S. HRG. 109–817

THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

JANUARY 11, 2005

Serial No. J–109–2A

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
33–400 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
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TUESDAY, JANUARY 11, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in room SH–216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Cornyn, Leahy, and Carper (ex officio).

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. The Senate Committee on the Judiciary will now proceed with a hearing on a discussion draft seeking to solve the asbestos crisis which confronts America at the present time.

I first saw the asbestos issue back in 1984, more than 20 years ago, when then-Senator Gary Hart of Colorado brought in Johns-Manville. And this very tough issue has been very elusive for more than two decades, and it has mounted in problems, reaching a situation where we now have some 74 companies which have gone into bankruptcy, thousands of individuals who have been exposed to asbestos, with deadly diseases—mesothelioma and cancer—and who are not being compensated. And about two-thirds of the claims, oddly enough, are being filed by people who are unimpaired.

The number of asbestos defendants has risen sharply from about 300 in the 1980s to more than 8,400 today, and most are users of the product. It spans some 85 percent of the U.S. economy. Some 60,000 workers have lost their jobs. Employees' retirement funds are said to have shrunken by some 25 percent. And beyond any question, the issue is one of catastrophic proportions.

The concept of a trust fund was incorporated by Senator Hatch and Senator Leahy in legislation which was introduced in the last Congress. And after an extensive markup in July of 2003, the bill was passed out, largely along party lines, obviously filled with a great many problems. I supported it in the interest of moving the issue along.

At that time I enlisted the aid of Circuit Judge Edward R. Becker, who had shortly before taken senior status, having been Chief Judge of the Court of Appeals for the Third Circuit and having written the landmark opinion on asbestos on class certification, which was upheld by the Supreme Court of the United States. And

Judge Becker's aid was enlisted to assist on an analysis and efforts to find common ground.

In August of 2003, for two days in Judge Becker's chambers in Philadelphia, meetings were held with what we call "the stakeholders"—the manufacturers, labor, AFL–CIO, the insurers, the trial lawyers—to see what areas there might be for common ground. And we have since held some 35 meetings in my conference room, the most recent one of which was held just yesterday.

A major effort was made to try to get legislation through at the end of last year. And, of course, if you want legislation passed in the last days of a Congress, it is something that has to be done by consensus, because any single Senator can block legislation at the very end of the term. And we were not successful.

But we have continued, and there have been areas of pretty much agreement. I am reluctant to use the word "agreement" because there is always some strand, somebody who has concerns, but I think that is an accurate statement on quite a number of matters, like the streamlining of the administrative process and the early start-up and the definitive and exigent health claims and judicial review.

The area of the amount of the trust fund has not been put in the discussion draft because it is very, very contentious, and it seemed to me that it was better to have this hearing, which is largely an educational hearing, so that we may explore the parameters of the bill and to see where are the areas of agreement and where are the areas of disagreement.

It is very easy to criticize and find fault with any legislative proposal in this field. It is so vast and there are so many complex and competing interests. But it would be my hope that the critics would hold their fire until there has been an analysis of the bill, and to the extent that there are criticisms, that there are objections, bring them to the Committee, bring them to our working group, and we will address them.

This may well be the last best chance to deal with this issue in the foreseeable future, and the effort has been really, really herculean. Judge Becker received the Devitt Award as the outstanding Federal judge of more than 1,000 judges in the Federal court system and has devoted himself very, very substantially. He still has some judicial duties as a senior judge, but very, very substantially. And we are looking for more than 60 votes to avoid cloture. I think if this bill is to be passed, it is going to have to be passed with big numbers. We passed the National Intelligence Director by 96–2 when we barely got it through conference. And in the last Congress, we had a Patient's Bill of Rights that passed both Houses, and it failed in the conference. So that it has to be worked through very, very carefully.

Senator Feinstein had wanted to be here today, but I talked to her yesterday afternoon, and she is under the weather, so to speak. She has been a major contributor and has proposed legislation in the field. And there have been many contributors. Senator Frist and Senator Daschle last year worked on this issue very assiduously, and they came to a figure for the trust fund of $140 billion. And their consideration, especially the quasi-adversarial relationship, makes that figure entitled to weight. But that is one where

it is my view that we need to confer. Senator Leahy and I, members of the Committee; Senator Cornyn, who has joined us here today, has been asked by Senator Frist to take a special look at the case.

This is not the best day of all days to have a hearing when the Senate is not in session, but there really is no good day to have a hearing, and three Senators, not a bad showing for a hearing on any day. But if we did not proceed today, we would be on into late January, and once the Senate goes into session, it is going to be very difficult to find floor time.

I have said that I would like to see a bill presented to the Majority Leader by early February, and that timetable has been labeled as unrealistic. Well, I believe in unrealistic timetables. If you have an unrealistic timetable, you are likely to get it done sooner. But there has been a full-court press on this issue because of the importance of it. And illustrative of that, one of the company representatives at a meeting a couple of weeks ago, talking about getting a bill done by July—which, candidly, through conference and on the President's desk, would be early on an expedited basis—said to me, "July is too late for my company."

Again, let me pay tribute to Senator Hatch, the Chairman last year, for the trust fund concept, and to Senator Leahy, who has been working at our side through this entire complex process. And I will yield to Senator Leahy for an opening statement.

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

Senator LEAHY. Well, thank you, Mr. Chairman.

I would mention to those who are here, I recall in grade school a nun who used to say, "Many are called, few are chosen." She did add, however, that those who showed up late would be chosen to go to the principal's office, so the fact that it is a time we have some of our colleagues overseas and elsewhere, but there has been great interest in this. And I think that Chairman Specter deserves an enormous amount of praise from both Republicans and Democrats in the Senate for holding this hearing.

My message is a simple one. We have to see our efforts through until we have a balanced and effective national trust fund that fairly compensates victims of asbestos-related disease. If you are going to reach that goal, you have got to work with the various stakeholders. You have to work with Senators, both Democratic and Republican Senators, until we settle the outstanding details on fair resolution for all those who are concerned.

I remember back in September 2002 I chaired the first Senate Judiciary Committee hearing on asbestos litigation. I said at that time I was in for the long run, the long haul. I have got to admit candidly I did not know the long haul was going to be quite this long a haul. But I am still here, and I am here because we have made some real progress in finding common ground around a national trust fund, even there have been some fits and starts along the way.

In the last Congress, we painstakingly built two of the four pillars of a successful trust fund: appropriate medical standards to determine who should receive quick compensation, and an efficient,

expedited system for processing claims. With the unanimous adoption—unanimous adoption—of the Leahy-Hatch medical criteria amendment, this Committee reached consensus on the proper standards for determining legitimate victims.

Meanwhile, Senator Specter and Judge Becker worked hand in hand with the stakeholders. They have achieved consensus for a no-fault administrative system to be housed at the Department of Labor.

Now, let me just make a personal note. We have people of varying views of what should be done here. You ought to all be thankful that Arlen Specter and Judge Edward Becker worked so hard on this. I have been in some of those meetings. I know how hard they worked. Senator Specter and I met a number of times in December. He has kept me fully apprised and my staff has been fully apprised of what is going on. Our input has been sought. This has been acting as a Senator should, seeking a consensus on an enormously complex piece of legislation.

And, Judge Becker, we owe you an enormous thanks because, you know, you are in a position in your life and career, one of the most distinguished of all appellate judges, where you could just say, Hey, guys, I have got other things to do, I do not have to take on something this complex. You have done it. You have done it with competence, skill, and dignity, and I applaud you for that.

Now, we have not reached consensus on the other two pillars of a successful trust fund: fair award values for asbestos victims and adequate funding to pay for their claims. And we know that if the award values are too low or subject to liens or reduce or exhaust recovery for victims, the bill will not go through. There are about 600,000 legal cases currently pending in the system, so you have to have adequate funding at the inception. Direct contributions from defendants and insurers and borrowing authority are going to be necessary to accommodate the inevitable, that is, thousands of these pending claims coming in on the very first day of the trust fund. It is a good news/bad news sort of thing for those who want to clean this up.

The negotiations between Senator Frist and Senator Daschle in the waning days of the last Congress narrowed the differences on many compensation funding provisions. We should build on that. Our undertaking is challenges. It is unprecedented. It will not be easy to hammer out the details necessary for enacting a bipartisan bill into law. But the stakes are so high, so much has already been accomplished, we fail if we leave the field before we try our utmost to complete this very difficult task.

Creating a national trust fund to compensate the victims is one of the most complex legislative undertakings I have seen in now beginning my 31st year in the Senate. This national trust fund is kind of like a Rubik's Cube, and that is why you have to have consensus, because it would be very easy for those who oppose the legislation to stop it, where it is going to be very difficult for those of us who want legislation to move it forward. It cannot be a stacked trust fund approach, an attempt to shoot the moon for one side or the other. It has got to be balanced.

You know, as I look at this, both of my grandfathers, my Irish grandfather and my Italian grandfather, were stone cutters in

Vermont. One immigrated to this country unable to even speak the language. My paternal grandfather died in his mid-thirties from silicosis of the lungs. I never knew him. I visit his grave periodically in Barre, Vermont, where it says Patrick J. Leahy, which kind of sends a shiver. And my other grandfather eventually died of silicosis of the lungs. I think of them, I think of what they went through, and I think of the hundreds of thousands of present and future asbestos victims.

I want to have a balanced bill, and I will work very much—I commend all of you, all of the major stakeholders who have worked so hard on this. But I want to thank you, Mr. Chairman, Judge Becker, and the representatives from organized labor, the trial bar, and the industry who have worked so hard to do it. I think it can be done. As I said, I was in it for the long run. I would not still be in it if I did not think it could be done.

So, Mr. Chairman, thank you for moving forward, even though you must feel a little bit like Sisyphus at times, but it is a rock worth rolling.

Chairman SPECTER. Thank you very much, Senator Leahy. Sisyphus would be a good example for the total work of the Congress. I am a little more optimistic on this one.

Senator Cornyn, we will turn to you for an opening statement.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman. I have a more extensive statement which I would like to make part of the record.

Chairman SPECTER. Without objection, the full statement will be made part of the record.

Senator CORNYN. Let me just say briefly, so as not to delay hearing from Judge Becker too long, how much I appreciate the good work that you have done and Ranking Member Leahy, but particularly the volunteer effort of Judge Becker. We get elected and paid to do what we do. He is a volunteer and someone who no doubt has carved out a special place in the hereafter as a result of his generous contributions towards solving this true problem.

Some have said this is not so much tort reform as scandal reform, where unimpaired claimants get to the head of the line and leave bankrupt companies in their wake that can only pay pennies on the dollar to people who have certifiably genuine asbestos-related disease. And that is something that has caused all three branches of Government—the President as recently as the last couple of days, the United States Supreme Court in uncharacteristic fashion has called out numerous times for reform, legislative reform; and, of course, you have already cited the efforts made in the last Congress. So I congratulate you, Mr. Chairman, for taking this on so early in the 109th Congress. I do not think we have a minute to waste, and I look forward to being one of those Senators who helps contribute to the ultimate success of this bill. There is just too much at stake on the part of the victims, on the part of the companies that provide pension plans and employment to people who have been put out of work. And to a country that calls itself a nation of laws and believes in equal justice under the law, this

situation cries out for reform and for a solution. And I look forward to working with you on that.

Thank you.

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

Chairman SPECTER. Thank you very much, Senator Cornyn.

We turn now to Judge Becker, whom I first met in the fall of 1950 on the Frankford Elevated going to the University of Pennsylvania. He was a freshman and I was a senior, and we have been close friends ever since, having gone to Penn together and Yale Law School together. Judge Becker was a very successful practicing lawyer. He became a United States district judge in 1970 at the age of 37. He was elevated to the court of appeals in 1982, became chief judge in 1998. He has a long resume of awards, having been asked by the Supreme Court to take on some of the most challenging jobs facing the Federal judiciary. Within the past week, he traveled to California for one job, and he is on his way to San Juan for another job, and he is a prodigious worker.

When we were trying to get this bill finished before the last session of Congress ended, it was on a consensus basis. It is obvious that we are not going to have consensus on all the points, but we have eliminated many, many areas of contention, and now the decisions on the remaining issues will have to be made by the Congress. The Senate will have a markup, and we will proceed with the legislative process.

This bill is 273 pages in duration. It is a discussion draft, and when it has legislative form and is introduced, I will formally at that point call it "the Becker bill."

We will have 10-minute rounds for all of the witnesses except for Judge Becker, who will speak at length to describe the bill, the areas of agreement, the remaining areas of disagreement. And I am glad we have the staffs here of all of the Judiciary Committee members. And we had alerted the other Senators who had been especially interested. And this I think will advance the knowledge of the bill and I hope will enable us to narrow the differences even further. And then on the remaining issues, we will be consulting, Senator Leahy and I, Senator Cornyn, Senator Feinstein, and those not on the Committee—Senator Carper has been especially interested in this legislation, as have been the Michigan Senators, Senator Levin and Senator Stabenow, and the Arkansas Senators.

This is a matter where we have been besieged on all sides, from people who are suffering from mesothelioma, a deadly disease, and from companies which are on the verge of bankruptcy, to try to find some relief in the immediate future.

Thank you again, Judge Becker, and the floor is yours.

STATEMENT OF EDWARD R. BECKER, JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PENNSYLVANIA

Judge BECKER. Thank you, Senator Specter, Senator Leahy, Senator Cornyn. I am very grateful for your very generous remarks. It has been a privilege for me to do what I have been doing here.

Although, Senator Specter, you very kindly talk about this as the Becker bill or the Specter-Becker bill, it is really just as much the

Hatch-Leahy bill because of the magnificent breakthrough in getting the medical criteria which came out of 1125, and the Frist-Daschle bill because of the major strides that the two leaders made during the last Congress.

I think, as you suggest, that I can be most useful in describing the bill. You have described this as an educational section, and what I would like to do—it is an enormously complex bill. But what I would like to do is go through each important section of the bill and lay it out so that there is full understanding. While it may take some time because of the length and complexity of the bill, I think it will kind of tee it up for the other speakers and facilitate their presentation.

Before I do, I do think it important to state on the record—and I will do so very briefly because it is so unusual for an Article III judge to be involved in the legislative process in this way—that I needed to and I did satisfy myself before embarking on this project as to the propriety of doing so. I sought advice and was advised certainly that were four factors that had to be satisfied:

Number one, that the efforts had to be bipartisan, and that has been satisfied because Senator Hatch and Senator Leahy initially blessed my participation, and then for 6 days last spring I was a personal delegate of Senator Frist and Senator Daschle. So it certainly has been bipartisan.

Secondly, inasmuch as I do not represent, cannot represent the Judicial Conference of the United States, I thought it important to note that I would not charge the Government for this. So I paid my way down here yesterday and paid my hotel bill, with the two exceptions of 2 days when I was otherwise here on Federal judicial business over the last—this has gone on 17 months. I have paid for all of these trips, I guess 33 trips, actually more than that, and my hotel bills, I paid them out of my own pocket, which I consider a privilege as a citizen if I can contribute to solving this crisis, which in my *Georgine* opinion, which Senator Specter pointed out, was affirmed by the Supreme Court in which I said it cried out for a legislative solution because it was beyond the competence of the courts. So, in a sense, not only is this a labor of labor for me, but it is my penance for having interred the class action solution to asbestos.

Thirdly, I had to satisfy myself that I had no conflicts with any stock, and I did that. And even though, as Senator Specter pointed out, as a senior judge I am not obliged to perform extensive judicial duties, I do, and last year I did more opinions than anybody on my court and continue to do so. So it has not interfered with my judicial duties.

Let me turn then to the Act and lay it out. Insofar as the statement of legislative findings and purpose, the members of the Committee have essentially set forth what is in the legislative findings and purpose, that the asbestos litigation system is broken in the tort system; the wrong people are getting paid; many of the people who were entitled to get paid, the really sick, are not getting paid because of the rash of bankruptcies.

This has been in my experience the greatest litigation crisis in the history of the American court system. And, indeed, one additional factor which is mentioned in the proposed bill is that it has

had an enormous toll on the Federal bankruptcy courts. The Federal bankruptcy courts have been overwhelmed and inundated, and the transaction costs in the bankruptcy courts have been huge. And the purpose, of course, is to find a fair and efficient means of dealing with the problem. The legislation is called "Fairness in Asbestos Injury," that is where the "fair" comes from, reform legislation.

Now, obviously as you pointed out, Senator Specter, and you as well, Senator Leahy, the big issue up front is the amount of the fund. The parties have not agreed, the stakeholders, on the amount of the fund. The business folks, as I understand it, think that the $140.25 billion figure which was negotiated by Senator Frist and Senator Daschle is adequate. The labor interests feel that it is not. And it is not yet in the bill. Ultimately, some figure will have to go in the bill, but I think it important, taking that as where we are now to describe where the funding comes from and how it works.

The fund under the Frist proposal will be funded by three—and in the previous incarnations of the bill will be funded by three principal sources. The defendants—that is, the manufacturers or those who have manufactured asbestos-containing products—I do not think we have had any asbestos manufacturers for a long time, but there are those—but, of course, as you pointed out, Senator Specter, the latency period is 30 to 40 years. Someone can have been exposed to asbestos 30, 35 years ago and 35 years later come up with lung cancer, mesothelioma, or asbestosis, or some asbestos-related disease.

So the defendants are responsible for $90 billion under this formula, the insurers for $46.02 billion, and the existing trusts—that is, the Manville Trust, the Fuller-Austin Trust—these are the companies which have gone into bankruptcy and have confirmed trusts under 524(g) of the Bankruptcy Act or the congressionally approved equivalent, which is the Manville Trust, to relieve them of asbestos liabilities. So the existing trusts are in for $4 billion. These defendants are companies named as defendants in asbestos lawsuits and which have incurred at least $1 million of cumulative asbestos liability. They are placed in seven different tiers. The Act is structured on the basis of tiers—t-i-e-r-s, tiers—based upon the amount that they have expended in asbestos liability, having in mind that small businesses, as defined under Section 3 of the Small Business Act, are exempt from the bill. And also included in the defendants' contribution is $1.4 billion from the Owens-Corning Fiber Board Trust, which is the functional equivalent of a 524(g), and that is due to be transferred within 60 days after enactment. Under the Frist proposal, and, of course, in the bill, when finally drafted, the formula for the different tiers will have to be set forth. The financial calculations that I have seen are to the effect that the amount set forth in 2290 will have to be increased by approximately 9.3 percent for each tier in order to reach the Frist $140.25 billion.

Under the Frist proposal, the payout is over 30 years, minimum of $3 billion a year, net of hardship and inequity allowance. I do not want to spend too much time on that, but there are provisions that a company that can demonstrate extreme hardship or a demonstrated inequity based on a showing that the defendants' alloca-

tion is exceptionally inequitable when measured against its likely costs net of insurance of its future participation in the tort system.

There are hardship and equity allowances for individual companies which are subject to judicial review, but the figure is net of those hardship and equity sums. Now the insurers, under the first proposal, would pay according to a 28-year schedule. The allocation would be determined by the Asbestos Insurance Commission, although with respect to the businesses, the respective contribution of the individual defendants is set forth on the basis of what tier they fit in. The responsibility of the insurers either has to be agreed to by the insurers or determined by an asbestos insurance commission, which I will describe a little bit later in my remarks.

The RAND study has estimated that there are approximately 8,400 companies—that is a lot of companies—that have been named in asbestos lawsuits. There are two senses. John Mesher, General Counsel of Saint-Gobain, who is here, did a survey where he analyzed all of the companies that were sued I think in Mississippi or Louisiana. I think there were 2,000 companies that were sued. And then the RAND did others. So it is not possible to predict exactly where the companies will fall within the tiers, but the significant factor from the point of view of the solvency of the fund is that the big companies, 100 big companies, will be in one of the two highest non-debtor tiers. By non-debtor I mean the companies that are solvent and are not in bankruptcy. The formula is in the bill. Tier I is the Chapter 11 companies, the companies that are in bankruptcy. Tier II is the companies with 75 million or more, Tier III with 50 to 75 million, and so it goes.

But the significant thing, even though in terms of transparency we cannot say for sure at this moment which companies are in which tiers, we do know that the big companies are all going to be in the top two tiers, and the big companies, the defendants as a whole, guarantee—the way the bill is drafted, if the payments from the defendant companies are less than the statutory minimum in any particular year and the defendant has guaranteed payment account, cannot make up the difference, the administrator has the right to seek payment on a pro rata basis from the defendant companies for the remaining liability. So it is not tier-by-tier guarantee, but it is a total guarantee. And the guarantee, which is enforced by a charge by the administrator, means that unless American industry goes down the drain—and the big companies are the giants of American industry; you have GE and Pfizer and Viacom and GM and Saint-Gobain—well, that is a French company but with a big American presence—all of the giant companies are in the top two tiers, so they have to guarantee these payments. So there is, I believe, the way the bill is drafted, a guarantee of solvency.

There is an issue with respect to the existing trust, the $4 billion that I reference. There is an interesting debate. Senator Specter, you referenced our attendance at the Yale Law School. The Harvard Law School is in the middle of this because there is one Harvard professor who says that the provision for—well, it is Professor Tribe, has given an opinion to the Committee as I recall—that the provision to transfer the amount of the $4 billion in the Manville and other trusts is constitutional. And another Harvard professor,

Professor Fallon, has said that it is unconstitutional. So we have the warring opinions of these two Harvard Law professors as to the constitutionality of the transfer of the $4 billion, but I think that is something we need not be concerned about because under the first proposal, the companies, the big companies guarantee the $4 billion in the event that that portion of the bill is declared unconstitutional. So there is at least 140.025 on the table.

There is borrowing capacity. This is a big issue with respect to the up-front money. Under the first proposal there would be $40 billion up front in the first five years. Labor has expressed the view that that is inadequate, but the fact of the business is that with the borrowing capacity, at least as analyzed by the Goldman Sachs folks, there is $30 billion of borrowing capacity so that in the first five years the $40 billion necessary for the start up—and there is concern that the fund would be overwhelmed in the early years—does go up to $60 billion. So there is $60 billion. The borrowing would provide liquidity through the life of the fund, and it provides greater comfort in the early years when the claims are believed to be greater, and of course, when the fund might lose the existing trust to a constitutional challenge.

Will monies be out there? By virtue of the authority given to the administrator any borrowing would be senior to senior unsecured claims in a bankruptcy. There is plenty of diversity with the 8,400 companies that have been named. The experts—and I am not one of them—say that the fund could achieve an investment grade rating on its borrowing. In terms of the liquidity in the first five years, to quantify that, the $40 billion would come $15 billion from the defendants, 20.6 billion from the insurers. The insurers do put up more up-front money because of the nature of the industry, and as I said, $4 billion from the existing trust. So as I have said there is, at least according to these folks, $60 billion of liquidity in the first five years.

Will this funding be sufficient to pay the claims? Again, the stakeholders are not in entire agreement on that. Whether it is or is not is a function of two factors, claim values and the projections. The claim values are what are in the bill as to how much you get for each category. The projections, which the Lord only knows, is how many people are going to get sick, how many people are going to get asbestos-related disease. We do know, because of the latency period, that sometime in this decade a number of people suffering from asbestos-related disease will start going down, but we do not know by how much. In the last weeks I have had different projections as to whether it is going up, which labor says, and whether it is going down, which is what business says. It is acknowledged, there is no doubt the Manville Trust, which has the greatest experience, has reflected a significant decline in the number of claims, but the mere fact that the number of claims, that is undisputed, has gone down, that is not of course conclusive as to whether the incidence of asbestos-related disease after the long latency period has gone up.

Now with respect to claim values, which are set forth in Section 131 of the bill, I think it is fair to say that there is agreement on most of the claim values. The most significant contribution of the bill—and again, Senator Hatch and Senator Leahy deserve so much

credit for this—is that those who are, although they have pleural thickening, they have asbestosis, but are not functionally impaired, the ones who are not sick—and these are the ones who Senator Cornyn has pointed out so graphically—have gotten huge awards in the tort system, accompanied by great transaction costs, these folks simply get medical monitoring. They do not get an award, but their condition is monitored. Every two years or every three years they get examinations and so forth to see if they get sick, and of course, if they do get sick, then they become eligible.

But the lower levels, which are people Level II and Level III, there is basic agreement—and I am comparing here the first offer, the Daschle offer, Senator Feinstein's proposal, and Senator Specter's and my proposal—at Level II everybody is agreed on 35,000; at Level III everybody is agreed on 100,000; Level IV, severe asbestosis, everybody is agreed on 400,000; a disabling asbestos everybody is agreed on 850,000; and Level VI, other cancer—and I will talk about that in a few minutes—everybody is agreed on 200,000.

The disagreements are when you get to the lung cancers and the mesotheliomas. Working backward from the mesotheliomas, the bill provides—Senator Frist's offer was 1.050 million, Senator Daschle and Senator Feinstein said 1.1 million, Senator Specter and I cut the baby in half, and it is 1.075 million. Now, there are a lot of mesos, so the dollar figure is not insignificant, but the difference in terms of claim value is not that great.

Working backwards, as I have said, lung cancer with asbestosis, there is essential agreement—well, I should point out that when you are dealing with the lung cancers, you have got three—and this is Level VII, VIII and IX—you have got three subgrades. The problem with the lung cancers is the complication of the impact of smoking. The companies have expressed a view that their concern is that this should not turn into a smoker's bill, and when smoking is in the picture, you have causation requirements. Now, administratively, the structure cannot work unless you have a schedule. You cannot have individual, you can only have a limited number of individual determinations. But, obviously, the folks who got lung cancer who were non-smokers, who never smoked, they need to get an awful lot more than the ones who remain smokers. Then you have the mid-level are the ones who are the ex-smokers. That is the ones who gave up smoking, in different incarnations it has been 12 or 15 years ago.

In Level IX, as I said, working backward from the more serious ones, the lung cancer with asbestosis, there is virtually no difference in the claims values among the contending parties. They are virtually all at the 575 to 600 thousand range for the smokers, 950,000 to a million for the ex-smokers and 1.5 to 1.1 for non-smokers. Senator Specter and I put them in as the same as the mesos, and we shaded them a little for the others.

On Level VIII, once again, they are almost the same, indeed for the non-smokers they are exactly the same.

The big issue relates to the so-called Level VIIs which I will have more to say about later. The Level VIIs, it is important to note, are the individuals who have lung cancer but no markers. That is, even though they have lung cancer and they have the requisite 15 years of exposure, they have no asbestos-related symptoms, bringing the

causation issue into play. Business has said, look, these fellows are smokers and we do not want to turn this into a smoker's bill. That is the one area where on the claims value there is a big disparity. Senator Frist's offer was 150,000. Senator Daschle's offer was 500,000. Senator Feinstein's proposal was 250,000. Senator Specter and I did put that in at 200,000, thinking the lower number was the better measure because of the causation problems with respect to smoking, individuals who have cancer who have been smokers, but who have no markers of asbestos.

The claims values in sum, except with respect to the Level VII smokers, the stakeholders are not that far apart on claims values. They have a bigger disagreement on projections, which as I have said, is something that the Lord has not let us in on in terms of how many people are going to get asbestos-related disease. I spent two days back in May with all the experts, Tom Florence, Fran Rabinowitz, Andy Kaiser from Goldman Sachs, and we went round and round and round, and at that point I had thought that the 139 billion worst case scenario based on the projections that was set forth by Goldman Sachs was realistic, but since then labor has given us some figures that said, no, epidemiologically there is data which shows a wider distribution of not cancers, but asbestosis and disabling lung disease. They say there are more mesos. Business says no, mesos are going down. I think it is fair to say that we will never know, we will never solve the projection issue. The only way we will know it is in the long run, and the old saying is: in the long run, we will all be dead. We cannot wait 30 years to do this bill to see how many people get asbestos-related disease over the next 30 years.

You just have to make some informed predictions on the projections, and having in mind that the linchpin of this bill is if the projections are wrong, there is a sunset. If the fund cannot pay the claims, then there is a sunset and it goes back to the tort system. So if business is wrong—and everybody wants, and I say this for labor—labor has made it very clear, they do not want this to fail. They are not interested in sunset. They want this fund to work. And none of us know for sure what the accurate projections are, but nonetheless, in due course if the projections are higher than we think that they are, then it goes back to tort system. In the event of insolvency, of course, there is borrowing. There are tough remedies. The bill provides a surcharge on the defendants to make up a shortfall, to require the insurers to put up security. There are liens, Section 222 to 224, but obviously there is a return to the tort system. And if it should turn out that there is overfunding, then there are step-downs and holidays which would give the business the benefit of that.

In terms of the benefit categories, I mentioned the unimpaired. The unimpaired simply get medical monitoring, and the Hatch-Leahy Bill gives a very elaborate description of how you qualify for Level II, how you qualify, Levels III, IV and V simply are increasing levels of impairment. Level III, minimal abnormality; Level V, serious impairment; Level IV in between; and of course the higher level you are in, the more compensation you get. And Level VI, other cancer, there are some medical/legal problems. Level VI requires a diagnosis of primary colorectal, laryngeal, esophageal,

pharyngeal or stomach cancer. With respect to some cancers, there is some doubt as to whether asbestos exposure causes these cancers. They do not fit in easily like the mesothelioma, the lung cancer and the asbestosis, and the bill provides for physician panels to deal with these things. And lung cancer I gave you a kind of description. Level VII is primary lung cancer, 15 years of exposure but no markers; Level VII where your symptoms are greater; and Level IX is with asbestosis; and Level X is mesothelioma, which is almost always caused by asbestosis, but there are cases of idiopathic mesothelioma which is not caused by asbestosis, and there are exceptional medical claims that can be evaluated.

With respect to the mesothelioma benefits I should also mention—and Senator Specter has expressed a great interest in this—there is a proposal that the mesothelioma awards be gradated based—let me give you an example. That a 70-year-old mesothelioma victim with no dependents should not get as much as a 40-year-old mesothelioma with a bunch of young dependents. The problem there is to make it cause neutral and not to burden the administrative structure with an awful lot of individualized determinations.

We are working on legislation in terms of, one of the things I was going to say at the end, where we go from here, good that this is a discussion bill. The stakeholders are here. Senator Specter and I met with them yesterday, and they are at work on a proposal, a drafting proposal, and they have been enormously helpful that we will perhaps solve that problem. We have administratively Senator Leahy mentioned about the administrative process. We have a streamlined administrative process in the bill. Section 113 sets forth the information required. The claimant has to set forth employment history, asbestos exposure history, smoking history, medical information, the medical records, and various affidavits will suffice, because have in mind that many of these folks were exposed 30 and 40 years ago. The companies have gone bankrupt, and the records are not all available. And so there will be heavy reliance on affidavits and affidavits of members of the family with respect to medical evidence.

The bill also contains auditing requirements. There is an expedited requirement for a decision within 90 days, internal administrative review and appeals. There is, and I am not going to spend much time on it, but we have set forth an elaborate appellate structure to various courts, and indeed, in terms of the thing I mentioned earlier where there is a constitutional challenge, the bill even says that the Supreme Court has got to give it expedited consideration, which of course it did to the Campaign Finance Bill, and I would be confident the Supreme Court would do that. There is also a provision with respect to attorneys fees, claimant assistance. There are educational programs. The Labor Department has to put up a website. The claims forms would be on the website.

There are provisions with respect to there are limitations on attorneys fees, but the administrator under the bill has the power to limit attorneys fees in certain classes of cases. The prime example would be if a mesothelioma victim gets a million dollars, 1.075 or whatever it turns out to be, a lawyer who does not have very much to do, because meso is virtually a slam dunk, should not get a

$200,000 fee for doing that. Well, there is a 10 percent limitation, 20 percent limitation for appeals. But the administrator presumably would say, look, in a simple mesothelioma case, that class of cases, the fee would not be 10 percent, it would be lower.

On the other hand, there are going to be cases where there are going to be causal issues, where they are really going to have to be litigated, and in that case, in order for attorneys to take these cases, which I think will be a different breed of attorneys than the ones that you, Senator Cornyn, were referring to, I think the asbestos plaintiff bar is going to be going on to other pastures. I think we are basically going to have a different bar handling these cases, and you do have to have some inducement for lawyers to handle these cases.

But the short of it is that although it will be burdensome, the Department of Labor does have the expertise in crafting regulations and handling claims and developing websites. The original proposal to put it in the Court of Federal Claims, I have been in the court system long enough to know that this is not the kind of thing a court could handle. It is not the kind of thing that a court is suited to handle. The Labor Department would be it. There would be an administrator. The administrator is a presidential appointment. The administrator is required to appoint a deputy administrator for claims administration, and one for fund management. There would be an Asbestos Advisory Committee that the Congress will have input into, a Medical Advisory Committee. There will be physicians panels.

The one thing that I would simply urge upon the Members of the Committee, if and when you pass this bill, is to urge upon the White House the importance of getting this thing up and running and targeting somebody, an administrator, who can get in place quickly, because as I will get to now, the transition and the sunset, become a very serious matter if this fund is not up and running, if the administration is not up and running and it has to go back to the tort system, the purpose will not have been achieved. So you have to target somebody, the White House has to target somebody. I do not think this is a political plum, this appointment. I do not know who is going to want it, but you are going to have to get the right person to get this thing up and running in a hurry, because otherwise the purpose of the legislation will not be affected.

Now let me run quickly through the remaining issues, which are, I confess, some of the most controversial issues, because business's position is if we put up $140 billion, we do not want any leakage. We are putting that up to settle our asbestos liabilities. We do not want to have to be back in the tort system.

Under start up, the money goes in. There is a transparency provision. It is kind of like the IRS, kind of like our taxes. We self-assess our taxes. These big companies know what they have spent. They know what their liabilities are. The insurers is another matter I will come to, and I can discuss that briefly. But within 60 days they have to set forth what they owe, what likely tier they are going to be in. The administrator has got to publish it in the Federal Register in case there is any issue. But once the fund goes up, there is a stay on all the claims. So the claims are stayed, the tort system is shut down. But what happens if the system does not

get going? Obviously, you cannot keep people, I mean I think there is a basic understanding that if the system does not work or if it is overwhelmed, then folks who have lost their right to jury trial have a right to go back to the tort system.

So what happens if the Labor Department is overwhelmed? This bill provides that within 180 days, if the administrator cannot certify that the exigent claims, that is, the mesotheliomas and the ones where the doctor says they will not live a year, are not being paid at a reasonable rate, they can go back to the tort system. We had a meeting with the stakeholders yesterday and I think that may have been a mistake. Maybe it ought to be 180 days from the time the administrator is appointed or it may be that if it goes back to the tort system it does not stay there, it can come back, or there is a credit. That has to be worked on some more. But there is a real concern, and this gets into the expedition point that I made, how critically important it is when this Act goes into effect, assuming that it does, that an administrator be appointed and an administrator be in place with the deputy administrators, and this thing has got to get up and running quickly. The regulations have to be promulgated, the claim forms have to be put out on the website, and the businesses who want this to work have to get their money in and up front quickly. I think they know that, because they want it to work, and I think that they will.

There is also an escape valve for 360 days unless the administrator can certify that all claims or valid claims are being paid at a reasonable rate, and I think the same concerns apply there.

Next hot button issue is pending cases, what cases should be grand-fathered, left in the tort system. The proposal, which I think cuts down the leakage, is that the only pending cases which remain in the tort system are those which are actual non-consolidated cases, that is, not where some trial judge someplace or other has consolidated 500 cases together, but a one-on-one typical, traditional two-party or three-party, whatever it may be, law case, an unconsolidated case which is actually on trial. Everything else gets shut down.

Insofar as what about settlements, there has been a lively discussion about that. I will point, and Senator Specter has been aware of this, some of the meetings that I have had with the stakeholders have been four-hour drafting sessions. They have been a lot of fun. You know, you have a lot of good lawyers together, and we draft and we redraft and so forth. We have had a lot of discussion about the settlement issue. The way it is in the bill now is that a settlement is preserved only if it has been signed by the individual and the defendant before the enactment of the bill, but there is a 60-day period. Business is not happy with that, but nonetheless, I thought it was reasonable. There is a 60-day period. And the insurers are not happy with that either. There is a 60-day period where any necessary paperwork has to be completed, and we have got some more drafting to do as to identify those.

Winding down on the insurance issues, there is, as I suggested, an Asbestosis Insurers Commission, which would be appointed by the President with the advice and consent of the Senate, and once again, if this bill goes through, I would hope that not only the

President makes prompt appointments but the Senate makes early confirmations to get this thing up and running.

One would hope that if this bill goes through, the insurers would all agree on the allocations. There has to be 100 percent agreement. There seems to be indication that if the bill is going to go through, the insurers are not going to want to subject themselves to the tender mercies of the Asbestos Insurers Commission, because they do not know who is going to be on it and what the Insurers Commission is going to do to them. One of the powers that is in this bill is a ground-up survey, because some of the insurers do not think that the other insurers have accurately reported what their asbestos exposure is. The Commission is entitled to do a ground-up survey to get records from the SEC. A lot of this is public stuff. But there are criteria of the historic premium lines, the recent loss, the amount of reserves, based upon which the Commission makes the determination. One would hope that they will not have to do so.

Another hot-button issue is what I describe as the Equitas issue. Equitas is the name given to the Lloyd's of London—this is the offshore reinsurer. Senator Specter identified the stakeholders as the businesses and the insurers, but we have had the insurers and the reinsurers, and the insurers and the reinsurers do not always agree, and then the domestic and the foreign reinsurers do not always agree. That is why Senator Leahy said this ain't exactly a simple proposition. We have also had, not only labor, Senator Specter mentioned this, but we have had the trial lawyers. We have had a representative of ATLA at every single one of our meetings, but the London reinsurers, the Equitas Group, think that they need to get a certain concession, a hardship concession that the American reinsurers do not think they ought to get. I do not want to say any more about it now. You are going to hear testimony about that.

Four remaining hot-button issues, and then sunset, and then a few other things. Workers Comp subrogation is an issue. Historically most folks with asbestos disease have not sought Workers Compensation. They have had access to the court system and the court system has given them by and large reasonably big awards and they never sought Workers Comp. But now they will not have access to the tort system, so the question is will they go and get Workers Comp. They may go get Workers Comp and the question is whether or not the Workers Comp carriers will be able to get subrogation, whether they will be able to go back against the claimant.

A couple of issues, and we mentioned before about things we have agreed upon. One of the things that was agreed upon early on in our process is that Blue Cross and Blue Shield cannot come back and get subrogation. We also have, in terms of health insurance, nondiscrimination under the HIPA Act passed by the Congress. There may be no discrimination against an asbestos worker in giving that worker health insurance because of prior asbestos exposure. But with respect to subrogation, the business says, look, if you are going to get $800,000 out of the fund, you ought not also be able to get Workers Comp because that is double dipping. Labor says, that is a different carrier. Sometimes it is, sometimes it is

not. A lot of times, many of these businesses, because of the regularity of Workers Comp, are self-insured.

Senator Specter and I have proposed a compromise. What we have tried to do all throughout is propose principled compromises, and I think it is a principled compromise, and it is the way it works in most states. It is a so-called holiday. That is the Workers Comp carrier cannot come back and recover anything that they have paid from the worker or from anybody. But during the period of time that the worker gets compensation out of the fund, to the extent of that total amount that the worker gets out of the fund, then the comp carrier does not have to pay comp. It does have to pay comp if the State law in New York or Delaware or Texas or wherever provides for more comp than they get under the fund. If they do that, the comp carrier has to pay that, and they cannot recover anything. So that is the compromise proposal. I am not going to tell you everybody is happy with that proposal. We think it is a principled proposal, but there it is, it is in the bill.

Another one is FELA. The rail workers want to preserve—they do not want FELA preempted, they want their rights preserved under both FELA and the fund. Now, talk about stakeholders, we also had the railroads in. Another group we had in were the Association of American Railroads and not just labor but the rail workers. It turned out, upon our investigation, that 95 percent of the rail workers who had asbestos exposure are now retired, so the would not get Workers Comp. But the other 5 percent or 10 percent, whatever it is, would get less under this bill than the nonrail workers. What we have proposed in the bill is that the difference be made up. That is a compromise. The rail workers are worried about somebody tinkering with the FELA. Senator Specter came up with the idea of putting in the bill to make it clear that Congress does not intend to mess with—excuse my vernacular—say, "Don't mess with Texas," "Don't mess with the FELA," Senator Cornyn, so they say. That is in the bill. This is not intended to mess with the FELA. Once again, it is an improvement, and the railroads are satisfied with it. They do not like the language in the bill. The rail workers want to do something else. We are still talking about that, but we think it is a good compromise.

Another issue that business does not like but which is a matter of enormous importance to labor as a health and safety issue is medical screening. We put in a provision for medical screening, that is, over the years to come—well, let me just start back. Business does not like medical screening because for years there was a history that the asbestos plaintiffs' lawyers had some B readers and others whom the businesses did not think were reputable, who they thought were mills of turning out plaintiffs. This provision is very different. It is for rigorous criteria, rigorous standards, run by NIOSH or run by a contractor selected by the administrator, who would for people in certain high-risk industry, give them examinations every few years to see if they get sick. If they do not get sick, they do not get anything. But if they do get sick, then they can come into the system. Business says, well, let their doctors, you know if they are sick they will go to the doctors, and this is a way of encouraging it, and most of the people with asbestosis do not get treated anyway.

Be that as it may, this is a matter of it seemed reasonable to us to have this avenue available for people in high-risk industries, so long as it is subject to reasonable and rigorous requirements, and Senator Specter and I have put it in there. Labor feels very strongly about it. Business does not like it. This is one of the issues that the Senate is going to have to decide and markup someplace or other.

One other issue where the folks are at odds is mixed dust, and Senator Leahy, you in effect introduced this subject. There are folks who have been exposed to asbestos and have also been exposed to silica, and they are sick. Business says, hey, look, I mean if what you have is really silica disease, sure, you can go in the tort system, but we are worried if this bill goes through that folks who have been exposed to asbestos, who have had some silica exposure, are going to repackage their asbestos claims as silica disease. I must say that Senator Specter and I have drafted a lot of things that one side or the other is not unhappy with. This is the only thing we drafted that nobody was happy with. So we did not put it in there. It is a problem that has to be solved. It can be solved in a number of ways. One way is, Senator Feinstein's proposal was, was your disease primarily from silica? Another way to deal with it is to set forth a credit, that if you have silica disease that the trial judge, if it goes into the state tort system, has to offset the proportion that is due to asbestos. That is a tough nut we have to deal with.

Finally, sunset. Sunset is a big ticket issue. There are two levels of sunset. One is if the total program cannot be funded and the second is the Level VIIs. And that is the tradeoff, if the fund is inadequate, then folks can get back to the tort system where they have the right to jury trial, but there are a number of issues. Senator Biden was the one who introduced this first, but the Biden proposal has been refined. Everyone agrees that before there be any sunset, there has to be program review. The administrator has to do a shortfall analysis, projections, how is this fund going to do over the next period of time? There must be a plan for winding up. There is a provision that has to go to a special commission consisting of the Attorney General, the Secretary of Labor and other functionaries in the Government, and it would have to give Congress an opportunity to affix the system. But nonetheless there has to be program review. There is agreement on that. The question, however, is how long need we wait to sunset? Business's proposal, the 2290 proposal, was seven years. Senator Specter can speak for himself on this. Senator Specter felt that seven years was too long. And there is no provision in this current draft as to a timeframe, although, obviously it could not happen right away because there would have to be this very elaborate program review. But at all events, the question of the time of sunset is an issue.

The second issue is the reversion. If it goes back to court, where does it go back to court? The provision that we have adopted is essentially a provision that Senator Feinstein proposed, that it could go back either to Federal Court or to state court, but only to a state court where the claimant lived or the claimant was exposed. In other words, you could not have 100 claimants who never had anything to do with Mississippi or some county someplace or other

which was a favorable plaintiffs' county and bring all the cases there. It would have to be either where the plaintiff lived or where the plaintiff was exposed. And if you cannot fine the defendant then against that defendant only, it is wherever you can fine the defendant. Business would like it to go entirely to Federal Court, but this is the compromise which we fashioned.

With respect to Level VII, the Level VIIs, the ones I described as the lung cancers, requisite exposure smokers but no markers, business has worried about whether the Level VIIs will overcome the system. Even though business concedes that most of these cases, when they go back to state courts, they win because there are the causation issues, nonetheless there are potentially huge volumes of them because of the level of smoking in this country, and the transaction costs are huge. The question then is what about a partial sunset? We have agreed basically there would be a partial sunset just for the Level VIIs. What Senator Specter and I put in the bill is 15 percent, 115 percent of the CBO figure. Labor wanted 150 percent. Business wanted the CBO figure. That is something the Senate is going to have to decide.

The other issue relates to the reversion. There we have put in, because there are complex issues as to whether there is in fact a proper Level VII reversion, there we have put in that that would go to Federal Court and that that could not go to state court. That would be a Federal Court matter. Business is happier with that. Labor is not.

With respect to the bankruptcy laws, we have taken a lot of care that we do not mess up the bankruptcy laws and bankruptcy liens. By and large, other than the confirmed bankruptcies, the others are all laying around, and the other bankruptcies are going to be folded into the system.

Three wrap-up items. Senator Murray proposed a ban on asbestos-containing products. That is in the bill. And Labor was concerned about violations of environmental and occupational and safety and health requirements, and we put in a bunch of provisions for that.

Other than some more technical provisions, that is my overview of the bill. Where we go from here is we have some more drafting sessions. I have identified a couple of issues that we are still working on drafting on. There are some issues that I do not think we are going to be able to get consensus on. I think I have identified each of them, and the Senate at its markup is going to have to deal with those.

I appreciate your indulgence, but it is arguably a sprawling bill, one of the most complex bills. I have been a Federal Judge for 34 years. I do not think I have ever seen a more complex bill than this. So forgive me for taking so long, but I wanted, since Senator Specter said it was an educational process, to lay it all out and put it on the table. I will be glad to answer any questions that any of the Senators may have.

Chairman SPECTER. Thank you very much, Judge Becker, for a very comprehensive statement of the draft discussion bill. Some insight into your level of enjoyment came when you smiled with the fun of drafting. Judge Becker is known for not only the number of his opinions but the length and the length of footnotes.

Turn the lights on 10-minute rounds, because as Chairman I want to observe the time limits meticulously so we can move ahead.

Since that is what you consider fun, that is some insight. Judge Becker has been known to write opinions that rhyme, and among his many talents he is the pianist for the Songfest of the Supreme Court of the United States, one of the little publicized and most interesting activities of the Supreme Court of the United States.

Judge Becker, as you have outlined the provisions of the bill, you have demonstrated the considerations on public policy issues where we had positions identified at length by so-called stakeholders, and then an evaluation of what seemed fair and just, and on accommodation, we found on many cases the parties could be brought together, and it was a matter of articulating language which would bridge the gap, and that has been done in many, many lines. The essential question which we have dealt with on this bill has been the giving up of the right to jury trial, which is a very fundamental right in our judicial system. In exchange for that would be a trust fund which was calculated to be adequate to take care of the claims. I think it is very important, as you went through the categories of claims—and Senator Leahy did a great deal of work on this, Senator Feinstein, Senator Frist and Senator Daschle, Senator Hatch—that there was pretty much agreement as to those areas.

The draft discussion bill has tried to provide for flexibility, on the illustration you gave of a 40-year-old man with children as opposed to a 70-year-old mesothelioma victim without children, so that it remains revenue neutral, so that we have tried to provide that flexibility.

When we had the markup in July of 2003, the issue of the reversion was a very contentious point, and as you have noted, it was Senator Biden who came in with a provision that there be a reversion. You have accurately noted considerations really by the insurers of a 7½ limit, and that is not easy to deal with when you have the kind of money we are dealing with here and the schedule of payments, it seems to be a virtual certainty that it would last at least 7½ years. An original draft put it at 20 years, which would really freeze out claimants in the event the fund was insufficient over that kind of a protracted period of time. But this is a balance.

When you have talked about reversion in the event that the exigent claims are not paid within 180 days and other claims within 360 days, just yesterday, the session brought to light a very important consideration that that timing, at least in my judgment, ought to start from the confirmation of the administrator because appointments take time, and confirmations sometimes take time. So that would be a reasonable parameter, bearing in mind that people who go into court are spending a lot more time in dire circumstances, the exigent claims on mesothelioma, but it is an effort to make a balance. Understandably, the manufacturers and the insurers were very insistent upon avoiding leakage to carry all the pending claims. That was a reasonable request on their part considering the amount of the money, as yet undetermined, but the substantial contributions and the reversion.

So unless the case is to verdict, not a matter of having a trial date, those cases go into the fund. We have left a little time after for settlement on individualized cases where the plaintiffs' themselves sign the settlement papers, not one of these block settlements where a lawyer settles for thousands of people yet to be determined in a very indecisive way so that there would be a large opening on that.

When it has come to the issue of medical screening, we have heard contentions by the insurers and the manufacturers, and just as we have tried to limit the 120 days with specification as to what will happen during that time, there has been I think a substantial and successful effort to have medical screening in a limited context so that it is not a wide open field.

Well, your description I think was very comprehensive, Judge. It sets the framework so that we can hear from others and see what other people have to say.

Judge BECKER. I will be glad to remain at the table if you want me to.

Chairman SPECTER. We are going to hear now from Senator Leahy, so you may be here for a while.

Judge BECKER. Okay.

[Laughter.]

Chairman SPECTER. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Judge, as I said before, I really do commend you for doing this, your diligence in mediating the matters. I did not realize it had been that number of trips down here. You sort of commute back and forth the same way that Senator Specter does.

Judge BECKER. Right.

Senator LEAHY. But you have made significant progress on the all-important issues such as the fund's borrowing authority, the transparency of contributions to the fund, allowing for a sunset if the fund runs out of money, another significant area. I know that involves delicate balancing acts and a successful trust fund cannot shift all the risk to future or current victims, obviously. But then you have the possibility of fund insolvency, the risk of inadequate funding short of insolvency. All these things have to be addressed. I think it is your number, but one of the numbers is 600,000 asbestos cases pending in the tort system. I am worried about the crush of claims in that first day. What is the appropriate amount of upfront funding in the first three years of the fund's existence so that we might be able to pay out claims within the statutory deadline? What would you say?

Judge BECKER. The time period I have been focusing on is five years, and my sense is that the 60 billion, 40 billion plus 20 billion borrowing capacity, for five years is adequate. Insofar as three years as opposed to five, while I guess you are right that you would probably have more in the first three and then they would start to slow down, one of the issues is going to be how fast is the system going to get up and running and how many claims are they going to process? I mean that was a matter that I expressed concern about before in terms of the administrative capacity.

I think there is no answer to your question. When I say this, there is certainly no empirical data. We have talked to the folks at

the Manville Trust. Mr. Austern was in when we were talking about projections. But I think in response to your question is that we have not done a study—I do not know that we can and maybe we ought to focus on this in the next couple of weeks, and it is certainly consistent with my concern that I expressed earlier and that I expressed the other day about how quickly the administrator structure can get going—as to how many claims are going to be filed, how many we can process within the next year or two. I am inclined to think that there will be—if the businesses which have an interest in getting their money up front, the big companies, know what their asbestos exposure has been, they know what tier they are going to be in, and if they get their money in in 60 days or 90 days, there is going to be a ton of money in this fund from both the insurers and from businesses.

Senator LEAHY. If I could ask you about that, because we talked about the 40 plus 20, the 60 billion, discussed this with the Frist bill, the Daschle bill and the others. Do you have commitments or letters from the financial institutions regarding the availability of $20 billion in front-end funding for the bill's borrowing authority?

Judge BECKER. Well, I do not think anybody has those letters in hand. They would probably violate Sarbanes-Oxley or Leahy-Specter or something or other if they gave those now.

[Laughter.]

Judge BECKER. But the predictions are that it would be available.

Senator LEAHY. But you see what I am getting at. And you are absolutely right when you say it is hard to do some kind of an empirical study. We are walking into something similar to what we did right after 9/11 with the victims and Ken Feinberg and the others who did that. We had some general idea where we were going. We did not know exactly where we were going, but we went. And Mr. Feinberg and others worked very well on that. Perfect solution? No, we are not in a perfect world, but it was a heck of a lot better than it had been, and that is probably where we are going to be here. We are not going to have a perfect bill from the manufacturers point of view, the insurance companies point of view, labor, lawyers, victims. It is not going to perfect for everybody. But we can get a lot better than the situation we now have. I would urge—because I know that there is representatives of all the groups I just mentioned in this room—do not look for perfection. Do not let the perfect be the enemy of the good, because we can do something. Senator Specter and I are committed to do something.

I notice in your draft bill, Judge, a provision that will allow victims' awards to be vulnerable to liens by the insurance companies. I think the language was compensation holiday. I am worried though about a sick victim who finally gets an award. The next day the registered letter comes from the insurance company saying, hey, give me back the money, give me back all or part of what you got in the victim's award. I do not know whether this subrogation language would override states laws on the insurance companies' rights to sue victims for subrogation. Does this create trouble in your mind, because we are talking about a no-fault administrative

system to fairly and quickly compensate victims? Is this a double-edged sword?

Judge BECKER. Senator, I do not think so. I mean I am not here in my usual capacity, but it strikes me that what the Congress does overrides state law here. I mean, plainly the Congress has the power under the Commerce Clause to do this. The language, as I understand it, would forbid the insurance company from trying to get money back from the claimant. If it does not say that clearly enough, it needs to be redrafted to say it more quickly.

Senator LEAHY. Is that what you want to do though, make sure they do not take back from the—

Judge BECKER. No. They cannot recover anything back, they cannot.

Senator LEAHY. Okay.

Judge BECKER. To the extent that that is in conflict with state law, the Supremacy Clause, in my opinion preempts state law.

Senator LEAHY. I had the joys of doing two things over the weekend, recovering from bronchitis and trying to go through the draft bill. Both had a certain degree of enjoyment. And I know the draft bill has been modified last night. But one thing I should say, all joking aside, I am extraordinarily impressed by what you have done. I think it reflects good-faith efforts to make real progress and reach the consensus that we have to have. I cannot emphasize enough to the stakeholders here in the room, this is a bill that will go through with consensus and end up on the President's desk. Without consensus on both sides of the aisle, there is no way in God's green earth it is going to make it there. Do you have recommendations how we might continue to narrow differences with the stakeholders and with Senators? We have Senators across the spectrum who are working in good faith here, as the Chairman and I are. How do we get more consensus?

Judge BECKER. Senator Specter and I and the stakeholders keep talking, keep on trucking, we keep on talking. The more we talk the more consensus we get. But I do believe, Senator, there are going to be certain issues that there is not going to be consensus on. I do not want to kid you. I think we can narrow a few more issues.

But there are going to be some of them they are simply not going to agree on. There are some folks who just feel by virtue of their institutional arrangements that they cannot say yes. And at some point I think you gentlemen and ladies are going to have to bite the bullet. I think that there are going to be—but the important thing is I think it may be narrowed down to six or seven issues.

Senator LEAHY. Well, you know, we see this in international negotiations all the time. Sometimes people just do not know when to say yes. Will you do me a favor? When you are talking to stakeholders on all sides, stress to them the urgency. And it may be a grudging yes, but at some point there has to be a yes. I do not think if we let this go into next year, or even much into this year, that we have a chance. Right now I think we do have a chance. Please carry that message back. They are going to hear it from both Republicans and Democrats. You have done so much. Senator Specter has done so much work on this. It would be a shame to let this fall apart.

Thank you, Mr. Chairman.

Judge BECKER. I will do so.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator LEAHY. I know you will.

Chairman SPECTER. Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

Judge Becker, last year when we marked up S. 1125, I know there were discussions about the adequacy of the funding, and I realize that we do not have a bottom-line figure in this proposal. But I want to talk to you about how do we determine whether the trust fund concept will be adequate to satisfy the demands made on those funds, and some of the things you said here today and some of the things I have heard previously I think need to be explored so everybody understands.

The amount of money that we are talking about being contributed into the trust fund is without regard really to our ability to know what the dollar demands are actually going to be. Would you agree with that?

Judge BECKER. Unfortunately, yes.

Senator CORNYN. And I am not being critical.

Judge BECKER. No.

Senator CORNYN. I just want to make sure we all understand.

Judge BECKER. It is in the nature of the situation.

Senator CORNYN. So if we get into extensive debates about whether $140 billion is enough or $110 billion is enough or $150 billion is too much, the truth is we do not know what the demands are going to be on this trust fund.

Judge BECKER. I think that is right. I think you end up talking to yourself.

Senator CORNYN. So it is certainly in everyone's interest who wants to see this approach work, this general approach work, to make sure we do whatever we can to make sure that the money that does go into the fund goes to victims. You would agree with that, wouldn't you?

Judge BECKER. Absolutely.

Senator CORNYN. And I know there has been some discussion about the near-term funding requirement, and you talked about in the first 5 years the $40 billion plus the $60 billion—

Judge BECKER. Plus the $2 billion.

Senator CORNYN. —borrowing capacity, which I think is a good cash flow device, which obviously helps ensure the fund is more likely to be successful. But, actually, the $40 billion, if my calculations are correct, represents about a four-fold increase over the amount that is currently paid out in the tort system. If you look at the—it consumes in the neighborhood of $5 to $7 billion annually, with about 60 to 65 percent going to transaction costs. Not to quibble over the numbers, but the amount of money that goes into this trust fund the first 5 years is substantial, and it is a multiple over the amount of money that currently is paid out to victims under the current tort system.

Judge BECKER. I have seen those figures, and there is documentation that would support those figures. I think the other side, I think that labor would controvert that. But, plainly, that is what the RAND study shows, absolutely.

Senator CORNYN. Let me ask you a little bit about—

Judge BECKER. Like $6 to $8 billion a year times, you know, 5, 6, years, that is the 40. So that is right.

Senator CORNYN. Let me ask you a little bit about the claims process. Is it the intent of the working group and your intention to make this claims process as simple as possible?

Judge BECKER. The answer is yes.

Senator CORNYN. And here, again, if you look at the RAND study that you alluded to, about 60 cents on the dollar under the current system go to pay the plaintiff's lawyer or the defendant's lawyer or court costs or other costs. Our goal here is to try to boil down the claim to eliminate as many transaction costs as possible so the victims get the money.

Judge BECKER. Absolutely.

Senator CORNYN. And is this something, a claim process that you think a reasonably intelligent individual could do on their own, or are they going to have to hire a lawyer?

Judge BECKER. I think for the most part, most of these can be done on their own. There are going to be some where they are going to need lawyers. Some are going to be complicated. Most of them they can do it on their own, and the Labor Department, by and large, they will hire contractors. I would say the way this is done is to hire contractors, and there are a lot of folks out there who have processed these claims for the bankruptcy trusts and so forth who should be available. But it is a claims evaluation process on the basis of the information that is—I do not think it is extraordinarily complex. It has got to be done carefully. But I think in most cases the claimant will be able to do it him—it is almost always going to be a himself. And you are not going to have to have a highly sophisticated claims examiner to evaluate the claim.

Senator CORNYN. And if, in fact, an individual, a victim of asbestos disease, is able to file their own claim, will they then be able to keep the entire award?

Judge BECKER. Yes.

Senator CORNYN. In other words, the amount of money that they would otherwise pay as attorney's fees would go into their pocket?

Judge BECKER. Absolutely.

Senator CORNYN. Okay. And I note under the Becker draft that there is a 10-percent provision for attorneys' fees.

Judge BECKER. And 20 percent if there is an appeal.

Senator CORNYN. And I want to ask you a little bit about that appeal, because, of course, this is just the amount of money that would be paid to the plaintiff's lawyer, the one who would be filing the claim.

Judge BECKER. Right.

Senator CORNYN. And you would expect, the world being what it is, that there would be some money spent, other transaction costs in addition, I guess.

Judge BECKER. I suppose there would be some—in any—it is a kind of personal injury case. There may be some costs for reports. There is not going to be formal discovery, but I guess there would be, you know, xerox costs if there are voluminous records. I do not think they would be significant, but I think there would be some other costs, travel costs maybe.

Senator CORNYN. Let me ask you about if there is a hearing—and I note there is a provision for a hearing under exceptional cases.

Judge BECKER. Right.

Senator CORNYN. Will this be an adversarial hearing?

Judge BECKER. No, I do not think it is an adversarial hearing.

Senator CORNYN. So it will just be the hearing officer, whoever that is.

Judge BECKER. The hearing officer, yes.

Senator CORNYN. And the victim and their lawyer, if they have a lawyer. And you have a provision—

Judge BECKER. But there is no defendant who has any interest.

Senator CORNYN. Right. Well, in terms of transaction costs, that is a substantial benefit in terms of getting money to the victim, which is our goal. But there is a 20-percent provision for appeals. Is that correct?

Judge BECKER. That is correct.

Senator CORNYN. And as I understand, there are, I guess, two kinds of appeals. One would be an administrative appeal and one would be judicial review, which would be based on substantial evidence review. But why is there a provision made to double the attorneys' fees for appeals because ordinarily—I mean, my experience is probably the same as yours, I hope it is, that appeals tend to be a little bit cheaper in the tort system than the trial preparation and the trial level itself.

Judge BECKER. Well, I think that generally is correct, but here you are talking about a relatively simple initial proceeding, and it is hard to picture at this point what the appeal issues are going to be. But my guess is that the appeal issues are going to be—it is a no-fault system and you do not have to deal with product identification and that kind of thing, which you deal with in the ordinary trial of an asbestos case. But it is probably going to be where there is some causation issue or, for example, the individual has got colorectal cancer, and was this colorectal cancer caused by asbestos.

Senator CORNYN. Caused by inhalation of asbestos.

Judge BECKER. Yes, I mean, that is a tricky issue, and a lawyer may have to do a lot of work, you know, to figure that out and argue that case.

Senator CORNYN. I would say a successful lawyer would have to do a whole lot of work to make that causal connection.

Judge BECKER. Well, that may be so. But that is why we have given to the administrator the authority to regulate the fees. These are simply presumptive maximums, and the administrator has the authority to cut them back—or to increase them if there is a fair case.

Senator CORNYN. Well, I will just leave it at this: As you have explained it, and as I understand it, the desire is to maximize money to the victim, eliminate as many transaction costs as possible, create a simple system that can be done even without counsel, should an individual choose to do so. So I would like to continue to work with you and the Chairman on those attorneys' fees allocations.

Judge BECKER. Of course.

Senator CORNYN. Because I think we ought to try to encourage and create a system that is, as a practical matter, something that could be done cheaply, efficiently, and with as few transaction costs as possible.

Finally, let me just in this round of questioning, you have mentioned the problem with Category VII. These are the people that have lung cancer, with no markers indicating that they actually have asbestos-related disease. And you said these are the kinds of cases if they go to court that typically the defendant would win.

Judge BECKER. They tell me they do. I do not know.

Senator CORNYN. Well, I would think that even if you are exposed to asbestos but you do not have any evidence of asbestos disease and you die or your diagnosis is lung cancer, that is, should be, a pretty tough case to win on the basis of an asbestos claim.

Judge BECKER. They do pretty well. They do not win them all, but they do pretty well in those cases, apparently.

Senator CORNYN. And under the provisions of this bill, there is as much as $200,000 that could be allocated to former smokers who have lung cancer but no evidence of asbestos disease.

Judge BECKER. That is correct. It is a much lower sum, but, you know, I guess it is an evaluation of risk. You know, in the tort system they may win three out of four cases, but they lose the fourth, and the plaintiff lawyer rings the bell, as they used to say, you know, on the fourth case. But, by and large, business has acknowledged that if we are going to have a gradated system, there has got to be a dollar figure there. And the only thing I can say is that dollar figure, as business has proposed it, and as Senator Specter and I have proposed it, is much less—also as Senator Feinstein has proposed it, is much less than what labor and Senator Daschle have proposed.

Senator CORNYN. I see my time is up, Mr. Chairman. Thank you.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Judge Becker, before you terminate your testimony, you had said in the final question from Senator Leahy that there were some issues where we cannot have consensus, and you particularized six or seven. I think it would be useful if you could enumerate those.

Judge BECKER. Well, I do not think we are going to get labor and business to agree on the dollar amount for the up-front funding. I do not think business is going to agree to medical monitoring, but you and I met with a whole bunch of business folks the other day and said do not fall on your swords on this. You know, it takes two to tango or three to troika, or whatever it is. But I think business is—business, kicking and screaming, may agree. The rail unions were working on this FELA thing. Yesterday at our meeting, Mr. O'Bannon from the Association of Railroads and Mr. Griffin from the maintenance of way folks agreed to talk some more about a formula. I think there is some possibility we may work something out on that.

I think that on the workers' comp subrogation, although I think what you and I have come up with is a principled solution, my guess is that labor is not going to—or the trial lawyers are not going to sign off on it.

Mixed dust, I am hopeful that we can work something out.

Let me look at my notes here. Equitas, the insurance issue, the offshore Lloyd's of London folks, I think you are going to have to resolve that.

I think with respect to the sunset provisions in terms of the reversion, I think we have a principled solution there, but I do not think—I mean, I think these are relatively narrow issues. It is up or down. But I just think you are just going to—especially with respect to the Level VII reversions, as to whether it is 115 percent and as to whether it just goes to Federal court, I do not think they are going to come to a consensus on that. And the time of the sunset, both in terms of the initial stay, the terms of that, although I think your approach to that is a sensible one, but the time of the ultimate sunset I think may be—business had said seven and a half years, and insurers have taken a strong position on that. Labor has taken the opposite position.

I think those are the main issues that you are going to have to resolve.

Chairman SPECTER. Well, Judge Becker, I am frankly encouraged by your specification of the outstanding issues. I think as to the dollar amount there is no doubt that the Congress is going to have to decide that. You have 140; as opposed to labor, trial lawyers at 149. Then you have 140 endorsed by Senator Daschle when he was head of the Democratic Party. So we are within the realm of handling it.

Medical monitoring, I understand the problems, but as we have delineated it, we may be able to limit it even further.

The FELA, we are going to solve that one with language. Labor is concerned about this being the start of the slippery slope to eliminate Federal employers' liability, and that is not the intention, and we can guard against that.

And the workers' comp subrogation, well, there is an issue where we may not come to terms, but it is not a gigantic matter. It is important.

Mixed dust, I think we will be able to draft through on that.

Equitas is for one group, and we will have to make that decision. We are prepared to do that.

When you talk about sunset, the time of sunset, seven and a half years and the amount of the funding to carry through that period of time, I think ultimately that the stakeholders, when they decide what positions to take, will have to make a judgment as to whether a bill which they have some concerns, even significant concerns, is better than going on with the system as it is now.

Judge BECKER. I should add the claims values, the claims values on the Level VIIs.

Chairman SPECTER. I should not have paused if you were going to add things.

Judge BECKER. The Level VII smokers, I do not think they are going to agree on that either.

Chairman SPECTER. Okay. On the reversion on that, labor at 150 percent and business and CBO and this draft comes in at 115. That is subject to some modification. But considering where we started off—and we all know that the perfect is the enemy of the good, and we are going to have to face up to the catastrophic nature as to what is going on. And there may be some room for patriotism here.

That perhaps is an inappropriate word where it is dollars and cents and shareholders, but the economy of the country is at risk.

Anything further, Senator Leahy?

Senator LEAHY. No. I think you have said it all very well. I agree.

Chairman SPECTER. Judge Becker, we would like you to remain at the witness table, if you would.

Judge BECKER. I would be pleased to.

Chairman SPECTER. Because there may be some comments which come up as we have the balance of our panel: Senator Engler, Ms. Seminario—

Senator LEAHY. Governor Engler. He does not want the demotion, Arlen.

[Laughter.]

Chairman SPECTER. Governor Engler. Pardon me. Mr. Forscey, Ms. Keener, Mr. Speicher, and Mr. Robinson. If you ladies and gentlemen will come forward, our lead witness is the former three-term Governor of Michigan, John M. Engler, who is now president of the National Association of Manufacturers, the largest industry trade group in America. Before becoming Governor, Governor Engler served 20 years in the State legislature, was the youngest person elected to the Michigan State House of Representatives. Seven of his 20 years in the legislature were as State Senate Majority Leader. Governor Engler has a law degree from the Cooley Law School and his bachelor's degree from Michigan State University.

Governor Engler, it is a pleasure to see you.

Senator LEAHY. Mr. Chairman, before we start, could I just ask consent to put in the record a statement by Senator Kennedy and some expert testimony in the record on subrogation?

Chairman SPECTER. Sure. Without objection, they will be made part of the record in full.

Our timekeeper will set the time at 10 minutes, and we look forward to your testimony, Governor.

STATEMENT OF JOHN M. ENGLER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, D.C.

Mr. ENGLER. Thank you, Mr. Chairman. Senator Specter, Senator Leahy, and members of the Judiciary Committee, thank you for the opportunity to testify about the need for asbestos liability reform, and I do want to say up front that I also have a written statement I would like to submit.

Chairman SPECTER. Without objection, your full statement will be made a part of the record, as will all the statements.

Mr. ENGLER. Thank you. I would also like to introduce our counsel for the Asbestos Alliance, Mr. Pat Hanlon, of Goodwin, Proctor, who is seated right behind me. So I have actually brought expert back-up as well.

Chairman SPECTER. Mr. Hanlon has been an extraordinary contributor to our 35 sessions. An extraordinary contributor. So you are well backed up.

Mr. ENGLER. I am indeed.

Senator Specter, the draft legislation, also, we want very much to compliment you. It reflects your serious commitment to finally resolving the litigation crisis, and we are grateful to you for that. I certainly want to acknowledge also the efforts of Judge Becker for such dedicated labor on behalf of the public good.

Today, as you have indicated, I am here speaking on behalf of the National Association of Manufacturers' Asbestos Alliance, a broad-based coalition of companies and associations committed to seeking a fair resolution of the asbestos litigation crisis. I am also very concerned about the plight of the victims, both medical victims and workers whose jobs and retirement savings have been affected. For their sake, Congress must build on last year's efforts and pass fair and reasonable legislation.

Our alliance strongly supports the trust fund approach. Removing claims from the tort system is the only way to ensure that the compensation goes to the victims, not the lawyers. It is also the only way to ensure that victims receive fair and prompt compensation, that the bankruptcies stop, and that the fraud and the uncertainty are eliminated.

I also want to note for the record that numerous veterans groups, including the Veterans of Foreign Wars, Non-Commissioned Officers Association, Paralyzed Veterans of America have also endorsed the trust fund approach. I think my seatmate, Ms. Keener, will be speaking to that a little bit later, but they do certainly because many veterans are also asbestos victims. I would ask that their endorsements be made part of the record as well.

In addition, I read yesterday that AFL–CIO President John Sweeney again described a trust fund approach as the best way "to show genuine compassion for the victims of asbestos disease." So, Mr. Chairman, I believe support for the trust fund concept is broad and it is bipartisan. And now I would like to move to the specifics of the draft bill. We have been continuing our review of that 250-page-plus draft that we received Friday evening, and the alliance is prepared to bring several general observations.

First, as has been discussed, the draft does not address the central issue of funding. The maximum size of the fund must be no more than $140 billion, as finally agreed to last fall by Senators Frist and Daschle. And just so there is no fuzzy math on that point, that $140 billion total includes all sources: defendant companies, the asbestos trusts, and insurers.

In addition, the funding schedule, especially in the first 5 years, must be reasonable. The approximately $40 billion in cash contributions in the first 5 years discussed last year, and certainly again this morning, meets that test. With the borrowing authority in the bill, the administrator could have as much as $60 billion or more to pay claims.

Now, to put that in context, the entire amount paid in asbestos litigation from the beginning in the late 1960s through 2002 was only $70 billion, and 60 percent of that went to those transaction costs we have been discussing, to lawyers on both sides of the issue.

The next requirement is that an asbestos solution must completely shut down the broken asbestos tort system. Provisions in the draft that call for a return to the tort system if certain dead-

lines are not met as the administrator sets up the fund are counterproductive. Worse, if we fail to get these cases out of the tort system, it could increase the costs to the program by tens of billions of dollars and result in asbestos victims and their families continuing to be victimized twice, first by the disease itself, second by a tort system broken beyond repair.

Certainly the heart of the problem is that too many claims are filed on behalf of people who are not sick and may never become ill from asbestos. That problem was dramatically illustrated last year in an independent study by Johns Hopkins researchers. The study was reported in Academic Radiology, one of the top peer-reviewed radiology journals. And, Mr. Chairman, I brought a copy of that and I would ask that that article and the accompanying editorial entitled "Is Something Rotten in the Courtroom?" become part of the Committee's record.

Chairman SPECTER. We will make it part of the record, without objection.

Mr. ENGLER. In this study, the researchers obtained 492 X-rays that had been examined by doctors retained by plaintiffs' lawyers and used in asbestos lawsuits. The plaintiffs' X-ray readers found asbestos-related lung damage in 96 percent of the cases. The Hopkins researchers put together an independent panel to interpret the same X-rays. The six panelists that they assembled were not told that these X-rays had been used in asbestos cases. The independent radiologists found abnormalities in a mere 4.5 percent of cases. That is 4.5 percent versus 96 percent. This is an outrage, and, generally, all too common in many of these asbestos cases.

The real tragedy is that thousands of these questionable claims are forcing victims, real victims, with serious illnesses in many cases, to wait longer and longer and longer for compensation. We cannot continue with a system that is hurting those who deserve help the most.

So, Mr. Chairman, I ask this Committee also ensure, which is a point we have been discussing this morning, that the legislation not become a smokers' compensation bill. Payments for lung cancer claimants who are current or former smokers should reflect their smoking history. This principle is essential and will protect the fund against an avalanche of smokers' claims that have little or nothing to do with asbestos.

The bill also must contain strong and effective provisions to lock the back door so creative trial lawyers just do not convert tens of thousands of unimpaired asbestos claims into silica claims and head to the courthouse once again. And I am encouraged by your comments on that today.

Finally, I do want to express concerns, as Judge Becker noted, about the new medical screening program included in the discussion draft. People who may have been exposed to asbestos but have no indication of any asbestos disease would receive medical services that are similar but less frequent than those received by Level I claimants. These people would have no claim in court and no right to compensation under State or Federal law. My concern with this is that every dollar diverted to the screening program, this new screening program, is a dollar then that is not available to compensate the sick.

Now, we are continuing our review and will continue to provide additional feedback through our able counsel, and the alliance remains committed, Senator, to working with you, Senator Leahy, Senator Cornyn, Senator Carper, who I was delighted stopped in this morning, because we recognize, as you have stated this morning, that this is a crisis that needs resolution. So your hard work and determination will be matched by our efforts. We do look forward to working with you and the members of the leadership and members of the Senate and ultimately the House and the White House to finally pass a bill that cares for victims and ends the current scandal-ridden system.

Thank you for the opportunity, Mr. Chairman.

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

Chairman SPECTER. Thank you very much, Governor Engler.

Our next witness is Ms. Margaret Seminario, Director of Occupational Safety and Health, AFL–CIO. She has worked for AFL–CIO since 1977, and since 1990 has been responsible for directing the organization's activities on safety and health. She holds a master of science degree in industrial hygiene from the Harvard School of Public Health and a bachelor's degree in biological science from Wellesley. Ms. Seminario has been a regular attender at our marathon sessions and a major, major contributor, heading up a very distinguished team from the AFL–CIO.

The floor is yours, Peg.

STATEMENT OF MARGARET SEMINARIO, DIRECTOR, SAFETY AND HEALTH DEPARTMENT, AFL–CIO, WASHINGTON, D.C.

Ms. SEMINARIO. Thank you very much, Senator Specter, and we do appreciate the opportunity to testify on this legislation on asbestos compensation.

As you have stated, we have been very, very involved in this most recent process. Just to note, the first asbestos compensation legislation that I was involved with was in 1978, so the AFL–CIO has been at this for a very, very long time, and we are pleased to see the progress that is being made with respect to addressing this issue.

I want to thank you and Senator Leahy, both of you, for your commitment and your tireless efforts to craft and sound asbestos compensation bill. And I would also like to acknowledge and thank Judge Becker for all of his very hard work, his tireless hours and hours spent on this very, very difficult issue.

We have welcomed the opportunity to participate in these efforts to craft a fair compensation bill for asbestos victims. For the last several decades we have seen the toll of workers and family members disabled and killed by asbestos disease mount to staggering levels, the result of willful practices of manufacturers and employers who withheld information about the hazards of asbestos and did little or nothing to control the exposures. And the result of these actions is an occupational and environmental disease crisis of unprecedented magnitude. And I think that we have to keep this in front of us, that while we talk about a litigation crisis—and there are indeed problems in the litigation system—the root of the problem is one of being an occupational health and environmental

disease crisis of unprecedented proportions. Hundreds of thousands of victims have already suffered and died, and hundreds of thousands more will die or suffer in the coming years.

As the disease crisis has grown, so has the litigation as victims have sought redress for their injuries. And as I have said, there are indeed problems in the current civil litigation system which we have recognized. And it is indeed for both of these reasons—the massive asbestos disease crisis and the serious problems with the current litigation system—that we have engaged so deeply in efforts to craft a fair bill.

We have indeed supported in principle the establishment of a Federal asbestos trust fund to compensate victims for their personal injuries through a no-fault system to replace the inadequate civil litigation system. We have consistently made clear that establishing a national compensation fund must provide for fair compensation for victims who suffer disease. It must have adequate funding to pay claims and ensure the fund's solvency. It must deliver compensation in an efficient and timely manner to victims. And it must ensure that victims will not be left at risk if administrative or financial problems arise.

We have also made clear we will not support and we will strongly oppose any legislation that does not meet these basic principles and any legislation that relieves defendants and insurers of responsibility and liability at victims' expense.

In the last Congress, much progress was made on some key issues of asbestos trust fund legislation, including the medical criteria and the establishment of a no-fault administrative system. But, indeed, differences on key issues remain, and let me turn to some of those key issues of concern for the AFL–CIO.

First and foremost is fair compensation for victims because ultimately asbestos compensation is about providing fair compensation to those who have developed a disease as a result of asbestos exposure. The compensation awarded should be commensurate with the level of disease and disability suffered. And, indeed, compensation values for diseases have moved closer to what represents in our view is fair compensation. However, the values proposed for some diseases in the last draft, 2290, and some of the latest business offers, particularly those proposed for the Level VII lung cancers in our view are too low. I think it is important to state that exposure to asbestos causes lung cancer and not only that, that indeed among victims who smoke, there is a synergistic effect with the resulting risk from both the exposure to asbestos and the smoking causing essentially a 50- to 90-fold increase in risk.

And so the fact of the matter is the fact that people smoked may indeed increase risk, but the exposure to asbestos has increased it even more, and those people deserve to be fairly compensated.

We also believe that with respect to the awards that are offered to victims under this bill, there should be no subrogation or liens against awards. And we do think that the proposals by insurers, which essentially call for a compensation holiday but still allow a total lien—a total lien against that award, is really unfair. And, indeed, it is worse than exists under many State laws where they do not allow a subrogation or lien against the entire award. And so we really do not think that those proposals are fair.

There must be adequate funding to ensure the trust fund solvency, and essentially the major sources of concern for us have most immediately focused on the early years when the demands and the stresses on the system will be the greatest. Last year the Congressional Budget Office itself, in an estimate of 2290, estimated that in the first 6 years the cost of claims under that bill will be $56 billion. The awards values that we are talking about here are higher than that bill. So the estimates of CBO are essentially in the range of, you know, $56 billion in the first 6 years of the program.

But we are concerned that those costs and claims projections are actually too low, and in one area alone, mesothelioma claims, the Government data, the most recent Government data show mesothelioma claims running essentially 30 to 50 percent higher than those estimates. And these are not my figures. These are the latest data from the National Center for Health Statistics released this November, and I would like to put those in the record of the hearing because I think—

Chairman SPECTER. Without objection, they will be made a part of the record.

Ms. SEMINARIO. I think it is very important that we base this on the best information we have. While there is a lot of uncertainty, let's use what we have.

And related to that, last summer the Centers for Disease Control, again, put forward information on what is going on with deaths relates to asbestosis, and, again, I would like to put that in the record as well, so that we can base these decisions—

Chairman SPECTER. Without objection, that will be made a part of the record as well.

Ms. SEMINARIO. So what we think is very, very important, that we use the information that we have, and that information indicates that the stresses on the system immediately will be very great. We think that we should fund to what is expected. We do not think that we should be looking at using borrowing authority to pay for what is expected. Borrowing authority may be useful to deal with what is unexpected, just the same way as we had a contingent call on 1125. But if we know the cost of this bill is $60 billion in the first 6 years, there should be $60 billion paid and not, you know, turning to a pool of money, because if the point is reducing transaction costs, we do not need to be paying a lot of money in interest. We need to be paying that money to the victims of this fund.

Another area of concern is the preemption of the definition of asbestos claim in the bill. That definition actually changed from 1125 as reported out of committee to what is in 2290 to be much broader. S. 1125 basically said this bill was about personal injury claims for asbestos-related diseases. S. 2290 now says that this is about any claim in the civil litigation system related directly, indirectly, derivative from, anything dealing with health effects of asbestos. We think that is far too broad and would have the unintended consequences of essentially preempting many actions that really should not be covered by this bill and for which there is no redress. So we do think that has to be looked at very carefully.

Another issue of concern, transition to a new system. This is probably one of the most difficult and complex issues with respect to this fund. With the existing 600,000 pending claims, new claims being filed, new cases coming forward, there are many, many people that are involved, and we do not think the system should be set up so that people who are getting sick are essentially put in a new holding pen. They might have been in one already in the current system to wait while the system gets up and running. It is not fair to people who are sick to basically have to bear what essentially are the time costs in setting up a new system. We have to do better with respect to providing some redress for those people while the system is getting up and running.

With respect to the sunset and reversion, I think with respect to the process that has been included in the draft in the bill, that is one that we have made progress on. But, again, we think if this does not work—and we hope it does work—that the system really has to go back to the status quo and not put in place a whole new set of rules because we do not see this as tort reform, we see this as—

Chairman SPECTER. Ms. Seminario, could you summarize please? The red light is on.

Ms. SEMINARIO. Yes. Let me just say that, in conclusion, we do support the establishment of a national asbestos trust fund, but it must meet the basic principles that we have set forth. We cannot and will not support legislation that does not provide fair compensation to victims, but we do stand ready to work with Senators and other stakeholders on the outstanding issues to see if an agreement on fair asbestos compensation legislation can be reached.

Thank you very much.

[The prepared statement of Ms. Seminario appears as a submission for the record.]

Chairman SPECTER. Thank you very much,

Ms. SEMINARIO.

We now turn to Mr. Craig A. Berrington, Senior Vice President and General Counsel of the American Insurance Association. Prior to joining the AIA in 1986, he held several key positions at the Department of Labor, including Deputy Assistant Secretary for Employment Standards. He received the Phillip Arnold Award, the Labor Department's highest honor for distinguished public service. He has his law degree from Northwestern and is a graduate of the School of International Service at American University and has been a contributor and attendee of our marathon sessions.

Welcome, Mr. Berrington, and we look forward to your testimony.

STATEMENT OF CRAIG A. BERRINGTON, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN INSURANCE ASSOCIATION, WASHINGTON, D.C.

Mr. BERRINGTON. Thank you very much, Mr. Chairman. As noted, I am general counsel of the American Insurance Association, and my statement today is also on behalf of other insurance trade associations—the National Association of Mutual Insurance Companies, the Property Casualty Insurers Association of America, the Reinsurance Association of America, and the Independent Insurance Agents and Brokers of America. We very much appreciate this

hearing, and it goes without saying we appreciate the extraordinary efforts that you and this Committee have made.

In this connection, I echo what others have said, that we all owe a tremendous debt of gratitude to Judge Becker who has led his graduate seminar in asbestos litigation with equal measures of intellect, patience, and firmness, and whose masterful presentation this morning took everyone through the bill in an extraordinarily clear way.

We have a written statement we would like to have submitted for the record, and I would like to make just a few conceptual comments.

Chairman SPECTER. It will be made part of the record, without objection.

Mr. BERRINGTON. Thank you.

As others have noted and as you, Mr. Chairman, stated with great force this morning, the current system of asbestos litigation has caused litigation chaos in the courts, massive economic dislocation to major sectors of the economy, great pressures on the insurance industry, and an extraordinarily expensive system of financial relief whose awards are often capricious, with a great majority of them going to people who are not sick. The United States Supreme Court has decried it but said that only Congress can fix it, as Judge Becker mentioned earlier.

In the insurance industry, we are prepared to support any legislation that will work. We had initially focused on legislation like that introduced in the last Congress by Representative Cannon. The legislation would provide medical criteria for the courts to use in asbestos lawsuits and, in addition, would address a variety of other litigation abuses, including those caused by lawsuits being brought not in the usual manner, where the plaintiff resides or the defendant is located, but where a favorable court decision could be guaranteed.

From the point that the Judiciary Committee decided to go the trust fund route, we have worked hard, along with all the other stakeholders, to make that approach work as well. At one point I think former Chairman Hatch referred to the effort—and it was referred to again this morning, I think perhaps by Senator Leahy—as this being the toughest litigation task that the Judiciary Committee had ever tackled. And I think we would all agree with that.

As we have worked on the trust fund approach, we have tried to stress certain bright line tests that are critical to us. While any piece of trust fund legislation will be complex, that complexity is only exacerbated if these bright lines are not included.

The essential bright line is that the amount of money that insurers put into the trust fund in the aggregate must be both certain and reasonable, and the money must pay for the system that is the exclusive place for resolving asbestos-related cases. Certainty comes in four ways:

First, by having the amount specifically set forth in the bill to be paid pursuant to a reasonable schedule. I understand why it is not in the bill right now, but I want to emphasize that the $46 billion nominal in S. 2290 represents maximums, not floors, and does not reflect the payments, the very, very substantial payments that

have been made through litigation in the bankruptcy system over the past 2 years.

Second, the bill should make certain no litigation remains after the trust fund legislation is enacted. This is often referred to and has been this morning as "the leakage problem." It may be leakage from the trust fund, but it could be a huge financial drain for insurers. In short, the trust fund, as I mentioned, must be the exclusive remedy for resolving asbestos claims from the day the President signs the bill, and all asbestos-related claims.

Third, the bill should not include provisions that require some type of operational certification for the trust fund before the litigation can be fully shut down, and we very much appreciate the conversations that we have had about that over the last several days. We must all come to grips with this because while we clearly understand the desire, indeed the need to have the trust fund get organized and start operations quickly, the bill already has a full set of operational provisions to do that. If more authority is necessary, the bill should add it. But if the bill holds out the possibility that the litigation system can start up again if operational certification is not given to the trust fund, it will have perhaps inadvertently provided incentives for some to throw road blocks in the fund's path or to mount legal challenges even to any certification that is given. This will cause massive leakage problems and litigation over the certification itself.

Fourth, if the bill is to include a litigation fail-safe system to kick in if the trust fund does run out of money, we believe there is no public policy justification, none whatsoever, for merely returning to the same litigation system that has been the vessel for all of the current problems. Thus, any such fail-safe system should, at the very least, place litigation in the Federal courts, not the State courts. Of course, a properly balanced law would be one where the possibility of the trust fund running out of money is very low because the fund's benefit payment system is well balanced with the fund's income.

Beyond the bright line requirements, the bill presents numerous important policy choices, and I want to raise one red flag about one of them. And I was happy to hear that the issue again is being addressed, and that has to do with how we deal with smokers, if individuals have long smoking histories, in the trust fund. We want to make sure that the trust fund is not designed with failure built in, yet this is the implicit assumption that a return to the tort system is inevitable. The reason for that assumption is that many believe the Level VII cases will swamp the fund. In fact, that is why there is that separate carve-out to move them back to the tort system. And it is imperative to remember that, as Judge Becker mentioned earlier, the Level VII cases include those claimants who have smoked, have lung cancer, and while exposed to asbestos perhaps 40 years ago, have never developed any underlying asbestos disease. A return to the tort system for these claims or because of these claims would be a function of eligibility criteria that will place on the fund a huge financial burden of compensating lung cancer generally rather than focusing on the compensation of lung cancer that was caused by asbestos exposure.

If the fund is to compensation those whose illness is much more likely to be the result of smoking, then at the very least we believe that the award level should be determined accordingly so those awards in the aggregate do not threaten the fund's existence.

Mr. Chairman, the insurance industry is committed to remaining at the table and to continuing our joint work toward a true and much needed resolution of our Nation's asbestos litigation crisis, whether through a properly constructed trust fund, as we are discussing today, or a medical criteria bill that directly addresses problems in the litigation system.

As we have heard this morning, the continued impact of this crisis on the victims, the business community, and the economy calls for a solution now. We want to help work with the Committee to get that solution.

Thank you.

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

Chairman SPECTER. Thank you. Thank you very much, Mr. Berrington.

We turn now to Mr. Michael Forscey, who has been involved in the asbestos issue since the 1970s, both as a congressional legislative assistant and private attorney. He appears here today representing the trial lawyers, the Association of Trial Lawyers of America, on the asbestos issue. He has had a distinguished career as a staff assistant for the Senate Labor Committee from 1977 to 1980 and as chief minority counsel on the Human Resources Committee under Senator Kennedy from 1981 to 1985 and worked as a legislative assistant to House Majority Whip John Brademas in the early 1980s. He has been a regular attender and a major contributor to our marathon sessions.

Welcome today, Mr. Forscey, and we look forward to your testimony.

STATEMENT OF MICHAEL FORSCEY, ON BEHALF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, WASHINGTON, D.C.

Mr. FORSCEY. Thank you, Mr. Chairman and members of the Committee. I am appearing here today on behalf of the Association of Trial Lawyers of America. I have represented ATLA in the discussions conducted by Judge Becker pertaining to the establishment of a trust fund to pay asbestos claims.

ATLA members represent the vast majority of the 500,000 existing victims who would lose—in an unprecedented fashion—their constitutional right to a jury trial under this Act. These victims have filed claims in good faith under the prevailing law for which they can expect to obtain substantial recovery in the courts. In our view, to radically change the rules governing the adjudication of these claims now is inherently unfair. We, therefore, deeply appreciate your willingness to listen to our views and to include us in the discussions that this Committee has sponsored and that Judge Becker has facilitated over the past several months.

At the outset, let me say that I believe no organization or lawyer should oppose the theoretical possibility of a trust fund that would provide fair compensation, paid promptly, to the approximately

million and a half of our fellow citizens who will develop asbestos disease in the future. ATLA has always said it could support a fully funded trust fund that would guarantee payment to future victims.

We believe that Judge Becker's involvement in this negotiation has produced a number of improvements that have moved us closer to the goal of a fair resolution for victims.

First and foremost, the current—and I emphasize "the current"—draft brings us much closer to both the language and the intent of the Biden amendment than does S. 2290. The Biden amendment, as we see it, has always been a critical incentive to achieve guaranteed funding, not an excuse to avoid it.

Second, Judge Becker's recognition that a 2-percent attorney fee is inadequate to ensure legal representation for claimants is also an improvement over earlier drafts, although we do not agree that we should retain the administrative discretion that is in the current draft.

Third, Judge Becker's proposal to increase award values is another welcome development.

Fourth, we believe that a medical screening and monitoring program is the least that Congress should provide to victims whose established right to compensation is being taken away. We believe this program should be fully funded.

Finally, we appreciate the judge's decision to remove a confusing provision that would have moved claims stayed under the bill back and forth between the tort system and the trust with no prospect of quick resolution.

However, many other improvements represent compromises which go only partway toward correcting the flaws of S. 2290. We remain convinced that the inflexibility shown by some of the other stakeholders on several key issues will need to change if a balanced package is to be produced through the negotiating process.

It is important to remember that the public health crisis caused by asbestos is real and continues to grow. When asbestos legislation was first considered by the Judiciary Committee last year, many Senators had been led to believe that few workers were still getting sick from asbestos exposure. Recent evidence, as Ms. Seminario pointed out, proves otherwise.

All told, over 300,000 U.S. workers have died because of exposure to asbestos, and approximately 10,000 people die each year from asbestos-related diseases. Epidemiologists, as Ms. Seminario pointed out, expect these trends to continue for decades, not decline.

The money necessary to fairly compensate these victims for the harm caused by asbestos manufacturers is obviously daunting. We believe the cost of compensating victims is clearly greater than $140 billion and could approach $200 billion. In the first 5 years, if all pending claims are forced through the fund, at least $60 billion will be necessary. If borrowed funds are used to pay pending claims, as is currently envisioned, required interest payments on these funds will deplete the money available to pay benefits by as much a 25 percent. Unless legislative proposals include guarantees of funding at substantial levels, the proposed asbestos trust will fail.

Thus, while the draft circulated by Judge Becker includes several proposed changes that we support, the central issue of financing—who pays and how much—is far from resolution. It seems unreasonable to move forward without a resolution to this issue that is grounded in sound claims estimates. We believe this issue has remained unresolved largely because the manufacturers and insurers have insisted on artificially low liability caps. Such caps render unreasonable a demand that all pending claims be forced into an administrative system that does not yet exist and that will likely not be operational for 18 months even under the best of circumstances.

The demand that all pending claims be resolved by the trust fund is at the heart of many of the unresolved issues with which this Committee continues to struggle: up-front funding, administrative gridlock, and reversion to the tort system. Forcing the pending claims into the fund also produces a substantial cost shift, away from those with vast current liability to those with relatively few current claims, as this Committee is just beginning to learn. Manufacturers and insurers have objected to honoring many settlement agreements into which they have voluntarily entered—agreements to pay specific sums to specific victims which, if honored, would significantly reduce the front-end funding needed for the bill and would greatly improve the fairness of the draft. Finally, these same defendants and insurers have unfairly insisted on forcing into the fund even those cases that have produced a judgment and an award, forcing claimants to start anew if that judgment is appealable. And we are pleased to see that the draft that was released last night appears to correct that problem, and we thank Judge Becker for that.

We are also concerned that the Department of Labor will not be able to process claims at the rate envisioned by the bill. We know from experience with other Government compensation programs that claims projections have historically been low. We also know that it is unrealistic to assume this program can be up and running in 90 days. Substantial delays have plagued both the black lung compensation program and the recent Energy Employees Compensation Act. These two programs are only a fraction of the size of this trust. The Committee must solicit the Department of Labor's views, in our view, on whether or not it can do what it is being asked to do. If the Department of Labor cannot get this program running in a matter of months, then Congress should not, as a matter of fundamental fairness, including the pending claims in the trust.

I am going to skip over a couple things, and I want to say finally one thing about the mixed dust cases. We do not think there is any evidence that mixed dust cases burden the courts, are not fairly resolved, or require Federal intervention. We think the legislation should not address these cases with legislative language.

Also, as to mesothelioma values, while the claims values in the latest draft are an improvement, we think that and we would propose that meso claims be compensated at a rate of $1.8 million, which is the average death benefit paid by the September 11th Fund.

In the past, compensation programs have been designed to provide a benefit to victims of harm when the courts have failed to do

so. We do not believe Congress has ever before adopted a compensation program that takes away from victims an established right to obtain compensation in the courts. As we move forward, we should not lose sight of the fact that in this case we are preserving not creating the right to compensation for asbestos victims.

Thank you very much.

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

Chairman SPECTER. Thank you very much, Mr. Forscey.

We now turn to Ms. Mary Lou Keener, the daughter of a mesothelioma victim who contracted this deadly illness while serving as a machinist mate in the United States Navy during World War II. Ms. Keener's father, who spent many hours in the engine rooms and boiler working on miles of pipes and fittings, ultimately succumbed to mesothelioma on Veterans Day 2001. And we will be hearing from two relatives of victims today, and I would underscore what Ms. Seminario had said, that when we talk about crises, we are talking about an occupational disease crisis.

Thank you for joining us, Ms. Keener, and we look forward to your testimony.

STATEMENT OF MARY LOU KEENER, MCLEAN, VIRGINIA

Ms. KEENER. Chairman Specter, Ranking Member Leahy, and members of the Committee, I am honored by this opportunity to appear before you here today and tell you about my dad's battle with asbestos-related disease and his untimely death from mesothelioma.

Following my dad's death, my family's personal experience in dealing with the current asbestos litigation system has not been a positive one, and it is my hope that by sharing this experience with you, the importance of your efforts to establish an asbestos injury compensation fund will become apparent.

My dad and I had a very special bond. We were both Navy veterans. I served as a Navy nurse in Vietnam, and he served as a machinist mate during World War II. During his service, he was on three different Navy ships, and two of those ships were literally blown up underneath him. And because, as you indicated, Mr. Chairman, he worked down in the engine room, there was really no doubt about the fact that he was exposed to significant amounts of asbestos.

In addition to having those two ships literally hit and blown up underneath him, he rode one of those ships back to the West Coast and worked in the shipyard to help in repairing that ship for several months.

Now, we all know, it is well documented that Navy ships then and even today still contain significant amounts of asbestos. It was literally almost more than 50 years after his service in the Navy—it was about April of 2001 that he first began to experience some pain under his shoulder on the right side. My dad and my mom came from Michigan to the D.C. area where they spent about 2 months with my husband and I, where he was seen and cared for at the National Cancer Institute at the National Institutes of Health in Bethesda.

It was there that after two months of driving back and forth each day on the Beltway, day after day for test after test, that he was diagnosed with stage 3 mesothelioma. After that diagnosis, he decided he wanted to go back home, where he underwent six weeks, five days a week, of radiation therapy in northern Michigan. He was too weak to undergo chemotherapy, and as he probably would have wanted it if he could have chosen, it was, as you said, on November 11th, Veterans Day, of 2001, that he died a very painful death from mesothelioma.

After my dad's death, because in my second life I was a lawyer, I was able to help my mother navigate all the regulatory and legal issues that she had to deal with. Of course, my dad's passing was so quick, six months from beginning to end, that we really never even thought about trying to pursue any type of compensation. All we wanted to do was make sure that he was cared for and had a good quality of life.

After his death, as I said, I was able to help my mom because I am also a veteran and very familiar with Department of Veterans Affairs benefits. I was able to help her file a DIC, a Dependent Indemnity Compensation claim, to receive service-connected death benefits because of my dad's death from mesothelioma due to exposure while he was in the Navy.

Then I helped my mom file a lawsuit with a plaintiffs law firm. That was in April of 2002. That was almost three years ago, and to this date her claim has not moved forward at all. Her claim is standing in line behind hundreds of claims of unimpaired victims. Nothing has happened, and that is just not fair.

As was mentioned before, there are very few viable, solvent defendants left in these cases. The law firm tells us that there are possibly 60 defendants in her case. Of these 60 defendants, 7 of them may be solvent; the remainder are all bankrupt. To date, my mother has received about three settlement checks from bankrupt defendants to the tune of pennies on the dollar from bankrupt defendants.

Unfortunately, my dad's story is just one of thousands like it in the veteran community. A Wall Street Journal article reported that claims from individuals exposed in military service and shipyard construction account for 26 percent of all mesothelioma claims, 16 percent of all lung cancer claims, and 13 percent of all asbestosis and other disabling lung disease cases.

Very few of these men and women who served in the military and were unknowingly exposed to asbestos as part of their service are receiving the compensation that they so rightfully deserve under this current system. The courts are so logjammed that they simply cannot provide compensation to the truly sick in a fair and a timely manner. The true victims of asbestos-related disease need to be compensated now, not years from now, in the current system.

For these and for many other reasons, I am so proud to join with my many friends in the veterans community in supporting this trust fund solution. Currently, there are 16 national veteran service organizations supporting a trust fund solution to the current asbestos litigation crisis. Some of these organizations are the Veterans of Foreign Wars, the Non-Commissioned Officers Association, the Military Order of the Purple Heart, the Jewish War Veterans,

and many others, including numerous State-based veterans organizations. These groups comprise hundreds of thousands of veterans across this country that are supporting the trust fund solution.

The names of all these veterans service organizations are included in my written statement, which I respectfully submit in its entirety for today's hearing record, and I look forward to answering any questions that you may have, Senator.

[The prepared statement of Ms. Keener appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Keener.

We now turn to Mr. Billie Speicher, a 67-year-old former Marine and pipefitter-steamfitter, who spent most of his career in Southern California oil refineries. He was exposed to asbestos as an aircraft mechanic in the Marine Corps in the 1950s and as a pipefitter. He suffers from mesothelioma and asbestosis and has a pending asbestos tort claim.

Thank you for joining us, Mr. Speicher, and the floor is yours.

STATEMENT OF BILLIE SPEICHER, ONTARIO, CALIFORNIA

Mr. SPEICHER. Good morning. My name is Billie Speicher and I appreciate the chance to talk to you today about the asbestos bill you have been working on.

I am here today for three reasons, to speak up for the men that used to work side by side with me who someday will have to live through what I am going through now. I want to speak for my family, and I would like to urge more research into the cancer that has changed my life.

I have mesothelioma. I don't have to tell you what that means because you have been there long enough. It is a deadly cancer, and by all rights I should only have a few months left. I was exposed as an aircraft mechanic for the Marine Corps in 1950, and a pipefitter from 1965 until 1999. And looking back, I can't think of two more dangerous lines of work, although none of us knew it then. No one told my buddies and me that asbestos could kill you.

Working on airplane brakes and insulation, and later in refineries and duster shops knocking off pipe insulation and installing and removing pipes and valves, cutting asbestos cement pipe, asbestos was everywhere. It was all over me and all over everybody who worked there.

I got the bad news mailed first. At first, the doctor I was seeing for two years kept telling me I had asthma, even though I had a CAT scan that showed my lungs were scarred with asbestos. Finally, the fluid built up so much in my lungs that they realized that I had asbestosis, stage 3. Now, I am living with a lot of pain and I can barely get my breath sometimes. I can't hardly sleep at night.

You know that mesothelioma is a death sentence—one year, 18 months, tops. That is all they give you and that is all they gave me. Well, I am still alive and kicking today because of one thing, an experimental drug called Veglin that was discovered by Dr. Gill. I started getting the Veglin shots about four months after my diagnosis, and so far it has stopped me from getting any new tumors.

You can probably figure out that these new experimental medicines like Veglin are very expensive. They are the reason I want

to talk to you about the bill you are thinking about here in the Senate.

I filed a workman's comp claim in my home State of California to help cover my medical expenses. The lawyers who handled this case tell me that since I have meso, I will most likely receive the maximum level of benefits under State law for permanent total disability medical benefits because I have meso and a death benefit. I am not sure how much—somewhere between $200 and $300,000. I also have a court case coming up and the trial date is set for February 22 of this year.

Now, I have followed this bill we are talking about since I got meso, and I have to say that I don't like the idea of it. I am no legal expert, but to me the jury system in our country is about as important as it gets, and I just don't think it is right to take those rights away from people, which I feel this proposal will do.

I don't want to be rude because you invited me here today, so I am going to do something with this new trust fund. There are a couple of things I hope you keep in mind. For one thing, if you would put this thing into law today, that would wipe out my trial rights. Even if I go to court before that and win a settlement, you get this thing passed by summer and it all goes away and it would be like I never got my day in court.

I would have to start all over again and go into this trust fund that is supposed to be set up in about a year that I don't have. I don't want to be disrespectful, but I was in the Marines. Except for war, I don't think the Government does anything very fast. The thing is I don't have a lot of time. And you may not know it, but I live in California where folks like me with meso get put at the head of the line in a court case.

Now, I don't want anybody thinking I came up here with my hand out or saying "show me the money," because that is not what I care about. I need help with my medical bills. Those Veglin shots are keeping me alive, and they are the only thing that is keeping me alive.

Second, I want to make sure my family is taken care of—my wife and my kids and the most beautiful granddaughter you have ever seen. This costs a lot of money to keep me alive and it will cost a whole bunch more. I don't want my family stuck with a pile of debts after I am gone. I am telling you right now that causes me as much pain as the cancer that is eating inside of me, in my body.

Finally, I want to say a word about research and the guys I used to work with. I am here to speak for them, not just the guys who busted pipe and asbestos with me, but the hundreds of thousands of guys all over the country who did it for years and may still be doing it today because, you know, asbestos is still out there in the construction trade and the buildings. The construction workers are exposed to asbestos whenever they do renovations.

You also know that everyday another worker is diagnosed with meso or some other asbestos-related disease, and many more will keep on coming in the future. So whatever you do, you have to make it work for them, and you also have to do something to help with the research to find a cure for this disease. I don't know if you put any money in the bill to help that, but you ought to, and you ought to do even if the Federal Government has to pay for it.

Now, I know that that doesn't go over too good, as we are in a war with a big deficit. But the plain truth is the Government had a lot to do with exposing guys like me to asbestos. I got my first taste of it working on airplanes in the Marine Corps. A whole lot of veterans got their first exposure to asbestos serving their country.

So I would just like to close by saying I hope you do the right thing by us when you finish writing this bill, and I hope you are thinking about all the workers in the future like me who are going to hear the same thing I did last May that they only have about one year left to live. Let's find a cure for mesothelioma. We know it is going to still be killing people for years and years, so let's do something about it.

Thank you.

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

Chairman SPECTER. Thank you very much, Mr. Speicher, for sharing with us your own situation, and we see the difficulty of your testimony. We very much appreciate your being here and presenting your views.

Our final witness is Mr. Jeff Robinson, who is a partner with the law firm of Baach, Robinson and Lewis. He is a graduate of Lafayette College, summa cum laude, and Yale Law School; served as Deputy Assistant Attorney General for the Department of Justice and did extensive work on this Committee, working for me many years ago. He has been an adjunct professor of law at Georgetown. He has been an active participant in our marathon sessions.

We welcome you here today as a witness, Mr. Robinson, and look forward to your testimony.

STATEMENT OF JEFFREY D. ROBINSON, BAACH ROBINSON & LEWIS PLLC, WASHINGTON, D.C.

Mr. ROBINSON. Thank you, Chairman Specter, Senator Leahy. I am here today on behalf of Equitas, which is an English company which is responsible for the pre-1993 liabilities of Lloyd's of London. Those include the asbestos liabilities.

Although a foreign company and in the position to avoid this, Equitas is keenly aware and supportive of efforts to find a legislative solution to the asbestos issue. Some of the allocations which have been done suggest that Equitas could be one of, if not the single largest contributor to the asbestos compensation fund.

I want to start by expressing our appreciation to you, Mr. Chairman, Senator Leahy, former Chairman Hatch and the other members of the Committee who have worked so hard during the past two Congresses to address the issue of asbestos litigation reform. Without that difficult and intense work, we would not be here today with the opportunity to enact historic legislation.

Like everyone else, I would also like to thank Judge Becker for his work during the last two years. He has forced agreement which makes the possibility of legislation a reality.

Many years ago, Equitas recognized that tremendous growth in claims from unimpaired individuals threatened to overwhelm the ability of the existing tort system to compensate those who were

truly injured by exposure to asbestos. This flood of claims also threatened the financial viability of numerous defendant companies and their insurers.

Equitas has done what it can as a single company to resist claims from the unimpaired and has had some success in this regard, but it has become obvious that no single company or group of companies can solve this problem through their own actions. A legislative solution is required.

Equitas actively supports efforts to obtain comprehensive legislative reform of the asbestos litigation system. We are not wedded to a particular approach and do not insist upon particular provisions in legislation. What we have also asked is that any legislation be effective at addressing the abuses in the current system and fair to all the participants—the claimants, defendants and insurers.

Unfortunately, various provisions in the current discussion draft render it ineffective and unfair in some respects. My comments today are focused on Title II, the subtitle related to the Asbestos Insurers Commission.

Insurers are expected to provide upwards of $46 billion in funding for the proposed trust fund. It should be noted that that $46 billion figure was reached almost two years ago. Equitas, like others in the insurance industry, has spent considerable amounts resolving claims during that period, significantly reducing our future liabilities for asbestos claims.

Despite repeated promises to do so, insurers have not presented a formula specifying how contributions would be calculated that could be set forth in the statute. As a result, the Asbestos Insurers Commission will be charged with the critical task for ensuring that the insurers' contribution is collected and allocated amongst the various insurers and reinsurers who will be participants. Despite that critical function, the current discussion draft handcuffs the commission, severely limiting its ability to obtain the required amounts through a fair process.

First and foremost, the discussion draft does not ensure that the members of the commission will be free of actual or perceived conflicts of interest when they perform their sensitive task of allocating contributions amongst insurers.

As currently designed, an officer or employee of an insurer participant could leave his or her job one day and the next be in charge of allocating billions of dollars amongst his or her former employer and its competitors. While it may be acceptable in some circumstances for a former employee or party to sit in judgment on matters of interest to that party, where the matter involves an allocation of enormous financial liabilities amongst the former employee's principal and its competitors, it is patently unacceptable, with or without disclosure.

The commission members should be subject to no less of a test than are judges, who would clearly be required to recuse themselves from deciding a case of this magnitude involving their former employer. The appearance of impropriety would compel it. Imagine the consternation and mistrust you would feel if you learned that your company had been assessed $1 billion more than you anticipated by a commission led by the former CEO of your

major competitor. No one would accept such a result from a court and it should not be accepted here.

Second, the discussion draft contains a provision allowing groups of insurers and reinsurers to circumvent the work of the commission and shield themselves from the commission's review by concluding private agreements regarding allocation.

Remarkably, the provision provides that all of the authority of the commission terminates with respect to insurers who are parties to such an agreement. This provision should be rejected. The provision undermines the entire role of the commission. If an independent commission applying a fair and transparent methodology to determining insurer shares is an appropriate and important exercise, it is appropriate for all participants.

Second, the provision is discriminatory because it permits domestic and foreign insurers and reinsurers to form alliances to enter into such agreements, but inexplicably precludes companies such as Equitas from participating in such agreements.

There has been much back-and-forth, as Judge Becker knows, concerning the shape of the asbestos commission. We are keenly concerned about it because under any version of the bill, our liability will be determined by the asbestos commission. Others who express interest in how the asbestos commission works go on to say that, in their desired world, they will never be subject to it because they will reach an agreement that terminates the commission's jurisdiction with respect to them.

Finally, Equitas is particularly concerned about a provision targeted only at it that would deny the commission the ability to grant Equitas meaningful financial hardship or exceptional circumstances adjustments, adjustments that could be granted to all other insurers and reinsurers.

Under the terms of the bill, insurers and reinsurers can obtain an adjustment that reduces their payment obligation to the fund if payment without such adjustment would threaten the solvency of the company, be exceptionally inequitable, or fail to account for other payments the insurer was required to make. This is very similar to the provision which are contained for defendant companies.

To keep the fund whole in the event of such an adjustment, the amount of the adjustment must be paid into the fund by the remaining insurer contributors based upon their proportionate shares of payment to the fund, again as is the case with defendant companies.

Although the bill allows Equitas to receive such an adjustment, it then discriminates against Equitas by applying to it and to no other insurance participant a provision that would nullify any such adjustment. The provision would require that the parties reinsured by Equitas make a payment to the fund in the amount of any adjustment granted to Equitas, thereby giving with one hand and taking way with the other.

This provision could lead to the following absurd result. The commission determines that the formula it has adopted substantially overcharges Equitas because Equitas would be faced with fewer liabilities in the existing tort system. The commission then grants an

adjustment to Equitas, but the parties whom Equitas reinsures would then be required to pay back to the commission the amount of the adjustment, even though it has been determined to be inequitable. That situation would arise with no other reinsurer, whether they could make their payments or whether—if they could not make their payments or if they got a hardship adjustment, the amounts are reallocated around the entire insurance community. But for Equitas, it is targeted back only on those people whom it reinsures.

It is simply wrong to treat one identified participant differently from all others, and it is also foolhardy. This discriminatory principle may make it impossible for Equitas to make a substantial contribution to the fund. It engenders some concern from the UK government and others about whether or not we are treating all foreign companies in the same way that we are treating American companies.

In conclusion, Mr. Chairman, we applaud you for taking up the critical but difficult issue of asbestos litigation reform. The discussion draft presented represents an important next step in the process, but it is a step hindered by some correctable errors. Absent steps to address these identified failings, this legislation will be neither effective nor fair. Taking these steps will go a long toward creating legislation that can resolve the asbestos litigation crisis facing the Nation.

On behalf of Equitas, we pledge our continued cooperation with the Committee in formulating an effective and fair reform of the asbestos litigation crisis. Mr. Chairman, I have a statement which I ask, like the others, be included for the record, and I thank you for inviting us here today.

Chairman SPECTER. Your statement, without objection, will be included for the record. Thank you very much, Mr. Robinson.

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

Chairman SPECTER. Mr. Speicher, your testimony was very compelling. When you talk about finding a cure for mesothelioma and cancer-related ailments, I serve on the subcommittee of Appropriations—actually, chair it—Labor, Health, Human Services and Education. We have allocated some $28 billion for National Institutes of Health research, and the cancer fund is right at the $5 billion level. So there are very, very substantial efforts being made, but I will take another look to see what the National Center Institute is handling on asbestosis and mesothelioma, and see if more could be done there.

Ms. Keener, thank you for your testimony on your father, who was a victim, and we note the problem which you have identified where your mother's claim is not moving forward because so many people are getting compensation and are in court where they have no disabilities. Governor Engler mentioned that as well, and that is one thing this bill is going to change.

The Supreme Court of the United States handed down that ruling. It was sort of inexplicable that they handed it down, but they do that from time to time. One of the things that the Judiciary Committee is going to be taking a close look at is more of the judg-

ments which Congress can correct, and that is one which we can deal with.

I was pleased to hear the level of support for the trust fund from Governor Engler and Ms. Seminario and Mr. Forscey, although Mr. Forscey has substantial reservations about many provisions.

Mr. Berrington, you raise the issue of the medical criteria bill. Now, the medical criteria bill pops up from time to time. Would you like to see us put the trust fund in the back burner and pick up a medical criteria bill—

Mr. BERRINGTON. We would like to work with—

Chairman SPECTER. —for the next 5, 10, 15 years?

Mr. BERRINGTON. I am glad you finished that sentence.

Chairman SPECTER. Well, I didn't want there to be any doubt as to my view of the medical criteria bill, but it is out there in the nimbus; it is out there in the clouds. Even the eminence of Judge Becker cannot produce a perfect bill. He just can't do it, and it greatly disappoints me that he hasn't done it.

But do you seriously think we ought to start looking for alternatives like the medical criteria bill?

Mr. BERRINGTON. We want to work with the Committee on what the Committee believes is the best way to proceed to get a resolution to this issue. And if we can do it through a good trust fund, let's do it. But if that turns out not to be possible, let's continue to work on the issue and find another approach.

Chairman SPECTER. Well, this Senator thinks that the trust fund is the best idea and I would hate to see us go back to ground zero. After the kind of effort which the Congress has put into this, it would be very hard to contemplate the kind of drive being duplicated on this issue which has happened in the past several years, with Senator Hatch and Senator Leahy as Chairman and Ranking—Senator Leahy conducted hearings when he was Chairman—to go back there.

I am pleased to have heard the comments about improvements, and Mr. Forscey has been a regular attender and has grave reservations about taking away the right to jury trials, frankly, as I do. But we have tried to provide the safeguards and the safety valves with the reversion, and we have heard the concerns about the reversion which Governor Engler has articulated.

And then you have the Level VII on smokers and non-smokers, smokers, ex-smokers, non-smokers, and lung cancer I. Governor Engler doesn't want this to be a smokers' bill, and Ms. Seminario brought up the issue that the figure is too low and it is synergistic. I was glad to hear about synergism between—or interested to hear—maybe not glad to hear about it, but interested to hear.

But on this table, Judge Becker and I did precious little with it. It came to us pretty much in this form. Judge Becker has been very patient and has sat at the witness table for more than an hour.

Judge Becker, on the individual evaluation as to number VII—and this sort of points up the problem that we have on different points of view—the smokers get $75,000, the ex-smokers $200,000, the non-smokers $625,000. Can you give us the genesis or origin of these amounts of money?

Judge BECKER. Well, the 625 for the non-smokers is Frist, Daschle and Feinstein. Everybody is agreed on that. I mean, those four parties agreed on 625 for the non-smokers, on the theory that if they had 15 years of weighted exposure, even though they had no absolute asbestos-related symptoms, the causality question would likely, if they were not non-smokers, be resolved in their favor. Hence, the $625,000.

The smokers, although—well, with respect to the ex-smokers, which is the big difference—

Chairman SPECTER. Where did that figure come from, Judge Becker, if you know?

Judge BECKER. Well, basically, I mean, Senator, all of these are arbitrary. They are, I trust, reasonably arbitrary.

Chairman SPECTER. Who put the arbitrary figure on them, if you know?

Judge BECKER. The answer is I don't know. Senator Frist put one figure on, Senator Daschle put one on, Senator Feinstein put one on, and we kind of compromised it and we kind of split the difference. But what we put on was much less than the Labor or the Daschle offer, and significantly less than the Feinstein offer. It was a little more than the Frist offer just with a view to sweetening it a little and maybe cutting the baby in half and seeing if everybody could be satisfied.

With respect to the smokers, we were very close to the Frist offer and significantly below the Daschle offer, on the theory that the smokers, as appears to be the case in the tort system, are going to have a difficult time proving causation. So by and large, what we did was kind of a sweetener, by not by much, to see if we could get everybody's agreement. I don't know that we have.

Chairman SPECTER. Governor Engler, you have talked about the medical screening and I would like you to take a look at that, and Pat Hanlon behind you, if there is any language that you would like to see us delineate more precisely to avoid opening the flood gates, which I understand is your concern.

Ms. Seminario, you have raised the issue about the definition of asbestos being too broad. If you have an idea on that, we are glad to entertain it further.

I was pleased to hear you say, Mr. Forscey, that the current draft is a big improvement on the reversion. And, again, we are open to further suggestions. We are working with Mr. Berrington on the avoidance of the leakage on the short amount of time afterwards. So we are still prepared.

Mr. Robinson, your issue we have taken up with you individually. We have given you a lot of attention. That is one thing that Judge Becker and I have done. You wanted to be a witness and we are glad to have you in as a witness, although you have a very fine point. But I don't like the idea of conflict of interest and discrimination, and if you give us language, we will consider it.

Senator Leahy, my yellow light is about to expire into red.

Senator LEAHY. Mr. Chairman, I appreciate the way the time goes. I have served on a lot of committees, as you have, and have Chaired a number, as you have. Sometimes, it is fault, sometimes

it isn't. But there just being the two of us here, I would certainly have no objection if you need more time.

Chairman SPECTER. Well, I do need more time, but we have done a rather thorough job here and I am going to observe my time limit.

Senator LEAHY. Thank you. Mr. Chairman, some of this I am going to have to submit for the record just because of time constraints and because I am also supposed to be somewhere else at the moment.

Mr. Berrington, I was puzzled, actually concerned by your testimony. You know, everybody here is dealing in good faith. The manufacturers have. I think we have been fortunate in having Governor Engler here, a person who, in his former career as governor, had to balance certainly in his State some of the most unbelievable, conflicting groups, and balanced them very well.

He had to deal with the legislature. He had to deal with all the problems of a major State, one with a huge industrial base as it transitions into an entirely different time. And I say this very honestly. I think, Governor, you did that in a way that very few people could have.

But we are here now in the realities, Mr. Berrington. You speak of the criteria bill. With all of the discussions, the hours and hours of work on this, the huge amount of lobbying—and I can almost hear the meters whirring in this room with those who are not here totally on their own nickel, as Judge Becker is.

The idea of a criteria bill—you know, in the last Congress there was only one sponsor of the criteria bill and one cosponsor, and now the sponsor has retired from the Senate. Now, we are not going to get anything through that doesn't have both Republican and Democratic support. It is going to need that to get passed. I believe it can be done, but let's not waste time on something that could only get one cosponsor last time and one sponsor, especially when that sponsor has retired.

Now, Mr. Speicher and Ms. Keener, I thank you for your military service. Ms. Keener, I hope you understand the gratitude of all of us for your father's service, and yours, and our condolences on his death.

Mr. Speicher, my youngest son is a former Marine, and so there is always a special part in my heart for Marines.

Ms. Keener, before you feel that somehow that leaves you out, my wife is a nurse. So we are covering all the bases.

But in your cases—Ms. Keener, in your father's case, and, Mr. Speicher, in yours, the exposure to asbestos was in service to your country. Many veterans are now sick, as you have pointed out, Mr. Speicher and Ms. Keener, with asbestos disease as a result of their exposure during service.

Would you think that the Federal Government should be providing contributions either directly or through tax incentives to provide more funding to a national trust fund because of the number of veterans who are going to be affected by this? Do either one of you want to answer?

Mr. SPEICHER. The research for mesothelioma which I appreciate you addressing was addressed as a cancer grant, and the thing

with mesothelioma is there weren't enough of us and it was kind of pushed over to the side and they tried everything else because all the chemos and everything that work for other cancers just don't do this.

So this is the reason I say we need more research in mesothelioma. The research that was done there by Dr. Gill is the reason I am able to sit here today, and somebody had to fund it. It was the Mesothelioma Foundation there at Norris.

Senator LEAHY. Ms. Keener.

Ms. KEENER. No, sir, I am not advocating any Government expense, but I do have a question perhaps of Judge Becker. In the prior bill, there were several provisions in 1125 and 2290 that provided specific advantages for veterans in the bill.

Also, Mr. Speicher, in that bill there was one provision that provided $1 million from the fund for each of the fiscal years 2004 through 2007 for up to ten mesothelioma disease, research and treatment centers. And I guess my question is I am hoping that those provisions are or will be included in this current draft.

Judge BECKER. If I may respond, Senator Leahy, Section 222(c)(1) of the bill, on page 79 of the new bill, entitled "Mesothelioma Research and Treatment Centers," provides that the administrator shall provide $1 million from the fund for each of the fiscal years 2005 through 2009 for each of up to ten mesothelioma disease research and treatment centers. It provides that the centers shall be chosen by the Director of NIH, chosen through competitive review, et cetera. So that provision remains in the bill.

Senator LEAHY. Ms. Seminario, I know you watched this very carefully. I mean, at the AFL–CIO, there are thousands of your members who have been exposed to asbestos during the course of their occupations. You have been a strong advocate for victims, I know, from the work with Judge Becker. You are an expert on occupational safety and health.

Let me ask you this question. Last October, Congress passed and the President signed into law legislation transferring the Energy Employees Occupational Injury Program from the Energy Department to the Labor Department. What kind of lessons can we learn from the Energy workers Federal comp program? Especially, I am thinking of difficulties approving claims, but also getting past bottlenecks, because we are talking about some time constraints for a lot of the people who are affected by this.

Ms. SEMINARIO. I think there are a number of lessons to be learned. The Energy workers program was one which was actually a relatively small program. It was to compensate those individuals who had worked in the DOE nuclear facilities. They are essentially the Cold War veterans, the people that built the atomic bombs in this country who were exposed to a variety of toxins, and as a result are suffering very significant illnesses and are dying.

The Congress passed the law, I believe, originally in 1999–2000. Part of it went to DOE, and what happened there is that the problems of trying to prove, first of all, exposure for individuals was very difficult. These were exposures that took place a long time ago. It became a huge, huge bottleneck.

It turned out that after four or five years of trying to get this program up and running, I believe ten people had been compensated. There was $75 million spent and 10 people compensated. DOE was trying to assist people to be compensated through the State compensation programs.

So what you had was with both these evidentiary requirements, as well as the way it was set up administratively, the hurdles were so high that nobody got compensated and a lot of money went to the administrative costs.

So the Congress made a decision to essentially shift it to an agency that knew how to deal with compensation programs, but, as importantly, to basically put in place more simple criteria to be the guide posts for whether or not people would be compensated.

The Department of Labor has just received that program and that program is dealing with 20,000 pending claims. They have been given 210 days to get that up and running. That compares to this program with, let's say, 600,000 pending claims, and there are proposals for 180 days. I think we have to be realistic about the time that is going to be needed, even with the best intentions and the smartest people.

So we are very concerned that during this transition period, the defendants and insurers are concerned about leakage. But if you are basically going to shut down the existing system, that means that people will have nowhere to go and that is not fair. It is not fair that victims who are going to die within 6 months—in 180 days, people will be dead by the time this program gets up and running. And we think that that is unconscionable and that the Congress cannot and should not put in place legislation that leaves victims with no redress.

Senator LEAHY. Mr. Chairman, I will follow your good example. I will have, if I might, a number of questions for the record.

Chairman SPECTER. Sure.

Senator LEAHY. On some, I will want to follow up on Governor Engler's testimony, which was excellent, as was everybody's.

Mr. Berrington, I have a question, as you may gather, for you, and Mr. Forscey. I realize this goes beyond the time, but I just wanted to applaud the Chairman for doing this.

Chairman SPECTER. You may go well beyond the time.

[Laughter.]

Senator LEAHY. This is one of those things where there are all these glamorous things you could be doing in hearings. Certainly, everybody is going to be having hearings on tsunami aid, and we are going to have hearings on this, that and the other thing. In this Committee, you could hit all of the hot-button items. This is one of the hard work—this is not the show horse; this is a work horse kind of thing. It is extremely difficult.

I applaud the Chairman for taking it on as one of the very first things he is doing as Chairman. I know the frustration I felt during the 17 months I was Chairman in dealing with it, but I also know the tremendous potential boost it can give to our economy if it is solved and the tremendous sense of closure and help it can give those who suffer. I mean, these are human cases. They are not just numbers; they are human cases. I have met many of these families.

None of it is going to be perfect. Judge Becker would be the first one to say that, and the Chairman would, but we can do so much better than we did.

So I applaud you for that, Mr. Chairman. Lead on.

Chairman SPECTER. Well, thank you very much, Senator Leahy, for your cooperation, your joinder on this issue, and your hard work and your staff's participation.

I think the testimony of Mr. Speicher and Ms. Keener was especially important today to put a focus on the victims. It is not easy for Mr. Billie Speicher to appear here and talk about the short time that he has because he suffers from mesothelioma, and Ms. Keener's comment about her mother not being able to get to court because so many people are head of her, where they don't have any injury. So taking care of America's victims is indispensable as we move ahead here. Senator Leahy has commented about the tremendous drain on the economy.

I am pleased to have heard the broad support for the trust fund concept. Sure, there are lots of issues, but that broad support is very important. With respect to improvements, we are still open. What we are going to be doing is going back to work a week from tomorrow, on the 19th, at ten o'clock, where there will be more time to review the draft. I have invited a number of you to submit more language.

My hope is to have other Senators take a look at this draft and the changes that we will incorporate, and to try to get a bill ready for introduction very, very early on, because once the Senate starts to function, it is a virtual impossibility to get floor time. That is why we have maintained this very, very heavy workload and full-court press over November and December and into January.

I am encouraged by what I have heard today, although I am not unmindful of the criticisms, and we are going to try to meet them to the extent we can. It is my hope that where the criticisms or the questions or the concerns relate to the uncertainty as to what we can predict that that will not be a bar as to whether final sum that we put on is going to be enough, because we do have an active safety valve.

Kim and I talked about yesterday the seven-and-a-half years. They would like there to be some assurances. It seems to me that there are a lot of practical assurances that will go well beyond seven-and-a-half years. But if the bottom falls out—and I don't think it is going to, but my point is not to let the uncertainties pull us down to look for greater certainties or greater protection. It is a question as to where we are.

And I use the number VII, smokers/non-smokers sort of illustratively. Maybe $200,000 is too much for people who have quit smoking and maybe $75,000 is too much for the smokers. But in the grand scheme of things, that is not going to be a big factor in this bill. And I would suggest that some of the other concerns we have are not going to be gigantic factors either, compared to getting something done. And it is really now or never, so let us not let the perfect be the enemy of the good.

Seema Singh, who has done yeoman work, sitting behind me, my staffer, will be receptive to any thoughts you may have, as will I

and also Judge Becker. We will reconvene on the 19th, with a view to trying to put the bill in final form. In the interim, I will be talking to my colleagues in the Senate to see if we can find some agreement, and we will come up with a figure when we have the next bill.

Thank you all very much.

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

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

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

QUESTIONS AND ANSWERS

Jan S. Amundson, Esq.
Senior Vice President and General Counsel
Law Department

National Association of Manufacturers

March 16, 2005

The Honorable Arlen Specter
United States Senate
Washington, DC 20510

Dear Senator Specter:

Enclosed please find the responses to the questions sent to Governor John Engler, President and CEO of the National Association of Manufacturers following his testimony before the Senate Judiciary Committee on January 11, 2005. Please accept my apology for the delay in sending these responses but I thought they had been forwarded to you. Again I apologize for my oversight.

If you have additional inquiries or need additional information please let me know and I will promptly respond. Thank you for your understanding of this delayed response.

Sincerely,

Jan S. Amundson

Questions for Gov. Engler (NAM)

1. Senator Frist's July 2004 trust fund proposal to Senator Daschle would have required $140 billion in total contributions with $15 billion coming from defendant participants within the first five years of the fund. I understand from your testimony that NAM supports $140 billion for overall trust funding. Does NAM still support Senator Frist's proposal regarding the $15 billion in upfront funding coming from defendant participants?

Yes.

2. At the hearing you testified that with the Frist proposal and the borrowing capacity, the trust fund administrator would have access to approximately $60 billion to pay the claims that are received at the "front end." What is the basis for this statement?

In the first five years, defendants will contribute $15 billion, insurers nearly $21 billion, existing trusts $4 billion and we estimate the fund's borrowing capacity to be at least $20 billion.

3. Do you have written commitments or letters from financial institutions regarding the availability of $20 billion in front-end funding from the bill's borrowing authority? If so, please provide to the committee.

We do not have written opinions from financial institutions in deliverable form yet. NAM's financial advisor, Chilmark Partners, has been working with several major banks. At such time as a bill is introduced, we expect to have available for the Committee written opinions as to the fund's borrowing capacity. The opinions cannot be written in advance of published language regarding the Administrator's obligation to repay and his authority to fulfill that obligation.

4. Finally, do you have any estimate of the interest costs that will be paid out if the fund needs to borrow $20 billion?

The fund is likely to be a high-quality borrower, and should be able to finance at a narrow premium to Treasuries. Funds will probably be raised in the securitization market. The precise spread and interest rate will be determined by the capital markets at the time of borrowing. The aggregate interest cost to the fund will depend on rate and the amounts borrowed during specific time periods. That depends, in turn, on the size and timing of benefit payments. Also, the fund will earn offsetting investment income, similarly related to its cash flows.

5. At the hearing you testified about the inclusion of silica claims into the asbestos legislation. Please provide me with any legislative proposal by NAM to include silica claims in this asbestos trust fund legislation.

A proposal for dealing with silica and mixed dust claims was included as section 403(b) of Senator Specter's discussion draft of January 20, 2005. We generally support this proposal.

American Insurance Association

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Washington, DC 20036
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Fax 202.293.1219
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February 2, 2005

VIA E-MAIL & FAX TO (202) 224-9102

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

Dear Senator Leahy:

We are pleased to respond to the questions you submitted following the Committee's January 11, 2005, hearing on "The Fairness in Asbestos Injury Resolution (FAIR) Act." Your questions and our responses are set forth below.

Question 1: "... last July, Senator Frist proposed to Senator Daschle that the Senate consider trust fund legislation that would have required $140 billion in total contributions with $20.6 billion coming from insurer participants within the first five years of the fund. My understanding is that the American Insurance Association (AIA) supported Senator Frist's proposal at the time. Does the AIA still support Senator Frist's proposal of July 14, 2004?"

Response: Senator Frist's proposal incorporated $46.025 billion (nominal) for insurers, to be paid pursuant to a specified schedule. AIA's affirmative response to the Frist financing provisions was predicated on the rest of the Trust Fund's provisions being acceptable. As I indicated in my testimony, the current drafts of the FAIR Act do not meet that requirement. Therefore, we can not answer this question in the abstract, and can only put the question to our membership within the context of a bill whose provisions, in their totality, meet our legislative objectives.

Question 2: "Please provide the committee with detailed information in writing on the settlement payment amounts that asbestos insurers have actually paid since July 14, 2004."

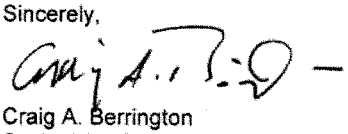
Response: We do not have detailed industry-wide or company-by-company numbers on settlement amounts. However, since 2003 the insurance industry has paid billions in

asbestos settlements of all types, including significant dollars paid in bankruptcy settlements. Although we do not have actual payment schedules, Western McArthur, for example, was approximately $2 billion and Halliburton has been publicly described as requiring insurers to pay approximately $1.5 billion.

Question 3: "... As you are aware, the committee-approved bill in the last Congress, S. 1125, required much higher contributions in the first three years of the fund's existence in light of the reserves that insurance companies have on-hand to pay out asbestos claims. What monetary concessions have the insurance industry made since this legislation was last before this committee."

Response: In comparing S. 1125 with the current situation, it is important to recall that S. 1125, as introduced, provided for a closed-end Trust Fund that had no reversion to the tort system. As you know, the current draft Trust Fund bills are constructed much differently; under them, the Trust Fund can be terminated, with a reversion to the tort system. If that reversion should occur, the principal monetary burden will fall on insurers – the result being that insurers will have had more than $46 billion in contribution obligations to the Trust Fund, and then face additional financial obligations through the reassertion of tort litigation. This problem is particularly exacerbated for insurers, because they are obligated to front-load their contributions to the Trust Fund, and then must be prepared for an early reversion to the tort system after their front-loaded payments are made.

Sincerely,



Craig A. Berrington
Senior Vice President
& General Counsel

BAACH ROBINSON & LEWIS PLLC

WASHINGTON | LONDON

January 28, 2005

VIA ELECTRONIC MAIL AND US MAIL

Barr Huefner
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Huefner:

Enclosed is my response to Senator Patrick J. Leahy's question from the Senate Judiciary Committee Hearing held January 11, 2005 on "The Fairness in Asbestos Injury Resolution Act".

Please feel free to contact me if you have any questions.

Sincerely,

Jeffrey D. Robinson

JDR/dmc
Enclosure
cc:

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Jeffrey Robinson's Response to Question Submitted by Senator Patrick J. Leahy
Senate Judiciary Committee Hearing on
"The Fairness in Asbestos Injury Resolution Act"
January 11, 2005

Question for Mr. Robinson (Equitas)

1. Mr. Robinson, my understanding of your testimony is that the bill that failed last year on the Senate floor and the current draft legislation singles out Equitas with discriminatory provisions, which apply to no other asbestos insurer, and which might leave a shortfall of $2-3 billion in the national trust fund. Would your client be agreeable to leaving the contribution decisions to the Asbestos Insurers Commission on an equal basis with all insurers and letting the Commission determine the fair contribution level for Equitas?

Answer:

Equitas strongly supports having its contribution to the trust fund determined on an equal basis with all other insurers by a fair and independent Asbestos Insurers Commission. From the beginning of this process, Equitas has supported a strong and independent Commission, treating all insurers equally, as the appropriate body to establish insurer contributions. In contrast, other insurers consistently have acted to weaken the Commission and dilute its independence and objectivity, while simultaneously taking every step in their power to ensure that the Commission will not calculate their contributions.

Ensuring that insurer shares are determined by a fair Commission applying consistent rules requires three steps. First, the language targeting Equitas for discriminatory treatment must be removed. Second, a strong provision needs to be adopted that would prevent the appointment of Commissioners with actual or perceived conflicts of interests. Finally, groups of insurers should not be authorized to evade Commission scrutiny by reaching private deals.

Questions submitted by Senator Patrick J. Leahy
Senate Judiciary Committee Hearing on
"The Fairness in Asbestos Injury Resolution Act"
January 11, 2005

Questions for Ms. Seminario (AFL-CIO)

1. Under the draft legislation, how would a claimant prove occupational exposure if it occurred 20 or 30 years ago? Do other occupational compensation programs have similar issues with long latency periods and stale evidence? What lessons can be learned from other programs to ensure that victims will be able to prove their claims decades after they were exposed?

2. The business community has expressed concerns about how medical screening, in some instances, has led to questionable claims in today's tort system. In your opinion, how is the screening provision in the recent draft legislation different and who should qualify for regular medical screening?

3. What are your views on the fairness of the monetary awards given to asbestos victims being subject to subrogation or liens by insurance companies?

4. Do you believe that the current award values in the draft legislation for victims exposed to asbestos who have lung cancer are fair?

5. In your many years of experience with projections of future asbestos claims, however well-intentioned these projections, have any of the projections proven accurate?

Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos

THIS OFFICIAL STATEMENT OF THE AMERICAN THORACIC SOCIETY WAS ADOPTED BY THE ATS BOARD OF DIRECTORS ON DECEMBER 12, 2003

CONTENTS

Asbestos is a general term for a heterogeneous group of hydrated magnesium silicate minerals that have in common a tendency to separate into fibers (1). These fibers, inhaled and displaced by various means to lung tissue, can cause a spectrum of diseases including cancer and disorders related to inflammation and fibrosis. Asbestos has been the largest single cause of occupational cancer in the United States and a significant cause of disease and disability from nonmalignant disease. To this demonstrable burden of asbestos-related disease is added the burden of public concern and fear regarding risk after minimal exposure.

This statement presents guidance for the diagnosis of nonmalignant asbestos-related disease. Nonmalignant asbestos-related disease refers to the following conditions: asbestosis, pleural thickening or asbestos-related pleural fibrosis (plaques or diffuse fibrosis), "benign" (nonmalignant) pleural effusion, and airflow obstruction. This document is intended to assist the clinician in making a diagnosis that will be the basis for individual management of the patient. It therefore provides overarching criteria for the diagnosis, specific guidelines for satisfying these criteria, and descriptions of the clinical implications of the diagnosis, including the basic management plan that should be triggered by the diagnosis. It is understood that disease may be present at a subclinical level and may not be sufficiently advanced to be apparent on histology, imaging, or functional studies.

One of the most important implications of the diagnosis of nonmalignant asbestos-related disease is that there is a close correlation between the presence of nonmalignant disease and the risk of malignancy, which may arise from exposure levels required to produce nonmalignant disease or mechanisms shared with premalignant processes that lead to cancer. The major malignancies associated with asbestos are cancer of the lung (with a complex relationship to cigarette smoking) and mesothelioma (pleural or peritoneal), with excess risk also reported for other sites. There is a strong statistical association between asbestos-related disease and malignancy, but the majority of patients with nonmalignant asbestos-related disease do not develop cancer. On the other hand, the risk of cancer may be elevated in a person exposed to asbestos without obvious signs of nonmalignant asbestos-related disease. However, a diagnosis of nonmalignant asbestos-related disease does imply a lifelong elevated risk for asbestos-related cancer.

DIAGNOSTIC CRITERIA AND GUIDELINES FOR DOCUMENTING THEM

People with past exposure to asbestos consult physicians for many relevant reasons: to be screened for asbestos-related disease, for evaluation of specific symptoms that may relate to past asbestos exposure (known or unsuspected), for treatment and advice, and for evaluation of impairment. In 1986, the American Thoracic Society convened a group of experts to review the literature and to present an authoritative consensus view of the current state of knowledge with respect to diagnosis of nonmalignant disease related to asbestos (2). In 2001, a new group was convened to review and to update the 1986 criteria. This statement constitutes that committee's report, completed in 2004.

The criteria formulated in this statement are intended for the diagnosis of nonmalignant asbestos-related disease in an individual in a clinical setting for the purpose of managing that person's current condition and future health. These general criteria are slightly modified from those presented in 1986 (Table 1) (2):

- Evidence of structural pathology consistent with asbestos-related disease as documented by imaging or histology
- Evidence of causation by asbestos as documented by the occupational and environmental history, markers of exposure (usually pleural plaques), recovery of asbestos bodies, or other means
- Exclusion of alternative plausible causes for the findings

The rest of this statement is largely devoted to presenting clinical guidelines required to document that each of these criteria is met. Demonstration of functional impairment is not required for the diagnosis of a nonmalignant asbestos-related disease, but where present should be documented as part of the complete evaluation. Evaluation of impairment has been exten-

Members of the Ad Hoc Statement Committee have disclosed any direct commercial associations (financial relationships or legal obligations) related to the preparation of this statement. This information is kept on file at the ATS headquarters.

Am J Respir Crit Care Med Vol 170. pp 691–715, 2004
DOI: 10.1164/rccm.200310-1436ST
Internet address: www.atsjournals.org

TABLE 1. CRITERIA FOR DIAGNOSIS OF NONMALIGNANT LUNG DISEASE RELATED TO ASBESTOS

1986 Guidelines	2004 Guidelines	Comparison and Notes
	Evidence of structural change, as demonstrated by one or more of the following:	Demonstrates the existence of a structural lesion consistent with the effects of asbestos. The criteria outlined in the 1986 guidelines were most explicit for asbestosis
Chest film (irregular opacities)	• Imaging methods	Chest film, HRCT, and possibly future methods based on imaging. The 1986 guidelines specified ILO classification 1/1
Pathology (College of American Pathologists)	• Histology (College of American Pathologists)	Criteria for identifying asbestosis on microscopic examination of tissue are unchanged
Consistent time interval	Evidence of plausible causation, as demonstrated by one or more of the following:	Evidence of plausible causation implies that the temporal relationship, including latency, is plausible
Occupational and environmental history	• Occupational and environmental history of exposure (with plausible latency)	
	• Markers of exposure (e.g., pleural plaques)	
Asbestos bodies or fibers in lung tissue	• Recovery of asbestos bodies	The 2004 guidelines are not limited to lung tissue, consider the role of BAL to be established, and deemphasize fibers because they are difficult to detect and a systematic analysis for asbestos fibers is not generally available
Rule out other causes of interstitial fibrosis or obstructive disease	Exclusion of alternative diagnoses	The 1986 guidelines primarily addressed asbestosis but mentioned smoking as a cause of obstructive disease. Implicit in the article, however, is that nonmalignant diseases presenting similarly to asbestos-related disease should also be ruled out
"Evidence of abnormal test"	Evidence of functional impairment, as demonstrated by one or more of the following:	Functional assessment is not required for diagnosis but is part of a complete evaluation. It contributes to diagnosis in defining the activity of disease and the resulting impairment
Crackles, bilateral, not cleared by cough	• Signs and symptoms (including crackles)	Signs and symptoms are not specific for diagnosis but are valuable in assessing impairment
Restrictive disease	• Change in ventilatory function (restrictive, obstructive patterns in context or disease history)	The 1986 criteria admitted the possibility of obstructive disease; the 2004 criteria address this specifically
Reduced diffusing capacity	• Impaired gas exchange (e.g., reduced diffusing capacity)	
	• Inflammation (e.g., by bronchoalveolar lavage)	The 1986 guidelines noted possible utility of bronchoalveolar lavage and gallium scanning but considered them to be experimental techniques. The 2004 guidelines exclude gallium scanning, suggest that additional indicators of active inflammation may become useful in future
	• Exercise testing	

Definition of abbreviations: BAL = bronchoalveolar lavage; HRCT = high-resolution computed tomography; ILO = International Labour Organization.
From References 64 and 65.

sively reviewed elsewhere and is not repeated here (3). Functional impairment may be demonstrated by evidence of symptoms or signs, ventilatory dysfunction, impaired gas exchange, and inflammation. Pulmonary function testing should be conducted in conformity with standards already published by the American Thoracic Society (4, 5), including multiple trials to confirm reproducibility and documentation of all trials attempted.

These guidelines are designed for clinical application, not for research, epidemiologic surveillance, screening, litigation, or adjudication. They balance the need to be as accurate as possible with protection of the patient's safety and the yield, cost, and accessibility of the diagnostic procedures available. These guidelines, if they err, err on the side of specificity rather than sensitivity. This is because nonmalignant asbestos-related disorders are difficult to detect in their earliest stages and because there is no early intervention that has been proven to alter the subsequent evolution of the disease. On the other hand, the documentation of causation by asbestos carries important implications for the patient and can be established with reasonable certainty, once the disease is identified.

Asbestos as a Hazard

The generic term "asbestos" is used to describe a group of minerals that, when crushed, break into fibers. As defined by the National Research Council (1), the term "asbestos" is a "commercial-industrial term rather than a mineralogical term. It refers to well-developed and hair-like long-fibered varieties of certain minerals that satisfy particular industrial needs." They are chemically heterogeneous hydrated silicates and each has chemical analogs with different structures that do not form fibers. Fibers have parallel sides with length three or more times greater than width. Asbestos fibers have great tensile strength, heat resistance, and acid resistance; varieties are also flexible. The six minerals that are traditionally defined as asbestos include chrysotile asbestos (the asbestiform variety of serpentine); the amphiboles, which include crocidolite (the asbestiform variety of riebeckite) and amosite (the asbestiform variety of cummingtonite-grunerite); and the asbestiform varieties of the amphiboles, which include anthophyllite (anthophyllite asbestos), actinolite (actinolite asbestos), and tremolite (tremolite asbestos) (6). Just as all forms of asbestos, by the definition and classification above, appear to cause malignancy, all may cause the nonmalignant diseases described. Issues of relative potency among the forms of asbestos, and particularly between chrysotile and the amphiboles, are primarily of concern with respect to the risk of malignancy and are not discussed in this document.

Commercial-grade asbestos is made up of fiber bundles. These bundles, in turn, are composed of extremely long and thin fibers, often with splayed ends, that can easily be separated from

one another. Commercial asbestos has high tensile strength, flexibility, resistance to chemical and thermal degradation, and high electrical resistance, and can often be woven. On the basis of these characteristics, asbestos was broadly used in the past in insulation, brake linings, flooring, cement, paint, textiles, and many other products; however, commercial use has declined substantially in more recent years.

Asbestos and asbestiform minerals may occur as a natural accessory mineral in other industrial mineral deposits or rocks. These asbestiform amphiboles and some other fibrous minerals may not completely fit the commercial definition of asbestos but may have similar effects, such as the tremolite-like asbestiform mineral found in association with vermiculite in Libby, Montana (7). Although the general criteria still apply, the specific diagnostic guidelines provided in this statement may or may not apply in such situations, depending on the mineral and exposure circumstances. Documentation of health effects in the scientific literature for these minerals is not as extensive as for chrysotile and the common amphiboles.

World production and use of asbestos climbed steadily since its commercial introduction in the late nineteenth century and fell rapidly after documentation of its hazards in the 1970s and 1980s. In Western industrialized countries, the widespread use of asbestos in industry and in the built environment in the first seven decades of the twentieth century has resulted in an epidemic of asbestos-related illness that now continues into the twenty-first century, despite decline in global production and use. Its use has now been banned in many Western countries. Asbestos is still mined in Russia and China, mainly for local use, and in Canada, where most of the product is exported to Asia and Africa.

Today, with stringent regulation of asbestos use and the disappearance of almost all asbestos-containing products from the market, nonmalignant asbestos-related disease is primarily a concern in four settings in the developed world: (*1*) the historical legacy of asbestos exposure affecting older workers; (*2*) the current risk experienced by the workforce engaged in certain occupations managing the remaining hazard, such as building and facility maintenance; (*3*) asbestos abatement operations, removing insulation and other asbestos-containing products; and (*4*) renovation and demolition of structures containing asbestos. In the developing world, workers and their families continue to be exposed. In some countries, including industrialized countries formerly belonging to the Eastern bloc and rapidly industrializing countries in Asia, the use of asbestos continues and may even be increasing.

Asbestos is still a hazard for an estimated 1.3 million workers in the construction industry in the United States and for workers involved in maintenance of buildings and equipment (8). Most asbestos in the United States today exists in building and machinery insulation and old products, such as appliances, that may be available for resale. New products that may contain asbestos today in the United States include friction surfaces (brake pads), roofing materials, vinyl tile, and imported cement pipe and sheeting. Significant asbestos content may be present as a contaminant in vermiculite insulation often found in homes (7).

Historically, occupations at greatest risk for nonmalignant asbestos-related disease have tended to be those engaged in the production and end use of products made from asbestos. These have included a wide assortment of items, including friction pads, brake linings, gas masks, cement water pipe, insulation, and textiles. Occupations engaged in the mining and extraction of asbestos have usually shown lower frequencies of nonmalignant asbestos-related disease. Passive exposure, including workers carrying home asbestos on their clothing, was historically associated with elevated cancer risk, particularly mesothelioma, and risk of nonmalignant asbestos-related disease. Workers in building and equipment maintenance may still encounter asbestos insulation even though asbestos is no longer widely used in commerce. Asbestos abatement activities, including removal and replacement of insulation, provide opportunities for exposure among contemporary workers (8).

Asbestos in Lung Tissue

Asbestos fibers carried to the deep lung induce an alveolitis that results in fibrosis. Inhaled asbestos fibers can also result in pleural inflammation. Asbestos fibers are transported to the pleural surface along lymphatic channels by macrophages and/or by direct penetration. The degree of fibrosis in asbestosis is dose dependent (9–12).

Asbestos fibers are deposited at airway bifurcations and in respiratory bronchioles and alveoli primarily by impaction and interception. Fibers migrate into the interstitium, in part via an uptake process involving Type I alveolar epithelial cells. This causes an alveolar macrophage–dominated alveolitis, as demonstrated in Figure 1 (12, 13). Thereafter, many of the fibers are cleared.

Activated macrophages are stimulated to engulf and remove asbestos fibers. This process is not uniformly successful, however, and many fibers are retained (9, 10). The long fibers cannot be completely engulfed by the macrophage, as demonstrated in Figure 2.

Chrysotile fibers also split longitudinally, creating additional fibrils. These are cleared more efficiently than amphibole asbestos fibers, which may be retained indefinitely (12). The fibers induce apoptosis, a form of controlled cell death, in the macrophage and stimulate inflammation. This effect is reduced once the fiber is coated to create an asbestos body, but the great majority of fibers in the lung remain uncoated. For these reasons, asbestos has a prolonged residence in the lung, penetrates the interstitium of the distal lung, and shows extensive mobility both in the lung and around the body (9).

Asbestos fibers, in particular, stimulate macrophages to produce a variety of mediators. Oxygen radicals contribute to tissue injury. Granulocytes are recruited to sites of disease activity and they in turn release mediators that contribute to tissue fibrosis by stimulating fibroblast proliferation and chemotaxis and ultimately promoting collagen synthesis (11–15).

The inflammatory processes induced by asbestos include alveolitis, inflammation in the surrounding interstitium, and inflammation followed by fibrotic change in the respiratory bronchioles that extends into adjacent alveolar tissue (11, 14, 16). Studies of the lung tissue of asbestos-exposed workers, including nonsmokers, have demonstrated a form of peribronchiolitis involving the walls of membranous and respiratory bronchioles, that shows characteristics of a more intense fibrotic response than the small airway lesions caused by nonspecific mineral dusts that the lesions otherwise resemble (17, 18).

Asbestos fibers and their derivatives, asbestos bodies, can be identified and quantified in lung tissue and bronchoalveolar lavage (BAL) specimens, as demonstrated in Figure 2 (19). Transbronchial lung biopsy is less reliable than BAL or open lung biopsy in recovering sufficient tissue to demonstrate elevated asbestos body or fiber counts when they do occur (20).

Asbestos fibers, unlike asbestos bodies, are rarely seen by light microscopy and must be analyzed by scanning/transmission electron microscopy (19, 21, 22). There is considerable variation among laboratories in procedures to quantify asbestos fibers in tissue (18, 23, 24), which has led to efforts to standardize procedures (19). Asbestos mineralogical types can be identified by energy-dispersive X-ray analysis, in which detection of magnesium and silicon is characteristic of most forms of asbestos and

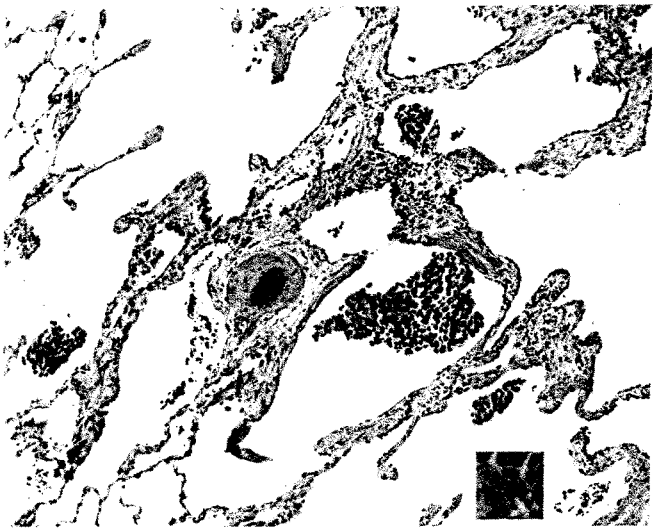


Figure 1. Low-power photomicrograph of hematoxylin and eosin (H&E)-stained sections from a patient with asbestosis, showing patchy asbestosis and a moderate number of macrophages within the alveoli. *Inset*: Close-up of macrophages in an iron-stained section showing an asbestos body.

the presence of a large iron peak signifies an amphibole (with the exception of tremolite) (25). Fiber analysis can be helpful in assessment of exposure and provides information about intensity, duration, and latency (e.g., uncoated fibers may reflect recent heavy exposure). However, because some fibers dissolve over time, the absence of a high fiber count does not necessarily mean that there has been no exposure, especially when chrysotile is the predominant exposure (22). Mineralogic analysis of asbestos fibers is largely a research technique and is not widely available (26).

Asbestos bodies. Asbestos bodies are asbestos fibers that have

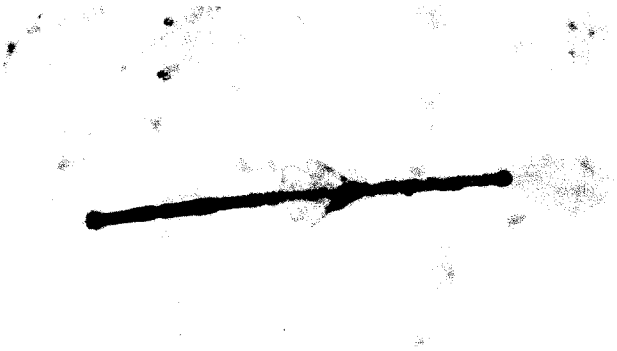


Figure 2. Asbestos body retrieved by bronchoalveolar lavage. Note its clear central core.

been coated with an iron-rich, proteinaceous concretion (Figures 1 and 2). Amphibole asbestos forms the majority of asbestos bodies and is more persistent in lung tissue than chrysotile (25). Asbestos bodies are larger than asbestos fibers and can be identified and quantified by light microscopy. An iron stain is helpful to identify fibrous bodies coated by iron (hence the general name "ferruginous bodies"). Ferruginous bodies generally form on fibers at least 10 μm in length, and more than 90% of all coated fibers have asbestos cores. Demonstration of an elevated body burden of asbestos confirms past exposure (19). Levels of at least one or two asbestos bodies per field of a tissue section on a slide under light microscopy are consistent with occupational exposure (19, 22, 24).

Transbronchial biopsy. Transbronchial lung biopsies are usually too small to analyze for asbestos bodies. Bronchoalveolar lavage recovers more material and therefore provides a better indicator of tissue burden. Some experienced clinicians have found that identification of six or more bodies in bleach-digested samples from at least two biopsies is characteristic of patients with occupational exposure (26). However, the absence of observable asbestos bodies is not reliable in excluding significant exposure in transbronchial biopsy tissue (20).

These indicators of fiber burden are sufficient but not necessary to identify occupational exposure and to diagnose asbestos-related disease. Beyond clinical research, the method has applications in litigation and exposure assessment for epidemiology.

Bronchoalveolar lavage. Asbestos bodies and fibers can be identified and quantified in BAL specimens, as in Figure 2 (22). There is considerable variation among laboratories in these tests (18, 19, 22, 23). The count of asbestos bodies in BAL fluid appears to correlate with the presence or degree of fibrosis in some studies but not others (24, 27, 28).

BAL in patients with asbestosis has demonstrated an alveolar macrophage alveolitis associated with a modest increase in neutrophils (12, 13). This neutrophilia correlates with the finding of crackles (rales) on physical examination and disturbances in oxygenation (12, 27) and is apt to be more pronounced in patients with advanced disease (13). Clinically apparent asbestosis occurs only after a significant latent period. However, studies using BAL, computed tomography (CT) scanning, and gallium-67 scanning have demonstrated that inflammatory events occur well before the onset of clinical disease. Thus, it is likely that the initial exposure induces inflammation and injury that persist through the latent or subclinical phase and later develop into the clinical disease, which is typically diagnosed by chest imaging (13).

CLINICAL EVALUATION AND INDICATORS

The clinical evaluation of nonmalignant asbestos-related disease should consider subjective symptoms as well as objective findings on physical examination, pulmonary function tests, and chest radiographic studies. In the large majority of patients, the diagnosis of nonmalignant asbestos-related lung disease is based on the clinical findings discussed below, in the context of an appropriate history of exposure to asbestos and a documented latency period sufficient to place an individual at risk.

Symptoms

The insidious onset of dyspnea is the most common respiratory symptom associated with asbestosis, typically beginning with dyspnea on exertion. A nonproductive cough is commonly present. The presence of wheeze or dyspnea (27), as reported on the ATS-DLD-78A respiratory questionnaire (5), is strongly associated with diminished ventilatory capacity in cross-sectional studies of asbestos-exposed workers, with an 11 to 17% reduction in ventilatory capacity (27, 29). A 2–8% reduction in ventilatory capacity has been observed for cough, phlegm, and symptoms of chronic bronchitis among asbestos-exposed workers (29). Development or progression of respiratory symptoms has been associated with accelerated loss of ventilatory capacity in a longitudinal investigation of asbestos-exposed workers, with an excess 28-ml/year decline in FEV_1 associated with development of dyspnea, and 67-ml/year excess decline in FVC associated with newly developed wheezing, relative to asymptomatic individuals (30).

In a study of 64 patients, diffuse pleural thickening or fibrothorax was associated with dyspnea on exertion, usually mild, in 95%, chest pain in more than half, and restrictive defect in one-third. The chest pain was intermittent in most but constant in 9% (31). Rapidly progressive or severe chest pain should raise clinical suspicion of either malignancy or a nonmalignant pleuritis.

Subjective symptoms are not easily interpreted in the absence of objective findings but provide important ancillary information. The persistence or new onset of respiratory symptoms is correlated with accelerated loss of lung function in asbestos-exposed workers and therefore may predict future risk (30).

Occupational and Environmental History

It is essential to take a comprehensive occupational and environmental history when asbestos-related disease is suspected (32). The occupational history should emphasize occupational and environmental opportunities for exposure that occurred about 15 years and more before presentation.

The diagnosis of asbestosis is ideally based on an accurate exposure history, obtained whenever possible directly from the patient, that defines the duration, intensity, time of onset, and setting of exposure experienced by the patient. Patients may forget short periods of employment, during which intense exposure is possible, or employment early in their lives. In such cases the characteristic radiographic signs of asbestos exposure may be enough to document exposure.

The occupational title is not enough, as the names of many occupations and trades are uninformative, such as "millwright" or "fireman" (a misleading title that sometimes refers to furnace workers and stokers) or "mixer." Representative occupational exposures include, but are not limited to, manufacture of asbestos products, asbestos mining and milling, construction trades (including insulators, sheet metal workers, electricians, plumbers, pipefitters, and carpenters), power plant workers, boilermakers, and shipyard workers.

Asbestosis is commonly associated with prolonged exposure, usually over 10 to 20 years. However, short, intense exposures to asbestos, lasting from several months to 1 year or more, can be sufficient to cause asbestosis. For example, shipyard workers who applied or removed insulation in confined spaces have developed asbestosis after brief periods of heavy exposure. Insulation workers have had similarly intense exposures during their apprenticeship when they unloaded asbestos-containing sacks into troughs for mixing asbestos cement. Such occupational exposures are now rare but were common in the United States from the years after World War II until the 1970s. Adequate industrial hygiene controls were absent or not widely applied. Protective regulations were inadequate and only partially enforced during much of that period.

Workers whose own jobs may not require handling asbestos may still be "bystanders" who worked in close proximity to other users, especially in the construction trades, where workers have experienced exposure from insulation being installed around them. Among sheet metal workers, for example, the prevalence of asbestos-related changes on chest film was 31% (19% pleural only, 7% parenchymal only, and 6% both). Among those who had been in the trade for 40 or more years, 41.5% had radio-

graphic findings (33). These findings established that sheet metal workers, although not working directly with asbestos, had substantial exposure in the work environment.

Measures taken to protect workers, or lapses in these measures, may be important in documenting exposure. Although exposure levels are generally low in developed countries today, lapses occur and were more frequent in the past. Some patients who have immigrated may have worked in countries where occupational health regulations have been poorly enforced or where environmental exposure has occurred.

Environmental sources of exposure, for example, tailings of asbestos mines or prolonged exposure in buildings with exposed sources of asbestos contamination, may be important in some cases. Passive exposure, for example, of children in the home when asbestos is brought into the house on the clothes of a worker, may cause disease (34). Undisturbed and nonfriable asbestos insulation in buildings, including schools, does not present a hazard.

The prevalence of asbestosis among asbestos workers increases with the length of employment, as illustrated in an early report in which investigators analyzed chest films of 1,117 New York and New Jersey asbestos insulation workers. They found asbestosis in 10% of workers who had been employed for 10 to 19 years, 73% among those employed for 20 to 29 years, and in 92% of those employed for 40 or more years (35). A similar exposure–response relationship was found among asbestos cement workers (36).

Differences in solubility among the various types of asbestos may affect fiber retention, body burden, and the risk of nonmalignant disease. The clinician is rarely in a position to evaluate this aspect of exposure and there is no validated means to adjust the occupational history to take this factor into account. Solubility is primarily of concern with respect to projecting future risk, particularly of malignant disease, given a history of exposure. It is irrelevant to diagnosis when disease is already present and other indicators of exposure are demonstrable.

Physical Examination

Physical findings in asbestosis include basilar rales, often characterized by end-inspiratory crackles (rales) (36, 37); in some cases of advanced asbestosis, finger clubbing may be present. Physical findings of crackles, clubbing, or cyanosis are associated with increased risk for asbestos-related mortality (36). Although these physical signs are useful when present, their overall clinical utility is limited by low sensitivity. For example, in one study as many as 80% of individuals with radiographic asbestosis demonstrated crackles, a frequency that appears to be unusually high in the experience of other clinicians (27).

Conventional Imaging

The chest radiograph remains an extremely useful tool for the radiographic diagnosis of asbestosis and asbestos-related pleural disease, and is widely available internationally. The plain film has long been the basis for assessing asbestos-related disease of the lung and pleura. A standardized system for taking and classifying films for presence and profusion of opacities consistent with pneumoconiosis and for pleural changes was developed in the 1950s and is now known as the *International Classification of Radiographs of Pneumoconiosis* (or "ILO classification" after its sponsor, the International Labour Organization). The ILO classification has been revised (38). This system, which is the basis of the "B-reader" qualification for designating persons as competent in classifying pneumoconiosis films, was developed for grading the radiographic severity of pneumoconiosis in epidemiologic studies but has been applied to clinical settings to maintain consistency in classifying chest films. The ILO classification requires conventional film-based posteroanterior (PA) chest films taken at prescribed specifications and classified with due regard for quality. Conventions for classifying digitized films and other advanced imaging systems have lagged behind the development of technology.

The initial radiographic presentation of asbestosis is typically that of bilateral small primarily irregular parenchymal opacities in the lower lobes bilaterally. Over time, the distribution and density or "profusion" of opacities may spread through the middle and upper lung zones. Although irregular opacities are most common from asbestos exposure, mixed irregular and rounded opacities are often present. The ILO classification profusion score correlates strongly with mortality risk (36), reduced diffusing capacity, and diminished ventilatory capacity (37, 39). A critical distinction is made between films that are suggestive but not presumptively diagnostic (0/1) and those that are presumptively diagnostic but not unequivocal (1/0). This dividing point is generally taken to separate films that are considered to be "positive" for asbestosis from those that are considered to be "negative." However, profusion itself is continuous (36, 38).

Plain chest radiographs are limited with respect to sensitivity and specificity in cases of mild or early asbestosis. Among individuals with asbestosis confirmed by histopathologic findings, 15–20% had no radiographic evidence of parenchymal fibrosis in one study (40), similar to the proportion of other interstitial lung diseases that present with normal chest films (41).

Pleural plaques are frequently documented on plain chest radiographs, but CT is more sensitive for their detection. Only 50 to 80% of cases of documented pleural thickening demonstrated by autopsy, conventional CT, or high-resolution CT (HRCT) are detected by chest radiograph (42, 43). Plain chest radiographs are also limited by specificity in cases of mild pleural disease, which may be difficult to distinguish from extrapleural fat pads (39, 44). Oblique views can enhance both sensitivity and specificity of plain chest radiographs in clinical settings where HRCT is unavailable, but may also fail to distinguish plaques from fat pads (45). CT and HRCT are discussed in the next section.

Computed Tomography

A chest film clearly showing the characteristic signs of asbestosis in the presence of a compatible history of exposure is adequate for the diagnosis of the disease: further imaging procedures are not required. Conventional CT is superior to chest films in identifying parenchymal lesions, rounded atelectasis, and pleural plaques (46). However, conventional CT has been displaced by HRCT for the evaluation of asbestos-exposed subjects because the latter is more sensitive for detecting parenchymal fibrosis.

In subjects with low profusion categories of asbestosis, CT signs tend to be clustered as follows (47):

- Honeycombing and thickening of septa and interlobular fissures, suggesting interstitial fibrosis
- Diffuse pleural thickening, parenchymal bands, and rounded atelectasis, suggesting diffuse fibrosis involving the visceral pleura
- Pleural plaques

HRCT has an important role when experienced readers disagree about the presence or absence of abnormalities on a high-quality chest film, when chest radiographic findings are equivocal, when diminished pulmonary function is identified in association with otherwise normal plain chest radiographic findings, and when extensive overlying pleural abnormalities do not allow a clear interpretation of parenchymal markings. Because HRCT is more sensitive than other techniques for detecting parenchymal changes, it may reveal abnormalities with uncertain prognostic

significance. HRCT is more specific than plain chest radiographs, excluding conditions such as emphysema, vessel prominence, overlying pleural disease, and bronchiectasis, which may confound radiographic interpretation.

HRCT is much more sensitive in the detection of asbestosis than plain chest radiographs (46, 48), although even a normal HRCT cannot completely exclude asbestosis (49). Among asbestos-exposed individuals with unremarkable chest radiographic findings (ILO score 0/0 or 0/1), 34% were identified by HRCT as having findings suggestive of asbestosis. HRCT findings also correlated with decrements in pulmonary function tests in these cases, with a significantly diminished vital capacity and diffusing capacity (50).

HRCT can detect early pleural thickening (i.e., 1–2 mm in thickness) much more sensitively than plain chest radiographs. Pleural thickening is frequently discontinuous and interspersed with normal regions. It is usually bilateral but may be unilateral in a third of cases (48). HRCT also offers an advantage over plain chest radiographs in specificity, being able to distinguish pleural disease from extrapleural fat (51).

HRCT should be obtained at 2-cm intervals, to allow a more accurate assessment of pleural abnormalities, as well as other abnormal findings such as pulmonary masses (52). Prone views should always be obtained, as it is essential to distinguish between dependent atelectasis and parenchymal fibrosis in the posterior lung fields. HRCT findings in asbestosis are typically bilateral, and include evidence of fibrosis (e.g., intralobular interstitial thickening and interlobular septal thickening), subpleural "dotlike" opacities, subpleural lines, parenchymal bands, occasionally ground-glass opacity, and honeycombing in advanced disease (47, 52, 53). A proposal has been put forward for a classification system analogous to that of the ILO system for plain chest radiographs (54), but none has been widely adopted.

The extent of plaque formation does not correlate with cumulative asbestos exposure and thus cannot be used to estimate exposure (55).

Bronchoalveolar Lavage

Sputum analyses for asbestos bodies miss almost half of occupationally exposed individuals in whom asbestos bodies are found on BAL (56). Thus, on the rare occasions in which the diagnosis of asbestosis hinges on demonstration of asbestos bodies and fibers to document exposure, BAL should be performed if sputum analysis is negative (19). Subjects with long-term exposure have higher concentrations of fibers than those with more recent exposure, probably because of higher workplace exposures in the past (19).

Asbestos bodies (ABs) in BAL fluid correlate with occupational exposure and asbestosis (10, 19, 56, 57) and with asbestos bodies in the lung (57). Patients with asbestosis consistently have 2 to 5 orders of magnitude more ABs per milliliter than do pleural plaque subjects. Recovery of more than 1 AB/ml indicates a high probability of substantial occupational exposure to asbestos (19, 58). In one large series, patients with asbestosis had a log mean of 120 AB/ml, those with pleural plaques had 5 AB/ml, those exposed to asbestos who had a normal chest X-ray had 4 AB/ml, and those with malignant mesothelioma or lung cancer had 8 AB/ml. Of those with more than 100 AB/ml, 60% had asbestosis; others had pleural plaques, mesothelioma, or lung cancer, and only 6% were exposed but had no evidence of pathology (59).

BAL cells can also be digested with bleach and the residue analyzed by electron microscopy, with fibers expressed per 10^6 alveolar macrophages (58). In U.S. asbestos insulation workers, electron microscopy identified 1 chrysotile fiber in every 35 alveolar macrophages and 1 amosite fiber per 215 macrophages, with no crocidolite detected. BAL performed on asbestos-exposed subjects has recovered 28×10^3 fibers compared with 1×10^3 in unexposed subjects (60). For every 100 fibers, there is typically 1 asbestos body (61). Clinically, the appearance of fibers or beaded fibers on a single centrifuged BAL sample mounted on a Diff-Quik slide represents an indicator of parenchymal asbestosis (28).

Amphibole fiber recovery on BAL correlates well with amphibole fiber burden in the lung, but the relationship does not hold for chrysotile because of translocation, clearance, and dissolution (57, 61–63).

Pulmonary Function Tests

Evaluation of subjects with suspected asbestos-related disease should include spirometry (with a hard copy of the flow–volume loop for the permanent medical record), all lung volumes, and the carbon monoxide diffusing capacity. Care should be taken to discriminate among effects due to asbestosis, chronic obstructive pulmonary disease, and restrictive changes due to obesity.

As with other interstitial lung diseases, the classic finding in asbestosis is a restrictive impairment. Mixed restrictive and obstructive impairment is frequently seen; isolated obstructive impairment is unusual. Restrictive impairment may also be observed with pleural disease (*see* section on pleural abnormalities below).

In addition to diminished lung volumes, the carbon monoxide diffusing capacity is commonly reduced due to diminished alveolar–capillary gas diffusion, as well as ventilation–perfusion mismatching. Although a low diffusing capacity for carbon monoxide is often reported as the most sensitive indicator of early asbestosis, it is also a relatively nonspecific finding.

Exercise testing is generally not required for diagnostic purposes, but may be useful in assessing aerobic work capacity in selected cases, or when the degree of dyspnea correlates poorly with objective pulmonary function measurements.

NONMALIGNANT DISEASE OUTCOMES

Asbestosis

Asbestosis is the interstitial pneumonitis and fibrosis caused by inhalation of asbestos fibers. After asbestos exposure, asbestosis becomes evident only after an appreciable latent period. The duration and intensity of exposure influence the prevalence of radiographically evident parenchymal pulmonary fibrosis. In work sites around the world that meet recommended control levels, high exposure to asbestos is now uncommon and clinical asbestosis is becoming a less severe disease that manifests itself after a longer latent interval.

Asbestosis specifically refers to interstitial fibrosis caused by the deposition of asbestos fibers in the lung (Figure 3). It does not refer to visceral pleural fibrosis, the subpleural extensions of fibrosis into the interlobular septae or lesions of the membranous bronchioles.

The College of American Pathologists has developed histologic criteria for asbestosis and a grading system to describe the severity and extent. The mildest (Grade I) form of asbestosis involves the alveolated walls of respiratory bronchioles and the alveolar ducts (Figures 4 and 5). More severe histologic grades involve greater proportions of the acinus (Grade II) until the whole acinar structure is involved (Grade III asbestosis) and some alveoli are completely obliterated (Figure 5). Alveolar collapse, with fibrosis and honeycomb remodeling resulting in new dilated spaces in the parenchyma, results in the most severe grade of asbestosis (Grade IV) (64, 65) (Figure 6). These patterns of acinar fibrosis together with the demonstration of asbestos bodies in standard histologic sections are diagnostic of asbestosis.

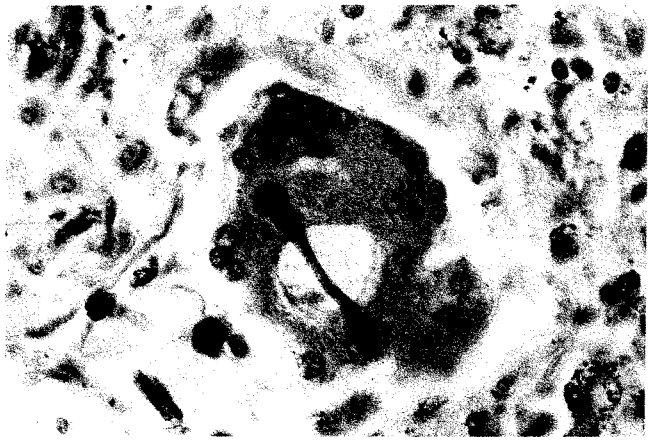


Figure 3. H&E-stained section demonstrating asbestos bodies within alveolus of person with asbestosis. At *center* is a single large asbestos body within a multinucleated giant cell.

Figure 4. H&E-stained section showing junction of terminal (membranous) bronchiole with a respiratory bronchiole from a person with asbestosis who was an ex-smoker. The walls of the bronchioles are thickened by collagen and show mild smooth muscle hyperplasia. There is a mild chronic inflammatory cell infiltrate in the wall. These features are consistent with asbestos-related small airway disease.

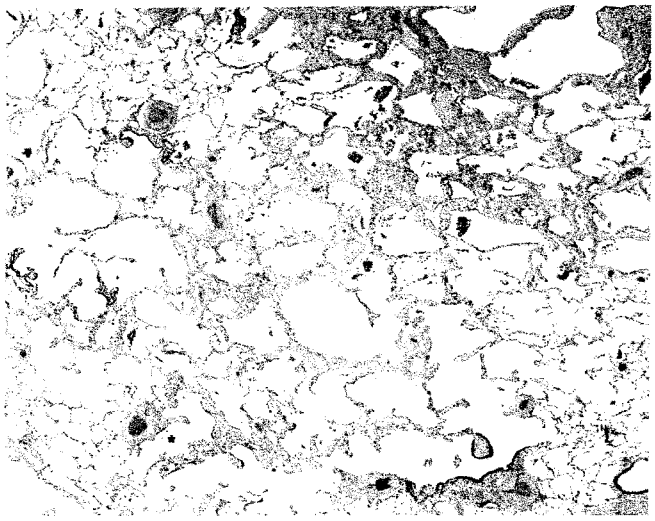


Figure 5. Photomicrograph showing predominantly Grade III asbestosis, partially defined by diffuse interstitial fibrosis extending from acinus to acinus. The respiratory bronchiole at *bottom left* (*) could be classified as a Grade I lesion (*see* Table 2).

Figure 6. H&E-stained section of lung showing Grade IV asbestosis with honeycombing. The overlying pleura (*bottom right*) is also thickened.

TABLE 2. HISTOLOGIC GRADES OF ASBESTOSIS

Grade	Change
Grade of severity	
0	No fibrosis associated with bronchioles
1 or I	Early fibrosis involving walls of at least one respiratory bronchiole, with or without extension into septa of adjacent alveoli; fibrosis confined to alveolated walls of respiratory bronchioles and ducts and not present in more distant alveoli. Alveolitis and inflammation similar to that caused by cigarette smoking
2 or II	More severe fibrosis involving acinus: alveolar ducts and/or two or more layers of adjacent alveoli. Normal lung remains in a zone between adjacent bronchioles
3 or III	Fibrosis advanced and coalescent, involves entire acinus; all lung between at least two adjacent bronchioles is affected. Some alveoli are completely obliterated
4 or IV	Honeycomb remodeling and large (up to 1 cm) dilated spaces grossly visible in parenchyma
Grade of extent	
A or 1	Only occasional bronchioles are involved. Most appear normal
B or 2	"More than occasional" but less than half of bronchioles are involved
C or 3	More than half of bronchioles are involved

Developed in 1980 by a committee of the College of American Pathologists.

Iron stains may facilitate recognition of the asbestos bodies; however, the presence of asbestos bodies alone is not sufficient to establish the diagnosis of asbestosis. Asbestosis is associated with a variable degree (usually mild) of chronic inflammation and increased numbers of alveolar macrophages, including multinucleate giant cells. The grades of asbestosis correlate with counts and frequencies of asbestos fibers and bodies in the lung and estimates of cumulative workplace exposure (12, 66) (Table 2).

Only the more severe grades of asbestosis are detectable by gross examination. In its classic form, there is diffuse, bilateral, pale, firm fibrosis most severe in the peripheral zones of the lower lobes. Honeycomb cysts and areas of confluent fibrosis may be present (Figure 7). Milder forms of asbestosis and asbestos-associated small airway disease may not be apparent to gross inspection or to palpation, hence the importance of adequate sampling for histology. This should include peripheral and central areas of all lung lobes (depending on the specimen) as well as portions of visibly diseased lung. Adequate sampling of lung adjacent to resected tumors is particularly important and frequently overlooked or inadequately sampled by pathologists. It is strongly recommended that, when biopsy is performed, thoracic surgeons specifically request additional sampling of lung parenchyma in resected lung specimens from patients with known or suspected asbestos exposure (64, 65).

Asbestosis is more prevalent and more advanced for a given duration of exposure in cigarette smokers, presumably because of reduced clearance of asbestos fibers in the lung (67). Some studies suggest that smokers without dust exposure may show occasional irregular radiographic opacities on chest film, but if so the profusion is rarely as high as 1/0; smoking alone therefore does not result in a chest film with the characteristics of asbestosis (68). Both smokers and ex-smokers have a higher frequency of asbestos-related irregular opacities on their chest radiographs than do nonsmoking asbestos-exposed workers in all profusion categories (68–70). Smoking does not affect the presentation of asbestos-related pleural fibrosis.

Clinical diagnosis. Asbestosis is asbestos-induced pulmonary parenchymal fibrosis, with or without pleural thickening. To diagnose this disorder, one must establish the presence of pulmonary fibrosis and determine whether an exposure has occurred that is of sufficient duration, latency, and intensity to be causal.

Asbestosis becomes evident only after an appreciable latency period, often two decades under current conditions in the United States. In one study of former workers from an amosite asbestos insulation factory that had high levels of asbestos dust, employment for as little as 1 month resulted in a prevalence of 20% of parenchymal opacities 20 years after exposure ceased (70). The duration and intensity of exposure probably influence the length of the latency period: relatively short-term, high-intensity exposures may be associated with a shorter latency than prolonged, lower intensity exposures.

Asbestosis is usually associated with dyspnea, bibasilar rales, and changes in pulmonary function: a restrictive pattern, mixed restrictive–obstructive pattern, and/or decreased diffusing capacity. The abnormal PA chest film and its interpretation remain the most important factors in establishing the presence of pulmonary fibrosis (Figure 8). Compensation systems may require that the chest radiographs be classified by the ILO system once it is established that the patient has been exposed to asbestos. A profusion of irregular opacities at the level of 1/0 is used as the boundary between normal and abnormal in the evaluation of the film, although the measure of profusion is continuous and there is no clear demarcation between 0/1 and 1/0 (Figure 9). When radiographic or lung function abnormalities are indeterminate, HRCT scanning is often useful in revealing characteristic parenchymal abnormalities as well as correlative pleural changes that are highly suggestive of asbestos exposure, particularly when they are bilateral. The specificity of the diagnosis of asbestosis increases with the number of consistent findings on chest film, the number of clinical features present (e.g., symptoms, signs, and pulmonary function changes), and the significance and strength of the history of exposure.

Although asbestosis is characteristically most advanced and appears earliest in the lower lung fields, there is a rare but well-characterized syndrome of massive bilateral upper lobe fibrosis, in the absence of tuberculosis or lung cancer (71–73).

The characteristic change in pulmonary function observed in asbestosis is a restrictive impairment, characterized by reduction in lung volumes (especially the FVC and total lung capacity), decreased diffusing capacity, and arterial hypoxemia (74, 75). Large airway function, as reflected by the FEV_1/FVC ratio, is generally well preserved. In one of the earliest studies conducted, about 50% of asbestos workers presented with FVC below 80% predicted. The frequency of abnormal vital capacity increased, and the mean vital capacity decreased by 18% over the subsequent 10 years (33, 75). The frequency and magnitude of the restrictive defect increased with ILO category (i.e., increased profusion of irregular opacities) and the presence of pleural changes.

Notwithstanding the predominantly parenchymal and restrictive pattern of the disease, airway obstruction can also be observed and can be seen alone in nonsmokers who have asbestosis. These patients usually have a restrictive pattern of lung function, but clinically they also feature an obstructive component charac-

Figure 7. Whole lung section of freeze-dried lung from a person who died of asbestosis. Note the peripheral honeycombing, which is most severe in the lower zones.

terized physiologically by increased isoflow volume, and increased upstream resistance at low lung volumes (14, 16). These obstructive findings may be due to asbestos-induced small airway disease. Thus, mixed restrictive and obstructive abnormalities do not rule out asbestosis or necessarily imply that asbestos has not caused an obstructive functional impairment (76).

Asbestosis may remain static or progress; regression is rare (77). The factors that determine prognosis and evolution of the disease are poorly understood. Progression, after cessation of exposure or reduction to current permissible exposure levels, is considerably more common in persons who already have radiographic abnormalities and appears to be associated with level and duration of exposure and therefore cumulative exposure (78).

Differential diagnosis. Although not usually necessary for the

Figure 8. Advanced asbestosis (details of case not available). Note characteristic features: fibrotic bands superimposed on a background of widespread irregular opacities, shaggy heart border and septal thickening, extensive pleural changes, and blunted costophrenic angles.

diagnosis of asbestosis when a significant exposure history is obtained, lung biopsy may be warranted to exclude other, potentially treatable diseases. Biopsy material may be helpful in identifying the nature of a disease in an indeterminate case or one lacking an adequate exposure history.

The presence of asbestos bodies in tissue sections should be

Figure 9. Early asbestosis, showing irregular opacities in lower lung fields that may be categorized as 0/1 or approaching 1/0 according to the ILO classification. Note pleural changes.

sufficient to differentiate asbestosis from other forms of interstitial fibrosis. The chance of finding one asbestos body from background exposure alone has been shown to be about 1 per 1,000 (79). Conversely, the presence of interstitial fibrosis in the absence of asbestos bodies is most likely not asbestosis, although rare cases of pulmonary fibrosis with large numbers of uncoated asbestos fibers have been described (80–82). Idiopathic pulmonary fibrosis (IPF in clinical terms or usual interstitial pneumonitis in terms of pathology) has an acinar pattern of fibrosis different from that of asbestosis and is not associated with asbestos bodies in tissue sections. On occasion, asbestosis is seen in conjunction with an unrelated interstitial lung disease (such as sarcoidosis) or in association with another pneumoconiosis, for example, silicosis. In the absence of fibrosis, asbestos bodies are an indication of exposure, not disease.

Asbestosis resembles a variety of other diffuse interstitial inflammatory and fibrotic processes in the lung and must be distinguished from other pneumoconioses, IPF, hypersensitivity pneumonitis, sarcoidosis, and other diseases of this class. The clinical features of asbestosis, although characteristic, are not individually unique or pathognomonic, but the characteristic signs of the disease are highly suggestive when they occur together. The presence of pleural plaques provides useful corollary evidence that the parenchymal process is asbestos related.

Diagnostic uncertainty is most likely in certain groups of patients. Patients may have a heavy cigarette-smoking history and concurrent emphysema (which also reduces the diffusing capacity). In such cases, one expects a history of asbestos exposure commensurate with the degree of disease. On occasion, a patient with another interstitial lung disease, such as IPF, will have a history of asbestos exposure. Rapid progression, with a visible, year-to-year increase in symptoms, progression of radiographic findings, and loss of pulmonary function in the absence of intense asbestos exposure, suggests the diagnosis of IPF rather than asbestosis.

Patients may be exposed at various times in their working life to more than one dust, such as silica and asbestos, or to mixed exposures, such as dusts in combination with fumes and vapors in welding (83). These patients may have combined disease or the effects of one dust or other exposure may dominate. For example, predominantly upper lobe rounded opacities, hilar node enlargement, and progressive massive fibrosis are not features of asbestosis and if present suggest other causes for the lung disease than asbestos, such as silicosis.

On occasion, isolated fibrotic lesions associated with asbestos resemble solitary pulmonary nodules. These are sometimes called "asbestomas" and usually occur against a background of irregular opacities; they rarely appear in isolation. They normally require biopsy because they are not distinguishable from lung malignancies otherwise (84).

Nonmalignant Pleural Abnormalities Associated with Asbestos

Pleural abnormalities associated with asbestos exposure are the result of collagen deposition resulting in subpleural thickening, which may subsequently calcify, and which in the visceral pleura may be associated with parenchymal fibrosis in adjacent subpleural alveoli (Figures 10 and 11). Pleural thickening, as a marker of asbestos exposure, has continued to be a prominent feature of exposure to asbestos while other outcomes, such as asbestosis, have become less frequent due to declining exposure levels. The major determinant of pleural thickening is duration from first exposure (70).

It is unclear whether the relative frequency of diffuse and circumscribed pleural thickening has changed. The *International Classification of Radiographs of Pneumoconioses* (38) provides a basis for recording and classifying both types of pleural thickening, allowing correlation with indices of exposure and measurements of lung function. Manifestations of disease of the lung and of the pleura have become less evident and less characteristic on plain films as exposures have decreased. However, CT scan (including high-resolution images) detects pleural thickening not evident on the plain film, and sometimes fails to confirm apparent pleural thickening read on the plain film. Schemes to quantify extent of pleural thickening on CT scan have been published (55, 85). Rarely, interlobar pleural thickening may mimic lung nodules on CT scan (86).

Pleuritis: acute pleural effusion, chronic pleuritic pain. Asbestos may cause an acute pleural effusion, often lasting several months, that is exudative and often hemorrhagic, with variable numbers of erythrocytes, neutrophils, lymphocytes, mesothelial cells, and often eosinophils (87–89). It may occur early (within 10 years, unlike other asbestos-related diseases) or late after the onset of asbestos exposure (90). It may be superimposed on long-standing pleural plaques (91). Although it is usually asymptomatic, the acute pleural effusion due to asbestos may also be exuberant, with fever and severe pleuritic pain. It is sometimes detected only incidentally on a radiograph taken for another purpose (87, 88). The effusion may persist for months, present bilaterally, or recur on the same or the opposite side (87). A friction rub may be present (92, 93). The traces of pleural effusion may be observed years later as a blunted costophrenic angle or as diffuse pleural thickening. Acute pleuritis is thought to underlie many cases of diffuse pleural thickening. Of 20 insulators with a past history of definite pleural effusion, diffuse pleural thickening was detected on radiograph in 16 (90). Dose–response relationships or characteristic features of exposure associated with effusion have not been described.

Chronic severe pleuritic pain is rare in patients with asbestos-related pleural disease (92, 93). Vague discomfort appears to be more frequent. Studies examining the frequency of atypical chest pain in asbestos-exposed patients have not been performed. In the few cases described, it was present for many years, disabling, and often bilateral. Radiographic evidence of pleural disease ranged from plaques to extensive diffuse and circumscribed pleural thickening; several cases followed pleural effusions. The diagnosis of acute asbestos-related pleural effusion is by exclusion of other causes of acute pleuritis, and most often is not arrived at until the pleural space is fully explored and biopsied, generally by thoracoscopy. Differentiation from Dressler's syndrome is difficult in asbestos-exposed patients who have undergone recent cardiac surgery. Differentiation from mesothelioma or pleural extension of a pulmonary malignancy is critical, and may be difficult on clinical grounds (including positive gallium and positron emission scan). Pleural fluid cytology is useful for distinguishing benign from malignant effusions. It is not unusual for nonspecific effusions to precede mesothelioma by several years. If a malignancy has not manifested itself within 3 years, the effusion is generally considered benign.

The diagnosis of chronic pleuritis manifested by pleuritic pain is reached by excluding malignancies, because most other causes of acute pleuritis do not result in chronic pain. Malignancy is unlikely when pain persists for years with little or no clinical or radiographic change.

Plaques: circumscribed pleural thickening. Pleural plaques are indicators of exposure to asbestos. They are clearly the most common manifestation of the inhalation, retention, and biologic effect of asbestos. Their prevalence is most directly related to duration from first exposure; they are rare within less than 20 years. Pleural plaques consistent with asbestos exposure appear in chest films of 2.3% of U.S. males, a percentage that has been

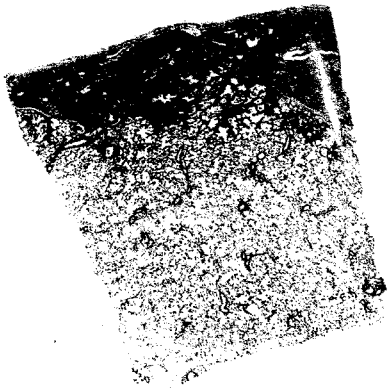


Figure 10. Photomicrograph of H&E-stained section of lung from a person with mild asbestosis. There is marked fibrosis of the pleura with some subpleural fibrosis. Higher power magnification of the same section showed that minimal disease was also present around the small respiratory bronchioles.

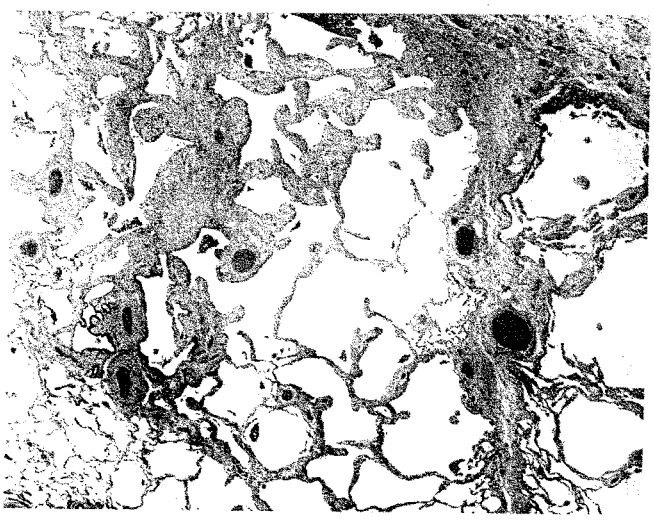


Figure 11. Photomicrograph of H&E-stained section of a person with Grade III asbestosis showing fibrosis in the lung parenchyma and overlying visceral pleura, with extension of the fibrosis into the interlobular septa.

Figure 12. Gross appearance at autopsy of asbestos-associated pleural plaques overlying the lateral thoracic wall.

remarkably stable both for the general population in the early 1970s and veterans in the 1990s (94, 95).

Calcification is similarly related to duration. Smoking plays no role in the prevalence of pleural plaques (68). Pleural plaques are bilateral, but not symmetric, lesions of the parietal pleura. Characteristically, they are found following the ribs on the lower posterior thoracic wall (Figure 12) and over the central tendons of the diaphragm (Figure 13). They are raised, sharply circumscribed with a smooth or with a rounded knobby surface, and range in color from white to pale yellow. They generally spare the costophrenic angles and apices of the thoracic cavity. Microscopically, they consist of mature collagen fibers arranged in an open basket-weave pattern and are covered by flattened or cuboidal mesothelial cells. They are relatively avascular and acellular and show minimal inflammation. They are sharply demarcated from subpleural tissues and central calcification is common. Asbestos bodies are not seen in or adjacent to the lesions (64). Isolated plaques may be associated with tuberculosis, trauma, and hemothorax; however, multiple lesions having the classic appearances described above are almost invariably associated with asbestos exposure.

The conventional chest film is a sensitive and appropriate imaging method for plaques, although it may identify abnormalities that resemble plaques but are not. In the PA radiograph, they are best seen in profile on the midlateral chest walls and on the diaphragm or face on, and show serrated borders. HRCT is not a practical screening method for demonstrating plaques because of the separation between sections, the high radiation exposure, and the lack of access to the test in some locations. HRCT is useful to identify questionable abnormalities and to resolve questions about structures that resemble plaques.

Typical pleural plaques are easily identified on plain films by sharp, often foliate, borders (face on) and by a raised straight surface with clear, cut-off edges when seen face on (Figures 14–16) and as irregular margins (sometimes almost rectangular) when seen in profile on the chest wall or diaphragm. Apparent pleural thickening with gradually tapering or indistinct edges is often due to subpleural fat or superimposed soft tissue; fat pads below the parietal pleura typically occur in the midthoracic wall,

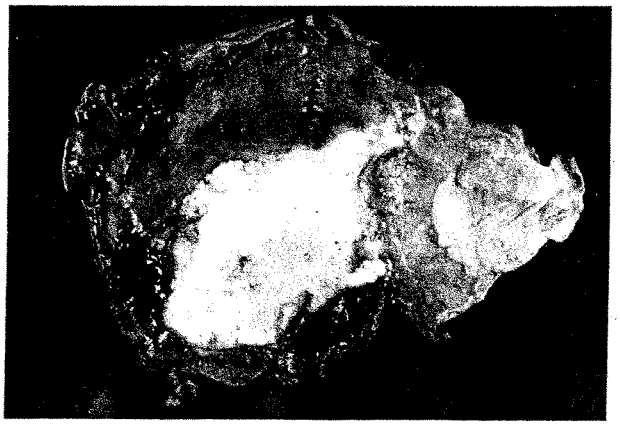


Figure 13. Gross appearance of large asbestos-related pleural plaque over the dome of the diaphragm.

Figure 14. En face (face on) pleural plaques in a chest film with minimal parenchymal disease; worker was 54 years old at the time this chest film was taken (1982) and was exposed to asbestos in the 1960s as an insulation worker.

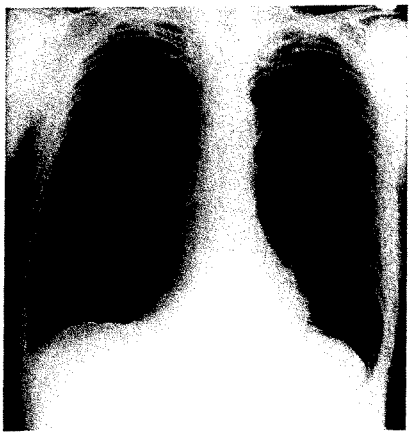


Figure 15. Pleural plaque, with linear calcification, seen on edge on the right hemidiaphragm in a 72-year-old sheet metal worker. No visible parenchymal disease.

between the fourth and eighth ribs, as do pleural plaques (51). Proper penetration is important on plain film; differentiation of fat from pleural plaques may still be difficult but is readily made by HRCT. Less typical plaques on the diaphragm may be difficult to detect and should be distinguished from atelectatic streaks, visceral folds, or diaphragmatic straightening caused by bullae. Calcification is helpful but may not be apparent in an underpenetrated film (Figure 14). Axial CT scans often fail to image diaphragmatic plaques (96).

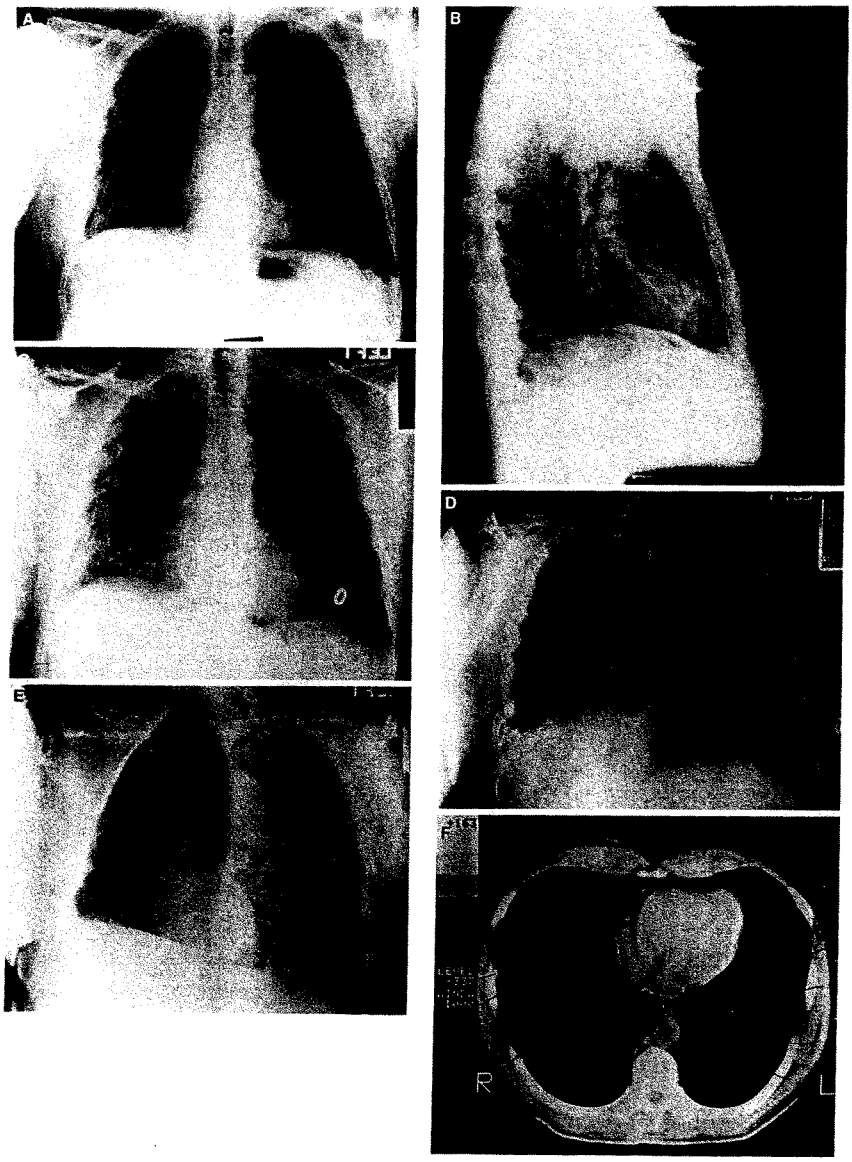
The origin of pleural plaques is not clear (97, 98). The burden of asbestos fibers in lung tissue and of asbestos bodies in bronchoalveolar lavage fluid is greatly increased in patients with diffuse pleural thickening or asbestosis and moderately increased in patients with pleural plaques compared with unexposed subjects (99–101). The presence of pleural plaques is correlated with parenchymal disease, in particular fibrotic bands and both peribronchiolar and alveolar fibrosis. However, peribronchiolar fibrosis is absent in many cases with pleural plaques and present in many cases without them (102).

Slow progression of plaques is typical. Approximately 85% of heavily exposed workers showed pleural thickening (predominantly plaques) on plain film more than 40 years from first exposure (103), as did up to 17% of environmentally exposed populations (104). More than half the cases were bilateral.

The presence of plaques is associated with a greater risk of mesothelioma and of lung cancer compared with subjects with comparable histories of asbestos exposure who do not have plaques (105, 106). This is thought to be due to greater exposure or retained body burden, not malignant degeneration. Therefore, the presence of pleural plaques should be interpreted as a marker for elevated risk of malignancy, which may be higher than the occupational history alone might suggest.

Although pleural plaques have long been considered inconsequential markers of asbestos exposure, studies of large cohorts have shown a significant reduction in lung function attributable to the plaques, averaging about 5% of FVC, even when interstitial fibrosis (asbestosis) is absent radiographically (74, 76, 107). The presence of circumscribed plaques can be associated with restrictive impairment and diminished diffusing capacity on pulmonary function testing, even in the absence of radiographic evidence of interstitial fibrosis (108, 109). Taking into account the degree of interstitial fibrosis as measured by ILO profusion score (described below), smoking, and duration of asbestos exposure, significant decrements in vital capacity have been observed: a reduction of up 140 ml or more of FVC associated with circumscribed plaques (76). This has not been a consistent finding (110, 111) and longitudinal studies have not shown a more rapid decrement in pulmonary function in subjects with pleural plaques (112). Decrements, when they occur, are probably related to early subclinical fibrosis. Dyspnea on exertion was reported more often among subjects with circumscribed pleural thickening independent of parenchymal disease and appeared to be proportional to the extent (110). There is a significant but small association between the extent of circumscribed pleural plaques and FVC, which is not seen with diffuse pleural thickening (112, 113). Even so, most people with pleural plaques alone have well preserved lung function (55).

It is unclear whether this small effect on lung function is sufficient to contribute to dyspnea but there is evidence that it might. Half of subjects with pleural thickening but normal chest films and normal lung function showed excessive ventilation with exercise, which can contribute to dyspnea (114). Excessive ventilation on exercise could be the result of decreased chest wall and/or lung compliance caused by pleural thickening alone or to decreased lung compliance and ventilation–perfusion imbalance caused by parenchymal fibrosis that was not detected radiographically.


A
B
D
R
L

Plaques are indicators of increased risk for the future development of asbestosis (94). This may reflect greater exposure or retained body burden. An autopsy study has demonstrated more frequent peribronchiolar fibrosis when plaques are present (90). This finding, as well as derangements in gas exchange (114) and evidence from HRCT, indicate that subradiographic asbestosis may be present in some patients with only pleural plaques. The presence of plaques is therefore an indication to monitor the patient over time for interstitial fibrosis (115).

Diffuse pleural thickening. Diffuse thickening of the visceral pleura is not sharply demarcated and is often associated with fibrous strands ("crow's feet") extending into the parenchyma. In large surveys of asbestos-exposed workers, diffuse pleural thickening has ranged from 9 to 22% of those with pleural disease. Both circumscribed and diffuse pleural thickening may be present in the same hemithorax. Diffuse pleural thickening superimposed on circumscribed plaques has been observed, often after pleural effusion (91).

The frequency of diffuse pleural thickening increases with time from first exposure and is thought to be dose related (104). Diffuse pleural thickening has been observed after acute pleuritis (90). It may also be caused by extension of interstitial fibrosis to the visceral pleura, consistent with the pleural migration of asbestos fibers. The extent of diffuse pleural thickening seems to be more or less uniformly distributed, the different degrees being fairly equally often seen, however, in contradistinction to circumscribed pleural thickening, in which the lowest categories are more frequent (113). Lung burdens of asbestos in these cases are intermediate between asbestosis and pleural plaques (116–118).

This condition affects the visceral pleural surface and is quite different in appearance from the parietal pleural plaque. It consists of pale gray diffuse thickening that blends at the edges with the more normal pleura. It may be extensive and cover a whole lobe or whole lung and obliterate lobar fissures. It ranges in thickness from less than 1 mm up to 1 cm or more. Adhesions to the parietal pleura are common, particularly opposite to pleural plaques. The lesion may show a gradient with immature granulation tissue and fibrin at the surface, progressing to mature collagen adjacent to the lung. The fibrosis may extend for a few millimeters into the lung parenchyma and into the lobular septae. The latter features do not constitute asbestosis.

Diffuse pleural thickening may have a significantly greater impact on pulmonary function than circumscribed plaques. A reduction of 270 ml of FVC has been associated with diffuse pleural thickening (76, 119). Workers with diffuse pleural thickening have a significantly greater decrement in FVC (by a factor of two or more) than those with circumscribed pleural thickening (76, 113). This effect is unrelated to the radiographic extent of pleural thickening; a similar reduction in FVC was seen with little more than costophrenic angle blunting as with extensive involvement (113). Decrements associated with diffuse pleural thickening reflect pulmonary restriction as a result of adhesions of the parietal with the visceral pleura. Restrictive impairment is characteristic, with relative preservation of diffusing capacity (pattern of entrapped lung).

Diffuse pleural fibrosis extends continuously over a portion of the visceral pleura, often causing adhesions to the parietal pleura, involving the fissures and obliterating the costophrenic angle. The newly revised ILO classification (2003) recognizes pleural thickening as diffuse "only in the presence of and in continuity with, an obliterated costophrenic angle" (38). Localized subpleural parenchymal fibrosis is often present without diffuse interstitial fibrosis (117). Calcification of the pleura occurs with the passage of time, and may involve fissures. A rare variant of visceral pleural fibrosis is progressive apical thickening associated with fibrosis of the upper lobe (120, 121).

Pachypleuritis is extensive, often bilateral, pleural fibrosis with evidence of active inflammation histologically and by gallium uptake. Extension of fibrosis into the lung is often evident radiographically as irregular pleural and pericardial borders, fibrous streaks, or "crow's feet" and bands. Ventilatory failure leading to CO_2 retention, cor pulmonale, and death has been described in four patients with bilateral involvement and little or no parenchymal fibrosis, and in one patient with unilateral pleural thickening. Decortication may be beneficial (122).

Rounded atelectasis. Rounded atelectasis (123, 124), also known as shrinking pleuritis, contracted pleurisy, pleuroma, Blesovsky's syndrome (125), or folded lung, presents radiographically as a mass and may be mistaken for a tumor (Figure 17). The condition may result from pleuritis of any cause. The lesion is thought to develop from infolding of thickened visceral pleura with collapse of the intervening lung parenchyma. Clinical experience suggests that it is more likely to occur today as a result of asbestos exposure than other causes. The classic "comet sign" is pathognomonic and is often more readily seen on an HRCT than on plain films. Clues to its identity are a band connecting the mass to an area of thickened pleura and a slower evolution than that of a lung cancer, so that previous films will show a similar finding. Histologic examination shows folded and fibrotic visceral pleura with atelectasis and variable amounts of chronic inflammation in the adjacent lung parenchyma. The sudden appearance of rounded atelectasis may follow acute pleuritis with effusion. Rounded atelectasis may be multiple and bilateral (124, 126).

Rounded atelectasis is important for the diagnostic pathologist to recognize as it is frequently removed surgically as a suspected peripheral lung cancer. Asbestos bodies and/or evidence of asbestosis should be carefully sought.

Differential diagnosis, including rounded atelectasis and apical thickening. Acute pleuritis of any cause can result in diffuse pleural thickening that is indistinguishable from that associated with asbestos, although such causes are usually unilateral. The most likely causes, empyema, tuberculosis, and trauma, including surgery, are likely to be identified in the medical history. Empyema in childhood or an infected pleural effusion associated with pneumonia may not be.

The major differential diagnostic consideration with diffuse pleural thickening is mesothelioma, which is progressive and more likely to be symptomatic at the time of detection. On occasion, when fibrosis and mesothelial proliferation are exuberant, the distinction is difficult clinically, radiographically, and histologically. Apical thickening (120, 122) must also be distin-

Figure 16. Extensive evaluation in 1983 of a 65-year-old business executive who, in the 1950s, had worked in shipyards for approximately 2 years and was exposed to high levels of asbestos. This case is unusual because both early asbestosis and a huge pleural plaque are unilateral. (*A*) PA film shows asbestosis and an extensive pleural plaque extending over three-quarters of the length of the hemothorax. Right costophrenic angle is blunted but would not satisfy strict criteria for this according to the ILO classification. (*B*) Lateral film, showing extensive calcified plaques over diaphragm, also visible on *left* in PA film. (*C*) Because of concern for possible mass in right lower lung lobe, PA film was repeated with nipple markers: mass not seen in this view. (*D*) Left anterior oblique, showing absence of other plaques on chest wall. (*E*) Right anterior oblique, showing detail of plaque. (*F*) CT scan, showing plaque.

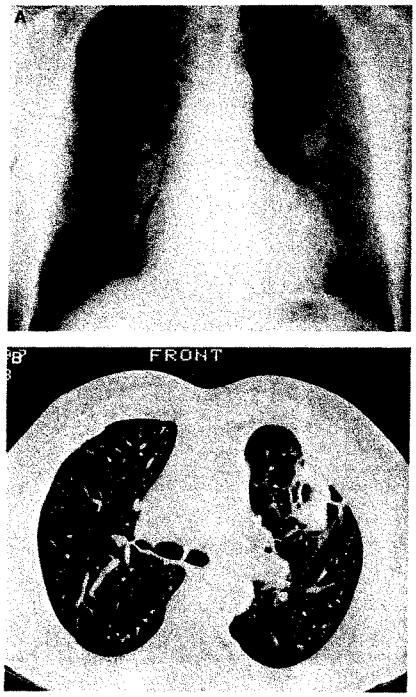


Figure 17. Rounded atelectasis in a 57-year-old sheet metal worker. (*A*) Presentation as a mass in the left chest. (*B*) CT scan showing pleural base and infolding of structures.

guished from mesothelioma and tuberculosis, which may be suggested by history and (previous) bacteriologic findings.

Chronic Airway Obstruction

Asbestos exposure has traditionally been considered to cause predominantly restrictive physiologic abnormalities. The role of asbestos as a cause of airway obstruction has been controversial. However, asbestos exposure has long been known to be associated with an obstructive physiological abnormality (127–129). This association might arise in one or more of several ways:

- Asbestos specifically causes obstructive abnormality.
- Asbestos causes obstructive abnormality nonspecifically (i.e., as do large burdens of most inorganic dusts) (83, 130).
- Work leading to extensive asbestos exposure is frequently associated with exposure to other agents affecting airways.
- Confounding by tobacco smoking may lead to an association.
- Anatomic and physiologic airway abnormalities develop as part of the pathophysiologic process of asbestosis and are not an independent entity.

Asbestos-related chronic airway obstruction may result in reduction in the FEV_1/FVC ratio associated with reduced FEV_1 (29, 76, 113, 127). Epidemiologic studies have demonstrated a significant association between asbestos exposure or asbestosis category as defined radiographically and reduction in FEV_1, FEV_1/FVC ratio, and midexpiratory flow rates (111, 130–133). The relationship between surrogate measures of exposure and the FEV_1 and FEV_1/FVC ratio also occurs in subjects who do not have radiographic evidence of asbestosis (defined as an ILO score exceeding 1/0) (130, 133, 134). A small effect has been observed in lifelong nonsmokers (14, 113, 135, 136). This effect begins in small airways, consistent with the known pathology of bronchiolitis in early asbestosis (136, 137). Radiographically, airflow abnormalities may also be associated with emphysema (138).

Histologically, inflammation and airway fibrosis characterize asbestos-related small airway disease. A major site of asbestos deposition is in the walls of membranous and respiratory bronchioles. In the walls of membranous bronchioles this leads to fibrosis and smooth muscle hyperplasia that are similar, but more severe, than that produced by cigarette smoking (128, 139) (Figures 4, 5, and 18). The respiratory bronchioles show fibrosis, which extends into the alveolated portions of the walls and alveolar ducts (Figure 19). In this regard, it differs from the lesion of cigarette smoking, which primarily involves the nonalveolated portions of the first generation of respiratory bronchioles (140). Asbestos bodies are not present in the walls of the membranous bronchioles, although inflammatory changes are present, but are commonly seen in the walls of the respiratory bronchioles and/or adjacent alveoli. Some authorities consider it appropriate to describe these lesions as true asbestosis because the walls of respiratory bronchioles are largely alveolated and therefore within the gas exchange region of the lung (64). Others consider the small airway lesions as distinct from asbestosis and refer to the lesions of both membranous and respiratory bronchioles as asbestos-induced small airway disease (12). These small airway lesions are the likely anatomic basis for airflow limitation in asbestos-exposed individuals.

In general, the magnitude of the asbestos effect on airway function is relatively small. This effect, by itself, is unlikely to result in functional impairment or the usual symptoms and signs of chronic obstructive pulmonary disease. However, if superimposed on another disease process, the additional loss of function due to the asbestos effect might contribute significantly to increased functional impairment, especially in persons with low lung function.

Asbestos exposure independently contributes to accelerated decline in airflow over time, whether or not exposure ceases (77, 129, 133, 134, 141). Dyspnea, cigarette smoking, diffuse pleural thickening, honeycombing observed on HRCT scan, and indicators of active inflammation have been associated with worsening obstruction (142). Effects on measures of early small airway dysfunction (e.g., midexpiratory flow rates) in themselves are unlikely to produce clinically relevant impairment, but may indicate an increased probability that disease will develop later (128, 129, 134, 143). Development or persistence of respiratory symptoms among asbestos-exposed workers is associated with accelerated loss of lung function, both FVC and FEV_1 (30). In patients with severe obstructive airway disease from another cause, the additional contribution of asbestos-related airflow obstruction might be functionally significant at low levels of lung function. Short duration and low cumulative exposure are less likely to produce significant obstructive abnormality (112, 134).

Figure 18. Photomicrograph of asbestos-related small airway disease, showing thickened membranous bronchiole. There is also fibrosis around the airway, and a mild chronic inflammatory cell infiltrate in its wall.

Assessment of functional impairment of clinical significance (3) should generally be based on the restrictive findings associated with asbestosis, as these are more likely to be disabling. However, the addition of obstructive disease adds to the level of functional impairment (144). Treating restriction and obstruction separately may underestimate their combined effect on impairment. The normal indicator for restrictive impairment, total lung capacity, has proven to be insensitive to total impairment in subjects with both asbestosis and chronic obstructive lung disease. In such cases, diffusing capacity and alveolar–arterial oxygen difference may be more revealing (144). Some of the restrictive component may be contributed by air trapping rather than fibrosis (145).

Chronic obstructive airway disease that is not due to asbestos (e.g., secondary to smoking) may complicate the recognition of asbestosis. For example, total lung capacity may be normal when both disorders are present, due to a restrictive process offsetting air trapping (143). Whereas the FEV_1/FVC ratio may be reduced in asbestos-exposed persons with no or a low profusion of small, irregular opacities, this ratio may also be normal in more advanced asbestosis (i.e., with higher profusion and diminished FVC) because of a reduction in FVC (75).

Effects on airflow begin before the development of asbestosis (129). In individuals who develop asbestosis, physiologic findings associated with airflow obstruction (e.g., reduction in the FEV_1/FVC ratio) become less prominent as asbestosis progresses; this may reflect increased pulmonary recoil.

The dose and time course of asbestos-associated airway abnormalities have received limited attention. Many available stud-

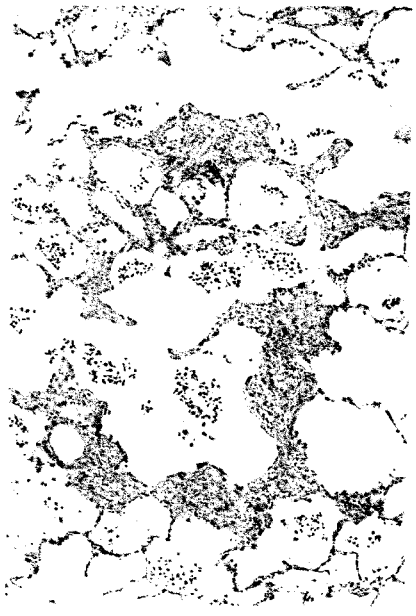


Figure 19. Photomicrograph of asbestos-related small airway disease, in this case a respiratory bronchiole, with extension of the fibrosis into the adjacent parenchyma (Grade II asbestosis; *see* Table 2).

TABLE 3. RECOMMENDATIONS FOR MANAGEMENT AFTER DIAGNOSIS OF ASBESTOSIS

1. Patient notification
   1.1. Inform patient of work-related illness
   1.2. Report to appropriate authority as occupational disease, as required by law
   1.3. Inform patient that there are options for compensation
2. Impairment assessment
   2.1. Conduct an assessment of functional impairment
   2.2. Rate impairment in accordance with ATS criteria,* which are incorporated into the AMA Guides†
3. Tertiary prevention
   3.1. Smoking cessation (primary prevention for smoking-related disorders)
   3.2. Withdrawal from further excessive exposure‡
   3.3. Immunization (pneumococcal pneumonia, influenza)
   3.4. Management of concurrent respiratory and other diseases
4. Monitoring
   4.1. Chest film and pulmonary function testing§ should be conducted every 3 to 5 years
   4.2. Active monitoring (periodic screening) for colon cancer
   4.3. Observation and elevated index of suspicion but not screening for lung cancer, mesothelioma, gastrointestinal cancers (other than colon)
5. Development of a patient-specific management plan for symptomatic disease

Definition of abbreviations: AMA = American Medical Association; ATS = American Thoracic Society.
* *See* Reference 3.
† *See* Reference 157.
‡ *See* text.
§ *See* References 4 and 5.

ies reflect relatively high historical levels of exposure. Among nonsmoking Chinese asbestos workers, association of cumulative exposure with functional effects was seen only among those with long-term exposure (133).

Tobacco smoking is the predominant cause of chronic airway obstruction in asbestos-exposed workers who smoke, although occupational exposures can be significant. The association between airway obstruction and exposure to asbestos has been well demonstrated in nonsmokers, and in some studies the association between exposure and airway obstruction is seen only among nonsmokers (131); among smoking asbestos-exposed workers, smoking accounts for most of the small airway abnormality (111, 127, 135, 141, 142). In addition to smoking, other occupational exposures might contribute to chronic obstructive airway disease; effects of asbestos in producing airflow obstruction are likely to be additive to these. There may be an interaction between smoking and asbestos in the development of airway obstruction, as has been demonstrated in animal models (146), but this has not yet been demonstrated for human subjects.

IMPLICATIONS OF DIAGNOSIS FOR PATIENT MANAGEMENT

A history of significant asbestos exposure obligates the responsible physician to provide a management plan for the patient that takes into consideration current disease and impairment as well as future risk (147). A recommended management plan is summarized in Table 3.

Workers referred for evaluation of asbestos-related disease today differ from those referred in past years. Exposure to asbestos among these workers is likely to be more remote in time and to have been less intense. Exposed workers may live longer and progress later to more advanced stages of disease. They are more likely to survive to develop additional outcomes associated with asbestos, such as malignancy, and to present more complicated management challenges (148).

Actions Required before Disease Is Apparent

A recent or short-term history of exposure to asbestos, particularly in the absence of detail on duration and intensity, requires the clinician at a minimum to educate the patient with respect to latency, the exposure–response relationship characteristic of asbestos-related diseases, and the future risk of malignant disease. Reassurance should be offered where appropriate and the risk placed into the context of the exposure history. This is often an excellent opportunity at the same time to review the patient's history, work hygiene practices, behavior and attitudes toward cigarette smoking, as well as exposure to other occupational and environmental carcinogens (149).

For all patients presenting with a history of significant or possibly significant exposure, at a minimum a baseline, high-quality chest film should be obtained, together with spirometry and a single-breath diffusing capacity that conform to American Thoracic Society guidelines. Complete pulmonary function testing should be obtained if clinically indicated. Workers who have had exposure to asbestos have also often worked in other dusty occupations. They and their families may have lived in communities where they experienced environmental exposures.

The sensitivity of the plain chest film for identifying asbestosis at a profusion level of 1/0 (in the ILO classification system) has been estimated at or slightly below 90%. The corresponding specificity has been estimated at 93%. Applied to populations with varying prevalence of disease, the positive predictive value of the minimally abnormal chest film alone in making the diagnosis of asbestosis may fall below 30% when exposure to asbestos has been infrequent and exceed 50% when it has been prevalent. This suggests that screening programs based on the chest film alone may vary considerably in their yield of true cases depending on the characteristics of the population being screened. In the general population and for occupational groups with low levels of exposure they may be unreliable in identifying asbestosis. The application of multiple criteria, as outlined in this statement, is a preferable approach (150). However, combinations of tests for a specific criterion, such as a hypothetical requirement that multiple tests for pulmonary function be abnormal, would reduce the sensitivity without enhancing specificity for asbestos-related disease; in general, the most sensitive test for a particular criterion is preferable (2).

Persons identified as having asbestos-related disease or a significant exposure history should be informed of the risk of progression of disease, the risk of malignancy, and especially

the interaction between smoking and asbestos exposure in enhancing the risk of lung cancer. Such persons who smoke may be more motivated to consider cessation when the connection between asbestos and the risk of respiratory impairment and of malignancy is brought up at this time (151). The risk conferred by other occupational and environmental carcinogens should also be emphasized at this time.

The question of monitoring for asbestos-related disease is complicated by requirements for occupational surveillance, especially for those with minimal exposure. The Occupational Safety and Health Administration asbestos standard requires employers to monitor their asbestos-exposed workers during employment but makes no provision beyond the period of employment, despite the latency, and private insurance may or may not allow the expense thereafter (8).

Persons with a history of exposure to asbestos but no manifest disease, and for whom the time since initial exposure is 10 years or more, may reasonably be monitored with chest films and pulmonary function studies every 3 to 5 years to identify the onset of asbestos-related disease.

Persons with a history of exposure to asbestos are also at risk for asbestos-related malignancies. Periodic health surveillance for lung cancer or mesothelioma is not recommended. Screening for lung cancer using periodic (annual) chest films, low-dose computed tomography, or sputum cytology has not been shown to be effective in preventing mortality or improving quality of life in populations of smokers without known adverse occupational exposures (152, 153). New technologies (e.g., low-dose spiral CT scanning) are being evaluated for use in high-risk groups (153). The risk of extrathoracic malignancies may also be increased in asbestos-exposed workers. Studies suggest that there may be an elevation in the risk of colon cancer (149, 150), although this remains controversial (154). Because colon cancer is often treatable and screening for colorectal cancer is recommended by the American Cancer Society for persons more than 50 years of age (155), it is reasonable on the basis of current evidence to screen for this condition. The risk of cancer of the larynx (156) and possibly gastrointestinal cancers other than colon, including pancreas, stomach, and esophagus (154), may also be increased with asbestos exposure, but the presence and magnitude of an association with asbestos remain controversial for extrathoracic cancers (154). Routine screening for these cancers is in any case not practical at present.

No prophylactic medication or treatment is currently available to prevent the development or progression of asbestosis or other asbestos-related diseases, once exposure has occurred.

Actions Required after Diagnosis

The diagnosis of asbestosis, in particular, imposes a duty to inform the patient that he or she has a disease that is work-related, to report the disease, and to inform the patient that he or she may have legal or adjudication options for compensation. The role of the physician in this compensation process includes performing an objective evaluation of impairment consistent with the rules of the specific compensation system. Guidelines developed by the American Thoracic Society (3) may be of use and are incorporated into the *AMA Guides to the Evaluation of Permanent Impairment* (157). As in the management of any lung disorder, the physician should also manage the clinical manifestations of the disease and counsel the patient to protect remaining lung function.

The patient with evidence of asbestosis should be considered to be at risk of progressive lung disease, whatever the level of impairment on first encounter. It seems logical that removal from further exposure to asbestos or other significant occupational and environmental exposures may avoid more rapid progression of lung disease, although specific evidence for this is lacking. However, if such exposures are minimal and are well within occupational guidelines, care must be taken not to deprive the patient of a livelihood for no clinical benefit.

Immunization against pneumococcal pneumonia and annual influenza vaccine should be administered unless contraindicated for other reasons. Effective management of concurrent chronic obstructive pulmonary disease or asthma, if present, may reduce morbidity from mixed disease.

Severe asbestosis is rare in the United States and other countries with generally effective occupational health regulation. Cor pulmonale, secondary polycythemia, and respiratory insufficiency and failure are all treated in the conventional manner in patients with asbestosis.

In the spring of 2000, the Association of Occupational and Environmental Clinics adopted a resolution recommending necessary standards for screening programs (158). This action was taken in response to the proliferation of screening programs undertaken to identify cases for possible legal actions in which counseling and education may be lacking (159), but the recommendations also apply to those conducted for patient care and protection. Their recommendations were consistent with those given above and also emphasized timely physician disclosure of results to the patient, appropriate medical follow-up, and patient education. The National Institute of Occupational Safety and Health has outlined elements of an adequate screening program, with special reference to screening for asbestos-related disorders in currently employed mineworkers, in a white paper produced in 2002 that has received little attention (160). The National Institute for Occupational Safety and Health recommended that such programs should be under the direction of a "qualified physician or other qualified health care provider" knowledgeable in the field and competent to administer it, and documented with written reports to workers and employers (the latter provision that would not necessarily be applicable to workers who had separated from the employer). However, the National Institute for Occupational Safety and Health did not address the issue of counseling in that document or clinical interventions to reduce future risk.

CONCLUSIONS

The diagnosis of nonmalignant asbestos-related disease rests, as it did in 1986, on the essential criteria described: a compatible structural lesion, evidence of exposure, and exclusion of other plausible conditions, with an additional requirement for impairment assessment if the other three criteria suggest asbestos-related disease (2). Each criterion may be satisfied by one of a number of findings or tests. The 2004 criteria are open to future testing modalities if and when they are validated. For example, HRCT has greatly increased the sensitivity of detection and has become a standard method of imaging. Evidence for exposure still rests on the occupational history, the demonstration of asbestos fibers or bodies, or pleural plaques. Impairment evaluation is largely unchanged from 1986 and remains an essential part of the clinical assessment. Potentially confounding conditions, such as idiopathic pulmonary fibrosis, are better understood and many, such as tuberculosis, are less common than in the past so that the clinical picture is less often confusing.

These criteria and the guidelines that support them are compatible with the Helsinki criteria, developed by an expert group in 1997, which represents substantial consensus worldwide (147). The guidelines supporting these criteria will undoubtedly change again in future, but the present guidelines should provide a reliable basis for clinical diagnosis for some years to come.

This statement was developed by an ad hoc subcommittee of the Scientific Assembly on Environmental and Occupational Health of the American Thoracic Society. Members of the committee are as follows:

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Acknowledgment: The statement subcommittee thanks the following for contributions, assistance, and suggestions: William Beckett, M.D., M.P.H. (University of Rochester, Rochester, NY) and Jerrold L. Abraham, M.D. (State University of New York, Syracuse, NY). Gross histology and photomicrographs were supplied by Francis H. Y. Green, M.D. Radiographs were supplied by Tee L. Guidotti, M.D., M.P.H.

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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

HEARING ON "THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT"

January 11, 2005

Testimony of
Craig A. Berrington, Senior Vice President and General Counsel,
American Insurance Association Statement

Chairman Specter, Ranking Member Leahy, and members of the Committee, I am appearing today on behalf of the American Insurance Association (AIA), the National Association of Mutual Insurance Companies (NAMIC), the Property Casualty Insurers Association of America (PCI), and the Reinsurance Association of America (RAA). Our member insurance companies write all lines of property-casualty insurance across the U.S. As major stakeholders in this process, we very much appreciate the opportunity to testify here today.

The Problem

There can be no question that the asbestos litigation system is in deep crisis. Courts are being overwhelmed with claims filed on behalf of individuals who are not sick from asbestos. The number of claims is rising despite the fact that most workplace asbestos exposure ended in the early 1970s. More than 730,000 asbestos claims have been filed to date. Over 100,000 new claimants filed in 2003 alone – the most in a single year.

And the litigation net continues to spread ever wider. Claims have been filed against more than 8,400 defendants, up from 6,000 defendants in 2001. Because many of the asbestos manufacturers are already bankrupt, claims are expanding rapidly into non-traditional industries; such claims rose 107 percent from 1999 to 2000, and 71 percent from 2000 to 2001. Today, at least one company in virtually every US industry has been targeted for litigation.

The ongoing crisis is not being caused by people who are truly sick as the result of asbestos exposure. Professor Lester Brickman of the Benjamin N. Cardozo School of Law at Yeshiva University has commented on the "disconnect between medical science and our tort and bankruptcy systems, noting that "80% - 90% of asbestos claimants have no asbestos–related *illness* recognized by medical science." ("Asbestos Litigation," Center for Legal Policy, Manhattan Institute, March 10, 2004).

The crisis adversely affects not only the stakeholders before you today, but the entire U.S. economy. At least 74 companies have gone bankrupt as a direct

result of asbestos liabilities. The number of bankruptcies has increased in recent years; the latest filing came this past week.

The crisis also is victimizing many thousands of hard-working Americans, whose jobs, pensions, and retirement funds are in jeopardy because of the costs of the ever-spreading litigation. According to one estimate, by 2003, as many as 60,000 jobs had been lost to these bankruptcies. In addition, workers at firms bankrupted by asbestos litigation have watched helplessly as the value of their 401(k)s drop by an average of 25 percent.

As the litigation environment has worsened, insurance industry asbestos losses have accelerated. This is despite the fact that, by and large, insurance contracts have not covered asbestos claims since the mid-1980's, and our connection to asbestos diminishes with each passing year.

We and other stakeholders have worked for several years with senators on both sides of the political aisle to enact a workable, politically feasible solution to our national asbestos litigation nightmare. We firmly believe that Congress can and must finish the job to resolve this critical public policy challenge. While we have not reached consensus on the details of such a legislative proposal, it seems that certain underlying aspects of meaningful reform are inarguable.

For example, we need a fair solution – one that is fair to both victims of asbestos disease and to those of us paying compensation to claimants. It is clear that we need a federal solution, and, Chairman Specter, we truly appreciate the thoughtfulness and leadership you have shown, as well as the considerable time and effort you, Judge Becker and your staff have dedicated to dealing with this problem. Senator Leahy, we also appreciate your long-standing commitment to resolving this crisis. And we appreciate the leadership of Senator Frist and Senator Hatch on this issue.

Insurers want to be part of developing a fair, workable federal solution. While we have had some success in obtaining reform at the state level in the last year, Congress must resolve this problem on a federal level to bring uniformity and certainty across the board.

In fact, the Supreme Court has on several occasions called on Congress to resolve the asbestos litigation crisis. To date, however, Congress has been unable to realize this goal. Just last week, President Bush once again directed national public attention to the asbestos litigation crisis. He called for a nationwide solution that meets these three principles: (1) "funds should be concentrated on those who are sick, not lawyers or claimants who are not ill;" (2) the process for delivering justice to deserving victims should be swift; and (3) the system must provide certainty. He urged Congress to pass a national solution this year.

As you know, throughout 2002, our industry explored a "medical criteria" approach to asbestos litigation reform. This was a federal solution that went directly to the heart of one of the principal problems with the current system. By creating a clear and objective standard for claimants to meet before proceeding in court, the plan would have allowed those who are truly sick from asbestos to bring suit, while holding off the claims of those who are not sick until such time as they actually do manifest an asbestos-induced illness. This would have benefited the real victims of asbestos – those who are sick – by providing a swifter way through a court system that would not be overloaded with cases from unimpaired claimants. It also would have helped to preserve the limited amount of asbestos compensation for claimants who may not file for another decade or even longer. Our approach also included venue and consolidation reform, and other provisions along the lines of H.R. 1586 introduced by Congressman Chris Cannon in the last Congress.

However, the Judiciary Committee decided to pursue a trust fund approach in early 2003. Since then, we have been working with the members of this committee and with other stakeholders to try to create a well-constructed trust fund that would be equitable for all parties.

I would like to state that insurers would support any construct that would provide a truly effective, long-range solution to the staggering problems we are confronting. Whether the specific legislative vehicle turns out to be a trust fund or a medical criteria bill along the lines of H.R. 1586, or something else, it is imperative that Congress act now.

The "FAIR Act"

The hearing today is focused on the "Fairness in Asbestos Injury Resolution Act" (FAIR), which comprises a trust fund, so let me now turn to what we believe are the elements that are critical to making a trust fund effective and one that our industry could support.

- The solution must be national and utilize federal tools.

In addition to my earlier comments on the need for a federal solution, I would like to add that a federal solution means more than just a congressionally mandated solution. Several legislative drafts that we have seen retain the risk of reversion of claims to state courts under specific scenarios. The last thing that a national trust fund should do is to allow asbestos litigation to continue after the bill is signed into law or to be structured in a way that ever allows a return to the litigation system that caused the problem that we are all working so hard to solve.

- The funding must be fair – what insurers pay must be appropriate and equitable in total, as well as with respect to how payments are scheduled.

The $46 billion obligation incorporated in S. 2290 represents the maximum, not a floor, and does not take into account the payments that have been made through the litigation and bankruptcy systems over the past year. The most recent draft contains no aggregate payment levels, making it impossible to determine the cost.

The fairness of the payment schedule is another critical issue. Insurers have expressed concerns about the acceleration of insurer payments into the fund. We understand that the insurance industry is being called upon to provide the majority of the up-front funding. Acceleration of insurer payments beyond reasonable levels would leave the industry in the position of having paid significant up-front funding, effectively increasing insurer funding obligations. This is exacerbated if the legislation contemplates a return to the litigation system at some point, thus leaving insurers in the position of having paid tens of billions into the trust fund, while still facing the prospect of decades of additional litigation should the trust fund go out of existence. Moreover, some of the medical criteria and awards structure create real concerns that the fund is "made to fail."

- There must be finality and certainty – the fund must be the exclusive remedy for resolving asbestos claims from the day the bill goes into effect – and there should be no leakage back into the tort system.

From the beginning of this process, insurers have been concerned that the fund should provide the exclusive remedy for resolution of asbestos claims. Absent inclusion of all asbestos claims in the fund, there is no real finality for the funding participants, since they could find themselves paying substantial sums into the fund and also paying in the tort system for claims that are permitted to "leak" outside of the fund.

There are a number of ways to avoid leakage from the fund. With respect to start-up, the bill should clearly terminate the litigation system when the bill is signed into law and then provide for the timely implementation of the trust fund. The bill should not allow the possibility of the litigation system being reasserted before the trust fund even gets going. As for sunset provisions, it is troubling for a bill to assume trust fund failure. The removal of a safe harbor period for trust fund operations is a move in the wrong direction. In this connection, the risk of sunset is exacerbated by increased claims values, particularly with respect to Level VII smokers and ex-smokers. In addition, it should be wholly unacceptable from a public policy standpoint to craft as a fallback, if one is necessary, a return to the same litigation system that has created the problem in the first place.

A trust fund should not be designed with failure assumed, yet this is implicit in the assumption that a return to the tort system is inevitable. The reason for that

assumption is that many believe that Level VII cases will swamp the fund. It is imperative to remember that Level VII is the category for claims where the claimant has smoked, has lung cancer and, while exposed to asbestos, has never developed any underlying asbestos disease. A return to the tort system for these claims – or because of these claims – is a function of medical criteria that will place on the fund a huge financial burden of compensating lung cancer generally (even though this disease is caused overwhelmingly by smoking), rather than compensating lung cancer that was caused by asbestos exposure. If the fund is to compensate those whose illness is much more likely to be the result of smoking, then at the very least the award levels should be circumscribed accordingly, so those awards in the aggregate do not threaten the fund's existence.

Conclusion

For us to be able to support a trust fund, it must meet these basic criteria. If the trust fund remedy proves elusive, another solution should and must be considered and advanced.

The insurance industry is committed to remaining at the table and to continuing our joint work toward a true and much-needed resolution to our nation's asbestos litigation crisis – whether through a properly constructed trust fund or medical criteria bill. The continuing impact of this crisis on the victims who are sick and on the economy calls for a solution – now.

Thank you very much for the opportunity to present our industry's views here today.

SENATOR CORNYN
OPENING STATEMENT
Senate Judiciary Committee Hearing
"The Fairness in Asbestos Injury Resolution Act"

Mr. Chairman, I want to thank you for all your hard work on this issue. Your dedication to solving what many refer to as "the asbestos liability crisis" is admirable and I appreciate greatly all your efforts. The truth is that we do face a crisis. Companies are going bankrupt, American workers are losing jobs, a handful of personal injury lawyers are running away with billions of dollars – all while the truly sick are not getting compensated fairly and efficiently – often times getting pennies on the dollar for their injury.

This simply is unacceptable.

This past Friday, the President held a town meeting in Michigan that focused on the Asbestos crisis in which he called for Congressional action – and I applaud him for it. He noted plainly that the current system is broken and unfair. And this is one of those rare times in Washington where we can all agree. Just yesterday morning, the Washington Post editorialized that "[President Bush] is right that the staggering costs and irrationality of America's civil justice system are unacceptable."

Senator Specter, again I appreciate your resolve and am happy to see you join the President in leading on the issue of Civil Justice Reform. Your commitment to a short timeline undoubtedly will help us as we move forward – on this issue, as well as the desperately needed Class Action, Bankruptcy and Medical Liability reforms.

In addition, I would like to take a moment to thank Judge Becker. He has devoted a great deal of personal time, resources and energy to helping us work through these complicated matters and has received nothing in return for doing so. Judge, I would like to thank you personally for all your efforts and look forward to hearing your testimony.

A great deal of effort has gone into various legislative proposals over the past several years to address some or all of these concerns. Senator Nickles was an early advocate for a Medical Criteria bill – an approach undertaken by a number of states across the country, such as Ohio most recently, and that is designed to stop the floodgates of claims from the unimpaired at the expense of those who are truly sick. It long has been an approach worthy of strong consideration and I hope that we will still continue to work towards strong medical criteria – no matter what approach we ultimately choose.

But after more than 70 bankruptcies and well more than $70 Billion in claims paid out, one of the key concerns is achieving a reasonable degree of finality. To address this issue and others, Senator Hatch worked very hard in the 108th Congress to pass the more comprehensive trust fund approach through this committee. I voted for that legislation – S1125 - in committee despite a number of reservations because I believed then, as I do now, that Congress ought to take action and that we would work on a number of my

concerns on the Senate floor. I joined several colleagues in expressing those concerns through additional views filed at the time we passed it out of committee in July of 2003.

I know that Majority Leader Frist worked last year with Senator Daschle to carry the mantle forward with S2290 as negotiations continued in an effort to reach a broad consensus among stakeholders. It is my understanding that S2290 made great progress, but that unfortunately, consensus was not reached.

As we begin the 109th Congress – I am hopeful that we will address the concerns that I know exist among the stakeholders. But perhaps more importantly, I wish to work with the Chairman and our committee colleagues to address the concerns held by Senators - some of which many of us have expressed since we began discussing a trust fund approach almost two years ago.

It is not typical for us to hold many hearings when we recess, but this issue clearly deserves immediate attention. I join you and Ranking Member Leahy in committing to work hard to solve this problem and I am happy to be here today to listen to those who have been living with the current broken system and who know first hand the problems we face.

Testimony of
John M. Engler
President and CEO
National Association of Manufacturers
On behalf of The Asbestos Alliance
Before the
Committee on the Judiciary
United States Senate
On
Draft Asbestos Legislation

January 11, 2005

Executive Summary

I am testifying on behalf of the National Association of Manufacturers' Asbestos Alliance, a broad based coalition of companies and associations committed to seeking a fair resolution of the asbestos litigation crisis. Most of the members of the Alliance are NAM members. I am also speaking out of a great concern for victims, both medical victims and workers whose jobs and retirement savings have been affected. For the sake of asbestos victims and their families, the nation's workers and the overall economy, Congress must build on last year's efforts and pass fair and reasonable legislation.

We strongly support the trust fund approach. Removing claims from the tort system is the only way to ensure that victims receive fair and prompt compensation, stop the bankruptcies, and eliminate the fraud and uncertainty for both victims and defendant companies. While we are continuing our review of the draft bill, we do have some general comments:

- The draft does not address the central issue of funding. The maximum size of the fund must be $140 billion, as agreed to last fall. Also, the funding schedule, especially in the first five years, must be reasonable.

- An asbestos bill must completely shut down the broken asbestos tort system. Provisions in the draft that call for a return to the tort system if certain deadlines are not met as the Administrator sets up the fund are unacceptable and could increase the cost of the program by tens of billions of dollars.
- This must not be a smokers' compensation bill. Claim values for lung cancer claimants who are current or former smokers should reflect those claimants' smoking history. This is essential to protect the fund against an avalanche of smokers' claims that have little to do with asbestos.
- The bill must contain stronger provisions to lock the backdoor so trial lawyers don't just convert tens of thousands of unimpaired asbestos claims into silica claims.
- We are deeply concerned about the medical screening program included in the discussion draft.

We will continue reviewing the draft and provide additional feedback shortly. We look forward to working with Senator Specter, members of the committee and other Senators to pass a bill that takes care of victims, stops the injustices of the current scandal-ridden system, provides certainty and finality to defendant companies and boosts the economy.

Introduction

Senator Specter, Sen. Leahy, and members of the Judiciary Committee: Thank you for the opportunity to testify before this committee on the need for asbestos liability reform. Today I speak on behalf of the National Association of Manufacturers' Asbestos Alliance, a broad based coalition of companies and associations committed to seeking a fair resolution of the asbestos litigation crisis. Most of the members of the Alliance are NAM members. I am also speaking out of a great concern for victims, both medical victims and workers whose jobs and retirement savings have been affected.

For two decades, Congress has struggled to find a legislative solution to the asbestos litigation crisis. Due to the extraordinary and persistent efforts of you, Senator Hatch, Senator Frist, Senator Daschle, members of this committee, and other Senators on both sides of the aisle, the last Congress made tremendous progress toward finally passing a bill. But that heroic effort fell short. For the sake of asbestos victims and their families, the nation's workers and the overall economy, Congress must not fail again.

As we begin the discussion on the specifics of legislation that will finally resolve the asbestos litigation mess once and for all, I think it is important to remember why we're here and why, despite the many obstacles in its path, the 109th Congress must succeed.

First and foremost, this is about asbestos victims and their families who have been victimized twice, first by a disease and second by a broken system. The heart of the problem is that too many claims are filed on behalf of people who are not sick and may never become ill

from asbestos. These questionable claims force real victims to wait longer and longer for what is often reduced compensation. We cannot continue with a system that is hurting those it should be helping the most. As Supreme Court Justice Anthony Kennedy noted two years ago, "This Court has recognized the danger that no compensation will be available for those with severe injuries caused by asbestos...It is only a matter of time before inability to pay for real illness comes to pass."

Mary Lou Keener knows firsthand what Justice Kennedy was talking about. Her father served our country during World War II. On Veteran's Day of 2001, he died a painful death from mesothelioma, a fatal disease caused by asbestos exposure. His exposure to asbestos came during his naval service. Since his death, Mary Lou's mother's legal claims have languished in the courts and she has received little compensation. If and when she does receive compensation, her attorneys will take almost half of any award. Under a trust fund bill, this family and others like them would receive fair, prompt and full compensation. And any attorneys' fees would be limited.

No one suffers from our broken litigation system more than asbestos victims and their families. But the unfairness of the system is having a broader impact on our workers, our communities and the nation's economy. With 8,400 defendants, the economic repercussions are absolutely incredible. As governor of Michigan, I saw firsthand the economic impact of runaway asbestos litigation on many of our fine companies.

Since the start of the litigation, an astounding 730,000 asbestos claims have been filed. A large percentage of those claims were filed on behalf of people who are not sick and may never become ill. This wave of questionable asbestos claims has forced more than 70 companies into bankruptcy, half of them since 2000. According to Nobel Prize winning economist Joseph Stiglitz, about 60,000 jobs, many in the manufacturing sector have been permanently lost due to these bankruptcies. A lot of those were union jobs. That is why a number of major labor unions sent letters to Senators Frist and Daschle last year urging them to reach an agreement on legislation. This includes the United Auto Workers, International Union of Operating Engineers, United Brotherhood of Carpenters and Joiners of America, International Union of Glass Molders, Pottery, Plastics and Allied Workers, Seafarers International Union and others.

Dr. Stiglitz reported that due to the bankruptcies, workers and their families have lost $200 million in wages alone. But their job and income losses tell only part of the story. Communities are also affected as laid-off workers tighten spending or even move away in search of new jobs and bankrupt companies cut operations and reduce purchases. This has a significant impact on a wide range of local businesses. In fact, it is estimated that for every 10 jobs lost to an asbestos bankruptcy, a community will lose as many as 8 more jobs.

Bankruptcies also decimate workers' retirement savings. Dr. Stiglitz estimated that on average, workers at bankrupt companies experienced a 25% decrease in the value of their 401(k)s. Let me give you a real life story of what this means. For 15 years, Drew Anders worked for a company and diligently contributed to his 401(k). That firm is an asbestos defendant and eventually filed for bankruptcy protection. Mr. Anders' savings, which at one

time totaled more than $50,000 in company stock, are now worth about $1,500. He can't count on that nest egg when he retires. There are thousands more stories out there like Drew Anders'.

These bankruptcies are a huge problem, but the asbestos litigation mess is also hurting thousands of other companies. This is exerting a tremendous drag on our economy. According to a study by Navigant Consulting, affected businesses pay an "asbestos litigation penalty" when raising capital, which increases the costs of borrowing. In some instances, it is impossible for these companies to raise capital to fund productive investments. Due to this penalty, Navigant estimated that failure to enact asbestos legislation could ultimately reduce economic growth by $2.4 billion per year, costing more than 30,000 jobs annually.

It is also important to note that many companies dragged into this litigation never even made or used asbestos. And they are not all large companies. Last week President Bush visited my home state and came out strongly for a legislative solution. Bruce McFee, the owner of a small business in Michigan that manufactures air compressors, joined the President. Mr. McFee, who employs about 100 workers, has been dragged into 53 lawsuits. Last Friday, he told the President, "We're being sued for things that we never made and we're being sued for things we never did." This is a perfect example of the madness of the broken asbestos litigation system.

So the record is clear. For the sake of the victims, for the sake of America's workers, for the sake of the economy, this Congress must pass fair and reasonable asbestos legislation that ensures that asbestos victims receive prompt and fair compensation, stops the bankruptcies and

eliminates the fraud and uncertainty for both victims and defendant companies inherent in the current system.

We strongly support the trust fund approach. Removing claims from the court system is the only way to solve all of these problems. It is also the only way to eliminate the enormous transaction costs. According to RAND, asbestos victims receive only 43 cents of every dollar spent on asbestos litigation, with the remainder going to transaction costs, such as legal fees. That is a grave injustice. The money must go to victims, not lawyers.

The draft bill represents a prodigious effort by Judge Becker and others over a period of 18 months to address many complex questions and to frame the issues for the committee. We have not yet absorbed all of the details in the new draft, but we do have some general comments.

First, the discussion draft does not address a central issue – funding. The maximum size of the national asbestos compensation fund must be $140 billion, the figure on which then-Minority Leader Daschle and Majority Leader Frist agreed last fall. The business community supported even this figure with considerable reluctance and at the cost of some support in our own ranks. We believe that $140 billion is more than enough to pay all qualifying claims at fair values. In fact, we believe that a bill funded at this level must include potential funding holidays or step-downs when the trust proves overfunded.

Equally importantly, the funding schedule must be reasonable. The business community supports Senator Frist's proposals, which would provide approximately $40 billion for the

program over the first 5 years. With the borrowing capacity built into the bill, the Administrator would have access to approximately $60 billion to pay the claims that are received at the "front end." That level will provide immediate relief to those victims who are the most sick and in the greatest need of having their claims resolved. For comparison, the RAND Institute puts the total cost of asbestos litigation in the tort system from the early 1970s through 2002, a period of over 30 years, at $70 billion. The funding schedule proposed by Senator Frist is reasonable, and, frankly, at the outer limit of what the business community can support.

Second, and an essential component of this legislation, an asbestos reform bill must completely shut down the broken asbestos tort system. The business community cannot agree to fund the administrative program at the levels that have been discussed and at the same time risk exposure to continued litigation in the tort system. We understand concerns that have been raised regarding the potential for delays in start-up and possible unfairness in terminating litigation that is already at an advanced stage. Senator Frist proposed in July to accelerate the implementation and funding of the program, and we think that is the right approach. We are pleased to see that the discussion draft adopts most of Senator Frist's suggestions.

But the discussion draft creates an extremely serious problem in attempting to address this small residual risk. Even with his or her best efforts, the Administrator may be set up for failure. The draft bill arranges a multibillion dollar bet. If the Administrator implements the program on time, then fine, all goes as planned. Otherwise, all pending cases (and even many new cases) will be permanently grand fathered and will proceed in the tort system, increasing the total cost of the program by tens of billions of dollars. This is true even if the Administrator

misses the deadline by a single day. Frankly, American industry cannot and will not play that game. The stakes are just too high.

Third, the bill must not be a smokers' compensation bill. Claims values for lung cancer claimants who are current or former smokers should reflect those claimants' smoking history. This is not only fair but essential to protect the fund against an avalanche of smokers' claims that have little to do with asbestos. We believe that the discussion draft's claims values for lung cancer in the smoker and former smoker categories generally reflect this principle, although we would prefer Senator Frist's values for Level VII cases.

Fourth, we believe that the bill must contain stronger provisions to lock the backdoor so trial lawyers don't just convert tens of thousands of unimpaired asbestos claims into silica claims. If that is allowed to happen, we will see the continuation of the asbestos litigation scandal under a new name. I say "under a new name" rather than "under new management," because the new silica litigation is being brought by the same lawyers who have created the asbestos scandal. As the *Wall Street Journal* reported, "asbestos attorneys are using the same legal machinery" to generate silica claims. One attorney was even brazen enough to tell the *Journal*, "why reinvent the wheel?" It is well-documented that this legal machinery includes mass screenings to recruit unimpaired claimants, fraudulent x-ray reports, and shameless forum shopping. When asbestos legislation first began moving forward a few years ago, silica claims skyrocketed. One company reports its silica claims tripled between 2002 and the first half of 2003 and increased 164 times over 1997. Defendants are concerned that millions of dollars of contributions to the asbestos compensation fund will merely result in the substitution of "silica"

for "asbestos" in thousands of complaints. We cannot allow silica to be turned into the next asbestos.

Make no mistake: Pure silica cases that involve impairment not related in any way to asbestos are not and should not be covered by the bill. But, we must prevent entrepreneurial lawyers from evading the bill by relabeling true asbestos claims as silica claims.

Finally, the business community is deeply concerned about the medical screening program included in the discussion draft. Under the bill, people who have been exposed to asbestos, but have no indication of any asbestos disease, would receive medical monitoring that is similar, if less frequent, than that received by Level I claimants. These people do not have any claims in court, and they have no right to compensation under state or federal law. Every penny that goes to this program is taken from the money available to compensate the sick. Without debating whether medical screening is a good or bad thing as such, it has no place whatever in a bill to substitute a privately funded administrative compensation solution for a ruinous and failed tort system.

Conclusion

We will continue reviewing the draft and provide additional feedback shortly. Your leadership on this issue and dedication to passing legislation are greatly appreciated. We look forward to working closely with you, members of the committee and other Senators to pass a bill that takes care of victims, stops the injustices of the current scandal-ridden system, provides certainty and finality to defendant companies and boosts the economy. Thank you.

John M. Engler is president of the National Association of Manufacturers (NAM), the largest industry trade group in America, representing small and large manufacturers in every industrial sector and in all 50 states. Engler became NAM president on Oct. 1, 2004.

As NAM president, Engler is committed to educating the public and policymakers that manufacturing is critical to our future as a nation. Under his leadership, the NAM Campaign for Growth and Manufacturing Renewal will advocate policies that seek to level the international playing field and reduce the cost of doing business at home, with special attention to high health care and litigation costs. The Campaign will continue to emphasize that manufacturers are driving innovation and productivity growth in the economy, providing the bulk of U.S. exports and offering rewarding careers for highly-skilled workers.

Engler has observed that excellent U.S. jobs often go unfilled because too many young people do not have the basic math, science and communications skills needed to succeed in modern manufacturing. He sees the looming shortage of skilled manufacturing employees as a real and growing threat to American competitiveness in the 21st century's high-tech global economy. Engler believes better educating the next generation of manufacturing workers is imperative. He is adamant that we must make innovation and quality as central to our educational system as it is to U.S. manufacturing.

The former three-term Michigan Governor brings to the NAM a lifelong commitment to reducing the size of government as a means to boosting economic growth and job creation. Engler insists that lower taxes on businesses and individuals, and reasonable and scientifically-based regulation, will create more wealth, improve standards of living for all income groups and best sustain America's vital middle class.

As Governor, Engler inherited a $1.8 billion state budget deficit and turned it into a $1.2 billion surplus. He signed 32 tax cuts into law -- saving Michigan taxpayers some $32 billion -- and helped create more than 800,000 new jobs during his tenure, taking Michigan's unemployment rate to its lowest level ever. Engler's environmental record in Michigan included creation of the Department of Environmental Quality, strengthening the Department of Natural Resources and elevating to cabinet level status the Office of the Great Lakes.

The top priority of Engler's administration was improving education, with a focus on high standards, more accountability and strengthened local control to help student test scores climb to record highs. During his tenure, more than 180 charter schools were set up and every Michigan child received a foundation grant to the school of his or her choice.

Prior to becoming Michigan's 46th Governor in 1991, Engler had served for 20 years in the State legislature, including seven years as State Senate Majority Leader. He was the youngest person ever elected to the Michigan State House of Representatives.

Born in Mt. Pleasant, Michigan, in 1948, Engler graduated from Michigan State University and later earned a law degree from Thomas M. Cooley Law School in Lansing. He serves on the boards of Northwest Airlines, Universal Forest Products and is a past chairman of the National Governors' Association. He and his wife Michelle are parents of triplet daughters born in 1994 -- Margaret, Hannah and Madeleine.

John can be reached at (202) 637-3106 or john.m.engler@nam.org.

Statement of Michael Forscey, on behalf of
The Association of Trial Lawyers of America
On "The Fairness in Asbestos Injury Resolution Act"
Before the
U.S. Senate Committee on the Judiciary
216 Senate Hart Building
January 11, 2005

My name is Michael Forscey. I am a partner in the Washington, D.C. law firm of Forscey and Stinson. I am appearing here today on behalf of the Association of Trial Lawyers of America (ATLA). I have represented ATLA in the discussions conducted by Judge Becker pertaining to the establishment of a trust fund to pay asbestos claims.

ATLA members represent the vast majority of the 500,000 existing victims who would lose – in unprecedented fashion -- their constitutional right to a jury trial and be required to navigate a new bureaucracy to obtain compensation for the asbestos-related injuries they have suffered. These victims have filed claims, in good faith under the prevailing law, for which they can expect substantial recovery in the courts. To radically change the rules governing how these claims are to be adjudicated now is inherently unfair. We therefore deeply appreciate your willingness to listen to our views and to include us in the discussions that this Committee has sponsored and that Judge Becker has facilitated over the past several months.

At the outset, let me say I believe that no organization or lawyer should oppose the theoretical possibility of a trust fund that would provide fair compensation, paid promptly, to the approximately million and a half of our fellow citizens who will develop

asbestos disease in the future. ATLA has always said it could support a fully funded trust fund that would guarantee payment to future victims.

We believe that Judge Becker's involvement in this negotiation has produced a number of improvements that have moved us closer to the goal of a fair resolution for victims. First, and foremost, the current draft brings us much closer to both the language and the intent of the sunset provisions, commonly referred to as the Biden Amendment, than does S. 2290. This sunset, as we see it, has always been a critical incentive to achieve guaranteed funding, not an excuse to avoid it. Second, Judge Becker's recognition that a 2% attorney fee is not adequate to ensure legal representation of claimants is also an improvement over earlier drafts. Third, Judge Becker's proposal to increase award values is another welcome improvement. Fourth, we believe that a medical screening and monitoring program, as Judge Becker included in his draft, is the least that Congress should provide to victims whose established right to compensation is being taken away. We believe this program should be fully funded. Finally, we appreciate the Judge's decision to remove a confusing provision that would have moved claims stayed by the trial courts back and forth between the tort system and the trust with no prospect of quick resolution.

Notwithstanding these positive steps forward, many of these improvements represent compromises, which go only part of the way toward correcting the flaws of S. 2290, which was itself a retreat from S. 1125, the bi-partisan Committee reported bill. We remain concerned that the inflexibility shown by some of the other stakeholders on

several key issues may need to lift if a balanced package is to be produced through a negotiated process.

It is important to remember that the public health crisis caused by asbestos is real and continues to grow. When asbestos legislation was first considered by the Judiciary Committee in the last Congress, many Senators had been led to believe that few workers were still getting sick from asbestos exposure. Recent evidence suggests the opposite.

Today, 4000 workers have mesothelioma, a fatal lung cancer who's only known cause is asbestos exposure. Each year, approximately 3000 more workers are diagnosed with mesothelioma. Additionally, according to the National Institute for Occupational Safety & Health, the incidence of asbestosis is also rising, whereas other occupational respiratory diseases are declining. All told, over 300,000 U.S. workers have died because of exposure to asbestos, and approximately 10,000 people each year die from asbestos related diseases. Epidemiologists expect these trends to continue for decades.

The money necessary fairly to compensate these victims for the harm willfully caused by asbestos manufacturers is obviously daunting. We believe the cost of compensating victims is clearly greater than $140 billion and could approach $200 billion. In the first five years, if all pending claims are forced through the Fund, at least $60 billion will be necessary. If borrowed funds are used to pay pending claims, as is currently envisioned, required interest payments on these funds will deplete the money available to pay benefits by as much as 25%. Unless legislative proposals include guarantees of funding at substantial levels, the proposed asbestos trust will fail.

Thus, while the draft circulated by Judge Becker includes several proposed changes that we support, the central issue of financing – who pays into the Fund and how much – is far from resolution. It seems unconscionable to move forward without a resolution to this issue that is grounded in sound claims estimates. We believe this issue has remained unresolved largely because manufacturer and insurers have insisted on artificial, low liability caps. Such caps render unreasonable a demand that all pending claims be forced into an administrative system that does not yet exist, and that will likely not be operational for 18 months even under the best of circumstances.

The demand that all pending claims be resolved by the trust fund is at the heart of many of the unresolved issues with which this Committee continues to struggle: up front funding, administrative gridlock and reversion to the tort system. Forcing the pending claims into the Fund also produces a substantial cost-shift, away from those with vast current liability to those with relatively few current claims. Manufacturers and insurers have objected to honoring many settlement agreements into which they have voluntarily entered -- agreements to pay specific sums to specific victims, which if honored would significantly reduce the up front funding needed for the bill and would greatly improve the fairness of the draft. Finally, these same defendants and insurers unfairly insist on forcing into the Fund even those cases that have produced a judgment and an award, forcing claimants to start anew if that judgment is appealable.

We are also concerned that the Department of Labor will not be able to process claims at the rate envisioned by the bill, likely making pending claimants wait years for compensation payments to begin. We know from experience with other government compensation programs that claims projections have historically been low. We also know that it is unrealistic to assume this program can be up and running and paying claims in 90 days. Substantial delays have plagued both the Black Lung Compensation program and the Energy Employees Occupational Illness Program Act. These two programs are only a fraction of the size of this trust, should it become law. The Committee must solicit the Department of Labor's views on whether it can do what is being asked of it as quickly as the bill requires. If the Department of Labor cannot get this program running in a matter of months, Congress should not, as a matter of fundamental fairness, include the pending claims in the trust.

In addition to our overarching concerns about the Fund, ATLA has some specific reservations about other provisions of the bill, which include, but are not limited to the following:

- **Subrogation** – We should revisit the subrogation provision, as it is unfair to any claimant with current workers' compensation payments. The Energy Employees Occupational Illness Compensation Program Act contains language barring any person from placing liens on awards. We believe this language should be included in asbestos legislation as well.
- **Mesothelioma Values** - While the claims values in the latest draft are an improvement over those included in S. 2290, we believe the claims value

for mesothelioma victims remains too low. We propose a 1.8 million dollar base award for mesothelioma victims – the average death benefit under the September 11th Fund. Moreover, we continue to believe that awards should be adjusted upwards based on a victim's age and number of dependants.

- **Transparency** - Transparency is a hallmark of public programs. The Fund will relieve defendants and insurers of substantial asbestos liability. Congress and the public have a fundamental right to know – before a fund is enacted, not afterwards - which companies would gain from this action.
- **Mixed Dust Cases** - There is no evidence that mixed dust cases burden the courts, are not fairly resolved, or require federal intervention. This legislation should not address these cases.

Past federal compensation programs have been designed to provide a benefit to victims of harm when the courts have failed to do so. Never before has Congress adopted a compensation program that takes away from victims an established right to obtain compensation in the courts. As we move forward, let us not lose sight of the fact that preserving the right to full and fair compensation for victims, their wives, husbands and children must remain the driving force for any asbestos legislation.

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January 10, 2005

The Honorable Patrick Leahy
The United States Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 20510

RE: Fairness in Asbestos Resolution Act of 2005

Dear Senator Leahy:

Thank you for permitting me to comment concerning the Fairness in Asbestos Resolution Act of 2005. I am the co-author of a national treatise, *Modern Workers Compensation Law* (West/Thompson) and the current and past editions of the NJ State treatise, *Workers' Compensation Law* (West/Thompson). For over 30 years I have actively represented asbestos victims primarily in workers' compensation proceedings throughout the country. My experience has permitted me to become uniquely familiar with subrogation issues involving asbestos litigation claims.

I am very concerned that the proposed legislation will create massive inequities in the current compensation system, will generate havoc and chaos with the presently functioning workers' compensation systems through out the country and will ultimately place a greater burden upon the Federal Medicare system. The proposed legislation will encourage forum shopping in workers' compensation actions and circumvention of the traditional compensation payment process to avoid payments that would be potentially subject to subrogation.

The State workers' compensation programs were enacted almost 100 years ago as remedial social legislation. They function as an efficient and effective method of providing benefits to injured workers in an expeditious fashion by use of an administrative process as an alternative to civil litigation. If the Fairness in Asbestos Resolution Act of 2005 were enacted with the proposed subrogation provisions claimants would be encouraged not to file a State workers' compensation claim and instead merely file a claim solely against the Federal Asbestos Injury Resolution Fund. This would shift the economic burden from the employers and their workers' compensation insurers in those jurisdictions. Since the cost of workers' compensation insurance is based on wages in effect at the time of employment, the insurance premiums for employees exposed to a substance such as asbestos with a disease latency of 30 or years, would have

been paid by employers to insurance carriers and may never be used to pay claims. Workers' compensation insurance carriers are in most cases not the same carriers who insure 3rd party defendants. Such activities will result in a degradation of the workers' compensation program by shift liability to those who were not primarily responsible for providing workers' compensation coverage including Medicare and Social Security. If State workers' compensation systems no longer pay workers for their lost wages and medical bills, Social Security and Medicare will likely do so, creating an additional economic burden on those programs. Medicare is acutely sensitive to reimbursement issues and is presently aggressively and successfully seeking reimbursement of conditional payments from Workers' Compensation insurance carriers for post enactment exposures under the Medicare Secondary Payment Act. A recent report revealed that Medicare is already covering $23 Billion in medical costs that should be paid by the workers' compensation system.[1]

The proposed subrogation provisions will create geographically imposed financial inequities since all State workers' compensation systems do not mandate liens and offsets of liability awards from workers' in a uniform fashion. While some State systems provide that an injured worker is required to reimburse the 3rd party defendant (ultimate wrongdoer) others do not. In some States there is no lien for sums paid pursuant to a workers' compensation resolution and in other States a lien exists only for compensation, medical, surgical or hospitalization benefits paid by the workers' compensation carrier. Additionally, the State workers' compensation systems differ on whether reimbursement includes the amount of the costs and expenses incurred in the prosecution of the 3rd party claim.

The State workers' compensation programs differ on what benefits if any are subject to subrogation from recovered benefits in workers' compensation dependency actions. In most jurisdictions benefits awarded in a workers' compensation dependency claim are not subject to reimbursement to the workers' compensation carrier if there is a 3rd party award or settlement. Furthermore, what constitutes dependency status in a workers' compensation claim differs statutorily in each State jurisdiction. Each State has its own eligibility criteria, period of payment and amount of payment for dependency benefits.

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[1] JP Leigh & JA Robins, "Occupational Disease and Workers' Compensation: Coverage, Costs, and Consequences", *Milbank Quarterly*, Vol. 82 (2004), JL Gelman, "Social Security Seeks to Workers' Compensation Subsidy," *166 NJLJ* 501 (November 5, 2001)

What constitutes an award due to asbestos exposure in a workers' compensation action differs from jurisdiction to jurisdiction. Each jurisdiction has different definitions of disease, eligibility criteria and disease factors in imposing workers' compensation liability. In many jurisdictions workers' compensation disability is awarded for pulmonary and internal residuals, including malignant conditions, and the awards are not separated as to specific industrial causation since the industrial environment where the worker was exposed contained many toxic substances and the resulting disease process occurred as a result of the synergistic effect of the exposure to many toxic substances over a long exposure and latency period. In some jurisdictions traditional factors are taken into consideration including tobacco exposure and in others pre-existing diseases may be discounted in reaching the ultimate compensation resolution. Further disparity exists in the apportionment of responsibility, statute of limitation issues, and, payment rates.

The priority of payment and reimbursement benefits to workers' compensation insurance carriers from 3rd party defendant recoveries differs from jurisdiction to jurisdiction. In some jurisdictions benefits are paid by workers' compensation insurance carriers, some are paid by self-insured employers and some are paid by pooled insurance funds. Workers' compensation insurance is usually sold based upon experience rating of specific industries and, based upon the wages in effect at the time of employment and retroactively assessed after the policy period. The priority of reimbursement is not uniform in each jurisdiction where subrogation is now mandated. This is consistency is partially based upon the fact that the periods of payment vary in each jurisdiction.

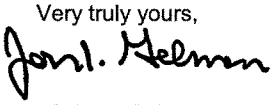
The mechanisms for distribution of benefits in the workers' compensation arena vary by jurisdiction. The proposed law will generate great inconsistency in reimbursement since the State laws vary so greatly on what is in fact subject to a lien. In some instances court approved judgments and orders approving settlements are utilized and in others options are available for the payment of lump sum benefits that are not consider traditional workers' compensation payments. In many of the lump sum resolutions the payment is not deemed to be a payment of workers' compensation benefits except for insurance purposes only and therefore are not subject to subrogation liens by the ultimate wrongdoer. In some jurisdictions the subrogation reimbursement can be avoid entirely by the dismissal of the workers' compensation action and the subsequent payment through the release and dismissal of the appeal. Some workers' compensation statutes provide that a workers' compensation award paid pursuant to a lump sum

JON L. GELMAN
ATTORNEY AT LAW

payment my not be lienable and not subject to subrogation by a 3rd party defendant in a civil action since the payment is not considered a payment of workers' compensation benefits. A similar result will occur when a matter is settled for a lump sum through a release and dismissal of a right to an appeal in the workers' compensation action. Furthermore, some jurisdictions permit lump sum payments to be paid to injured workers for unauthorized medical treatment which are also not considered to be payments of workers' compensation benefits.

The potential adverse consequence of enacting this legislation is enormous. In its present form, by allowing subrogation of workers' compensation claims, the proposed legislation would cause major inconsistencies and inequities in the delivery of State workers' compensation benefits to asbestos victims. In many instances it would eliminate the incentive of filing State workers' compensation claims and it would shift and generate additional economic burdens upon the Federal benefit system by impairing Medicare's ability to recoup conditional medical payments from responsible workers' compensation insurers and the Social Security Administration's ability to off-set benefits workers' compensation awards.

Very truly yours,



JON L. GELMAN

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STATEMENT OF SENATOR EDWARD M. KENNEDY
ON ASBESTOS LEGISLATION
January 11, 2005

All of us believe that the current system for compensating asbestos victims is not working well and that legislation creating a fairer, more effective process is needed.

Senator Specter, Senator Leahy and Judge Becker have each devoted an enormous amount of time and effort to the goal of achieving consensus legislation on this extremely complex issue, and I commend them for it. There has been a willingness to listen to the concerns of injured victims, and involve their representatives in a serious dialogue. The openness and inclusiveness of the process is appreciated. The working draft which Judge Becker has presented shows significant improvement over the Frist bill from last year. But, it still leaves a number of serious concerns unaddressed.

I urge the Chairman to continue the process, even though finding consensus is taking longer than many of us had hoped. On an issue of this importance and complexity, a consensus bill supported by all of the key stakeholders is the only way to pass legislation through the Senate. Labor as well as business, victims' advocates as well as insurance companies, must believe that they have been treated fairly if legislation is to be successfully enacted into law.

As we go about our task, it is important to remember that the real crisis which confronts us is not an "asbestos litigation crisis," it is an asbestos-induced disease crisis. Asbestos is the most lethal substance ever widely used in the workplace. Between 1940 and 1980, there were 27.5 million workers in this country who were exposed to asbestos on the job, and nearly 19 million of them had high levels of exposure over long periods of time. That exposure changed many of their lives. Each year, more than 10,000 of them die from lung cancers and other diseases caused by asbestos. Each year, hundreds of thousands of them suffer

from lung conditions which make breathing so difficult that they cannot engage in the routine activities of daily life. Even more become unemployable due to their medical condition. And, because of the long latency period of these diseases, all of them live with fear of a premature death due to asbestos-induced disease. These are the real victims. They deserve to be the first and foremost focus of our concern.

All too often, the tragedy these workers and their families are enduring becomes lost in a complex debate about the economic impact of asbestos litigation. We cannot allow that to happen. The litigation did not create these costs. Exposure to asbestos created them. They are the costs of medical care, the lost wages of incapacitated workers, and the cost of providing for the families of workers who died years before their time. Those costs are real. No legislative proposal can make them disappear. All legislation can do is shift those costs from one party to another.

Any proposal which would have the effect of shifting more of the financial burden onto the backs of injured workers is unacceptable to me, and I would hope that it would be unacceptable to every one of us. The key test of any legislative proposal on asbestos claims is whether, by reducing transaction costs, it will put more money into the pockets of seriously injured workers and their families than they are receiving under the current system. That should be our goal.

I believe that a properly designed trust fund to compensate workers suffering with asbestos-induced disease can move us toward that goal. To do so, it must use inclusive medical criteria which cover all workers who have sustained real injuries, it must provide fair levels of compensation for all workers who have been injured – particularly those who have been most seriously injured, and it must guarantee that all injured workers who qualify will receive full compensation on a timely basis. The legislation before us still does not fully meet these standards.

The proposed Trust Fund still does not provide adequate levels of compensation for those victims who are suffering from the most severe, life-threatening impairments. Nor should the legislation allow that compensation to be further diminished by subrogation or collateral claims. The level of compensation proposed for lung cancer victims is particularly unfair. It ignores the gravity of their medical condition and the strong probability that asbestos was a contributing cause.

There are still serious unresolved issues about the capacity of the Trust Fund to fully compensate injured workers in a timely manner. Any proposal which would merely create one new large underfunded trust in place of the many smaller underfunded bankruptcy trusts which exist today is obviously unacceptable. Injured workers need certainty even more than business and insurers.

These are fundamental concerns which still need to be addressed. I sincerely hope that, in the weeks ahead, this Committee can produce legislation which does address them in a fair and just manner.

Written Statement of

Mary Lou Keener

Before the

United States Senate

Committee on the Judiciary

" The Fairness in Asbestos Injury Resolution Act"

January 11, 2005

Chairman Specter, Ranking Member Leahy, Members of the Committee, my name is Mary Lou Keener, and as a Navy Vietnam Veteran and the daughter of a wonderful father whose life was shortened by asbestos-related disease, I am honored to have this opportunity to offer testimony to the Senate Judiciary Committee on the very important issue of asbestos litigation reform. My personal experience in dealing with the asbestos-related death of my father was not an easy one. It is my hope that by sharing this experience with you, the importance of your efforts to establish an asbestos injury compensation fund will become apparent.

My father was also a Navy veteran. During World War II he served as a machinist mate in engine rooms aboard the USS Mayrant, Lindsey, and Columbus. Both the USS Mayrant and Lindsey were "hit" and the engine rooms blown up. My dad spent many months aboard these ships "riding" them back to port and/or working repairs on them in a shipyard. It is well documented that all three of these ships contained significant amounts of asbestos, and there is no question regarding his exposure. On Veterans Day 2001, he died a quick but painful death from mesothelioma. Asbestos is the only known cause of mesothelioma. It is the most severe of asbestos related diseases and there is no known cure.

My dad was lucky to have a daughter who is a nurse, a lawyer, and a veteran to help him and my mom navigate all the health, regulatory, and legal systems we had to deal with. I was able to bring them to the National Cancer Institute, at the National Institutes of Health in Washington, D.C. where he received a definitive diagnosis of mesothelioma and the best care available. After his death, I was able to help my mom receive Dependent Indemnity Compensation from the Department of Veterans Affairs for a service connected death. And finally, I helped my mom find an asbestos plaintiff's law firm to file her tort and wrongful death claims.

Unfortunately, her legal claims have been languishing in the courts for almost three years now. There are few viable defendants in these cases because most companies that supplied asbestos to the Navy are no longer in existence or are bankrupt. The courts are clogged with asbestos cases, and even if she finally has her day in court, the law firm will collect almost half of any jury award. That's why a trust fund solution is so important – the court system just doesn't work for lots of asbestos victims. A trust fund solution to this problem, if designed properly, will bring much needed compensation to veterans suffering from asbestos related diseases and end the vagaries and lengthy delays of the current tort/wrongful death systems.

One of the most tragic facts about asbestos-related injuries is that U.S. veterans, as a population, were disproportionately exposed and are now, therefore, disproportionately suffering from the disease and the inability to secure appropriate compensation through the judicial system. Let me explain.

During and after World War II, asbestos use greatly expanded in the military

as the asbestos products were specified for use on U.S. Navy ships. This caused hundreds of thousands of workers and sailors to be unknowingly exposed to dangerous asbestos dust. As a result, many of these men and women in our armed forces are contracting an asbestos-related disease decades later.

It was not until the 1970's that the U.S. Government began to regulate asbestos use ... too late for the thousands of veterans who became afflicted with asbestosis, lung cancer, and mesothelioma as a result of their exposure.

The wide variety of occupations of the victims of asbestos disease proves that no one was immune – even family members have been afflicted. Although fire and engine rooms were most commonly associated with asbestos disease, no place aboard Navy ships was safe, including sleeping quarters, mess halls, and navigation rooms, due to asbestos in pipes. Thousands were exposed to asbestos while working at shipyards and dry docks.

Unfortunately, veterans have limited avenues to seek compensation for illnesses caused by their asbestos exposure. This is so because the Federal government was their "employer," and their ability to recover from the government is restricted by law. Adding to the recovery difficulty is the fact that many asbestos suppliers to the Federal government have largely gone bankrupt, often providing only pennies on the dollar to victims of asbestos exposure, if anything at all.

A November 2003 *Wall Street Journal* article reported that claims from individuals exposed in military and shipyard construction accounted for 26% of all mesothelioma cases, 16% of all other lung-cancer cases, and 13% of all disabling lung-disease cases.

The Department of Veterans Affairs continues to receive claims for benefits

from veterans for illnesses related to asbestos exposure while serving in the military; however, due to the difficulty of proof, less than one-third of the known VA asbestos claimants receive service connected compensation for their asbestos disease.

The status quo is unfair and inequitable. For my family, and for the many asbestos victims in the veterans community, it is absolutely unacceptable. A solution must be found and it must be expeditiously implemented.

I understand that Chairman Specter is working on revisions of the Fairness in Asbestos Injury Resolution Act that was proposed in the 108th Congress, first as S. 1125 and later as S. 2290. S. 2290 is a very good starting point for the Chairman's efforts. In fact, I would urge Congress to enact legislation that looks very much like last year's S. 2290.

The trust fund proposal envisioned by S. 2290 and, as I understand it, the new proposal being drafted by Chairman Specter, would provide many advantages for veterans over the current tort system.

First, S. 2290 preempted all claims for asbestos-related injuries except claims brought under Workers' Compensation and Veterans' Benefits Programs and thus would keep intact the benefits currently available to Veterans if they choose to pursue these benefits.

Second, in the tort system, payments received by an individual from Veterans' Benefits Programs may be reduced from any recovery by a defendant, known as the "collateral source" rule. Although S. 2290 required reductions for recoveries from collateral sources, the requirement excluded any recoveries under Veterans' Benefits Programs.

Third, S. 2290 applied to exposures to U.S. citizens occurring on U.S. owned ships and occurring overseas while working for U.S. entities.

Fourth, S. 2290 recognized that military exposures occurring prior to 1976 were more significant than those exposures occurring after 1976, especially for employees working at shipyards during World War II. As such, S. 2290 reduced the exposure requirements for these types of exposures by weighting them more heavily.

Fifth, under S. 2290, claimants could have included family members of the victim, allowing spouses or children to recover in place of the victim.

Sixth, because S. 2290 contemplated a no-fault system, the evidentiary burden on the claimant would have been reduced. Unlike Veterans' Benefits, there would be no "service-related" requirement, easing the burden of proof on those individuals who were exposed while in the military and while employed as a civilian.

And, seventh, S. 2290 would have provided $1 million from the fund for each of fiscal years 2004 through 2008 for up to 10 mesothelioma disease research and treatment centers. The bill required that the centers be geographically distributed throughout the U.S. and closely associated with Department of Veterans Affairs medical centers, to provide research benefits and care to veterans who've suffered excessively from mesothelioma.

For these and many other reasons, I am proud to join with my many friends in the veterans' community in supporting a trust fund resolution to the asbestos-related injury litigation crisis, including the Veterans of Foreign Wars of the United

States, the Non-Commissioned Officers Association, the Military Order of the Purple Heart, the Jewish War Veterans, the National Association for Black Veterans, the Paralyzed Veterans of America, the National Association for Uniformed Services, the Veterans of the Vietnam War, Inc., the Pearl Harbor Survivors Association, the Women in Military Service for America, the Marine Corp League Fleet Reserve Association, the Military Officers Association of America, the Blinded Veterans Association, the American Ex-Prisoners of War, the Retired Enlisted Association, the Arkansas Veterans' Coalition, the Florida Veterans of Foreign Wars, the Louisiana Veterans of Foreign Wars, the Texas Veterans of Foreign Wars, the West Virginia Veterans of Foreign Wars, the West Virginia American Legion, and the National Association of State Directors of Veterans Affairs, all of whom have come out in support of a trust fund solution to this troubling crisis.

Thank you for listening and I look forward to working with the Committee in the weeks and months ahead to enact this critical and much needed relief for veterans and other deserving asbestos victims.

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing On
"The Fairness In Asbestos Injury Resolution Act"
January 11, 2005

I commend Chairman Specter for holding this hearing on asbestos legislation. My message today is a simple one: We must see our efforts through until we have a balanced and effective national trust fund that fairly compensates victims of asbestos-related disease. In order to reach that goal, we must continue to work with the various stakeholders and Senators on both sides of the aisle until we settle the outstanding details on a fair resolution for all concerned.

Back in September 2002 I chaired the first Senate Judiciary Committee hearing on asbestos litigation. Since that time I am pleased that we have made real progress in finding common ground around a national trust fund, despite some fits and starts along the way.

In the last Congress, we painstakingly built two of the four pillars of a successful trust fund: appropriate medical standards to determine who should receive quick compensation, and an efficient, expedited system for processing claims. With the unanimous adoption of the Leahy-Hatch medical criteria amendment, this committee reached consensus on the proper standards for determining legitimate victims. Meanwhile, Senator Specter and Judge Becker, working hand-in-hand with the stakeholders, achieved consensus on the framework for a no-fault administrative system to be housed at the Department of Labor.

We have yet to reach consensus on the other two pillars of a successful trust fund -- fair award values for asbestos victims, and adequate funding to pay for the victims' claims. If the award values are too low or subject to liens that reduce or exhaust any recovery for victims, the bill will be inherently unfair and unworthy of our support. There are about 600,000 legal cases currently pending in the system, making it critical to have adequate funding at the inception of a national trust fund. Direct contributions from defendants and insurers and borrowing authority will be necessary to accommodate the inevitable, which is thousands of these pending claims coming in on the very first day of the trust fund.

The negotiations between Senator Frist and Senator Daschle in the waning days of the last Congress narrowed the differences on many compensation and funding provisions.

Now we need to build on that progress with all the stakeholders to resolve these remaining critical and connected issues. Our undertaking is challenging and unprecedented. It will not be easy to hammer out the details necessary for enacting a bipartisan bill into law. But the stakes are too high, and too much progress has already been accomplished, for us to leave the field before trying our utmost to complete this difficult task.

Creating a fair national trust fund to compensate asbestos victims is one of the most complex legislative undertakings I have been involved with in my 30 years in the Senate. The interrelated aspects necessary for a fair national trust fund are like a Rubik's Cube, and that is all the more reason why we need a consensus solution, translated into legislation.

For Congress to enact reforms this year, all the stakeholders will have to be willing to work with open minds toward a realistic and reasonable national trust fund. It cannot be a stacked trust fund approach that attempts to shoot the moon for one side or the other. To succeed, it must be a balanced piece of legislation.

My two grandfathers worked as stonecutters in the granite quarries of Vermont. They both suffered from silicosis because of their workplace exposures to stone dust. One of my grandfathers died at the age of 35 because of the disease. Thinking of them, and of the hundreds of thousands of present and future asbestos victims, I want to make every effort to enact a fair and balanced national trust fund, and I commend and encourage all who are working in good faith to help do that.

Acting together is the best way to move a bipartisan bill through the legislative process and into law. There remain a number of important issues on which we need to find common ground, and by working together we stand the best chance of success.

I thank Chairman Specter, Judge Becker and the representatives from organized labor, the trial bar, and industry who have worked so hard to try to reach consensus on a national trust fund. Now is the time to renew and redouble our efforts and to seize this opportunity to enact a fair and balanced bill.

I look forward to continuing to work with Chairman Specter, Judge Becker, the stakeholders, and Senators on both sides of the aisle to do the hard work necessary for us to craft the bipartisan solutions necessary to enact an effective trust fund to fairly compensate asbestos victims.

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UNITED STATES SENATE JUDICIARY COMMITTEE
Hearing Regarding:
The Fairness in Asbestos Injury Resolution Act

Linda Reinstein
Executive Director and Co-founder
Asbestos Disease Awareness Organization
January 11, 2005

My name is Linda Reinstein, Executive Director of the Asbestos Disease Awareness Organization. My husband has mesothelioma and we have an 11-year-old daughter. I am neither a lobbyist nor an attorney, only a volunteer.

On behalf of the Asbestos Disease Awareness Organization (ADAO), I represent thousand of victims and their families around the world who have become sick or died as a result of exposure to asbestos.

As President Bush mentioned, "The volume of asbestos lawsuits is beyond the capacity of our courts to handle, and it is growing. More than 100,000 new asbestos claims were filed last year alone." But we need a solution that takes into account the voice of the victims and puts their rights first.

- Asbestos is a public-health crisis not a bankruptcy crisis. The U.S. alone loses 30 lives every single day, and the numbers are estimated to be five times higher if victims were diagnosed correctly.
- Asbestos exposure is responsible for one in every 125 deaths of men over the age of 50.
- Asbestos has not been banned in the United States.
- Asbestos is the largest single cause of occupational cancer in the United States.

Presently, ADAO is opposed to the bill for the following reasons.

- Our Medical Advisory Board strongly objects to the outdated and incorrect medical criteria in this bill describing the symptoms, diagnosis and severity of asbestos related diseases. Any piece of legislation should follow the established American Thoracic Society guidelines to diagnose and treat asbestos related diseases.
- Inordinate compensation delays and ineligibility for the victims.
- Inadequate funding for not only research, but education, prevention and outreach.

The collapse of the World Trade Center towers led to the release of hundreds of tons of asbestos from the towers. Many rescue workers have been diagnosed with deceased respiratory function and some New Yorkers are already suffering from the 911 cough.

Asbestos diseases can take twice as long to appear as the fund is designed to last. That leaves millions of Americans exposed to asbestos with a fund that is destined to become insolvent.

And now, younger victims are dying from diseases. Recently, a 9-year-old child was diagnosed with mesothelioma and died 3 years later. Victims of asbestos related diseases are completely

innocent. They are firefighters and veterans, construction workers and engineers. They are the women who became exposed washing their husbands' work clothes.

Before we talk about tort reform, it's important to understand the dangers of asbestos exposure and often deadly asbestos related diseases. Companies have known for more than fifty years that asbestos exposure can cause disease -- painful, incurable and often terminal diseases. Corporations and insurers are not the victims, we are.

Documents prove, many asbestos manufacturers willingly withheld information about asbestos hazards and continued to expose their workers and their customers to this dangerous substance. Honest and innocent workers and consumers suffering from asbestos related diseases are paying the ultimate price for what companies that knew and did not disclose -- their lives.

The Rand Institute for Civil Justice estimates 600,000 pending asbestos claims may be processed through the asbestos trust fund, even the best attempts to immediately compensated victims claims will be unsuccessful. Cases are stalling in the courts pending possibly future legislation. Victims are concerned about an avalanche of an estimated 600,000 claims will overwhelm the trust fund system; 911 rescue workers, resident and employees are worried the fund will be insolvent when they tragically need to file a claim.

Once again, sick and dying victims will be at the mercy of bureaucracy and receive more aggravation than compensation. Wasting time establishing a fund and processing claims will cost more victims precious time and impact their ability to pay for medication, treatment and prescriptions.

When deadly asbestos fibers are inhaled or swallowed, the damage is permanent and irreversible. These fibers can cause mesothelioma, asbestosis, lung cancer and pleural diseases and take 10 to 50 years before they appear. Fighting asbestos related diseases is a tough and painful battle, and innocent victims never win. To the victims and their families, these diseases are physically, emotionally and financially devastating.

We are not principally opposed to a trust fund. But it makes good business sense to design a fair and balanced fund that provides speedy compensation and adequate funding for research, education and outreach. Give the victims the right to choose the fund or a trial. Citizens need to make certain before they give up their right to a trial, that a national trust fund has sufficient funding for the future.

For many of us, it's too late, but it's not too late for Congress to write fair and just legislation for the victims of today and the future.

The Asbestos Disease Awareness Organization (ADAO), a volunteer victim-to-victim organization, is committed to asbestos disease awareness, education, prevention, research and fair asbestos legislation.

STATEMENT OF

JEFFREY D. ROBINSON, ESQUIRE

ON BEHALF OF

EQUITAS REINSURANCE LIMITED AND EQUITAS LIMITED

BEFORE
THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ASBESTOS LITIGATION REFORM
"FAIR" ACT OF 2005

JANUARY 11, 2005

Mr. Chairman, Senator Leahy, Members of the Committee, my name is Jeffrey Robinson and I am with the law firm Baach Robinson & Lewis. I am here today on behalf of Equitas Reinsurance Limited and Equitas Limited, English companies, which together reinsure all (non-life) direct and reinsurance liabilities of pre-1993 Lloyd's Names, including liabilities on claims for asbestos-related injuries.

I wish to begin by expressing our appreciation to the Chairman, Senator Leahy, former Chairman Hatch, and the other members of the Committee who have worked so hard during the past two Congresses to address the issue of asbestos litigation reform. Without that difficult and intense work, we would not be here today with the opportunity to enact historic legislation that could resolve one of the most significant problems ever to face our national court system. I would also like to thank Judge Becker for his work during the last two years to help the stakeholders forge agreements that may lead to effective legislation.

Mr. Chairman, as you know, we have been active participants in Judge Becker's meetings. Without his skill, experience and commitment to bringing about fair and effective legislation, I do not believe we would be as close to a solution as we are. While there is additional work required to achieve legislation that is truly fair and effective, my remarks are in no manner intended to denigrate Judge Becker's unprecedented efforts. Rather, my comments are meant to highlight a number of serious, but correctable, flaws that keep the legislation as proposed from being either fair or effective.

Many years ago Equitas recognized that the tremendous growth in claims from unimpaired individuals threatened to overwhelm the ability of the existing tort system to compensate those who were truly injured by exposure to asbestos. This flood of claims also threatened the financial viability of numerous defendant companies and their insurers. Equitas has done what it can as a single company to resist claims from the unimpaired and has had some success in this regard. It has become obvious, however, that no single company, or group of companies, can solve this problem through their own actions. A legislative solution is required.

Equitas actively supports efforts to obtain a comprehensive legislative reform of the asbestos litigation system. We have not been wedded to a particular approach and do not insist upon particular provisions in legislation. What we have always asked is that any legislation be effective in addressing the abuses in the current system and fair to all the participants – claimants, defendants and insurers. Unfortunately, various provisions in the current discussion draft render it ineffective and unfair.

My comments today are focused on Title II, Subtitle B – Asbestos Insurers Commission. Insurers are expected to provide upwards of $46 Billion in funding for the proposed trust fund. It should be noted that the $46 Billion figure was reached almost two years ago. Equitas, like others in the insurance industry, has spent considerable amounts resolving claims during that period significantly reducing our future liabilities for asbestos claims. Despite repeated promises to do so, insurers have not presented a formula specifying how contributions would

be calculated that could be set forth in the statute. As a result, the Asbestos Insurers Commission will be charged with the critical task of ensuring that the insurers' contribution is collected and allocated amongst the various insurers and reinsurers who will be participants. As you might imagine, Equitas is keenly aware of the importance of this process, since some of the allocations prepared before the significant expenditures during the last two years showed Equitas making one of, if not the, largest contributions to the fund. Despite its critical function, the current discussion draft handcuffs the Commission, severely limiting its ability to obtain the required amounts through a fair process.

Independent and Impartial Commission

First and foremost, the discussion draft does not ensure that the members of the Commission will be free of actual or perceived conflicts of interest when they perform their sensitive task of allocating contributions amongst insurer participants. As currently designed, an officer or employee of an insurer participant could leave his or her job one day and the next be in charge of allocating billions of dollars among his/her former employer and its competitors. While it may be acceptable in some circumstances for a former employee of a party to sit in judgment on matters of interest to that party, where the matter involves an allocation of enormous financial liabilities amongst the former employee's principal and its competitors, it is patently unacceptable, with or without disclosure.

The Commission members should be subject to no less of a test than are judges who would clearly be required to recuse themselves from deciding a case

of this magnitude involving their former employer. The appearance of impropriety would compel it. Imagine the consternation and mistrust you would feel if you learned that your company had been assessed a billion dollars more than you anticipated by a commission led by the former CEO of your major competitor. No one would accept such a result from a court, and it should not be accepted here.

Such a restriction would not place an undue burden on the President's ability to secure highly qualified Commission members. There are numerous candidates with backgrounds as actuaries, accountants, auditors, insurance regulators, and academics with the appropriate skills who would be impartial. There is simply no need to select members from the ranks of former employees whose natural allegiance will be, or will be seen to be, with specific insurers.

Voluntary Agreements Depriving the Commission of Jurisdiction

The discussion draft contains a provision allowing groups of insurers and reinsurers to circumvent the work of the Commission and shield themselves from the Commission's review by concluding private agreements regarding allocation. Remarkably, the provision provides that all of the authority of the Commission terminates with respect to insurers who are parties to such an agreement. This provision should be rejected on multiple grounds.

The provision undermines the entire role of the Commission. If an independent commission applying a fair and transparent methodology to determining insurer shares is an appropriate and important exercise, it is appropriate for all participants. Agreements among groups of insurers as to how

shares should be subdivided must be scrutinized under the same criteria applicable to all. In setting overall shares, private agreements among groups of insurers are calculated to keep the Commission from examining carefully the individual reserves and future exposures of those included in the agreement. If some insurers can reach an agreement amongst themselves regarding allocation, they should present it to the Commission and argue its merits. The Commission should be free to reach an independent judgment on the merits of the agreement and not be bound to rubber stamp it and terminate all its authority over the participants.

Second, this provision is discriminatory because it permits domestic and foreign insurers and reinsurers to form alliances to enter into such agreements but inexplicably precludes run off entities, such as Equitas, from participating.

Blatant Discrimination Against Equitas

Equitas is particularly concerned about a provision targeted only at it, that would deny the Commission the ability to grant Equitas meaningful financial hardship or exceptional circumstances adjustments, adjustments that could be granted to all other insurers and reinsurers. Under the terms of the bill, insurers and reinsurers can obtain an adjustment that reduces their payment obligation to the Fund if payment without such adjustment would threaten their solvency, be exceptionally inequitable, or fail to account for other payments the insurer was required to make. To keep the Fund whole in the event of such an adjustment, the amount of the adjustment must be paid into the Fund by the remaining insurer contributors based on their proportionate shares of payment to the Fund.

Although the bill allows Equitas to receive an adjustment, it then discriminates against Equitas by applying to it (and to no other insurer participant) a provision that would nullify any such adjustment. The provision requires the parties reinsured by Equitas to make payment to the Fund in the amount of any adjustment granted to Equitas.

This provision could lead to the following absurd situation. The Commission determines that the formula it has adopted substantially overcharges Equitas because Equitas would face fewer liabilities in the existing tort system because of actions it has taken to reduce its future liabilities. The Commission then grants an adjustment to Equitas, but the parties who Equitas reinsures are required to pay to the Fund the adjusted amounts even though it has been determined to be inequitable.

Similarly, this provision leaves Equitas as the only contributor to the fund, defendant company or insurer, that could not obtain meaningful relief from an assessment that created a risk to its solvency. It makes no sense to prohibit the Commission from acting to meaningfully address a legislatively created solvency risk when (1) a major reason for enacting legislation is to address insolvencies caused by the existing system and (2) the insolvency of a major contributor could threaten the viability of the trust fund.

It is simply wrong to treat one identified participant different from all others. Wrongness contributed to by the fact that this provision appears to be the result of an attempt by some insurers and reinsurers to use this legislation to achieve a competitive advantage. It is also foolhardy, since such discriminatory

provisions may make it impossible for Equitas to make its substantial contribution to the fund.

I would add that such a provision also might be contrary to the obligations of the United States under the General Agreement on Trade in Services ("GATS"). Specifically, GATS requires member countries in the World Trade Organization ("WTO") to provide "national treatment" to service suppliers of other member countries no less favorable than that afforded their own service suppliers. Treatment is considered less favorable if it modifies the conditions of competition in favor of service suppliers of a WTO member country compared to service suppliers of any other member country. The United States and the United Kingdom are WTO member countries. By protecting the solvency of all U.S. insurers and reinsurers while denying such protection to a British reinsurer, this provision in the draft bill would appear to violate the national treatment requirement of GATS.

In conclusion, Mr. Chairman, we applaud you for taking up the critical but difficult issue of asbestos litigation reform. The discussion draft presented represents an important next step in this process, but it is a step hindered by correctable error. Truly meaningful reform requires legislation that is both effective and fair. Absent steps to address these identified failings in the Asbestos Insurers Commission, this legislation will be neither effective nor fair. Taking these steps will go a long way towards creating legislation that can resolve the asbestos litigation crisis facing the nation.

On behalf of Equitas, we pledge our continued cooperation with the Committee in formulating an effective and fair reform of the asbestos litigation crises.

Thank you for inviting me to speak here today.

Testimony of Margaret Seminario,
Director, Safety and Health Department,
American Federation Labor and Congress of Industrial Organizations
Before the Senate Judiciary Committee
on Federal Asbestos Compensation Legislation

January 11, 2005

The AFL-CIO appreciates the opportunity to testify on federal legislation on asbestos compensation. Senator Specter, I want to begin by congratulating you on your selection as Chair of the Senate Judiciary Committee. I also want to thank both you and Senator Leahy for your commitment and tireless efforts to craft a fair and sound asbestos compensation bill. It is certainly a daunting and complex task, but a most important undertaking. I also would like to take this opportunity to thank Judge Edward Becker for his dedication to this issue and effort. For the last year and a half, he has devoted countless hours of his time working with stakeholders, senators and others to bring the parties together to examine key issues and narrow and bridge differences.

The AFL-CIO has welcomed the opportunity to participate in these efforts to craft a fair compensation bill for asbestos victims. For the last several decades we have seen the toll of workers and family members disabled and killed by asbestos disease mount to staggering levels, the result of the willful practices of manufacturers and employers who withheld information about the hazards of asbestos, and did little or nothing to control exposures. The result of these actions is an occupational and environmental disease crisis of unprecedented magnitude. Hundreds of thousands of victims have already suffered and died from cancers and disabling lung diseases. Hundreds of thousands more will suffer or die in coming years.

As the disease crisis has grown, so has litigation as victims have sought redress for their injuries. While the civil litigation system provides justice for some asbestos victims, because of long delays, high transaction costs, and inequitable distribution of compensation among victims, it is far from an optimal system for compensating victims and their families. In addition, as companies with the greatest responsibility for asbestos exposures have sought bankruptcy protection, plaintiffs have increasingly looked to other firms for relief, creating uncertainty for those companies about future liability and uncertainty for victims about whether sources of compensation will be available in the future.

It is for both these reasons – the massive asbestos disease crisis and the serious problems with the current litigation system – that the AFL-CIO has engaged so deeply in efforts to craft a legislative solution.

The AFL-CIO has supported, in principle, the establishment of a federal asbestos trust fund to compensate victims for their personal injuries through a no-fault system to replace the present, inadequate civil litigation system. We have consistently made clear

that, to gain our support, any legislation establishing a national compensation fund must provide fair compensation for victims for the diseases they have suffered; have adequate funding to pay claims and ensure fund solvency; deliver compensation in an efficient and timely manner to victims who qualify; and ensure that victims will not be left at risk if administrative or financial problems arise. We have also made clear that we will not support, and will strongly oppose, any legislation that does not meet these basic principles, and any legislation that relieves defendants and insurers of their responsibility and liability at victims' expense.

In the last Congress, through hard work, extensive discussions and good faith efforts by many, including Senators Frist and Daschle, significant progress was made on key aspects of asbestos trust fund legislation. Important agreements were reached among senators and stakeholders on medical criteria and the establishment of an administrative system at the Department of Labor. Major progress was made on providing fair awards for disease victims and increased funding for the trust fund. But at the end of the Congress, differences on key issues remained.

Given these agreements and progress, we are deeply disturbed and dismayed by letters and statements from some insurance and business groups opposing current efforts to reach a compromise on asbestos trust fund legislation. Apparently, these groups read the results of the November election as license to back track on previous agreements, and to renege on their commitments made to fairly compensate asbestos victims. If, indeed, business groups are not prepared to stand behind their agreements, it will be impossible to resolve, or even to narrow, remaining differences, destroying any possibility of passing asbestos compensation legislation.

Let me now turn to the key issues that the AFL-CIO believes must be addressed in asbestos compensation legislation. But first let me note that we have not had the opportunity to review the latest discussion draft of the legislation in great detail. We are in the process of doing so, and will provide our views and comments on that proposal shortly. For today, this testimony will outline the AFL-CIO's views on key issues that have been under discussion for the past two years.

Key Issues for the AFL-CIO

Fair Compensation for Victims – First and foremost, asbestos compensation legislation must provide fair compensation to victims who have developed disease as a result of asbestos exposure. The compensation awarded should be commensurate with the level of disease and disability suffered. We believe that through last year's discussions, compensation values for diseases have moved closer to what represents fair compensation. However, the values proposed for some diseases in S.2290 and in the latest business offers, particularly those proposed for Level VII lung cancer remain far too low. The argument that claimants with lung cancers merit lower awards because their conditions may not really be asbestos-related ignores the requirement that, to qualify for an award, these claimants must show 15 years of exposure to asbestos, a period of time that makes it substantially likely that exposure to asbestos contributed significantly to

their condition. These victims deserve to be fairly compensated for this serious, life-threatening disease.

Second, the legislation must provide for upward adjustments in compensation for those victims and the families of victims on whom the burdens of asbestos disease fall most harshly. For reasons of administrative efficiency, the AFL-CIO has been willing to accept a compensation scheme under which claimants who qualify for an award for a particular disease level would for the most part receive the same lump sum amount, regardless of individual circumstances. We have not, for example, insisted that awards be individualized to take into account differences in lost income or future earnings or differences in the medical expenses incurred by different claimants. However, where a claimant is significantly younger than the typical claimant and has more dependents, basic principles of fairness require that there be some adjustment in his or her award to account for those circumstances. The simple fact is that both the economic and the non-economic impacts of a life-threatening or disabling asbestos-related disease are much greater on a 45- year-old with young children than they are on an 85- year-old with the same disease. We have therefore proposed that, in exceptional circumstances where the claimant is unusually young or has dependent children, adjustments in awards be made to take account of those circumstances. Because the victim's age and the number and ages of the victim's dependents are objective factors that can easily be demonstrated, a compensation scheme that provides for such adjustments would be easy to administer and could be designed in such a way that it would not increase the overall cost of the bill.

Directly related to award values are the issues of collateral source offsets and subrogation of awards, which will determine the net value of compensation received by claimants. As has been recognized by all those involved in this process, the award values in the bill are not designed to fully compensate individual victims for the effects of their asbestos exposures. Even if awards are adjusted as we have proposed for claimants who are unusually young and have dependent children, there will be no individualization to take into account actual and projected medical costs or lost income, nor are there values assigned to pain and suffering. Consequently, for many sick claimants, the award levels are far below what they would receive in the current tort system. To be fair to victims, claimants must be permitted to receive and retain the full value of their awards. There should be no collateral offsets, except for amounts received in litigation over the same asbestos-related conditions. And the bill must extinguish any liens or rights of subrogation that other parties might otherwise assert against the claimants based on workers' compensation awards, health insurance payments, health and welfare plans, or the like.

Recent proposals by insurers have called for a workers' compensation payment holiday for insurers or employers for victims who receive trust fund awards. These proposals would in effect allow them to impose a lien against the entire trust fund award, which goes well beyond the practice under a number many state and federal laws, which the insurers propose be preempted. The AFL-CIO strongly believes that there should be no subrogation against trust fund awards, but certainly in no way should the legislation

reduce workers compensation payments and make things worse for victims, as the insurers proposal would do.

Adequate Funding to Ensure Trust Fund Solvency - A central concern of the AFL-CIO is that the trust fund has sufficient funding to ensure that victims' claims can be paid. We are particularly concerned that the program be adequately funded during the early years, when the demands and stresses on the system will be greatest. The number of pending claims that may immediately come into the fund is estimated to range from 300,000 - 600,000. With the new claims that are expected, projections predict that one-third of total costs and claims will come in the first 5-6 years of the program.

As the AFL-CIO has stated previously, we are deeply concerned that the costs and claims projections performed for this legislation in 2003 underestimate the claims that will actually be filed with the fund, particularly in its early years. The most recent government data from the National Center for Health Statistics (NCHS) show that reported mesothelioma deaths in the United States are running 25 percent higher than the number of mesothelioma claims projected in cost estimates for the bill. The NCHS data also show that the asbestos disease epidemic has not yet peaked, but instead that deaths attributed to mesothelioma and other asbestos-related deaths are still increasing, with 2,573 mesothelioma deaths reported in the United States in 2002.

Moreover, a recent study by the National Institute of Occupational Safety and Health (NIOSH) reports the actual incidence of mesothelioma (as opposed to the number of reported deaths where mesothelioma was specified as the cause of death) to be even greater, which would put the number of actual mesothelioma cases at a level that is 50 percent greater than that projected in the costs estimates for S.2290.

While we recognize that there are uncertainties in claims projections, the legislation and funding needs should be based upon the most complete and current information available. The legislation must provide for sufficient funding to pay the large numbers of initial claims that are expected, and to ensure that the fund will work. It is in no one's interest and, indeed, it would be a disaster, particularly for victims, if the fund were to collapse within a few years of its inception.

Since the last Congress, the confirmation of the Halliburton bankruptcy trust for asbestos has raised a new issue with respect to contributions and funding. This confirmation will result in a change in the treatment of Halliburton under the legislation from a Tier I defendant to an asbestos class action trust. Defendants have asked that the aggregate contribution level for Tier I entities and defendants be reduced by the amount Halliburton would have paid as a Tier I defendant, so that other defendants are not responsible for making up the amount of Halliburton's contribution. The AFL-CIO does not object to such an adjustment being made. However, based upon available information, it appears that Halliburton's contribution to the national trust fund as a bankruptcy trust will exceed what it would have been required to pay as a Tier I defendant. It is the AFL-CIO's position, as was intended in establishing the Halliburton trust, the victims should benefit from the additional value of its contribution, not the defendants. Therefore, the

adjustment to the defendants' contribution should be fixed at the amount that Halliburton would have paid as a Tier I defendant, and any additional liability on Halliburton's part should simply increase the overall size of the national trust fund.

Treatment of Existing Asbestos Trusts - It is the AFL-CIO's view that the immediate and total transfer of assets from existing asbestos bankruptcy trusts to the new national fund, as proposed in S.2290 is very problematic because in the event of a sunset of the national trust fund, victims injured by the companies that established these trusts would have nowhere to go to obtain compensation. Under section 524(g) of the bankruptcy code, companies like Johns Manville that created these trusts were able to rid themselves of all future liability for asbestos-related injuries in return for creating and funding these trusts, to which all future claims were to be channeled. If, however, the assets of the trusts are transferred at the outset into the new national fund and the fund subsequently becomes insolvent, triggering a return of claims to the tort system, claimants who would have otherwise have had the right to file a claim for compensation with one or more of these trusts will be left without recourse.

We have proposed, as an alternative, that the existing trusts pay into the national trust fund over time like other defendants, with their annual contributions set at levels calculated to insure that if there is a reversion, the trusts will have retained a proportionate share of their assets with which to pay future claims. Recently, the companies that have established such 524(g) trusts have made a similar proposal, with a modification that would require the contribution of 10 years of estimated payments upfront. While we continue to believe that annual contributions by the 524(g) trusts are preferable, the proposal made by the 524(g) companies is more acceptable than the treatment of these trusts under S. 2290.

Transparency of Contributions- As proposed, S. 2290 failed to provide any transparency with respect to liabilities and contributions of defendant and insurer contributors, and indeed specifically provided that information submitted by contributors would be treated as confidential financial records for FOIA purposes. While the argument has been made that defendants and insurers are reluctant to provide such information prior to enactment of the legislation, there is no reason that such information should be withheld from the public after the enactment of the statute. Indeed, one of the primary mechanisms for ensuring that defendants' and insurers' declarations of asbestos liability are true is to provide for public review of those declarations, so that others with factual knowledge have the opportunity for comment.

To this end, the AFL-CIO believes that information submitted by defendants and insurers should be treated under the existing requirements of FOIA. Moreover, we believe that the legislation should require that initially and during the assessment process, there is notification through the Federal Register of defendants and insurers identified as potential and qualifying participants and the assignment of their level of contributions, and the opportunity for the public to comment on the accuracy and completeness of these determinations.

Preemption of "Asbestos Claims" - A matter of increasing concern to the AFL-CIO is the preemptive scope of the proposed legislation – that is, the kinds of claims that plaintiffs will be precluded from bringing in court if the new asbestos fund is created. From the start, it has been understood by all concerned that the proposed new administrative compensation scheme would be a substitute for the current civil litigation system for resolving asbestos-related personal injury claims; that in return for obtaining the right to obtain compensation for their injuries from the proposed new fund, victims of asbestos disease would lose their current right to sue third parties responsible for their exposures in state and federal court; and that in return for obtaining immunity from such suits, those third party defendants and their insurers would finance the new fund. Unfortunately, however, because of overreaching by the business community, the pre-emptive scope of the bill has been broadened to the point that it would extinguish all kinds of perfectly valid claims by persons or entities who would have no right of recovery for those claims from the new fund, against persons or entities who would have no obligation to contribute to the fund. There is no justification whatsoever for allowing this to happen.

The way this broad preemption is accomplished is through the definition of an "asbestos claim," which defines what claims will be extinguished when the new legislation is enacted. As originally introduced and reported out of Committee, S. 1125 defined an "asbestos claim" for preemption purposes as "any *personal injury* claim" arising out of, based on, or related to, the health effects of exposure to asbestos. The limitation to personal injury claims was consistent with the intended purpose of the bill, and with the scope of the administrative remedy that the bill would provide. At the behest of the business community, however, this language was changed in S. 2290 to provide for preemption of "*any claim, premised on any theory, allegation, or cause of action*" arising out of, based on, or "related to," the health effects of exposure to asbestos.

This definition of an "asbestos claim" is so broad that it would, on its face, preempt the following lawsuits, all of which are actual examples of cases "relating to" the health effects of asbestos that have been brought in state or federal court:

- a suit by a state environmental agency to collect a fine or enforce a lien imposed against a property owner or contractor for improper removal or disposal of asbestos materials.

- an action by an insured against a disability or health insurer for refusing to pay for treatment for a covered asbestos-related condition;

- a suit by a union to enforce an arbitration award requiring an employer to furnish personal protective equipment to employees working with or around asbestos in accordance with a collective bargaining agreement provision requiring the employer to provide such equipment.

- a suit by a purchaser of real property against the seller to recover damages for the seller's failure to comply with a contractual provision requiring abatement of asbestos hazards prior to transfer of the property

- a suit by a commercial building owner against a city tax assessor seeking a reduction in real property tax assessments because of diminished value caused by the presence of asbestos in the building

The definition of a preempted "asbestos claim" in S.2290 covers not only claims for damages but also claims for "other relief, " such as, presumably, injunctions. This too sweeps far beyond the intended purpose of the bill and would preclude the use of the courts by federal and state enforcement agencies to enjoin individuals or entities from engaging in actions that create or expose individuals to asbestos hazards, or to require them to take actions necessary to avoid such exposures.

In addition, in the name of preventing "leakage," defendants and insurers seek to cut off all suits by claimants who have had so-called "mixed dust" exposures – that is, who have had exposures not only to asbestos but to other substances, such as silica, that also cause disease, including cancer. Under their proposed broad definition of an "asbestos claim," a victim of silica disease who also happened to have been exposed to asbestos would be unable to bring a suit for damages against a defendant responsible for the exposure, regardless of whether or not the claimant was eligible for an asbestos award from the new fund, and even though the fund provides no compensation for silica-related conditions and companies that manufactured and used silica in their products are not required to contribute to the fund. Under no circumstances could the AFL-CIO acquiesce in the passage of a bill which so heedlessly and unjustly stripped workers and others of their rights of access to the civil justice system.

Transition to a New System - Providing for a smooth and fair transition to a new no-fault compensation system from the current litigation system is one of the most complex issues associated with this legislation. As noted earlier, there are more than 300,000 people with claims currently pending, with some estimates as high as 600,000 claims. Many of these are victims with serious diseases who have been in limbo for years while the defendants seek bankruptcy protection, and who have legitimate expectations that, absent legislation, their claims will soon, finally be settled. These people simply cannot have their current rights extinguished, only to be left again to wait, with no recourse, while a new system is put in place.

It is critical to be realistic about the time needed to make a new administrative system operational, and to pay victim's claims. Congress recently enacted legislation transferring portions of the Energy Employees Occupational Injury Program to the Department of Labor, giving the department 210 days to begin processing the 20,000 pending claims. Given the complexity of setting up an entirely new asbestos compensation program, which is dependent on the assessment and collection of contributions from as yet unidentified parties, it is likely that it will take much longer for this program to be operational.

The transition from the tort system must be accomplished in such a way that claimants who have invested substantial time, energy and resources in litigating their claims are not shut out of the court system and left with no recourse while the administrative system is created. A reasonable cutoff must be found that permits ripe cases to proceed to conclusion in the tort system. Similarly, claimants who have entered into enforceable settlements must be granted the benefits of their bargains. Finally, provisions must be made the to ensure that those with exigent claims – that is, mesothelioma victims or other claimants suffering from terminal illnesses – can have their claims quickly processed, either in the new system or, pending startup, back in the courts.

Administrative Issues – As I have noted, the central premise of the proposed legislation is that in return for losing their right to seek compensation for their injuries in court, asbestos disease victims will be able to secure fair compensation quickly and efficiently through a no-fault administrative system. The administrative system in S.2290 is largely the product of the good faith negotiations by parties in the last Congress. In our view, this system goes a long way to ensure that claims will be processed fairly and expeditiously. The agreement to assign the Department of Labor the responsibility for processing claims is important since, as the agency with the most extensive experience in handling compensation programs, it will be best able to get the program up and running.

One of the key elements of the medical criteria – and therefore, one of the key elements of a claimant's case – is exposure to asbestos for a specified period of time. For the administrative system to function efficiently, without presenting claimants with bureaucratic traps, the exposure proof requirements must be clear, simple and straightforward, and the Administrator must be easily able to determine whether the exposure requirements are satisfied. To that end, claimants should be able to attest to their exposure by affidavit, subject to the penalty of perjury to prevent fraud. And the Administrator should be required to identify industries and occupations for which there will be a rebuttable presumption that workers employed in those industries and occupations had substantial occupational exposure to asbestos. We propose that, to facilitate that task, the exposure presumptions currently used in the Manville Trust be among those adopted by the Administrator.

Statute of Limitations Issues - The AFL-CIO feels strongly that while there is reason to impose a statute of limitations on claims that have arisen before the establishment of the Fund – to avoid flooding the Fund with claims that would have been time-barred under the current system -- imposing limitations periods on claims that arise after the Fund is established and on claims that are pending in court or at a bankruptcy trust at the time of enactment would actually be detrimental to the interests of the Fund. A statute of limitations would lead to more filings in the early years, when the Fund is likely to be under the most financial pressure, and would create incentives for claimants to file, who might otherwise forego filing a claim at an early stage of disease, in order to avoid having their claims extinguished. We believe permitting these cases to come in over time would alleviate some of the anticipated flood of claims in the first few years, and avoid a major

spike in claims filing – and the attendant bottleneck in processing – that is predictable at the close of a limitations period.

Labor is also strongly opposed, on both fairness and practical grounds, to the language in S.2290 providing that the statute of limitations runs from when the individual first received a medical diagnosis of an eligible disease or condition "or discovered facts that would have led a reasonable person to obtain a medical diagnosis with respect to an eligible disease or condition." We believe such a standard would create an administrative nightmare for the Fund and for claimants. It would impose a duty on the Administrator to make a threshold factual determination as to when the claimant had discovered facts that would have led a reasonable person to obtain a medical diagnosis -- a determination that would necessitate extensive inquiry into when and to what degree the claimant first began experiencing symptoms of his disease and require the Administrator to make a highly subjective and contestable determination as to when a "reasonable person" would have acted on those facts to obtain a diagnosis. This kind of inquiry and judgment is not appropriate for a no-fault administrative system that is supposed to ensure prompt processing of claims based on objective criteria.

Sunset and Reversion - Just as there must be a smooth and orderly transition at the start-up of the compensation fund, the bill must contain provisions for a smooth and orderly shutdown, in the event the fund is ever unable to satisfy all of its financial obligations. We support a process under which the Administrator will routinely evaluate the program's success in processing and paying claims and the fund's continuing ability to satisfy its on-going financial obligations. If, through these periodic assessments, the Administrator determines that funding will not be adequate, the Administrator should be required to develop options for addressing the problem, including planning to close the program's doors and permit claimants to return to the tort system. Any shutdown would be undertaken only as a last resort, after a thorough examination of the alternatives and through careful advance planning.

In letters and statements issued during the past few weeks, defendant companies and insurers have expressed concern and even alarm over the prospect that, should the fund run out of money, claims will revert to the tort system. The suggestion that reversion is a new and surprising concept is, in our view, completely disingenuous.

As reported out of Committee, S.1125 provided for a base amount of funding, with the possibility that, should the fund prove inadequate, the Administrator could make contingent calls requiring substantial additional contributions from the fund participants. And, if the fund were ultimately unable to satisfy all claims, the system would revert to the courts. Responding to the cries of the defendant and insurer communities, Senator Frist proposed eliminating the contingent calls and instead creating a fund that would give contributors greater certainty by fixing their contribution levels. The trade-off was that if the fund ran out of money, claimants would return to court. This is the system embodied by S.2290.

The AFL-CIO's preference from the beginning would have been to create an evergreen fund – one that would be replenished as necessary to ensure that all meritorious claims are paid in full, as long as there are victims of asbestos exposure. Absent an evergreen fund, however, the only fair alternative is to permit claimants to return to the courts once the Administrator determines that the fund cannot satisfy their claims. We cannot believe that the Congress would create a system that would leave asbestos victims totally without recourse if the fund collapsed.

No one who is honestly committed to establishing this asbestos compensation fund wants to see claims revert to the tort system. But there must be a safety valve to protect future claimants. In our view, the legislation must provide for a return to the status quo. This bill simply is not and cannot be a vehicle for tort reform. The AFL-CIO has engaged in this process in good faith, and has worked long and hard to guarantee fairness to victims of asbestos exposure and to help ensure the financial viability of the entities that owe them compensation. The solution that all this work has been aimed at is the creation of an administrative compensation system, outside the courts. If this system fails – which we sincerely hope it will not – and asbestos disease victims are forced to return to court, it will be the responsibility of the policymakers then in place to determine whether adjustments need to be made in the judicial system for handling those cases.

Federal Employee Liability Act (FELA) Claims - A key issue for the AFL-CIO has been the legislation's treatment of asbestos disease claims under the Federal Employee Liability Act (FELA), the workers' compensation system for rail workers. Earlier versions of the bill would have preempted FELA claims for asbestos-related diseases, limiting victim's recovery to compensation under a national asbestos trust fund. Such an approach is grossly unfair to rail workers, since for all other workers, the bill maintains workers' compensation rights. Alternative approaches to dealing with the FELA issue have been proposed, including providing for a supplemental payment, in addition to awards under the bill, to provide compensation to rail workers for work-related asbestos diseases. The AFL-CIO's affiliates who represent workers in the rail industry have been engaged in discussions with industry and senators on this issue, and will continue to work to see if a fair resolution can be reached.

Medical Screening - The inclusion of a medical screening program in the asbestos compensation legislation is a priority for the AFL-CIO. Medical screening of individuals at high risk of asbestos disease due to past exposure is necessary for the early detection of disease, so that interventions can be made to lessen the impacts and/or prevent the disease from progressing. Indeed, the recently issued American Thoracic Society Guidelines on the Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos recommend both medical screening and medical monitoring as part of the medical management of asbestos-related diseases (Am J Respir Crit Care Med, Vol. 170. pp 691-715, 2004). In addition to providing early detection, treatment and management of asbestos-related diseases, a high quality medical screening program can provide individuals at high-risk with access to medical evaluations that meet accepted medical standards, conducted by qualified medical professionals. Patients can have confidence in the results and medical advice provided through such evaluations.

Prevention of Future Exposures and Disease – The various versions of this legislation have included provisions to ban asbestos and promote strong enforcement actions against parties that violate EPA or OSHA asbestos rules, thereby putting workers and the public at risk of asbestos-related diseases. While we strongly support the intent of such provisions, as drafted, they fall short of the mark. In particular, the bills call for referral of OSHA asbestos violations to the U.S. Attorney and Secretary of Labor for possible criminal prosecution under the OSHAct. However, the OSHAct provides for criminal sanctions only in those cases where a willful violation results in the death of a worker, a circumstance that is not possible when an employer is cited for an asbestos violation, given the long latency of the disease and the fact that any citation must be issued within six months after the agency discovers the violative workplace condition.

The AFL-CIO is very concerned that by eliminating third party liability, the bill will reduce current incentives to ensure that asbestos regulations are followed and workers and the public protected. To increase those incentives, and reduce the chance of future asbestos-related diseases, the AFL-CIO proposes that strengthening the OSHAct criminal penalties for willful violations of OSHA asbestos standards, and further, that that violators of EPA and OSHA asbestos standards be assessed for contributions to the national asbestos trust fund. Such contributions should be at levels sufficient to create real deterrence, with increasing contributions for recurring violations.

Conclusion

In conclusion, the AFL-CIO supports the establishment of a national asbestos trust fund, but it must meet the basic principles that we have set forth. We cannot and will not support legislation that does not provide fair compensation to victims and have sufficient funding and other provisions to ensure that it will indeed work. We stand ready to work with senators and other stakeholders on the outstanding issues to see if an agreement on fair asbestos compensation legislation can be reached.

Tuesday January 11, 2005
Statement from Billie Speicher
1359 North Palm Avenue
Ontario, California 91762

Good morning. My name is Billie Speicher and I appreciate the chance to talk to you today about the asbestos bill you've been working on.

I'm here today for three reasons ---to speak up for the men that used to work side-by-side with me who will someday will have to live through what I'm going through –I want to speak for my family –and I'd like to urge more research into the cancer that's changed my life.

I have mesothelioma. I don't have to tell you what that means – you've been at this long enough –it's a deadly cancer and by all rights I should only have a few months to live.

I was exposed as an aircraft mechanic for the Marine Corps in the late 1950s --- and as a pipe fitter from 1965 to 1999. Looking back I can't think of two more dangerous lines of work. Although none of us knew it then –no one told my buddies and me that asbestos could kill you.

Working on airplane brakes and insulation –and later on in refineries and industrial shops knocking off pipe insulation and installing and removing pipes and valves and cutting asbestos cement pipe –asbestos was everywhere. It was all over me and all over everyone who worked near me.

I got the bad news last May. At first the doctors I was seeing for two years kept telling me I had asthma –even though I had CAT scans that showed my lungs were scarred.

But finally the fluid built up so much in my lungs they realized I had mesothelioma. Now I'm living with a lot of pain –and I can barely get my breath. Can't hardly sleep at night either.

You know that mesothelioma is a death sentence. One year –18 months tops – that's all they give you –and all they gave me. Well I'm still alive and kicking today because of one thing – an experimental drug called Veglin. It was discovered by Dr. Gill. I started getting the Veglin shots about a month after my diagnosis and so far they have stopped me from getting any new tumors.

You can probably figure out that new experimental medicines like Veglin are very expensive. They are and that's one of the reasons I want to talk to you about the bill your thinking about up here in the Senate.

I've filed a workers comp claim in my home state of California to help cover my medical expenses. The lawyer who handles this case for me tells me that since I have meso I will most likely receive the maximum level of benefits under state law for a permanent and total disability. I'm not sure how much ---somewhere between 200 and 300-thousand dollars. California law also provides lifetime medical benefits for me since I have mesothelioma

I also have a court case coming up and the trial date is set for February 22nd this year.

Now I've followed this bill you're talking about since I got meso last year and I have to say that I don't like the idea of it. I'm no legal expert but to me the jury system in our country is about as important as it gets. And I just don't think it's right to take those rights away from people like I hear this proposal will do.

But –I don't want to be rude because you've invited me here so --if you are going to do something with this new trust fund there are a couple of things I hope you keep in mind.

For one thing ---if you were to put this thing into law today –well that would wipe out my trial right? –and even if I go to court before that and win –or win a settlement --- you get this thing passed by summer –it all goes away and it'd be like I never got my day in court.

I'd have to start all over again and go into this trust fund that's supposed to be set up in about a year. I don't want to be disrespectful –but I was in the Marines –except for war –I don't think the government does anything very fast. Thing is I don't have a lot of time. And you may not know it but I live in California where folks like me with meso get put at the head of the line with their court cases.

I know the idea is that you're setting up a trust fund and I'm supposed to get help from that –but that's the next thing –the way I understand it --the way you wrote this bill up the help I'm supposed to get from my state in the workers comp system would be subtracted from the compensation I'm supposed to get from this new trust fund.

I just don't think that's right. I'm not sure because I don't know all the specifics – but I have to believe I'm going to do a lot better in court than what you've got in mind in this trust fund. So I get less help from this bill –and I'm going to have to wait a long time –and on top of it all the compensation I'm entitled to from my state is taken out of what I'm supposed to get from this trust fund. And that includes death benefits my wife will get when I'm gone. Seems to me that there oughta be a law against that.

Now, I don't want anyone thinking I've come up here with my hand out saying "show me the money" –because that's not what I care about.

I need help with my medical bills –those Veglin shots are keeping me alive –the only thing that's keeping me alive. Second I want to make sure my family is taken care of ---my wife and my kids and the most beautiful grand kid you've ever seen. It's costing a lot of money to keep me alive –and it'll cost a whole bunch more. I don't want my family stuck with a pile of debts after I'm gone ---I'm telling you right now that's causing me as much pain as the cancer that's eating away at my body.

But finally – I want to say a word about research and the guys I used to work with. I'm here today to speak for them. Not just the guys who busted pipe and asbestos insulation with me –but the hundreds of thousands of guys all over the country who did it for years ---and may still be doing it today –because you know asbestos is still out there in the construction trades in buildings. And construction workers are exposed to asbestos whenever they do renovations.

You also know that every day another worker is diagnosed with meso or some other asbestos related disease –and many more will keep on coming in the future.

So whatever you do you have to make it work for them. And you also have to do something to help with the research to find a cure for Mesothelioma. I don't know if you've put any money in this bill to help with that. But you ought to.

And you ought to do it even if the federal government has to pay for it. Now I know that may not go over to good –there's a war on and we have a big deficit. But the plain truth is that the Government had a lot to do with exposing guys like me to asbestos.

I got my first taste of it working on airplanes when I was in the Marines. Navy guys – marines –a whole lot of veterans got their first exposure to asbestos serving their country.

So I'd just like to close by saying I hope you do the right thing by us when you finish writing this bill –and I hope you're thinking about all the workers in the future like me who are going to hear the same thing I did last May ----that they only have about one year to live. Let's find a cure for mesothelioma ---we know it's going to still be killing people for years and years –so let's do something about it.

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January 7, 2005

The Honorable Patrick Leahy
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Re S.2290, Fairness in Asbestos Injury Resolution Act of 2004

Dear Senator Leahy:

I have practiced law for twenty-five years assisting workers in obtaining necessary workers' compensation and disability benefits. Many of the workers I have represented were seriously injured from exposure to asbestos at their work place. Having advocated for the rights of these workers for so long, I am now extremely concerned with the result that the above-referenced legislation will have on workers injured from asbestos exposure.

I recently wrote an article that I submitted to the ABA for publication in *The Brief.* Although it has not yet been accepted for publication, the article describes just some of the problems I see with the Fairness in Asbestos Injury Resolution Act ("the Act") if it is passed into law as presently written.

The Act, if passed in its present form, would have a horrendous impact on a recipient's recovery because the Act does not adequately address and eliminate subrogation rights of various entities that may claim entitlement to a portion of the recipient's award. As my article addresses, there would be no net recovery to individuals unless a broad subrogation provision is contained within the Act specifically excluding subrogation by any entity that may have provided benefits to the injured worker. If such a provision is not included, the minimal recoveries the victims would receive for their diseases would not remain in the hands of the recipient, but would be used to repay providers of disability benefits (from both company-sponsored and employee-purchased plans), retirement benefits and pensions, medical insurance, Medicare, Medicaid, Social Security benefits, Veterans benefits, workers' compensation benefits (including penalties for failing to provide a safe work place), and any other benefit or recovery obtained as a result of the employer-employee

relationship. As a result, the injured worker will be left with little to no recovery to compensate him or her for injuries he or she sustained.

I welcome the opportunity to talk with you or anyone else interested in discussing this important topic and the devastating effect the Act will have on workers if the issue of subrogation is not addressed. I have attached my article for your review and consideration in hopes that it will be of some assistance to you.

Thank you for your consideration. I remain,

Very truly yours,

WALLACE & GRAHAM, P.A.

Mona Lisa Wallace

Mona Lisa Wallace

MLW/caw
Encl.

COMPENSATION UNDER A TRUST-FUND SOLUTION TO ASBESTOS CLAIMS : IS IT REALLY FAIR?

By Mona Lisa Wallace and Edward F. Sherman*

Over the last twenty years, the number of asbestos claims have been steadily increasing. Some 730,000 asbestos claims had been filed before 2002[1], with 50,000 to 70,000 new claims filed per year from 2000-2002.[2] About 300,000 asbestos-related bodily injury claims are currently pending in state and federal courts.[3] Many of the manufacturers of asbestos have taken bankruptcy, and secondary defendants including suppliers and sellers have taken their place in or been added to the suits. Efforts to resolve the crisis through government and private sources have failed.

Congress has given serious consideration over the past year to national legislation to resolve all asbestos litigation. The most recent version of that legislation, S.2290, known as the Fairness in Asbestos Injury Resolution Act of 2004 (the "FAIR Act"),[4] is a proposed bill establishing a privately funded, but publicly administered, fund to compensate present and future asbestos injury victims.[5] The defendants and insurers would contribute to the fund, and the rights of asbestos claimants to seek compensation through litigation would be extinguished in lieu of benefits under the fund.

Putting aside the debate over whether a trust fund approach is the best way to deal with the asbestos crisis, there are fundamental questions over whether claimants will really receive the benefits that the legislation promises. The problem is that the bill fails to protect the awards received by the claimants from reduction from collateral sources; it eliminates causes of action without indicating whether victims will be fully compensated under the Act; and it fails to protect victims from having their awards reduced by liens or claims of employers, insurers, the

federal government, or others claiming a right to the fund benefits. Insurance companies from which victims purchased their own medical insurance, disability policies, and life insurance policies would also have the right to seek reimbursement from the limited compensation allowable by the fund. These issues have been largely ignored in the congressional debates that have primarily focused on the dollar amount that should go into the fund.[6]

Protecting claimants' entitlement to fund benefits against various kinds of set offs and subrogation would involve the waiver of certain reimbursement rights of such sources as employers, health and other kinds of insurers, and the federal government. This could complicate the negotiations for a trust fund that have thus far focused solely on contributions from defendants and liability insurers. But failure to address these issues could result in asbestos victims not receiving the benefits that have been promised by the trust fund legislation and could prevent a fair and just resolution of the asbestos crisis.

The FAIR Act of 2004

The FAIR Act precludes all civil actions, arising out of state law, against employers, co-workers, and premises owners for work-related injuries. Instead, asbestos victims must file an asbestos claim under the procedures set forth in the Act.

An "asbestos claim" is defined as:

> **any claim, premised on any theory**, allegation, or cause of action for damages or other relief presented in a civil action or bankruptcy proceeding, directly, indirectly, or derivatively arising out of, based on, or related to, in whole or part, the health effects of exposure to asbestos, including loss of consortium, wrongful death, and any derivative claim made by, or on behalf of, any exposed person or any representative, spouse, parent, child or other relative of any exposed person.[7]

Expressly excluded from this definition are "claims alleging damage or injury to tangible property, or claims for benefits under a workers' compensation law or veteran's benefits

program."[8] Similarly, a "civil action" that would be precluded by the Act does not include an action relating to any workers compensation law, or a proceeding for benefits under any veterans' benefits program."[9] Thus the only compensatory benefits that the bill permits victims to retain are their workers compensation benefits and veterans' benefits.

The Act also permits a reduction in benefit payments for payments made from collateral sources, defined as compensation that the claimant receives, or is entitled to receive, from a defendant or an insurer of that defendant, or compensation trust as a result of a judgment or settlement for an asbestos-related injury that is the subject of a claim filed under the Act.[10]

The following is an illustration of the problems these sections of the Act will pose if not corrected.

Workers' Compensation Benefits And Claims Against Employers, Premises Owners, and Co-workers

Different states have various and distinct laws that allow recovery to victims against employers, co-workers, or premises owners for work-related injuries, intended to encourage a safe working environment for employees. For example, many states have exclusivity provisions, which limit an employee's right to sue an employer only within the state's workers' compensation system for a work-related injury, with the proviso that an employee may sue the employer in a separate civil action for the employer's deliberate and intentional misconduct.[11]

Under the FAIR Act as drafted, however, such a civil action against an employer would be barred. By excluding workers' compensation claims, in general, without adequately defining the parameters of such claims, the bill inadvertently creates an avenue for employers to engage in bad faith and intentional misconduct, such as dropping workers' compensation insurance coverage for asbestos disease, while, at the same time, avoiding liability for such conduct.

Employers would be provided instant immunity for even the most egregious acts without having paid a dime into the fund. Less scrupulous employers could, potentially, engage in non-compliant activity or commit intentional torts knowing that all asbestos claims are now subject to the FAIR Act.

The Act also fails to address whether claims for penalties from violations of court orders and state OSHA regulations currently allowable within the law of some states would be permitted.[12] The Act, as written, ignores and possibly eradicates state laws designed to provide additional compensation in the form of a fine to injured employees if their employers fail to provide safe working environments.

The exclusion for "asbestos claims" should be revised to eliminate any incentive for employers to disregard the state workers' compensation law. For example, section 3(3)(B) of the FAIR Act might be reworded, as follows:

> "EXCLUSION – The term does not include claims for benefits under a workers' compensation law or under any individual state law that allows civil actions or penalties arising out of the employer-employee relationship, or claims brought by any person as a subrogee by virtue of the payment of benefits under a workers' compensation law."

The Act does exclude workers' compensation benefits from being considered a collateral source so as to reduce the benefits awarded to a claimant. But the Act's language does not address the nuances or ancillary issues involving workers' compensation benefits, such as an employer's statutory right to a subrogation lien in those states that allow it.[13] Thus, while the Act's administrators may not reduce the award, the Act does not address what effect, if any, this provision has on those state statutes that permit the employer to place a lien on the award proceeds.

Finally, the FAIR Act seemingly bars all claims against premise owners for liability for asbestos related injuries. Under current state law, for example, victims may sue the owners of a building in which they worked, the companies that managed the premises, or the companies responsible for installing and replacing asbestos insulation in the victim's work place. Because the victim is not employed by any of these companies, the claim falls outside the state workers' compensation law, and are compensable through a civil action. Under the FAIR Act, however, these premise liability claims, not being workers compensation benefits, would be barred in the future.

To protect a victim's state law right to sue premise owners and others who may not be considered fund participants, section 3(5) of the FAIR Act, which defines "civil actions," should be rewritten to state:

> The term "civil action" means all suits of a civil nature in State or Federal court, whether cognizable as cases at law or in equity or in admiralty, but does not include an action relating to any workers' compensation law, or action arising from the employer-employee relationship, or from any premises owner or employer, or a proceeding for benefits under any veterans' benefits program."

Finally, the Act ignores the reality that employees could be entitled to other benefits and compensation, such as disability benefits and medical insurance for which the employee has contributed. For example, those victims who had the foresight to purchase cancer or life insurance policies, for which they paid premiums, will have those benefits offset against the fund award. The Act also fails to address rights under employer-sponsored disability plans, most of which have been funded by the unions or the workers.

Other federal government victim compensation programs do include provisions protecting the victims' awards from reduction by subrogation liens. For example, the Radiation

Exposure Compensation Act[14] protects payments to victims from claims by insurance carriers, including those for workers' compensation payments.[15]

The FAIR Act should be revised to prohibit the offset of awards from the fund by state-based employer or disability benefits payors and plans. The Act could be amended to include language similar to that provided in the Radiation Exposure Compensation Act, the Energy Employees Occupational Illness Compensation Program Act, and the Ricky Ray Hemophilia Relief Fund Act.

Medicare and Social Security Disability

Medicare is a government-funded program that pays for medical benefits for disabled and elderly individuals. Under certain circumstances, Medicare is considered a "secondary payer" and has the right to seek reimbursement from any "primary plan" or entity if the primary plan has or had responsibility to pay for the item or service.[16]

The FAIR Act, denies Medicare's right to reimbursement as a secondary payer, and thus claimants' benefits cannot be reached by Medicare.[17] The same is not true, however, of Social Security disability benefits to which some claimants may be entitled. The FAIR Act fails to insure that a victim can obtain a fund award and still receive the monthly Social Security disability benefits that are payable by the government. Unless the Act is amended to expressly exclude fund awards from being treated as income, award recipients will lose eligibility to collect monthly Social Security disability checks. Once these benefits are discontinued, victims will require legal assistance to reinstate their disability checks—a process that could take years. Many of those who receive these benefits are dependent upon every dollar to make ends meet because they are disabled and are not employable.

Congress has taken steps in other federal compensation fund legislation to prevent award recipients from losing benefits like Social Security because of a payment from the fund. The Radiation Exposure Compensation Act, the Energy Employees Occupational Illness Compensation Program Act, and the Ricky Ray Hemophilia Relief Fund Act each contain express provisions protecting an award recipient from losing eligibility for social security benefits. These acts expressly state that amounts paid to individuals "shall not be included as income or resources for purposes of determining eligibility to receive" social security benefits or the amount of such benefits.[18] To protect fund award recipients under the FAIR Act, a similar provision should be added to the proposed bill.

Medicaid

Medicaid provides medical assistance for certain individuals and families with low income. Eligibility is determined by financial need and whether the individual meets one or more of the statutory criteria. Using federal guidelines, the states are permitted to establish their own eligibility requirements.[19] Under many state statutes, by receiving medical assistance, the Medicaid recipient is deemed to have assigned to the state her right to collect any proceeds she obtains from a third party, whether by settlement, judgment, or otherwise.[20] Thus, states offering medical assistance have the right to seek reimbursement out of the benefit received from the third party.[21] Given that the FAIR Act prohibits the state and federal government from recovering *Medicare* payments from a trust award, the Act should be broadened to include *Medicaid* payments as well.

Additionally, because Medicaid eligibility is based, in part, on financial need, an award from the fund may cause the Medicaid recipients to lose eligibility. Once Medicaid stops paying a recipient due to a momentary spike in his or her income, it may take years for the state to

reinstate the individual's Medicaid benefits, if at all. Other legislation, such as the Radiation Exposure Compensation Act and other acts noted above,[22] protect the benefit recipients from losing Medicaid relief, and a similar provision should be added to the FAIR Act.

Loss of Vested And Self Funded Benefits

There are serious questions regarding the constitutionality of the proposed Act. The FAIR Act contemplates rolling the assets of the existing bankruptcy trusts into the fund.[23] Thus, injured workers with pending claims against bankruptcy trusts such as the Manville Personal Injury Settlement Trust, the NGC Settlement Trust, and the Fuller-Austin Trust would lose those claims and have to file new ones under the FAIR Act. Likewise, workers with insurance policies and court orders allocating money to them under the rolled-in trusts would have those awards taken away without receiving comparable compensation from the fund. And any fund award these recipients receive will be subject to the lien and set-off claims discussed above.

It would seem that workers who paid for insurance policies, self-funded medical insurance, and private disability plans would be entitled to challenge the constitutionality of the present bill if they are deprived of their vested benefits by the allowance of a credit or lien against their self-funded benefits. The Act should be rewritten so that it does not deprive workers of benefits they would otherwise be entitled to receive.

Administrative Concerns

Under the FAIR Act, the some 300,000 existing asbestos claims and lawsuits would be terminated and re-filed as claims for compensation under the Act.[24] This will likely create an enormous backlog of claims at the outset of the fund program. And because the FAIR Act raises a significant number of questions, fund administrators may be confronted with issues relating to conflicting claims for liens, setoff, recoupment, subrogation, and the like. Myriad Social

Security disability and Medicaid setoff and subrogation claims would have to be processed. But because there is no time restriction for the federal government to respond to challenges to liens, the government could stop paying benefits before the issues are resolved. And because of the insufficient staffing and lack of coordination of the government entities and complexity of the law relating to lien issues, it may take a lengthy period to resolve a subrogation lien issue with the federal government, often requiring legal assistance that the claimants may not have available.

Tax Status

The original bill for the FAIR Act, introduced in 2003, included language excluding payments under the Act from being considered taxable income.[25] It provided that "all amounts of an award received under [the Act] shall be deemed to be compensation for personal physical injuries or physical sickness under section 104 of the Internal Revenue Code of 1986."[26] Under section 104 of the Revenue Code, gross income does not include "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness."[27]

The tax-exempt language, however, was removed in later versions of the FAIR Act. To fully compensate a victim for awards from the fund, the proposed bill should include a tax-exempt provision for awards from the fund.[28]

Deceased Victims

Although the FAIR Act grants structured payments for victims of asbestos-related injuries, it does not provide any relief for the victim's spouse or family should the victim die.[29] The lack of such provisions is especially inequitable given that the Act envisages structured payments to the claimant over time and eliminates wrongful death and loss of consortium claims.

By including loss of consortium and wrongful death claims in the definition of "asbestos claims" that will be extinguished, the bill abrogates these rights without providing compensation for them under the Act's fund. To correct this inequity, a provision making awards payable to the surviving spouse or family members should be added to the proposed bill.

Pending Claims

The FAIR Act, if enacted, will void all pending asbestos settlements that have not yet been fully paid, trial jury verdicts, and court decisions, except those no longer subject to appeal.[30] This means that over 300,000 lawsuits currently pending in state and federal courts throughout the country would be dismissed.

Many of these victims and their families have invested years of their life struggling through court battles. Some may have obtained a jury verdict, which is on appeal. In many cases, individuals are being compensated under settlement agreements. With the enactment of the FAIR Act, however, these pending judgments and settlements will be voided and the victims will have to seek compensation from the fund. Victims stand the chance of receiving less compensation from the fund than what they had or potentially could have received through their pending claims. By negating existing settlements and verdicts the bill would infringe on basic constitutional property, contract, due process, and jury rights. The Act would destroy contracts entered into by private parties with respect to asbestos claims that require future performance.

The solution, however, is simple. The Act could be revised to take exception to pending claims. By invoking a "grandfather clause" for pending claims, Congress could ensure a smoother transition from the current litigation system to the no-fault fund approach.

CONCLUSION

The proposed FAIR Act, as drafted, does not do what it purportedly was established to do. While it establishes a fund from which victims of asbestos-related injuries will be compensated, it abrogates legal rights including various legal causes of action established by the states to promote a safe working environment. It fails to protect the victims from having their awards reduced by collateral sources and subrogation liens from employers, the federal government, insurance carriers, medical providers, and other payors claiming an interest in the award amount. Other federal acts providing relief to injured victims have enacted adequate protections to ensure that the victims receive full compensation for their injuries. Until these issues are addressed and remedied, asbestos victims will be adversely affected by this proposed bill. How can that be "FAIR"?

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* Ms. Wallace is a partner in the law firm of Wallace and Graham, P.A. in Salisbury N.C. and has litigated many asbestos cases. Mr. Sherman is former dean and presently professor of law at Tulane Law School in New Orleans, LA. Mr. Sherman is Reporter for the American Bar Association Tort Trial & Insurance Section Task Force on Asbestos, and Ms. Wallace is a member of the task force. They can be reached at mwallace@wallacegraham.com., and esherman@law.tulane.edu.

[1] Asbestos Litigation Costs and Compensation, An Interim Report, RAND Institute for Civil Justice, 2002, at 32.

[2] Statement of Jennifer L. Biggs, FCAS, MAA, Chair, Mass Torts Subcommittee American Academy of Actuaries, before the Committee On Property/Casualty Insurance National Conference on Insurance Legislators Hearing on Proposed Resolution Regarding the Need for Effective Asbestos Reform, July 10, 2003, at 4.

[3] Id.

[4] S. 2290, 108th Cong. (2004).

[5] Id. § 2.

[6] Senators Frist and Daschle, the majority and minority leaders, were reported to have agreed upon a trust fund of $140 billion. "Federal Legislation: Daschle Agrees to $140 Billion Trust Fund for Asbestos; Concedes on Pending Lawsuits," 32 BNA Product Safety & Liability Reporter 863 (Sept. 20, 2004).

[7] S. 2290, § 3(3).

[8] Id. § 3(3)(B).

[9] Id. § 3(5) (emphasis added).

[10] Id. § 3(6). The pre-July 2003 version of the FAIR Act, Senate Bill 1125, defined "collateral source" to include "disability insurance, health insurance, Medicare, Medicaid, death benefit programs, defendants, insurers of defendants, compensation trusts" but "shall not include life insurance." S. 1125, 108th Cong. § 3(7) (2003). In July 2003, this language was changed to the language now being used in the Act. See id.

[11] Under North Carolina law, an injured employee may sue his or her employer, notwithstanding the exclusivity provision of the workers' compensation law, if the employer committed a deliberate and intentional tort. Woodson v. Rowland, 407 S.E.2d 222, 228 (N.C. 1991).

[12] For example, North Carolina permits the workers' compensation commission to assess a 10 percent penalty against employers who willfully fail to provide a safe workplace in violation of court orders and regulations promulgated by the NC Department of Labor. N.C. Gen. Stat. § 97-12 (2000) This monetary award payable to the victim is not a workers' compensation benefit but, rather, is in the nature of a fine.

[13] For example, in North Carolina, if an injured employee elects to sue a third party tortfeasor for his or her work-related injury, the employer or its carrier is entitled to a lien on any proceeds recovered in the third party action.

[14] Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified at 42 U.S.C. § 2210 note).

[15] Section 10 of the Radiation Exposure Compensation Act states:

> A payment made under this Act . . . shall not be considered as any form of compensation or reimbursement for a loss for purposes of imposing liability on any individual receiving such payment, on the basis of such receipt, to repay any insurance carrier for insurance payments, or to repay any person on account of worker's compensation payments; and a payment under this Act . . . shall not affect any claim against an insurance carrier with respect to insurance or against any person with respect to worker's compensation.

By way of further examples, the Energy Employees Occupational Illness Compensation Program Act and the Ricky Ray Hemophilia Relief Fund Act of 1998 also contain similar provisions.

[16] 42 U.S.C. § 1395y(b)(2)(B)(ii).

[17] Section 133(d), FAIR Act.

[18] See Radiation Exposure Compensation Act, 42 U.S.C.A. § 2210 note (stating in section 6(h) that "[a]mounts paid to an individual under this section . . . shall not be included as income or resources for purposes of determining eligibility to receive benefits described in section 3803(c)(2)(C) of title 31, United States Code [section

3803(c)(2)(C) of Title 31, Money and Finance], or the amount of such benefits"). See also Energy Employees Occupational Illness Compensation Program of 2000, 42 U.S.C. § 7385e(2) (same); Ricky Ray Hemophilia Relief Fund Act of 1998, 42 U.S.C.A. § 300c-22 note (same). Section 3803(c)(2)(C) of Title 31 lists several "benefits" including benefits under the supplemental security income program under Title XVI of the Social Security Act, medical assistance under a Medicaid program, and Medicare benefits under Title XVIII of the Social Security Act.

[19] See N.C. Gen. Stat. § 108A-57 (2000).

[20] Id.

[21] See generally, Larue & Posin, Medicaid, ERISA and Other Medical Liens Against Personal Injury Recoveries, 51 La. Bar J. 334 (Feb/Mar 2004).

[22] See supra text accompanying note 18.

[23] S. 2290, 108th Cong., § 402(f).

[24] See supra notes 2 and 3.

[25] S. 1125, 108th Cong. (2003).

[26] S. 1125, 108th Cong., § 133(d).

[27] 26 U.S.C.A. § 104(a)(2).

[28] Other victim compensation programs, such as the Radiation Exposure Compensation Act, the Energy Employees' Occupational Illness Compensation Program Act, and the Ricky Ray Hemophilia Relief Fund Act, expressly state that awards under these acts are not taxable. See Radiation Exposure Compensation Act, 42 U.S.C.A. § 2210 note (stating in section 6(h) of the Act that "amounts paid to an individual under this section . . . shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering"); Energy Employees Occupational Illness Compensation Program of 2000, 42 U.S.C. § 7385e(1) (same); Ricky Ray Hemophilia Relief Fund Act of 1998, 42 U.S.C.A. § 300c-22 note (stating in section 103(h) that "[a] payment under subsection (c)(1) to an individual . . . shall be treated for purposes of the Internal Revenue Code of 1986 as damages described in section 104(a)(2) of such Code [26 U.S.C.A. § 104(a)(2)]").

[29] In other victim compensation programs, such as the Radiation Exposure Compensation Act, the Energy Employees Occupational Illness Compensation Program Act, and the Ricky Ray Hemophilia Relief Fund Act, provisions expressly provide for payment of awards to spouses or others in the event of the victim's death. [29] See Radiation Exposure Compensation Act, 42 U.S.C.A. § 2210 note (providing for payments to the victim's surviving spouse and children); Energy Employees Occupational Illness Compensation Program of 2000, 42 U.S.C. § 7384s (same); Ricky Ray Hemophilia Relief Fund Act of 1998, 42 U.S.C.A. § 300c-22 note (same).

[30] See S. 2290, 108th Cong., § 403(d) ("no pending asbestos claim may be maintained in any Federal or State court, except for enforcement of claims for which an order or judgment has been duly entered by a court that is no longer subject to any appeal or judicial review"); § 113(b)(2) (stating that victim with a "pending claim" must file claim under Act within 4 years); § 403(d)(3) (stating that "[a]ny action asserting an asbestos claim . . . in any Federal or State court, except actions for which an order or judgment has been duly entered by a court that is no longer subject to an appeal or judicial review before the date of enactment of this Act, is preempted by this Act.").

○