly after the medical review process is over.

Indeed, there are important reasons to believe that plaintiffs will be more likely to receive full and prompt compensation under the legislation than under the *Georgine* class action on which it was based (which is sometimes said to have offered greater guarantees of compensation than S. 758). In *Georgine,* plaintiffs agreed to a $1 billion cap on defendants' liability, and they also agreed to yearly caps on the amount of money that would be paid in any given year. There are no such caps in this bill, and for that reason, plaintiffs are ensured full and prompt compensation. In addition, while *Georgine* set settlement ranges (which were criticized as too low), the legislation would allow for full tort recoveries and would constantly adjust settlement values to maintain an equilibrium with the results of arbitrations and trials and with actual settlement experience.

Question 2. In your testimony, you argue that defendants are forced to settle claims as a result of judicial pressure and the trial court system. You cite the *Cosey* case as support but admit that "the defendants rushed to settle before the jury could return a verdict on punitive damages." Isn't the real pressure then emanating from the threat of large verdicts rather than from judges?

Answer 2. The pressure in the *Cosey* litigation was a function of case consolidation, not of the ordinary jury system. In desperation over the caseload pressure, and the inaction of Congress, many state courts have turned to consolidation in order to attempt to clear the docket. Unfortunately, consolidations do, not work. What generally happens is that thousands of claims will be consolidated in one courtroom. Consolidation is designed to make sure that none of the cases are even actually tried or that only a handful are tried. Attorneys generally have control over which cases will be tried first, and will pick their strongest claims in order to put maximum pressure on the defendants to settle.

Although the defendants may wish to settle these particularly strong claims, the plaintiff's attorneys will not allow the defendants to settle only those claims, but insist on settlement for all of the thousands of cases that have been consolidated, many of which involve claims without any impairment whatsoever. I described this in my written testimony. When the tactic works, unimpaired claimants receive substantial settlements, and this encourages a further waive of filings which prompts judges to ask for further consolidations in order to clear the docket.

I strongly support our jury system. When thousands of cases are improperly joined before one jury, however, and plaintiffs' attorneys are given a free hand in determining which cases are going to be tried as allegedly representative of the whole, it is not surprising that the attorneys will select the most dramatic cases for trial, to put severe pressure on defendants to settle the remaining cases. If defendants choose to go to verdict, the stakes are raised to intolerable levels, because the risk of a punishing award is magnified thousands of times. This is simply inconsistent with basic fairness.

Question 3. S. 758 would take away any current remedy for persons with asbestos-related physical changes, but without current functional impairment. The rationale for excluding all currently available state remedies, including funding for medical monitoring, is that funding must be conserved to pay those with greater impairments. This implies that there are limited funds available and that future bankruptcies among asbestos defendants are likely under the current system. What evidence do you have that future bankruptcies are likely to occur (as opposed to the bankruptcies of the 1980s)? In particular, are you aware of any asbestos company's 10(K) filings with the Securities and Exchange Commission that indicate their asbestos liabilities are out of control and threaten the companies' existence or future business plans? if defendants are not making this disclosure, upon what do you base your bankruptcy and its attendant limited funds argument?

Answer 3. After the bankruptcy of well over 20 major defendants, the threat that the limited assets available to compensate asbestos victims will run out before all victims of serious injury can be compensated cannot be doubted. Just two weeks

ago, a small manufacturer in Rutland, Vermont was the latest victim of the asbestos litigation problem. This company had been in the same family for five generations. It made an asbestos-containing product for wood stoves, which brought in about $1,000,000 per year. The weight of 33,000 asbestos claims, however, dragged it under. This is unconscionable. Nor is the experience of the Vermont unique. Over 25 percent of asbestos-related bankruptcies have occurred in the 1990s, including such defendants as Keene, Celotex, and National Gypsum.

These bankruptcies have had a serious impact on the ability of asbestos victims to receive full and prompt compensation. When Johns Manville went bankrupt in 1982—without, I might add, giving warning of its impending bankruptcy in its Form 10K—many asbestos claimants were left without recourse. Historically, Johns Manville was the largest manufacturer of asbestos products and, by some estimates, was responsible for about 40–50 percent of the liability. Today, the Johns Manville Trust, which is responsible for claims against Manville, pays claims at 10 cents on the dollar.

Apart from bankruptcies, there can be no doubt that resources for compensating asbestos victims are not unlimited. Workers, families and the communities that depend on today's asbestos defendants, cannot make needed investments in their businesses, create jobs, or invest in research and development if they remain burdened by a crushing caseload of asbestos claims. The legislation takes the public policy position that the resources of asbestos defendants should be focused on compensating those who have become sick because of exposure to their asbestos products. This reflects in appropriate balance of social priorities.

RESPONSES OF CONRAD MALLETT TO QUESTIONS FROM SENATOR THURMOND

Question 1. How do you respond to Mr. Middleton's contention that "S. 758 would negatively impact and, in many cases, overturn the various state laws that have induced settlements * * * [and that] [t]he bill's restrictive medical criteria would eliminate compensation for thousands of cases that are presently compensable under, state laws?"

Answer 1. I am not sure what Mr. Middleton meant by the "various state laws that have induced settlements." I assume, however, that he was referring to mass consolidations and the threat of punitive damages, which together raise the stakes of trial to the point where defendants have no choice but to settle, whether a case is meritorious or not. This sort of coercion is effective at inducing settlements, without a doubt. But the cost is a sacrifice of impartial justice in each case, and to high diversion of scarce resources to payments for the unimpaired and transaction costs, including high contingency fees. As a former judge, I consider this distortion of the judicial system to be one of the more significant problems of asbestos litigation.

The proposed legislation has its own incentives for defendants to settle, and I have described these incentives at length in my answer to Senator Grassley's first question. Suffice it to say that I am convinced that a reasonable level of settlements will be achieved under the program established by S. 758, without the need for coercive measures that have already undermined the administration of justice in the interest of clearing overwhelmed court dockets, and that these settlements will be focused on providing compensation to the sick.

Let me turn now to the second part of the question—whether the bill would eliminate claims that are compensable under state law. In most states today (Pennsylvania being a notable exception), a plaintiff can get to a jury by showing a legal "injury," which is not the same as what most laymen understand to be an injury. Pleural plaques, which are an indicator of asbestos exposure and which themselves do not cause breathing impairment or increase the risk of future disease, normally count as a technical injury for this purpose. Since plaques are common in individuals exposed to asbestos, this means that hundreds of thousands of people can bring suit even though they do not have cancer or any other functional impairment. Plaintiffs' lawyers actively solicit such people through mass screening programs and flood the courts with claims on their behalf.

That's the problem.

The solution proposed by S. 758 is to establish medical criteria that require impairment by an asbestos-related disease as a precondition for recovery. The medical criteria contained in S. 758 were carefully negotiated between lawyers for plaintiffs and defendants, were endorsed by leading members of the plaintiff's bar, and by organized labor. A federal district court held exhaustive hearings on the fairness of the medical criteria and rejected all of the arguments that were proffered by those who objected to the settlement. The federal district judge found that the medical criteria were fair and reasonable, and that, supplemented by the exceptional medical

claim's panel, would not exclude any plaintiff who is deserving of compensation. That finding was never questioned on appeal.

Question 2. Mr. Middleton contends that "[t]he courts are well equipped to handle the pending and future asbestos cases that will require trial [and that] [a] litigation crisis, as that term is usually understood, does not exist." Based on your experience as a judge, do you agree?

Answer 2. The numerous federal and state courts who have had occasion to comment on the asbestos litigation situation emphatically disagree with Mr. Middleton's opinion of the problem. Just this summer, the Supreme Court again described the seriousness of the asbestos litigation problem, and stated that only Congress could solve it.

In my experience in Michigan, the asbestos litigation problem resulted not from trials, but from the tremendous judicial resources that had to be spent on managing hundreds of thousands of cases through the pre-trial stage. These resources require judges to manage a process involving depositions, expert reports, and other aspects of our costly litigation system. After these substantial judicial resources have been spent on the cases, the cases do generally settle, but only on the eve of trial.

Indeed, I would venture to say that probably 99 percent of the cases settle. In my written statement, I described how this settlement rate is a symptom of the problem. It is *not* an indication that there is no problem. The extremely high settlement rate is a result of a system which has given up on handling cases on an individual basis, and instead prefers to encourage batch settlements which exacerbate the problem of diverting the resources of the defendants away from providing compensation for the sick and towards providing compensation for for the unimpaired.

This is nothing new. Mr. Middleton agrees that during the 1980s, asbestos litigation was creating serious problems for federal and state courts, but says that the problem is no longer as serious—as evidenced by the fact that there were only 55 trials in the United States in 1998 that proceeded to verdict. An examination of the RAND Corporation studies shows that this rate of 55 trials in a year is very similar to the rate of trials that occurred in the 1980s when Mr. Middleton says there was a problem. Most asbestos cases have always settled, but the existence of well over 200,000 cases pending on federal and state court dockets has nevertheless resulted in enormous problems in the state and federal judiciaries, problems that are only getting worse.

Question 3. How widespread in your opinion is the phenomenon of juries awarding extraordinary verdicts for asymptomatic plaintiffs? Why do you think this is happening?

Answer 3. I am a strong believer in the jury system, and I believe that the award of extraordinary verdicts for plaintiffs with little or no impairment is not a result of any failing of the jury system per se, but instead occurs because of the dynamics of case consolidation. Plaintiff's lawyers understand that sensible juries will not award extraordinary damages to plaintiffs who have very little visible signs of disease. Instead, they seek to package these plaintiffs with other, more sympathetic plaintiffs who have serious illness.

Professor Eskridge of Yale Law School has provided a thoughtful analysis of why this may be happening in a statement that was submitted to the House Judiciary Committee.[3] He describes how this dynamic creates a situation in which the unimpaired receive sizeable awards, awards that are much larger than the awards they would receive if their cases were tried alone. He notes two reasons, among others. First, both judges and juries have a difficult time in separating out the cases of more than just a very few plaintiffs and treating them each individually. Because the plaintiffs with serious injury have very dramatic stories to tell, it becomes difficult to separate their cases from the cases of those plaintiffs who do not suffer serious injury. Secondly, juries inevitably begin to assume—wrongly—that those plaintiffs who do not suffer serious injury will inevitably get sick. In fact, the vast majority of asymptomatic plaintiffs will never become sick.

That said, the *number* of cases in which extraordinary damages were awarded to unimpaired claimants is comparatively small, because most cases settle. In the *Cosey* litigation, at least two plaintiffs were awarded between $2.5 and despite the lack of any impairment. In the Carborundum case, a Texas jury awarded $15.6 million in compensatory damages, and $100 million in punitive damages, to a group of twenty-one plaintiffs whose disease ranged from mild asbestosis to admittedly asymptomatic conditions. The *risk* of a hung verdict in the asbestos litigation lot-

[3] *See* Jumbo Consolidations in Asbestos Litigation: Prepared Statement by Prof. William N. Eskridge, Jr., Yale Law School, at a Hearing before the House Committee on the Judiciary, July 1, 1999, available at *http://www.house.gov/judiciary/eskr0701htm*.

tery, multiplied by a mass consolidation, drives defendants to make substantial payments to the unimpaired in mass settlements.

Question 4. Do you believe that the drive to enact legislation such as S. 758 reflects a consensus among jurists, scholars, and practitioners that the judicial system is no longer capable of making a meaningful distinction between sick and non-sick asbestos claimants?

Answer 4. I do believe that the momentum which S. 758 has gained in this Congress is in part because of the consensus judges, and lawyers that one of the most serious problems in asbestos litigation today is the inability of the system to make a meaningful distinction between those who are sick from asbestos-related disease, and those who are not. All three law professors who testified in the third panel, Professor Green, Professor Nagaretta, and Dean Verkuil, agreed that of the most serious problems of asbestos litigation today. John Hiatt, who testified on behalf of the AFL–CIO and legislation, nevertheless agreed that the inability to make distinctions between the impaired and the unimpaired was a significant problem. Supreme Court Justice Stephen Breyer has commented that perhaps half of all asbestos claims physical impairment. There is no real debate among impartial scholars, judges, and lawyers that this is one of the principle problems with asbestos litigation today.

Question 5. Please compare the actual benefits to both the impaired and unimpaired claimants that are offered by the settlements that the Association of Trial Lawyers of America advocates and the system that S. 758 would establish.

Answer 5. I believe that both the impaired and the unimpaired claimants that are offered by the private settlement deals that the Association of Trail Lawyers of America (ATLA) has advocated as an alternative to the legislation.

For the impaired, there can be no doubt that the system established by the legislation is far superior. The system allows an impaired claimant to proceed swiftly through a medical review process. Following that, the claimant is able to force the defendants to mediation and require that they make good-faith offers. If those offers turn out to be significantly lower than the amount the plaintiff can obtain either in arbitration under the auspices of the Asbestos Resolution Corporation suit and obtaining a jury trial, the defendant face penalties. Because of this, defendants will be required to offer realistic settlement figures to the plaintiff at an early stage in the process.

The private deals advocated by ATLA are not an improvement on this system. Under such private deals, the current clients of a plaintiffs' lawyer nearly always receives a better settlement than future claimants (who generally have not yet walked into the lawyer's office). There is a fundamental problem of fairness here. Moreover, with regard to future claimants, the agreements are premised upon keeping experienced plaintiffs' attorneys from representing claimants who do not like the settlement agreements, a lawyer who has entered into a private deal would tell future claimants that they have two choices: they can accept the offer of the defendant under the private settlement deal or find another lawyer. If it is easy to find another lawyer, the private settlement will not work. If it is hard, the plaintiff's "choice" is illusory.

It is also important to realize that a plaintiff who settles with a defendant such as Owens Corning has not finally settled his case—there are dozens more defendants with which to settle. Where (as has been the case with Owens Corning) there have been concerns about the ability of the defendant to continue paying the flood of asbestos claims while maintaining its financial health, it may make sense to settle for a relatively low value and attempt to make up the difference through recoveries from, or setlements with, other defendants. Thus, a global settlement with one company may make it that much harder to enter into similar settlements with other defendants.

The Coalition believes that S. 758 is not inconsistent with appropriate private settlements. It establishes a framework—an authoritative medical eligibility process, elimination of the statute of limitations, extensive waiver of defenses, and provision of an administrative process that can cut down on delays—within which private agreements would be encouraged. The issue in short, is not whether we should have a government program or private settlements, but rather what kind of government program will best encourage private settlements that are fair and appropriate.

The unimpaired will also benefit from the legislation as compared with the alternative private arrangements espoused by ATLA. As soon as the legislation is enacted, the statute of limitations will be abolished for all asbestos claims that are not barred by the date of enactment. On the other hand, in the Owens-Corning agreement, for example, plaintiffs who proceed in the Owens-Corning system will have the statute of limitations tolled only after they sign up with the system.

To be sure, some of the private settlement arrangements that have been proposed involve some nominal compensation to the unimpaired. When the unimpaired receives such compensation, however, they are binding themselves to the settlement values that are contained in the agreements, and cannot obtain full compensation for their injuries. In the legislation, claimants who are unimpaired will receive full compensatory value for their claims when and if they ever become sick.

Question 6. Do you believe that S. 758 will present any federalism or Tenth Amendment problems?

Answer 6. The state supreme courts have recognized that Congress must act to solve the asbestos litigation crisis. Congress must act because any solution must be uniform, and such a solution can only be accomplished by Congress. National legislation does, of course, imply some preemption of state law. Congress has ample authority under the Commerce Clause to make the modifications to state law that are contained in S. 758 in order to solve the asbestos litigation crisis.

In his written statement, Dean Paul Verkuil of the Cardozo School of Law provides a careful analysis of recent decisions which upheld the sovereignty of the state federal intrusion. I agree with Dean Verkuil's analysis of the legislation, and I believe that by preserving access to state courts for all impaired claimants, the legislation balanced to make only those changes to state tort law that are strictly necessary to solve the asbestos litigation. Instead of preempting state tort law altogether, and establishing a completely federalized system, S. 758 works carefully with our existing state court systems to address those problems which the state courts have faced, and yet still preserve access to those courts for all impaired claimants who choose to file their claims in the state court. This is consistent with my philosophy as a defender of our state court systems.

RESPONSES OF MICHAEL D. GREEN TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. Professor Green, you indicate that because of its adversarial nature, S. 758 creates a procedurally complicated system where representation by counsel is almost essential. You state that these costs could be minimized by a "simpler, less adversarial, compensation system." Do you have any specific suggestions that could improve the current process in the bill?

Answer 1. Specific suggestions for simplifying the process so as to reduce administrative costs include:

(1) Preparing a schedule for damages based on simple, objectively
(2) Jettisoning the requirement that claimant prove which asbestos products he or she was exposed to. This means a global resolution of the asbestos industry's contribution to the compensation scheme.

In general, the fewer, simpler, and more objective the criteria for recovery, the more efficient, inexpensive, and speedy the process will be.

Question 2. Thousands of plaintiffs have already entered the legal system with stages in the process. What should happen to those claims in the event an administrative program is adopted? Do you think that S. 758 should apply only prospectively and allow existing claims to proceed through the courts, should there be an option for claimants to either continue with their present claims or chose to enter the program, or should they all have to participate in this program?

Answer 2. One of the major problems that S. 758 addresses is the proliferation of nonimpairment cases. The bill requires those with abnormal impairment to wait until they suffer from clinical symptoms. To exempt all of the cases that are currently filed from this provision of S. 758 would be unfortunate. On the other hand, if there are plaintiffs with serious disease who are close to trial, requiring them to start anew with the process set forth in S. 758would be most unfair. At the same time, barring those plaintiffs from recovering punitive damages (as the Bill does) would further the goal of making sure that the available resources are used to compensate all who suffer asbestotic disease. Overall, my preference would be to presume that all current cases would be subject to the Bill, but with appropriate exceptions for cases that are well advanced and involve serious diseases.

Question 3. Some have criticized S. 758 because they say that it forces claimants into a program in which they may not want to participate. Do you believe that this is a problem? What are your thoughts on including an "opt out" provision or allowing participation on a voluntary basis?

Answer 3. This statute must be mandatory for claimants. Overall, this statute will benefit all real asbestos victims by maximizing industry resources and ensuring that those resources are used to compensate the most seriously impaired victims. If the

Bill provides a voluntary scheme, all those with abnormal chest x-rays but no impairment will opt out of the statutory scheme and file suit. Similarly, those with good prospects for a punitive damages claim would choose to go to court. In short, claimants will play their options strategically, which would result in the best cases being filed in court and the worst cases opting into the Bill's process. This would virtually gut the effectiveness of the Bill.

RESPONSES OF MICHAEL D. GREEN TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. One of the principal obstacles to the establishment of a fund is the argument that a corporation's insurance may not cover the cost of contribution. Is there a way to structure a fund so that insurance companies would continue to be liable?

Answer 1. I believe there is. The standard CGL insurance policy provides coverage for "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage." This language does not require tort liability. Courts have held that this language encompasses liability imposed by the Comprehensive Environmental Response, Compensation and Liability Act CERCLA"),[1] I a federal statute imposing liability on those who generated, transported, or disposed of hazardous waste. In addition, liability insurers contributed to obligations of asbestos defendants who participated in the Wellington Agreement, in which global apportionment of each participating defendant was employed. And courts ruled that a decision to participate in the Wellington process was a reasonable mechanism for resolving liability for which insurers were obligated to provide coverage.[2]

Perhaps more importantly, establishing a compensation fund and resolving each defendants' liability on a global basis will save a substantial amount of money that would otherwise be paid as costs of defending these suits. In addition, some states permit insurance coverage of punitive damages, which the Bill would end. These savings would redound to the benefit of insurers, which, after all, are concerned with costs and profits. This Bill should be very attractive to liability insurers. Indeed, I would venture the forecast that if participation in the administrative scheme were made voluntary for asbestos defendants and their insurers, with the option to participate or remain governed by current law, we would see a massive movement toward participation in the direction of the scheme set up in the Bill.

Question 2. In your testimony, you state that "asbestos cases take considerably longer to resolve than other civil cases." Could the long delays be due in part to the inactive docket system alluded to in Mr. Middleton's testimony? If not, please explain the cause for delays.

Answer 2. First, I should disclaim having any empirical evidence on the length of time required to resolve asbestos cases. My impression is that they tend to take longer to resolve, and I believe that the Hearings held before this Subcommittee and the House Judiciary Committee bear that out. Surely one reason for the delay could be the inactive docket devices that some jurisdictions have adopted, although that would depend on whether the study measuring time-to-resolution included those inactive docket cases. Another reason is that most asbestos defendants are not anxious to settle cases and pay claimants until they are absolutely required to do so, which often is on the courthouse steps on the way to trial. Because, historically, asbestos cases tended to congregate in a few jurisdictions, they overwhelmed those courts and created long waiting lines for trial dates. Many asbestos plaintiffs in the Eastern District of Texas agreed to a variety of unusual procedures that were employed by Judge Robert Parker, because without such extraordinary efforts their cases would take many years or decades before called for trial.

Question 3. You testified that one of the primary goals of any legislative solution to the asbestos problem is to expedite the compensation process. Do you believe that the proposed system will expedite compensation to victims? If not, what suggestions would you give for streamlining the process?

Answer 3. It is very difficult to tell if the Bill's provisions for alternative dispute resolution (mediation and arbitration) will expedite resolution of claims. To a large extent, the answer to this inquiry depends on whether asbestos defendants participate in a good faith effort to resolve claims promptly. To they extent that they do, claims resolution could be accelerated. On the other hand, if one or more defendants

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[1] 42 U.S.C. §§ 9601–75 (1997), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 100 Stat. 1613.

[2] *See Stonewall Insurance Co.* v. *National Gypsum Co.,* No. 86 Civ. 9671 [JSM] (S.D.N.Y. Dec. 22,1993)

decide that it is in their interest to delay payment for as long as possible, the Bill could actually build in further delay by requiring claimants to go through mediation before being able to assert their claims in court. I am also concerned about the provisions in the Bill that require apportionment of liability among multiple defendants on the basis of comparative fault. This requirement, which could delay resolution of the claim, will apparently exist whether a claim is resolved in mediation, arbitration, or in a lawsuit.

For my suggestions for streamlining the process, please see my answers to Senator Grassley's first supplemental question.

Question 4. In your testimony, you attack the proposed system as overly adversarial and as retaining too many "tort-like" elements. How could the system be altered to remove these elements while still protecting a defendant's legitimate interest in compensating only those it has harmed?

Answer 4. I would resist the premise of this question that a defendant has a legitimate interest in compensating only those it has harmed significant interest is that they not be required to pay more than they would be required to pay under the current system. The more administratively efficient the process in this Bill, the more that defendants will ultimately save over what they would be required to pay if left to the common law tort system. Numerous major asbestos defendants voluntarily joined the Wellington Agreement which, decoupled defendants' payments from those injured by each defendant's asbestos products. They joined the Wellington Agreement because they anticipated they would save money from the joint defense to be employed under different premises from tort law. Thus, the National Childhood Vaccine Injury Act [3] was enacted by Congress, and is funded by an excise tax on each dose of vaccine sold. There is no causal connection between payments by vaccine manufacturers and compensation to child victims. We should not impose tort principles—which often are modified by exigencies of particular cases [4]—on compensation schemes.

RESPONSES OF RICHARD MIDDLETON TO QUESTIONS FROM SENATOR THURMOND

Question 1. Your prepared testimony states that S. 758's "restrictive medical criteria would eliminate compensation for thousands of cases that are presently compensable under state laws." Is this because there are statutes or reported judicial decisions that hold that non-sick plaintiffs are entitled to compensation? If so, please provide appropriate citations.

Answer 1. Virtually every state court decision dealing with the issue of the appropriateness of permitting an award of damages to victims of asbestos-related diseases follows established principles of common law tort doctrine requiring that there must first be evidence of "bodily harm" or "physical injury" before a damage award is permitted. The American Law Institute's Restatement of the Law of Torts, 3rd, states that "bodily harm" is an essential element of a cause of action under Section 402A, which governs product liability actions. Section 15 of the Restatement defines bodily harm as "* * * any physical impairment of the condition of another's body, or physical pain or illness." See, e.g., *Verbryke* v. *Owens-Corning, Fiberglas Corp.*, 616 N.E.2d 1162 (Ohio App. 1992).

To be sure, individuals whose lungs have been scarred by asbestos high risk of developing cancer (at least 3 times increased risk) have suffered bodily harm. Hillerdal, a Swedish researcher, recently stated that "persons with pleural plaques have increased risk of mesothelioma, cancer of the bronchi and the gastrointestinal tract pulmonary fibrosis." Hillerdal, *Pleural Plaques and Risk for Bronchial Carcinoma Mesothelioma,* 105 Chest 144 (1994). And numerous researchers have concluded that individuals "with pleural thickening appear to have more shortness of breath * * * and more dyspnea with major activities such as walking up a steep hill or climbing two flights of stairs." Bourbeau, *The Relationship Between Respiratory Impairment and Asbestos-Related Pleural Abnormality in an Active Work Force,* 142 Am. Rev. Respir. Dis. 837 (1990).

Yet the medical criteria of S. 758 requires significant pulmonary function deficits to be present before victims of asbestos disease may be compensated. Most, if not all claimants with pleural disease and even a majority of those with full blown asbestosis will be excluded from compensation under the Bill because of the application of standards that were meant to measure, for medical treatment purposes, such

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[3] 42 U.S.C. §§ 300aa-33 et seq. (1997).

[4] *See, e.g, Hymowitz* v. *Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989) (adopting a "market share" theory of liability for DES victims that ensured that defendants would pay to compensate those that they did not harm).

things as oxygen exchange propensities and lung volumes rather subjective signs of illness and injury. Indeed, many researchers have concluded that even an attempted use of pulmonary function tests to measure impairment in victims of asbestos-related disease is inappropriate. See, Barnhart, *Total Lung Capacity, an Insensitive Measure of Impairment in Patients with Asbestosis and Chronic Obstructive Pulmonary Disease,* 93 Chest 299 (1988).

Question 2. If, as your prepared testimony states, "[l]iability of the defendant companies is no longer seriously disputed," why is it still necessary to limit asbestos claimants to seeking compensation from a system under which 60 cents of every dollar spent is consumed by transaction costs and attorney's fee?

Answer 2. The basic premise of this question, that "60 cents on every dollar spent [on asbestos cases] is consumed by transactions costs and attorneys' fees," is a fiction. The genesis of this oft-used quote is a report published in 1985 by the Rand Institute, which studied asbestos litigation during the years 1981 through 1983. Eighteen years ago, when the liability of the asbestos industry was being seriously disputed, the cost of prosecuting an individual asbestos-related claim was high. And it's true that in 1983, a relatively large percentage of the cases were tried to verdict, and were expensive. Things have changed considerably in the past 18 years. In 1998, only 55 cases were tried to verdict in all state and federal courts and over 25,000 were settled. Although no accurate statistics are kept, information available from anecdotal evidence would support the proposition that the cost of asbestos litigation, when spread among the population of resolved cases, is typically far less per case than in other types of civil litigation and certainly it is significantly less than the number reported by Rand in 1985.

It is particularly disturbing to us that the proponents of this legislation are even raising this issue, since transaction costs and attorney's fees in asbestos litigation have been generated primarily by defendants not claimants. Even when the costs were as high as those cited in the Rand report, it was because defendants insisted upon raising false defenses, delaying discovery, seeking to withhold documents, and forcing claimants to relitigate settled issues. Moreover, at the same time, asbestos defendants were extensively litigating coverage disputes with their insurers, further elevating transaction costs and generating additional legal fees—for defense and insurance attorneys, not for plaintiffs' lawyers. It seems to us unconscionable for the proponents of S. 758 to now come before Congress and hide behind the transaction cost issue as justification for taking away the rights of claimants.

RESPONSE OF RICHARD MIDDLETON TO A QUESTION FROM SENATOR FEINGOLD

Question 1. Mr. Edley testified that there are 200,000 pending claims and a heightened pace of new filings. During your testimony, you stated that in most jurisdictions cases of persons with no functional impairment are put on an inactive docket and therefore require no court resources. How many of the 200,000 pending claims are on these inactive dockets? To what do you attribute the heightened pace of new filings? How are the claims of those with no functional impairment handled in those jurisdictions that have not adopted an inactive docket system?

Answer 1. To begin with, a serious question can be raised about the accuracy of Mr. Edley's assertion that there are 200,000 pending asbestos-injury claims. Although no empirical data is available from any source on the total number of cases that are currently pending in both the state and federal courts, annual reports of many companies who are traditionally named as defendants in asbestos cases would indicate that the number of open, pending cases may be far less than half of Mr. Edley's number. Owens-Illinois, for instance, a company that is often sued for asbestos-related injuries, reports that less than 25,000 cases are currently pending. Other often sued companies report less than 50,000 pending cases. At a minimum, some inquiry should be made by Congress to determine this fundamental information before an attempt is made to fashion any remedy of perceived problems.

Similarly, no exact statistics are available as to how many jurisdictions have adopted "inactive" dockets and how many cases are pending on such dockets. Anecdotal reports to ATLA would indicate that in both jurisdictions where "inactive" dockets are available and in others where they are not, statute of limitations tolling agreements have been entered into by litigants, on a private, consensual basis, which encompass a reasonably large number of cases. Again, however, it would be pure speculation to attempt to quantify this data.

As to the alleged "heightened pace" of new filings, this would appear to be inaccurate information. The Manville Trust, which handles asbestos-injury claims filed against the Johns-Manville Company, the largest of the asbestos products manufacturers, recently reported that between July 1, 1998 and June 30, 1999 a total of

25,574 claims for compensation were filed against the Trust. This number represents a significant reduction from the previous period and throws into question the accuracy of the assertion that claims are being filed at an increased rate.

Finally, as mentioned above, many claims are placed into an "inactive" status by voluntary tolling agreements that are routinely entered into by the parties to asbestos litigation. Although all jurisdictions require that an "injury" be sustained before a compensable claim may be pursued for individual damages, most states permit tort damages for asbestos-injuries even if they do not produce incapacity. As the medical literature uniformly states, even pleural thickening without accompanying loss of earning capacity is an "injury" and subjects a victim to maladies such as chest pain, shortness of breath, cough and, most assuredly, a significantly increased risk of developing cancer. See, e.g., *Rosenstock, Roentgenographic Manifestations and Pulmonary Effects of Asbestos-Induced Pleural Thickening,* 7 Toxicology and Industrial Health 81 (1991).

RESPONSES OF DEAN PAUL R. VERKUIL TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. Thousands of plaintiffs have already entered the legal system with claims at varying stages in the process. What should happen to those claims in the event any administrative system is adopted? Do you think that S. 758 should apply only prospectively and allow existing claims to proceed through the courts, should there be an option for claimants to either continue with their present claims or choose to enter the program, or should they all have to participate in this program?

Answer 1. S. 758 addresses the tremendous problems that have already been caused by over 200,000 pending asbestos claims, most of which have been filed on behalf of claimants who have only so-called pleural plaques, which do not lead to any breathing impairment or increased risk of cancer. These are the cases that the Supreme Court called an "elephantine mass which defies customary judicial administration." Asbestos litigation is not a wreck that is waiting to happen, but one that has already occurred. S. 758 would be ineffective if it ignored the more than 200,000 cases that have already been filed.

S. 758 would change the legal landscape immediately for all pending cases. Thus, new rules of law established by the statute would be applicable right away:

- the statutory medical criteria,
- the elimination of the statute of limitations and the imposition of absolute liability,
- the guarantee of "come-back" rights if asbestosis victims later contract cancer,
- the elimination of punitive damages, and
- limits on consolidations.

The plaintiffs in pending cases would not, however, be required to obtain a certificate of medical eligibility from the ARC until the ARC is in operation. Cases could go to trial before that time under the new rules without the certificate, in which case the medical criteria would be applied by the court.

It seems to me that this is an appropriate balance. The new rules established by the bill should generally be applied to pending cases. The legislation would be ineffective if the medical criteria were applied prospectively. Moreover, on balance the package of legal reforms in the bill are favorable to claimants with cancer or impairing non-malignant disease, and those individuals should obtain the benefit of the new rules as soon as possible. I recognize, of course, that there will be a few cases which are already in trial or possibly on appeal when the bill is enacted. There is a reasonable argument against changing the legal rules applicable to such cases. Grandfathering these cases would not seriously undermine the effectiveness of the bill, since, as other witnesses point out, very few asbestos cases are actually tried each year.

Question 2. Some have criticized S. 758 because they say that it forces claimants into a program in which they may not want to participate. Is this a problem? What are your thoughts on including an "opt out "provision or allowing participation on a voluntary basis?

Answer 2. A provision that allows claimants to opt out of the medical critiera would completely undermine the basic purpose of the legislation. If the medical criteria were made voluntary, the sick would participate in the program, while the unimpaired would still flock to the courts, as they do now. Judicial overload and the diversion of the resources of defendants would continue unabated, at the expense of the people who are impaired by their exposure to asbestos.

Right now both the courts and the limited resources of defendants are being overwhelmed by a flood of claims by the unimpaired. This is a major source of the prob-

lems with asbestos litigation today which have so far eluded customary judicial administration, according to most who have studied the problem, including Professor Edley, Professor Green and Professor Nagareda who testified at the hearing. I agree with my colleagues on this point.

According to studies and judicial decisions, at least 50 percent (and possibly many more) of the current claimants are not impaired by any asbestos-related disease. These cases involving unimpaired claimants are creating what the Supreme Court termed an "elephantine mass" of asbestos claims flooding state and federal court dockets. More troubling, as the Judicial Conference observed several years ago, diverting the resources of defendants to paying hundreds of thousands of claims by the unimpaired threatens defendants ability to pay seriously ill people in the future.

The main contribution this bill makes to resolving the asbestos litigation crisis is focusing the resources of the defendant companies on those who are impaired by asbestos-related disease, instead of on those who have been exposed but are not now sick. This fundamental purpose cannot be achieved without requiring the unimpaired to defer their claims.

Question 3. Some have criticized the bill on Tenth Amendment grounds. What would be the effect if this legislation only operated at the federal level?

Answer 3. Applying the legislation only to cases filed in federal court would eviscerate its effectiveness. The vast majority of the over 200,000 asbestos cases pending today are in state courts. Because the litigation is mobile, and litigation in each state affects the viability of defendants in all states, only a uniform, national solution to the problem could effectively ensure a policy of focusing defendants' resources on the sick, reducing transaction costs, and solving the other problems that the legislation addresses. A solution that applies only at the federal level would leave the great bulk of the litigation in the same state it is today.

In *W.R. Grace & Co.* v. *Waters,* 638 So.2d 502 (1994), the Florida Supreme Court noted:

> Any realistic solution to the problems caused by the asbestos litigation in the United States must be applicable to all fifty states. It is our belief that such a uniform solution can only be effected by federal legislation. *Id.* at 505.

Other state supreme courts have made the same observation. The Supreme Court of West Virginia notes that Congress's inaction has forced the state systems to cope with the crisis on their own.

> Congress, by not creating any legislative solution to these problems, has effectively forced the courts to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active dockets.* * * [T]hese efforts have failed to expedite a substantial fraction of the caseload. Nor do they appear to have brought about significant reduction in transaction costs.'" *State ex rel. Appalachian Power Co.* v. *MacQueen,* 479 S.E.2d 300, 304 & n.8 (1996).

Likewise, the Supreme Court has said that the asbestos litigation problem requires "national legislation." National legislation presupposes at least some preemption of state law.

In my written testimony, I addressed in depth the Tenth Amendment issues that relate to this legislation. I concluded that the legislation did not present any serious Tenth Amendment concerns. Rather, I believe that the legislation was drafted with attention to the sovereignty of the states and their systems by moving incrementally to make only those reforms that are necessary to alleviate the asbestos litigation crisis.

Question 4. Does S. 758 provide the necessary incentives or dis-incentives for plaintiffs and defendants to resolve their claims promptly in the first stages of the Asbestos Resolution Corporation and without proceeding to litigation? For example, Owens Corning argues that there are no set settlement values or payment schedules which would encourage plaintiffs to forgo court action and enter into settlements with asbestos defendants. Owens Corning proposes that tax incentives might be incorporated to encourage defendants to settle, while Professor Green suggests that penalties might encourage the early resolution of claims. What incentives or dis-incentives do you think might be appropriate to incorporate into this legislation to encourage prompt settlement of claims?

Answer 4. I believe that S. 758 does provide appropriate incentives for early settlement. For plaintiffs, of course, early settlement should mean early compensation. A settlement schedule mandated by the legislation should not be necessary to en-

courage plaintiffs to settle. In practice, many defendants will have voluntary futures agreements with plaintiffs' lawyers, just as they do now, in order to administer claims efficiently and with a minimum of cost. Those agreements are likely to have either settlement schedules or ranges to promote early settlement and over time these arguments will establish settlement parameters.

From the defendants' perspective, the bill removes a number of current obstacles to settlement. The bill requires disclosure of information necessary to formulate a sensible settlement offer, which now takes place only after discovery, typically on the courthouse steps. In particular, reliable information about the claimant's medical condition will be available early in the process. Second, the bill requires all of the parties to focus on settlement at or before the mediation stage, and by imposing the costs of mediation on defendants, it encourages settlement even before mediation begins. Third, the bill simplifies the issues for litigation, essentially eliminating defenses relating to product defect and the statute of limitations. Defendants will have an increased incentive to settle because the case against them will be stronger. Fourth, the bill eliminates the threat of punitive damages, a wild card that can undermine settlement discussions. And, finally, the bill requires defendants to make good faith offers following mediation and imposes a surcharge on the judgment if their final offer proves to be more than 25 percent short of the mark.

Essentially, S. 758 is designed to create a framework in which all sides have an incentive to settle, and I believe that it does that. I am not familiar with and thus cannot comment upon Owens Corning's proposal for tax incentives to encourage early settlement. I believe that the current set of incentives are sufficient to make S. 758 work.

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF SUSAN K. PINGLETON, M.D., PRESIDENT-ELECT, AMERICAN COLLEGE OF CHEST PHYSICIANS

I am a physician specializing in pulmonary medicine. As my attached *Curriculum Vitae* reflects, I am Professor of Medicine and Director of the Pulmonary and Critical Care Division at the University of Kansas Medical Center. I am the President-Elect of the American College of Chest Physicians. I am also a Fellow in the American College of Chest Physicians and a Fellow in the American College of Physicians. I have taught and practiced in the area of pulmonary medicine for over twenty-five years and am the author of over one hundred publications. During my many years oil practice, I have treated many patients suffering from asbestos related diseases.

I welcome the opportunity to submit to you my written testimony in support of S. 758, the *Fairness in Asbestos Compensation Act of 1999 ("Act").* I support the proposed legislation and, in particular, express my endorsement of the medical criteria contained in the Act.

On a regular basis, I see patients, teach medical students and surgery residents, conduct research and write articles for the scientific literature in the field of chest diseases. Based on this experience, as well as my expertise as reflected in my *Curriculum vitae,* I have reviewed the act, and in particular the medical criteria in the act. It is my firm conclusion that the medical criteria in the act fairly and clearly distinguish between those individuals exposed to asbestos who are truly sick and those who are not. The Act's medical criteria reflect the mainstream of medical thinking and ensure that those truly injured as a result of asbestos will be compensated while at the same time it preserves the rights of those who, in the future, develop asbestos-related diseases. Below, I will discuss the medical criteria and the basis for my conclusion that they are fair.

1. Mesothelioma: Mesothelioma is a relatively rare but essentially universally fatal cancer which is usually associated with a history of asbestos exposure. This cancer arises in the pleura which is the lining of the chest wall or the peritoneum which is the lining of the abdomen. The medical criteria described are designed to—and do—establish the reliability of the diagnosis of mesothelioma.

2. Lung Cancer: Lung cancer has several known causes, the most common of which is cigarette smoking. The purpose of the lung cancer criteria are to be sure that a potential claimant's lung cancer is in fact related to the asbestos exposure, rather than to smoking or some other factor. It is important for this Committee to understand that the majority of epidemiological studies indicate that "asbestosis" is the only risk factor for asbestos-related lung cancer. The majority of these studies indicate that pleural abnormalities by themselves are not associated with an increase in lung cancer. Including these pleural-space criteria in the Act serves to broaden the criteria and increase the number of qualified claimants.

3. "Other" Asbestos-Related Cancers: There is no consensus in the medical community on whether any "other" cancers may be related to asbestos exposure. Considerable evidence exists to suggest that such "other" cancers in fact are not caused by asbestos. Nevertheless, there is a contrary opinion among the minority of the medical community. The criteria included in the category are designed to ensure that the claimant has evidence of sufficient exposure to asbestos to make it reasonable to attribute the "other" cancer at least in part to asbestos exposure.

4. "Non-malignant conditions" The non-malignant conditions criteria are established so that a potential claimant will qualify at the first signs of diminished respiratory capacity due to asbestos exposure. I believe that these criteria fairly described claimants who were exposed to asbestos and have been injured as a result of their non-malignant condition.

As I understand it, the purpose of the Act is to ensure prompt and fair compensation to persons who are suffering from an asbestos-related impairment.

I have reviewed in detail the medical criteria in the Act which relate to each of the four medical categories. Based on my experience as a physician who has treated hundreds of individuals exposed to asbestos, I am confident that these medical criteria are sufficiently inclusive to permit virtually all claimants with asbestos-related impairment to receive compensation. If anything, these criteria are conservative and protective of claimants. The Exceptional Medical Panel created by the Act further provides protection for those claimants who, for some reason, are unable to satisfy the Act's medical criteria can submit their claim to the Exceptional Medical Panel.

As I understand the Act, this Exceptional Medical Panel would review these claims and identify which claimants who, notwithstanding their inability to satisfy the medical criteria, nevertheless could receive compensation for their injures. Thus, even if anyone were to argue that the medical criteria were somehow too exclusive, the Panel provides an additional safety net to ensure that claimants with asbestos-related impairment who fail to satisfy the Act's medical criteria nevertheless will be eligible to receive compensation under the proposed Act.

It is for these reasons that I unreservedly support the *Fairness in Asbestos Compensation Act of 1999.*

[EDITOR'S NOTE: Susan K. Pingleton's Curriculum Vitae is retained in Committee files.]

PREPARED STATEMENT OF LOUIS W. SULLIVAN

Chairman Grassley, Senator Torricelli, members of the Committee, thank you for the opportunity to submit to you my written testimony in support of S. 758, the Fairness in Asbestos Compensation Act of 1999, bi-partisan legislation sponsored by Senator Ashcroft and based on the *Georgine* asbestos-litigation settlement. I support the proposed legislation and applaud your efforts because I believe that Congress has a responsibility to resolve the judicial crisis caused by years of back-logged litigation and to ensure quick, fair, and efficient relief to hundreds of people suffering from asbestos-related illnesses. I hereby state that I personally have not received any federal grant, contract or subcontract in the current or preceding two fiscal years.

S. 758 recognizes the fundamental flaws of a system which has previously defied resolution and, as a remedy, establishes straightforward and sound policy principles. The policy principles incorporated in this legislation are clear:

(1) impaired claimants, those suffering now and those who develop asbestos-related illnesses in the future, must be assured adequate, timely, and fair compensation;
(2) resources for compensating victims should go to those who are impaired, while the claims of those who have no current impairment are deferred until the onset of any impairment;
(3) claimants should be able to bring claims whenever they are sick and not be limited by any state statute of limitations;
(4) defendant companies resources are better spent on compensation than on litigation costs; and (5) claimants should have meaningful access to court as a check on administrative decision making.

CONGRESS MUST ACT

I urge this Committee, and Congress as a whole, to address this important issue. I believe that Congress must accept the responsibility to solve the asbestos settlement crisis and ensure that sick individuals are compensated while they are still living. Indeed, I believe that only Congress has the ability to ensure this resolution.

The legislation under discussion is modeled after a Federal District Court order approving an innovative settlement in a class action suit alleging asbestos-related personal injury (*Georgine* v. *Amchem Products, Inc.*) The U.S. Supreme Court, when considering the appeal of the settlement terms, reversed on procedural and technical grounds, but called for legislative resolution of the asbestos crisis, stating that legally only Congress could create an out-of-court settlement process to help settle these asbestos lawsuits.

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution." (*Georgine* v. *Amchem Products, Inc.*)

This past June, 1999, the Supreme Court (in *Ortiz* v. *Fibreboard*) specifically called for "national legislation" to solve what the Court called the "elephantine mass of asbestos cases * * * which defies customary judiciary administration."

In response, Senator Ashcroft and others have crafted a bill which provides a creative and innovative solution to the asbestos litigation crisis. S. 758 creates a unique administrative mechanism to resolve asbestos claims funded entirely by the asbestos defendants. Claims for asbestos-related injuries should be resolved by administrative rather than judicial means. The claims process established by the bill would be administered by a quasi-governmental corporation whose board of directors would be appointed by the President and confirmed by the Senate. This inven-

tive solution would eliminate lengthy trial proceedings and provide quick relief to individuals suffering from asbestos-related illnesses. The current system and its protracted judicial process has allowed sick individuals to die before they ever get their day in court. Congress must act to speed up the process and to ensure that sick individuals receive fair compensation before it is too late for them.

GENEROUS IMPAIRMENT GUIDELINES

Others testifying or submitting written testimony today, will discuss the medical criteria set forth in the proposed legislation. I understand that Drs. Rosenow, Little, and Shure all of whom are past Presidents of the American College of Chest Physicians, and Dr. Susan Pingleton, President-Elect of the American College of Chest Physicians also have submitted written testimony to the Committee expressing their support for the proposed legislation and specifically discussing the medical criteria which it contains. These medical criteria were originally established in the *Georgine* settlement, agreed to by both the labor organizations and the trial lawyers, and approved by a Federal District Court as fair and reasonable. To ensure a fair system under the proposed settlement process, a distinction must be drawn between people who are impaired and those who are not impaired. Claims should be judged based upon the recognized medical criteria patterned after those agreed to by all sides in the *Georgine* settlement. I believe that these criteria provide an objective, workable, and equitable solution to get compensation to people who are actually sick now.

Further, the "impairment lines" drawn by the legislation are generous to claimants and are designed to ensure that no individual suffering from asbestos-related impairment be excluded from compensation. Most administrative compensation programs are dependent upon disability—a far more restrictive concept—and use compensation schedules that do not reflect intangibles like pain and suffering. As Secretary of the Department of Health and Human Services, I was responsible for many programs that involved determining medical eligibility for certain remedies, and I believe that this bill sets forth a workable concept to ensure fair compensation.

Finally, the original *Georgine* settlement proposal included a rigid compensation schedule which was subject to caps and other limits. The settlement ranges provided were some of the most highly criticized aspects of the settlement and resulted in complaints that the compensation levels were inadequate. S. 758 does not include such limitations on claims and will likely promote faster settlements through mediation without imposing caps on injured individuals' potential compensation.

STATUTES OF LIMITATION WAIVER

I would like now to address the waiver of state statutes of limitation as contained in S. 758. I believe this is one of the most important policy aspects to ensure that individuals suffering from asbestos-related illnesses receive fair and adequate compensation. Currently, we see mass filings of cases on behalf of large groups of people who are not sick and may never become sick but who are compelled to file for remedial compensation simply because of state statutes of limitation. Previous exposure to asbestos material does not in all cases lead to illness. In fact, only a small percentage of individuals exposed to asbestos ever become impaired and may not become impaired for 20 or even 30 years after exposure. Most claims that have been filed to date are on behalf of people who are not sick from asbestos but are still seeking compensation.

S. 758 waives state statutes of limitation and similar defenses and preserves individuals' right to file claims regardless of when they become sick or how long ago the exposure occurred. The proposed legislation sets no time limits for filing a claim. In addition, individuals would be able to re-enter the mediation process at any time to seek compensation for the on-set of new and additional asbestos-related illnesses. Finally, individuals would retain the right to enter the court system if they are unsatisfied with the mediation process or compensation award.

With an additional 30,000 to 50,000 additional cases expected to be filed this year alone, on top of the 200,000 cases already filed, this provision is necessary to stem the flood of claims currently burdening our court systems. Most importantly, sick individuals would come first under the proposed out-of-court administrative system while still allowing people who become sick later to file appropriate claims.

CONCLUSION

I urge Congressional action to resolve the national asbestos litigation crisis and to ensure the adequate, timely, and fair compensation of individuals suffering from asbestos-related illnesses. The resolution proposed in S. 758 is based on sound policy goals and will provide adequate remedies for individuals currently seeking com-

pensation and those individuals who will need compensation in the future. The U.S. Supreme Court has now twice recommended Congressional action to resolve this crisis. Further, the interested parties: unions, asbestos defendant corporations, and trial lawyers, all agreed to the *Georgine* settlement upon which S. 758 is based. Accordingly, I would urge Congress to act quickly to pass S. 758 and thus prevent a judicial crisis from becoming a public health crisis.

Thank you.

[EDITOR'S NOTE: Louis W. Sullivan's Curriculum Vitae is retained in Committee files.]

PREPARED STATEMENT OF BRIAN WOLFMAN OF THE PUBLIC CITIZENS LITIGATION GROUP

CHAIRMAN GRASSLEY AND MEMBERS OF THE COMMITTEE: Thank you for the opportunity to submit this testimony. Before explaining our concerns about S. 759, I want to describe the basis for our interest in the proposed legislation. I am a staff attorney with Public Citizen Litigation Group, a non-profit, national public interest law firm founded in 1972 as the litigating arm of Public Citizen, a consumer advocacy organization with approximately 150,000 members.

The Litigation Group represented a group of objectors to the *Amchem* v. *Windsor* class action asbestos settlement, before the lower federal courts and in the Supreme Court. Our clients included individuals exposed to asbestos, advocacy groups, and labor unions. We objected to the settlement not only on legal grounds, including those adopted by the Supreme Court in rejecting the settlement, but also on fairness grounds—that the settlement terms would cause delay and would deny deserving asbestos plaintiffs proper compensation and, in many instances, any compensation at all. Because the substantive terms of the now-rejected, *Amchem* settlement have been adopted in large measure into S. 758, we have particular expertise in responding to that legislation.

Attached to this testimony is Public Citizen's analysis of S. 758, and the companion House bill, H.R. 1283. That analysis, prepared in April of this year, sets forth our views on the legislation in considerable detail, and explains how many provisions of the bill will undermine the rights of individuals harmed by asbestos and unjustly benefit the asbestos industry. We urge Committee Members to consult that analysis.

In addition, in this testimony, we wish to comment on several recurring justifications—or myths—used to bolster S. 758, and explain why none of them are correct. Those myths are (1) that the current volume of asbestos cases presents a unique litigation "crisis" requiring national legislation; (2) that S. 758 will ameliorate the alleged crisis by streamlining litigation and reducing delay; and (3) that S. 758 will pay fair compensation to people injured by asbestos. We take up each of these myths in turn.

(1) THE ALLEGED ASBESTOS LITIGATION "CRISIS" IS NOT A JUSTIFICATION FOR S. 758

Without question, there are a large number of asbestos personal-injury cases in the federal and state courts, with the vast majority in state court. The fact that there are a large number of asbestos cases in the courts, in itself, is no reason to single those cases out for special treatment. The large number of cases is directly related to the magnitude of the harm inflicted; in other words, there are many cases because many people have been (and will be) injured.

Thus, the real question is whether, on a per-case basis, asbestos cases are so costly and so difficult to resolve that special treatment in the form of sweeping federal legislation affecting primarily state cases is necessary.

To be sure, in the early years of asbestos litigation, the complexity of the underlying liability issues, unresolved issues relating to insurance coverage, asbestos bankruptcies, and other matters made asbestos litigation costly. These factors gave rise to the oft-cited 1985 RAND study, which indicated that more than 60 percent of asbestos litigation costs went to lawyers and other transaction costs, not to asbestos plaintiffs. RAND, *Asbestos in the Courts, The Challenge of Mass Torts iii.* Significantly, RAND found that defendants' attorney fees and costs were 37 percent of each asbestos litigation dollar, 50 percent more than plaintiffs' fees and costs (less than 24 percent).

But no one has brought forth hard data showing that the current cost of asbestos personal-injury litigation is different from the cost of other product liability litigation or of litigation generally. Not only is there no evidence that asbestos cases are currently more expensive than other litigation, but there is reason to think that, at

this juncture, they are less expensive to resolve. In the first place, unlike many product liability cases, because the asbestos litigation is very "mature," generally no discovery about the defendants' liability is necessary, because that discovery has already been taken. Furthermore, the defendants' and the plaintiffs' bar have amassed large amounts of information about asbestos exposure—which products were used at which work sites in which years—and so discovery on those questions is limited or non-existent. An individual plaintiff's injuries and damages can usually be proved through a single deposition and/or medical records. In sum, asbestos litigation is unusually amenable to settlement (or in rare instances, trial) without large amounts of pre-trial litigation and discovery.

Although asbestos trials, including consolidated trials, continue to take place, the vast majority of cases are resolved by settlement. The Center for Claims Resolution asbestos defendants—the 20 companies that were defendants in the *Amchem* case, and which represent about 25 percent of the industry's liability share settle approximately 99.8 percent, of the personal-injury cases filed against them. *See Georgine* v. *Amchem,* No. 93–0215 (E.D. Pa.), Doc. No. 173, Response of CCR Defendants to the Order to Show Cause, p. 27 n. 18 (filed Mar. 17, 1993). This is because the CCR companies, and the plaintiffs that sue them, recognize that the issues in asbestos litigation have been greatly refined, and thus the case values have been fairly well established over time.

In addition, asbestos defendants and court systems have become adept at managing their asbestos dockets. For instance, Owens Corning's voluntary settlement program demonstrates both that a federal program is not needed and that settlement, not costly litigation, is the norm. Indeed, Owens Corning in its testimony on the House bill made it clear that S. 758's federal bureaucracy would be more costly, and less beneficial to injured plaintiffs, than that company's voluntary settlement program. And, although some of the components of Owens Corning's program could be harmful to some plaintiffs (e,g., its restrictive medical criteria), in the context of a truly *voluntary* program plaintiffs are free to reject the program and go to court, without the restrictive medical criteria and other substantive and procedural impediments imposed by S. 7S8.

In sum, although there are large numbers of asbestos cases in the courts, there is no evidence that, at the present time, on a per-case basis, those cases are either more costly or more likely to delay the administration of justice than other comparable cases.

(2) S. 758 WILL NOT STREAMLINE CASE ADMINISTRATION OR PROVIDE QUICKER JUSTICE FOR INJURED PLAINTIFFS

As explained in our attached section-by-section analysis, asbestos claims will not be dealt with more quickly if S. 758 is enacted. The bill requires asbestos claimants to file enormously detailed claims setting out their personal information (including smoking history and work history), their asbestos exposure, and medical information about claimed asbestos-related conditions. As a practical matter, because of the great complexity of the submission and the procedures involved, the claimant will be required to hire a lawyer, even though this process alone is simply a first step and cannot itself lead to recovery of damages.

After the filing of the claim, the Asbestos Resolution Corporation ("ARC")—the new federal bureaucracy established by the legislation—then determines whether the claimant meets the bill's stringent medical criteria. If the ARC allows the claim, it issues a "certificate of medical eligibility." If the ARC denies the claim, the claimant must seek reconsideration to keep his or her claim alive. If the claim is again denied, the claimant enters "round one" of court proceedings by filing a suit in federal court seeking reversal of the ARCs denial of the certificate of medical eligibility. The bill contains no time limit on when the federal courts must decide these cases; indeed, it is likely, given the volume of asbestos cases, that thousands of new cases will be filed in federal district courts. These cases will not decide whether an asbestos victim will be compensated for his or her injuries, but *only* the threshold issue whether he or she is medically eligible to file suit. *All* of these cases must be filed in federal district court, thus effectively transferring a large number of cases previously filed in state court to the federal system.

In addition to the delays caused by moving many state cases to federal court, further delays will be caused by the fact that these medical qualification cases will be entirely new to the federal courts. The courts will have had no experience interpreting the law's new medical criteria and the accompanying rules and regulations to be issued by the ARC. An entire new jurisprudence will have to be created by the district courts and, ultimately, the federal courts of appeals, much as currently exists in social security cases.

Only if a claimant wins in federal court, or previously obtains a certificate of medical eligibility, can he or she file an ordinary civil action in state or federal court to collect damages. Thus, many claimants will have to go court *twice.*

In many respects, these second suits will mimic the suits that already exist in federal and state courts around the Nation. But there is reason to think that they will engender somewhat more delay than current asbestos cases. First, under the bill no individual asbestos case may be made a part of a class action, or be subject to joinder or any other type of aggregation, without the consent of all defendants. Public Citizen interviews with officials of several courts, such as the Philadelphia state courts, have found that aggregating small numbers of cases where plaintiffs have suffered similar injuries and were exposed at the same workplaces has allowed the courts to eliminate the large backlog of asbestos cases that plagued them in the 1980s. Without any opportunity for courts to aggregate cases for any purposes, cases will take longer to resolve.

Moreover, although a finding of medical eligibility is presumed correct, the defendant has the right to challenge that determination and, therefore, lawsuits may well involve substantial re-litigation over whether the claimant meets the bill's medical criteria, *even though the plaintiff has already obtained a certificate of medical eligibility.*

The bill's proponents do not—because they cannot—dispute the existence of S. 758's Byzantine, multi-layered procedures. They argue instead that most cases will be resolved through the bill's mediation process, and therefore delay will not, as a practical matter, be a serious problem. That argument fails to support this legislation for two reasons. First, successful mediation is simply a form of settlement, and parties to litigation may always settle on terms agreeable to them. Many federal and state courts already have mandatory mediation programs. Those programs, like the one imposed by S. 759, require that the parties exchange information and discuss settlement, but they do not require settlement. And as noted above, certain asbestos defendants already have aggressive settlement programs. In short, we do not see how this legislation does anything that asbestos plaintiffs and defendants cannot already do, either at the behest of courts, or on their own.

Second, mediation only makes sense for the injured worker against a backdrop of viable litigation that sets appropriate settlement values for individual cases. Until claimants go through S. 758's litigation process, there will be no basis for knowing the terms upon which to settle. Therefore, at least in the beginning, the mediation process established by S. 758 Will likely be less successful, not more successful, than the settlement processes established in current litigation.

(3) COMPENSATION LEVELS WILL NOT BE FAIR

In the attached memorandum, we show that the bill's medical criteria and its elimination of certain types of claims compensable under state law are grossly unfair, and will severely harm asbestos victims.

We wish to address a related issue. The bill's proponents have also made the claim that compensation levels for those who do qualify for compensation will be fair, perhaps greater than that which they presently obtain in the tort system. We strenuously disagree. The bill does not set forth minimum compensation requirements for particular diseases. Nor does the bill even require that awards take into account historical tort awards ill asbestos cases or in comparable personal-injury and wrongful death cases. Rather, S. 758 simply assumes that awards will adequately compensate victims. However, there is every reason to believe that asbestos defendants will make "low ball" offers in the alternative dispute resolution system established by the legislation.

Once the claimant enters S. 758's mediation program, he or she may have already gone through years of delay in obtaining a certificate of medical eligibility, including a full federal court review, thus making acceptance of a low offer much more likely. The only additional leverage available to the claimant is to file a lawsuit in state or federal court, in which (1) there is no opportunity to aggregate the claim for any purpose; (2) any defendant can still contest the existence of a medical condition that the claimant has already proved to the ARC or to a federal court; and (3) punitive damages may not be sought under any circumstances. Thus, with additional court delay ahead (recall that the ordinary suit to recover damages has yet to be filed), and the plaintiffs subject to S. 758's substantive and procedural disadvantages, it would be pure folly to think that defendants will offer anything approaching the damages that plaintiffs have historically obtained in the tort system. Put differently, S. 758 will greatly depress settlement values.

Asbestos is a very dangerous product and our goal should be to ensure that those injured by it receive swift and fair compensation. Depressing settlement values and delaying resolution of claims will not achieve that goal.

* * * * *

Again, we ask the Subcommittee to consider our attached analysis of S. 758. For the reasons stated in that analysis and in the testimony above, we urge the Subcommittee to reject S. 758. Thank you for the opportunity to submit this testimony.

ANALYSIS OF PROPOSED FEDERAL ASBESTOS LEGISLATION—THE SO-CALLED "FAIRNESS IN ASBESTOS COMPENSATION ACT"

APRIL 1999

This paper analyzes key provisions of two bills reintroduced in the 106th Congress: H.R. 1283, sponsored by House Judiciary Committee Chairman Henry Hyde, and S. 758, sponsored by Senator John Ashcroft and others.

Because the core provisions of both bills are similar in major respects, the bills are analyzed together, with significant variations noted.

Before turning to a detailed analysis of the bills, there are a few general observations that should be underscored. As Public Citizen's analysis of the bills make clear, they are seriously flawed and represent a substantial step backward for the tens of thousands of American workers exposed to asbestos on the job who, through no fault of their own, may suffer serious illness or death as a result. Among the most serious problems with the bills are the following:

1. Faulty Premise: We do not accept the premise on which both bills rest, namely that the volume of asbestos litigation has overwhelmed the ability of state and federal courts to dispense justice to asbestos victims in a fair and efficient manner. There are steps that could be taken to bolster the judicial resources available to resolve asbestos cases, and perhaps Congress and state legislatures should consider how best to strengthen our judicial system generally. But nothing in these bills is aimed at improving the administration of justice for asbestos victims.

Nor is there any justification for the wholesale repudiation of state law called for in the bills. Our federalist system of government is predicated on the idea that no one-size-fits-all rule is necessarily best, and that the states should be free to establish their own substantive liability rules, as well as their own procedures for adjudicating cases. The bills cast that basic constitutional tenet aside, and substitute a congressionally-mandated liability scheme—both substantive and procedural—that governs all cases. Congress ought not displace state law on a wholesale basis so cavalierly.

2. Denial of Existing Asbestos Claims: The bills' approach to reducing the burden of asbestos litigation is to adopt the most Procrustean solution imaginable—the bills simply deprive entire classes of asbestos victims of compensation. It is like "solving" a food shortage simply by saying that half the population gets no food. For one thing, the bills reverse state law by adopting very restrictive medical criteria for lung cancer. As many as half the lung cancer victims who currently recover damages under state law would be deprived of any remedies under the bills. Similarly, the bills set aside state law and deny recovery for victims with pleural plaques and pleural thickening (abnormalities of the outside lining of the lung), even though most states provide for recovery for people with these conditions. It appears that the bills may also be interpreted to eliminate loss of consortium claims by spouses, parents, and children of injured asbestos workers suggesting that Congress is unconcerned about the devastation that asbestos-induced disease and death inflicts on family members. Accordingly, the bills are mistitled; they are not "compensation" Acts, but Acts to deprive injured parties compensation.

3. New Layers of Procedure and Delay: Despite the bills' promise to enhance efficiency, the bills actually handicap the litigation of asbestos claims, and will only add to the delays. To be sure, the bills place relatively short time frames on the administrative process they create for asbestos victims to establish eligibility. But then claimants are forced to undergo a lengthy "alternative dispute resolution" proceeding that forces the claimants, not the companies, to lay their case out in full. And if no settlement is reached, then the claimants are back to square one—they then may go to court and litigate their claims in precisely the same way asbestos cases are now litigated. Compounding the problem for claimants, although their medical eligibility will have been determined by a quasi-governmental entity after an exhaustive medical review in which the claimant bears the burden of proof, that determination is fair game for litigation by the companies—giving them a second bite at

the apple on this pivotal point. In reality, all the bills do is add to the start of an asbestos victim's quest for compensation a cumbersome administrative process that will add delay and engender additional expense.

To make matters worse, the bills do not resolve perhaps the most critical issue in asbestos litigation—how liability should be, allocated among the various defendants. Because most asbestos victims have been exposed to multiple products and because it is often difficult for the victim to identify which products he has been exposed to, asbestos litigation often involves 10, 15, or 20 defendants, and much of the effort in asbestos cases is litigation among the companies to apportion damages. Astonishingly, the bills ignore this problem.

4. Tilting Civil Actions Against Injured Plaintiffs: Last, but not least, the bills sacrifice the needs of asbestos victims to save the asbestos companies money in ways apart from the bills' wholesale intrusion into state law to deprive meritorious asbestos claimants compensation. The bills reduce the financial burden on the industry in three ways. First, they establish increased procedural hurdles that will make asbestos litigation more costly for plaintiffs, while lowering defense costs. Second, they derogate state law by providing that plaintiffs are absolutely barred from recovering punitive damages, no matter how reprehensible, deliberate or malicious the company's conduct. And finally, although the bills' professed goal is efficiency, they guarantee inefficiency in asbestos litigation by forbidding plaintiffs from aggregating or consolidating their actions with other asbestos victims, unless the industry consents.

THE BILLS—A TITLE BY TITLE ANALYSIS

Introductory materials

Like most bills, these begin with lengthy congressional findings. Here, the "findings" are especially one-sided and unfairly portray the current state of affairs regarding asbestos litigation. In a nutshell, we agree with the findings insofar as they suggest that there are substantial numbers of asbestos cases pending in the courts, and that there have been significant delays in some forums. But we do not agree that the courts are incapable of dispensing justice to asbestos claimants in an orderly and swift manner. Indeed, in some jurisdictions that have seen a substantial number of asbestos filings, there is little or no backlog of asbestos cases.

Both bills contain a detailed list of definitions; they are at the beginning of the Senate bill and in the last title of the House bill. Many have substantive import. For instance, the term "asbestos claim," section 3(3), is defined in a way that loss of consortium claims, which are ordinarily treated as entire separate legal claims asserted by spouses, parents and children of asbestos victims, are defined as asbestos claims as well. As discussed in more detail below, the effect of this definition and provisions, particularly in the Senate bill, may eliminate or make it impossible to prove these consortium claims. The bills also contain detailed definitions of medical terms such as "clinical evidence of asbestosis," "evidence of bilateral pleural thickening with impairment," and "FEV." These definitions mirror those adopted in *Georgine* v. *Amchem*, and many of them were criticized as unfair to claimants.

Title I

Both bills begin by creating a new federal entity called the "Asbestos Resolution Corporation," a quasi-governmental entity to manage the administrative system that lies at the heart of the legislation. The Corporation is empowered to hire employees, contract for services, receive contributions of funds (presumably from the asbestos industry and its insurers), appoint medical claims policies, adopt rules for recovery of funds from responsible parties, sue and be sued, and manage its own affairs. In a nutshell, the Corporation's major functions are to screen asbestos claimants to determine whether they satisfy the Act's definitions of medical eligibility, and, if so, to subject their claims to a mandatory mediation process with the hope of reaching a settlement.

The Corporation will be managed by a 7-member Board, appointed by the President with the advice and consent of the Senate, with the Board Chairperson designated by the President. The Board must be politically balanced: only four members may be of the same political party. Board members are appointed to staggered 6-year terms, and may be removed only "for cause" by the President. Board members are entitled to compensation not exceeding $50,000 per year, with the Chair's compensation set at an annual maximum of $15,000. These levels of compensation suggest that service on the Board will be significantly less than full time. Board members are given qualified immunity.

Apart from managing the Corporation, the most significant responsibility entrusted to the Board is to appoint a "Medical Advisory Board," which advises the Board on medical matters, including the retention, supervision, and removal of phy-

sicians, and the appropriateness of adding new diseases to the "other cancer" category. The Advisory Board may have no fewer than five and no more than nine members, at least one Board member must be board-certified in each of four specialities—radiology, pulmonary, pathology, and oncology. The Board of Directors is instructed to set rules governing the operations of the Medical Advisory Board, and the Act provides expressly that the Advisory Board is not subject to the Federal Advisory Committee Act. There is, it bears noting, a conflict of interest provision that forbids members of the Advisory Committee from any role in proceedings before the Corporation. This provision may assume more importance than one might expect because the bills exempt the Corporation from the Ethics in Government Act.

Title II—Medical eligibility determinations

In order for a claimant to have a right to proceed through the alternative dispute resolution mechanism established in Title III of the Act, and ultimately have a right to go to Court (Title IV), the claimant must receive a certificate of medical eligibility from the Corporation. Title II deals with questions of eligibility, and sets detailed eligibility criteria that the Corporation must apply in making certification determinations. The, eligibility criteria set forth in Title II are the same criteria adopted in the *Amchem* settlement, many of which were criticized for being overly restrictive.

For *non*-cancer cases, section 201 sets forth eligibility criteria, one of which *excludes* about half the current asbestos claimants. Under section 201(2)(C), in order to be eligible, a person exposed to asbestos who does not have either cancer or clinical or pathological evidence of asbestosis, must show "evidence of bilateral pleural thickening with impairment." State law generally does not require impairment, and hence this provision will deny recovery to many claimants who currently have valid claims under state law.

Mesothelioma cases are addressed in section 202. For non-mesothelioma lung cancer claimants, section 203 sets up Byzantine eligibility criteria that depend in large part on the dates of exposures, the nature of the exposures, the extent to which the exposed person's employer complied with then-existing OSHA exposure standards (without regard to whether the standards were later discredited), and many other factors. These criteria are weighted-in favor of defendants by heavily discounting certain types of exposures, and will result in the exclusion of as many as half the lung cancer claims that are currently compensated via settlement or court judgment.

In order for a claimant to obtain a certificate of eligibility, he has to submit a detailed form to the Corporation. (Section 205). Although the statute says that the claimant "is not required to retain an attorney in order to file and proceed with a claim," the sheer volume and detail of information required to be submitted may, as a practical matter, make it necessary for claimants to have lawyers. The application is to be submitted under oath. Once a claimant files a complete application, the Corporation, at its discretion, can require the submission of supplemental data, seek records from third parties—including records pertaining to the person exposed to asbestos—and order the exposed person to undergo further medical review.[1]

Within 60 days of accepting the application as complete, the Corporation shall issue either a certificate of eligibility or a finding of non-eligibility, accompanied by a brief statement of reasons. The claimant may seek reconsideration of the Corporation's decision, and may, at that time, submit additional evidence. Requests for reconsideration are referred to two-physician panels, who are instructed to reconsider, *de novo,* the application. In the case of a deadlock, a third physician is appointed to break the tie. If the panel accepts the request, then the Corporation issues a certificate of eligibility; if the panel denies the request, the panel is required to provide a brief statement of reasons. Reconsideration requests are supposed to be acted upon within 30 days.

The bill recognizes that claimants unhappy with the eligibility determinations are entitled to judicial review, and the bills permit claimants to go to federal district court to challenge adverse Corporation eligibility decisions—except those that were not subject to reconsideration. The courts are instructed to uphold the Corporation's decisions where "supported by substantial evidence on the record as a whole" and "not contrary to law. Due account shall be taken of the rule of prejudicial error." This standard, although somewhat oddly formulated, is typical for judicial review of actions of government administrative agencies.

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[1] There is a process for claimants who concede that the exposed persons' condition does not fit into any of the eligibility criteria laid out in the statute to nonetheless seek certification of their claims as "exceptional." The procedures that the Corporation is to follow in considering these claims are, set forth in section 206.

There is one point that merits emphasis. Although these appeals involve review of an administrative record, and therefore involve no new fact-gathering that is ordinarily the province of district courts, they are sent to district courts, not courts of appeals. This designation will substantially delay the resolution of these cases for two reasons. First, it squanders scarce judicial resources, because the party that loses in federal district court has every incentive to pursue an appeal, meaning that two levels of federal court review will ordinarily be required to conclusively adjudicate these claims. Most cases involving court review "on the record" are assigned to courts of appeals in the first instance, to avoid precisely this needless drain on resources. Second, district courts are already overburdened: these cases are not likely to be adjudicated quickly. Thus, the judicial review process laid out for these cases will be time- and resource-consuming.

Title III—Alternative dispute resolution

The Corporation is directed to establish detailed rules for a comprehensive alternative dispute resolution (ADR) process. (Section 301). This process begins after the Corporation issues an eligibility certificate. At that point, the Corporation is to assign a "motions officer" to the claim; the motions officer is to determine procedural issues, to issue subpoenas, to resolve discovery disputes, and generally to ensure that the claim is expeditiously processed.

After a motions officer is designated, all potential responsible parties—generally meaning asbestos companies—are given notice, including a "verified particularized statement" prepared by the claimant setting forth the basis for the allegations against that party. (Section 303(a)(2)).[2] The Act describes the required contents in elaborate detail. (Section 303(a)(2)). In some cases, the motions officer is empowered to allow the claimant discovery to assist in the preparation of the verified statement. Once the statement is filed, the Senate bill specifically allows a respondent to identify additional likely responsible parties, and add them by filing a verified statement.

Remarkably, although the bills require the claimant to lay bare his entire case in the verified statement (the detail of which far exceeds the detail normally found in complaints), there is no requirement that the respondents formally respond. Although the Senate bill says that respondents "may accept as true any assertion made by the claimant in a particularized statement" neither bill requires the respondent to say anything.

After the statements are submitted, the bills contemplate a "grace period" of 60 days to encourage the parties to reach a voluntary settlement. At the expiration of this period, the Corporation appoints a mediator to assist the parties. At this point, the parties are required to serve on one another a "statement of the information required for the settlement." The Corporation is to prescribe by rule the information required for the parties to evaluate the claim (except for the disclosure of privileged information). The mediation is to be concluded within 60 days of the appointment of the mediator, with extensions allowed in limited circumstances. Statements made in the course of mediation are inadmissible in any subsequent trial or mediation.

The mediation process is highly structured. At least 15 days prior to the, close of mediation, the bills put the onus on the claimant to make a "good faith" final demand of settlement. No later than 10 days prior to the close of mediation, each respondent is required to make a good faith settlement offer, except if a respondent fails to do so the statute deems the offer to be $0. In the event that the mediation fails, the mediator issues a "release from mediation," which entitles the claimant to either go to court or to binding arbitration.

Before turning to arbitration, it bears emphasis that the mediation process spelled out in the bills is nearly as onerous as litigation, and, compounding the problem for claimants, requires them to lay their cards on the table in a way that gives their adversaries a clear understanding of their case—warts and all—while permitting the defendants to hold back considerable information. Thus, the mandatory mediation process disadvantages claimants in two ways: (1) it saps their resources because it is protracted and resource-intensive mediation; and (2) it gives their opponents a detailed preview of their case in court.

Should the mediation fail to bring about an acceptable resolution with regard to all of respondents, then, at the close of the process, the claimant is back to square one—the place he would be in absent the statute. At this point, the claimant finally is entitled to bring suit (civil litigation is addressed in Title IV).

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[2] Among other things, the statement must include the dates of exposure, each worksite, the nature of the exposure, an identification of each asbestos-containing product the person was exposed to, and other information that the Corporation may require by rule or otherwise.

The bills also provide that, should he elect to do so, a claimant can invoke *as an alternative to litigation* a binding arbitration process that would involve all of the remaining respondents. The arbitration, which would be governed by the Federal Arbitration Act, would apply the law that would be applied by a court designated by the claimant and having jurisdiction over the respondents. Arbitrators, like motions officers, would have subpoena authority. Findings of medical eligibility would be conclusive and binding, unless rebutted by "clear and convincing evidence" by respondents.[3] Arbitrators are empowered to render awards, but, in contrast to ordinary arbitrations, awards must be accompanied by 'findings and fact and conclusions of law.'"[4] With certain exceptions, respondents are jointly and severally liable to the extent provided by state law.[5] Contribution rights by respondents are expressly retained. And arbitrators are given the power to add a "penalty" of 10 percent of the award where the respondents' final "good faith" offer was significantly less than the amount ultimately awarded.

Title IV—Civil actions

Section 401 sets forth the general prohibition against asbestos actions until a claimant has both obtained a medical certificate and completed the mediation process; it says "no civil action may be filed or maintained unless the plaintiff has obtained a certificate of medical eligibility and release from mediation." Not only is litigation precluded outside this process, but a number of unique rules are created to constrain and govern these actions.

First, the bills preclude plaintiffs from using collective actions—no class actions, joinder of parties, aggregation of claims, or any other device to enhance the efficiency of asbestos litigation is allowed for the plaintiffs, "without the consent of each defendant." No similar prohibition attaches to the defendants.

Second, any asbestos case filed in violation of the rules—such as a case filed prior to the claimant obtaining an eligibility certificate, or one filed as a class action—is subject to removal to federal court. Insofar as we are aware, there is no precedent for this provision, and, to the extent that Congress is asserting power to dictate procedural rules to the states—such as the "no class action" rule—we believe that such an arrogation of power presents serious constitutional problems.

In addition to these special rules, this Title also establishes the presumption that medical eligibility determinations are conclusive and may be set aside only on the basis of "clear and compelling evidence," except for cases involving questions of exposure, which are to be determined on the basis of state law.[6]

Finally, like the arbitration provision, judges are empowered to penalize respondents who failed to make an adequate offer in mediation (measured by the differential between the offer and the final award) by enhancing the award 10 percent.

Title V—Rules applicable to arbitrations and civil actions

This Title builds on Title IV, and lays down some general principles intended to guide the substantive decisions in arbitrations and civil litigation.

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[3] As discussed in more depth below, see n.6, infra, eligibility determinations are always subject to challenge by the companies, allowing them another bite of the apple.

[4] Arbitrators often do not issue findings and conclusions, in large measure because of the presumption that arbitration awards are conclusive and not subject to judicial review. If the bills' requirement of findings of fact and conclusions of law suggests that judicial review might be more widely available here, that would call into question the value of arbitration.

[5] As with awards in litigation, although the bills nominally retain joint and several liability, to the extent it is available under state law, there are certain modifications to the joint and several rule that might allow respondents to escape full liability and leave a claimant with less than full compensation.

[6] This provision is especially troubling, because it suggests that the question of a claimant's medical eligibility may be, always open to relitigation when the question has been resolved in the claimant's favor. To use an illustration, assume that the claimant is initially found by the Corporation to be medically ineligible, and that determination is upheld on reconsideration by a medical panel. Assume further that the claimant then seeks review in a federal district court and the question of medical eligibility is fully litigated and that the claimant prevails. Normally, under the doctrine of *res judicata*, one might think that the court's judgment on eligibility would be conclusive and binding. Yet this provision drives home the point that medical eligibility determinations could nonetheless be open to relitigation by the companies—either in court, or in binding arbitration—in the event that the mediation process fails to achieve a settlement. Not only is this provision troubling in its own right but there is an asymmetry here that works to the claimant's disadvantage. If the claimant is found to be medically ineligible, loses on reconsideration, and then loses in court, that determination would bar the claimant from litigating his eligibility in court, unless new evidence came to light or his medical condition changed. Even then the claimant would have to start over in Title II and not Title IV of the bills. But the companies are not similarly bound by the court's ruling and have at least two bites at the eligibility apple.

First, section 501(1) sets up the basic rule that no one shall recover in any proceeding relating to an asbestos claim unless that person establishes the existence of an eligible medical condition. This provision, read in combination with other sections of the bill, is ambiguous. It could be interpreted to eliminate the asbestos companies' liability under state law to spouses, parents and children of injured workers, since they would not be able to establish "eligibility" under the statute.

In the Senate bill, section 501(2) provides that in proceedings to resolve asbestos claims, there are three main issues to be decided: (a) whether the exposed person with respect to whom a claim is made has an asbestos-related disease or condition; (b) whether exposure to asbestos or an asbestos-containing product was a "substantial contributing factor" in causing that disease or condition; and (c) the amount of compensatory damages, if any, that should be awarded. Although the claimant would be entitled to the presumption of eligibility, those issues would nonetheless be fair game in litigation. As discussed above, the consequences are that the asbestos companies have at least two bites at the liability apple, since the claimant is required to prove initially to the Corporation that he is medically eligible under the Act to receive compensation and then to defend the Corporation's ruling on medical eligibility in court or arbitration.

Third, both bills forbid the award of damages or any other relief for emotional distress, mental harm, or medical monitoring, without proof of the exposed person's medical eligibility. The Senate bill adds the additional requirement of proving that the exposure to the respondent's product was a substantial contributing factor causing the injury.

Fourth, both bills forbid the award of any damages or any other relief for the enhanced risk of contracting cancer or any other disease.

Fifth, both bills categorically forbid the award of punitive damages on any asbestos claim, no matter how deliberate, malicious, or unconscionable the acts of the respondents.

Sixth, section 502 abolishes a statute of limitation, laches, or statute of repose defense for any claim that was not untimely on the date of the Act's enactment.

Seventh, section 503 abrogates existing attorneys' fees contracts and governs all future contracts by setting a fee ceiling of 25 percent of the compensation the claimant receives in any of the proceedings covered by the Act. This limitation applies even if the attorney represents the claimant in both the mediation proceeding and then in litigation. Attorneys will be required to submit to the Corporation an itemized statement of their fees and costs before recovering any fee, attorneys who violate this provision are made subject to serious civil and criminal penalties. There is no requirement that respondents' counsel disclose their fee arrangements, their costs and fees, and defense counsel are not subject to any cap or limit on the fees they can charge. This is particularly troublesome since the Rand Corporation study of asbestos litigation expenses found defendants' attorney and litigation fees consumed 37 percent of each asbestos litigation dollar, 50 percent more than plaintiffs' fees (less than 24 percent). In the House bill, the attorneys' fee cap is not imposed on attorneys' fees for cases that settle before the mediation process has begun, creating a perverse incentive for attorneys to settle early, even if that is not in the best interest of the client.

Eighth, and finally, section 504 provides that a judgment or settlement on a nonmalignant claim does not foreclose the right of a plaintiff to bring a claim based on a malignant condition, should one arise.

Title VI—Funding

The bills create a highly complex funding structure that allows the Corporation to assess, on a pro-rata basis, potential respondents for the cost of administering the, Corporation's medical screening, ADR, and other activities. There are provisions for "transitional funding" that require potential respondents to use historical measures to determine their likely pro rata share to get the Corporation up and running. Thereafter, the assessments will be made based on the numbers of cases the respondents have pending. The Secretary of the Treasury is directed to establish a special Trust Fund for the Corporation's accounts. Mediation costs will be charged on a per capita basis to each participating respondent; the same appears to be true of arbitrations. The Corporation is empowered to bring suit to enforce these obligations, and is entitled to attorneys' fees, costs, and interest when it prevails. Moreover, the bills anticipate that there will be serious disagreements among the asbestos companies over their shares of mediation, arbitration, and general administrative costs. Accordingly, the Act sets up elaborate arbitration and litigation provisions to resolve these disputes.

Title VII—Applicability; pending civil actions

Section 701 sets forth the general rule that the Act applies to any case pending on the date of enactment that has not resulted in a final, nonappealable judgment. For pending cases, a certificate of eligibility is not required where a trial has already commenced, and no release from mediation is required if the action was pending, regardless of whether trial had begun. (Section 702).

The upshot of this provision is that, except for the handful of claimants whose trials are actually ongoing on the date of the Act's enactment, every one of the more than 100,000 current asbestos plaintiffs will have to go to the Corporation to get a certificate of eligibility in order to proceed with their cases.

Finally, and critically, the Act changes the rules of decision for pending cases by providing (in section 702(c)) that plaintiffs in cases being tried (who have not obtained certificates of eligibility) "have the burden of establishing the existence of an asbestos-related condition that meets the criteria for an eligible medical category pursuant to sections 201 through 204." There is a serious constitutional question whether Congress can change a rule of decision in pending cases, and there is no doubt that is precisely what section 702 seeks to accomplish.

Title VIII—Miscellaneous provisions

This Title is a grab-bag of unrelated administrative and housekeeping matters, some with real consequence. To begin with, it makes clear that directors and employees of the Corporation are not officers of the United States or government employees.

The Corporation is required to comply with the rulemaking provisions of the Administrative Procedure Act; however the Corporation is made exempt from the Freedom of Information Act, the Ethics in Government Act, the Equal Access to Justice Act, and a host of other Statutes that govern the conduct of federal agencies and government controlled corporations.

Title VIII permits, but does not require, any of the asbestos trusts in existence at the time of the enactment of the statute to be subject to the Act.

Finally, the, Act contains a standard severability clause.

ASSOCIATED BUILDERS AND CONTRACTORS,
Rosslyn, VA, October 5, 1999.

The Hon. CHARLES GRASSLEY,
Chairman, Subcommittee on Oversight and the Courts,
Judiciary Committee, U.S. Senate Washington, DC.

DEAR CHAIRMAN GRASSLEY: Associated Builders and Contractors (ABC), representing over 21,000 contractors, subcontractors, material suppliers and related firms across the country and from all specialties in the construction industry with a network of 83 chapters, strongly supports S. 758, the Fairness in Asbestos Compensation Act of 1999. We strongly support today's hearing and respectfully request that our statement of support for S. 758 be included in the hearing record of October 5, "Finding Solutions to the Asbestos Litigation Problem."

ABC has a long-standing position in support of legal reforms that will ensure that businesses across the country can operate and compete based on fair, flexible and equal opportunities in the marketplace. Our litigious society has run amok and has subjected entrepreneurs as well as bureaucracies to costly and unproductive consequences. Congress must address excessive litigation, which is eating away at the United States' entrepreneurial society, and relieve businesses from having to defend against special interest groups who seek to invoke economic damages through the courts.

ABC is very concerned about the rise in personal injury suits without an injury in asbestos cases filed in state and federal courts, and the impact these cases have on individuals who have contracted asbestos related illness and asbestos companies. Lawsuits by individuals whose health is unaffected by exposure to asbestos are clogging the courts and are delaying or preventing legitimate cases brought sick individuals from receiving adequate attention in the courts. Furthermore, the impact of such cases against companies are increased liabilities and high legal expenses. The need for this legislation is clear—to ensure sick individuals can be compensated in a timely manner and companies can be freed from lengthy and unnecessary litigation procedures.

ABC supports the Fairness in Asbestos Compensation Act of 1999 which seeks to establish a non-judicial Alternative Dispute Resolution System to resolve asbestos injury claims, based on a settlement in *Amchem Products, Inc.* v. *Windsor,* which established the medical criteria that individuals would have to meet in order to be

eligible for compensation. ABC also supports the administrative process proposed in the legislation which is funded by the defendant companies to compensate persons who have asbestos-related illnesses and alleviate the delays and transactional costs of asbestos litigation while relieving the caseload burden on state and federal courts.

The Fairness in Asbestos Compensation Act would provide a secure, fair and efficient means of compensating victims of asbestos, ABC looks forward to working with you on this important legislation.

Thank you for considering our views on this issue.

Sincerely,

ERIKA L. BAUM,
Director, Workplace Policy.

OWENS CORNING,
October 5, 1999.

The Hon. CHARLES E. GRASSLEY,
U.S. Senate Washington, DC.

DEAR SENATOR GRASSLEY: Thank you for your leadership and serious consideration in your efforts to resolve the complex matters resulting from asbestos litigation, Owens Corning, as you may know from my testimony before the House Judiciary Committee on July 1, 1999, has recently entered into a private national settlement plan. I have included with this letter an addendum that explains our plan.

An integral and attractive element of our settlement plan lies in the fact that the vast majority of the dollars paid and to be paid go to plaintiffs with asbestos-related malignancies or asbestos-related non-malignant impairments that would satisfy the medical criteria in the proposed legislation. Claimants with pending cases who do not meet the medical criteria typically receive a modest cash payment in return for signing a binding settlement agreement. However, if they develop an asbestos-related malignancy or impairment meeting the medical criteria, they have the night (but only under the terms of their agreements) to receive additional payments. Importantly, these additional payments are for amounts negotiated at the time of the original settlements, thus helping Owens Corning achieve financial predictability.

Future claimants only receive compensation if they have an asbestos-related malignancy or if they meet the medical impairment criteria.

Contrary to proponents' intentions, the proposed legislation does not create a level of certainty superior to existing private solutions. For example, no manufacturer or other responsible party can know what its percentage share of liability on a particular claim will be under the proposed legislation, nor can any manufacturer or other responsible party know the annual level of dollar commitments it may be called upon to fund. These are serious problems better addressed in Owens Corning's private plan.

We hope, as you explore solutions to this complex problem, that you will concur with Chairman Hyde that private settlement plans, like Owens Corning's, should not be adversely affected by well-intended legislation. We further hope that the legislative approach will continue to be thoughtful and measured, and that the views and interests of all parties will be considered as legislation is crafted.

Thank you for the opportunity to provide this for the hearing record. If I can be of further assistance, I can be reached, or you may contact John Libonati, Director of Government Affairs. We assure you of our participation in the process and will make ourselves available upon your request.

Sincerely,

MAURA J. ABELN,
Senior Vice President, General Counsel and Secretary, Owens Corning.

ADDENDUM TO THE PREPARED STATEMENT OF OWENS CORNING, HOUSE JUDICIARY COMMITTEE JULY 1, 1999

PREPARED BY MAURA J. ABELN, SENIOR VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY

Introduction

Owens Corning, headquartered in Toledo, Ohio, is a publicly-held U.S. company, founded in 1938. The Company manufactures composites and building materials, with production and research facilities located predominantly in the United States.

We have more than 20,000 employees, the majority of whom reside in Ohio, South Carolina, Texas, Pennsylvania, Florida, Georgia, California and New York.

The Company's building materials-such as fiberglas insulation, vinyl siding, windows, roofing shingles, and cast stone products—are used in residential remodeling and repair, commercial improvement, new residential and commercial construction, and other related markets; its composites products are used in diverse products in building construction, automotive, telecommunications, marine, aerospace, energy, appliance, packaging and electronics. Our products are widely recognized by our registered trademarks, including the name FIBERGLASS and the color PINK. We are the company people think of when they see the PINK PANTHER™ a mascot we have licensed for use in our advertising and promotions.

Asbestos litigation history

Owens Corning is a co-defendant with other former manufacturers, distributors and installers of products containing asbestos and with miners and suppliers of asbestos fibers in personal injury litigation. Since 1987, the Company has been named as a defendant in almost 400,000 cases. Virtually all of the asbestos-related lawsuits against Owens Corning arise out of its manufacture, distribution, sale or installation of an asbestos-containing calcium silicate, high temperature insulation product, the manufacture of which was discontinued in 1972. The personal injury claimants generally allege injuries to their health caused inhalation of asbestos fibers from Owens Corning's products. Most of the claimants seek punitive damages as well as compensatory damages. But for the operation of Owens Corning's National Settlement Program, described below, Owens Corning would be a defendant more than 200,000 cases that were pending at time of the programs announcement.

The national settlement program

In December 1998, Owens Corning announced its National Settlement Program (the "NSP"). At that time, we had agreed with more than 50 plaintiffs' law firms to resolve approximately 176,000 asbestos claims against the Company. We had also agreed to resolve more than 100,000 claims against its wholly-owned subsidiary, Fibreboard Corporation, in the event that Fibreboard's global class action settlement, under review by the U.S. Supreme Court, was overturned.

The NSP also established procedures for resolving future claims brought by plaintiffs' law firms participating in the NSP without litigation. As of June 30, 1999, settlement payments aggregating approximately $1.9 billion will be made over the next two to five years, with most payments occurring in 1999 and 2000. These payments will be made from the Company's available cash and credit resources.

The NSP is designed to better manage Owens Corning's asbestos liability, and that of Fibreboard, and to enable the Company to better predict the timing and amount of indemnity payments for both pending and future claims. Under the NSP, each participating law firm has entered into a long-term settlement agreement ("NSP Agreement") providing for the resolution of claims pending against both Owens Corning and Fibreboard for settlement amounts negotiated with each participating firm. Settlement amounts to each claimant vary based on a number of factors, including the type and severity of disease.

As is true of the legislative scheme provided under H.R. Bill 1283, the NSP Agreements impose a number of Standards and procedures for the review and processing of the cases being settled. All payments to settling claimants are subject to satisfactory evidence of a qualifying medical condition, evidence of exposure to an Owens Corning and/or Fibreboard asbestos-containing product during a defined time period, and delivery of customary releases by each claimant. The NSP Agreements allow claimants to receive prompt payment without incurring the significant delays and uncertainties of litigation. Claimants settling non-malignancy claims may also be entitled to seek additional compensation if they develop a more severe asbestos-related medical condition in the future.

Like H.R. Bill 1283, NSP Agreements require participating firms to agree to attempt to resolve all future claims outside the courts. Under each NSP Agreement, the participating firms have agreed (consistent with applicable legal requirements) to resolve any future asbestos personal injury claims against Owens Corning or Fibreboard through an administrative processing arrangement, rather than through litigation. Under such arrangement, no settlement payment will be made for future claims unless specified medical criteria and other requirements are met, and the amount of any such payment is based an the disease of the claimant and other factors. In the case of future claims not involving malignancy, such criteria require medical evidence of functional impairment.

The medical criteria employed in the NSP are very similar to the criteria proposed in H.R. Bill 1283, and will have the effect of limiting future payments by Owens

Corning and Fibreboard only to those claimants who present evidence of an asbestos-related lung disease and, as to non-malignancies, functional impairment. Claims will be processed for payment for both pending and future claims Integrex, a wholly-owned Owens Corning subsidiary that specializes in claims processing and other litigation support services.

It is anticipated that payments for a limited number of future "exigent" claims (principally malignancy claims) under the administrative processing arrangement will generally begin in 2001. while payments for other future claims will begin in 2003. Participating plaintiffs' counsel have agreed that payments for future claims beginning in 2003 and Later years will be constrained by the availability of cash flow rather than the number of claims per year. The restrictions established by the covenants in the Owens Corning's Credit Agreement are designed to ensure the predictability of annual cash outflows for asbestos payments. Owens Corning will not be required to make any payments that would place in jeopardy those financial covenants. The NSP Agreements have a term of at least 10 years and may be extended by mutual agreement of the parties.

Each NSP Agreement will also resolve claims against *Fibreboard*. The Supreme Court's recent decision in *Ortiz* v. *Fibreboard Corporation* (June 23, 1999) makes it appear virtually certain that the Global Settlement will be finally disapproved by the Courts. If as expected, the Global Settlement does not receive such approval, a back up Insurance Settlement will become effective. Under the Insurance Settlement (which has received final court approval), *Fibreboard* will have access to assets of approximately $1.9 billion, to be used to resolve pending and future *Fibreboard* claims. Approximately $1.0 billion will be devoted to pending claims, and the remainder, plus interest, will be used to satisfy future claims. Each of Owens Corning and *Fibreboard* retain the right to terminate any individual NSP Agreement, if in any year more than a specified number of plaintiffs represented by the plaintiffs' firm in question opt out of such agreement.

Owens Corning believes the NSP is working, and will work in the future, by (i) providing prompt, predictable settlement payments to qualifying claimants who would otherwise wait many years in the tort system to resolve their cases, (ii) providing Owens Corning a much higher degree of financial certainty by allowing it to better predict and control future annual settlement payments and defense costs, and (iii) decreasing the resources used to defend asbestos cases, thus freeing more money with which to pay claimants.

Comments on H.R. bill 1283

Owens Corning applauds the Chairman and other supporters of the proposed legislation for their leadership on this important issue. However, in fight of the success of the NSP, the Company does not believe that it is either necessary or desirable for the federal government to impose on plaintiffs and defendants a federal administrative scheme of the kind contemplated by H.R. 1283. Many specific aspects of the proposed legislation, while reflecting laudable goals, can either be better achieved by private negotiation among parties in the litigation or can be accomplished under existing laws and without the need of further legislation. The NSP is proof that plaintiffs' counsel and their clients are prepared to enter into private, non-traditional arrangements to resolve large numbers of pending and future cases without involving the courts. The NSP also demonstrates that mutually negotiated agreements among the parties, rather than the creation of a federal corporation and imposition of an additional level of bureaucracy, are achievable. In our view, the NSP represents for all companies a model that could be adopted to end most of the asbestos litigation.

A voluntary, non-legislative resolution of asbestos cases such as the NSP avoids the many drawbacks inherent in the federal administrative scheme envisioned by H.R. Bill 1283. In particular, a voluntary program involves no government compulsion, no new federal bureaucracy and no interference with the legal rights of those who do not wish to participate. The NSP raises none of the serious federalism concerns that are presented by the proposed legislation.

Owens Corning has the following brief comments on several of the major aspects of the proposed legislation:

1. *Establishment of a Federal "Asbestos Resolution Corporation"*. Owens Corning has reservations concerning the wisdom and workability of creating a federal administrative agency to evaluate and process asbestos personal injury claims. On the basis of its long experience in the asbestos litigation. Owens Corning believes that, as a practical matter, the creation of a federal bureaucracy will prove extremely cumbersome, while failing to achieve anything that cannot be accomplished through private negotiations between plaintiffs and defendants. Claims are currently evaluated and processed by the defendants, each of whom uses a unique system and

unique standards—including medical and exposure standards—for determining whether to pay on a particular claim, and, if so, how much to pay. Often, group settlements of cases between defendants and plaintiffs' counsel are achieved on the basis of long-standing relationships, unique historical relationships and unique settlement criteria, and involve trading concessions in order to tailor mutually acceptable arrangements.

The one-size-fits-all approach of H.R. Bill 1283 is not consistent with this practice, and may deprive parties of the flexibility needed to achieve settlements. Moreover, placing a large federal corporation at the helm of evaluating and processing hundreds of thousands of pending claims—many of which have been in the tort system for many years—will lead to even further delays in resolving the pending cases.

For all of these reasons, Owens Corning believes that Congress should act with special caution in creating a new administrative regime to deal with asbestos claims. As many Members have recognized, an administrative agency, once created, often takes on a life of its own. Such a new administrative entity may well prove difficult to reform or rein in should it take a different course than its creators intended or anticipated.

2. *Medical Eligibility Criteria.* Owens Corning has long recognized, as do the sponsors of the proposed legislation, that the limited resources available to provide compensation to individuals who are injured as a result of exposure to asbestos-containing products should not be diverted to pay claims of individuals who do not have demonstrable illnesses or actual physical impairment. As illustrated by the NSP, plaintiffs and defendants are capable of negotiating appropriate, mutually agreeable medical criteria that defer claims of those who are not impaired. Their rights are preserved in the event that they become ill in later years. Such a voluntary deferral system does not preclude those claimants who nonetheless want to pursue their claim even though they do not meet medical criteria. In our view, the NSP is preferable to a compulsory "one-size-fits-all" set of requirements imposed by the federal government.

To the extent that some claimants still pursue litigation. Owens Corning believes that the tools necessary to appropriately prioritize the claims of truly sick plaintiffs already are available to the courts. These include inactive dockets—such as those employed in Cook County, Illinois and Baltimore, Maryland—for the claims of unimpaired plaintiffs, and the prioritizing of more serious claims as in the federal multi-district proceedings. Also, some jurisdictions, such as New York City, have what are called "in extremis" dockets for exigent cases of the most seriously ill who are likely to die within six months of an asbestos related disease. These cases are processed quickly to give these claimants their day in court. Most of these cases are settled. These techniques, together with others which have been successfully employed by many courts, provide far greater flexibility than can a federally mandated set of uniform medical criteria.

3. *Application to Pending Claims.* One of the most troubling features of the proposed legislation is its applicability to pending lawsuits. By making the bill's provisions applicable to lawsuits pending at the time of enactment, Congress would in effect be changing, or completely preempting, state substantive law in a dramatically retroactive fashion, imposing new rules on state causes of action that not only have already accrued but have actually been filed. In many instances, plaintiffs have been waiting for trial for many years.

There are serious federalism concerns any time Congress supercedes state law in areas in which the states have traditionally been free to adopt their own policies. As the Supreme Court made clear just last week in its opinion in *Alden* v. *Maine,* the federal government has been granted by The Constitution only "limited and enumerated powers," while a "vital role" is "reserved to the States by the constitutional design." These federalism concerns are heightened immeasurably when state law is rewritten with respect to claims that are already in the courts. Moreover, this retroactive feature of the proposed legislation would have the effect of imposing a massive stay on all pending asbestos claims (except those actually on trial). This delays the resolution of these claims for what may be a number of additional years until the new agency is in a position to address the backlog of hundreds of thousands of pending claims.

4. *Alternative—Dispute Resolution ("ADR").* Owens Corning is not opposed to the use of ADR to process asbestos claims, on the contrary, the NSP Agreements 'include a privately-negotiated provision that requests claimants to mediate claims as a precondition to opting out of the program. Moreover, many courts already make effective use of ADR to resolve asbestos cases. However, Owens Corning does not perceive the need or justification for a new and compulsory ADR system under the aegis of a federal administrative bureaucracy.

5. *Limitations on Private Litigation.* Once again, Owens Corning applauds many of the concepts reflected in the current legislation, particularly with regard to those provisions rejecting as inappropriate and unfair the consolidation of large numbers of individual asbestos claims and the continued imposition of repetitive punitive damages awards. Even without new legislation, however, courts have increasingly come to view these aspects of the asbestos litigation as counter-productive and improper. While Owens Corning welcomes further reform in this area, we believe that the creation of a new federal administrative bureaucracy is unnecessary to accomplish these goals.

6. *Funding from Existing Defendants.* Owens Corning is particularly concerned with those provisions in the legislation that provide for all funding to be collected from existing defendants in proportion to the number of claims asserted against those defendants. There are two serious problems with this approach.

First, the legislation ignores the well-documented central role of the federal government in exposing tens of thousands of individuals to asbestos-containing materials. As many Members are aware, although the use of such products was actually required by the federal government through such mandates as the Walsh-Healy Act, the government has invoked its defense of sovereign immunity to escape paying its fair share toward compensating injured plaintiffs. It is particularly ironic that the Congress should now contemplate the establishment of a federal bureaucracy for the resolution of these same asbestos claims entirely funded by private industry. We can not support federal legislation without federal funding.

Second, the particular funding formula embodied in the pending legislation will have the effect of freezing into place the disproportionate level of payments by a relatively small percentage of the many hundreds of former producers and distributors of asbestos-containing products. Such an allocation is particularly unfair to Owens Corning, which has resolved the vast majority of claims against it and therefore has no need for such a program. Moreover, it is important for the Committee to understand that, although the asbestos litigation originally arose insulators and shipyard workers whose primary exposure involved high temperature pipe-and-block insulation, the litigation has expanded dramatically to encompass a wide range of occupations involving very different product exposures. Unfortunately, the traditional "pipe-and-block" defendants have continued to pay far in excess of their fair share in the litigation. No administrative procedure should be adopted that demands continued disproportionate contributions from these traditional defendants while permitting newer defendants, many of whom have substantial resources to escape paying their fair share.

Conclusion

Owens Corning suggests that this Committee give serious consideration to the NSP as a viable alternative to legislation, However, we would welcome the opportunity to discuss our concerns further, and appreciate the opportunity to be heard on this important subject. Thank you for your consideration.

LAW OFFICES OF MCGARVEY, HEBERLING,
SULLIVAN, & MCGARVEY, P.C.,
Kalispoll, MT, October 4, 1999.

Re: 10/5/99 hearing on "Fairness Asbestos Compensation Act of 1999"

Hon. MAX BAUCUS,
U.S. Senate, Washington, DC.

DEAR SENATOR BAUCUS: We represent Montana mine workers and, family members who have been injured or killed by exposure to asbestos from vermiculite ore coming from W.R. Grace's Libby mine. The proposed legislation would take away substantial rights presently available to these people. The bill purports to address the problem created by thousands of asbestos claims pending around the country. The vast majority of this litigation consists of product liability claims arising out of exposure to asbestos insulation and other products. The legislation is being opposed, in toto by such organizations as Public Citizen and The Association of Trial Lawyers of America (ATLA). We support these efforts to defeat this legislation. However, we also seek your assistance in making sure that the Senate is fully apprised of the compelling reasons why this legislation should, in any event, be amended so that it does not displace the expeditious and efficient recourse presently available to hundreds of your injured constituents. I attach hereto (as exhibit 1) the amendatory language. Set forth below is additional information concerning the impacts of the proposed legislation on your Montana constituents, which I hope will be shared with your colleagues.

1. THE MONTANA CLAIMS ARE NOT PRODUCT LIABILITY CLAIMS

The proponents of this legislation point to the concern expressed by several Supreme Court justices in *Amchem Products, Inc.* v. *Windsor,* 521 U.S. 591, 628–29 (1997) and *Ortiz* v. *Fibreboard Corp.* No. 97–1704, slip op. at 1 (June 23, 1999). Likewise, proponents point to the numerous cases pending in the federal court multi-district litigation entitled *In Re Asbestos Products Liability Litigation. Amchem* and *Ortiz* were large product liability class action lawsuits. Similarly, the multi-district litigation involves product liability claims. In contrast, the claims of your constituents are based on the intentional and negligent conduct of W.R. Grace & Co. in exposing Libby miners and their families to raw asbestos from the *mining and milling* process and the dust brought home on the miners' clothes. We are not asserting product liability claims on behalf of these victims.

Unfortunately, through the unnecessarily broad scope of its definitional and applicability sections the bill would indiscriminately displace the claims not only of consumers and workers exposed to asbestos *products,* but would also preempt the *very different exposures of the Montana miners and their families.*

We are requesting that you push for an amendment to the bill which would exclude from the definition of "asbestos claim" *the claims of miners and their families* arising from exposure to raw asbestos from the mining and milling process. (See exhibit 1, attached.)

2. MONTANA'S STATE COURTS ARE RESOLVING THESE CLAIMS SWIFTLY AND FAIRLY

Both Justice Dryer and Chief Justice Renquist expressed concern with "the massive impact of asbestos-related claims on the *federal courts.*" *Ortiz, supra* at 1 (emphasis added). Ironically, the proposed legislation would remove the Libby cases from Montana's *state court system* and place them first in a federal administrative process and ultimately in the federal courts.

The claims of the grievously injured people from Libby receive prompt attention in our state court system. The state district court in Libby has special asbestos injury jury trial terms each February, May, August and November. The most seriously injured are allowed first access to the court. This system has worked remarkably well. Ironically, the proponents of the legislation purport to be concerned for plaintiffs being forced to wait years to recover for their injuries. However, the processing of your constituents' claims through the proposed new federal administrative bureaucracy, with appeals taken to the federal court, would be nowhere near as expeditious.

Members of both political parties have justifiably expressed concern over federal encroachment into matters that have traditionally been governed by state law. Federal encroachment is particularly ill-advised here, where Montana's judicial system is dispensing justice swiftly.

3. THE MONTANA CLAIMS ALL INVOLVE GRIEVOUS INJURY OR DEATH

Another assertion of the bill's proponents', which does not apply to the Libby claims, is that many of the pending product liability claims involve individuals who are worried about their exposure to asbestos but who never will be affected by disease. This is in grim contrast to the situation here in Montana. Attached hereto (as exhibit 2) is a list of 88 Montanans who have already died of asbestos-related diseases due to their exposure at the Libby facility. This list does not include family or community members, who have died from asbestos exposure arising from the Libby facility. The claims now pending here in state court all involve either lung cancer, mesothelioma, asbestosis—or death from one of these asbestos-related diseases. A brief sampling of the human misery caused to the involved families is described in several letters from victims' families (attached as exhibit 3).

4. W.R. GRACE IS SOLVENT AND MUST BE HELD ACCOUNTABLE FOR ITS CONDUCT

Proponents of the legislation contend that the major primary defendants have gone bankrupt, causing plaintiffs' attorneys to target tangentially involved "deep pocket" corporations as defendants. Not so here. W.R. Grace & Co. owned, operated and profited from the operation of its vermiculite mine and mill in Libby, Montana. While Grace has tried in recent years to spin off new corporate forms in an attempt to disguise and shelter the corporate entity that owned the Libby mine, W.R. Grace remains a large and solvent corporation.

Moreover, compelling policy reasons argue against allowing a rogue corporation to benefit from federal legislation at the expense of those whom it negligently and/or maliciously injured. The vermiculite mine and mill in Libby was in operation since the 1930s. The mining and milling process produced a considerable amount of dust.

In 1956 the Montana Board of Health issued a report based on its industrial hygiene study of the Libby facility. That report informed the company of numerous air quality violations, numerous violations of standard industrial hygiene practices, and informed the company in unequivocal terms that: "The asbestos dust in the air is of considerable toxicity, and is a factor in the consideration of reducing dustiness in this plant." The report cited to the extant industrial hygiene literature and described the disease process set in motion by asbestos exposure. For decades after the issuance of this report, the Zonolite Company and W.R. Grace withheld this critically important information from its workers, their families, and, indeed, the community of Libby.

It must be emphasized that the nature and degree of exposure to raw asbestos from the mining and milling operations in Libby, Montana is profoundly different from the exposures to asbestos from end-products such as insulation. For example, the asbestos dust levels measured in the Libby mine and milling operations were as much as *400 times* greater than the applicable threshold limit values (TLV) and thousands of times greater than the current accepted TLV. Grace's own internal memos observed that *92 percent* of workers with more than 20 years exposure had lung disease. It is hardly appropriate to place this type of direct exposure to extreme levels of raw asbestos in the same category as the insulation and other product-related exposures which comprise 90+ percent of the litigation addressed by this legislation.

5. CONCLUSION

In. summary, we support efforts to defeat this legislation in its entirety. At a minimum the legislation must be amended to protect the rights of grievously injured Montanans, who presently have efficient and expeditious recourse through this state's judicial system. On behalf of the numerous miners and their families, I am requesting your assistance in carrying this message to each and every Senator. We trust that in this way justice will prevail.

Please let me know if I can provide further information or assistance on this matter.

Yours sincerely,

ROGER M. SULLIVAN,
McGarvey, Heberling, Sullivan, & McGarvey.

WORKERS DEAD FROM ASBESTOS DISEASE

Key to Death Certificates evaluation by Dr. Whitehouse:

- **A1 = Asbestosis for sure**
- **A2 = Probable Asbestosis**
- **A1,C1 = Asbestosis and Asbestos Lung Cancer**
- **A1,M = Asbestosis and Mesothelioma**
- **C1 = Asbestos Lung Cancer for sure**
- **C2 = Probable Asbestos Lung Cancer**
- **M = Mesothelioma**

⋆ Died of LC within 10 yrs. of 1st exposure - not included in cumulative totals.
† If coded A1,C1 or A1,M, deceased worker will be tallied in Asbestosis column.

YEAR	NAME	YRS @ WRG	DEATH BY ASBESTOS DISEASE		DEATH TOTALS		
			Asbestos Lung Cancer	Asbestosis	Asbestos Lung Cancer	Asbestosis	Total
1960	Rudolph Engle	46-60	C1		1		1
1961	William Airth	46-57		A2,A1			
	Glenn Taylor	44-59		A1			
	Charles Wagner	49-59		A2		3	4
1963	Raymond Orsborn	48-50	C1				
	Ottis Mast	47-56	C1		3		6
1966	John Ludwig	57-66	C1				
	Walter McQueen	44-62		A1	4	4	8
1967	⋆Merle McComas	58-67	C1				
1968	Raymond Bleich	35-68	C1				
	William Hedrick	57-68		A2	5	5	10
1969	William Shows	47-48	C1				
	Jimmie Starr	52-56	C1		7		12
1970	William Smithers	50-52		A1,C1		6	13
1971	Orville D. Murray	49-52		A2		7	14
1973	Lionel Van Horn	50-73	C1				
	Henry Hammer	48-54		A2	8	8	16

EXHIBIT
EXH. 2

YEAR	NAME	YRS @ WRG	DEATH BY ASBESTOS DISEASE		DEATH TOTALS		
			Asbestos Lung Cancer	Asbestosis	Asbestos Lung Cancer	Asbestosis	Total
1974	Lilas Welch	49-67		A1			
	Perley Vatland	55-74		A1		10	18
1975	Lawrence Kins	46-49		A2		11	19
1976	Edward Dinwiddie	45-55	C1				
	Roy Dawson	38-43	C1		10		21
1977	Robert Cohenour	48-74	C1				
	Thomas Craver	59-77		A2	11	12	23
1978	Harold Day	65-76	C1				
	Ted Wright	51-56	C1				
	Glenn Mitchell	62-78	C1				
	*Peter Roberts	70-74	C1				
	Lloyd Miller	48-76		A1,C1			
	Orville G. Murray	37-45		A1,C1	14	14	28
1979	Verle Olson	46-62	M				
	Robert Weitzel	51-56		A2	15	15	30
1980	Clarence Peterson	46-53	M				
	Richard Rayome	46-75	C1		17		32
1981	Morris Ahrenkiel	47-50	C1				
	John Parker	48-50	C1				
	Robert Dahms	57-72		A1,C1	19	16	35
1982	Morland Baker	47-49	M				
	James Gidley	53-78	C1				
	Virgil Priest	61-78	C1				
	Allen Boothman	48-67		A2	22	17	39
1983	Peter Powell	44-55	C2				
	Michael McNair	43-75		A1,M			
	Kenneth Koehler	57-64	C1				
	Walter Baker	45-74		A1			
	Herbert Waltman	37-40	C1		25	19	44
1984	Hord Kimble, Jr.	62-65		A1,M		20	45

YEAR	NAME	YRS @ WRG	DEATH BY ASBESTOS DISEASE		DEATH TOTALS		
			Asbestos Lung Cancer	Asbestosis	Asbestos Lung Cancer	Asbestosis	Total
1985	Joseph Lyon	42-43		A1			
	Walter Dutton	48-55		A1			
	Lyle Warner	57-66		A2		23	48
1986	Robert Vinion	56-67		A1,C1			
	Calvin Henderson	49-52	C1		26	24	50
1987	Merle Everett	62-64	C1				
	Ronald Johnson	60-76		A1,M			
	James Smith	51-68	C1				
	John Kilpatrick	70-71	C1				
	Raymond Belangie	47-76		A1,C1	29	26	55
1988	Jack Lewis, Sr.	46-47		A1			
	Clyde Basham	48-?		A1		28	57
1989	Charles Carroll	58-76		A1			
	Lyle Siefke	63-0		A1			
	Lloyd Maynard, Sr.	57-74		A1			
	Clyde Snyder	68-73	C1				
	Morriss Kair	54-79		A1	30	32	62
1990	Harvey Noble	51-83		A1		33	63
1991	Kenneth Fredericks	66-81	C1				
	Ted Boyd	63-65	C1				
	Willis Fields	46-84		A1,C1			
	Darrell Lockwood	74-84	M		33	34	67
1992	Robert Thomson	68-0		A1,C1			
	Arnold Smith	50-79	C1				
	Billy Dorrington	37-80		A1,C1			
	Raymond Carlson	57-84		A1			
	Henry Schnetter	74-84	C1				
	Gerald Nelson	66-0	C1				
	John Calkins	52-58	M		37	37	74
1993	Edward Wittlake	51-64	M				
	George Oldham	55-66		A1			
	Donald Peterson	50-53		A1	38	39	77

YEAR	NAME	YRS @ WRG	DEATH BY ASBESTOS DISEASE		DEATH TOTALS		
			Asbestos Lung Cancer	Asbestosis	Asbestos Lung Cancer	Asbestosis	Total
1994	Donald Howard	48-50	C1				
	H. Shrewsberry	52-84		A1	39	40	79
1996	Rex Smith	57-86		A1,C1			
	Robin Clark	66-67	C1				
	William Hostetler	59-80		A2			
	Rbt. Stufflebeam	74-86		A1	40	43	83
1997	Donald Riley	60-87		A1			
	Thomas Albert	60-62	C1				
	Wesley Siefke	50-51	C1		42	44	86
1998	Robert Graham	62-90		A1,M			
	Donald Johnson	50-81		A1		46	88

March 3, 1999

Dear Senator Baucus,

My husband worked at the W.R. Grace mine from 1942 until 1975. During that time, he was exposed to a tremendous amount of dust. All the while he worked there, he was told that the dust was not harmful. He died on May 8th. 1983 following surgery. The asbestos had calcified and become so heavy that one of his lungs collasped. The doctors had to do surgery because the cavity was filling with water faster than they could drain it. When the doctors got in they found cancer already established. My husband died three days after the surgery.

Two years ago I too was diagnosed with asbestosis. I am houseridden and have to take about $300.00 worth of medicine a month. The side effects of the medication keeps me near the bathroom. I suffer from bloating and weight gain, which also makes it difficult for me to walk. My life has been greatly affected.

Sadly all my children have also been diagnosed with asbestosis. This is extremely frightening to me. The prospect of them going through what I'm suffering and what I witnessed my husband suffering, is hard to bear.

I have heard that the Congress is taking it upon itself to pass a bill that would take away the rights of other victims of asbestosis to a fair trial.

In Libby, we have fought long and hard to be able to be heard in court. I am against the "Asbestos-Fairness Act".

Attn: Brian Kuehl

Sincerely, Louise McNair

Louise MCNair,

EXHIBIT
Exh 3

Senator Max Baucus
U.S. Senate
SH-511
Washington DC 20510-2602

Dear Senator Baucus,

My father, Art Bundrock, worked at the W.R. Grace Zonolite Div. in Libby from 1957 to 1976. During that time he was exposed to a tremendous amount of dust. All the while he worked there he was told that the dust was not harmful. We now know that the dust contained asbestos fibers. During his tenure there he often came home covered with dust, so my entire family was exposed to the harmful dust for years. There were 7 of us in my family, my mom and dad and 5 children. My father passed away this summer after struggling for his breath for too long. He was an amazing man who we all miss very much. My father died after 21 years on permanent disability.

Of the 6 people left living in my family 5 of us have been diagnosed with asbestosis, my mom, myself, 2 of my sisters and my only brother. My youngest sister has not been diagnosed with it and hopefully in the future she won't be. The severity of this asbestosis varies but we are all affected in many ways. My mother's health has been severely affected by the asbestosis. She often has to use help with her breathing. It is very difficult to watch. She is very independent and works hard at maintaining the breathing capacity she has but it is getting worse every day.

I know that my families health will be affected for the rest of our lives because of this exposure and ultimately so will our children's and our spouse's lives be affected. My health at age 43 is not severely affected yet; asbestosis is not a quick acting disease. I try and maintain a healthy life style and remain positive, but I have an 18 month old son and I do worry about how this will affect his future with me and other members of my family who have asbestosis.

I have heard that the Congress is taking it upon itself to pass a bill that would take away my rights to a fair trial. The system has worked in Libby in these cases and I'm distressed that the government is taking it upon itself to allow the company that was responsible for mine, and my families illness be the final judge as to whether we deserve compensation. In Libby people have fought long and hard to be heard in court. I am against the Asbestos-Fairness Act. ***Fairness*** is a very ironic word to be used for this act. What would have been fair was to have told the workers and families what they were being exposed to, or better yet make the work environment clean and healthy, and build a changing room for the workers. It is documented that W.R.Grace knew the exposure was harmful but did nothing to abate it for many years. I know the fact that my father brought the dust home and exposed his entire family to it **haunted** him until his death.

Sincerely,

Robbin Redman
PO Box 746
Troy, MT 59935

WHITE LUNG ASBESTOS INFORMATION CENTER,
New York, NY, October 5, 1999.

Senator CHARLES GRASSLEY,
Chairman, Subcommittee for Administrative Oversight and the Courts,
Hart Senate Office Building, Washington, DC.

DEAR SENATOR GRASSLEY: The major portion of this testimony was prepared as a letter to Senator Torricelli and presented to him at a meeting in his office in Newark. I present for inclusion in the record that letter with some slight modification. In addition to the White Lung Asbestos Information Center, the current testimony represents the view of Consumers For Civil Justice, the largest consumer advocacy group in New Jersey. Since our meeting with Senator Torricelli in May a lot has transpired that directly pertains to S. 758 and its House companion H.R. 1283. Opposition to the House bill from unions and asbestos victim groups has made clear that the bill in its current form lacks consensus. Thus the American Trial Lawyers Association has developed a set of principles for the *Review of Asbestos Personal Injury and Wrongful Death Cases* and in apparent response Christopher Edley has structured a proposal that is markedly different from the bill that is before us today. It is time for asbestos victims to state some principles:

FALSE PREMISES

The underlying premises upon which S. 758 or any of its future revisions are based are false. The first premise is that the defendant manufacturers are at risk of bankruptcy and that many jobs will be lost if these companies are not assisted. I know of no former asbestos manufacturers who are in danger of filing for bankruptcy. Most of those manufacturers who might benefit from the bill are members of the Center For Claims Resolution (CCR). The insurance coverage of these manufacturers is minimally 1.5 billion dollars. This we know from the Amchem settlement. The second premise is that asbestos litigation is cluttering the courts. As has been repeatedly pointed out, asbestos compensation is a mature tort. All the major legal issues have been resolved many times over and the value of claims has historically evolved. Few cases go to trial, less than 100 in 1998. The tort system has brought homeostasis between victims and the defendant manufacturers. It's not hard to determine why the latter are not happy with this equilibrium. They've lost and find the tort system no longer serviceable.

MAXIMIZED COMPENSATION

I have agreed to review and comment on the efforts of Mr. Edley and in general to keep an open mind concerning the possibility of a legislative surrogate for asbestos tort. There is only one valid reason for an asbestos victim advocate to do this and that is to maximize asbestos victim compensation. As you know, the bankruptcy filing of Manville Corporation has worked out wonderfully for the newly re-named Johns-Manville Corporation but not so well for its victims who receive no more than 10 percent of the historical value of their claims from the settlement trust. *Asbestos victims are not adequately compensated for their injuries.* To date Mr. Edley's very fertile mind has effectively scuttled H.R. 1283 but it has not made any headway in putting on the table a guaranteed amount of money. Indeed, there has been no estimate of the dollar value of present and future liability, no research into defendant insurance assets and no discussion of maximizing victim compensation.

There are two tortfeasors who as yet have not been held responsible for their participation in the generation of asbestos disease. The U.S. Government and the Tobacco Industry. I suggest linkage between the Justice Department's suit against tobacco and the complicit role of the U.S. Government in suppressing information and its failure to adequately protect workers through regulation. A portion of jury awards to the U.S. Government might be set aside for asbestos victim compensation. Any legislative replacement of tort should stipulate its primary goal as the maximization of asbestos victim compensation.

Prevention and Early Detection of Asbestos Related Disease

Advances in CAT scan technology, especially in the area of early lung cancer detection, holds the promise of dramatically improving the five year survival rate of asbestos related lung cancer. Any federally sponsored asbestos disease compensation program should involve early detection lung cancer monitoring. (See the NY Times, July 9, 1999). Targeted smoking cessation programs should also be made available to asbestos victims.

Letter to Senator Torricelli (May, 1999)

1 am writing in opposition to S. 758, the so-called "Fairness in Asbestos Compensation Act of 1999." This bill is reminiscent of a long line of asbestos bailout schemes devised by the former manufacturers of asbestos products. The pillar, upon which asbestos victim litigation has been successfully brought, has not changed over the past three and a half decades. The industry that seeks your protection from our judicial system remains the same industry that knew of the health hazards of asbestos exposure and willfully, routinely, and energetically kept that information from the workers who manufactured and installed their products and from the consumers who ultimately used them.

The ostensible purpose of S. 758 is to reduce markedly the number of tort claims filed against the former manufacturers of asbestos products, while providing fair and timely compensation for asbestos victims. In reality, the bill creates a class of citizens, asbestos victims, whose access to our civil justice system would be rendered far different and greatly inferior to that of all other citizens. It would also create a class of manufacturers—the former manufacturers of asbestos products—who would be afforded an unprecedented level of tort protection. The tobacco industry is keenly watching for the fate of this bill. What's good for the goose is good for the gander.

The right to a jury trial and day in court is as good as eliminated in S. 758 which sets up an industry funded Asbestos Resolution Corporation (ARC). The ARC would require that the asbestos victim obtain a Certificate of Eligibility for his/her claim through meeting unprecedented and onerous medical criteria (discussed below). If the Certificate of Eligibility is obtained, the asbestos victim, who is unsatisfied with the settlement offer, must then submit to mediation. Only after mediation has failed is the victim allowed to file a civil action or proceed to Alternative Dispute Resolution. If the victim was unable to obtain a Certificate of Eligibility, he would have no right to file a civil action in any court, state or federal.

The transference of such power to validate or liquidate the assets of victims, i.e., their claim under the law for compensation for injury, from our independent Judiciary to a Corporation whose independence would always be suspect because of its funding structure, demands close and careful scrutiny as to both its underlying justification and fairness.

I. JUSTIFICATION

The asbestos manufacturers who have written this bill contend that asbestos personal injury litigation is "unfair and inefficient and poses a crushing burden on litigants and taxpayers alike." There is little doubt that the defendants and their insurers have had to ante up billions of dollars as the result of asbestos litigation. They get no sympathy from this quarter.

I have helped too many of my members die and have watched too many widows mourn and adjust, some successfully, some not, to the loneliness of life without a spouse. As for the burden of litigation (court costs largely) which the taxpayer must bear, keep in mind that this is an expense of a democratic society. If there are excesses unique to asbestos litigation, they are largely created by the *stalling tactics* of the asbestos defendants. In light of these tactics, the claim that asbestos litigation has not been able to provide compensation swiftly, truly bewilders. Once the die establishing the culpability of the manufacturers was cast, and it was cast early on, *delay and deception* became their overarching strategy.

Keep also in mind that what economists call the externalization of costs has been put at $500 billion for the production of asbestos products. These are the costs which accrue to society at large and which are not paid by the manufacturers themselves. These are the costs associated with loss of income, worker compensation, asbestos related burdens on Social Security, SS Disability, Medicare, Medicaid and other social services, and the cost of asbestos abatement and control in the thousands of buildings where the material is in place and continues to deteriorate. In light of these costs the manufactures' concern for the taxpayer in the present instance hints of the disingenuous.

The asbestos manufacturers also contend that 150,000 cases are currently pending and that tens of thousands of new cases are being filed each year, with the inference that these cases will finally be resolved through trial. This is not the case. As the defendants point out, asbestos litigation is a *mature* tort. This means that most cases are settled out of court with both parties having clear understandings as to the historical value of claims. In fact, the homeostasis wrought by years of litigation would be severely upset by the introduction of a mechanism entirely the product of only one of the parties to the most significant mass tort in history.

The asbestos manufacturers contend that "in many courts, the vast majority of pending asbestos claims are filed by individuals who suffer no present asbestos-related impairment" and that "these claims divert the resources of defendants from compensating individuals who are suffering from serious asbestos-related disease." This statement is *not* accurate.

Asbestosis is a compensable disease and is usually accompanied by lung function impairment. Likewise in the majority of pleural plaque cases (72 percent according to one study) lung function impairment is involved.

The manufactures' argument is a classic *blame the victim argument.* Asbestosis victims or pleural plaque victims with slight or no lung function impairment have the audacity, so the argument goes, to file their lawful claims and thus deny fair compensation to those who are really injured. Never mind that as much as 30 percent or more of their lung tissue might be affected by scarring and that their fiber burden is often in the millions per gram of lung tissue, or that their immune systems are compromised. Never mind that their exposures were known to the manufacturers and could have been prevented. Forgive the incredulity, but I do not believe that if the claims of the so-called non-impaired were wiped out in every state and federal court that the historical value of a mesothelioma case would rise by one penny as a result.

The manufacturers also contend that "in order to obtain compensation for non-malignant disease, claimants often must give up their right to obtain compensation later on, if they develop an asbestos-related cancer." The manufacturers have used the fact that asbestos victims are often economically stressed to buy protection against the liability of future asbestos-related cancers. They need to stop this inhumane practice.

II. FAIRNESS

Claims adjudication under S. 758 is *fundamental unfair* and *manifestly an industry product:*

A. Medical criteria

The medical criteria, which must be met for the Corporation to issue a Certificate of Eligibility, are more stringent than would be applied in most state jurisdictions. This is true for pleural plaques, asbestosis, mesothelioma and lung cancer.

Asbestosis and pleural disease victims must not only have x-rays that definitively show disease but also pulmonary function tests that demonstrate significant lung impairment. The majority of asbestos victims who at present have viable court cases would not meet the bill's eligibility criteria. An individual could have 30 percent of his lung tissue scarred and lose as much as 20 percent or more of his lung capacity but not be injured sufficiently to warrant compensation.

Mesothelioma victims must meet criteria, that no court requires for the diagnoses of Mesothelioma. First, an invasive procedure must be performed to obtain tissue for microscopic analysis and second the tissue must be evaluated by three Board Certified pathologists, one of whom must be a member of the United States-Canada Mesothelioma Reference Panel. For years courts have recognized that it is not always necessary to subject the mesothelioma victim to invasive procedures and when tissue is obtained, usually upon autopsy, the hospital pathologist is fully qualified to make the diagnosis.

Asbestos Lung Cancer cases face in most instances insurmountable barriers to claim eligibility. First, the lung cancer claim must be accompanied by a diagnosis of asbestosis or pleural disease which meet the criteria for impairment stated above. The assumption here is that asbestos related lung cancer will not appear if non-malignant disease is not also present. This is simply unscientific. Asbestos exposure is the criterion for establishing a lung cancer as asbestos related.

All lung cancer claims require the establishment (if a minimum 12 year latency period and a minimum of 15 years of asbestos exposure. The latency period is unfair because the duration of latency is associated with the individual's background risk. Thus the older the lung cancer victim is at time of exposure the shorter is the latency period.

The bill's criterion for establishing 15 years of exposure is unreasonable on many grounds. First, 15 years of exposure is not required to produce lung cancer. Greater intensity of exposure in a short time is just as productive of lung cancer as lesser exposure over a shorter time. Second, the way asbestos exposure is calculated for exposures occurring from 1972 onward is particularly cynical. Each year of exposure that occurred between 1972 and 1976 would count as only ½ year toward the 15 year exposure criterion if the manufacturer could show that asbestos operations complied with the then current OSHA Permissible Exposure Limit (PEL) of 5 mil-

lion fibers per cubic meter of air. By its own admission OSHA has stipulated that it did not intend for that PEL to substantially reduce the risk of asbestos related cancers. Indeed, at that PEL the risk of death is 150 per 1000 exposed workers for 20–40 years of work. Thus even one year of work at the PEL substantially increases the workers risk of asbestos cancer of all types.

If the asbestos victim wishes to have his exposure from 1976 through 1979 count as a full year of exposure, then he, the victim, must demonstrate that the employer's asbestos operations *were not* in compliance with the then current PEL of 2 million fibers per cubic meter of air. This is virtually impossible. In many circumstances the data does not exist, in other circumstances it does not reflect actual exposures. Even when the data legitimately show compliance with the PEL, the increased risk of lung cancer even for one year of exposure is substantial. A 2 million fibers per cubic meter of air the rate of death is 64 per 1000 workers exposed for 20–40 years of exposure. If the victim cannot show non-compliance with the PEL each year of exposure counts only as ½ year.

In lung cancer suits this is precisely the kind of information juries need to hear when companies offer the standard regulatory compliance defense. S. 758 raises acceptance of the regulatory compliance defense to the level of law. Indeed the bill goes far beyond that. Exposures that occur after 1979 do not count at all, unless the victim can demonstrate that for most of the year the employer's asbestos operations were not in compliance with the PEL. Thus the bill assumes that all employers are entitled to the regulatory compliance defense without demonstrating compliance. It is the victim's task to rebut.

WW II SHIPYARD WORKERS BADLY TREATED

Of the bill's criteria for lung cancer, the most hurtful and irreconcilable with our American values of fair play is the treatment of our WW II shipyard workers. Over 15 million workers went into our shipyards nationwide after Dec 7, 1941; 4 million sustained significant exposure to asbestos. Many were there for several months only, while they awaited the draft or mobilization into the armed services. Some worked for a year, some for two years and others for three years. None were afforded information concerning asbestos hazards: none were provided with protective equipment and many thousands of them have died of asbestos related disease. Under the bill, the WW II shipyard workers would have to have worked for almost 4 full years to establish the fifteen year exposure requirement. The overwhelming majority of WW II shipyard workers would not meet the bill's lung cancer eligibility requirement.

B. Consolidation of cases

While complaining about the unwieldiness of asbestos litigation, the asbestos manufacturers would prohibit the consolidation of cases, a device, which many jurisdictions, have found effective in providing a speedy resolution of cases.

C. Elimination of other causes of action

Many jurisdictions allow damages for emotional distress caused by cancer diagnosis and prognoses of death. S. 758 eliminates such damages.

It also eliminates compensation for medical monitoring, which is particularly important in light of the increased risk of cancer suffered by asbestos victims.

D. Current and future cases

S. 758 has the audacity to eliminate all currently filed asbestos cases, which have not resulted in a final, non-appealable judgment. Asbestos victims in certain jurisdictions have been waiting years for their day in court. This is unspeakable arrogance.

In conclusion, S. 758 is the product of an asbestos industry, which has acted unilaterally to construct a totally self-serving *deus ex machina.* It is an industry that does not need the help, since its insurance coverage is ample to satisfy its present and future obligations. And certain of its members do not see it as a help at all, most notably Owens-Corning Fiberglass. Please abandon your support of this bill.

Sincerely,

MYLES O'MALLEY,
Director of Research.

WILLIAM RAUSNITZ,
President.

BERENICE ROSENBERG,
Vice-President and Treasurer.

BARBARA ZELUCK,
Secretary and Editor.

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