106TH CONGRESS
*2d Session*
HOUSE OF REPRESENTATIVES
REPORT
106–782

# ASBESTOS COMPENSATION ACT OF 2000

JULY 24, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

# R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.R. 1283]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1283) to establish legal standards and procedures for the fair, prompt, inexpensive, and efficient resolution of personal injury claims arising out of asbestos exposure, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) SHORT TITLE.—This Act may be cited as the "Asbestos Compensation Act of 2000".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:



# TITLE I—ESTABLISHMENT AND PROCEDURE

**SEC. 101. ESTABLISHMENT OF THE OFFICE OF ASBESTOS COMPENSATION.**

(a) ESTABLISHMENT OF PROGRAM; ADMINISTRATOR.—There is established in the Department of Justice the Office of Asbestos Compensation (OAC) to be headed by an Administrator. The Administrator shall be appointed by the President by and with the advice and consent of the Senate. The Administrator shall serve for a term of 10 years, and may be removed by the Attorney General only for good cause. The Administrator shall have authority to promulgate all procedural and substantive rules necessary to administer this Act. All claims and other filings under this Act shall be lodged with the office designated by the Administrator.

(b) EXCLUSIVE JURISDICTION.—Except as otherwise provided in this Act, the OAC shall have exclusive jurisdiction over proceedings to determine if a claimant is entitled to compensation for an asbestos claim and the amount of such compensation. The foregoing shall not apply to any claim brought under any workers' compensation law or veterans' benefits program.

(c) MEDICAL DIRECTOR.—The Administrator shall appoint the Medical Director and may remove the Medical Director for good cause. The Medical Director shall, under the supervision of the Administrator, manage the medical review process under section 102 and shall have the authority to appoint or to contract for the services of claims examiners, physicians, and such other personnel as may be necessary or appropriate for the efficient conduct of the medical review process and to create the exceptional medical claims panel.

(d) ASBESTOS COMPENSATION FUND.—There is established in the OAC an Asbestos Compensation Fund for the purpose of providing payments to claimants under this Act. The Administrator shall appoint the Trustee of the Asbestos Compensation Fund and may remove the Trustee for good cause.

(e) OFFICE OF ADMINISTRATIVE LAW JUDGES.—There is established in the OAC an Office of Administrative Law Judges for the purpose of providing expedited administrative adjudication of asbestos claims pursuant to section 105. The Administrator shall have authority to appoint Administrative Law Judges on a temporary or emergency basis and to remove such judges for good cause.

(f) MEDICAL ADVISORY COMMITTEE.—The Administrator shall appoint a Medical Advisory Committee which shall periodically evaluate this Act's medical review process and medical eligibility criteria. The Administrator shall set a term of appointment for members of the Medical Advisory Committee. The Committee shall make appropriate recommendations as and when it deems appropriate and shall submit an annual report to the Administrator and the Congress.

**SEC. 102. MEDICAL ELIGIBILITY REVIEW.**

(a) DETERMINATION OF ELIGIBILITY.—All claims when filed shall be immediately referred to the Medical Director. The Medical Director shall determine whether the claimant meets the requirements for medical eligibility in section 301 or the requirements for medical testing reimbursement in section 306

(b) INFORMATION FOR MEDICAL REVIEW.—The Administrator shall issue rules for the expeditious conduct of the medical review process. Such rules at a minimum shall provide for the following:

(1) Submission of the following information where relevant and feasible: smoking history; occupational history; description of the circumstances, intensity, time, and duration of exposure; medical test results necessary for a decision as to whether an exposed person meets the requirements for one or more medically eligible categories under sections 301, 302, 303, 304, 305, or 306, including all of the supporting data for any pulmonary function tests on which the claimant relies (including all flow volume loops, spirographs, and any other tracings for any test that is performed). The claimant shall also provide such medical releases as the Administrator may require allowing the OAC to obtain any and all medical information relevant to the determination of medical eligibility.

(2) The Medical Director may require additional non-invasive medical tests at the expense of the OAC if necessary for a determination of medical eligibility.

(c) PROCEDURES.—Upon receipt of a complete medical application, the Medical Director shall send notice to the claimant confirming the OAC's receipt of the claim. The Medical Director shall make an initial decision within 30 days of such receipt. If the application is initially denied, the claimant shall be so notified and, at the claimant's request, the application shall be immediately referred to—

(1) a review panel of 2 qualified physicians, with a third qualified physician available to resolve any disagreement between the initial 2 qualified physicians; or

(2) an exceptional medical claims panel.

The Medical Director shall be bound by a panel's decision. The rules shall also provide for the prioritization of claims, including enhanced priority for claimants who have mesothelioma, and set a time limit for a determination by the review panel.

(d) EXCEPTIONAL MEDICAL CLAIMS.—The rules of the medical review process shall provide the claimant with an opportunity to apply to an exceptional medical claims panel for a determination of whether the exposed person meets the requirements under section 301(b) for an exceptional medical claim for any category. This opportunity shall be provided both at the initial filing of a claim and after a claim has been denied under this subsection. The exceptional medical claims panel shall decide whether the claimant qualifies as an exceptional medical claim within 30 days of receipt of the claim. This time limit may be extended by the Administrator

only for good cause. The Medical Director shall be bound by the decision of the exceptional medical claims panel. The Medical Director shall issue a final denial, along with a brief statement of reasons, if the claimant is found ineligible following an opportunity to submit the claim to a medical review panel and an exceptional medical claims panel.

(e) MONITORING ACCURACY OF DETERMINATIONS.—The Medical Director shall establish audit and personnel review procedures for evaluating the accuracy of medical eligibility determinations, including both erroneous approvals and erroneous denials.

(f) OPT-OUT.—After receiving a certificate of eligibility, a claimant may opt out of settlement proceedings provided for under sections 103 and 104 and elect to file suit in any State or Federal court of competent jurisdiction.

**SEC. 103. ELECTION OF ADMINISTRATIVE PROCESS; SETTLEMENT OFFERS.**

(a) NAMING AND NOTIFICATION OF DEFENDANTS.—Medically eligible claimants, other than those who elect to file suit in court under section 102(f), shall name defendants. Defendants shall receive notice from the Administrator.

(1) IDENTIFICATION OF DEFENDANTS ASSOCIATED WITH WORK SITES.—At the claimant's request, the Administrator will provide information concerning person who may have provided asbestos or asbestos-containing products or materials to work sites named by the claimant and when such asbestos or asbestos-containing products or materials may have been provided as well as the time such products or materials were located at the named work sites The Administrator may implement this paragraph through rulemaking.

(2) VERIFIED PARTICULARIZED STATEMENT.—Within such time after receiving a certificate of medical eligibility as may be provided by rule, a claimant shall provide, with respect to each person that the claimant alleges is responsible for the injury claimed, a verified particularized statement of the basis for the allegation that the person is or may be responsible for the injury. The particularized statement shall include such information as the Administrator may require for the purpose of providing the defendant with a reasonable basis for making an offer of settlement. The claimant may incorporate by reference any information required by this paragraph that may already have been submitted to the OAC.

(3) NOTICE.—Upon finding that the claimant's particularized statement meets the requirements of paragraph (2), the Administrator shall provide notice to each named defendant. The defendant shall at the same time be furnished with a copy of all particularized statements submitted by the claimant under paragraph (2) and, subject to reasonable rules protecting the confidentiality of information provided by the claimant, a copy of all information submitted by the claimant, records and other information obtained by the Medical Director relating to the claim and the results of any medical tests administered at the direction of the Medical Director. Any defendant may provide any information relevant to the amount of any recommended settlement under subsection (b), including information regarding product identification, exposure, and damages.

(4) THIRD-PARTY PRACTICE.—Defendants may assert third-party claims in accordance with rules adopted by the Administrator. Third-party claimants shall provide a verified particularized statement, meeting the requirements of paragraph (2), substantiating the allegation that the third-party defendant may be liable to the third-party plaintiff, wholly or in part, for the claimant's injury. For good cause shown and subject to reasonable limitations, an Administrative Law Judge may allow discovery for the purpose of obtaining information necessary to allow the claimant or any third-party plaintiff to provide a particularized statement under paragraph (2) or this paragraph.

(b) SETTLEMENT OFFERS; OFFER OF COMPENSATION BY THE TRUSTEE.—

(1) MANDATORY OFFER FROM DEFENDANTS.—Within 21 days following the naming of all defendants, each defendant shall provide to the claimant in writing a good faith settlement offer, and shall provide a copy to the Trustee.

(2) MANDATORY OFFER FROM ASBESTOS COMPENSATION FUND.—Within 10 days of receiving all of the defendants' offers, the Trustee shall make an offer of compensation to the claimant, based on a compensation grid which shall be established and regularly revised by rule.

**SEC. 104. CLAIMANT'S CHOICE OF FORUM.**

(a) IN GENERAL.—The claimant shall notify each defendant and the Trustee whether the claimant accepts or rejects the defendant's settlement offer under section 103(b)(1). If the claimant accepts any such offer, or any other settlement offer, the Trustee's offer of compensation shall be automatically reduced by the amount of such settlements.

(b) NOTICE.—The claimant shall notify the Trustee and any defendant within 60 days whether the claimant accepts or rejects an offer that has been provided pursuant to section 103(b)(1) or 103(b)(2).

(c) ORPHAN SHARES.—The Trustee shall not make an offer to the claimant under section 103(b) if no solvent defendant has been named.

(d) ACCEPTANCE.—If the claimant accepts the Trustee's offer of compensation, the Trustee shall assume the claim. The Trustee may accept any defendant's settlement offer under section 103(b)(1) or may prosecute the claim against any defendant as provided in section 105, or may prosecute the claim in any State or Federal court.

(e) REJECTION.—If the claimant rejects any defendant's settlement offer and also rejects the Trustee's offer of compensation, the claimant may elect an administrative adjudication under section 105 or opt out of further administrative proceedings and file suit in a State or Federal court.

**SEC. 105. ADMINISTRATIVE ADJUDICATION.**

If a claimant elects adjudication under this section, the OAC shall assign an Administrative Law Judge to conduct a hearing on the record and to determine whether compensation is to be provided and the amount of such compensation. The Administrative Law Judge shall adhere to the law applicable to asbestos adjudications as contained in sections 201 through 210. The Administrative Law Judge shall issue a decision, containing findings of fact and conclusions of law, as expeditiously as possible, but not later than 90 days after the case is assigned.

**SEC. 106. APPEALS; JUDICIAL REVIEW.**

Any person aggrieved by a final decision of the Administrator under section 105 or a final denial by the Medical Director under section 102, may seek review of that decision or denial in the United States Court of Federal Claims, which shall uphold the decision or denial if it is supported by substantial evidence and is not contrary to law. A decision by the Medical Director that a claimant has an eligible medical condition is not a final decision under this section. Decisions of the United States Court of Federal Claims are appealable, without regard to the amount in controversy or the citizenship of the parties, to a United States Court of Appeals for a judicial circuit.

**SEC. 107. GATHERING AND MAINTENANCE OF INFORMATION.**

(a) PRODUCT IDENTIFICATION.—The OAC shall collect and regularly update information regarding product identification and shall make such information publicly available. The data base maintained by the OAC under this section is for information purposes only, and the presence of information in that database shall not lead to any presumption.

(b) SETTLEMENTS, JUDGMENTS, AND AWARDS.—The OAC shall collect data on settlements, judgments, and awards in connection with asbestos claims and shall make such data publicly available. The OAC may require this data to be reported in such form as it may prescribe.

(c) SUBPOENA POWER.—The OAC may compel, by subpoena or other appropriate process, information from any person regarding past settlements or product identification for purposes of developing and maintaining a compensation grid under section 103(b)(2) and maintaining a database for purposes of naming defendants under section 103(a)(1). In addition, the subpoena power under this subsection may be used by the OAC in order to secure financial information from any defendant.

(d) CONFIDENTIALITY.—Any information or documentary material concerning settlements which is specific to a company, law firm, or plaintiff that is provided to the OAC pursuant to subsection (b) or (c), whether by subpoena or otherwise, shall be exempt from disclosure under section 552 of title 5, United States Code, and the disclosure of such information by the OAC or any person is prohibited.

**SEC. 108. LEGAL ASSISTANCE PROGRAM.**

(a) IN GENERAL.—The OAC shall implement a legal assistance program for the purpose of providing legal representation to claimants. The OAC shall maintain a roster of qualified counsel who agree to provide services to claimants under rules, practices, and procedures established by the Administrator.

(b) FREE CHOICE OF COUNSEL.—Claimants shall not be required to use counsel provided or recommended by the OAC, but shall retain their right to be assisted by counsel of their choice.

(c) LEGAL ASSISTANCE.—The OAC shall adopt rules concerning the reasonableness of fees, and all legal representation of persons asserting asbestos claims shall comply with such rules.

**SEC. 109. TIME LIMITS FOR DISPOSITIONS.**

(a) IN GENERAL.—If the Medical Director fails to meet the time limits for an initial decision provided under this Act with respect to more than 30 percent of

claims, then the Administrator shall take such action as may be necessary, including increasing staff and administrative assessments under section 401, to ensure compliance with such time limit with regard to at least 70 percent of claims

(b) NO OFFER.—If the Trustee fails to make an offer within 120 days after the Administrator's receipt of a complete application under section 102 with respect to more than 30 percent of claims, then the Administrator shall take such action as may be necessary, including increasing staff and administrative assessments under section 401, to ensure compliance with such time limit with regard to at least 70 percent of claims.

(c) DUTIES.—The duties established by subsections (a) and (b) shall be non-discretionary and enforceable by an order of mandamus from any judge of the United States Court of Federal Claims.

(d) EXCEPTIONS.—The Administrator may by rule establish exceptions to the time limits in this section. Such rules shall take into consideration the complexity of the case, the extent to which delays are attributable to the fault or neglect of the claimant or the claimant's attorney and other factors that are beyond the control of the OAC.

# TITLE II—LAW APPLICABLE TO ASBESTOS ADJUDICATIONS.

**SEC. 201. MEDICAL ELIGIBILITY.**

A claimant may recover compensation for damages caused by an eligible medical condition only if the claimant presents a certificate of medical eligibility establishing its existence. A certificate of medical eligibility shall be conclusive unless rebutted by clear and convincing evidence. However, a certificate of medical eligibility shall not be conclusive as to allegations regarding exposure to asbestos or when medical eligibility is established pursuant to section 304(b).

**SEC. 202. DAMAGES.**

A claimant who establishes an eligible medical condition shall be entitled to compensatory damages to the extent provided by applicable law, including damages for emotional distress, pain and suffering, and medical monitoring where authorized. Such damages shall not include punitive damages or damages solely for enhanced risk of a future condition, except as provided in section 208(d).

**SEC. 203. STATUTE OF LIMITATIONS OR REPOSE.**

No defense to an asbestos claim based on a statute of limitations or statute of repose, laches, or any other defense based on the timeliness of the claim shall be recognized or allowed, unless such claim was untimely as of the date of enactment of this Act. No claim shall be deemed to have accrued until and unless the claimant's condition would have qualified as an eligible medical condition under section 302, 303, 304, or 305.

**SEC. 204. COME BACK RIGHTS.**

Notwithstanding any other provision of law, a judgment or settlement of an asbestos claim for a non-malignant disease shall not preclude a subsequent claim with respect to the same exposed person for an eligible medical condition pursuant to section 301(b), 303, 304, or 305

**SEC. 205. CLASS ACTIONS, AGGREGATIONS OF CLAIMS AND VENUE.**

(a) CONSOLIDATIONS.—No joinder of parties, aggregation of claims, consolidation of actions, extrapolation, or other device to determine multiple asbestos claims on a collective basis shall be permitted without the consent of all parties, except as provided in subsection (b) or unless the court, pursuant to an exercise of judicial authority to promote the just and efficient conduct of asbestos civil actions, orders such procedures, including the transfer for consolidation, to determine multiple asbestos claims on a collective basis.

(b) CLASS ACTION SUITS.—In any civil action asserting an asbestos claim, a class action may be allowed without the consent of all parties if the requirements of Rule 23, Federal Rules of Civil Procedure are satisfied.

(c) VENUE.—At the election of the claimant, an asbestos claim may be filed in any jurisdiction where the claimant is alleging that the claimant was exposed to asbestos or where the claimant is currently domiciled.

(d) REMOVAL.—Any party in a civil action that involves a violation of subsection (a), (b) or (c) of this section may remove such action to an appropriate district court of the United States. The district courts of the United States shall have jurisdiction of all civil actions removed pursuant to this section without regard to diversity of citizenship or amount in controversy.

(e) ADMINISTRATIVE PROCEEDINGS.—In any proceeding under section 105, the Administrative Law Judge may order adjudication of claims on a collective basis.

**SEC. 206. JOINT AND SEVERAL LIABILITY.**

This Act shall not be construed to limit joint and several liability under applicable Federal or State law. In any core claim that is successfully asserted against a defendant, such defendant shall be held jointly and severally liable for full compensatory damages to the claimant notwithstanding any contrary provision of law.

**SEC. 207. CORE CLAIMS.**

In any core claim, the issues to be decided shall be limited to—

(1) whether the exposed person with respect to whom a claim is made has or had an eligible medical condition;

(2) whether the exposure of the exposed person to the product of the defendant was a substantial contributing factor in causing that eligible medical condition; and

(3) the amount of compensation to be provided.

**SEC. 208. SPECIAL RULES APPLICABLE TO SECTION 105 ADJUDICATIONS.**

(a) APPLICABLE LAW.—Unless otherwise provided in this Act, in claims based on State law, the Administrative Law Judge shall, with respect to each defendant, apply the substantive law of the State which has the most significant relationship to the exposure and the parties.

(b) FULL COMPENSATORY DAMAGES IN WRONGFUL DEATH CASES.—Notwithstanding any contrary provision of State law, full compensatory damages, including damages for non-economic loss, shall be awarded in wrongful death claims involving mesothelima. In all other cases, damages for non-economic loss may be awarded to the extent that they are available pursuant to applicable law.

(c) PENALTY FOR INADEQUATE OFFER.—In any proceeding against a defendant by a claimant under section 105, and in any proceeding by the Trustee, if the final offer made by any defendant is less than the share of the total liability awarded against that defendant, a penalty shall be added to the award equal to 100 percent of the difference between the defendant's settlement offer under section 103(b) and the lesser of—

(1) the defendant's share of the offer made by the Trustee under section 103(b); or

(2) the defendant's share of the award made under section 105.

(d) PUNITIVE DAMAGES.—Punitive damages may be awarded against a defendant if the claimant establishes by clear and convincing evidence that the conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others was the proximate cause of the harm that is the subject of the asbestos claim. Punitive damages may not exceed 3 times the amount of the award pursuant to a section 105 adjudication plus any penalties added to that award pursuant to subsection (c).

**SEC. 209. SPECIAL RULES APPLICABLE TO THE TRUSTEE.**

In an action by the Trustee as assignee of the claimant, the award under section 104(d) shall include compensatory damages for the claimant's injury and all punitive damages under section 208(d), any penalties for inadequate offers by defendants, and the Trustee's costs in establishing the claim, including reasonable attorneys' fees and expenses and an allowance for interest on the amount paid by the Fund to the claimant under section 104. Interest shall be calculated from the time of such payments, and in accordance with Title IV. All economic and non-economic damages recovered by the Fund in excess of 200 percent of the amount paid to the claimant pursuant to section 104 and all punitive damages under section 208(d) shall be paid to the settling claimant. The fact that the claimant has accepted an offer of compensation by the Trustee, and the amount and terms of such offer, shall not be admissible in any adjudication of a claim brought by the Trustee against any defendant.

# TITLE III—ELIGIBLE MEDICAL CATEGORIES.

**SEC. 301. ELIGIBLE MEDICAL CATEGORIES.**

(a) IN GENERAL.—The eligible medical categories under this Act are asbestos-related non-malignant conditions with impairment, asbestos-related mesothelioma, asbestos-related lung cancer, and asbestos-related other cancer.

(b) ESTABLISHING EXISTENCE.—A claimant may establish the existence of an eligible medical condition either by demonstrating that the exposed person meets the standard criteria provided in sections 302, 303, 304, and 305 or by demonstrating

to an exceptional medical claims panel, through reliable evidence, that the exposed person has an asbestos-related impairment that is substantially comparable to the condition of an exposed person who would satisfy the requirements of a given medical category. The Administrator, after consultation with the Medical Advisory Committee, may adopt rules consistent with this section to assure consistency and efficiency in the designation of claims as exceptional medical claims.

**SEC. 302. ASBESTOS-RELATED NON-MALIGNANT CONDITIONS WITH IMPAIRMENT.**

(a) IN GENERAL.—The standard criteria for asbestos-related non-malignant conditions with impairment shall include—

(1) clinical evidence of asbestosis,

(2) pathological evidence of asbestosis, or

(3) evidence of bilateral pleural thickening with impairment.

(b) OBSTRUCTIVE LUNG DISEASE.—A claimant shall not be disqualified from compensation under this category solely because an exposed person who otherwise meets the requirements for impairment has a reduced FEV1/FVC ratio indicating obstructive lung disease. In that event, the exceptional medical claims panel shall determine, giving due regard to the evidence that any impairment is related to obstructive disease and taking into consideration all available evidence, whether an asbestos-related restrictive disease substantially contributes to the impairment of the exposed person. Such a contribution shall be presumed if the panel concludes, based upon the findings of a certified B-reader, that the exposed person's chest x-ray is ILO Grade 2/1 or more.

**SEC. 303. ASBESTOS-RELATED MESOTHELIOMA.**

The standard criteria for asbestos-related mesothelioma shall include a diagnosis by a qualified physician of a malignant mesothelioma caused or contributed to by exposure to asbestos with a primary site in the pleura, peritoneum, or like tissue, or reasonably equivalent clinical diagnosis in the absence of adequate tissue for pathological diagnosis.

**SEC. 304. ASBESTOS-RELATED LUNG CANCER.**

(a) IN GENERAL.—The standard criteria for asbestos-related lung cancer shall include—

(1) a diagnosis by a qualified physician of lung cancer that the physician concludes was caused or contributed to by exposure to asbestos;

(2) a latency period of at least 10 years; and

(3) either—

(A) evidence of asbestosis or bilateral pleural thickening with impairment sufficient to meet the requirements of section 302 or to qualify as an exceptional medical claim under section 301(b); or

(B) chest x-rays which, in the opinion of a certified B-reader, demonstrate asbestos-related bilateral pleural plaques or thickening, and 7.5 equivalent-years of exposure to asbestos-containing materials in employment regularly requiring work in the immediate area of visible asbestos dust.

(b) HISTORY OF SMOKING.—If a finding of asbestos-related lung cancer is made pursuant to paragraph (3)(B) and the exposed person has a substantial history of smoking, which shall be defined by rule, the claimant shall be medically eligible for compensation, but the finding of asbestos-related lung cancer shall not be conclusive as to causation for purposes of section 201.

**SEC. 305. ASBESTOS-RELATED OTHER CANCER.**

The standard criteria for asbestos-related other cancer shall include a diagnosis by a qualified physician of a malignant primary tumor of the larynx, oral-pharynx, gastro-intestinal tract, or stomach, caused or contributed to by exposure to asbestos, together with evidence of a condition sufficient to meet the requirements of section 302 or to qualify as an exceptional medical claim under section 301(b).

**SEC. 306. MEDICAL TESTING REIMBURSEMENT.**

(a) LEVEL A.—A claimant with at least 4 equivalent-years of heavy exposure to asbestos, whose chest x-ray shows either small irregular opacities of ILO Grade 1/0 or bilateral pleural thickening of ILO Grade B/2, shall be eligible for reimbursement of 100 percent of out-of-pocket expenses for any medical testing required under section 102, up to a ceiling of $1500. Level A claimants shall be eligible at 3 year intervals for similar reimbursement of future medical testing expenses for up to 2 additional occasions. Level A reimbursements shall be treated as administrative expenses of the OAC and paid for by defendants under section 401.

(b) LEVEL B.—The Administrator shall, subject to the availability of appropriated funds, reimburse up to 100 percent of the out-of-pocket expenses for any medical testing required under section 102, up to a ceiling established by rule, with

the approval of the Trustee, for any claimant with at least one equivalent-year of heavy exposure to asbestos who meets the medical but not the exposure requirements of Level A. Level B claimants may be eligible for similar reimbursement of future medical testing expenses for up to 2 additional occasions at least 3 years apart. The Administrator shall adjust periodically the amount of the cash payment to reflect changes in medical costs. Level B reimbursements shall be treated as administrative expenses of the OAC and paid for by defendants under section 401.

(c) CERTIFIED LABS.—The Administrator is authorized to establish a program for the certification of laboratories to provide medical testing under this section.

(d) EXPOSURE VERIFICATION.—The Administrator shall establish audit and other procedures to provide reasonable assurance that statements concerning exposure made by claimants seeking medical testing reimbursement under this section are accurate.

# TITLE IV—FUNDING.

**SEC. 401. ASSESSMENT AND ENFORCEMENT.**

(a) RULES.—The Administrator shall adopt rules for calculating and collecting from defendants all costs associated with the determination of claims and payments to claimants.

(b) TRUSTEE.—The Trustee shall have authority to bring an action in the district courts of the United States to enforce any obligation imposed on any person by this section and such courts shall have exclusive jurisdiction of such actions without regard to the amount in controversy or citizenship of the parties. The district court shall not entertain any defense other than lack of jurisdiction in any action by the Trustee under this subsection.

(c) TRUSTEE PREVAILS.—In any action under subsection (b) in which the Trustee prevails, the Trustee shall be entitled to costs, including reasonable attorneys' fees, and interest on any unpaid amount.

(d) JUDICIAL REVIEW.—A defendant may challenge the legality or amount of any assessment only by seeking judicial review in the United States Court of Federal Claims after paying the disputed amount. If successful, the defendant shall be awarded interest.

**SEC. 402. FISCAL AND FINANCIAL MANAGEMENT OF THE ASBESTOS COMPENSATION FUND**

(a) APPLICABILITY OF CREDIT REFORM ACT PRINCIPLES; FISCAL MANAGEMENT RULES.—Except as provided in this section, the operations of the Fund related to settlement payments under section 104, and associated recoveries from defendants, shall be governed by the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.), notwithstanding the status of the Fund as a governmental entity. The Administrator shall promulgate rules, approved by the Office of Management and Budget, for the fiscal management of the Fund. Such rules and their application shall not be subject to judicial review and shall, as regards payments under section 104—

(1) provide all reasonable assurance that, over an appropriate time period, the subsidy rate associated with the net litigation risk of the Fund is zero;

(2) provide all reasonable assurance that, in any given year, the subsidy rate associated with the net litigation risk of the Fund is no more than 2 percent;

(3) provide for the allocation of receipts from defendants to various Fund accounts, including the Fund's financing account, program account, and an account for salaries and expenses (which shall include litigation costs); and

(4) provide specific instructions for the Trustee to reduce payments by the Fund when necessary to meet the solvency requirements of this subsection.

(b) FINANCING OF THE FUND, SETTLEMENT PAYMENTS TO CLAIMANTS.—

(1) CREDIT REFORM PRINCIPLES.—The Fund is authorized to receive from defendants, as offsetting receipts, any amounts related to settlements or judgments, including damages, interest, litigation costs, specific administrative costs that may be required by the Administrator through rulemaking, and interest costs incurred by the Fund in connection with payment of settlement offers made under section 103. Amounts received from defendants as interest shall be sufficient to pay interest costs due to the United States Treasury from the financing account, plus the subsidy costs of the program account, provided that the latter amounts may not exceed 3 percent of the amount of any settlement or award. Recoveries on a claim by the Fund in excess of the settlement amount paid to the claimant and other costs of the Fund which are not paid to the claimant under section 209 shall be available to the program account as a reduction to subsidy costs in the current or any subsequent year.

(2) AUTHORITY.—The program account shall have permanent indefinite authority, not subject to further appropriation, to transfer funds to the finance account in accordance with principles of the Credit Reform Act.

**SEC. 403. AUTHORIZATION FOR APPROPRIATIONS AND OFFSETTING COLLECTIONS.**

(a) IN GENERAL.—There are authorized to be appropriated—

(1) to the OAC such sums as may be required to perform responsibilities under this Act;

(2) to the United States Court of Federal Claims, such sums as may be required to carry out its responsibilities under this Act; and

(3) to the OAC an amount not to exceed $100 million, for a one-time loan to the Fund in connection with startup expenses, such loan to be repaid by the Fund with interest;

The total of appropriations provided under this subsection in the first year after the date of enactment not exceed $250 million and in any subsequent year not exceed $150 million.

(b) OFFSETTING COLLECTIONS OF ADMINISTRATIVE ASSESSMENTS.—The OAC is authorized to receive and to expend in any year, as offsetting collections, all administrative assessments or prepaid administrative assessments and all costs and penalties paid to it.

# TITLE V—TRANSITION

**SEC. 501. APPLICABILITY; TRANSITIONAL CIVIL ACTIONS.**

(a) IN GENERAL.—This Act shall be effective upon its date of enactment with respect to any civil action asserting an asbestos claim in which trial has not commenced as of that date.

(b) PENDING CLAIM.—A claimant with a pending civil claim on the date of enactment shall not be required to obtain a certificate of medical eligibility or otherwise exhaust the procedures set forth in title I if trial commences within 6 months of the date of enactment of this Act. This 6-month period may be extended by the Attorney General for up to an additional 6 months if required for the orderly implementation of this Act, and after reporting to the Congress the reasons for any such extension.

(c) RIGHT TO SUE LETTER.—If a claimant with—

(1) a pending civil action on the date of enactment of this Act, and

(2) a scheduled trial date within one year after the date of enactment of this Act

does not receive an initial decision on medical eligibility within the time period prescribed in section 102(c), the claimant may request a right-to sue letter from the Administrator at any time prior to the issuance of that initial decision. If the Attorney General determines that the 6-month period in subsection (b) should be extended, the one-year period in the preceding sentence shall be similarly extended. The Administrator shall issue a right-to-sue letter or an initial decision under section 102 within 10 days following the receipt of the claimant's request. A claimant who receives a right-to-sue letter may assert the claimant's asbestos claim in any competent forum notwithstanding section 101(b).

(d) CLAIM IN ANOTHER FORUM.—Any claimant who asserts his claim in a forum other than the OAC under subsections (b) or (c) must demonstrate that the exposed person has qualified for medical eligibility under section 301, 302, 303, 304, 305, or 306.

# TITLE VI—DEFINITIONS

**SEC. 601: DEFINITIONS.**

In this Act:

(1) ASBESTOS CLAIM.—The term "asbestos claim" means any claim for damages or other relief, arising out of, based on, or related to the health effects of exposure to asbestos, including any claim for personal injury, death, mental or emotional injury, risk of disease or other injury, or the costs of medical monitoring or surveillance, and including any claim made by or on behalf of any exposed person or any representative, spouse, parent, child, or other relative of any exposed person. The term does not include any claim for workers' compensation benefits, or any claim by an employer or insurer for reimbursement from a third-party for benefits paid under a workers' compensation plan, or any claim for benefits under a veterans' benefits program.

(2) ASBESTOS TRUST.—The term "asbestos trust" means a court-supervised trust established to resolve asbestos claims arising directly or indirectly from exposure to asbestos or asbestos-containing products, including a trust created pursuant to the bankruptcy laws of the United States or Rule 23 of the Federal Rules of Civil Procedure.

(3) CERTIFICATE OF MEDICAL ELIGIBILITY.—The term "certificate of medical eligibility" means a certificate issued to a claimant pursuant to this Act certifying that an exposed person meets the requirements of one or more eligible medical categories or qualifies as an exceptional medical claim.

(4) CERTIFIED B-READER.—The term "certified B-reader" means an individual qualified as a "final' or "B-reader" under 42 C.F.R. 37.51(b) (1997) (and any subsequent revisions thereof) whose certification is current.

(5) CHEST X-RAYS.—The term "chest x-rays" means chest radiographs taken in at least 2 views (Posterior-Anterior and Lateral) and graded quality 1 for reading according to the criteria established by the ILO. If the claimant is unable to provide quality 1 chest x-rays because of death or because of an inability to have new chest x-rays taken, chest x-rays graded quality 2 will be acceptable.

(6) CIVIL ACTION.—The term "civil action" means any action, lawsuit, or proceeding in any State, Federal, or tribal court, but does not include—

(A) a criminal action; or

(B) an action relating to State or Federal workers' compensation laws, or a proceeding for benefits under any veterans' benefits program.

(7) CLAIMANT.—The term "claimant" means any exposed person or the person's legal representative, and any relative of an exposed person or their legal representative, who asserts an asbestos claim.

(8) CLINICAL EVIDENCE OF ASBESTOSIS.—The term "clinical evidence of asbestosis" means a diagnosis of pulmonary asbestosis by a qualified physician based on the minimum objective criteria of—

(A) Chest x-rays for which a B-reader report is furnished showing small irregular opacities of ILO Grade 1/0 and pulmonary function testing and physical examination that show either—

(i) FVC <80% of predicted value with FEV1/FVC≥ 75% (actual value); or

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

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

(i) FVC <80% of predicted value with FEV1/FVC≥ 72% (actual value) or, if the individual tested is at least 68 years old at the time of the testing, with FEV1/FVC≥ 65% (actual value); or

(ii) TLC <80% of predicted value.

(9) COMPENSATORY DAMAGES.—The term "compensatory damages" means damages awarded for economic loss, such as medical expenses, as well as non-economic loss. Non-economic loss includes subjective, non-pecuniary loss, such as pain, suffering, inconvenience, emotional distress, loss of society and companionship, and loss of consortium.

(10) CORE CLAIM.—The term "core claim" means an asbestos claim against a defendant who either—

(A) manufactured any asbestos-containing product which released asbestos fibers to which the exposed person was exposed, and paid out $ 50 million in respect of such claims cumulatively over the 10 year period preceding the filing of the claim; or

(B) was not a manufacturer but paid out $ 100 million in respect of such claims cumulatively over the 10 year period preceding the filing of the claim; provided that the alleged liability is not based upon the control or ownership of property.

(11) DEFENDANT.—The term "defendant" means any person who is or may be responsible for the asbestos-related condition of the exposed person and who is so notified by the Administrator pursuant to title I. The term does not include—

(A) an asbestos trust in existence as of the date of enactment of this Act unless the trust elects to be covered by this Act under section 701(b); or

(B) the United States Government or a State government.

(12) DLCO.—The term "DLCO" means single-breath diffusing capacity of the lung (carbon monoxide), which is a measure of the volume of carbon mon-

oxide transferred from the alveoli to blood in the pulmonary capillaries for each unit of driving pressure of the carbon monoxide.

(13) EQUIVALENT-YEAR.—The term "equivalent-year" means a measure of exposure to asbestos adjusted to reflect varying exposure levels typical of different occupations. Each year of exposure in which an exposed person's primary occupation involved the direct installation, repair, or removal of asbestos-containing products, shall count as one year. Each year of such occupational exposure in which the exposed person's primary occupation involved either the direct manufacture of asbestos-containing products using raw asbestos fiber or the direct installation, repair, or removal of asbestos-containing products in a shipyard during World War II, shall count as 2 years. Each year of exposure in occupations not described above shall count as one-half year.

(14) EVIDENCE OF BILATERAL PLEURAL THICKENING WITH IMPAIRMENT.—The term "evidence of bilateral pleural thickening with impairment" means a diagnosis of bilateral pleural thickening by a qualified physician based on the minimum objective criteria of either—

(A) Chest x-rays for which a B-reader report is furnished showing bilateral pleural thickening of ILO Grade B/2 with pulmonary function testing and physical examination that show either—

(i) FVC <80% of predicted value with FEV1/FVC≥ 75% (actual value) or

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

(B) Chest x-rays for which a B-reader report is furnished showing bilateral pleural thickening of ILO Grade C/2 or greater; and pulmonary function testing that shows either—

(i) FVC <80% of predicted value with FEV1/FVC≥ 72% (actual value) or, if the individual tested is at least 68 years old at the time of the testing, with FEV1/FVC≥ 65% (actual value); or

(ii) TLC <80% of predicted value.

(15) EXPOSED PERSON.—The term "exposed person" means any person who has been exposed in any State (or while working aboard a United States vessel outside the United States) to asbestos or to asbestos-containing products.

(16) FEV1.—The term "FEV1" means forced expiratory volume (1 second), which is the maximal volume of air expelled in one second during performance of the spirometric test for forced vital capacity (FVC).

(17) FUND.—The term "Fund" means the Asbestos Compensation Fund.

(18) FVC.—The term "FVC" means forced vital capacity, which is the maximal volume of air expired with a maximally forced effort from a position of maximal inspiration.

(19) ILO.—The term "ILO" means the International Labour Organization.

(20) ILO GRADE.—The term "ILO grade" means the radiological ratings for the presence of lung or pleural changes by chest x-ray as established from time to time by the ILO.

(21) LATENCY PERIOD.—The term "latency period" means the period from the date of the exposed person's first exposure to asbestos or an asbestos-containing product to the date of manifestation of the condition claimed.

(22) LUNG CANCER.—The term "lung cancer" means a primary malignant bronchogenic tumor, of any cell type, caused or contributed to by exposure to asbestos.

(23) MANIFESTATION.—The term "manifestation" means either the date of the actual diagnosis of the condition claimed, or the date upon which the clinical records and available tests indicate that the condition could reasonably have been diagnosed by a qualified physician.

(24) NET LITIGATION RISK.—The term "net litigation risk" means the risk to the Asbestos Compensation Fund that amounts paid out to claimants, plus associated interest and litigation expenses, will exceed amounts recovered from defendants, expressed as a percentage of sums expended, and estimated for a specific cohort of transactions. Losses on particular claims are netted against excess recoveries on other claims.

(25) OAC.—The term "OAC" means the Office of Asbestos Compensation.

(25) OCCUPATIONAL HISTORY.—The term "occupational history" means a listing of all employment positions, providing for the dates and location of employment, the employer, and a description of job responsibilities and activities.

(26) PARTY.—The term "party" does not include the United States Government or a State government.

(27) PATHOLOGICAL EVIDENCE OF ASBESTOSIS.—The term "pathological evidence of asbestosis" means diagnosis of pulmonary asbestosis by a qualified physician based on a finding that more than one representative section of lung tissue otherwise uninvolved with any other process (e.g., cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies, and also that there is no other more likely explanation for the presence of the fibrosis.

(28) PERSON.—The term "person" means an individual, trust, firm, corporation, association, partnership, or joint venture. The term does not include—

(A) an asbestos trust in existence as of the date of enactment of this Act unless the trust elects to be covered by this Act under section 701(b); or

(B) the United States Government or any State government.

(29) PHYSICIAN.—The term "physician" means a medical doctor or doctor of osteopathy currently licensed to practice medicine in any State who has not, within the 5-year period prior to the date of enactment of this Act, spent more than one half of the doctor's professional time, or derived more than one-half of the doctor's professional income, either annually or in total, either reviewing or testifying in any forum on medical-legal issues related to asbestos.

(30) PREDICTED VALUE.—The term "predicted value" means a published reference to the normal breathing capacity of healthy populations based on age, height, and gender, as approved by the Medical Director, pursuant to a rule, issued within 120 days of the date of enactment. For the purposes of this Act, the use of any published, predicted values that are generally accepted in the medical community shall be acceptable and such values may not be adjusted for race.

(31) PULMONARY FUNCTION TESTING.—The term "pulmonary function testing" means tests for forced vital capacity, lung volume, and diffusing studies using equipment, tests and standards generally accepted in the medical community, as approved by the Medical Director, pursuant to a rule, issued within 120 days of enactment of this Act. Such pulmonary function test shall not be adjusted for race.

(32) PUNITIVE DAMAGES.—The term "punitive damages" means damages, in addition to compensatory damages, awarded against any person to punish past conduct or deter that person, or others, from engaging in similar conduct in the future.

(33) QUALIFIED PHYSICIAN.—The term "qualified physician" means, with respect to a diagnosis or other medical judgment or procedure under this Act, an internist, pulmonary specialist, pathologist, radiologist, oncologist, or specialist in occupational medicine with an appropriate subspecialty, as appropriate, who is certified by the relevant medical specialty board.

(34) QUALIFYING NATIONAL SETTLEMENT PLAN.—The term "Qualifying National Settlement Plan" means a written agreement or related series of written agreements with claimants or with attorneys or law firms representing claimants, pursuant to which a person who is or may be responsible for such claims has resolved or agreed to resolve at least 50 percent of the asbestos claims that were pending against such person.

(35) STATE.—The term "State" means any State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States or any political subdivision of any of the foregoing.

(36) TLC.—The term "TLC" means total lung capacity, which is the volume of air in the lung after maximal inspiration.

(37) TRUSTEE.—The term "Trustee" means the Trustee of the Asbestos Compensation Fund.

(38) VETERANS' BENEFITS PROGRAM..—The term "veterans' benefits program" means any program for benefits in connection with military service administered by the Veterans' Administration under Title 38, United States Code.

(39) WORKERS' COMPENSATION LAW.—The term "workers' compensation law" means a law respecting a program administered by a State or the United States to provide benefits, funded by a responsible employer or its insurance carrier, for occupational diseases or injuries or for disability or death caused by occupational diseases or injuries. The term includes the Longshore and Harbor Workers' Compensation Act, (33 U.S.C. 901-944, 948-950), but does not include the Employer's Liability Act, (45 U.S.C. chapter 2).

# TITLE VII—MISCELLANEOUS PROVISIONS

**SEC. 701. RELATIONSHIP TO OTHER LAWS.**

(a) APPLICABILITY OF OTHER FEDERAL LAWS.—The OAC may, with the approval of the Director of the Office of Management and Budget, waive the applicability in whole or in part of personnel and procurement laws and regulations, provided that any such waiver must be specific, must be subject to periodic review and evaluation, and must be reasonably related to the goals of expeditious, professional, efficient, cost-effective and fair resolution of asbestos claims.

(b) APPLICATION TO EXISTING ASBESTOS TRUSTS.—

(1) IN GENERAL.—This Act shall not apply to any asbestos trust in existence as of the date of enactment of this Act, except as provided in paragraph (2).

(2) ELECTION.—An asbestos trust may elect to be subject to this Act by providing written notice of such election to the OAC, in which case the trust will have the same rights and responsibilities under this Act as any person who is not a trust. A valid election under this paragraph shall be irrevocable.

(c) SETTLEMENTS PRESERVED.—Nothing in this Act—

(1) invalidates any settlement of asbestos claims entered into prior to the date of enactment of this Act; or

(2) revokes or negates any asbestos defendant's standing offer to settle existing asbestos claims.

(d) OTHER COMPENSATION.—This Act shall not be construed to affect the scope or operation of any workers' compensation law or veterans' disability benefit program, to affect the exclusive remedy provisions of any such law, or to authorize any lawsuit which is barred by any such provision of law.

(e) SUCCESSOR LIABILITY.—Nothing in this Act is intended to displace otherwise applicable law governing any liability arising from the defendants' status as transferee or successor with respect to a change in ownership of corporate assets.

**SEC. 702. ANNUAL REPORTS.**

The Administrator shall submit an annual report to the President and Congress.

**SEC. 703. ENFORCEMENT.**

The Administrator may enforce any obligation imposed on any person by this Act in a district court of the United States, and such courts shall have exclusive jurisdiction over such actions without regard to the amount in controversy or citizenship of the parties. The Administrator, if successful, shall be entitled to costs, including attorney's fees.

**SEC. 704. QUALIFYING NATIONAL SETTLEMENT PLAN.**

Any defendant which is party to a Qualifying National Settlement Plan may elect to defer the application of this Act (other than sections 201 through 207 and section 501) to asbestos claims against that defendant for a period not exceeding 7 years from a date relative to the commencement of the Qualified National Settlement Plan. The Administrator shall, by rule, adopt procedures for processing requests for deferral under this section. If the request for deferral is accepted, the deferred defendant and any asbestos claims or third party asbestos claims against the deferred defendant shall not be subject to the provisions of this Act (other than sections 201 through 207 and section 501).

**SEC. 705. SEVERABILITY.**

If any provision of this Act or the application of such provision to any person or circumstance is held invalid, it is the intent of Congress that the remainder of this Act and application of such provision to other persons or circumstances shall not be affected thereby.

**SEC. 706. SETTLEMENTS.**

For a period of 7 years after the date of enactment of this Act, a claimant or a defendant may specifically enforce, in any applicable Federal or State court where the claimant is alleging that the claimant was exposed to asbestos or where the claimant is currently domiciled, any written settlement agreement which was agreed to by the claimant or the claimant's attorney and the defendant before such date of enactment.

## THE AMENDMENT

Inasmuch as H.R. 1283, the Asbestos Compensation Act of 2000, was ordered reported with a single amendment in the nature of a

substitute, as amended, the contents of this report constitute an explanation of the bill as so amended.

## PURPOSE AND SUMMARY

H.R. 1283 establishes a comprehensive asbestos compensation program pertaining to asbestos-related personal injury lawsuits. The purpose of H.R. 1283 is to provide all asbestos victims with efficient and fair compensation by ensuring that claimants suffering from an asbestos-related impairment will be given priority over other asbestos related claims.

The heart of the bill's compensation program is a non-adversarial determination of medical eligibility. Claimants that are determined to be medically eligible may assert their claim by proceeding to State or Federal court at anytime, or electing non-adversarial settlement offers or an administrative adjudication under the administrative program. In addition, a determination of medical eligibility creates a presumption that the claimant has an asbestos related illness, this presumption may only be rebutted by "clear and convincing" evidence.

H.R. 1283 also contains a comprehensive set of rules pertaining to asbestos litigation. These rules eliminate practices that may diminish an individual's claim and hold major asbestos manufacturers and distributors to a higher standard of liability. In addition, a legal assistance program will assure that asbestos victims can retain counsel for a reasonable fee set by the Office of Asbestos Compensation.

## BACKGROUND AND NEED FOR THE LEGISLATION

### BACKGROUND

On May 20, 1998, Representative Henry J. Hyde, Chairman of the Committee on the Judiciary, introduced H.R. 3905, the "Fairness in Asbestos Compensation Act of 1998." While H.R. 3905 expired at the conclusion of the 105th Congress with 12 cosponsors, the committee was consumed with impeachment proceedings. Accordingly, on March 25, 1999, Chairman Hyde introduced a virtually identical bill, H.R. 1283 the "Fairness in Asbestos Compensation Act of 1999," which has 75 cosponsors.

### NEED FOR THE LEGISLATION

*Asbestos: The Public Health Tragedy.* Asbestos is a fibrous mineral that has been widely used as insulation and as a fire retardant in a wide variety of applications. Asbestos can produce dust that, when inhaled, becomes deposited in the lungs. Asbestos dust causes a number of serious, and sometimes fatal, diseases. These include asbestosis, mesothelioma (a malignant tumor in the lining of the lungs or the abdominal cavity), and lung cancer. Asbestos exposure has also been shown by medical studies to contribute to certain other cancers.

Although it was known early in the 20th century that exposure to asbestos in high concentrations could lead to asbestosis, the full range of asbestos hazards only came to be appreciated in the late 1960's. A turning point in this tragedy came years ago in the form of a decision made by the United States Government to require its

use in ships during World War II and for decades beyond. That one decision by our Government led to the exposure of hundreds of thousands Americans and prompted wider use of the fibrous mineral for both public and private purposes.

Through litigation and regulatory action, the widespread use of asbestos in the United States began a rapid decline in the 1970's and largely ended in the early 1980's. For almost 30 years, workplace exposures have been regulated by the Government. Several Federal and State agencies have the authority to regulate asbestos, most notably the Occupational Safety and Health Administration (OSHA) and the U.S. Environmental Protection Agency (EPA). Since the 1970's, the domestic consumption of asbestos has fallen by more than 97 percent. Further, the manufacture of "friable" asbestos products (material that can be crumbled by hand pressure, releasing asbestos fibers into the air), which pose the highest risk of exposure, has been virtually eliminated in the United States. Today, the production and use of asbestos is at a historic low, with substitute materials now taking its place in all but a few instances where there is no realistic substitute.

In the decades before strict Federal regulation, exposure to asbestos in many occupations was heavy. It has been estimated that over 27 million Americans have been exposed. While these people can expect a latency period up to 40 years before an asbestos related disease will manifest, many will continue to produce serious asbestos-related illnesses well into the 21st century. Although the first legislative attempt to extend benefits to enable asbestos victims to receive compensation dates back as far as 1973, no Federal program has been adopted for the purposes of compensating asbestos victims.

*Asbestos: The Litigation Crisis.* Prior to the 1970's, asbestos lawsuits were relatively rare. Workers injured by exposure to asbestos typically sought to recover benefits from their employers, through the workers' compensation system, although statutes of limitations and other barriers often prevented substantial recoveries. At that time, tort suits against manufacturers and distributors of asbestos-containing products were usually unsuccessful.

This situation began to change in the early 1970's. In *Borel* v. *Fibreboard Corp.*, 493 F.2d 1076 (5th Cir. 1973), a Federal appeals court affirmed a verdict against an asbestos defendant on a theory of strict liability for failure to warn. This decision facilitated liability for asbestos related illnesses, led to thousands of claims by individuals sick or dying from exposure to asbestos, and revealed the unknown dangers of asbestos. The most troubling revelation from these lawsuits was that many of the largest asbestos manufacturers and distributors, as well as the United States Government, had known of the dangers of asbestos exposure well before they had previously acknowledged.

In the late 1970's, the lawsuits began to multiply. By 1982, the Johns Manville Corporation, the largest manufacturer of asbestos products, faced over 17,000 pending tort claims. Under the weight of these lawsuits, Manville declared bankruptcy.[1] While at the time, Manville was the largest defendant, this liability was, in part, transferred to other companies that either manufactured or

[1] *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. 710, 751 (E. & S.D.N.Y. 1991).

distributed asbestos through joint and several liability. Many of these companies also faced the same fate as Manville. Recently two additional major asbestos defendants filed for bankruptcy protection, Babcock & Wilcox filed on February 22, 2000 and the Pittsburgh Corning Corporation filed on April 16, 2000.

Following the Manville bankruptcy in 1982, the number of tort lawsuits against other major asbestos defendants rose dramatically. These lawsuits proved very complex. Studies by the RAND Corporation showed that they involved large transaction costs—approximately 61% of the resources expended by defendants went to lawyers for plaintiffs and defendants and other litigation expenses, with only 39% going to the plaintiffs.[2] In 1985, a group of major asbestos producers and insurers agreed to pool resources and handle claims on a collective basis under what became known as the Wellington Agreement. In 1998 the Wellington Agreement collapsed and several more bankruptcies followed.

By the late 1980's, the sheer number of asbestos personal injury cases in the Federal and State courts had presented serious caseload and backlog problems. In September 1990, Chief Justice William Rehnquist appointed an Ad Hoc Committee on Asbestos Litigation. The committee was composed of seven Federal judges with extensive experience in asbestos litigation, and it was chaired by Judge Thomas M. Reavley of the Fifth Circuit. The committee made its report to the Chief Justice and the members of the Judicial Conference of the United States in March 1991. The committee's report contained the following observation, and recommendation:

> "The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both Federal and State courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transactions costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.
>
> It is easy to describe the problems. It is not easy to fashion an appropriate remedy in the context of our Federal system.
>
> The committee firmly believes that the ultimate solution should be legislation recognizing the national proportions of the problem both in Federal and State courts and creating a national asbestos dispute resolution scheme. . . ." Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (March, 1991), p. 3.

In the 102nd Congress, the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee held hearings focusing on the impact of asbestos litigation on the Federal and State courts and on the findings of the Ad Hoc Committee's report.[3] The Subcommittee on Courts and Administrative Practice of the Senate Judiciary subsequently held similar hear-

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[2] James S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses*, p. xviii (Rand 1984).

[3] *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before The Subcomm. On Intellectual Property and Judicial Admin. of the Comm. on the Judiciary, House of Representatives*, 102nd Cong. 1st and 2nd Sess. (1992).

ings.[4] While no legislation was introduced in either house to implement the recommendations provided by the Ad Hoc Committee or any of these hearings, it was clear that asbestos victims were bearing enormous delays and costs through this complex litigation.

At approximately the same time that the Ad Hoc Committee issued its report, all pending Federal asbestos cases were consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation ("MDL Panel"). The MDL Panel transferred those cases to the Eastern District of Pennsylvania, where they were assigned to Judge Charles Weiner. The Panel found that the more than 30,000 asbestos-related personal injury or wrongful death actions then pending in the Federal courts had "reached a magnitude . . . that threatens the administration of justice and that requires a new, streamlined approach." *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 418 (J.P.M.L. 1991).

The Panel urged Judge Weiner to consider innovative approaches to managing the litigation, including establishing "deferral programs" for plaintiffs "who have been exposed to asbestos but do not presently show any signs of impairment." *Id.* at 420. Studies showed that the volume of asbestos claims by unimpaired plaintiffs was very large,[5] and deferral of these claims was considered crucial to providing timely disposition of claims involving asbestos-related impairment or malignancy. Accordingly, Judge Weiner implemented an order (Administrative Order No. 3) establishing a mandatory negotiation process and setting priority for remand based on the severity of the plaintiff's medical condition.

Notwithstanding Judge Weiner's limited progress at the Federal level, the asbestos litigation problem seriously deteriorated throughout the 1990's. Even before the consolidation of Federal cases by the MDL Panel, asbestos cases had begun to flow from the Federal courts to the State courts. Following the MDL order, the rate of asbestos related filings in State courts accelerated. Thus, despite a reduction in Federal filings, the overall backlog in both Federal and State courts, estimated by the Judicial Conference at 100,000 claims in 1990, doubled to over 200,000 claims in 1999.[6] A survey of the most recent SEC filings by major asbestos defendants, reporting pending claims through the third quarter of 1999, shows that this estimate appears quite conservative.[7]

This large increase in the pending backlog indicates that the rate of settlements and trials was not keeping up with new filings. From 1997 through 1999 new filings against some defendants ranged from 40,000 to over 60,000 per year—figures that would have been staggering just a few years before.[8] A survey of State

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[4] *The Problems in Asbestos Litigation: Hearing Before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary, United States Senate*, 102nd Cong. (1993).

[5] See, e.g., *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 129 B.R. at 935 (app. C) (showing "pleural" claims accounting for 54.4% of all claims involving the Manville Trust).

[6] *H.R. 1283 the "Fairness in Asbestos Compensation Act of 1999": Hearing Before the House Committee on the Judiciary*, 106th Cong., 1st Sess. (1999)(testimony of Prof. Christopher Edley, Jr.).

[7] For example, in their filings on Form 10Q with the Securities and Exchange Commission for the third quarter of 1999, Armstrong World Industries reported 182,000 pending claims, GAF Corporation reported 114,000, USG Corporation reported 100,000, W.R. Grace & Co. reported 102,894, and Kaiser Aluminum reported 110,599.

[8] These figures are supported by the most recent figures reported by major defendants to the Securities and Exchange Commission on Form 10Q, covering the first three quarters of 1999. On these forms, Armstrong World Industries reports receiving 40,200 claims for the first three quarters of 1999 and 71,000 claims for all of 1998. Kaiser Aluminium reports 29,700 new claims for the first three quarters of 1999 and 22,900 claims for calander year 1998. GAF Corporation

court dockets in 1999 also showed a serious pattern of delays, with asbestos cases pending on average for several years.[9] The Department of Justice reported in September 1999 that asbestos cases took, on average, twice as long as other tort cases to reach verdict, with cases taking an average of 4 years.[10]

Bankruptcies continued throughout the 1990's. At least 24 known asbestos defendants have declared bankruptcy. Bankruptcies resulted in serious hardship for plaintiffs with claims against those companies.[11] For example, most claimants against the Manville Trust, which filed for bankruptcy in 1982, had to wait 12 years before they could pursue their claims—and even then they were entitled to receive only 10 cents on the dollar. Other bankruptcies have involved similar delays, and have left claimants with even less. In addition to plaintiffs, bankruptcies have harmed—shareholders, employees, and communities affected, as well as future claimants who now must look elsewhere for compensation.

*Amchem Prods.* v. *Windsor, Class Action Settlement.* When the Multi District Litigation (MDL) Panel transferred all pending Federal asbestos cases to the Eastern District of Pennsylvania, Steering Committees for the plaintiffs and defendants were formed in an effort to produce a global settlement. When those broad-based negotiations reached an impasse, plaintiffs' class counsel and representatives of the Center for Claims Resolution (CCR)—which comprised 20 defendant companies—began negotiations to resolve CCR's asbestos liability. After a year of discussions, the two sides reached a settlement agreement and filed a class action to implement the agreement. The settlement agreement also received the backing of Robert Georgine of the Building and Construction Trades Department of the AFL–CIO.

The settlement was approved and the settlement class was certified on August 16, 1994. *Georgine* v. *Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994). However, certain persons who would have been members of the affected class under the settlement, objected to the parties' subsequent motion for a preliminary injunction that would have barred class members from initiating claims against any CCR defendant pending a final judgment in this case. See *Georgine* v. *Amchem Prods., Inc.*, 878 F. Supp. 716 (E.D. Pa. 1994). On appeal, the Third Circuit Court of Appeals overturned the decision to grant class certification, finding that it failed to meet the commonality and predominance requirements of Federal rule 23(a) and 23(b)(3). *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610 (3rd Cir. 1996). Essentially, the Court determined that the class was too large and too disparate to meet the requirements of

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reports 42,200 new claims during the first three quarters of 1999. W.R. Grace & Co. reports 20,629 new claims during the first three quarters of 1999. USG Corporation reports 38,000 new personal injury claims in the first three quarters of 1999, 80,000 new claims for the entire year in 1998, and 23,500 new claims in 1997. In Owens Corning's Form 10Q filed with the Securities and Exchange Commission in November 1998 (covering the first three quarters of 1998), which is the last SEC form available in which Owens Corning reports figures for pending cases and new filings, Owens Corning reported receiving 27,100 new claims for the first three quarters of 1998, and 36,500 new claims for the entire year in 1997.

[9] *H.R. 1283 the "Fairness in Asbestos Compensation Act of 1999": Hearing Before the House Committee on the Judiciary*, 106th Cong., 1st Sess. (1999)(testimony of Prof. Christopher Edley, Jr.).

[10] Carol J. DeFrances & Marika F.X. Litras, Bureau of Justice Statistics, *Civil Trial Cases and Verdicts in Large Counties*, 1996, at p. 13, table 11 (September 1999).

[11] *H.R. 1283 the "Fairness in Asbestos Compensation Act of 1999": Hearing Before the House Committee on the Judiciary*, 106th Cong., 1st Sess. (1999)(testimony of Prof. Christopher Edley, Jr.).

Federal rule 23. In the course of his opinion, however, Judge Becker made numerous favorable comments about the innovative approach taken in the *Amchem* settlement and, in fact, referred to it at one point as an "arguably brilliant partial solution" to the asbestos litigation crisis. 83 F.3d at 617. Nevertheless, the Court felt obligated by a literal interpretation of Federal rule 23 to overturn the settlement. On June 25, 1997, in *Amchem Prods., Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997), the Supreme Court affirmed the Third Circuit's decision that the settlement class failed to meet the requirements of Federal rule 23.

*Ortiz* v. *Fibreboard, Class Action Settlement*. On June 23, 1999 the Supreme Court reversed and remanded another massive asbestos-related global settlement that had been certified under rule 23 of the Federal Rules of Civil Procedure. *Ortiz* v. *Fibreboard*, 119 S. Ct. 2295 (1999).

*The Supreme Court Speaks*. In *Amchem Prods.* v. *Windsor*, Justice Ruth Bader Ginsburg, writing for the Court, suggested that Congress might be the most appropriate body to resolve the asbestos litigation crisis:

> "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And rule 23 . . . cannot carry the large load heaped upon it." *Amchem Prods., Inc.* v. *Windsor*, 117 S. Ct. 2231, 2253 (1997).

Bills responding to the Supreme Court's invitation were introduced in the 105th Congress by Rep. Henry Hyde (H.R. 3905) and Sen. Orrin Hatch (S. 2546) of the House and Senate Judiciary Committees. The 105th Congress came to an end, however, without action on either bill. Similar bills were reintroduced in the 106th Congress in both the House (H.R. 1283) and the Senate (S. 758).

While these bills were pending, and in the wake of the *Amchem* decision, the Supreme Court handed down the decision in *Ortiz* v. *Fibreboard*. Writing for the Court, Justice David Souter opined that Congress was the most appropriate body to resolve the asbestos litigation crisis:

> "[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation." *Ortiz* v. *Fibreboard Corp.*, 119 S. Ct. 2295, 2302 (1999).

Chief Justice William Rehnquist, joined by Justices Scalia and Kennedy, also called for a legislative solution in a concurring opinion:

> "[T]he Court's opinion correctly states the existing law, and I join it. But the 'elephantine mass of asbestos cases,' . . . cries out for a legislative solution." Id. at 2324.

*The Asbestos Compensation Act of 2000*. Following these failed attempts to address asbestos litigation under existing law, legislation is needed addressing the underlying causes of the problem. The critical need is to separate the claims of those who are impaired by asbestos-related disease from the claim of those who are not impaired. This will alleviate the serious backlog of mostly

unimpaired asbestos claims and focus resources on compensating the sick.

This basic reform requires objective and administrative medical criteria. But, it is not enough just to establish an impairment line. Legislation needs to expedite the claims of the sick and eliminate arbitrary barriers to recovery. There needs to be a streamlined administrative process with strict time limits. Early settlements should be encouraged, and claimants should be guaranteed fair settlement offers as soon as medical eligibility is established. The statute of limitations and other timeliness rules, which have prompted many unimpaired plaintiffs to file lawsuits prematurely, should be abolished. And, legislation should simplify the issues, at least with respect to the main defendants, to provide more reliable and even handed compensation for the sick.

Legislation is also needed to put an end to abusive forum shopping and to control punitive damages awards that divert a limited pool of resources from compensation for the sick and accentuate the inequities of the current litigation system.

## HEARINGS

The committee's Subcommittee on Intellectual Property and Judicial Administration held a series of hearings in October 1991 and February 1992 to begin to assess the complex litigation that had been caused by the prevalent use of asbestos in America. While legislation had not been introduced, voluminous testimony detailed the horrors of asbestos litigation. Six years later on May 20, 1998, Henry J. Hyde, Chairman of the Committee on the Judiciary, introduced H.R. 3905, the "Fairness in Asbestos Compensation Act of 1998." Later that year, a hearing on H.R. 3905, scheduled for September 15, 1998 was canceled following the arrival of the Report from the Independent Counsel. Accordingly, after the conclusion of the impeachment trial of William Jefferson Clinton in the United States Senate, Chairman Hyde introduced H.R. 1283, the "Fairness in Asbestos Compensation Act of 1999," which was virtually identical to H.R. 3905.

On July 1, 1999 the Committee on the Judiciary held an extensive hearing on H.R. 1283. The hearing consisted of ten witness on two panels. Witnesses on the first panel included Professor Christopher F. Edley Jr of Harvard University School of Law; Louis W. Sullivan, President of the Morehouse School of Medicine and former Secretary of the Department of Health and Human Services; Richard H. Middleton, President of the Association of Trial Lawyers of America; Samuel J. Heyman, Chairman and Chief Executive Officer of the GAF Corporation; Dr. Christine Oliver, Associate Physician at Massachusetts General Hospital; and Dr. Gary Epler, Associate Physician at Brigham & Women's Hospital in Massachusetts. The second panel included Maura J. Abeln Smith, Senior Vice President and General Counsel of Owens Corning; Thomas J. Donohue, President of the United States Chamber of Commerce; Johnathan Hiatt, General Counsel of the AFL–CIO; and Conrad L. Mallett Jr., former Chief Justice of the Michigan Supreme Court.

## COMMITTEE CONSIDERATION

On March 9, 15, and 16, 2000, the Committee on the Judiciary met in open session to consider this bill and on March 16 ordered favorably reported the bill H.R. 1283, with a single amendment in the nature of a substitute as amended, by a recorded vote of 18 to 15, a quorum being present.

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

Mr. Hyde offered an amendment in the nature of a substitute which, without objection, was considered as the original text for purposes of markup.

## VOTES OF THE COMMITTEE

1. An amendment offered by Mr. Berman to the amendment in the nature of a substitute to H.R. 1283, which would have struck the effective date and inserted new language establishing March 15, 2000, as the effective date. Defeated by voice vote.

2. An amendment offered by Mr. Scott to the amendment in the nature of a substitute to H.R. 1283, which would have struck all tort reform provisions. Defeated by voice vote.

3. Amendment offered by Mr. Conyers, Mr. Nadler, Mr. Scott to the amendment in the nature of a substitute to H.R. 1283, which would have struck the medical criteria and inserted new language requiring the National Institute for Occupational Safety and Health to establish a uniform medical criteria. Defeated 10 ayes to 10 nays.

ROLLCALL NO. 1

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | | X | |
| Mr. McCollum | | | |
| Mr. Gekas | | | |
| Mr. Coble | | X | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | | | |
| Mr. Canady | | X | |
| Mr. Goodlatte | | | |
| Mr. Chabot | | X | |
| Mr. Barr | | | |
| Mr. Jenkins | | X | |
| Mr. Hutchinson | | | |
| Mr. Pease | | X | |
| Mr. Cannon | | | |
| Mr. Rogan | | X | |
| Mr. Graham | | | |
| Ms. Bono | | X | |
| Mr. Bachus | | X | |
| Mr. Scarborough | | | |
| Mr. Vitter | | | |
| Mr. Conyers | | | |
| Mr. Frank | X | | |
| Mr. Berman | | | |
| Mr. Boucher | | | |
| Mr. Nadler | | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | X | | |
| Ms. Waters | X | | |

ROLLCALL NO. 1—Continued

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Meehan | X | | |
| Mr. Delahunt | X | | |
| Mr. Wexler | | | |
| Mr. Rothman | X | | |
| Ms. Baldwin | | | |
| Mr. Weiner | X | | |
| Mr. Hyde, Chairman | | X | |
| Total | 10 | 10 | |

4. An amendment offered by Mr. Conyers, Mr. Scott, Mr. Hyde to the amendment in the nature of a substitute to H.R. 1283, striking the definition of "predicted value" and pulmonary function testing and inserting new language requiring the Medical Director to approve acceptable predicted values and pulmonary function testing through an administrative rule. Adopted by unanimous consent.

5. An amendment offered by Mr. Hutchinson to the amendment in the nature of a substitute to H.R. 1283, striking the 5 year limitation for Qualifying National Settlement Plans and inserting new language limiting Qualifying National Settlement Plans to 7 years. The amendment inserted new language which applied all tort reform provisions to any claim filed against a defendant with a Qualifying National Settlement Plan. In addition, this amendment struck the July 1, 1999 requirement from the definition of Qualifying National Settlement Plan. Passed by voice vote.

6. An amendment offered by Ms. Jackson Lee to the amendment in the nature of a substitute to H.R. 1283, which would have created an additional eligible medical category for Bilateral Pleural Disease. Defeated 11 ayes to 14 nays.

ROLLCALL NO. 2

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | | X | |
| Mr. McCollum | | X | |
| Mr. Gekas | | X | |
| Mr. Coble | | X | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | | | |
| Mr. Canady | | X | |
| Mr. Goodlatte | | | |
| Mr. Chabot | | X | |
| Mr. Barr | | X | |
| Mr. Jenkins | | X | |
| Mr. Hutchinson | | | |
| Mr. Pease | | X | |
| Mr. Cannon | | | |
| Mr. Rogan | | X | |
| Mr. Graham | | X | |
| Ms. Bono | | X | |
| Mr. Bachus | | X | |
| Mr. Scarborough | | | |
| Mr. Vitter | | | |
| Mr. Conyers | X | | |
| Mr. Frank | X | | |
| Mr. Berman | | | |
| Mr. Boucher | | | |
| Mr. Nadler | X | | |

ROLLCALL NO. 2—Continued

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | X | | |
| Ms. Waters | X | | |
| Mr. Meehan | X | | |
| Mr. Delahunt | | | |
| Mr. Wexler | | | |
| Mr. Rothman | X | | |
| Ms. Baldwin | | | |
| Mr. Weiner | X | | |
| Mr. Hyde, Chairman | | X | |
| Total | 11 | 14 | |

7. An amendment offered by Mr. Pease to the amendment in the nature of a substitute to H.R. 1283, which would have allowed States to enact a law to be excluded from the jurisdiction of the Office of Asbestos Compensation. Adopted 15 ayes to 14 nays.

ROLLCALL NO. 3

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | | X | |
| Mr. McCollum | | X | |
| Mr. Gekas | | X | |
| Mr. Coble | | X | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | | | |
| Mr. Canady | | X | |
| Mr. Goodlatte | X | | |
| Mr. Chabot | | X | |
| Mr. Barr | | X | |
| Mr. Jenkins | X | | |
| Mr. Hutchinson | | X | |
| Mr. Pease | X | | |
| Mr. Cannon | X | | |
| Mr. Rogan | | X | |
| Mr. Graham | | X | |
| Ms. Bono | | X | |
| Mr. Bachus | | X | |
| Mr. Scarborough | | | |
| Mr. Vitter | | X | |
| Mr. Conyers | X | | |
| Mr. Frank | X | | |
| Mr. Berman | | | |
| Mr. Boucher | | | |
| Mr. Nadler | X | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | X | | |
| Ms. Waters | X | | |
| Mr. Meehan | X | | |
| Mr. Delahunt | | | |
| Mr. Wexler | | | |
| Mr. Rothman | X | | |
| Ms. Baldwin | | | |
| Mr. Weiner | X | | |
| Mr. Hyde, Chairman | | X | |
| Total | 15 | 14 | |

8. An amendment offered by Mr. Conyers, Mr. Scott, Ms. Lofgren, Mr. Watt to the amendment in the nature of a substitute to H.R. 1283, which would have made the Office of Asbestos Compensation completely voluntary and would have struck the prerequisite of medical eligibility before an asbestos-related claim could be filed in State or Federal court. Defeated 11 ayes to 18 nays.

ROLLCALL NO. 4

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | | X | |
| Mr. McCollum | | X | |
| Mr. Gekas | | X | |
| Mr. Coble | | X | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | | X | |
| Mr. Canady | | X | |
| Mr. Goodlatte | | X | |
| Mr. Chabot | | X | |
| Mr. Barr | | X | |
| Mr. Jenkins | | X | |
| Mr. Hutchinson | | X | |
| Mr. Pease | | X | |
| Mr. Cannon | | X | |
| Mr. Rogan | | X | |
| Mr. Graham | | X | |
| Ms. Bono | | | |
| Mr. Bachus | | X | |
| Mr. Scarborough | | | |
| Mr. Vitter | | X | |
| Mr. Conyers | X | | |
| Mr. Frank | | | |
| Mr. Berman | | | |
| Mr. Boucher | | | |
| Mr. Nadler | X | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | X | | |
| Ms. Waters | X | | |
| Mr. Meehan | X | | |
| Mr. Delahunt | X | | |
| Mr. Wexler | | | |
| Mr. Rothman | X | | |
| Ms. Baldwin | | | |
| Mr. Weiner | X | | |
| Mr. Hyde, Chairman | | X | |
| Total | 11 | 18 | |

9. A motion by Mr. Cannon to reconsider the vote by which the Pease amendment to the amendment in the nature of a substitute was adopted. Adopted 16 ayes to 14 nays.

ROLLCALL NO. 5

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | X | | |
| Mr. McCollum | X | | |
| Mr. Gekas | X | | |
| Mr. Coble | X | | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | | X | |

ROLLCALL NO. 5—Continued

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Canady | X | | |
| Mr. Goodlatte | X | | |
| Mr. Chabot | X | | |
| Mr. Barr | X | | |
| Mr. Jenkins | | X | |
| Mr. Hutchinson | X | | |
| Mr. Pease | | X | |
| Mr. Cannon | X | | |
| Mr. Rogan | X | | |
| Mr. Graham | X | | |
| Ms. Bono | X | | |
| Mr. Bachus | X | | |
| Mr. Scarborough | | | |
| Mr. Vitter | X | | |
| Mr. Conyers | | X | |
| Mr. Frank | | | |
| Mr. Berman | | | |
| Mr. Boucher | | | |
| Mr. Nadler | | X | |
| Mr. Scott | | X | |
| Mr. Watt | | X | |
| Ms. Lofgren | | X | |
| Ms. Jackson Lee | | X | |
| Ms. Waters | | X | |
| Mr. Meehan | | X | |
| Mr. Delahunt | | X | |
| Mr. Wexler | | | |
| Mr. Rothman | | X | |
| Ms. Baldwin | | | |
| Mr. Weiner | | X | |
| Mr. Hyde, Chairman | X | | |
| Total | 16 | 14 | |

10. A motion by Mr. Weiner to postpone consideration of the Pease amendment to a time certain. Defeated 11 ayes to 18 nays.

ROLLCALL NO. 6

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | | X | |
| Mr. McCollum | | X | |
| Mr. Gekas | | X | |
| Mr. Coble | | X | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | | X | |
| Mr. Canady | | X | |
| Mr. Goodlatte | | | |
| Mr. Chabot | | X | |
| Mr. Barr | | X | |
| Mr. Jenkins | | X | |
| Mr. Hutchinson | | X | |
| Mr. Pease | | X | |
| Mr. Cannon | | X | |
| Mr. Rogan | | X | |
| Mr. Graham | | X | |
| Ms. Bono | | X | |
| Mr. Bachus | | X | |
| Mr. Scarborough | | | |
| Mr. Vitter | | X | |
| Mr. Conyers | X | | |
| Mr. Frank | | | |
| Mr. Berman | X | | |

ROLLCALL NO. 6—Continued

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Boucher | | | |
| Mr. Nadler | X | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | X | | |
| Ms. Waters | X | | |
| Mr. Meehan | X | | |
| Mr. Delahunt | | | |
| Mr. Wexler | | | |
| Mr. Rothman | X | | |
| Ms. Baldwin | | | |
| Mr. Weiner | X | | |
| Mr. Hyde, Chairman | | X | |
| Total | 11 | 18 | |

11. Reconsideration of an amendment offered by Mr. Pease to the amendment in the nature of a substitute to H.R. 1283, which would have allowed States to enact a law to be excluded from the jurisdiction of the Office of Asbestos Compensation. Defeated 14 ayes to 15 nays.

ROLLCALL NO. 7

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | | X | |
| Mr. McCollum | | X | |
| Mr. Gekas | | X | |
| Mr. Coble | | X | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | X | | |
| Mr. Canady | | X | |
| Mr. Goodlatte | | | |
| Mr. Chabot | | X | |
| Mr. Barr | | X | |
| Mr. Jenkins | X | | |
| Mr. Hutchinson | | X | |
| Mr. Pease | X | | |
| Mr. Cannon | | X | |
| Mr. Rogan | | X | |
| Mr. Graham | | X | |
| Ms. Bono | | X | |
| Mr. Bachus | | X | |
| Mr. Scarborough | | | |
| Mr. Vitter | | X | |
| Mr. Conyers | X | | |
| Mr. Frank | | | |
| Mr. Berman | X | | |
| Mr. Boucher | | | |
| Mr. Nadler | X | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | X | | |
| Ms. Waters | X | | |
| Mr. Meehan | X | | |
| Mr. Delahunt | | | |
| Mr. Wexler | | | |
| Mr. Rothman | X | | |
| Ms. Baldwin | | | |
| Mr. Weiner | X | | |

ROLLCALL NO. 7—Continued

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Hyde, Chairman | | X | |
| Total | 14 | 15 | |

12. An amendment offered by Mr. Scott to the amendment in the nature of a substitute to H.R. 1283, which created a provision to allow claimants to enforce asbestos-related written settlement agreements in any applicable State or Federal court. On unanimous consent, Mr. Scott modified his amendment to insert "or defendant" after claimant on line 3. Adopted by voice vote.

13. Amendment offered by Mr. Scott to the amendment in the nature of a substitute to H.R. 1283, which would have allowed claimants to proceed to State or Federal court if the Office of Asbestos Compensation failed to act within 60 days from the date the claim was filed with the Office of Asbestos Compensation. Defeated 11 ayes to 17 nays.

ROLLCALL NO. 8

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | | X | |
| Mr. McCollum | | X | |
| Mr. Gekas | | X | |
| Mr. Coble | | X | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | | | |
| Mr. Canady | | X | |
| Mr. Goodlatte | | | |
| Mr. Chabot | | X | |
| Mr. Barr | | X | |
| Mr. Jenkins | | X | |
| Mr. Hutchinson | | X | |
| Mr. Pease | | X | |
| Mr. Cannon | | X | |
| Mr. Rogan | | X | |
| Mr. Graham | | X | |
| Ms. Bono | | X | |
| Mr. Bachus | | X | |
| Mr. Scarborough | | | |
| Mr. Vitter | | X | |
| Mr. Conyers | X | | |
| Mr. Frank | | | |
| Mr. Berman | X | | |
| Mr. Boucher | | | |
| Mr. Nadler | X | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | X | | |
| Ms. Waters | X | | |
| Mr. Meehan | | | |
| Mr. Delahunt | | | |
| Mr. Wexler | X | | |
| Mr. Rothman | X | | |
| Ms. Baldwin | | | |
| Mr. Weiner | X | | |
| Mr. Hyde, Chairman | | X | |
| Total | 11 | 17 | |

14. An amendment offered by Mr. Weiner to the amendment in the nature of a substitute to H.R. 1283, which struck the original "Assessment and Enforcement" section of title IV and inserted new language requiring the Administrator to adopt rules for calculating and collecting assessments from defendants. Adopted by voice vote.

15. Amendment offered by Mr. Scott to the amendment in the nature of a substitute to H.R. 1283, which would have extended the date of enactment until 90 days after the later of the appointment of the Office of Asbestos Compensation officers, implementation of all rules, or the collection of all necessary funds to pay claimants. Defeated 12 ayes to 17 nays.

ROLLCALL NO. 9

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | | X | |
| Mr. McCollum | | X | |
| Mr. Gekas | | X | |
| Mr. Coble | | X | |
| Mr. Smith (TX) | | | |
| Mr. Gallegly | | | |
| Mr. Canady | | X | |
| Mr. Goodlatte | | | |
| Mr. Chabot | | X | |
| Mr. Barr | | X | |
| Mr. Jenkins | | X | |
| Mr. Hutchinson | | X | |
| Mr. Pease | | X | |
| Mr. Cannon | | X | |
| Mr. Rogan | | X | |
| Mr. Graham | | X | |
| Ms. Bono | | X | |
| Mr. Bachus | | X | |
| Mr. Scarborough | | | |
| Mr. Vitter | | X | |
| Mr. Conyers | X | | |
| Mr. Frank | | | |
| Mr. Berman | X | | |
| Mr. Boucher | | | |
| Mr. Nadler | X | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | X | | |
| Ms. Waters | X | | |
| Mr. Meehan | X | | |
| Mr. Delahunt | | | |
| Mr. Wexler | X | | |
| Mr. Rothman | X | | |
| Ms. Baldwin | | | |
| Mr. Weiner | X | | |
| Mr. Hyde, Chairman | | X | |
| Total | 12 | 17 | |

16. The Hyde amendment in the nature of a substitute was adopted by a voice vote.

17. Motion by Mr. Hyde to report favorably the bill as amended by the amendment in the nature of a substitute to H.R. 1283, as amended. Adopted 18 ayes to 15 nays.

ROLLCALL NO. 10

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | X | | |
| Mr. McCollum | X | | |
| Mr. Gekas | X | | |
| Mr. Coble | X | | |
| Mr. Smith (TX) | X | | |
| Mr. Gallegly | | | |
| Mr. Canady | X | | |
| Mr. Goodlatte | | | |
| Mr. Chabot | X | | |
| Mr. Barr | X | | |
| Mr. Jenkins | X | | |
| Mr. Hutchinson | X | | |
| Mr. Pease | X | | |
| Mr. Cannon | X | | |
| Mr. Rogan | X | | |
| Mr. Graham | | X | |
| Ms. Bono | X | | |
| Mr. Bachus | X | | |
| Mr. Scarborough | | X | |
| Mr. Vitter | X | | |
| Mr. Conyers | | X | |
| Mr. Frank | | X | |
| Mr. Berman | | X | |
| Mr. Boucher | | X | |
| Mr. Nadler | | X | |
| Mr. Scott | X | | |
| Mr. Watt | | X | |
| Ms. Lofgren | | X | |
| Ms. Jackson Lee | | X | |
| Ms. Waters | | | |
| Mr. Meehan | | X | |
| Mr. Delahunt | | X | |
| Mr. Wexler | | X | |
| Mr. Rothman | | X | |
| Ms. Baldwin | | X | |
| Mr. Weiner | | | |
| Mr. Hyde, Chairman | X | | |
| Total | 18 | 15 | |

18. Mr. Scott moved to reconsider the vote (rollcall no. 10) by which the bill was ordered favorably reported, a non-debatable motion, which was superceded by a motion offered by Mr. Sensenbrenner to table the Scott motion. No vote on the Scott motion. Adopted 17 ayes to 16 nays.

ROLLCALL NO. 11

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Sensenbrenner | X | | |
| Mr. McCollum | X | | |
| Mr. Gekas | X | | |
| Mr. Coble | X | | |
| Mr. Smith (TX) | X | | |
| Mr. Gallegly | X | | |
| Mr. Canady | X | | |
| Mr. Goodlatte | | | |
| Mr. Chabot | X | | |
| Mr. Barr | X | | |
| Mr. Jenkins | X | | |
| Mr. Hutchinson | X | | |
| Mr. Pease | | | |

ROLLCALL NO. 11—Continued

| | Ayes | Nays | Present |
|---|---|---|---|
| Mr. Cannon | X | | |
| Mr. Rogan | X | | |
| Mr. Graham | | | |
| Ms. Bono | X | | |
| Mr. Bachus | X | | |
| Mr. Scarborough | | X | |
| Mr. Vitter | X | | |
| Mr. Conyers | | X | |
| Mr. Frank | | X | |
| Mr. Berman | | X | |
| Mr. Boucher | | X | |
| Mr. Nadler | | X | |
| Mr. Scott | | X | |
| Mr. Watt | | X | |
| Ms. Lofgren | | X | |
| Ms. Jackson Lee | | X | |
| Ms. Waters | | | |
| Mr. Meehan | | X | |
| Mr. Delahunt | | X | |
| Mr. Wexler | | X | |
| Mr. Rothman | | X | |
| Ms. Baldwin | | X | |
| Mr. Weiner | | X | |
| Mr. Hyde, Chairman | X | | |
| Total | 17 | 16 | |

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the finding and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, July 13, 2000.*

Hon. HENRY J. HYDE, *Chairman,*
*Committee on the Judiciary,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1283, the Asbestos Compensation Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette Keith (for fed-

eral costs), who can be reached at 226–2860, and John Harris (for the private-sector impact), who can be reached at 226–2618.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Democratic Member

*H.R. 1283—Asbestos Compensation Act of 2000.*

SUMMARY

H.R. 1283 would establish a process to attempt to resolve claims made by individuals whose health has been impaired by exposure to asbestos. CBO estimates that implementing H.R. 1283 would cost about $1.4 billion over the 2001–2005 period, assuming the appropriation of the necessary amounts. In addition, the legislation would authorize the recovery of federal funds used to pay individual asbestos claimants, and the spending of any funds recovered. Those cash flows would affect direct spending; therefore, pay-as-you-go procedures would apply. CBO expects that the collection and spending of recovered funds would nearly offset each other over the next several years, but we estimate collections would exceed spending by $40 million over the 2002–2005 period.

H.R. 1283 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. H.R. 1283 would create new private-sector mandates for individuals filing new claims for compensation for injuries caused by exposure to asbestos, for all attorneys representing those individuals, and for businesses named as defendants by such individuals. Because reliable data on current asbestos litigation is scarce, CBO cannot produce a precise estimate of the total cost of those mandates. CBO expects, however, that the total cost to the private sector of complying with the mandates in the bill would fall below the threshold established in UMRA ($109 million in 2000, adjusted annually for inflation).

MAJOR PROVISIONS

H.R. 1283 would establish the Office of Asbestos Compensation (OAC) within the Department of Justice. The bill would authorize appropriations for the new office of up to $250 million in the first year after enactment and up to $150 million in each year thereafter. The OAC would review the medical eligibility of claimants under the bill, adjudicate cases, reimburse claimants for medical examination and testing expenses, pay individuals to settle certain claims, and seek to recover compensation payments made to individuals from liable firms in the asbestos industry.

Under H.R. 1283, the OAC would have to issue a certificate of medical eligibility to claimants before cases could be tried in federal or state court. The bill would require the OAC and all defendants named in asbestos litigation cases to offer settlements to each medically eligible claimant in a timely manner. If the OAC's settlement offer is accepted by the claimant, the OAC would pay the claim and seek reimbursement from the named defendants.

H.R. 1283 would authorize the OAC to recover its administrative expenses, medical reimbursements, and settlement payments from

the defendants. The OAC also would have the authority to spend these collections without further appropriation action.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 1283 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice). CBO expects that, after 2005, the number of cases settled each year would decline. As a result, net discretionary costs would decrease to about $100 million annually by fiscal year 2010. Both the claims reimbursement and settlement payments from those collections also would decline gradually after 2005.

BASIS OF ESTIMATE

CBO estimates that implementing H.R. 1283 would have gross discretionary costs of $1.6 billion over the 2001–2005 period. Some of these costs would be offset by assessments on asbestos defendant firms to cover certain administrative and medical examination costs under the bill. Over the 2001–2005 period we estimate the OAC would collect about $260 million from such assessments. Therefore, CBO estimates that implementing H.R. 1283 would result in net discretionary spending of $1.4 billion over the 2001–2005 period.

In addition, we estimate that enactment of the bill would result in the collection from defendant firms of some of the federal funds paid to compensate asbestos claimants. The collections would be recorded as offsetting receipts (a credit against direct spending). Over the 2002–2005 period, we estimate $1 billion would be collected, and all but about $40 million would be paid to settle additional asbestos claims during those years.

By fiscal year, in millions of dollars

| | 2001 | 2002 | 2003 | 2004 | 2005 |
|---|---|---|---|---|---|
| SPENDING SUBJECT TO APPROPRIATION | | | | | |
| Administrative and Medical Examination Costs | | | | | |
| Estimated Budget Authority | 20 | 70 | 85 | 90 | 95 |
| Estimated Outlays | 15 | 65 | 85 | 90 | 95 |
| Settlement Payments to Claimants | | | | | |
| Estimated Budget Authority | 100 | 150 | 340 | 350 | 360 |
| Estimated Outlays | 0 | 230 | 330 | 350 | 360 |
| Offsetting Collections from Administrative and Medical Reimbursements | | | | | |
| Estimated Budget Authority | 0 | -35 | -70 | -75 | -80 |
| Estimated Outlays | 0 | -35 | -70 | -75 | -80 |
| Total Discretionary Spending | | | | | |
| Estimated Budget Authority | 120 | 185 | 355 | 365 | 375 |
| Estimated Outlays | 15 | 260 | 345 | 365 | 375 |
| DIRECT SPENDING | | | | | |
| Offsetting Receipts from Claims Reimbursements | | | | | |
| Estimated Budget Authority | 0 | -70 | -180 | -330 | -420 |
| Estimated Outlays | 0 | -70 | -180 | -330 | -420 |
| Settlement Payments to Claimants | | | | | |
| Estimated Budget Authority | 0 | 70 | 180 | 330 | 420 |
| Estimated Outlays | 0 | 65 | 170 | 315 | 410 |
| Total Direct Spending | | | | | |
| Estimated Budget Authority | 0 | 0 | 0 | 0 | 0 |
| Estimated Outlays | 0 | -5 | -10 | -15 | -10 |

This estimate assumes that the funds that would be appropriated to implement the bill would exceed the amounts specifically authorized by the legislation. CBO estimates that additional funds would be required to expedite the settlement of outstanding claims—as required by the legislation.

While H.R. 1283 would authorize the appropriation of $850 million over the 2001–2005 period for the costs of the OAC, CBO estimates this amount would not be sufficient for the OAC to certify applicants and make compensation offers. We estimate that additional appropriations of $810 million would be needed over the five-year period. The bill would require that the OAC quickly certify the medical eligibility of all claimants, including those involved in the 200,000 cases currently pending. Claimants could not seek damages in court until certified. CBO expects that the OAC would attempt to certify as many applicants as possible. Further, the OAC would not have the discretion to delay its offer of compensation to claimants. The bill would require that the OAC offer compensation to each certified claimant within 10 days of the defendants' offers.

CBO estimates that the OAC would not be successful in recovering all claims paid to eligible claimants from defendants. If the OAC does successfully achieve a reimbursement rate higher that our estimate, the net cost of this legislation to the government would be lower. H.R. 1283 also would authorize the OAC to recover from the defendants administrative expenses, medical reimbursements, and settlement payments. Based on the experience of similar programs and our assessment of the capacity of the asbestos industry to pay claims, CBO expects that the OAC will collect over

80 percent of its administrative costs and about 65 percent of settlement payments to claimants. We expect that most defendants' payments would occur over a three-year period.

*Asbestos Claims Background*

H.R. 1283 would establish the OAC to attempt to resolve a large backlog of cases involving individuals seeking compensation from private companies connected to the manufacture of asbestos. Approximately 200,000 such cases remain outstanding and about 30,000 new cases are filed each year. The majority of cases that are resolved each year result in settlement payments before the cases are tried in federal or state court.

*Asbestos Claims Process Under the Bill*

The OAC would serve two major functions under the bill. First, it would issue certificates of medical eligibility that all claimants must receive prior to pursuing damages in court. The bill specifies the medical criteria that would qualify individuals to seek such compensation. Second, the OAC would make settlement offers to each qualifying applicant. These offers would vary depending on the age of the applicant, the degree of impairment, and other factors. The OAC would establish a schedule of compensation payments offered by the OAC and such offers would be made public. Qualifying individuals could accept a compensation offer from the OAC or from the private companies named in their claim. The bill would authorize the appropriation of funds for the administrative costs of the OAC and for settlement payments to claimants.

*OAC Administrative Costs*

Because the intent of H.R. 1283 is to provide a timely resolution to asbestos claims, CBO expects that the OAC would be fully staffed and able to review claims by the beginning of fiscal year 2002, with a headquarters in Washington, D.C., and six regional offices. Based on the experience of other program startups and the magnitude of the task facing the OAC, we anticipate that the staff of the OAC would total about 400 persons by 2002 and would grow by 10 percent annually through fiscal year 2005. The number of OAC staff would gradually decrease thereafter as the total number of outstanding claims decreases. Assuming that the OAC is reasonably efficient at handling claims, we estimate that the office could process 60,000 claims in 2002 and would clear the existing backlog of roughly 200,000 claims by the end of 2005. CBO estimates that administrative expenses of the OAC would total $200 million over the five-year period.

*Medical Expenses Reimbursement*

H.R. 1283 would provide for the reimbursement of certain medical expenses of claimants, up to $1,500 per claim. Such expenses could include chest X-rays and lung capacity testing. Under current law, settlement offers by the defendants often include reimbursements for medical expenses. Absent this offer, the claimants are responsible for such costs.

Based on information from asbestos industry experts, CBO expects that most claimants who do not meet the bill's requirements for medical eligibility would apply for and receive reimbursement

at an average cost of $1,200 per claim. CBO estimates that this provision would apply to over 30,000 individuals for each of fiscal years 2001 through 2005 and would cost increase discretionary spending byabout $150 million over the 2001–2005 period.

*Settlement Payments To Claimants*

H.R. 1283 would authorized the director of the OAC to establish a schedule of compensationgrid payments that would be offered to individuals with varying degrees of asbestos impairment to determine the value of the OAC's settlement offers to claimants and to make settlement offers to all medically eligible claimants based on this gridschedule. CBO estimates that the OAC would be able to process about 60,000 claims in 2002, with the annual amount increasing to about 80,000 by 2005. Based on information from consultants to the defendant companies, CBO expects that just under half of these claims would meet the bill's medical eligibility requirements.

In addition, we assume that thatthe settlement amounts offered by the OAC would be are similar to the payments that individuals can expect under current law., wCBO estimates that total settlement payments to claimants by the OAC would be about $2.2 billion over the 2002–2005 period, including $1.3 billion from appropriated funds and direct spending of $960 million from amounts recovered from defendant companies.

Under current law, settlement offers vary widely and are determined, in part, by jurisdiction, age of claimant, number of years of exposure, and type of illness. For example, claimants with mesothelioma (a severe and terminal disease caused by exposure to asbestos) are likely to receive a private compensation settlement of over $1 million, while a case withinvolving a claimant whose X-rays shows exposure to asbestos but whose medical tests do not show advanced signs of disease may receive $5,000 and the right to seek future compensation if a disease develops. Furthermore, claimants who present the same facts in different jurisdictions throughout the United States could receive widely disparate awards. Based on past settlement payments made by the defendantss, CBO estimates that the average settlement payment made by the OAC to claimants would be about $50,000.

CBO expects that some individuals, especially those with the severest levels of impairment (mesothelioma claimants, for example) would opt out of the OAC's compensation processes and seek higher compensation payments in court. Because the compensation gridschedule would be publicly available, CBO expects that the defendants would offer claimants from jurisdictions with historically high compensation levels greater settlement amounts than what they would receive from the OAC to avoid the high cost of a jury award in such jurisdictions. CBO estimates that only about 40 percent of the eligible claimants (or about 10,000 to 15,000 claimants each year over the five-year period) would accept the OAC's settlement offer.

Section 402 would authorize the appropriation of $100 million for a loan to the OAC to settle claims. For the purpose ofthis estimate, CBO considers the $100 million as an authorization for the appropriation of funds in fiscal year 2001. Even though the bill characterizes that authority as a loan subject to the Federal Credit Re-

form Act, a payment cannot be considered a loan under Credit Reform if the duty to repay the government arises from an exercise of sovereign power, tort liability, or some other non-contractual obligation.

*U.S. Court of Federal Claims*

The bill would transfer the jurisdiction of cases in which the claimant accepts the OAC's offer from the U.S. District Court to the U.S. Court of Federal Claims. CBO estimates that H.R. 1283 would cost the U.S. Court of Federal Claims $1 million annually over the five-year period for additional attorneys and support staff. Because of the large backlog of cases in U.S. District Court, CBO estimates that enacting H.R. 1283 would not result in savings for that court over the 2001–2005 period.

*Cost Recovery*

CBO estimates that the OAC would collect $240 million over the 2001–2005 period from asbestos defendants for administrative and medical reimbursement costs. (Such collections would offset appropriated spending.) In addition, CBO estimates the OAC would collect $1 billion from asbestos defendants to settle cases over the five-year period. Because the OAC would be authorized to spend these receipts without further appropriation action, these collections would be recorded as offsetting receipts (a form of direct spending) and their expenditure would be recorded as direct spending.

*Administrative and Medical Reimbursements*. The legislation would authorize the collection of funds to reimburse the OAC for administrative and medical examination expenses, and for the cost of paying claims to individuals. Based on the experience of similar programs, CBO estimates that the OAC will collect nearly $260 million over the 2001–2005 period—about 85 percent of medical and administrative expenses.

*Claims Reimbursements*. H.R. 1283 would authorize the OAC to pursue claims against the defendant companies after paying settlement offers to claimants. CBO estimates the OAC would receive $1 billion over the 2001–2005 period from defendant companies—or about two-thirds of the total amount paid to individuals. The amount of such receipts is highly uncertain. Because of the large number of cases involved and the history of asbestos litigation, CBO expects that the OAC and defendant companies will settle most of the OAC claims out of court. Based on information from defendants and groups representing asbestos claimants, CBO expects that the above total is at or near the maximum amount the industry can pay to settle such claims without risking insolvency of the firms involved.

Under current law, asbestos defendants report a liability for asbestos compensation claims that exceeds $8 billion. Information on the total amount of cash compensation payments made by defendants to individuals is incomplete but probably exceeds $3 billion, based on limited information from public reports. Those payments represent a substantial financial burden for defendants, and present a significant risk that some firms will become insolvent. This year alone, two of the major asbestos defendants entered

bankruptcy. This burden is increasing as juries award larger damages and claimants demand larger settlements.

Thus, to avoid insolvency, we expect most companies would negotiate either to repay the federal government amounts less than those paid by the OAC to settle claims, or to make scheduled payments over a number of years. The amount of OAC settlement payments to claimants that is reimbursed would depend in part on how much the OAC offers on an annual basis. We expect that defendant companies would be unable to pay total settlement amounts to claimants significantly in excess of their current spending level. Information on annual amounts paid by asbestos defendants to settle asbestos claims is not uniformly or consistently reported, however, based on information from some defendant firms we expect defendants would seek to negotiate reimbursements of up to 90 percent of the OAC's annual compensation costs over the five-year period. As the total amount of compensation paid by the OAC declines we expect the recovery rate from defendant firms would increase.

In addition to negotiated reimbursement amounts, settlement agreements with the OAC would expose the government to the risk that defendants would become insolvent before paying the agreed amounts. To estimate this risk, CBO consulted with industry experts and examined the credit ratings of defendants. The information on credit ratings is useful because different credit ratings reflect analysts' expectations of insolvency. Most defendants have credit ratings around "BBB"; however, one credit-ratings company announced that it is considering lowering the rating of a defendant as a result of the recent increase in asbestos liabilities. CBO assumes that the payments by defendants under settlement agreements with OAC would have a credit risk comparable to debt rated as "B." Debt with this rating typically has a default rate of around 30 percent.

Considering both the capacity of asbestos defendants to reimburse the OAC and the risk to the government that such firms may default in their agreements to reimburse the OAC, CBO estimates the OAC would collect about 65 percent of the cost of settlement agreements from defendants. The precise amount of recoveries is very uncertain, but is unlikely to approach 100 percent. If the total claims paid by the OAC are significantly more than CBO estimates, we expect this recovery rate would be lower. Alternatively, if the OAC can achieve a higher recovery rate, the net cost of the bill would be lower than we have estimated.

## PAY-AS-YOU-GO CONSIDERATIONS

The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays that are subject to pay-as-you-go procedures are shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, budget year, and the succeeding four years are counted.

By fiscal year, in millions of dollars

| | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Changes in outlays | 0 | 0 | -5 | -10 | -15 | -10 | 0 | 10 | 15 | 5 | 0 |
| Changes in receipts | Not applicable | | | | | | | | | | |

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 1283 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 1283 would create new private-sector mandates for individuals filing new claims for compensation for injuries caused by exposure to asbestos, for all attorneys representing those individuals, and for businesses named as defendants by such individuals. CBO estimates, that the total cost to the private sector of complying with the mandates in the bill would fall below the threshold established in UMRA ($109 million in 2000, adjusted annually for inflation).

H.R. 1283 would create a new private-sector mandate for individuals filing new claims for compensation for injuries caused by exposure to asbestos. The bill would require such individuals to obtain certificates of medical eligibility from the Office of Asbestos Compensation before filing suit in state or federal court. For individuals who meet the bill's medical requirements, the cost of the mandate would be small. Section 102 would require the OAC to make determinations of eligibility within 30 days of receiving a claim. After receiving certificates of eligibility, those individuals could proceed to file suit as under current law.

The costs of the mandate for individuals whom the OAC deems ineligible would be the value of the settlements and judgments that they would be able to obtain under current law but not under H.R. 1283. The bill would prevent individuals whom the OAC judges do not meet the medical eligibility requirements from obtaining compensation for their exposure to asbestos through the courts. (The bill would, however, toll the statute of limitations for such injuries, so that if such individuals did develop eligible conditions they could seek compensation at a later date.)

Because comprehensive data relating to asbestos exposure, litigation, and compensation are difficult to obtain, CBO cannot precisely estimate the costs of the bill's mandate for claimants. Based on the information available to CBO from academic, industry, and other sources, CBO expects that the cost of the mandate on ineligible claimants could fall between $10 million and $40 million annually by 2005. (Costs would be lower in the early years because many claimants receive settlement payments over the course of several years.) The uncertainty in those estimates stems from the difficulty in predicting the number of claimants who would receive compensation under current law but would be ineligible under H.R. 1283.

The bill would create a new private-sector mandate for claimants' attorneys by directing the OAC to regulate attorneys' fees and compensation. Most attorneys representing claimants in asbestos cases

charge contingent fees; that is, they take a percentage of any settlement or damages awarded to the claimant as payment for their services. Although the bill does not contain specific rules or guidelines for the OAC to follow, CBO expects that the OAC would limit attorneys' fees to some maximum allowable percentage of a claimant's recovery, perhaps comparable to the fees that federal courts allow claimants' attorneys in product liability class-action suits to charge. Because the bill contains few guidelines for OAC regulation and because asbestos cases are tried in multiple state and federal courts, CBO cannot estimate the costs of this mandate to claimants' attorneys.

H.R. 1283 would create a new private-sector mandate for defendants by requiring them to pay assessments to the OAC. Section 401 would direct the OAC to collect assessments from asbestos defendants to defray administrative and certain other costs. The bill would not provide specific rules for calculating or collecting assessments, however, CBO expects that assessments levied on individual defendants would be proportional to the OAC's expenditures relating to that defendant. CBO estimates that asbestos defendants would be required to pay assessments totaling $35 million in 2002, $70 million in 2003, $75 million in 2004, and $60 million in 2005.

Overall, however, the bill would result in substantial benefits to asbestos defendants. H.R. 1283 would encourage claimants to choose administrative adjudication through the OAC rather than go to court. Out-of-court settlements are typically lower than court-awarded judgments. Participation in the bill's administrative adjudication process would eliminate the risk of punitive damages for some defendants. More significantly, the bill would benefit defendants by reducing the number of new claims against them.

ESTIMATE PREPARED BY:

Federal Costs: Lanette J. Keith, Mark Grabowicz, and Mark Hadley (226–2860)
Impact on State, Local, and Tribal Governments: Shelley Finlayson (225–3220)
Impact on the Private Sector: John Harris (226–2618)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8, clauses 3 and 18 and in Article III of the Constitution.

While State and Federal courts have acknowledged the judiciary's inability to fashion a solution to the problems created by asbestos litigation, as recently as 1999, the United States Supreme Court has called on Congress to craft Federal legislation to handle the massive backlog of asbestos claims. See *Amchem Products* v. *Windsor*, Cass Action Settlement, and *Ortiz* v. *Fibreboard*, Class Action Settlement under Need For the Legislation.

## SECTION-BY-SECTION ANALYSIS AND DISCUSSION

### TITLE I. ESTABLISHMENT AND PROCEDURE

*Section 101. Establishment of the Office of Asbestos Compensation*

Subsection (a) establishes an Office of Asbestos Compensation (OAC) within the United States Department of Justice (DOJ). The Administrator is vested with authority to promulgate all procedural and substantive rules necessary to administer this act. In addition, the Administrator will designate an office or offices where all asbestos claims will be filed. The OAC is headed by an Administrator who is appointed by the President with the advice and consent of the Senate. Accordingly, the Administrator will serve for a term of 10 years and will be removable by the Attorney General only for good cause.

Subsection (b) provides the OAC with exclusive jurisdiction over proceedings to determine liability and compensatory awards for asbestos-related claims. However, claims for workers' compensation, veterans' benefits, claims against existing asbestos trusts (unless the trusts opt in to the administrative process), or claims relating to certain private settlements are excluded from the OAC's exclusive jurisdiction. In addition, claimants that have receive a certificate of medical eligibility, under Section 102 (f) of this act, may opt out of the OAC's jurisdiction and proceed to State or Federal court.

Subsection (c) requires the Administrator to appoint a Medical Director to manage a medical review procedure, retain needed medical personnel to conduct the medical review, as well as create the exceptional medical claims panel.

Subsection (d) establishes an Asbestos Compensation Fund (Fund) which will be managed by a Trustee that is appointed by the Administrator. The Fund will make settlement payments to claimants under Section 104 (d) of this act. In addition, reimbursement for medical testing expenses does not come out of the Fund. These expenses are paid for by defendants pursuant to assessments for administrative expenses under section 401. Under Section 401, administrative expenses relating to the general operations of the OAC are collected by the Administrator directly and under subsection 403 (b) may be appropriated directly to the OAC. The Fund is there only to manage settlement payments and recoupment from defendants and has nothing to do with the OAC's general administrative expenses.

Subsection (e) establishes an Office of Administrative Law Judges within the OAC for purposes of conducting administrative adjudications under Section 105 of this act. The Administrator will appoint administrative law judges (ALJ's) and may remove ALJ's for good cause. This subsection does not prohibit the Administrator from appointing ALJ's from other agencies in order to process the enormous backlog of pending asbestos claim.

Subsection (f) establishes a Medical Advisory Committee (committee) which is appointed by the Administrator. The committee will periodically review the medical review procedures and eligibility criteria, make appropriate recommendations to the Administrator, and submit an annual report to the Administrator and the Congress. The composition of the Medical Advisory Committee is within the discretion of the Administrator, this committee should

embody a cumulative view that is supported by a majority of professional organizations in relevant medical and scientific fields. In addition, the Administrator may contract for staff to support the committee in carrying out its functions.

*Section 102. Medical eligibility review*

Section 102 creates an administrative procedure to determine whether the claimant meets the statutory medical criteria or qualifies as an "exceptional medical claim." This proceeding is administered by the Medical Director and is completely non-adversarial. The Administrator will retain qualified physicians for the medical review process on a contract basis. These physicians would be treated as "special governmental employees."

The Administrator will promulgate rules and procedures under subsection 101 (a) to govern the medical review process. Those rules will be designed to provide a prompt and efficient procedure for making reliable determinations of medical eligibility. Claims will be prioritized so that the most urgent, including those in which the claimant has a malignancy, are resolved first.

Asbestos claims filed under subsection 101(a) will be immediately referred to the Medical Director, who will issue a notice of acceptance unless additional information is needed. The information to be provided in an application will be established by rule. This information will include occupational history, information about exposure, medical history, and the results of specific medical tests. Where necessary, applicants may be required to undergo additional non-invasive medical testing at the expense of the OAC. The OAC will assist claimants in filing their claims by providing clear explanations of what is required and by providing standardized application forms and guidance.

The Medical Director must make an initial determination of medical eligibility within 30 days of the issuance of the notice of acceptance. If an application is initially denied, the claimant may elect to have the application reviewed by a two physician review panel. In the event of disagreement, a third physician would be added.

Although most qualified claimants will meet the standard criteria contained in sections 302, 303, 304, and 305 of the act, some claimants will not meet those criteria but will provide equally reliable evidence of an asbestos-related impairment and may qualify for medical eligibility under Section 301. For example, a claimant could provide CAT scan evidence of asbestosis which could be considered equivalent to the x-ray evidence normally required. Similarly, a claimant with a smoking-related obstructive lung disease such as emphysema could provide evidence that asbestosis significantly contributed to his breathing impairment. Cases of this kind would be decided, on the basis of all relevant evidence, by an exceptional medical claims panel. While no criteria has been created for the exceptional medical claims criteria, the Administrator is authorized to establish rules and procedures for reviewing these claims. The Administrator will consult with the Medical Advisory Committee and the Medical Director to formulate similar but not identical requirements for exceptional medical claims; however, the purpose of this subsection is to include all individuals with an asbestos related impairment that do not satisfy the existing criteria.

Claimants may designate their claims as exceptional medical claims either in their initial application or following an initial denial by the Medical Director. Under subsection 102(d), the exceptional medical claims panel is required to make a determination within 30 days of its receipt of the claim. The exceptional medical claims panel may extend the time for rendering its decision for "good cause." This authority should be used sparingly. Good cause extensions may be appropriate when the claimant has not provided necessary information in a timely way, when further medical testing is needed, or in cases of unusual medical complexity.

The Medical Director is bound by the determinations of the appellate panel, the exceptional medical claims panel or an initial approval. The decision of the Medical Director may be appealed to the United States Court of Federal Claims under Section 106.

The Medical Director will establish audit and review procedures under section 102(e) to evaluate the efficiency and effectiveness of medical review. The evaluation of the procedures should include examination of errors in approving and denying eligibility, as well as timeliness and other measures of performance.

Those who meet the eligibility requirements of the act will receive a certificate of medical eligibility. Claimants with a certificate of medical eligibility may proceed to State or Federal court under subsection 102 (f) or obtain settlement offers under section 103.

*Section 103. Election of administrative process; settlement offers*

Under this section claimants may elect to receive non-adversarial settlement offers from named defendants and the Asbestos Compensation Fund. Claimants must first identify potential defendants with the assistance of the OAC under subsection 103 (a)(1). For each such defendant, the claimant will provide the OAC with a verified "particularized statement" of the basis for the defendant's potential liability. Under subsection 103 (a)(2) the statement will include information that the OAC, by rule, concludes is necessary to provide the named defendant with a reasonable basis for making a settlement offer. The required information are the dates of exposure, work sites, the nature and frequency of the exposure, and a description of the exposed person's job and working conditions during the relevant time period. The OAC will also help claimants identify defendants by providing information gathered through the exercise of its subpoena power, under Section 107.

Under subsection 103 (a)(3), after reviewing the statement to ensure compliance with the act, the OAC will provide a copy of each statement to each defendant, and, subject to privacy rules, each defendant will also receive a copy of the records of the medical review process. Under subsection 103 (a)(4), defendants named by the claimant will have limited additional time, which will be established by the Administrator, to name "third-party defendants," following the same procedure that claimants follow for naming defendants. Also under subsection 103 (a)(4), discovery may be allowed to obtain information that is necessary to allow the claimant or any third-party plaintiff to provide a particularized statement.

Under Section 103 (b)(1), once the time for adding additional defendants has expired, defendants will have 21 days to provide to the claimant with a good faith written settlement offer. Rules will require that all offers will also be submitted to the Trustee. Under

Section 208 defendants will be penalized for making an inadequate settlement offer. Under subsection 103 (b)(2), the Trustee of the Asbestos Compensation Fund is required to make an aggregate settlement offer within an additional 10 days. The Trustee's offer will be based on a compensation grid, established and regularly revised by rule under subsection 103 (b)(2).

The compensation grid will not be a mere average of past settlements. The Administrator will take into consideration all relevant factors in determining the grid. Among these factors is the type of claim, nature and extent of asbestos disease or injury, smoking history, disability, age, number and age of dependents, amount of exposure to products of named defendants, job history, geographic location and any other relevant criteria generally used in the settlement of asbestos cases. In addition, the settlement values adopted by the Administrator will reflect the act's deferral of the claims of the unimpaired, which may be included in some pre-enactment settlement averages, as well as the act's limitations on venue. In short, the grid should reflect the current value of asbestos claims based on accumulated historical data, also taking into account the effect of this act.

The compensation grid is a crucial element in the effort to provide fast and fair settlements. The Administrator may utilize the good cause exception to the notice-and-comment requirements of the rule-making process as provided under Section 553 of the Administrative Procedures Act in order to issue emergency interim final regulations to establish the grid. These regulations will be final, following full notice and comment procedures, and to update them regularly to reflect new information.

*Section 104. Claimant's choice of forum*

This section explains how settlement offers are rejected and accepted. Claimants will receive settlement offers from each named defendant and the Trustee of the Asbestos Compensation Fund. Under subsection 104 (a), the Trustee's offer will be reduced dollar-for-dollar by the amount of any defendants' offers that are accepted by the claimant. Under subsection 104 (b), claimant's are required to provide notice of acceptance or rejection of any offer within 60 days from the delivery of the receipt of the last offer. Under subsection 104 (c), no offers are required unless the claimant can name a solvent defendant. Those claimants who cannot name a solvent defendant, also known as orphan claims, must pursue their claim in State or Federal court.

Under subsection 104 (d), if the claimant accepts the Trustee's offer, the Trustee will assume the claim and may accept any remaining offers from the defendants or prosecute the claim either in administrative proceedings under Section 105 or in court. By accepting the Trustee's offer, the claimant agrees to cooperate in future proceedings against defendants. Such cooperation may include appearing as a witness in proceedings by the Trustee against defendants. Under Section 209, the claimant would retain the right to any recovery by the Trustee that exceeds 200 percent of the Trustee's offer, plus any punitive damages awarded in the administrative process. Under subsection 104 (e), claimants who reject the Trustee's offer and do not settle with all defendants may seek to

resolve their claim in State or Federal court or invoking an expedited administrative adjudication under Section 105.

*Section 105. Administrative adjudication*

Under Section 105, claimants are provided the option of electing a 90 day administrative adjudication. An administrative law judge (ALJ) will be assigned to the claim and a "de novo" hearing (hearing on the record) will be conducted. The hearing will be governed by the procedures for formal adjudications provided under the Administrative Procedures Act. The ALJ will apply the law set out in Sections 201–210; however, Section 208 explicitly pertains to administrative adjudications. Section 208 contains rules for applicable law, special damages in wrongful death cases, and penalties for inadequate offers made pursuant to Section 103.

*Section 106. Appeals; judicial review*

Under Section 106, a claimant may obtain judicial review of adverse decisions by the Medical Director under Section102, and any party may obtain judicial review of final awards by the ALJ under Section 105. These proceedings will be in the United States Court of Federal Claims, which will apply the familiar "substantial evidence" standard of review. Review will be based on the record before the OAC, and additional evidence before the court will be unnecessary. In addition, while the Court is located in Washington, D.C., it presently hears cases throughout the United States, this will provide accessibility for claimants seeking review.

A Medical Director's favorable ruling on medical eligibility is not a final decision appealable under this section. Thus, defendants will not be able to delay consideration of an asbestos claim by appealing a finding of medical eligibility. Of course, defendants may try, at trial or in an administrative proceeding, to rebut the finding of medical eligibility by clear and convincing evidence, and they may appeal a judgment of an adverse final decision of an administrative or court proceeding. Decisions of the United States Court of Federal Claims in turn may be appealed to any United States Court of Appeals.

*Section 107. Gathering and maintenance of information*

Section 107 requires the OAC to establish databases containing product identification information, information regarding settlements, judgments and awards, which will be used to establish a settlement grid pursuant to subsection 103 (b)(2). The purpose of the product identification database, under subsection 107 (a), is to help claimants obtain access to the information necessary to identify the asbestos products to which they were exposed. Product identification includes work sites, location of a product within a work site, the occupations of exposed persons, and time period the product was located at the work site. As well as, the location and identification of asbestos found outside of work sites, this includes locations where raw asbestos fibers have been released into the ambient air or various other asbestos containing products. This information will be made publicly available.

Information on past settlements, judgments, and awards, under subsection 107 (b) will assist the OAC to establish values for settlement based on a settlement grid (grid). In addition under sub-

section 107 (d), any information obtained for purposes of Section 107 that is specific to individual plaintiffs, defendants or law firms will be kept confidential and is exempt from the Freedom of Information Act. Subsection 107 (c) provides the OAC with subpoena power to obtain information regarding production identification, settlement values, judgements, or awards and to secure financial information from any defendant.

*Section 108. Legal assistance program*

Under Section 108, claimants are free to retain the counsel of their choice; however, the OAC will also maintain a roster of qualified counsel to assist claimants. The OAC will adopt rules on reasonable attorney fees, which will govern legal representation of persons asserting asbestos claims before the OAC. In addition, only those counsel agreeing to comply with these rules will be placed on the roster of qualified counsel to assist claimants. Rules on reasonable attorney fees will not prohibit contingency fee contracts.

*Section 109. Time limits for dispositions*

Section 109 provides claimants with a procedure to require the Administrator to comply with time limitations established by this act. Under subsections 109 (a), (b), and (c), if either the Medical Director or the Trustee fails to meet the time limits for an initial decision of eligibility or making a settlement offer, respectively, with respect to more than 30 percent of claims, the Administrator has a nondiscretionary duty, enforceable by mandamus, to take remedial action. Such action may include increasing staff and administrative assessments against defendants. In addition to the procedures established in this section for enforcing time limits on a system-wide basis, the Administrator has authority under section 101(a) to adopt rules for enforcing time limits case-by-case.

TITLE II. LAW APPLICABLE TO ASBESTOS ADJUDICATION

*Section 201. Medical eligibility*

Section 201 of the bill establishes when claimants may recover compensatory damages for an asbestos claim. This certificate establishes a presumption of an asbestos related illness that is rebuttable only by clear and convincing evidence. The presumption is subject to two qualifications, however. First, insofar as the certificate of medical eligibility is based on the claimant's allegations regarding exposure under Section 306, no presumption is created. This limitation is required because there is no mechanism to accurately determine what degree of the claimant's condition was caused by asbestos. Second, as explained under section 304(b), lung cancer claimants who smoke and who do not have a qualifying nonmalignant disease must establish that asbestos caused their lung cancer.

*Section 202. Damages*

Medically eligible claimants may recover compensatory damages under applicable law, including damages for emotional distress, pain, and medical monitoring where authorized. They may not, however, recover for "enhanced risk" for other diseases, such as cancer, since Section 204 eliminates statute of limitations and stat-

ute of repose defenses. Punitive damages are limited to administrative proceedings in accordance with subsection 208(d).

*Section 203. Statute of limitations or repose*

Section 203 eliminates timeliness defenses except as to claims already untimely as of the date of enactment of the act. This section also provides that a claim will not accrue before the exposed person has an eligible medical condition under the act. Regardless of any State statute that would dictate otherwise. The policy of the bill is to preserve the claims of asbestos victims who delay bringing lawsuits until they are impaired.

*Section 204. Come back rights*

Section 204 allows claimants to recover additional awards for subsequent asbestos-related cancers, regardless of any contrary State law, although the claimant may have already received an award for a claim based on medical eligibility under Section 302 (Asbestos Related Non-malignant Condition With Impairment). However, this provision does not override private settlement agreements in which claimants may have bargained for a general release which would cover subsequent cancer claims. This is reinforced under Section 701 (c).

*Section 205. Class actions, aggregations of claims and venue*

Section 205 establishes comprehensive rules for the consolidation and venue of asbestos claims. Under subsections 205 (a) and (b) class actions, consolidations, and other aggregative procedures may be employed in judicial proceedings in Federal or State courts (1) with the consent of the parties; (2) with respect to class actions, if they meet the requirements of Federal Rule of Civil Procedure 23, and (3) with respect to all such aggregations, if the court orders such procedures to promote the just and efficient conduct of the case. ALJ's presiding over administrative claims under section 105 proceedings may aggregate any number of claims. However, all claimants must qualify for an eligible medical criteria under Sections 301, 302, 303, 304, or 305 and must receive a certificate of medical eligibility under Section 102 before their claims may be consolidated, bundled or grouped in any other method.

Under section 205 (c) venue is provided for an asbestos claim in the State where the exposure occurred or where the claimant is domiciled. These venues will generally be convenient for the claimant and will prevent forum shopping.

Under subsection 205 (d), in any case where there is an alleged violation of the rules regarding aggregation or venue under this section, the case may be removed to Federal court pursuant to the guidelines of chapter 28 of title 28 of the United States Code.

*Section 206. Joint and several liability*

Section 206 establishes joint and several liability with respect to claims against major asbestos manufacturers and distributors. Claims against these defendants are named "core claims" and defined in paragraph (10) of Section 601. For this class of defendants, therefore, the bill substantially broadens joint and several liability. For non-"core claims," the bill preserves currently applicable State (or Federal) rules regarding joint and several liability.

*Section 207. Core claims*

Section 207 simplifies the resolution of "core claims" by limiting the issues to be decided in each "core claim". Claimants are only required to prove medical eligibility, product identification, and the amount of compensation. By limiting the issues, defenses such as "contributory negligence" and "state of the art" will not be allowed. However, by limiting the issues in this way, State law regarding contribution among joint tortfeasors is not modified.

*Section 208. Special rules applicable to Section 105 adjudications*

Section 208 sets out special rules to govern administrative proceedings before ALJs under Section 105. First, under subsection 208 (a), ALJ's are required to apply the substantive law of the State which has the most significant relationship to the exposure and the parties. Second, under subsection 208 (b), full compensatory damages are provided for wrongful death actions based on mesothelioma, notwithstanding contrary State law. This corrects an anomaly found in the law of some States, where damages for pain and suffering are available in mesothelioma cases only if the case reaches judgment before the victim dies. Third, under subsection 208(c), a penalty may be imposed on defendants whose offer under section 103 turns out to be below the defendant's share of the total liability awarded by the ALJ. The amount of the penalty is the difference between the defendant's settlement offer and the defendant's share of either the aggregate offer made by the Trustee or the ALJ's aggregate award, whichever is less. This penalty is not "punitive damages" and is considered to be a portion of the claimant's award for purposes of calculating the limit on "punitive damages" under subsection 208 (d). Under subsection 208 (d), "punitive damages" may be awarded by an ALJ and are only allowed through an administrative adjudication. Punitive damage awards under this subsection are limited to 300 percent of the claimant's total compensatory award. In order to receive punitive damages, the claimant must establish by clear and convincing evidence that the defendant's conduct was carried out "with a conscious, flagrant indifference to the rights and safety of others" and that the defendant's conduct was the proximate cause of the harm to the claimant.

*Section 209. Special rules applicable to the Trustee*

Section 209 sets out rules governing actions brought by the Trustee as assignee of asbestos claimants who have accepted the Trustee's settlement offer pursuant to Section 104. First, this section provides that in addition to any compensatory or punitive damages, or penalty for inadequate offers, that the claimant could have recovered, the Trustee may also recover (1) its own costs in establishing the claim, including reasonable attorneys' fees and expenses and (2) interest on any amount paid to claimants from the Asbestos Compensation Fund under section 104. A Trustee may recover from defendants more than it actually paid to the settling claimant under section 104. However, any compensatory damages recovered by the Trustee in excess of 200 percent of the amount by the Trustee to the claimant, and all punitive damages, are to be paid over to the claimant. Finally, the fact that a claimant settled with the Trustee, and the amount paid to the claimant in that settlement, is not admissible in the Trustee's action against the de-

fendant. This rule will avoid any practical prejudice that might flow from the fact that the Trustee, rather than the claimant, is pursuing the claim against the defendant.

TITLE III. ELIGIBLE MEDICAL CATEGORIES

*Section 301. Eligible medical categories*

Section 301 establishes eligible medical categories, asbestos-related non-malignant conditions with impairment, mesothelioma, lung cancer, and other cancer. Claims may qualify for compensation under the bill if they (1) meet the standard criteria set forth in sections 302, 303, 304, and 305, or (2) are found by an exceptional medical claims panel to be based upon comparably reliable evidence of these medical conditions. The exceptional medical claims panel will take into consideration innovative or non-standardized diagnostic techniques, including CAT scans and other forms of computer-assisted imaging.

Section 301(b) authorizes the Administrator, after consultation with the Medical Advisory Committee, to adopt rules to assure consistency and efficiency in the designation of claims as exceptional medical claims. Such rules could, for example, establish methods for evaluating claims based on non-occupational exposure to asbestos, or provide guidance on the interpretation of new or unusual diagnostic procedures which are not specified in sections 302 through 305 of the act. The Administrator will use rule-making authority provided in this section to establish guidelines for exceptional medical claims rather than announcing such guidelines in decisions on particular cases.

*Section 302. Asbestos-related non-malignant conditions with impairment*

Section 302 sets out objective criteria to determine whether a claimant suffers from a medically eligible non-malignant condition—either asbestosis or bilateral pleural thickening with impairment. Asbestosis is a scarring of the tissue inside the lung that can adversely affect breathing. In contrast, pleural thickening affects not lung tissue but the membranes surrounding the lung—the so-called "pleura."

There are two types of pleural thickening. "Pleural plaques" are circumscribed thickened areas that, according to the overwhelming weight of medical evidence, are without clinically significant effects,[14] and do not increase cancer risk above that of similarly exposed individuals who do not have plaques.[15] The other kind of pleural thickening is so-called "diffuse pleural thickening." Here,

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[14] See American Medical Association, *Guides to the Evaluation of Permanent Impairment* 158 (4th ed. 1999)[hereinafter "AMA, *Guides*"]; Roggli, V., et al., *Pathology of Asbestos-Associated Diseases* 176 (1992); Doll, R. & Peto, J., *Asbestos: Effects on Health of Exposure to Asbestos* 2 (1985); Epstein, P.E., *Asbestos Inhalation and the Nonmalignant Abnormalities of the Chest*, Sem. Roentgenology 1992; 27:85–93, 91).

[15] See Roggli, et al., *supra*, at 176; Hillerdal, G., *Radiological Criteria: Pleural Changes*, in Finnish Inst. Occ. Health, *Asbestos, Asbestosis and Cancer: Proceedings of an International Expert Meeting* 41, 44 (1997) (reviewing medical literature; finding that "whether [pleural plaques] indicate an increased risk of lung cancer has not been proven."); Smith, D., *Plaques, Cancer, and Confusion*, Chest 1994; 105:8–9, 9). Pleural plaques are a marker of asbestos exposure, although there are also other causes. See Light, R.D., *Pleural Diseases* 224 (1983) ("Asbestos exposure is not the only cause" of pleural plaques); Craighead, J.E. et al., *The Pathology of Asbestos-Associated Diseases of the Lungs and Pleural Cavities: Diagnostic Criteria and Proposed Grading Schema*, Arch. Pathol. Lab. Med. 1982; 106:544–597, 551 (pleural plaques "have been considered one of the pathologic and radiologic hallmarks of [asbestos] exposure.").

the thickening of the pleura is not circumscribed but generalized, and in extreme cases this condition can cause restrictive breathing impairment.[16] Diffuse pleural thickening has a number of causes other than asbestos exposure.[17]

Asbestosis can be demonstrated through either clinical or pathological evidence. The definition of "clinical evidence of asbestosis" is found in Section 601(8). A person will be able to qualify under this definition with the minimum chest x-ray reading consistent with a finding of asbestosis (a 1/0 reading on the ILO scale) together with pulmonary function tests that demonstrate "restrictive" impairment—the type of breathing abnormality typical of asbestos-related disease. If the x-ray evidence is stronger (a 1/1 or greater on the ILO scale), the PFT requirements are somewhat relaxed.

Pulmonary functions tests measure impairment and help to distinguish restrictive impairment, which may be associated with asbestos exposure, from impairment due to "chronic obstructive pulmonary disease," which is typically caused by smoking. Breathing impairment is indicated by a lung capacity (either "forced vital capacity" (FVC) or "total lung capacity" (TLC)) that falls even minimally below the normal range. The principal indicator of obstructive disease is the ratio of the amount of air the exposed person can breath out in 1 second (FEV1) compared to the amount of air he can breath out in a single forced breath (FVC). A ratio of less than 75 percent indicates obstructive rather than restrictive lung disease.[18] In addition, an abnormally low total lung capacity indicates restrictive rather than obstructive disease, since in the early stages, at least, obstructive lung disease leads to overinflation of the lung and thus an abnormally high total lung capacity.[19]

The bill's criteria for clinical diagnosis of asbestosis are more favorable to the plaintiffs than the diagnostic criteria adopted by the American Thoracic Society (ATS) in 1986.[20] The ATS requires an "appropriate" latency period—generally a minimum of 15 years—while the bill does not have any latency requirement at all.[21] Moreover, the ATS states that a chest x-ray rated 1/1 or greater is indicative of asbestosis, and "considerable caution" should be observed before arriving at a diagnosis of asbestos if that criterion is not met.[22] The bill, however, requires only a 1/0 x-ray.

Asbestosis can also be demonstrated through Pathological Evidence. "Pathological evidence of asbestosis" is defined in Section 601(27). The key elements of this definition are a pattern of scarring (fibrosis) in the lungs together with the presence of characteristic asbestos bodies. This definition is similar to the College of American Pathologists of the National Institute for Occupational Safety and Health (*CAP–NIOSH*) criteria for pathological diagnosis of asbestosis. *CAP–NIOSH*, in an influential joint study, adopted the following guideline: "[T]he minimal features that permit the di-

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[16] See, e.g., AMA, *Guides*, *supra*, at 158 ("[I]n an unusual case of diffuse massive thickening, respiratory movement may be impeded and a restrictive abnormality may result.")

[17] See Roggli, et al., *supra*, at 177.

[18] See American Thoracic Society, *Evaluation of Impairment/Disability Secondary to Respiratory Disorders*, Am. Rev. Respir. Dis. 1986; 134:1205–1209, 1205.

[19] See American Thoracic Society, *Lung Function Testing: Selection of Reference Values and Interpretive Strategies*, Am. Rev. Respir. Dis. 1991; 144:1202–1218, 1210 ("A restrictive ventilatory defect is characterized physiologically by a reduction in TLC.").

[20] See American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestosis*, Am. Rev. Respir. Dis. 1986; 134:363–368 [hereinafter "ATS, *Diagnosis*"].

[21] *Id.* at 365, 367.

[22] *Id.* at 367.

agnosis [of asbestosis] are the demonstration of discrete foci of fibrosis in the walls of respiratory bronchioles associated with accumulations of asbestos bodies."[23] This standard has been formally adopted by the ATS.[24] The act's pathological criteria similarly require discrete occurrences of peribronchiolar or parenchymal scarring (that is, fibrosis) in association with asbestos bodies. The additional requirement that there be no more likely cause does not significantly deviate from the *CAP–NIOSH* standard, but merely represents prudent diagnostic practice.

Claimants may also recover by showing evidence of "Bilateral Pleural Thickening with Impairment," which is defined in section 601(14). This definition is similar to the definition of clinical evidence of asbestosis. A claimant with x-ray evidence of pleural changes (B/2 chest x-ray on the ILO scale) is medically eligible if his pulmonary function tests meet the same requirements that apply to asbestosis claimants with a 1/0 x-ray. If the x-ray evidence of pleural thickening is stronger (a C/2 on the ILO scale), the pulmonary function requirements are reduced, as they are for asbestosis claimants with stronger x-ray evidence.

Claimants suffering from obstructive diseases will not be disqualified from qualifying for asbestosis. In some cases, breathing impairment may be caused by both obstructive lung disease (smoking) and restrictive disease (asbestos). Section 302(b) directs the exceptional medical claims panel to qualify claimants in this situation if it finds, on the basis of all the evidence, that asbestos-related disease is a substantial contributing factor to the claimant's impairment. The panel must presume that asbestos is a substantial contributing factor if the exposed person's chest x-ray is graded 2/1 or higher on the ILO scale. This will ensure that claimants will be medically eligible if asbestos is a substantial contributing factor to their breathing impairment, even if smoking is also a cause.

*Section 303. Asbestos-related mesothelioma*

Section 303 designates mesothelioma as an eligible medical category. Where possible, diagnosis of mesothelioma should be based upon pathological evidence; however, clinical evidence may be used in the absence of adequate tissue for a pathological diagnosis.

*Section 304. Asbestos-related lung cancer*

Section 304 designates asbestos-related lung cancer as an eligible medical category. The act provides two independent ways for a claimant with lung cancer to show that the cancer is related to asbestos. The first is by showing that, in addition to cancer, the exposed person has a qualifying non-malignant condition—the claimant also has asbestosis or bilateral pleural thickening that would meet the requirements of section 301(b) or 302. The second is to show substantial exposure, which is measured by work history in certain occupations in which exposure is likely, and confirmed by pleural plaques, which are a biological marker of exposure.

When eligibility is established on the basis of exposure, the amount of exposure required is measured in equivalent-years, as defined in Section 601(13), which adjusts real-time years of employ-

[23] Craighead et al., *supra*, at 559 (emphasis in original)
[24] See ATS, *Diagnosis, supra*, at 364–65.

ment to reflect typical levels of exposure in different occupations. Individuals who received non-occupational exposures would apply for medical eligibility through the exceptional medical claims panel. Similarly, individuals with indirect occupational exposure who could show that they were exposed to levels of asbestos comparable to the exposure levels of people who worked directly with asbestos could make that case to the exceptional medical claims panel.

Individuals whose lung cancer is attributed to asbestosis on the basis of exposure, without a qualifying non-malignant disease, are entitled to a certificate of medical eligibility regardless of their smoking history. See Section 304(b). However, because of the causation problems that arise when lung cancer victims were exposed both to tobacco and to asbestos, smokers without a qualifying non-malignant disease do not receive the benefit of a presumption of an asbestos caused illness under Section 201. The Administrator will promulgate rules to define what constitutes a "substantial history of smoking."

*Section 305. Asbestos-related other cancer*

Section 305 establishes other cancers as an eligible medical category. Claimants can recover for asbestos-related other cancer if they can demonstrate (1) the presence of a cancer set forth in this section that is caused or contributed to by asbestos exposure, and (2) evidence of a non-malignant condition that would satisfy either Section 301(b) or Section 302.

*Section 306. Medical testing reimbursement*

Section 306 establishes a medical testing reimbursement benefit for claimants who have a chest x-ray consistent with asbestosis or substantial pleural thickening but who are not yet impaired. The benefit allows reimbursement of 100 percent of out-of-pocket expenses for medical tests required under Section 102. These expenses include radiographic exams and pulmonary function tests and will not duplicate payments from other sources, including Medicare, Medicaid, private insurance, or employer-provided medical benefits This benefit would be available for up to three testing occasions at least 3 years apart. All benefits under this section will be funded by administrative assessments against defendants under Section 401.

Claimants who have at least four equivalent-years of exposure, the medical testing reimbursement is capped at $1500 per occasion. The Administrator will establish by rule a cap for claimants with less exposure. The Administrator is required under section 306(d) to establish procedures to ensure accuracy in statements by claimants concerning their history of exposure. The Administrator is authorized under section 306(c) to establish a certification program for laboratories that provide medical testing for claimants under this act. The purpose of the certification program is to ensure that testing done under this section is performed at laboratories that meet industry standards for the administration and interpretation of tests, including appropriate quality assurance and control. Claimants are not required to use certified laboratories under Section 102, although they will be encouraged to do so. Standards for certification of laboratories will be developed in consultation with the Medical Advisory Committee.

TITLE IV. FUNDING

*Section 401. Assessments and enforcement*

This section directs the Administrator to adopt rules for calculating and collecting from defendants all costs associated with the determination of claims and payments to claimants. Rules will allocate costs in accordance with a general principle of proportionality and will provide an exclusion for defendants whose involvement in asbestos litigation is de minimis. Also, while costs will be deferred for select defendants pursuant to Section 704, administrative costs for these defendants are limited to those claims that are not covered by the approved Qualifying National Settlement Plan.

Section 401 further provides special procedures for streamlined collection actions. The Trustee is empowered to bring an action in any Federal district court to enforce a section 401 assessment, notwithstanding amount in controversy or citizenship of the parties, and subject only to jurisdictional defenses. A defendant may challenge the legality or amount of the assessment only by seeking review in the United States Court of Federal Claims, and only after paying the disputed amount. Moreover, the Trustee is entitled to costs and reasonable attorneys' fees in any successful action under this section. Rules and procedures for calculating and developing assessments will ensure that Funds for the administration of the OAC will be made available from defendants rather than the Federal Government.

*Section 402. Fiscal and financial management of the Asbestos Compensation Fund*

This section governs the operations of the Asbestos Compensation Fund relating to settlement payments by the Fund under section 104, and associated recoveries by the Fund from defendants. Except as otherwise provided in this section, the operations of the Fund will be governed by the Federal Credit Reform Act of 1990, notwithstanding the status of the Fund as a governmental agency. The Federal Credit Reform Act governs a wide range of Federal funding programs, including SBA loans, farm loans, Federal student loans, and various forms of foreign credit assistance.

Under this section, the Fund is required to recover sufficient amounts from defendants to offset all payments made under section 104 together with all other associated costs of the Fund. The Administrator must promulgate rules, which are to be approved by the Office of Management and Budget, for the fiscal management of the Fund. Those rules will not be subject to judicial review and must provide, among other things, that over a reasonable period of time there will be no net taxpayer subsidy to the program.

The Fund may borrow from the Treasury, under Credit Reform Act principles, amounts sufficient to pay claimants under section 104. The Fund is authorized to receive, as offsetting receipts, any amounts paid by defendants in connection with settlements and judgments of the claims assigned to the Fund under that section. These amounts include, among other things, damages, interest, litigation costs, and administrative costs. These amounts will offset amounts borrowed from the Treasury to finance section 104 payments to claimants together with a premium for all of the Fund's litigation risk.

The Trustee will be seeking, at a minimum, to recover from defendants the amount it borrowed from the Treasury to pay claimants, plus interest, plus its litigation costs. The Fund assumes the litigation risk when it settles with individual claimants, and that risk includes both the possibility that recovery will fall short of the settlement amount and the possibility that it will be higher. The Trustee is allowed to use amounts recovered from defendants, over and above the amount paid to claimants (but subject to a cap of 200 percent of that amount), to offset the Fund's litigation risk. In addition, the Trustee is entitled to prejudgment interest, litigation expenses, and in appropriate cases a penalty for inadequate offers by defendants. Finally, the Trustee has full flexibility to adjust the settlement amount it offers any claimant to reflect not only the litigation risk in the specific claim, but also the financial condition of the Fund. Accordingly, the Fund can and should be managed so that, over an appropriate period of time, the risk that the Fund will be unable to recover from defendants the full amount that it paid to claimants plus its costs.

*Section 403. Authorization for appropriations and offsetting collections*

Section 403(b) authorizes the OAC to receive as offsetting collections, and spend, the administrative assessments, costs, and penalties paid to it under section 401. This is the basic funding mechanism for administrative expenses under the bill.

Section 403(a) authorizes additional appropriations to the OAC and the United States Court of Federal Claims for carrying out their responsibilities under the act. These appropriations, if approved by Congress, would supplement administrative assessments against defendants. These appropriations are not essential, the OAC can function perfectly well using funds available to it from defendants under section 403(b). The consequence of an appropriation under section 403(a) (1) for administrative expenses of the OAC would be to reduce the amounts otherwise assessed against defendants.

In addition, section 403(a) authorizes a one-time loan of $100 million to defray start-up costs for the fund, which will be repaid with interest from amounts collected from defendants. Total appropriations under section 403(a) may not exceed $250 million during its first year of operation and $150 million thereafter.

TITLE V. TRANSITION

*Section 501. Applicability; transitional civil actions*

Section 501 provides that the bill will be effective on the date of enactment with respect to all claims that have not begun trial by that time.

There are two exceptions to the application of the provisions of this section. First, claimants with pending claims as of the date of enactment would not have to obtain a certificate of medical eligibility if a trial begins within 6 months. This 6-month transition period may be extended by the Attorney General for an additional 6 months. Claimants covered by this provision would be required to show medical eligibility (as defined in the bill) at trial, but would not be required to receive a certificate of medical eligibility from

the Medical Director. In addition, a claimant who has a trial date within 6 months after the end of the formal transition period may receive a right-to-sue letter if the OAC is not able to meet the 30-day statutory deadline for issuing an initial decision on medical eligibility. At trial, claimants who have a right to sue letter would have to prove medical eligibility, which does not include claims for medical expenses.

TITLE VI. DEFINITIONS

*Section 601. Definitions*

Section 601 defines terms used in the act. The most important of these terms are described here. Terms relating to medical eligibility, procedure and administration, and applicability are discussed separately.

*Terms Relating to Medical Eligibility*

A number of the definitions in Section 601 are important for determining medical eligibility. Certain terms—e.g., clinical evidence of asbestosis, pathological evidence of asbestosis, and evidence of bilateral pleural thickening with impairment—have been discussed in connection with title III, and that discussion will not be repeated here.

"*Chest x-ray*," under paragraph (5), means chest radiographs taken in at least two views (Posterior and Lateral) and graded quality 1 for reading according to the criteria established by the ILO. If the claimant is unable to provide quality 1 x-rays, chest x-rays graded quality 2 are acceptable. Because of the importance of x-rays in the medical eligibility process, the committee believes that where possible those x-rays should be of sufficient quality to minimize the risk of interpretive errors.

"*Equivalent-years*," under paragraph (13), are used to calculate periods of exposure for purposes of the lung cancer criteria in section 304 and medical testing in section 306. Equivalent-years are used rather than real-time years to reflect the fact that levels of asbestos exposure varied between different occupations. A year spent in occupations involving direct installation, repair, or removal of asbestos products is the standard. Years spent in occupations characterized by very high levels of exposure—e.g., shipbuilding in World War II and manufacturing of asbestos products—are weighted more heavily, while years in occupations involving only indirect exposure to asbestos are weighted less heavily.

Some individuals exposed in non-occupational settings may have received exposures equivalent to workplace exposures. Similarly, some who received indirect exposure may have had a level of exposure typical of workers who directly installed, repaired, or removed asbestos. Claims of this kind should be addressed by the exceptional medical claims panels.

The "*latency period*," under paragraph (21), of a disease is the time between first exposure to asbestos and manifestation of the disease. The first exposure to asbestos under this definition does not need to meet any threshold of "significance," but exposure to background levels of asbestos, similar to those to which the public generally is exposed should not be considered a first exposure under this definition.

"*Physician*," under paragraph (29), means a licensed medical doctor who has not, in the 5 years prior to the date of enactment, spent more than half of his professional time, or derived more than half of his professional income, either annually or in total, on medico-legal issues related to asbestos. This definition will help ensure that the doctors who serve vital functions under the bill will be impartial treating physicians, and not doctors whose professional life has come to center on asbestos litigation, usually as witnesses testifying predominantly for one side or the other.

"*Predicted value*," under paragraph (30), means a published reference to the normal breathing capacity of healthy populations based on age, height, and gender. Such values must be generally accepted in the medical community, and may not be adjusted by race. The Medical Director will approve such predicted values by rule adopted within 120 days of the date of enactment.

"*Pulmonary function testing*," under paragraph (31), means tests for forced vital capacity, lung volume, and diffusing studies, using equipment, tests, and standards generally accepted in the medical community. The results of pulmonary function testing may not be adjusted by race. The Medical Director will adopt rules relating to pulmonary function testing within 120 days after the date of enactment. The Medical Director will take into consideration, as applicable, existing rules on pulmonary function testing adopted by the Department of Labor in consultation with *NIOSH* and published in 20 CFR 718.013 (1997) and Appendix B thereto. Information provided to the OAC must be sufficient to enable the agency to determine whether pulmonary function tests were properly administered. This will require submission of all spirometry tests including the designated "best test," both volume time graphs and flow volume loops, and values for any other attempt or trial.

*Procedural and Administrative Terms*

"*Compensatory damages*," under paragraph (9), include both economic damages and non-pecuniary losses like pain, suffering, inconvenience, or emotional distress.

"*Core claim*," under paragraph (10), means an asbestos claim against certain primary asbestos defendants—i.e., (a) defendants who manufactured an asbestos-containing product to which the exposed person was exposed and who have paid out $50 million cumulatively over the 10 years prior to the filing of the claim or (b) defendants who were not manufacturers, and whose liability is not based on ownership or control of property, who have paid out $100 million over the preceding 10 years. The bill subjects these primary defendants to joint and several liability, notwithstanding contrary State law, and it eliminates most of the those defendants' traditional defenses.

*Applicability*

"*Asbestos claim*," under paragraph (1), means any claim for damages or other relief arising out of, based on, or relating to the health effects of exposure to asbestos. It includes claims for personal injury, death, emotional distress, and medical monitoring. It also includes claims brought by family members, such as loss of consortium. It does not, however, include claims for workers' compensation benefits, or any claim by an employer or insurer against

the third party for reimbursement of workers' compensation benefits, or any claim for veterans' benefits.

"*Asbestos Trust*," while this definition excludes certain trusts established to pay asbestos claims, other trusts that may or may not be court-supervised which have also been established to pay asbestos claims are not excluded by this definition. In particular, trusts that essentially function as an escrow account for purposes of paying asbestos claims or trusts established pursuant to class action settlements are not intended to be excluded by this definition. Only those trusts that are active participants in asbestos litigation would qualify as an "asbestos trust".

"*Claimant*," under paragraph (7), means the exposed person or that person's legal representative, and any relative of an exposed person, or their legal representative, who asserts an asbestos claim. The committee notes that the claimant will often not be the exposed person himself, but rather family members and personal representatives.

"*Defendant*," under paragraph (11), means any person who is or may be responsible for the asbestos-related condition of the exposed person and who is named under title I. The term does not include asbestos trusts, the Federal Government, or State Governments. The committee intends that asbestos claims against the Federal Government and State Governments will not be subject to the jurisdiction of the OAC but may be brought in other forums with jurisdiction under other law.

"*Qualifying National Settlement Plan*," under paragraph (34), sets forth the criteria that a defendant's settlement plan must satisfy in order to qualify for a 7-year exemption from the act under section 704. Defendants may reapply for an extended exemption.

"*State*," under paragraph (35), includes any State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States. The term also includes any political subdivision of the foregoing.

## TITLE VII. MISCELLANEOUS PROVISIONS

### *Section 701. Applicability to Other Federal Laws*

This section specifies the manner in which the bill is intended to interact with other laws as well as with existing trusts and settlements or settlement offers. First, the Administrator may waive personnel and procurement laws and regulations with the approval of the Director of the Office of Management and Budget. Any such waivers granted by OMB must be periodically reconsidered. The flexibility to be exempt from certain of these statutes and regulations is indispensable if the OAC is to address over 200,000 asbestos claims and achieve the bill's strict time limits for processing claims. OMB should act expeditiously and favorably on such requests, in consultation with interested agencies such as The Office of Personnel Management and the General Services Administration. Second, the bill will not apply to existing asbestos trusts (such as the Manville Trust) unless the trust elects to be subject to the bill and notifies the Administrator of that decision in writing. A trust's decision to be subject to the bill cannot be revoked. Third, the bill does not invalidate any settlement of asbestos claims en-

tered into before the date of enactment or revoke or negate any standing offer to settle claims. This preserves both actual settlements and so-called "futures agreements" between defendants and certain law firms representing asbestos claimants. Fourth, the bill does not affect the scope or operation of either workers' compensation or veterans benefits programs. In particular, the bill would not authorize any lawsuit that is barred by the exclusive remedy provision of workers' compensation laws. "Workers' compensation laws" includes the Federal Longshore and Harbor Workers Compensation Act, 33 U.S.C. sections 901–944, 948–50, but it does not include the Federal Employer's Liability Act (FELA), 45 U.S.C. chapter 2. FELA applies to occupational injuries arising out of railroad work and resembles tort litigation more than traditional workers' compensation programs. See *Metro-North Commuter R.R. Co.* v. *Buckley*, 521 U.S. 424 (1997). Fifth, the bill does not affect any law governing successor or transferee liability.

*Section 702. Annual Reports*

Section 702 requires the Administrator of the OAC to submit an annual report to the President and the Congress.

*Section 703. Enforcement*

This provision allows the Administrator to seek enforcement of the bill's provisions in Federal district courts. The Federal courts have exclusive jurisdiction over such proceedings without regard to amount in controversy or diversity. If the Administrator's action is successful, the Administrator will be entitled to costs and attorney's fees. Thus, this provision gives the Administrator the authority to enforce administrative assessments against defendants and, through the award of costs and attorneys fees, provide another incentive for defendants to avoid engaging in litigation with the Administrator.

*Section 704. Qualifying National Settlement Plan*

The bill permits a defendant who is part of a Qualifying National Settlement Plan to apply with the Administrator to defer application of the bill to that defendant for up to 7 years. The term "Qualifying National Settlement Plan" is defined in section 601(34) and would include, for example, the "National Settlement Plan" concluded between Owens Corning Fibreboard and numerous plaintiffs' attorneys in 1998–1999. The Administrator will determine whether to accept a defendant's request for deferral according to rules that the Administrator will promulgate. If the deferral is granted, claims against that defendant will not be subject to the provisions of the bill, except for those provisions relating to medical eligibility, damages, the statute of limitations, come back rights, class actions, joint and several liability, core claims and the transition period. See Sections 201–207 and 501. "Deferral applies to all costs for claims covered by the deferred defendant's Qualifying National Settlement Plan. This includes administrative costs. However, a deferred defendant may not be assessed administrative costs for claims that are resolved by the approved Qualifying National Settlement Plan."

*Section 705. Severability*

If any part of the bill is found to be invalid, the remainder of the bill will remain in effect.

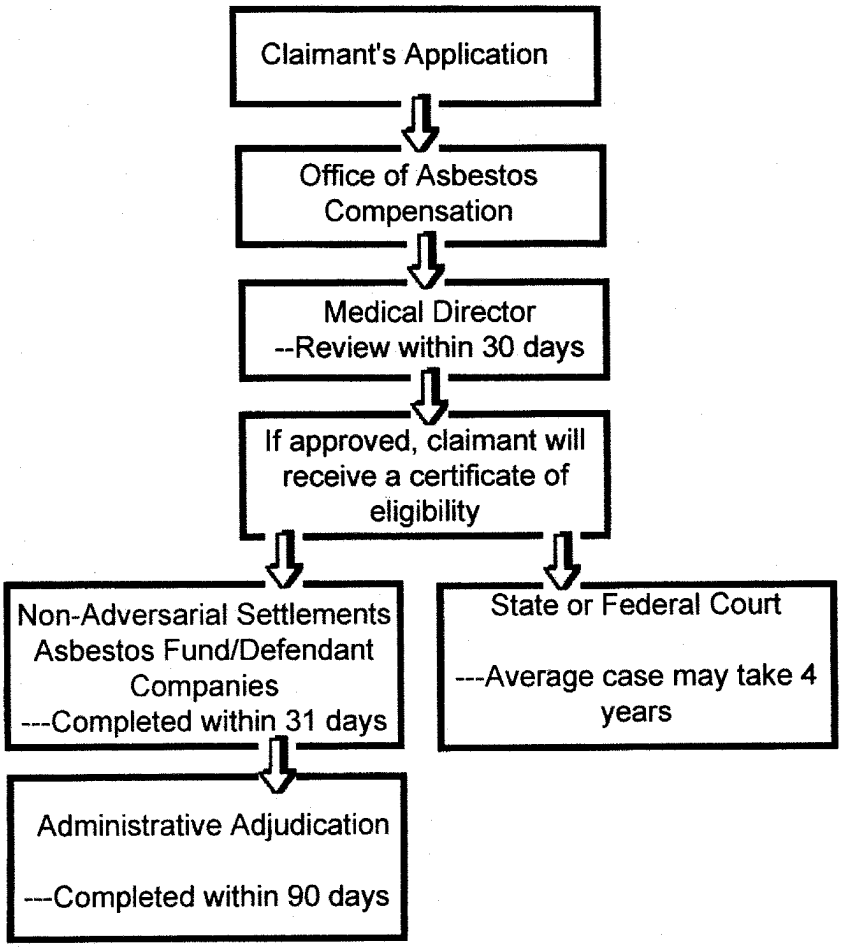
*Section 706. Settlement*

For a period of 7 years after the date of enactment, a claimant or a defendant may specifically enforce any written settlement agreement that was agreed to by the claimant, or the claimant's attorney, and the defendant before the date of enactment. Such enforcement actions must be brought in a Federal or State court where the claimant is currently domiciled or where the claimant alleges exposure to asbestos. Where the claimant is not the exposed person (as happens, for example, with loss of consortium claims), that enforcement action may be brought where the exposed person was exposed.

OPERATION OF THE BILL

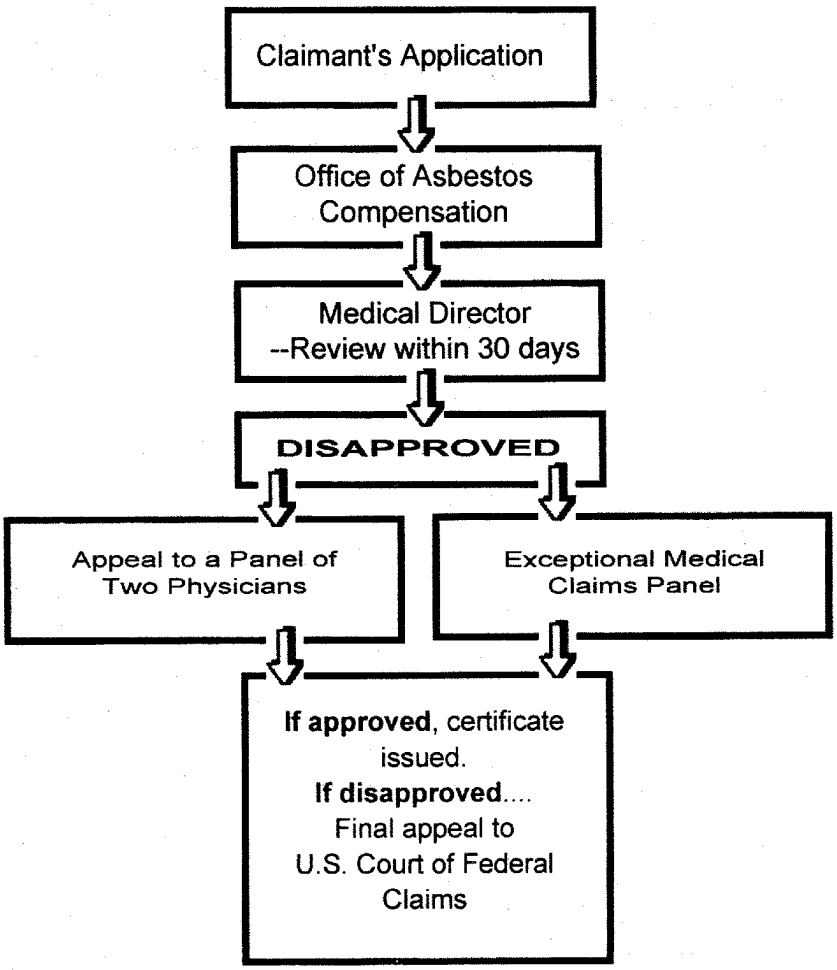
# Fairness in Asbestos Compensation Act

## A Typical Case - If Approved



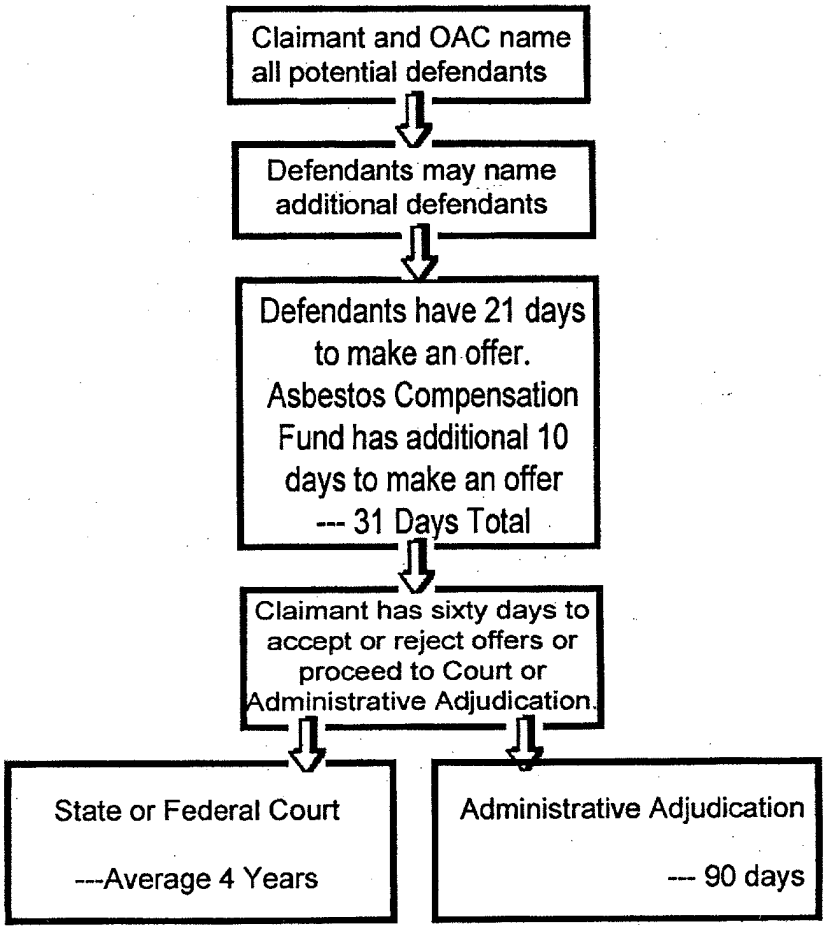
# Fairness in Asbestos Compensation Act

## A Typical Case - NOT Approved



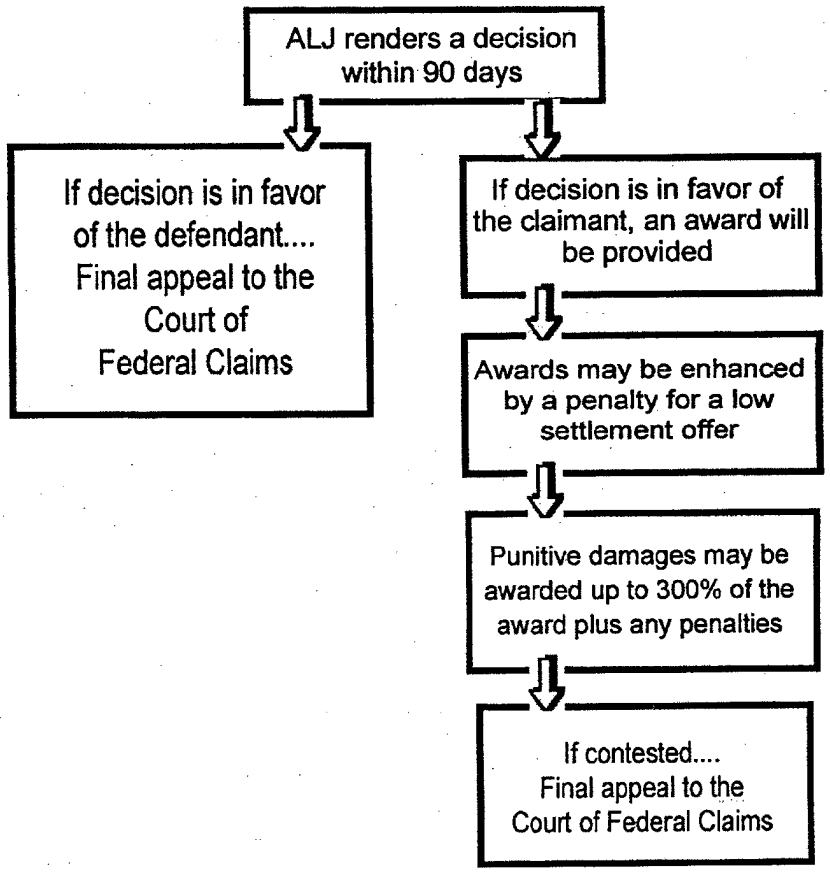
# Fairness in Asbestos Compensation Act

## Administrative Settlement Proceedings



# Fairness in Asbestos Compensation Act

## Administrative Adjudication



## OPERATING COST ANALYSIS

### INTRODUCTION AND BACKGROUND

Operating costs under the committee bill fall into three broad categories:

- Overhead and medical review costs;
- Costs of administrative adjudications; and
- Costs to the Trustee of administration and litigation associated with the Trustee's settlement or prosecution of claims against the defendants.

The bill contemplates that all of these operating costs (in addition to any amounts paid to claimants in settlements or as damages) will be borne by the defendants.

Peterson Worldwide ("Peterson"), a wholly owned subsidiary of Navigant Consulting, Inc., has prepared an analysis of these operating costs to defendants. Peterson's analysis estimates start-up costs and annual operating costs for each of the first five years after the Office of Asbestos Compensation (OAC) becomes operational. Settlement payments would not be treated as operating costs under Credit Reform Act principles, and thus are not included in the Peterson analysis because those costs must be accounted for in the credit analysis of the Fund's costs and risks under that distinct feature of the legislation. (See sections 103(b)(2) and 403. The Fund's administrative and litigation costs, however, are included.) Peterson also does not try to estimate the costs of the medical testing program under section 306. The assumptions that Peterson used to prepare its analysis were based on industry experience, available data from defendants and others, and estimates of projected impaired claimants prepared by Chambers Associates.

Peterson concludes that the total cost of the program to defendants, including start up and the first five years of operation, would be $287 million. Start up expenses account for $23.8 million of this total. The program would cost $85.2 million annually in the first two years of operation, which is the amount of time the OAC will need to process the existing backlog of pending cases. In the next three years, costs drop to $30.9 million per year. During the last three years of operation, the program will require 326 full time equivalent (FTE) personnel. During the first two years, extra personnel will be required to handle the existing backlog of claims and the anticipated initially high rate of new filings.

### ASSUMPTIONS

*Claim Flow Assumptions.* The OAC will process the current backlog of 200,000 cases within two years, not including some months of startup time to hire and train staff. In the first year, new claims will be filed at current levels (about 40,000), but new filings will decline over time. This is a conservative assumption, since some portion of the current backlog and the first year's new filings will consist of unimpaired claims that will not be filed.

Peterson then projects the number of claims that will qualify under the medical criteria of the bill, based on Chambers Associates' projection of the incidence of impairing asbestos-related disease. Peterson then estimates the number of claimants who will opt out at various stages of the process, the number who will settle

with defendants or the trustee, and the number that will proceed to administrative adjudication by an Administrative Law Judge.

*Organizational Assumptions.* The Peterson model makes some assumptions about how the OAC will be organized to process claims efficiently and conveniently. Among these assumptions are the following:

- There will be one headquarters and six regional offices.
- The Administrator, Medical Director and Trustee of the Asbestos Compensation Fund will each head a division of the OAC with sufficient support staff to perform their duties.
- Much of the OAC's work, including medical review, optional settlement proceedings involving the Trustee of the Asbestos Compensation Fund, and hearings before Administrative Law Judges, will take place in the regional offices.

CONCLUSIONS

Peterson concludes that the following full time equivalent (FTE) personnel will be required to handle the steady stream of new asbestos cases following the first two years (after the OAC has processed the existing backlog of cases):

| | Total Personnel (FTE) |
|---|---|
| Administrator's Office | 41 |
| ALJ Offices (including Legal Assistance Program) | 60 |
| Medical Director's Office | 169 |
| Trustee of Asbestos Compensation Fund | 44 |
| Total OAC | 314 |
| U.S. Court of Federal Claims | 7 |
| National Medical Advisory Committee | 5 |
| Total | 326 |

In order to handle the existing backlog of pending claims and claims for medical testing reimbursements during the first two years of operation, an additional 380–390 personnel (FTE) will be required on a temporary basis. (Moreover, Peterson estimates an initially higher rate of new filings that will require 46 and 31 additional personnel (FTE), respectively, in the first and second years of the program.) Under section 701(a), the OAC may, with the approval of the Office of Management and Budget (OMB), waive personnel and procurement laws and regulations to expedite the handling of asbestos claims. The OAC is expected to use this authority, as necessary, to hire additional short term staff and contract for the needed facilities to meet the objective of processing the backlog of pending claims as soon as possible, but in any event within the first two years of operations.

Peterson estimates the cost of salaries and benefits for the required positions—as well as the cost of necessary equipment and facilities—based on price data in the locations where the OAC is expected to have offices. Peterson concludes that in the first two years the overall cost of the program will be approximately $85 million per year. This declines to $31 million per year in the last three years, after the backlog of pending claims and claims for medical testing reimbursements has been processed. The report's estimates of cost are as follows:

| Year | Costs |
|---|---|
| Start-Up | $23.8 |
| 1 (including backlog) | $85.2 |
| 2 (including backlog) | $85.2 |
| 3 | $30.9 |
| 4 | $30.9 |
| 5 | $30.9 |
| Total Start-Up plus 5 Years | $286.9 |

In conclusion, Peterson predicts that the total operating costs of the Asbestos Compensation Act of 2000, will be $287 million for start up and the first five years of operation. In its size and scope, the OAC would be roughly comparable to the Federal Mediation and Conciliation Service, which assists labor and management in resolving disputes through mediation and arbitration services. The Federal Mediation and Conciliation Service has an annual budget of $39 million, and personnel of 292 (FTE).

## AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, March 8, 2000.*

Hon. HENRY J. HYDE, *Chairman,*
*Committee on the Judiciary,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This letter presents the views of the Administration, updating the preliminary views of the Department of Justice presented to you on October 26, 1999, regarding H. R. 1283, the "Fairness in Asbestos Compensation Act of 1999." H.R. 1283 has changed considerably since our last letter, which raised a number of issues and questions that we have spent the last several months analyzing. In recent weeks, we have received several amendments, including the latest amendment, in the nature of a substitute, on March 3.[1] We understand that the Committee has spent substantial time crafting the legislation, and we have met with your staff and others working on behalf of the proposed legislation. As we have informed your staff, we remain interested in continuing our dialogue about these very important and difficult issues.

Like the Committee, the Department of Justice wants to see asbestos claims processed fairly, efficiently, and quickly. We share the same concerns and sympathies for the victims of asbestos exposure. As the Committee knows, the diseases that result from exposure to asbestos can cause great suffering, and often lead to quick and painful deaths. Like the Committee, we have considered at great length the question of how to ensure prompt and appropriate compensation for individuals harmed by exposure to asbestos. The question for both the Department and the Committee, we believe, is whether the proposed solution improves upon the status quo by

[1] While the latest amendment has not yet been introduced, we understand that the Committee intends to make it a substitute for the currently pending bill. Therefore, in this letter, "H.R. 1283" refers to this amendment, entitled "Asbestos Compensation Act of 2000."

ensuring faster and more equitable compensation to asbestos victims. We could not support any proposal that fails to improve the present system or hinders the progress made in compensating asbestos victims.

We oppose H.R. 1283 for a number of reasons, including:

- The process of compensating asbestos victims has improved since the 1980s, when the last comprehensive study on asbestos litigation was completed. While the current system is not ideal, we believe a new administrative process would undermine progress that has been made.
- H.R. 1283 would deprive asbestos victims of fair compensation, including victims who are demonstrably sick as a result of exposure to asbestos;
- H.R. 1283 would transfer costs now borne by defendant companies—who have been found legally responsible for the harm caused—to asbestos victims and the taxpayers; and
- H.R. 1283 would delay and worsen, rather than accelerate and improve, compensation to the sick.

*I. The Asbestos Litigation and Compensation Process Has Improved*

Like the Committee, we have been concerned by reports that the asbestos litigation and compensation process is an "elephantine" morass in need of reform.[2] In evaluating the state of asbestos litigation, the Supreme Court relied on a study using data from the mid-1980s. For the past several months, we have attempted to analyze the situation in asbestos litigation today. To some extent, our efforts have been hampered by the paucity of data and the absence of any more recent comprehensive study of asbestos caseloads, settlements and the like. Nevertheless, we are persuaded that the process for compensating victims of asbestos exposure has improved since the mid-1980s.

First, in recent years the parties to the asbestos controversy have settled hundreds of thousands of claims, a marked improvement over the more adversarial culture that permeated much of asbestos litigation at the time of the last major study. Working together, the plaintiff and defense bars have created a number of these private settlement mechanisms and national settlement programs, all of which have hastened the payment of claims to sick individuals, reduced the burden on the courts, and brought greater financial certainty to a number of defendants. For example, as the Committee was informed in its July 1999 hearing, Owens Corning alone has settled over 200,000 claims through the National Settlement Program it initiated in 1998. Another example is the Louisiana settlement agreement entered into by plaintiffs and defendants in 1998, which is creating numerous additional settlements.

Second, as to the claims that do remain on the court dockets, the courts have made considerable progress in managing these caseloads. In particular, state and federal courts around the country have instituted several case management controls that harness the volume of asbestos claims and permit the claims of the sickest victims to be expedited. These tools include multi-district consolidation in the Federal courts, the consolidation of similar claims for discovery and trial, and procedures for those with less serious dis-

[2] See *Ortiz* v. *Fibreboard*, 119 S. Ct. 2295, 2302 (1999).

eases to file claims in court without actively prosecuting them (*i.e.*, pleural registries). This latter technique has resulted in a de facto stay for many claims of the less impaired. Thus, in courts utilizing pleural registries, even though the cases of the less impaired constitute a large part of the pending case backlog, they consume comparatively few judicial resources. In addition, several states have created distinct causes of action for different asbestos-related injuries, eliminating the incentive for victims to rush to court at the first physical sign of injury and permitting those who initially recover small amounts for minimal injury to return to court if their condition subsequently deteriorates.

Third, asbestos has become a "mature" tort, with many of the basic liability questions resolved. Over the past decade, the litigants have clarified some of the medical issues, made progress on product identification, causation, and apportionment of liability issues, and the defendant companies have resolved a number of disputes with their insurers. This has resulted in fewer disputes, less discovery, less repetition in depositions and trials, and, as a consequence, a higher percentage of available dollars going to the victims.

This is not to say, however, that the present state of asbestos litigation is ideal. There are still a large number of cases pending in the courts, and not every court system has instituted the case management and prioritization techniques used successfully by other courts. As a consequence, some cases migrate to forums that are historically more favorable to plaintiffs, resulting in inconsistent verdicts and settlements, and some deserving victims are still compensated too slowly.

For the Administration, a key question is whether the imperfections in the current system justify the substitution of untested administrative procedures and standards for the traditional court system. Given our concerns that the system would not work as hoped and would benefit culpable defendants at the expense of the victims and taxpayers, we think the case for this untested system has not been made.

### *II. H.R. 1283 Would Exclude Many Asbestos Victims From Fair Compensation*

H.R. 1283 would create medical criteria according to which asbestos victims would be determined to be medically eligible or ineligible for compensation. At the outset, we note that legislating medical criteria to limit recipients of asbestos-related compensation sets standards that overstate the precision of existing diagnostic testing; and it precludes the incorporation of advances in medical knowledge by prescribing standards that may soon be outdated. Further, the proposed legislation does not foster fairness for people with diseases resulting from asbestos exposure.

First, the medical criteria in H.R. 1283 would result in sick people being denied compensation for their injuries. Even if we were to accept the proponents' avowed purpose of eliminating the claims of the non-sick while preserving the claims of the sick, the medical criteria in H.R. 1283 would not accomplish that goal. Experts from the Department of Health and Human Services, as well as many in the medical community, have indicated that the proposed med-

ical criteria are too restrictive and would result in the denial of compensation to many injured and impaired patients.

For example, the proposed medical criteria for asbestosis would require a claimant with evidence of obstructive disease on lung function testing to demonstrate high levels of fibrosis on chest x-rays as well. Yet, as our colleagues at HHS have informed us, asbestos exposure may cause a mixed obstructive and restrictive pattern and, in some instances, cause predominantly obstructive disease. In addition, the use of objective norms to measure the lung function of every claimant treats all claimants as if their normal lung function is identical. This, of course, is not the case. Some patients may have pre-exposure lung functions well above average and may lose more than 20% of their lung capacity, yet fail to meet the lung function criteria in the proposed bill. H.R. 1283 would deny compensation to these people who have been demonstrably impaired by their exposure to asbestos. Further, patients with asbestosis may have shortness of breath with exertion and functional impairment demonstrated by reduced arterial oxygenation during exercise, yet not meet the lung function criteria in the bill. In addition, H.R. 1283 understates the degree of injury experienced by individuals with pleural disease who fail to meet the lung function criteria, and does not adequately provide screening for these individuals. As a result of the proposed medical criteria, we are informed that physically impaired asbestos victims would be denied compensation.

Second, the medical criteria of H.R. 1283 would eliminate many existing causes of action and injuries compensable under current state law. In many jurisdictions, for example, plaintiffs are entitled to sue and recover for scarring of the lungs or for an increased risk of lung cancer as a result of exposure to asbestos, regardless of impairment. Under H.R. 1283, those claims would no longer be recognized, prohibiting claimants exposed to asbestos from obtaining compensation. At best, the claimants alleging such injuries could recover reimbursement of medical monitoring costs, as compared to the significant compensation they might receive today. Section 306(a). In a system in which those who are not yet physically impaired are denied the right to bring a claim, it is unlikely that the plaintiffs' bar, which currently finances and facilitates much of the medical monitoring of the less seriously impaired, would have the necessary financial incentive to pursue claims for medical monitoring. As a result, many victims who today receive the peace of mind and prompt medical attention that results from medical monitoring—at little or no cost to the victims—would be denied that benefit.

Third, H.R. 1283 would make it effectively impossible for many victims of asbestos exposure, who also were smokers, to recover compensation from asbestos defendants for the damage done to them by asbestos. H.R. 1283 would prohibit presumptive eligibility for lung cancer victims, where the claimant has a "substantial history of smoking" and does not have a qualifying non-malignant condition. Section 304(b). As many experts have stated, the interaction of smoking and asbestos exposure is synergistic, and smokers exposed to asbestos are at an exponentially greater risk of developing lung cancer than smokers without asbestos exposure. Among those heavily exposed, for example, 80% of all lung cancers would have

been eliminated in the absence of asbestos exposure, even had smoking habits not been changed.[3] Thus, contrary to the implication of H.R. 1283, many lung cancers involving both a substantial history of smoking and significant asbestos exposure would not have occurred but for the asbestos exposure. As for the requirement that lung cancer be accompanied by a qualifying non-malignant condition, HHS advises us that many studies have clearly shown that asbestos is a carcinogen and causes cancer independent of causing non-malignant disease, again contrary to the implication of H.R. 1283. In short, H.R. 1283 would prevent many victims of lung cancer from recovering compensation for a primary cause of their cancer—asbestos exposure.

Fourth, H.R. 1283 would prohibit courts from awarding punitive damages to victims. Section 202. Under H.R. 1283, punitive damages would be available only in administrative adjudications, thus diluting any right to opt out to a traditional court and eliminating the already-rare phenomenon of court-imposed punitive damages. Yet, even in the administrative context, where any possible concerns over jury-applied punitive damages would be eliminated, the legislation would make punitive damages available only where a "conscious, flagrant indifference" to a claimant was "the proximate cause" of the injury. And even if the claimant could satisfy this standard, he or she would be severely limited as to the amount of punitive damages available for past bad acts by culpable companies. Section 208(d). As we have stated with regard to other tort reform legislation, punitive damages serve an important deterrent function.

### *III. H.R. 1283 Would Impose Unwarranted Costs on Asbestos Victims and Taxpayers*

In addition to our concerns with the medical criteria and the exclusion of asbestos victims, we have a number of concerns with the economic impact of the legislation. Specifically, we believe that H.R. 1283 would provide unwarranted benefits to asbestos companies to the detriment of victims of asbestos and the taxpayers.

First, to the extent that it is unable to recover from defendants the recommended aggregate settlement that it has already paid to claimants, the Asbestos Compensation Fund—the entity charged with paying claimants—would be required to reduce future recommended aggregate settlements, taking into account the outstanding deficit. Section 402(a)(4). This provision, in effect, creates an incentive for defendants to avoid paying the government in a timely manner, if at all, on the assumption that a deficient Fund reduces settlement values and therefore defendants' ultimate expense. Ultimately, this would lead to lower settlement values for deserving victims.

Second, although the stated intention of the program is for defendants ultimately to cover all expenses, under H.R.1283, the Federal Treasury could advance the Office of Asbestos Compensation (the "OAC") up to $100 million in start-up funds. Section 403(a). Past programs in which the Federal government has advanced funds have been largely unsuccessful in trying to recover from re-

[3] See, e.g., A. Ritzen and L. Rosenstock, *The Misuse of Epidemiology and Apportionment in Compensation for Occupational Disease*, New Solutions, Winter 1993, at 29–36. R. Saracci, *Interaction and Synergism*. 12 American Journal of Epidemiology 465–466 (1980).

sponsible parties. In programs such as the Black Lung Benefits Act and the Comprehensive Environmental Response, Compensation and Liability Act (the CERCLA Superfund), the government spent considerable resources to seek reimbursement from responsible parties, and yet in many instances failed, leaving the taxpayers to subsidize the programs, or reducing future settlements to cover the shortfall. Similarly, we are concerned that the defendant companies may not pay for all of the costs associated with the administration of the OAC.

Third, to the extent that less seriously injured claimants seek medical monitoring expenses, it is likely that the U.S. government would be left holding the bill. Unlike other parts of the legislation, no mechanism is even proposed for the defendants to fund medical monitoring. By contrast, the bill contemplates yearly non-administrative appropriations by the U.S. of up to $150 million, which would not be reimbursable. Section 403. It appears that payment for medical monitoring would be drawn from these appropriations.[4] In the coming years, therefore, the government could be required to pay billions of dollars for injuries caused by the asbestos companies. We see no justification for the taxpayers to assume such a liability from the defendant companies, particularly in light of the fact that courts consistently have found the asbestos companies legally responsible for asbestos-related harm.

As we understand it, one of the justifications offered for this taxpayer subsidy is that the United States should share in paying for the asbestos problem. This argument does not fully account for the substantial sums that the United States already has spent as a result of the asbestos problem. Over the past thirty years, the government has paid billions of dollars in health, medical, research, and abatement costs to address the problems created by the marketing and sale of asbestos products. Similarly, in the coming years U.S. taxpayers can expect to pay additional billions in such costs, without the additional financial burden placed on them by this legislation. To the extent the Committee believes the government should pay even more because the United States shares culpability with the asbestos companies for the sale and distribution of asbestos products, we believe that premise is misguided. Virtually every court has rejected the assertion that the United States is culpable for the harms inflicted by asbestos. Significantly, these rulings were based not on immunity doctrines but on factual findings that the liability of asbestos defendants should not be placed upon the United States. As one court concluded, the effort by the asbestos companies to transfer culpability to the government is a "grossly misplaced" attempt to "impose the woes of asbestos compensation upon the customer [the United States] whom they actively pursued."[5] Another court, after conducting a six-week trial on the issue, rejected the assertion that "the Government sacrificed the health of shipyard workers to the war effort." Instead, the court concluded, based on the facts, that "the Government took reason-

[4] An earlier draft of the bill specified appropriations of $200 million annually for certain medical monitoring reimbursements. That provision has been excised from the current draft with no new provision to provide such funding.

[5] *Glover* v. *Johns Manville*, 525 F. Supp. 984, 986 (E.D. Va. 1979), *aff'd in part, vacated in part and remanded*, 662 F.2d 225 (4th Cir. 1981).

able health and safety measures regarding asbestos use in the shipyard environment. . . .”[6]

Taken together, these various provisions, along with the elimination of many claims through the imposition of H.R. 1283's medical criteria, result in a massive transfer of funds—billions of dollars—to the defendant companies, financed by asbestos victims and taxpayers. We see no justification for such a significant subsidy, particularly given the fact that so many courts and juries have found asbestos companies liable to the people who have been exposed to their products.

We understand that some have asserted that cost-shifting is required to ensure the continued viability of defendant companies so that they will continue to have the capacity to compensate sick victims in the future. We agree that preserving the assets of companies in order to compensate sick victims is vital. However, proponents of H.R. 1283 have not demonstrated that the financial health of asbestos defendants, taken as a whole, is so dire as to require a large subsidy of the sort envisioned by H.R. 1283. The Treasury Department has examined publicly available information regarding a number of asbestos defendants. While the industry has seen bankruptcies in the past two decades, public filings (10K and 10Q reports) by many major industry participants do not indicate financial distress; to the contrary, their statements often inform shareholders and others that asbestos-related liabilities will not have a material impact upon the present or future financial performance of the companies. In fact, over the past decade, many of these companies successfully have recovered, or made agreements to recover, billions of dollars in insurance coverage. We do not doubt that some companies may be in distress due to asbestos-related liabilities, but we have not seen the kind of compelling financial data, on an industry-wide basis, to justify shifting the economic responsibility of these injuries from the culpable corporate defendants and their shareholders to the victims and the taxpayers. In addition, the Treasury Department informs us that some companies that have chosen to work cooperatively with plaintiffs to resolve their asbestos-related liabilities could be placed at a competitive disadvantage by H.R. 1283. Public policy should not seek to reward defendants that have chosen not to settle at the expense of those firms that have acknowledged their responsibility.

### *IV. H.R. 1283's Administrative System Would Delay Compensation to the Sick, Not Make It Better or Faster*

While one of the stated goals of H.R. 1283 is to speed compensation to deserving claimants, our analysis of the proposal indicates the opposite. In our view, H.R. 1283 would delay compensation to sick victims of asbestos exposure.

#### *A. Start-up Delays*

The creation of an administrative structure to handle a large number of claims inherently requires a multitude of steps and decisions before that structure can begin to process the claims of the

[6] *Johns Manville* v. *United States*, 13 Cl. Ct. 72, 133 (1987), *vacated on jurisdictional grounds*, 855 F.2d 1571 (Fed. Cir. 1988); see also *GAF* v. *United States*, 19 Cl. Ct. 490, 499 (1990) (rejecting GAF's assertion that “the Government knowingly exposed its employees to asbestos hazards”), *aff'd*, 932 F.2d 947 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992).

sick. Of necessity, these steps and decisions delay the processing of claims for those cases that are already pending. Based on our experience administering several compensation programs, we are convinced such delay would result were H.R. 1283 to be adopted.

First, we believe it would take a considerable amount of time to establish and effectively operate the proposed Office of Asbestos Compensation ("OAC"), which would serve both administrative and adjudicatory functions. As we read H.R. 1283, the OAC likely would need to hire and/or contract with hundreds, and perhaps over a thousand employees—including lawyers, physicians, claims reviewers, and administrative personnel—before it could adequately handle the large number of cases that would confront the OAC initially.

In this regard, a comparison to the National Vaccine Injury Compensation Program, established more than a decade ago, is instructive. That program processes cases that, while often medically complex, are nevertheless more streamlined than the average asbestos case in that vaccine cases do not require resolution of difficult and fact-intensive issues such as allocation, apportionment, or the exercise of subrogation rights against the industry. Yet, the vaccine program utilizes approximately 100 staffers in various agencies to handle the approximately 700 cases currently pending before it, and has resolved approximately 5,000 cases in its entire eleven-year history. We are concerned that, given similar staff-to-claim needs and even assuming some economies of scale accompanying the larger volume of asbestos cases, the OAC may need to hire a very large number of people to process the tens of thousands of claims that would be filed upon the commencement of OAC operations.

Second, in addition to hiring and training all of these people, the OAC, no matter how well-intentioned and diligent in purpose, would face further delays in opening due to the complex and controversial rules that would have to be promulgated before any claim could be processed. For example, as we read H.R. 1283, before processing a claim, the OAC must develop, based on difficult-to-obtain historical data, a "compensation grid" on which offers to the asbestos claimants would be based. Section 103(b)(2). The legislation appears to recognize the difficulty of this exercise by providing the OAC with subpoena power to collect information about prior settlements. Section 107(c). It is almost certain that litigants would challenge the process of developing this grid. This is precisely what occurred in the vaccine program, which has developed and modified its own compensation grid. Litigation and disputes over the development of the compensation grid would further delay compensation to the sick.

Third, the processing of asbestos claims would be further delayed by satellite litigation on at least two significant issues. First, even once developed, the "compensation grid" would lead to more litigation when affected parties were not satisfied by the outcome. Second, the medical criteria, and the controversy surrounding them, would lead to new litigation and multiple appeals. For example, the parties to the asbestos claims process almost certainly would litigate and appeal multiple questions involving claimants with asbestos-related lung cancer and a history of smoking. The uncertainty resulting from this litigation over new questions—which the par-

ties, not the OAC, would initiate—would further delay compensation to asbestos victims facing progressive asbestos-related illness.

This delay in establishing the OAC is crucial because during this interim, start-up period, most of the pending asbestos claims would almost certainly grind to a halt. Although the bill allows for current claimants to continue with their case in court if trial commences within six months of the bill's enactment (Section 501(b)), only a marginal percentage of asbestos cases currently make it to trial, let alone within six months. Similarly, although the bill permits claimants to demand "right to sue" letters from the OAC if they do not receive an initial decision on medical eligibility quickly, that right is limited to those rare claimants with "a scheduled trial date within one year" after enactment. Section 501(c). In any event, even if a few claimants could return to court before the OAC was operational, the prospective change in the law that the bill represents (and, in particular, the development of the compensation grid) almost certainly would alter the defendants' litigating positions and create incentives to defer litigating and settling the pending cases until the OAC process sorted itself out. Therefore, for the years that it would take for the OAC to become operational, while many victims' disease would progress, their claims would not.

Again, a comparison to the vaccine program is illuminating. Although the National Childhood Vaccine Injury Act was passed by Congress in 1986, the vaccine program did not issue its first award for several years. In the interim, during the years it took to establish the vaccine office, most cases were stayed by the courts and little settlement progress was made. Once the vaccine claims resolution process commenced, it took twice as long to resolve claims as was predicted at the time the legislation was drafted (two years instead of one). Indeed, with the backlog created by the initial filing of approximately 4,300 cases by 1990, the vast majority of vaccine cases were not resolved in even two years. Thus, our experience indicates that, with the erection of any new administrative structure, pending cases tend to be delayed far longer than anticipated, no matter how well intentioned or diligent the staff. The result is delayed justice for deserving victims.

*B. Delays in the Claims Resolution Process*

Once the OAC was finally up and running, the proposed claims resolution process would not, in our view, materially improve upon the traditional court system. H.R. 1283's claims processing procedures would require a number of steps for each individual. First, as we understand the bill, a claimant would have to submit a detailed, complete medical file before a claim was considered filed. Section 102(b). Our experience with asbestos litigation indicates that it would often take months to complete such a file. Second, once the claim was successfully filed, the claimant would be required to wait up to thirty days for the Medical Director to make an initial decision regarding eligibility. If initially denied, the claimant would then be obligated to petition for review by a panel of two qualified physicians or an exceptional medical claims panel. Section 102(c). If the denial were affirmed by the review panel, the claimant would then seek further review through an appeal to the Court of Federal Claims, and ultimately to a U.S. Court of Appeals. Section 106.

Third, for a claimant determined to be medically eligible, if the claimant decided to use the administrative system, he/she would have to name all defendants and submit a verified, particularized statement providing, with respect to each defendant, the basis for the allegation. The amount of time permitted for such a filing is not yet determined. Section 103(a)(2). Fourth, upon finding that the claimant's statement met the requirements of the bill, the Administrator would have to provide notice to each named defendant. The Administrator is not given a deadline for doing so. Section 103(a)(3).

Fifth, each named defendant in turn would have the right to assert third party claims, and likely would be entitled to discovery for the purpose of obtaining information necessary to identify all such additional defendants. This discovery, to be determined by an Administrative Law Judge, would not be subject to statutory or regulatory deadlines and could itself take months, particularly given the history of disputes regarding the allocation of responsibility among asbestos defendants. Section 103(a)(4).

As we read H.R. 1283, it is only after these five events occur that the claimant would be entitled to receive a good faith settlement offer from the named defendants. It is entirely likely that a claimant under the new administrative system would face a substantial wait before receiving even an initial settlement offer, let alone full compensation. That is not a material improvement over the current system. Indeed, for many claimants, the wait to work their way through the system would follow the wait for the system to be erected, resulting in years of delay in compensation to the sick.

Moreover, even if a claimant is able to resolve his or her claim, H.R. 1283 would create the likelihood of bitter litigation over one of the most contentious issues in asbestos suits: apportionment of liability among the defendant companies. In many cases, it is this dispute which occupies the most time and resources. Rather than attempt to reduce this litigation, the legislation would insert the U.S. government further into the maelstrom, by obliging the Trustee to litigate against defendants in an effort to recover the funds awarded to the claimant. Section 104. The Trustee would be prohibited from even acknowledging in court the fact or the amount of the settlement for which it is seeking reimbursement. Section 209. Meanwhile, the defendants would remain as capable and likely as they are today to attempt to elude paying their appropriate share of liability. Given the litigation history over apportionment of liability, we believe years of litigation would be likely, involving the U.S. government in matters that previously have remained a private dispute, and—to the extent the defendants were successful individually in defeating U.S. attempts to recover the full settlement amount—leaving the taxpayer to pay the difference and reducing the funds available to victims in future settlements.

Finally, one aspect of H.R. 1283 raises constitutional concerns. H.R. 1283's provision for the appointment of the OAC's Medical Director by the Administrator of the OAC, Section 101(c), appears to run afoul of the Appointments Clause. The Director is an inferior officer whose appointment must be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." Because the Attorney General may remove the Administrator of the OAC for cause (see Section 101(a)), we do not believe the Administrator

to be the head of a department for purposes of the Appointments Clause.[7]

To be clear, the concerns we express about H.R. 1283 do not stem from a "can't-do" attitude, or from any objection that the Department of Justice, as opposed to another federal agency, is tasked with developing this proposed administrative process. If this bill were enacted, the Department of Justice would embrace this challenge with dedication to our statutory responsibilities and to the need to speed compensation to deserving claimants. Our concerns arise, regrettably, from our experience with similar administrative systems and our decades-long experience with asbestos litigation.

* * * *

As we noted at the outset, we remain interested in a dialogue with the Committee on how to improve the present state of asbestos compensation, which is far from perfect. However, to the extent that any legislation would improve the process, one might do better by building upon developments in the current system than by erecting new structures of the type proposed by H.R. 1283. As we have informed your staff, we remain willing to work with the Committee on this issue and to evaluate any other proposal for improving the present state of asbestos compensation.

Thank you once again for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

ROBERT RABEN, *Assistant Attorney General.*

cc: Honorable John Conyers, Jr.
Ranking Minority Member

## JUDICIAL CALLS FOR FEDERAL LEGISLATION

*Federal Courts.* Many in the judiciary have long recognized the need for legislative action to resolve the asbestos litigation crisis. In 1991, the U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice William Rehnquist, found that the typical asbestos case took 31 months—nearly three years—to wind its way to resolution through the court system, compared with 18 months for the typical liability suit. The report issued by the Ad Hoc Committee called on Congress to address the asbestos litigation crisis, writing that "the ultimate solution should be legislation recognizing the national proportions of the problem," and that "[i]n the final analysis . . . Congressional action is necessary." These findings were supported by statistics developed by the Rand Institute for Civil Justice, which found that attorneys' fees and other transaction costs consumed sixty-one percent of asbestos litigation, leaving only thirty-nine percent to compensate claimants.

[7] In addition to this concern, and the constitutional concern we raised in our letter of October 26, 1999, H.R. 1283 contains no congressional findings regarding the problems caused by the current approach to asbestos litigation, including its impact on victims, on the judicial system, and, most importantly, on interstate commerce. This may make it less likely that H.R. 1283 would withstand constitutional challenge under the Commerce Clause.

In 1993, the Third Circuit in *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir. 1993)(en banc), the court wrote that:

> ". . . both state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products." *Id.* at 1386.

Again in 1996, the Third Circuit in *Georgine* v. *Amchem Prods., Inc.* 83 F.3d 610, (3d Cir. 1996), stated that asbestos litigation required:

> "innovation in the management of mass tort litigation . . . But reform must come from the policy-makers, not the courts. . . . The most direct and encompassing solution would be legislative action." *Id.* at 633.

In 1997, the United States Supreme Court in *Amchem Prods., Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997), ruled that a massive global settlement of asbestos-related claims was invalid under the Federal Rule of Civil Procedure 23 (b)(3)—the rule governing class actions in federal courts. Justice Ginsburg, writing for the Majority, stated:

> "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23 . . . cannot carry the large load . . . heaped upon it." *Amchem*, 117 S. Ct. at 2253.

Justice Stephen Breyer, concurring in part and dissenting in part, observed that asbestos litigation has weakened the judiciary while leaving victims uncompensated. Id. at 2252. Justice Breyer pointed to the overwhelming evidence provided by the Ad Hoc Committee, which detailed the chaos asbestos litigation has levied upon the judiciary, to suggest that if the majority was unwilling to accept the global settlement as a means to fix the problem, some other solution was necessary. *Id.*

In 1998, the Fifth Circuit in *Cimino* v. *Raymark Industries, Inc.*, 151 F.3d 297, 313 (5th Cir. 1998) (quoting *Jackson* v. *Johns Mansville Sales Corp*, 750 F.2d 1314, 1327 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986)), the court wrote that:

> "[T]here is no doubt that a desperate need exists for Federal legislation in the field of asbestos litigation. Congress' silence on the matter however, hardly authorizes the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions."

In 1999, the United States Supreme Court in *Ortiz* v. *Fibreboard Corp.*, 119 S. Ct. 2295 (1999), ruled that a massive global settlement of asbestos-related claims was invalid under the Federal Rule of Civil Procedure 23 (b)(1)(B)—the rule governing "limited fund" class actions in federal courts. Justice Souter, writing for the majority, stated:

> "this case is a class action prompted by the elephantine mass of asbestos cases, . . . this litigation defies customary judicial administration and calls for national legislation." *Id.* at 2302.

Chief Justice Rehnquist, writing the concurring opinion, stated:

> "Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims . . . the 'elephantine mass of asbestos cases,' cries out for a legislative solution." *Id.* at 2324.

*State Courts.* State Courts, too, have recognized that a federal legislative solution to the asbestos litigation morass is required.

In 1986, the Supreme Court of New Jersey in *Fischer* v. *Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986), wrote that:

> "[a]t the state court level we are powerless to implement solutions to the nationwide problems created by asbestos exposure and litigation arising from that exposure."

In 1994, the Supreme Court of Florida in *W.R. Grace & Co.—Conn.* v. *Waters*, 638 So.2d 502, 506 (Fla. 1994), wrote that:

> "[a]ny realistic solution to the problems caused by the asbestos litigation in the United States must be applicable to all fifty states. It is our belief that such a uniform solution can only be effected by federal legislation."

In 1996, the West Virginia Supreme Court of Appeals in *Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996), also cited the need for Congressional action:

> "Congress by not creating any legislative solution to these problems, has effectively forced the courts to adopt diverse, innovative and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active dockets." *Id.*

In 1998, the Supreme Court of Texas in *Owens-Corning Fiberglass Corporation* v. *Malone*, 972 S.W.2d 35, 53 (Tex. 1998), wrote that:

> "it may be that a truly uniform solution can only be fashioned by either the Supreme Court or Congress."

## DISSENTING VIEWS

We strongly oppose H.R. 1283, the so-called "Asbestos Compensation Act of 2000." H.R. 1283 is an unjustified Federal intrusion into State tort law that purports to resolve the "asbestos litigation crisis" by cutting off viable claims of exposed workers. Instead of creating an administrative alternative to the civil justice system to provide fair and speedy compensation to injured workers, the effect of this bill would be to free corporations from their responsibility to compensate victims injured by asbestos exposure. H.R. 1283 is opposed by the Department of Justice,[1] the AFL–CIO,[2] Public Citizen,[3] the National Council of Senior Citizens[4] and the Association of Trial Lawyers of America,[5] among others. The legislation is expected to be vetoed should it reach the President's desk.

H.R. 1283 establishes an Office of Asbestos Compensation ("OAC"), headed by an Administrator in the Department of Justice ("DOJ"), in which all asbestos complaints must be filed. Once the program is set up—which is likely to take several years—and a complaint is filed, a Medical Director determines whether a claimant meets the restrictive medical criteria outlined in the bill. If the criteria are met, the named defendants are then required to make settlement offers to the claimant. The Trustee of the Asbestos Compensation Fund is also required to make an offer of compensation to the claimant, based on a compensation grid to be established by rule. If the claimant accepts the defendants' offers, the claim is settled. If the claimant accepts the Fund's offer, the Trustee may then enforce the claim against the defendant companies through litigation before a DOJ administrative law judge or in State or Federal Court. If the claimant rejects both the Fund's offer and the defendants' offers, he may pursue the claim either before a DOJ administrative law judge or in State or Federal court, subject to numerous restrictions on their rights under State tort law. The legislation has a retroactive effective date and would preempt all asbestos claims currently pending in Federal and State court.

In our view, the test for crafting asbestos legislation is whether it improves the situation of the victims of asbestos as a whole. Un-

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[1] See Letter from Assistant Attorney General Robert Raben, U.S. Department of Justice, Office of Legislative Affairs, to Chairman Henry Hyde, (March 8, 2000) (on file with the minority staff of the House Judiciary Committee) [hereinafter DOJ Letter].

[2] See Letter from Peggy Taylor, President, AFL–CIO, to Chairman Henry Hyde, (February 14, 2000) (on file with the minority staff of the House Judiciary Committee) [hereinafter AFL–CIO Letter].

[3] See Letter from Joan Claybrook, President, Public Citizen, to Ranking Member John Conyers, (March 7, 2000) (on file with the minority staff of the House Judiciary Committee) [hereinafter Public Citizen Letter].

[4] See Letter from George J. Kourpias and Steve Protulis, National Council of Senior Citizens, to Members of Congress, (February 9, 2000) (on file with the minority staff of the House Judiciary Committee).

[5] *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the Comm. on the Judiciary*, 106th Cong. (1999) (statement of Richard Middleton, Jr., President, ATLA) [hereinafter ATLA Testimony].

fortunately, H.R. 1283 does not meet this test in a number of important respects. First and foremost, the bill's medical criteria provide that many victims who would be eligible for recovery under the longstanding traditions of tort law in our States would be shut out arbitrarily by Congress. The minimum exposure and latency requirements will deny compensation to many asbestos supervisors and clean-up workers. The criteria will also exclude many spouses and children of workers who contracted cancer from their contact with asbestos workers and their clothes—like those in Libby, Montana.

In addition, we believe opt-in is effectively laying your fairness cards on the table. If you really believe this bill is fair, then why not give the victims the right to make that determination themselves? Under *Amchem Products, Inc.* v. *Windsor (Georgine)*,[6] a model the proponents of this bill repeatedly invoke, all of the victims had an absolute right to choose whether to opt into the plan, and 170,000 chose not to. However, the proponents propose a perverted version of this. You can "opt-out" of the administrative system and into the courts only if you survive the contorted medical criteria. That means that tens if not hundreds of thousands of victims will never get any choice.

Moreover, the new administrative maze will create more, not fewer, delays. Under the bill, every single claim—no matter how sick the victim—will be placed in legal limbo for as long as it takes to create the massive new legal bureaucracy, promulgate and litigate a dozen new rules, and obtain funding. Even once the bureaucracy is set up, the delays will go on and on. Claimants will face nearly a dozen separate steps—each one subject to lengthy delay and litigation—before they can obtain any compensation.

The legislation's regressive new "tort reforms" will reduce the value of the few claims which become eligible for compensation. The bill narrows and caps punitive damages, limits legal fees, limits class actions, and narrows venue all on behalf of a special interest. Harm caused by asbestos constitutes perhaps the most grievous tort in American history—to date hundreds of thousands of individuals have been killed, and millions more have been harmed. Given that asbestos manufacturers have known since the early part of the 1900's that the fiber would kill workers and harm their families, and that they have sought to avoid responsibility for their actions and fight efforts to ban its use, these tort reforms send a shocking message about corporate accountability.

We also strongly object to the legislation's retroactive effective date, which will preempt all 200,000 cases pending in the courts today. The so-called exemption for cases which reach trial within the next 6 months is next to worthless, since even these cases will be subject to the restrictive new medical criteria. The net effect will be to bail out wrongdoers and shift liability to victims and the Federal Government. For these and the following reasons, we dissent from this legislation.

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[6] *Amchem Products, Inc.* v. *Windsor*, 117 S.Ct. 2231 (1997).

*I. The "litigation crisis" is vastly overblown and based on dated information.*

The principal purported justification for this legislation is that we are in the midst of an asbestos litigation crisis, with a supposed "elephantine mass" of pending cases which will lead to the bankruptcy of most of the remaining asbestos companies.[7] We cannot agree with this contention. First, there is no data showing that asbestos litigation is any more time consuming or expensive than any other type of product liability case. Indeed, because of the widespread harm caused by these products and the 25 years of litigation that have settled the major liability issues, asbestos is now a mature tort. Thus, asbestos cases today are less time consuming and less expensive to pursue than other types of tort actions. The vast majority of these cases are being settled—with the 20 companies in the Center for Claims Resolution settling approximately 99.8% of their cases, and with defendants such as Owens Corning having agreed to a voluntary settlement program for 180,000 of its claims. At the committee hearing on H.R. 1283, Owens Corning's General Counsel, Maura Abeln, stated that "there is a viable alternative to legislation—a settlement process which protects the rights of individual claimants and permits companies to manage their own financial destiny."[8]

Moreover, Federal court procedures are particularly streamlined, with all Federal cases having been consolidated for procedural purposes in a single court in Philadelphia. According to ATLA President Richard Middleton:

> [I]t is simply inaccurate to any longer claim that asbestos litigation is placing an undue burden on the courts. As statistics clearly show, claims filed do not translate into cases tried. The vast majority of cases do not take up the time of the courts. Although many new cases are filed each year, large numbers are placed on inactive dockets and most other claims are settled under private agreements. In fact, according to Mealey's Asbestos Litigation Report, during 1998 only 55 asbestos cases involving 125 individuals proceeded to verdict in the 50 States and all Federal courts, a 45% decline from 1997—and clearly a negligible number.

We also note that the courts are already providing the needed flexibility so that cases involving persons who are seriously ill may move to the front of the litigation line. A Public Citizen survey has found that, at both the State and Federal levels, courts have adopted "gatekeeper" mechanisms which prioritize the claims of plaintiffs with more advanced illnesses and allow stays for less impaired individuals. This has been accomplished through the use of pleural registries (which allow persons with less serious diseases to file claims in court without actively prosecuting them) and by the widespread allowance of distinct causes of action for different asbestos-related injuries. Thus, it appears that because many of the problems that the courts confronted during the last decade have been eliminated, the federally mandated administrative system proposed

[7] *Ortiz* v. *Fibreboard Corp.*, No. 97–1704, 1999 WL 412604, at 5 (U.S. June 23, 1999).
[8] See ATLA Testimony at 4.

in H.R. 1283 will only serve to create new and lengthy delays for injured asbestos victims.

We also find little evidence to support the proponents' claim that the legislation is needed because we will otherwise face a growing stream of bankruptcies by defendant companies. It is instructive to note that the Treasury Department has examined publicly available information regarding a number of asbestos defendants and found the Majority's arguments unpersuasive. They concluded, "[w]hile the industry has seen bankruptcies in the past two decades, public filings (10K and 10Q reports) by many major industry participants do not indicate financial distress; to the contrary, their statements often inform shareholders and others that asbestos-related liabilities will not have a material impact upon the present or future financial performance of the companies. In fact, over the past decade, many of these companies successfully have recovered, or made agreements to recover billions of dollars in insurance coverage." [9]

Our review of the specific liability statements by publicly traded asbestos defendants confirms that the principal remaining asbestos defendants are not facing any significant threat of bankruptcy. For example, in March of this year, Paul Norris, the Chairman and Chief Executive Officer of W.R. Grace—one of the largest remaining asbestos defendants, and the company allegedly responsible for the Libby, Montana asbestos deaths and illnesses—acknowledged that "Grace generates ample cash to cover its asbestos-litigation burden." [10] Similarly, Owens-Corning, another major asbestos defendant, admitted in a March 1, 2000 SEC filing that ". . . we believe that the costs which may be associated with [the asbestos] matter will not have a materially adverse effect on Owens Corning's financial position or results of operations." [11] The situation is much the same with other significant asbestos defendants—U.S. Gypsum,[12] Federal Mogul,[13] Armstrong World Industries,[14] and Pfizer (parent company of Quigley) [15] all have indicated there is little likelihood that asbestos liability could lead to bankruptcy.

If the Majority was truly concerned that Congress' failure to legislate could cause these firms to file for bankruptcy, we would have expected them to have subpoenaed, or at least investigated the fi-

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[9] See DOJ Letter at 7.

[10] See Susan Warren, *W.R. Grace Has New Business, but Needs a New Image*, Wall Street Journal, March16, 2000, at B4.

[11] Owens Corning, SEC 10k filing, March 1, 2000; *Yahoo! Finance* (December 31, 1999) <http://quote.yahoo.com/?u>.

[12] U.S. Gypsum acknowledged in its quarterly report filed with the SEC that, "asbestos litigation is not expected to have a significant impact on [U.S. Gypsum's] liquidity or cash flows during 1999." U.S. Gypsum Corporation, SEC 10Q filing, March 1, 2000.

[13] In its most recent securities filing with the SEC, Federal Mogul admitted, ". . . [M]anagement believes that asbestos claims pending against the Company . . . will not have a material effect on the Company's financial position." Federal Mogul, SEC 10k filing, March 1, 2000. Federal Mogul has estimated a maximum of $1.1 billion in future asbestos liability while at the same time it reported shareholders' equity of more than 20 times that liability. *Yahoo! Finance* (December 31, 1999)<http://quote.yahoo.com/?u>.

[14] In its annual report filed with the SEC, Armstrong World Industries characterized the cost of asbestos claims as not having, ". . . [A]ny material after-tax effect on the financial condition of Armstrong or its liquidity." Armstrong World Industries, SEC 10k filing, March 1, 2000.

[15] Pfizer, the parent corporation of Quigley Company, Inc., a producer of asbestos, has stated that costs incurred in defending and ultimately disposing of the asbestos personal injury claims, as well as other asbestos-related costs, will be covered by insurance policies and ultimately will have no materially adverse effect on its financial position. Pfizer Inc., SEC 10k filing, March 1, 2000. At year end, Pfizer had a market value of approximately $122.6 billion. *Yahoo! Finance* (December 31, 1999)<http://quote.yahoo.com/?u>.

nancial situation of these companies. However, that has not occurred, and the Majority has chosen instead to rely on self-serving statements of financial distress, rather than the companies' statements made to the SEC and their own shareholders.

*II. Medical criteria will unfairly reduce the number of claimants.*

There are several problems with regard to the medical criteria.[16] As a general matter, the medical criteria are not consensus standards generally accepted in the medical community as demonstrated by communications submitted to the committee by distinguished experts in the field.[17] Rather, they represent litigation-driven standards, promoted by defendants, which are unsupported by the medical literature. Further, despite the majority's repeated attempts to characterize the criteria as merely representing a codification of negotiated private settlement standards "agreed to by all the parties," the proponents have chosen the least favorable and the most restrictive standards from a menu of settlement agreements, the most restrictive of which was *Amchem*. At the same time, they have ignored whole cloth more liberal standards contained in numerous other settlements and judicially approved plans.[18]

Moreover, we believe it is inappropriate for Congress to specify detailed and fixed medical criteria governing tort actions. To the extent there is any role for the Federal Government in this regard, it would be far preferable to assign the responsibility to an entity with actual expertise in the area, such as the National Institute of Occupational Safety and Health ("NIOSH"), rather than Congress.[19] Also, under the bill, the value to a victim of meeting the medical criteria is somewhat limited, given that the medical certificate is subject to rebuttal by defendants,[20] and even if it is not rebutted, it does not automatically entitle the claimant to compensation.[21]

A related concern is that under the procedures in the bill, asbestos manufacturers would appear to be guaranteed a right to a jury trial with regard to the claimant's medical condition, but the claimant's right to a jury trial may be eliminated by the medical panels or the Federal court of claims. Additionally, the medical review process unfairly prevents some of the most qualified physicians—

[16] The original substitute would have allowed for racial profiling by referring to an article that provided that African Americans have worse lung functioning and therefore should have a higher bar to establish recovery (The original substitute's definition of "pulmonary function testing" referenced standards requiring race corrections and encouraged physicians to apply different standards blacks than whites). Fortunately, these concerns were alleviated as a result of an amendment offered by Representatives Scott, Conyers and Hyde which requires the Medical Director to eliminate predicted values and pulmonary function tests that incorporate adjustments based on race.

[17] *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christine Oliver, M.D.).

[18] See In re Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988) and *In re Asbestos Litigation* v. *Gerald Ahearn*, 90 F.3d 963 (5th Cir. 1996).

[19] Representatives Conyers, Scott and Nadler offered an amendment, which the Majority rejected, that would have required the Department of Justice, in consultation with NIOSH, to draft medical criteria.

[20] Sec. 201. The certificate can be rebutted by "clear and convincing evidence." The defendants could easily argue that a contradictory diagnosis obtained from their own experts would meet this standard. Accordingly, the required procedure for obtaining a certificate of eligibility simply delays the adjudication of the plaintiff's claim and coerces him to disclose his entire medical case and all of his evidence of exposure before he is permitted to file suit. This effectively gives the defendants an unlimited time to prepare its defense.

[21] Sec. 207.

*e.g.*, those who have spent a significant amount of their time working as asbestos experts—from serving as an eligible physician for medical review purposes and requires thousands of workers to submit themselves to new chest x-rays to meet the bill's more stringent testing requirements.[22] Finally, we take issue with the notion that the so-called "less sick" or "unimpaired" should be barred from receiving any compensation.

We also have a number of specific problems with the individual categories of asbestos related harm, particularly with regard to lung cancer and non-malignant conditions (*i.e.*, "less sick" or "unimpaired" individuals).

*A. Lung cancer*

The criteria for asbestos related lung cancer is unduly restrictive and discriminatory. Even if a claimant meets the arbitrary exposure requirement, the whole issue of medical eligibility and causation may be fully relitigated at trial if the lung cancer claimant has a history of smoking. Thus, for these claimants, the certificate of medical eligibility is illusory in that it does not establish even a rebuttable presumption of eligibility.[23] This presumption against smokers is inconsistent with the jurisprudence[24] and could leave tens of thousands of workers with little chance of obtaining compensation from either the asbestos or tobacco industry (notwithstanding determinations by OSHA and the Surgeon General which have found that persons exposed to asbestos who smoke have a 50 times greater likelihood of contracting lung cancer than ordinary individuals).[25]

Another concern is that the legislation denies compensation to lung cancer victims who cannot show a latency period from their first exposure to asbestos to the date of illness of at least 10 years. In addition, victims who are unable to establish they were regularly exposed to visible asbestos dust in their workplace for at least 7.5 years (and as a practical matter, in most cases, 15 years)[26] unless their lung cancer is accompanied by a qualifying non-malignant disease, are also denied compensation under H.R. 1283. These

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[22] Sec. 601(28). Sec. 601(5) requires quality one rather than quality 2 x-rays.

[23] Sec. 304(b).

[24] See *Brisboy* v. *Fibreboard*, 418 N.W. 2d 650 (1988, MI Sup. Ct); *Alvin J. Acosta* v. *Babcock & Wilcox*, No. 90–3714 (5th Cir. 1992) (applying "substantial causation" standard for asbestos claims brought by smokers, rather than the bill's suggested standard that asbestos exposure must be the sole and "but for" cause).

[25] An individual with asbestos exposure who is a non-smoker has a 5x greater risk of contracting lung cancer than an unexposed person. Regular smokers have a 10x greater risk of contracting lung cancer than persons who do not smoke. However, persons with both asbestos exposure history and a smoking history have an increased risk of lung cancer that is 50 to 90 times greater than normal. *Health Consequences of Smoking and Cancer*, report of the Surgeon General (1992), pages 189–190. See also *Bldg. & Construction Trades Dept.* v. *Brock*, 838 F.2d 1258, 1265–66 (D.C. Cir. 1986) (citing OSHA Regulations, 51 Fed. Reg. 22,612 *et seq.*, finding that non-smokers exposed to asbestos have a 2x greater risk of contracting lung cancer than the general population, smokers have a 10x greater risk, and smokers exposed to asbestos have a 20x greater risk).

[26] Sec. 304(a). As a general matter, asbestos dust is not visible except at levels that are 1,000 times greater than the OSHA standard of .1 fibers per cubic centimeter of air. Sec. 304. Further, exposure to asbestos is often mixed with exposure to other nuisance dusts making the percentage of asbestos dust present hard to determine. Workers are unlikely to have access to exposure records of dust levels. Also, with regard to the issue of "equivalent years of exposure" which is defined in Sec. 601(13), the only persons who would qualify to obtain full year exposure for each year of work are those persons whose primary occupation involved the direct installation, repair, or removal of asbestos-containing products (this would include supervisors, bystanders, clean-up workers, inspectors, or anyone else who worked in the same area and breathed the same dust).

time requirements bar recovery by persons subject to shorter latency or exposure periods (the scientific literature contains numerous examples of individuals developing lung cancer with shorter latency and exposure periods),[27] and make it almost impossible for spouses and children exposed as a result of contact with an asbestos worker to recover.

Asbestos-related lung cancer can be caused by minimal exposure. The medical criteria in H.R. 1283 will result in the exclusion of a substantial proportion of the lung cancer victims that are currently compensated in the tort system for their injuries. The provisions of the bill, therefore, only serve to emphasize that the proposed medical criteria are not designed to be fair to exposed victims, but simply to cut off liability for the defendants. As the Department of Justice wrote in its letter to the committee, "HHS advises us that many studies have clearly shown that asbestos is a carcinogen and causes cancer independent of causing non-malignant disease, again contrary to the implication of H.R. 1283.[28]

Yet another concern with regard to the lung cancer medical criteria is that claimants must either have a qualifying non-malignant condition or evidence of pleural plaques and many years of very heavy exposure to visible asbestos dust.[29] The weight of scientific evidence is that the presence of asbestosis or other non-malignant disease is not a precondition for asbestos-related lung cancer.[30] Lung cancer, asbestosis and pleural disease are separate and distinct diseases, each of which are caused by asbestos exposure. They are not a continuum or progression of a simple disease. Consequently, there is no scientific or logical basis for requiring one to be a precondition for eligibility to receive compensation for another. Moreover, private settlement agreements such as *In re Asbestos Litigation* v. *Gerald Ahearn* [31] provide compensation for lung cancer without regard to whether the claimant has a non-malignant condition.

*B. Non-Malignant conditions*

The criteria for non-malignant conditions are based on the flawed notion that no recovery should be permitted unless an asbestos victim can show they are impaired. Tort law traditionally has provided compensation for those injured by the wrongdoing of another. The amount of damages varies with the level of harm caused to the victim. Under H.R. 1283, asbestos victims would have to show greater damage to obtain recovery—proof of impairment rather than injury—than would other victims of wrongdoing. We do not agree that asbestos victims should be held to such a high standard of proof.

Even if impairment, and not injury, were the proper standard for recovery, the medical criteria in the bill could deny compensation (other than reimbursing a portion of some medical tests) for many

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[27] Letter from L. Christine Oliver, Assistant Clinical Professor of Medicine, Harvard Medical School, et al., to Congressman John Conyers, Jr., Ranking Minority Member, U.S. House Judiciary Committee, (February 1, 2000) (on file with the Judiciary Committee Minority Staff).

[28] See DOJ Letter at 4.

[29] Sec. 304.

[30] David Egilman, *Lung Cancer and Asbestos Exposure: Asbestosis is Not Necessary*, American Journal of Industrial Medicine 30:398–406 (1996).

[31] 90 F.3d 963 (5th Cir. 1996) (prior class action settlement with Fiberboard corporation).

persons suffering from pleural thickening and pleural plaques, which are an alteration to the lining of the lung, based on arbitrarily defined limits on lung functioning.[32] Again, this flies directly in the face of established court precedent,[33] and private settlements [34] and will operate to deny justice to persons facing real suffering—both from the fear of the increased likelihood of dying as well as from pleural thickening in their lungs and plaques leading to shortness of breath.

The medical criteria are also unduly restrictive in denying compensation to those with asbestosis. The bill requires asbestosis victims to meet arbitrary, rigid x-ray and lung function criteria to qualify for compensation. These medical criteria do not conform to the diagnostic guidelines of the American College of Chest Physicians and the America Thoracic Society. Experts in chest disease and pulmonary function agree that there is no clear and consistent correlation between chest x-ray findings, pulmonary function, and clinical signs such as basilar crackles, yet H.R. 1283 requires such a rigid correlation as a prerequisite to medical eligibility.

In this regard, scholarly studies have found that "[i]ndividuals with pleural plaques and thickening . . . generally . . . have between 2½ and 3 times increased risks of cancer." [35] Another study found that breathlessness of exertion was reported by 95% of subjects found to have asbestos-related pleural thickening and a history of wheezing was found in 55% of subjects, with a regular cough in 53% and occasional sputum production in 47%. 56% of this population of individuals with only pleural thickening noted chest pain and a history of pleural effusions was elicited in 37%.[36] Yet another study determined that "subjects with pleural thickening appear to have more shortness of breath as assessed by questionnaire and more dyspnea with major activities such as walking up a steep hill or climbing two flights of stairs." [37]

*C. Other cancers*

In terms of asbestos related "other cancer," the bill only identifies certain types of cancers for which there can be compensation (*e.g.*, larynx, oral-pharynx, gasto-intestinal and stomach).[38] To our knowledge, no basis exists—nor has any evidence been proffered—for excluding any additionally recognized asbestos-related cancers from eligibility for compensation.

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[32] Sec. 302.

[33] See e.g,. *Verryke* v. *Owens-Corning Fiberglass Corp.*, 616 N.E. 2d 1162 (Ohio Ct. of App. 1992) (rejecting defendant's assertion that pleural thickening cases should not be compensable, because "a pleural plaque or thickening meets the definition of 'bodily harm,' which is a subspecies of 'physical harm,' and thus satisfies the injury requirement of the Restatement of Torts."); *In Re Cuyahoga County Asbestos Cases*, 713 N.E. 2d 20 (1988); *Sullivan* v. *Combustion Eng.*, 590 A.2d 944 (Md. Ct. Of Special Appeals 1998).

[34] See *In re Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988) and *In re Asbestos Litigation* v. *Gerald Ahearn*, 90 F.3d 963 (5th Cir. 1996), settlements.

[35] Fletcher, *A Mortality Study of Shipyard Workers with Pleural Plaques*, 29 Bit. J. Industr. Med 142 (1972) & Hillerdal, *Pleural Plaques and Risk for Bronchial Carcinoma and Mesothelioma*, 105 Chest 144 (1994).

[36] *Yates, et al, Asbestos-related Bilateral Diffuse Pleural Thickening: Natural History of Radiographic and Lung Function Abnormalities*, 153 Am. J. Respir. Crit. Care Med. 301 (1966).

[37] Borbeau, et al, *The Relationship Between Respiratory Impairment and Asbestos-Related Pleural Abnormality in an Active Work Force*, 142 Am. Rev. Respir. Dis. 837 (1990).

[38] Sec. 305.

*III. The tort limitations will unfairly reduce the size of the settlements without any meaningful offsetting benefit to claimants and will protect reckless and dangerous misconduct.*

*A. Nature of tort reform*

We also object to the inclusion of a number of extraneous "tort reforms" in the legislation, which include: (1) limits on claimants legal fees (sec. 108(c)); (2) elimination of damages from enhanced risk of a future condition (sec. 202); (3) limitations on class actions to those that meet Federal requirements (sec. 205); (4) limiting venue to jurisdictions where the exposure occurred or the claimant resides (sec 205 ( c); (5) mandating choice of law (sec. 208(a)); and (6) increasing the evidentiary standard for establishing punitive damages and capping punitive damages at three times compensatory damages for administrative proceedings (sec. 208(d)) and totally eliminating punitive damages in court proceedings (sec. 202).[39]

These "tort reforms" tilt the playing field against workers and unfairly shield defendants from legal responsibility for their past misconduct. For example, the restrictions on legal fees (which could include bans on contingency fee arrangements), constitute a limitation on an asbestos victim's ability to obtain the most competent legal advice and are also discriminatory because they apply to claimants but not defendants. The limits on class actions will limit victims' access to the courts and prevent States from being able to resolve mass asbestos claims in the manner they deem most efficient. The venue limits preclude actions in defendants' home States or where they are found to be doing business—even though these may be the only locales where jurisdiction may lie or service of process can be effectuated.

Finally, the limits on punitive damages will mitigate the liability of the most egregious offenders. AFL–CIO General Counsel John Hiatt emphasized this point in his hearing testimony when he suggested that the committee be mindful of incentives it creates for industrial decision makers as it considers whether to create exceptions to State tort law: "I am sure the committee would not want to suggest to business executives making decisions in the future that if the scale of the risk their product poses is truly awe inspiring, Congress will step in to save them from the consequences of their actions under State tort law." [40]

*B. No offsetting benefit*

Traditionally, workers' compensation programs have been based on a *quid pro quo* with both injured workers and employers giving up some common law rights in exchange for administrative compensation programs. Under this *quid pro quo*, workers receive prompt, limited administrative compensation but forfeit their right to common law remedies for negligence. Employers give up their right to raise certain defenses to recovery in exchange for greater

[39] Representative Scott offered unsuccessfully an amendment to strike all of the tort reform provisions in the bill.

[40] *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the Comm. on the Judiciary*, 106th Cong. (1999) (statement of John Hiatt, General Counsel, AFL–CIO at 8).

certainty as to the amount of recovery. By contrast, H.R. 1283 contains no *quid pro quo*. Workers give up their right to common law recovery, but gain neither prompt remedy nor certainty as to the amount of compensation. Further, asbestos defendants give up few of the defenses to recovery they may currently raise. A victim who obtains a medical certificate must continue on a long, contentious road before compensation is provided and is subject to many defenses including rebuttal of medical eligibility, and causation and product identification.[41]

There is also little analogy between the legislation and an insolvency proceeding—bankruptcy only applies to businesses whose debts exceed their assets and requires debtors to subject themselves to a number of legal and financial constraints. By contrast, H.R. 1283 fails to ascertain in advance whether the defendants are able to pay their obligations, and fails to include any protection against fraudulent conveyances to insiders or limitation on other transactions which could impair the defendants' ability to make asbestos payments.

*C. Previous reckless conduct*

It is particularly inappropriate to mandate limitations on legal liability in asbestos cases, given the perniciousness and long term harm caused, and the culpability of the industry. In contrast to previous tort reform bills approved by this committee, which at least purport to limit "frivolous suits" against blameless defendants, this legislation would safeguard reckless conduct which has already killed and harmed hundreds of thousands of individuals.

For example, medical articles detailing the dangers of asbestosis appeared as early as 1902, with a landmark article by Dr. Merewether published in 1930 that describes in detail the clinical characteristics of asbestosis, the dust control requirements that are necessary to prevent the disease, the importance of educating workers about the hazards of asbestos, and the future risk to industries such as shipbuilding.[42] In 1932, medical personnel discovered over 300 cases of asbestosis at the Johns-Manville plant.[43] By the 1940's, even more widespread evidence of asbestos harm was published by the medical community.[44]

Culpability in the asbestos industry extends well beyond Manville. For example, in the 1950's and 1960's, Owens Corning Fiberglass distributed pipe covers and block known as Kaylo, even though the final report on the product in 1952 concluded, "Kaylo dust is capable of producing a peribroncheolar fibrosis typical of asbestosis . . . the results of the study indicate that every precaution should be taken to protect workers against inhaling the dust."[45] In the early 1960's, Philip Carey Manufacturing Company, a producer of asbestos pipecovering, hired Dr. Thomas Mancuso to investigate its asbestos problem.[46] After the completion of his study, Mancuso advised the Philip Carey officials to end their practice of putting sub-contractors and insulators on the payroll because of the occupa-

[41] Sec. 207.
[42] Barry I. Castleman, Asbestos: Medical and Legal Aspects 1,12 (3d ed. 1990).
[43] *Id.* at 24.
[44] *Id.* at 59.
[45] Paul Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial 151 (1985).
[46] *Id.* at 195.

tional disease liability.[47] Philip Carey ignored Dr. Mancuso's warning and continued manufacturing asbestos insulation without labels, throughout the 1960's.[48]

In 1964, Dr. Irving Selikoff convened an international conference of doctors and scientists in New York City to sound the alarm about epidemic levels of asbestosis, lung cancer and mesothelioma that he found in a study of 17,000 industrial workers in the New York/New Jersey area.[49] The study concluded that up to 80% of asbestos insulators were contracting asbestosis after a latency period of 20 years, that the risk of lung cancer for asbestos workers (especially that who smoked) was 90 times greater than expected, and that asbestosis was killing hundreds of asbestos insulators.[50] Immediately after the Selikoff Conference, John Brown, President of the Asbestos Textile Institute, writes to J.T. Griffus of H.K. Porter Company (an asbestos textile manufacturer): "This subject [the Selikoff Conference on asbestosis and lung cancer] should not be brought to the attention of [persons] other than management of our several companies, as any discussion of this situation by sales personnel with users of our products could possibly aggravate the situation and result in individual opinions which could be damaging." [51]

Also, through the 1960's, W.R. Grace appears to have intentionally and knowingly exposed vermiculite mine workers (and their families) to dangerous levels of asbestos. Vermiculite was mined in Libby, Montana—where at least 192 people have died and another 375 have been diagnosed with asbestosis—and shipped to expansion sites throughout the country.[52] Testimony to date indicates that Grace knew of the problem, yet continued to expose workers and their families while covering up the dangers.[53]

Although most asbestos products were discontinued in the mid-1970's, after OSHA mandated a series of employer safeguards, the threat from asbestos is still ongoing. In 1983, the value of imported asbestos was $80.6 million.[54] In 1992, the U.S. consumed 31.6 thousand metric tons of asbestos,[55] and despite widespread knowledge of asbestos dangerous effects, its use remains. Moreover, industry objections delayed OSHA action to prevent cancer risk until 1986 when a Federal appeals court found further regulation necessary to prevent worker exposure to significant risks.[56] EPA's 1989 efforts to ban the manufacture, importation, and distribution

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[47] *Id.* at 196.
[48] *Id.* at 197.
[49] *Annals of Industry: Causalities of the Workplace*, The New Yorker, October 29, 1973, at 49.
[50] *Id.* at 48–49.
[51] Paul Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial (1985).
[52] In a letter to Judiciary Committee Ranking Member John Conyers, Jr., the attorney for 125 Libby asbestos disease patients (suffering from mesothelioma, asbestosis and lung cancer) stated that the medical criteria in H.R. 1283 could shut out 74% of the victims he represents. See Letter from Roger M. Sullivan, Esq., McGarvey, Heberling, Sullivan & McGarvey, to The Honorable John Conyers, Jr., U.S. House Judiciary Committee Ranking Member, (March 8, 2000) (on file with the minority staff of the House Judiciary Committee). See also Letter from Senator Max Baucus (Montana) to The Honorable Henry J. Hyde and the Honorable John Conyers, Jr., (February 29, 2000) (urging the committee to take more time to find out whether the medical criteria in H.R. 1283 unreasonably restricts and clearly screens out large numbers of individuals exposed to asbestos) (on file with the minority staff of the House Judiciary Committee).
[53] See *Finstadt* v. *W.R. Grace*, No. DV–98–139 (19th Dist. Mont. 1999).
[54] OSHA RIA at II–3, 1986.
[55] 59 Fed. Reg. 41026.
[56] *Building & Constr. Trades Dept.* v. *Brock*, 838 F.2d 1258 (D.C. Cir. 1986).

of asbestos products failed in the face of industry legal challengers.[57]

Finally, the courts have consistently held that the asbestos industry demonstrated reckless, if not intentional, misconduct. In *Fischer* v. *Johns-Manville*,[58] the Superior Court, Appellate Division of New Jersey held: "The jury here was justified in concluding that both defendants, fully appreciating the nature, extent and gravity of the risk (in exposing plaintiffs to asbestos), nevertheless made a conscious and cold-blooded business decision, in utter and flagrant disregard of the rights of others, to take no protective or remedial action." Similarly, the Supreme Court of New Jersey, in *Fischer* v. *Johns-Manville*,[59] stated "[i]t is indeed appalling to us that the company had so much information on the hazards to asbestos workers as early as the mid-1930's and that it not only failed to use that information to protect these workers but, more egregiously, that it also attempted to withhold this information from the public." And, in *Ballard* v. *Owens-Corning Fiberglas Corp.*,[60] the Supreme Court of Florida held: "The clear and convincing evidence in this case revealed that for more than thirty years the company concealed what it knew about the dangers of asbestos. In fact, the company's conduct was even worse than concealment, it also included intentional and knowing misrepresentations concerning the danger of its asbestos containing products." Despite this unconscionable conduct, we are considering unprecedented legislation written, in large part, by that very industry.

*IV. The new bureaucracy will severely delay payment of claims.*

Rather than expediting claims, H.R. 1283 will delay the payment of compensation, including payments to victims who are seriously ill and at or near death. As the AFL–CIO complained, "the proposed legislation would slam the courthouse door shut on hundreds of thousands of poisoned workers to the benefit of the very companies that poisoned them."[61] In essence, the legislation will overturn a court system which has adapted over time to the massive load of asbestos cases, and substitute a completely new and untested legal regime.

Under the legislation, every single claim—no matter how compelling the merits or how sick the victim—will be placed on hold for as long as it takes to create the massive new legal bureaucracy. The prejudice from this delay will be especially severe for living victims of lung cancer and mesothelioma who currently can expect to receive prompt trial dates because of preferential treatment the courts give to these cases. Moreover, H.R. 1283 cuts off these claimants' right to trial and provides no mechanism to preserve their testimony by videotape or any other method. At a minimum, tens of thousands of victims will now need to schedule new physical examinations under new standards in an attempt to comply with the numerous requirements of H.R. 1283. These examinations will be

[57] *Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201 (5th Cir. 1991).
[58] 472 A.2d 577 (N.J. Super. 1984).
[59] 512 A.2d 466 (N.J. 1986).
[60] 1999 WL 669026 (Fla. 1999).
[61] See AFL–CIO letter at 1.

costly and time-consuming and will provide no benefit to the claimant.

Setting up the OAC will require hiring hundreds if not thousands of new employees within four separate Justice Department divisions. Public Citizen has noted that questions have been raised about the Federal Government's ability to create and run such a large bureaucracy: "While the National Vaccine Injury Compensation Program is held up as model, it has only dealt with 5,735 cases over 11 years, not the hundreds of thousands of asbestos cases that would have to be processed immediately."[62] In addition, the OAC will not be able to begin to process any claims until it adopts at least 11 complex new administrative rules,[63] which are subject to notice and comment, and in most cases, to extensive legal review and appeals. It is likely that this hiring and rulemaking process will take several years at a minimum, by which time scores of thousands of new claims will be waiting in line for compensation.

Even once the OAC is set up and running, it will be subject to further delays. The legislation envisions from 10–15 proceedings before a claimant's case can finally be resolved, with some steps scheduled to take up to 90 days.[64] Even worse, in some cases no deadline is imposed and there is no legal guarantee that any of the formal deadlines will be observed for individual claimants, because they are subject to waiver by the OAC[65] and because there is no individual enforcement remedy or mechanism.[66] The fact that the legislation includes a mandamus mechanism in the event deadlines are not complied with more than 30% of the time constitutes a tacit admission that delays are fully expected and anticipated.[67]

Rather than simplifying the processing of asbestos claims, H.R. 1283 gives defendants the power to make the prosecution of these

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[62] See Public Citizen Letter at 4.

[63] See Secs. 102(b); 103(b)(2); 108(c); 109(d); 301(b) [likely 4 separate rules]; 304(b); 306(a); 306(b); 401(a); 402(a); & 704.

[64] The possible proceedings include:

1. Filing of Claim.
2. Determination by Medical Director regarding Medical Criteria within 30 days (sec. 102(c)).
3. Possible appeal of Medical Director's decision to review panel of physicians, no deadline (sec 102(c)).
4. Possible appeal to exceptional medical claims panel, determination due within 30 days (sec. 102(d)).
5. Claimant must file particularized statement for each defendant (sec. 103(a)(2)).
6. Notice to defendants (sec. 103(a)(3)).
7. Opportunity for defendants to bring in third parties (sec. 103 (a)(4)).
8. Each defendant to make "good faith offer," due within 21 days of naming all defendants (sec. 103(b)(1)).
9. Trustee to make offer of compensation to claimant based on compensation grid. (sec. 103(b)(2), due within 10 days of receiving defendants offers.
10. Claimant to accept or reject defendant and trustee offers within 60 days (sec. 104).
11. If claimant accepts, Trustee must decide whether to accept defendant offer or prosecute claim administratively or in court (sec. 104(d)).
12. If claimant rejects, may elect administrative resolution or file suit in court (sec. 104(e)).
13. Administrative decision on claimant's claim due within 90 days (sec. 105).
14. ALJ decision subject to appeal to Court of Federal Claims by either claimant or defendant, no deadline (Sec. 106).
15. If claimant elects to pursue claim in court, no deadline specified.

[65] Sec. 109(d).

[66] Representative Scott offered an amendment, which the Majority rejected, that, among other things, provided that if specified time limits in the bill are not met, the claimant could leave the administrative system and file a claim in State or Federal court.

[67] Sec. 109. And even this mechanism is designed merely to get the OAC to start working on the problem, not to fix it.

claims more complex than they have ever been in the tort system. The vehicle for this complexity is a specific statutory allowance for third-party practice[68] injected into the government bureaucracy that was allegedly conceived to speed payments to claimants. This procedure gives asbestos manufacturers the ability to add unlimited numbers of third-party defendants to each and every claim for the purpose of either denying, delaying or diluting their liability to the claimant and the OAC. Although the committee belatedly acted to remove the United States government as one of these third-parties, virtually every other entity can and will be named including employers (who currently have immunity and a subrogation lien), tobacco companies, peripheral suppliers and manufacturers of asbestos products, insurance companies and others. As the recent experience with the Compensation and Liability Act (CERCLA/Superfund) has amply demonstrated, mechanisms such as this when incorporated either directly or otherwise into statutory schemes inevitably lead to decades of judicial gridlock.

*V. The retroactive effective date will deny court access to thousands of pending claims.*

Another major concern with the bill is that it will force all existing cases to proceed under the new legal regime beginning with the date of enactment. This retroactivity provision—which is unprecedented in scope and application—provides a very significant financial and tactical benefit to all asbestos defendants. Efforts to modify the manifest injustice of the provision have been only cosmetic and provide nothing meaningful for victims.

H.R. 1283's effective date provision will terminate the processing of virtually every asbestos case pending in the courts today (estimated at 200,000) and render worthless the work product of the pretrial preparation in every such case.[69] The problem derives from the fact that the legislation applies to all cases for which a trial is not commenced within 6–12 months of the date of enactment.[70] Even the few claims which proceed to court within the 6–12 month time period will be impaired because they will be subject to the bill's medical eligibility criteria[71] (even though such claims will not benefit from any of the nominally pro-claimant provisions, such as the restriction on defenses (sec. 207), comeback rights for the nonsick (sec. 204), and penalties for inadequate offers (sec. 208(c)). Even worse is the fact that the legislation appears to create a dangerous "Catch-22" situation for victims, because it requires a determination of whether the medical criteria apply before a trial may commence, yet it may take longer than the statutory deadline of 6–12 months before the OAC issues the medical criteria rules and it can be determined whether they apply in a pending case.[72]

It is highly unusual for tort legislation to "change the rules in the middle of the game" by applying to pending claims. For example, the Volunteer Protection Act—signed into law during the 105th

[68] Sec. 103(a)(4).
[69] Sec. 501.
[70] Sec. 501(b). The Attorney General may extend the initial 6 month period for an additional 6 months if required for "orderly implementation of the Act."
[71] Sec. 501(d).
[72] The right to sue letter provided in section 501 to the Attorney General offers little protection to victims, since it is totally discretionary.

Congress—only applies to claims filed more than 90 days after the date of enactment, and only if the harm that is the subject of the claim occurred after such effective date.[73] Other recently enacted tort laws, such as the General Aviation Reform Act of 1994,[74] the Bill Emerson Good Samaritan Food Donation Act,[75] and the Biomaterials Access and Assurance Act of 1998[76] were all written to apply prospectively. The most recent tort reform bills approved by this committee—the Small Business Liability Reform Act (H.R. 2366),[77] the statute of repose bill (H.R. 2005),[78] and the class action bill (H.R. 1875)[79]—were all drafted to safeguard pending claims from the proposed new statutory restrictions.[80]

*VI. The funding mechanisms are illusory.*

We also have deep-seated concerns regarding the reliability of the bill's funding mechanisms. The entire legal regime rests on three highly questionable sources of revenue—discretionary Federal funding, legal reimbursement actions brought against defendants, and defendant assessments of administrative costs and payments made to claimants. Although the legislation authorizes Federal funds ranging up to $150–250 million/year (in order to set up the legal bureaucracy and loan funds to the Asbestos Compensation Fund),[81] there is no guarantee that any funding (let alone the full amount) will be forthcoming. The legislation is written in this manner in order to avoid being subject to a budget point of order, yet the provision raises the very real risk that the OAC will not be funded or will be severely underfunded, leaving plaintiffs with little ability to pursue their claims.

A second far larger source of funds is to be derived from the defendants by way of government reimbursement litigation. Here again, there is little certainty that such funds will materialize, as real life experience with reimbursement schemes in the context of the Black Lung Benefits Act and the Comprehensive Environmental Response and Superfund have not been promising. To the extent there is a shortfall in such reimbursements, claimants will again be left at risk and facing reduced or no payments, even though they will have already forfeited their common law rights under the legislation.

An alternative funding mechanism, which vastly improved the bill, was introduced by Representative Weiner (D–NY), and accepted by the committee. The effect of the Weiner amendment is twofold: first, it requires the Administrator to promulgate rules for calculating and collecting from defendants all costs associated with the determination of claims and payments to claimants. Second, if

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[73] 42 U.S.C. Sec. 14501.
[74] 49 U.S.C. Sec. 40101 note.
[75] 42 U.S.C. Sec. 1791.
[76] 21 U.S.C. Sec. 1601–06.
[77] H.R. 2366, sec. 301.
[78] H.R. 2005, sec. 4.
[79] H.R. 1875, sec. 5.
[80] In an effort to address the concerns about the bill's effect on pending cases, Representative Berman offered an amendment to make the effective date the date of the markup of the bill, and Representative Scott offered an amendment to make the effective date the latter of the date the of the appointment of the Administrator, the Medical Director and the Trustee, the date the rules are promulgated, and the date on which the authorized monies have been appropriated. Neither of the amendments, however, were accepted by the Majority.
[81] Sec. 405.

the amount assessed through the Administrator's rules is inadequate to cover the payments to claimants, the trustee must bring an action against the defendant company to recoup payments by the Fund. In addition, the Weiner amendment removed from the defendants the ability to assert any defense in such a proceeding other than lack of jurisdiction.[82] Notwithstanding the adoption of this amendment, there remains a major concern that the bill imposes undue financial risks on claimants (*e.g.*, if a defendant company contests its assessed amount or if the government reimbursement litigation is protracted or unsuccessful).

*VII. The opt-out is illusory.*

We also do not believe the legislation's supposed "opt-out" under section 102(f), offers meaningful relief for victims. First, the opt-out is only available to persons who obtain a certificate of medical eligibility—perhaps the most onerous statutory requirement imposed under the bill. Second, even those claimants who receive a medical certificate and bring their claim in court would continue to be subject to many of the bill's "tort reform" provisions (such as the elimination of punitive damages and special statutory limitations on class actions and venue),[83] even though they would not benefit from any of the bill's nominally pro-victim provisions. The net result is an "opt-out" right which will be very difficult to exercise and will be of very little real value. While the Majority rejected an amendment that Representatives Conyers, Scott, Lofgren and Watt offered to make the administrative system completely voluntary, we believe that if the legislation provided a demonstrably streamlined and fair administrative procedure, a true opt-out would not be problematic.

*VIII. The medical monitoring benefits are inadequate.*

Under Sec. 306, medical testing benefits are provided only to those who can show certain amounts of "heavy"[84] exposure to asbestos at work and establish certain radiographic injury. Therefore, spouses and children who have been exposed when asbestos dust was brought home cannot get compensation for medical monitoring. In addition, it would appear that supervisors, cleanup workers, inspectors and any other trade that did not directly have hands-on use of the asbestos product would not be eligible for medical monitoring.

The medical monitoring benefits provide for a maximum of 3 sets of medical tests during a victim's lifetime. By contrast, OSHA regulations require more frequent medical testing for workers exposed to asbestos, and for workers with 10 years of exposure over age 45, annual physicals with chest x-ray are required by rules.[85]

Another concern is that exposure verification is required by the bill to qualify for medical testing. Yet, few companies have exposure monitoring records for asbestos before the mid-1970's. Expo-

[82] The original funding scheme allowed a defendant to litigate whether so-called "core claims" had been asserted against it in order to obtain an exemption from or reduction in its assessment by the Administrator.

[83] Sec. 205(d).

[84] The bill includes no definition of "heavy exposure" to asbestos (as opposed to "equivalent years of exposure").

[85] 29 C.F.R. 1910.1001(L)(3)(ii) Table 2.

sure records may have been lost or destroyed, and imposing on workers the obligation to prove the levels of their exposure means many will not be able to obtain medical monitoring benefits.

*IX. H.R. 1283 raises serious constitutional concerns.*

Finally, the Federal Government's intrusion into State tort law raises very serious federalism and constitutional concerns. Since Congress has traditionally deferred to the States regarding tort law in general and product liability law in particular, preempting State law in the area of asbestos litigation would constitute a dramatic shift in this balance. And given the direction of recent Supreme Court decisions, the attempts to impose rules on State court civil justice systems raises serious constitutional questions. The bill—which contains no interstate commerce jurisdictional requirement—may run afoul of the constitutional requirement under the Commerce Clause. The Commerce Clause limits congressional authority to the regulation of interstate commerce and under the Tenth Amendment, which reserves all of the unenumerated powers to the States. This is a particular concern in light of the recent Supreme Court decisions such as *Lopez* v. *United States* (striking down a Federal gun-free school zone law which had no interstate commerce requirement),[86] and *New York* v. *United States*[87] and *Printz* v. *United States*[88] in which the Court showed extreme scepticism regarding Congress' ability to dictate State legal policies.

There is also an apparent constitutional flaw under the "Appointments Clause." According to the Department of Justice, "H.R. 1283's provision for the appointment of the OAC's Medical Director by the Administrator of the OAC, Section 101(c), appears to run afoul of the Appointments Clause. The Director is an inferior officer whose appointment must be vested in the President alone, in the Courts of Law, or in the Heads of Departments. Because the Attorney General may remove the Administrator of the OAC for cause (see Section 101(a)), we do not believe the Administrator to be the head of the Department for purposes of the Appointments Clause."[89]

*Conclusion*

We oppose H.R. 1283 because it constitutes an unjustified corporate bail-out at the expense of victims and taxpayers. The legislation creates an unmanageable Federal bureaucracy, excludes hundreds of thousands of individuals from eligibility for compensation, reduces and delays compensation payments to those who remain eligible, throws most if not all existing cases out of court, and unfairly preempts State law. We cannot support this extreme legislation, which rewards the perpetrators of one of the country's most

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[86] 514 U.S. 549 (1995).

[87] 505 U.S. 144 (1992) (invalidating a Federal law requiring States to assume ownership of radioactive waste or accept legal liability for damages caused by the waste because it was found to "commandeer the legislative processes of the States").

[88] 521 U.S. 898; 117 S.Ct. 2365; 138 L.Ed. 2d 914; 65 U.S.L.W. 4731 (U.S. June 27, 1997) (invalidating portions of the Brady Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

[89] See DOJ Letter at 11.

serious and deadly torts, while punishing the victims and their families.

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