

Testimony of

The Honorable Orrin Hatch

September 25, 2002

Mr. Chairman, I want to thank you for agreeing to schedule a hearing to examine the extremely important issue of asbestos litigation. I do not think that there can be any serious doubt that our nation faces an "asbestos-litigation crisis." Nor do I believe that it can be seriously disputed that some type of comprehensive solution is necessary. Over the past decade, a variety of developments have greatly intensified the need and the urgency for a federal solution. An exponential increase in asbestos claims has resulted in a wave of asbestos-related bankruptcies and consequently threatens to leave hundreds of thousands of claimants without fair compensation. Moreover, this crisis is impacting not only the claims of those who are truly sick, but also the jobs and pensions of employees of the defendant companies. The Supreme Court has twice called upon the Congress to act and it is time we do so.

The current crisis is not going to get better, and it will continue to worsen unless we act. In fact, as you are aware, the RAND Institute for Civil Justice today released their study of the asbestos litigation crisis. RAND identifies that the number of claims continues to rise, and that to date over 600,000 people have filed claims, typically against dozens of defendants. In addition, more than 6,000 companies have been named as defendants in asbestos litigation. RAND also notes that "about two-thirds of the claims are now filed by the unimpaired, while in the past they were filed only by the manifestly ill." Former Attorney General Griffin Bell recently denounced this type of "jackpot justice."

Because of this surge in litigation, companies - many of whom never manufactured asbestos nor marketed it - are going bankrupt paying people who are not sick and may never be sick, and who, therefore, may not need immediate compensation. Let me be clear, I do not advocate denying deserving claimants timely and appropriate compensation. But I do think that we have to make some choices here - about prioritizing who is paid now, and who is paid later. If we don't, there won't be a later, and true victims of asbestos exposure, as well as the companies' employees and pensioners, will pay the price.

An editorial in The Wall Street Journal (January 23, 2002) suggested:

"Seeing legislators pull their hair over Enron is a pleasant diversion, but if Washington is really interested in the jobs and livelihood of American citizens it might be better off paying attention to the runaway blob known as asbestos litigation."

Why do the number of claims continue to increase when actual asbestos exposure has decreased over the years? Because the current litigation system has in some instances required that those who are not yet ill file their claims now, or risk being barred by the statute of limitations later. This is coupled with an "enterprising" trial bar that has orchestrated mass "asbestos screenings" to identify potential clients. Don't get me wrong, legitimate medical screenings can help to identify valid health concerns worthy of compensation. However, frequently these screenings are

nothing more than an effort to generate large numbers of potential claimants in an effort to force a defendant to settle a case, regardless of culpability or causal relation to the claimants, rather than incur the costs of litigation.

In a letter to the editor of the American Journal of Industrial Medicine in May of this year, Dr. David Egilman, M.D. relates that for the past several years he has served as an expert witness in liability cases primarily at the request of plaintiffs' attorneys. Over the past two years he has "noted that many of these individuals could not (due to inadequate latency or exposure) and did not manifest any evidence of asbestos-related disease." And he notes that "most of these cases are generated by 'screenings' which plaintiff lawyers have sponsored over the past several years to attract new asbestos clients for lawsuits." He was "amazed to discover that in some of these screenings, the worker's x-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by at least one of them." And he points out that a payment plan for the reader is often based on the reading result, a higher price for a higher reading of exposure. I doubt that encourages objectivity.

In addition, the American Academy of Actuaries reports in its December 2001 Overview of Asbestos Issues and Trends that two recent estimates "indicate that the ultimate costs arising from U.S. exposure to asbestos could range from \$200 to \$275 billion." By some estimates this amount exceeds the current estimates for all Superfund cleanup sites combined, Hurricane Andrew or the September 11th terrorist attacks. That is incredible.

Mr. Chairman, as I am sure you are aware, asbestos litigation has already bankrupted over 60 companies, and one-third of those bankruptcies have happened in the last two and one-half years. No one can credibly deny that this is a serious problem. As Mr. Austern will testify, the number of claims is outstripping the resources of bankruptcy trusts to pay a the true value of a sick person's claim. Trusts such as Manville are today only able to pay approximately 5% of a claim's liquidated value because of the increased number of claims filed each year that defy all estimated projections.

It is possible that some of these companies may be able to emerge from bankruptcy some day. However, what is the cost of the delay caused by a reorganization and approval of a bankruptcy trust? What about the vastly diminished resources available for deserving claimants? Those that are sick may die before they receive compensation.

Incredibly, there are some who will attempt to claim that there is no crisis at all - even some who are here today. Some will contend that the current system will sort itself out and that, therefore there is no need for reform. But, the general consensus out there is that there is a very real problem, and I refuse to bury my head in the sand.

I am encouraged that there are those among the trial bar that recognize the problem and see the need for reform. I know that Mr. Kazan recognizes this problem, especially because it affects his clients most directly. I look forward to hearing him elaborate on how the current system results in those that are truly ill having their awards reduced. I am interested in hearing about how the vast numbers of those who are not ill are draining the limited resources of the defendant companies, often driving them into bankruptcy - where the risk is that there will be little if any compensation left for the truly deserving. I submit for the record a copy of a full page ad that was placed in Roll Call recently, and signed by 20 of Mr. Kazan's colleagues in the asbestos trial bar.

The ad urges simple legislative reform to ensure that the truly sick are compensated, while also guaranteeing those who are healthy their day in court, if and when they become ill.

I would like the written statements from the American Academy of Actuaries, the Coalition for Asbestos Justice, the National Association of Manufacturers, as well as several letters that I have received, to be submitted for the record. I think the information that they provide is helpful to our analysis and essential to the debate of this issue.

In conclusion, I would like to say that I sincerely hope my colleagues will agree to work together so that we can attempt to resolve this issue in a reasonable and straightforward manner, before its crippling effects further endanger our economy and cheat true victims out of compensation and innocent employees out of their jobs and pensions.