

## ADDITIONAL VIEWS OF SENATOR KYL

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

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

I write separately here to discuss the asbestos-litigation crisis generally – and to offer a reply to the Supreme Court's several entreaties to Congress. I believe that the Court fails to appreciate the true nature of the asbestos-lawsuit problem. The Court has stated, for example, that "the most objectionable aspects of asbestos litigation" are the fact that "dockets in both federal and state courts continue to grow" and that "trials are too long." (*Amchem*, 521 U.S. at 598.) I think that a better description of the most objectionable aspects of asbestos litigation is that provided by law professor Lester Brickman, who states that "asbestos litigation today is, for

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

the most part, a massively fraudulent enterprise that can rightfully take its place among the pantheon of \* \* \* great American swindles.”<sup>2</sup>

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

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

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

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

As an initial matter, in defense of the legislative and executive branches, it bears mention that Congress and the President *have* acted to address actual asbestos health hazards. Federal legislation and regulations virtually have eliminated the asbestos exposures that cause disease or injury. According to Dr. James Crapo, one of the nation’s leading specialists in pulmonary medicine, “[d]ue to federal regulation of asbestos that began in the early 1970s, current occupational exposure levels are a tiny fraction of those that existed in the 1940s and 1950s. All

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

of the asbestos-related diseases are considered dose-dependent, and the pre-1973 exposures to asbestos that resulted in severe asbestosis and lung cancer are not present today.”<sup>3</sup>

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

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

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<sup>3</sup>Written Statement of Dr. James Crapo, Professor of Medicine, Nation Jewish Center and University of Colorado Health Sciences Center, Before the Senate Committee on the Judiciary Concerning S. 1125, The Fairness in Asbestos Injury Resolution Act of 2003 (June 4, 2003). See also Carroll *et al.*, *supra* note 1, at 13. Dr. Crapo served for more than 20 years on the medical faculty of Duke University; during 17 of those years, he served as Chief of the Division of Pulmonary and Critical Care Medicine. He is a past president of the American Thoracic Society and is the co-author of several leading textbooks on pulmonary medicine.

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

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

<sup>6</sup>Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, THE NEW YORK TIMES, A1, April 10, 2002.

<sup>7</sup>*Id.*

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

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

Asbestos-injury *legal claims*, on the other hand, have “prov[en] impervious to the predictions of medical science.”<sup>10</sup> “Contrary to expectations, the numbers of claims filed increased rapidly during the 1990s.”<sup>11</sup> Only “[a]pproximately 20,000 claims were filed annually against major asbestos defendants in the early 1990s.”<sup>12</sup> But in 2001, at least 90,000 new asbestos claims were filed – a three-fold increase over the number filed in 1999.<sup>13</sup> Also, “[t]he number of defendants named in asbestos claims has risen dramatically from around 300 in the early 1980s to approximately 2,000 identified in 2001 to 8,400 cited in the most recent RAND findings.”<sup>14</sup> Bankruptcies also have increased sharply. Of the 78 firms driven to bankruptcy by asbestos lawsuits since 1982, 30 have filed between 2000 and 2002.<sup>15</sup>

### *Persuasive Evidence of Fraud*

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

This phenomenon – of asbestos claims brought by people who are not sick – is quantified in several sources. It has been noted in the experience of the Manville Trust.<sup>17</sup> According to a

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

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

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

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

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

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

<sup>16</sup>Dr. David Egilman, *Asbestos Screenings*, AMERICAN JOURNAL OF INDUSTRIAL MEDICINE 42:163 (2002) (Letter to the Editor).

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

recent report, “90% of the Trust’s last 200,000 claims have come from attorney-sponsored x-ray screening programs, \* \* \* 91% of all claims allege only non-malignant asbestos ‘disease,’ and these cases currently receive 76% of all Trust funds.”<sup>18</sup> A recent RAND study has identified the same pattern in the tort system as a whole: “Claims for nonmalignant injuries grew sharply through the last half of the [1990s].”<sup>19</sup> The study notes that “[a]lmost all the growth in the asbestos caseload can be attributed to the growth in the number of these claims, which include claims from people with little or no current functional impairment.” These claims grew as a fraction of all claims “through the late 1980s and early 1990s, finally stabilizing at about 90 percent of annual claims in the late 1990s.”<sup>20</sup>

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

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

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

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

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

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

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

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

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

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

The memo effectively resolves one mystery that has bedeviled asbestos defendants for several years. As the major asbestos producers have gone bankrupt, lawsuits have shifted to defendants with an increasingly minor role in the asbestos industry. These companies often produced only a small volume of asbestos-containing products, yet plaintiffs have been able to identify these products in very large numbers. “Many of the remaining asbestos manufacturers complain that they couldn’t possibly have sold enough product to expose even a fraction of the men who claim to remember seeing their goods.”<sup>23</sup> According to one defense lawyer,

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

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

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

For each of these 14 products, the memo gives a detailed account of which types of workers used the product, for what purposes, in what places, how it was mixed and applied, and what types of containers held the product. Each description goes well beyond what one would

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pending nationwide”).

<sup>23</sup>Christine Biedermann, Thomas Korosec, Julie Lyons, and Patrick Williams, *Toxic Justice*, DALLAS OBSERVER, August 13, 1998.

think necessary simply to refresh the memory of someone who had actually worked with the product. Instead, the memo appears to anticipate that clients will not have any previous familiarity with the product. For example, the memo reminds clients: “Insulating cement is NOT like sidewalk concrete! \* \* \* \* It was typically used to insulate steam pipes.” The memo provides sufficient information about all aspects of the product to allow any person to credibly testify that he worked with the product.

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

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

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

\* \* \* \*

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

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

You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered! If the

defense attorney asks you if you were shown pictures of products, wait for your attorney to advise you to answer, then say that a girl from Baron & Budd showed you pictures of MANY products, and you picked out the ones you remembered.

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

\* \* \* \*

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

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

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

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

\* \* \* \*

Make sure you concentrate on your exposure to asbestos products in the 1950s, 1960s and early 1970s. Do NOT talk about what went on at work in the 1980s and 1990s. The reason for this is that by the mid 1970s most insulating products being installed no longer contained asbestos.

\* \* \* \*

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



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

\* \* \* \*

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

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

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

\* \* \* \*

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

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

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

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

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

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

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

Later, she says, Johns-Manville began paying settlements, and she was ordered to go out and ‘meet these guys again’ and get them once again to name Johns-Manville products.”

- “[The paralegal] says she learned some of these methods and techniques from ‘other paralegals I worked with.’ But she has no doubt that her supervisors and at least one of the firm’s partners knew what was going on. ‘I remember specifically there was a case in the Mobile, Alabama, area that was set for trial, and I was specifically sent down there to get product ID. I was basically told, ‘Don’t come back without the IDs.’ [One of two Baron & Budd attorneys] told me that.”
- “[According to the paralegal,] ‘There was at least one time, maybe more, that I went to [a particular Baron & Budd attorney] and said I didn’t think a particular settlement was right. That I can’t believe we’re doing this. I was basically told to be quiet or leave.’ \* \* \* \* ‘There were clients we were getting money for, and some people just didn’t deserve a dime.’”
- “[Another former paralegal] recalls being asked to falsify product-ID information the very first week she was on the job. ‘They were having me fill out the product IDs [forms that the paralegals had gathered from clients] . . . There was a man, he was some sort of contractor. He had absolutely no exposure to asbestos – none. There was nothing in his work history.’ As she scanned the paperwork, [a Baron & Budd partner] walked by the office she was working in. ‘I got up and walked out and said, ‘I don’t know what to do. This man has not had exposure at all.’ He looked at me and said, ‘Oh you’re a smart lady. Be creative,’ and he turned and he walked away.’ She says she then went to her immediate supervisor, who she recalls also told her to ‘fill it in, make up stuff.’ ‘I was shocked,’ she says. When she refused to fill in product names, the supervisor simply took over the file, she says. ‘I don’t know what happened to the case after that.’”
- “[A former Baron & Budd attorney] describes \* \* \* an atmosphere where attorneys and paralegals were not only taught that manufacturing testimony was their duty, but disciplined if the ‘proper’ testimony was not obtained. She says she lasted a few years. ‘Slowly, you begin to question whether the means you are using to achieve the ends are legitimate. And if not, what is your involvement in that?’ she says. ‘And you either leave or you accept it.’ She still recalls one of the first depositions she ever defended at Baron & Budd by herself. ‘I knew my guy wasn’t prepared to tell the lie,’ she says. ‘This gentleman did not know Kaylo [a product manufactured by an important defendant], had never seen pipe covering and never worked with it. It was on his work-history sheet. And for me not to get the testimony that some paralegal got . . . I’d have caught shit for that if that group went to trial. I pulled him out [of the deposition],’ she says. ‘And I said, ‘Could you just read off your work-history sheet?’ . . . He goes, ‘I don’t know why it’s on there. It shouldn’t be on there. I don’t remember it.’ ‘. . . And I was in fear and feeling totally inadequate and knowing that in getting what I needed to get, I was crossing

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

- “[Yet another former Baron & Budd paralegal] says he would at times be given rush jobs that took him out of his daily, witness-finding duties. As the firm reached mass settlements with manufacturers, it needed to produce sworn affidavits from every client who had sued, he recalls. The mostly retired workers had to swear they had been exposed, 30, 40 or 50 years ago, to specific products the company made. Industry officials say they require the statements to validate claims and present them to insurers. [The paralegal] says some clients had already identified the products in prior talks with the firm, and sometimes they had not. Frequently, he says, he was the first person to mention the products, and clients who didn’t remember them were hesitant and worried about signing. ‘They’d ask, ‘Do I have to go court? Do I have to come to Dallas?’” [The paralegal] says he would assure them all they had to do was sign the document, have it notarized, send it in, and money would be coming their way. ‘It was like telephone marketing . . . a marketing approach,’ [the paralegal] says. But it didn’t take much savvy to close the sale. Everyone would sign, he says. ‘When you are offering someone the ability to get money in their pocket when they’re not expecting money for any particular reason, it’s not all that difficult.’”
- “[The former paralegal also] says he was assigned to find witnesses who could support claims by Baron & Budd plaintiffs that they were exposed to asbestos products at various workplaces from the early 1940s until the late 1960s. The problem was, almost nobody could remember these facts without being told what to say, [the paralegal] recalled in an interview earlier this month. It was his job to get them to name 20 or 30 different products from the multiple companies Baron & Budd would typically sue. \* \* \* \* [The paralegal] says he was pretty good at his job, and he’d usually end up getting many men to say many things they had no idea about before he called. ‘I’d get ‘em to identify every one,’ he says of his list of 20 or more products. Clerical staff managers and a ‘product ID’ paralegal he worked under taught him his techniques. \* \* \* \* Truth got lost in the process, he says, and [the paralegal] recalls being uncomfortable from the start with telling witnesses how to testify. ‘What I was doing was fraudulent. There was never any doubt in my mind about it.’”<sup>27</sup>

Other documents obtained by the Dallas Observer “appear to track what these former paralegals say about how the firm’s product-identification process works” – and provide instructions similar to those in “Preparing for Your Deposition.” For example, a document titled “P.I.D. Study Sheet,” written by a former paralegal, also contains detailed, deposition-relevant product-use information. In a handwritten 1993 memo to several attorneys, the Baron & Budd

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

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

paralegal who produced the document “writes that she gives the attached ‘study sheet’ to ‘all my clients who can read [and] ask them to be familiar [with] the information for their deposition.’”<sup>28</sup> Another document obtained by the Observer consisted of “handwritten notes apparently taken by [a Baron & Budd attorney] during an internal training session.” The notes state: “Warn [plaintiffs] not to say you were around it – even if you were – after you knew it was dangerous.” Elsewhere, under a section titled “name that product,” the notes state: “Show client filled out sheet showing what [client] picked out. Get him to agree he picked out . . . Products: explain in the context of who will be in depo[sition] – emphasize those products.”<sup>29</sup> Another set of notes obtained by the Observer, which were prepared by a Baron & Budd attorney, simply state: “If client is asked if any other doctors told him about his condition before the diagnosing doctor named in the [interrogatory], client should answer NO.”<sup>30</sup>

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

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

Perhaps as disturbing as the script memo itself, and the statements of Baron & Budd’s former employees, is the firm’s partly successful efforts to suppress any investigation of its activities. After “Preparing for Your Deposition” was discovered, a state district judge referred

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

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

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

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

the matter to the local district attorney's office for criminal prosecution. According to the assistant district attorney in charge of the matter, local authorities did not act because "our investigation has been taken over federally."<sup>33</sup> The local U.S. attorneys office, however, gave a different account of why the local DA did not pursue the case: "Because of the politics of it, [the DA's office] wanted to drop it, and so it ended up here."<sup>34</sup>

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

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

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

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

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

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<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

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

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

It bears mention, however, that Baron & Budd is not all stick and no carrot. The Observer also reports that Baron & Budd attorneys initiated an effort to hire a lobbyist to represent state judges in their requests for additional funding from the state legislature. Attorneys at the firm also led a drive to buy every civil judge in Dallas County a new personal computer.<sup>37</sup> The firm also has managed to retain a University of Texas legal-ethics professor, who has written law-review articles about the script memo favorable to Baron & Budd – without disclosing that he has been hired by the firm.<sup>38</sup>

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

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

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

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

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

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

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

\* \* \* \*

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

\* \* \* \*

The next day, state District Judge Ann Ashby granted Baron & Budd's quickly drafted motion for a temporary restraining order. It barred Kroll from contacting the firm's employees and ordered Kroll's investigators to submit themselves to questioning by Baron & Budd about what they had learned.<sup>40</sup>

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

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

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

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

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

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

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



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

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

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

Another example:

A United States District Court judge, using impartial medical experts and excluding the parties' use of their own experts, determined that of 65 plaintiffs claiming to have contracted asbestosis – who, but for the court's order, would have offered their own medical experts' testimony in support of their claims and on that basis would very likely have been awarded significant compensation by the jury – only 10 (15%) had in fact contracted asbestosis.<sup>46</sup>

An even more extreme example of consistent misdiagnosis of asbestosis was provided directly to this committee by Mr. Otha Linton, who served for 25 years on the principal staff of the American College of Radiology Task Force on Pneumoconiosis, and Dr. Joseph Gitlin, a faculty member of the department of radiology at the Johns Hopkins Medical Institutions. Mr. Linton and Dr. Gitlin were asked to review over 500 chest x-rays that originally had been

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<sup>43</sup>Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, WILLIAM AND MARY ENVIRONMENTAL LAW AND POLICY REVIEW 243, Winter 2001 (hereinafter "Brickman, *Aggregative Litigation*").

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

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

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

provided by an asbestos plaintiffs firm. That firm's medical experts had given 91.7% of these x-rays an ILO score of 1/0 or higher. (Which itself is only marginal evidence of asbestosis, *see infra* Attachment "E" (Letter of Dr. Crapo.)) Mr. Linton and Dr. Gitlin arranged for a blind reading of those same x-rays by six consultants in chest radiology who were also B readers. These independent experts gave the same x-rays an ILO score of at least 1/0 in only 4.5% of their reports.<sup>47</sup>

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

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

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

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

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

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

<sup>49</sup>Roger Parloff, *Mass Tort Medicine Men*, THE AMERICAN LAWYER, January 15, 2003. *See also* Parloff, *\$200 Billion Miscarriage of Justice*, *supra* note 4 (noting that "[j]ust eight screening doctors accounted for more than 70% of all claims filed with the Manville Trust between January 1995 and April 1998").

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

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

Professor Brickman estimates that the number of workers who have undergone attorney-sponsored asbestos screenings since the mid-1980s exceeds 1,000,000 and may approach 2,000,000. He also concludes, based on the evidence that he has collected, that these screening

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

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

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

companies identify positive evidence of asbestos-related disease in at least 40% and sometimes as many as 85% of the workers that they screen.<sup>53</sup>

To sum up all that has been discussed so far, I quote another commentator who, having reviewed evidence similar to that described here, has come to the following concise conclusion about the nature of asbestos litigation as it is conducted today: “Among ordinary people, there is a word for this: fraud. This is a legalized fraud.”<sup>54</sup>

### *Medical Facts About Asbestos Injury*

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

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

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

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

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

<sup>54</sup>Robert J. Samuelson, *Asbestos Fraud*, WASHINGTON POST, November 20, 2002, A25.

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

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

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

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

Dr. Weiss: “Pleural plaques are an injury which generally does not cause any impairment unless they are very extensive. They do not predict an increased risk of lung cancer. Pleural thickening is an injury which varies in degree and impairment from negligible to moderate and even severe.”

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

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

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

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

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

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

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

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

Dr. Weiss: “No.”

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

Dr. Weiss’ review concluded that:

Only a few cohort studies have addressed directly the issue of asbestosis as a marker for increased lung cancer among workers exposed to asbestos. What evidence exists supports the hypothesis that asbestosis is such a marker as reviewed in the first section above. Additional circumstantial evidence has been described in subsequent sections: (1) there is no excess risk of lung cancer in cohorts with no deaths from asbestosis; (2) workers with pleural plaques but no asbestosis have no increased risk of lung cancer in well-designed studies; and (3) the association between asbestosis and excess lung cancer rates is much stronger than the association between cumulative asbestos exposure and the relative risk of lung cancer.

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

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

Dr. Crapo: “Compensation by the FAIR Act for forms of cancer other than lung cancer and mesothelioma is not justified by current medical science. While the evidence suggests an association between asbestos and laryngeal carcinoma, no other form of cancer is clearly

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

<sup>56</sup>*Id.* at 546.

associated with asbestos exposure. Moreover, the suggested association between asbestos exposure and laryngeal cancer is suspect because of the absence of a dose-response relationship.”

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

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

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

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

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

With regard to kidney cancer, Dr. Gee quotes an analysis summarizing both published data and data from additional inquiries: “this analysis pointed toward a lack of an association between asbestos exposure and renal cancer.”

Discussing Dr. Goodman’s study, Dr. Gee concludes that it “noted an overall excess laryngeal cancer risk rate that was about 1.6 but there was no dose response, no correlation with increasing mesothelioma rates and importantly, no adjustment in the original cohort data for the confounding effects of smoking, alcohol or their combination. Thus, this value of 1.6 is suspect and the absence of a dose response with asbestos exposure suggests alternative factors cause these cancers. Other data show a correlation between the lung and laryngeal cancer rates that is most likely due to a common smoking origin.”

Dr. Goodman: He notes that his 1999 study, *Cancer in Asbestos-Exposed Occupational Cohorts: A Meta-Analysis*,<sup>57</sup> “confirmed a causal link between asbestos exposure and lung cancer.”

“Data for urinary cancers (bladder, kidney, prostate), gastrointestinal cancers (esophagus, stomach, colon, rectum) and lymphohematopoietic cancers (lymphoma, myeloma, leukemia) failed to demonstrate a consistent statistically significant increase in risk. Analysis for laryngeal cancer was suggestive of a causal association, but not as conclusive as the analysis for lung cancer.”

“With respect to most cancers, the latency period is typically 20 years or more. For this reason, studies that examine latency are considered more reliable and a true causal relationship is expected to become more evident after latency is taken into account. We re-analyzed the data by including only studies that took into consideration latency of at least 10 years. The results for lung cancer showed further elevation in risk, the risk of laryngeal cancer was somewhat higher, but was no longer statistically significant, while the risks of other cancers either decreased or remained essentially unchanged.”

“Another set of analyses in our study examined the exposure-response relationship between asbestos and cancer. If the risk of disease increases with increasing level of exposure, the relationship is more likely to be causal. \* \* \* Our analyses demonstrated that lung cancer risk was strongly associated with and statistically significantly related to the proportionate mesothelioma mortality. However, this observation did not hold true for other cancers including laryngeal cancer and thus, did not support the causal association between asbestos exposure and other cancer sites.”

“It is important to point out that our meta-analysis is not the only publication reviewing the scientific evidence on the association between asbestos exposure and malignancies other than mesothelioma and lung cancer. For example, a 2000 article by Browne and Gee entitled, ‘Asbestos Exposure and Laryngeal Cancer’ concluded that the available evidence does not support the contention that asbestos causes laryngeal carcinoma. According to the authors of this article, their review is in agreement with five or six other reviews of this topic published since 1985. Similarly, a 1994 article entitled ‘Asbestos and Colon Cancer: A Weight-of-the-Evidence Review’ by J. Gamble concluded that asbestos exposure, ‘does not appear to increase the risk of colon cancer.’”

“In summary, the epidemiological literature on balance does not support a causal association between asbestos exposure and the development of cancers other than mesothelioma and lung cancer.”

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<sup>57</sup>Cancer Causes and Control 10:453-465, 1999.



#### 4. The Medical Criteria Employed by the Committee-Reported Bill

The information provided by these doctors casts doubt on this bill's standards for identifying asbestos injury. To all three of the questions discussed above, the doctors overwhelmingly answer "no." But the committee-reported bill appears to assume that the answer to each questions is "yes," or at least "maybe."

First, the bill assumes that pleural plaques are meaningful indicia of injury. As Dr. Crapo notes:

The x-ray findings required for compensation in Non-Malignant Levels III, IV, and V are generous. In the first place, it is possible to recover in each of these categories with an x-ray indicating pleural plaques or diffuse pleural thickening that register B2 on the ILO scale. It is rare, however, that people with only pleural conditions of this kind will have a genuine impairment.<sup>58</sup>

Second, the bill assumes that lung cancer can be attributed to asbestos even in the absence of clinically significant asbestosis. Again, Dr. Crapo notes: "From a medical perspective, the [proposed federal] trust should not provide compensation to claimants who have lung cancer and exposure, but who do not have asbestosis (*i.e.*, Malignant Levels VII and VIII)."

Dr. Crapo goes on to warn that the bill's "Malignant Levels VII and VIII will allow a significant number of people to qualify for compensation who do not in fact have a lung cancer caused by asbestos exposure. In other words, there will be a substantial number of 'false positives.'"

Finally, the committee-reported bill assumes that other cancers – including colorectal cancer – are caused by asbestos. Dr. Crapo bluntly notes that "[c]ompensation by the FAIR Act for forms of cancer other than lung cancer and mesothelioma is not justified by current medical science." He goes on to state that "[i]n my view there is a danger that the limited resources of the Fund will be diverted to paying the claims of people with 'other cancers,' many of which are quite common and could give rise to numerous claims in a no-fault system."

The committee-reported bill's inclusion of colorectal cancer is particularly disappointing. The original bill did not include this cancer. Indeed, during the introductory hearing on the bill, Dr. Crapo praised this omission, and specifically warned against awarding compensation for colorectal cancer. He noted that "[a]ccording to the National Cancer Institute, there are 147,500 colo-rectal cancers each year. To allow recovery based on nothing more than plaques and the requisite exposure could expose the Trust to considerable, unpredictable liabilities in future years."

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<sup>58</sup>*Infra* at Attachment "E."

Dr. Crapo also noted that including colorectal cancer “would be ironic, since asbestos litigation as it is today involves few ‘other cancer’ cases, presumably because of the difficulties of proof. There is a danger that the medical criteria in the bill would open the door to many more claims of this kind than are currently seen.”

In other words, attributing “other cancers” to asbestos exposure is an argument that even the tort system does not accept. But it is an argument accepted by this bill.

It was to be expected that this committee would give claimants the benefit of the medical doubt when developing a national trust fund that will bar access to the tort system. It was not to be expected that the committee would also cast aside the overwhelming conclusions of the last thirty years of medical research.<sup>59</sup>

One potential consequence of this committee’s inclusion in the trust fund of “other cancers” and other unjustified compensation categories is described in a letter received by Senator Sessions from Dr. E.B. Ilgren.<sup>60</sup> Dr. Ilgren agrees with all of the conclusions reached by the doctors whose opinions are described above. He concurs that: “[t]he medical literature provides very strong evidence that asbestos does not cause or enhance an individual’s risk for cancer aside from mesothelioma and lung cancer,” and that “[t]here is no reason to include pleural plaques amongst the medical criteria of attributable changes that deserve compensation. Pleural plaques do not portend future malignancy.” He additionally notes that an ILO score of 1/0 – one of the criteria that the bill relies on as evidence of asbestosis – is also consistent with long-term, heavy smoking.

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<sup>59</sup>As for why this committee even began with a bill that compensates *any* “other cancers” – despite the clear weight of the medical evidence that none of these cancers is caused by asbestos exposure – the explanation is simple: the existing bankruptcy trusts, particularly Manville, are a natural political default for designing a national trust fund, and most of those trusts – including Manville – compensate claimants for “other cancer.” See White, *supra* note 1, at 1324-26 & n. 25. The explanation for why these trusts make awards for “other cancers” and other medically unsupportable claims is even simpler: “[b]ecause an asbestos firm’s bankruptcy reorganization plan must be approved by at least 75% of claimants, the [firm] managers’ [bankruptcy] decision \* \* \* depends on whether more than or less than 75% of claims are fraudulent, *i.e.*, whether the critical voter on the reorganization plan is a fraudulent or a valid claimant.” *Id.* at 1339.

Those who contend that asbestos exposure causes stomach or colon cancer usually rely on studies published in the mid-1960s by Irving Selikoff. Though all subsequent studies were unable to confirm his results, Selikoff dominated the field of occupational medicine during his lifetime, and frequently participated in litigation as an expert witness on behalf of plaintiffs. Any marginal deference due from this committee to Selikoff’s findings certainly is further diminished by the fact that, as one scholar recently has noted, “in terms of medical education and qualification, Selikoff was a fraud.” P.W.J. Bartrip, *Irving John Selikoff and the Strange Case of the Missing Medical Degrees*, *JOURNAL OF THE HISTORY OF MEDICINE AND ALLIED SCIENCE* 28, Vol. 58 (2003). The author discovered that Selikoff lacked the medical degree that he had always represented himself as having – though he did have a PhD, earned in one year, from “an unaccredited school of appalling quality on the verge of collapse.” *Id.* at 22. The author concludes that “[i]f Selikoff’s evasions had been uncovered [during his lifetime], his credibility would almost certainly have been destroyed.” *Id.* at 31-32.

<sup>60</sup>This letter is included as Attachment “I” to this statement.

Dr. Ilgren also notes, however, that “[i]nclusion of pleuro-pulmonary malignancies in the medical criteria potentially undermines present day evidentiary standards.” Stated otherwise, this committee is setting a very bad precedent. Dr. Ilgren also points out – in the spirit of Jonathan Swift – that inclusion of these criteria argues for inclusion of numerous other premalignant conditions for numerous other cancers as well.<sup>61</sup>

### *Some Suggestions to a Coordinate Branch of Government*

Over the course of this committee’s consideration of this bill, Senators have heard from a large number of manufacturers, doctors, insurance carriers, union officials, and even trial lawyers about their stake in this matter. Each of these groups is divided into subgroups, which often have conflicting interests. Plaintiffs lawyers are divided between those who primarily represent cancer victims – and want strict medical limits placed on asbestos claims, in order to preserve funds for their clients – and those who pursue large numbers of manufactured claims, and who oppose any limits on the tort system. Business is divided between those facing massive asbestos liability (and possibly bankruptcy), who want a bill at any cost, and those who only will support legislation within certain limits. Each of these groups has its own story to tell.

Members of this committee have been presented with a vast amount of information about asbestos litigation. We have heard numerous accounts, many of them first hand, about how these lawsuits are conducted. From all these accounts, certain patterns emerge, and certain aspects of the asbestos-litigation crisis come into relief. Two matters call out for the judiciary’s attention.

First, it is apparent that the truth-seeking function of a trial is completely undermined when courts allow illegitimate expert testimony to be presented to a jury. As a matter of federal due process, all unreliable expert testimony should be excluded from the courtroom.

Asbestos lawsuits repeatedly have confirmed the finds of Milgram’s experiment: that most people will believe what an expert tells them. When an expert testifies about scientific or technological facts, we believe what he says, not because of his credentials, or because we think ourselves obligated to do so, but because we believe that he has access to the truth. We believe that the expert is revealing to us a part of that truth. We are aware that we do not know as much as the expert does, and so we defer to him.

Before an expert is allowed to exercise this power over a jury, the courts must be certain that he is, in fact, presenting the truth. The expert’s power over the jury is not diminished when he presents inaccurate information. Rather, it is the trial itself that is compromised.<sup>62</sup>

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<sup>61</sup>See *infra* at Attachment “I.”

<sup>62</sup>The Judiciary Committee encountered this very phenomenon during the first day of its executive consideration of this bill. In response to a question from a member of the committee, Dr. Laura Welch, a medical doctor affiliated with The Center to Protect Workers’ Rights, stated that in her “opinion, there are epidemiologic studies that show that substantial exposure to asbestos raises the risk of colon cancer.” This opinion easily could

Had all courts been required to exclude expert testimony that has not been tested for validity and relevance, the asbestos-litigation crisis probably never would have become a crisis.<sup>63</sup> The pleural plaques-phase of the litigation, which dominated the mid-1990s, never would have occurred. The clear weight of the medical evidence indicates that pleural plaques are not substantial evidence of either present harm or the threat of future harm. No expert evidence to the contrary should be admissible in an American court. Nor, were invalid expert testimony excluded from the courtroom, would law firms be able to employ slipshod medical diagnoses to identify asbestosis.

Second, it is apparent that for many defendants, going to trial ceases to be an option when unrestricted intangible damages are threatened. By “intangible damages,” I refer to punitive damages, pain and suffering, and all other damages that are not based on a measurable harm and that are potentially unlimited in amount.<sup>64</sup>

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have been persuasive to committee members had Dr. Crapo not been present to respond. He explained: “There is really only one cohort or study that has really significantly shown an association [of asbestos exposure] with colorectal cancer. It was an early one done. The problem with that cohort was that – and it was Selikoff’s cohort of insulators – they had an 80 percent smoking incidence in that cohort, and the controls [the study] used to predict the rate of colorectal cancer in the group came from normal American males that had about a 40 to 50 percent smoking rate, and smoking is a major cause of colorectal cancer. So you can raise some concerns of, did they have the right control number when they estimated the increased rate? That epidemiological study has been redone in a total of 14 cohorts, and when you do a meta-analysis, which means [you] take all the cohorts, all the work that has been done on [the subject] \* \* \* and say, is there an increased risk?, the answer is absolutely no. The SMR for that is 1.03, where no risk is 1.00. An elevated risk would be 2 or something. So you are talking about a profound amount of studies that say there is no increased risk if you properly control for smoking. And I would further add that if you go to most major medical textbooks under asbestosis and cancers and look it up, they will say colorectal [cancer] is not associated [with asbestos exposure].” *See also infra*, Attachments “E,” “F,” “G,” “H,” and “I.”

<sup>63</sup>*See* Patrick M. Hanlon, *Asbestos Legislation*, SH043, ALI-ABA Course of Study Materials (Sept. 2002) (“Only a few thousand cancer cases are filed each year. If the judicial system merely had to resolve those cases, there would be no asbestos litigation crisis”). *See also id.* (“Most defendants, including many of those who have filed for bankruptcy, could manage the problem of compensating cancer victims and people with serious asbestosis. Compensating hundreds of thousands of people who have no breathing impairment whatever is a task not many companies can handle”). *See also infra* Attachment “I” (describing unsound medical theories employed in asbestos litigation) (Letter of Dr. Ilgren).

<sup>64</sup>Common sense and practical experience suggest that these types of damages are interchangeable – where a jury can award one kind, it generally can find ways to award other kinds as well. *See, e.g.* Adam Liptak, *Pain-and-Suffering Awards Let Juries Avoid New Limits*, THE NEW YORK TIMES, October 28, 2002, at A14 (noting that “[a]s all sorts of limitations have recently been placed on punitive damages, creative lawyers have shifted their attention to pain and suffering, a little-scrutinized form of compensation for psychic harm”). *See also* Parloff, *The \$200 Million Miscarriage of Justice*, *supra* note 4 (describing Mississippi jury award of \$150 million in “compensatory” – not punitive – damages to six asbestos plaintiffs with no injury or impairment).

These types of damages (particularly punitive damages) are at war with the principles and structure of the civil trial.<sup>65</sup> The civil-justice system tolerates low standards of proof because it does not *create* or *impose* harm. Rather, it evaluates *existing* harms and determines which party most appropriately bears their costs. The civil-justice standard of proof is thus proportionate to the potential of compensatory liability. Because the harm at issue exists regardless of whether the court acts, it is appropriate to ask simply who, more likely than not, should bear the cost of that harm.

But when unlimited intangible damages are permitted, the civil-justice system's low standard of proof becomes an invitation to abuse. Now the court creates new harms – and imposes them despite reasonable doubt about the facts. And, unlike even in the criminal justice system, the potential liability is unknowable. In the classes of cases where punitive damages often are awarded, the defendant, in every case, risks putting his entire business at stake.<sup>66</sup> Given the uncertainties of a jury trial, the typical defendant will not take this risk, even if he believes that he can show that he is not liable.

This clearly is what occurs in much asbestos litigation. The threat of massive intangible damages has vastly magnified the bargaining power of the plaintiffs firms. As a direct consequence, these firms are now able to impose coercive settlements. In exchange for settling its few legitimate claims, a large-inventory firm can demand that defendants also settle thousands of manufactured claims involving no credible evidence of impairment.<sup>67</sup> Even large defendants are afraid (with reason) to go before a jury even on a small number of claims.

The Supreme Court recently again has held that the federal guarantee of due process places limits on the amount of a punitive-damage award.<sup>68</sup> Once again, however, the court's

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<sup>65</sup>See also Thomas H. Dupree, Jr. & Theodore J. Boutrous, Jr., *Successfully Challenging Punitive Damage Awards: Winning Strategies After State Farm v. Campbell*, National Legal Center for the Public Interest (forthcoming 2003) (noting that punitive damages “do not serve a compensatory function, nor are they awarded with the protections of the criminal justice system”).

<sup>66</sup>Just four months ago, for example, a Madison County, Illinois jury awarded an individual asbestos plaintiff \$250 million – an amount that certainly would threaten the viability of most businesses. See Alex Berenson, *2 Large Verdicts in New Asbestos Cases*, THE NEW YORK TIMES, April 1, 2002, at C4. For a discussion of punitive damages' predominance in particular classes of cases, see Erik K. Moller *et al.*, *Punitive Damages in Financial Injury Verdicts*, 28 J. Legal Stud. 283, 304 (finding, based on review of financial-injury cases in five large jurisdictions, that “[u]niformly, punitive damages represent a large portion of the total damages awarded \* \* \* : from 43 percent of all damages in other contract verdicts to over 70 percent of all damages in insurance verdicts”). For data regarding the frequency with which punitive damages are awarded in particular classes of cases, see Erik K. Moller, *Trends in Civil Jury Verdicts Since 1985* 54 Table A.9 (RAND 1996) (indicating that in some types of litigation, punitive damages are awarded in over a quarter of cases).

<sup>67</sup>For examples of this phenomenon, see Parloff, *\$200 Billion Miscarriage of Justice*, *supra* note 4 (discussing bouquet trials and *David Cosey* litigation).

<sup>68</sup>See *State Farm v. Campbell*, 123 S.Ct. 1513 (2003).

analysis is restricted to formal punitive damages – it ignores other types of punitive-in-all-but-name intangible damages that have grown to massive size in recent years. Moreover, once again, the Court has “eschew[ed] a bright-line limit” even for punitive awards.<sup>69</sup> As commentators have noted, this ambiguity already has been exploited by some courts.<sup>70</sup>

The federal high court should restrict intangible-damage awards to the value of transactions costs – *i.e.*, to the amount of a reasonable attorneys fee. And, where additional damages are authorized by statute, they should be limited to a small multiple of concrete, calculable damages.

Some jurists have taken the view that because exemplary damages were allowed at the time that the Fifth and Fourteenth Amendments were adopted, the due-process guarantee places no limits on such awards today. It thus bears emphasis that truly massive intangible-damage awards are a creature only of the last thirty years. As one commentator has noted, for example, the largest reported punitive-damage award upheld on appeal in California before 1960 was \$10,000.<sup>71</sup> The size of awards allowed at common law was relatively small – in fact, comparable to the limits suggested here. The due-process clauses guarantee no “right” to these types of awards, unless one takes the view that our Constitution acquired its current meaning in the 1970s.

For intangible damages – as for asbestos – it is the dose that makes the poison. The massive awards permitted today overwhelm the civil-justice system and frustrate its truth-seeking function. Unless these awards are cabined within their historical limits, all other process guaranteed to those who are sued becomes illusory.

To conclude, I think that it is fair to say that asbestos litigation has warped the American civil-justice system. The courts have been used to commit abuses that one would not have thought possible in America. Congress may yet enact this bill, and put an end to asbestos lawsuits. Even if Congress does so, however, the asbestos model of litigation is now too well-practiced to permit hope that it will not reappear in some other form. The problems described here are ones that we will confront again in the coming years.

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<sup>69</sup>Dupree & Boutrous, *supra* note 65.

<sup>70</sup>*See id.* (discussing *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, No. 01-1201, 2003 WL 21205367 (Wis. May 23, 2003), and *TVT Records v. The Island Def Jam Music Group*, 257 F. Supp. 2d 737 (S.D.N.Y. 2003)).

<sup>71</sup>*Written Statement of Theodore B. Olson Concerning Civil Justice Reform*, Before the U.S. Senate Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism of the Committee on Commerce, Science, and Transportation, 1995 WL 152026 (April 4, 1995). *See also id.* (describing recent decade’s exponential growth in size of Alabama and Texas punitive-damages awards); Dupree & Boutrous, *supra* note 65 (describing Kentucky Supreme Court’s recent approval of a punitive-damages award “more than twice as large as the *aggregate* of all punitive verdicts approved on appeal in Kentucky history”) (emphasis in original).