Testimony of

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Introduction

I am a plaintiffs' trial lawyer. I represent working people with asbestos cancers and their families. I've specialized in asbestos litigation since 1974 - almost 30 years. For the last 15 to 20 years, my firm has represented almost exclusively people who are dying of cancers such as mesothelioma. While I speak for myself, I also reflect the views of scores of other lawyers who primarily represent these cancer victims. Our views are aimed at protecting the interests of thousands of these victims, who we all can agree are the people who have been hurt the most by asbestos.

The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs' attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them. This bankrupts defendants - who are then not there when it comes time to seek compensation for cancer victims and their families - and it drains the assets of the trusts established to pay the claims of these companies after they reorganize in bankruptcy. /

Asbestos: A Public Health Catastrophe

Exposure

Millions of people were exposed to asbestos before, during, and after World War II. Between 1940 and 1979, up to 27.5 million Americans worked in occupations where substantial asbestos exposures were common, and for many who worked in shipyards or the insulation trades, the exposure could be very high. / As many as 100 million American workers had at least some occupational exposure. / Although it was known as early as the 1920s that asbestos could be harmful to the lungs of workers, and even though the connection between asbestos and lung cancer was established beyond any doubt in the 1950s, asbestos manufacturers never even tried to give a warning to the people who would be exposed to the asbestos in their products until the 1960s. /

Public concern in the 1970s led to the establishment of OSHA and the advent of government regulation to protect workers' health. / This regulation and fears of liability led to a drastic reduction in asbestos usage after 1973. / As a result, exposure levels have been relatively low during the last 20 years. But pre-OSHA exposures have left a wake of devastation that will be with us for decades.

Health Effects of Asbestos

Asbestos causes several cancers and several "non-malignant" conditions. A non-malignant condition is simply one that does not involve cancer. It may or may not be medically important.

Asbestos Cancers. The two principal asbestos cancers are mesothelioma and lung cancer. Mesothelioma is a cancer of the cells that make up the lining around the outside of the lungs and inside of the ribs (pleura), or around the abdominal organs (peritoneum). / There is as yet no

known cure for mesothelioma; it is invariably fatal. The prognosis depends on various factors, including the size and stage of the tumor, the extent of the tumor, the cell type, and whether or not the tumor responds to treatment. In most cases this disease causes death within a year or two of diagnosis. /

Asbestos is also a leading cause of lung cancer - a fact that was established beyond any reasonable doubt by Sir Richard Doll's studies in England in the 1950s. / Irving Selikoff and his collaborators at New York's Mt. Sinai School of Medicine clearly established the link between asbestos exposure and lung cancer among insulators in the early 1960s. / Selikoff also showed that asbestos exposure worked synergistically with tobacco smoke to increase the risk of lung cancer. / An insulator who smoked had a risk of lung cancer more than 50 times higher than a comparable worker who neither smoked nor was exposed to asbestos. /

These cancers have long latency periods. Latency is the amount of time that typically elapses between a person's first exposure and diagnosis. For lung cancer, latency averages between 20 and 30 years. / An even longer average latency - as much as 40 years - is common for mesothelioma. / For this reason, exposures that occurred decades ago are just now resulting in fatal cancers. /

It is generally accepted that mesothelioma has recently peaked at nearly 2,500 cases annually and that there will be 2,000 or more mesothelioma cases each year for at least the next 15 years. / Studies suggest that asbestos lung cancers peaked in the mid-1990s, but they will remain significant for decades as well. /

Some researchers have argued that other cancers, such as cancer of the gastro-intestinal tract, are also caused by asbestos exposure, but these theories are still controversial in the medical community. / In any event, "other cancers" result in relatively few lawsuits, and difficulties in proving causation have generally meant that these cases settle for relatively low values.

Non-Malignant Conditions. In addition to cancer, asbestos causes two major "non-malignant" conditions, asbestosis and pleural thickening.

Asbestosis is a scarring of the walls of the air sacs within the lungs. In extreme cases, as a result of heavy exposures, asbestosis can severely interfere with the functioning of the lung, leading to disability and even death. These severe asbestos cases, common in the early days of asbestos litigation, have since then become rare. / Most people who have x-rays indicating possible asbestosis have no symptoms whatsoever. /

Pleural changes are different from asbestosis. They do not involve the tissues of the lung at all, but rather the thin membrane called the pleura, which covers the surface of the lung and lines the chest wall. In the vast majority of cases, pleural changes take the form of pleural plaques, which affect relatively small, circumscribed areas of this membrane. Pleural plaques do not cause symptoms: they are merely an indicator of exposure. On occasion, pleural changes take the form of "diffuse pleural thickening," which can affect the functioning of the lung but usually does not. /

Progressivity. Non-malignant asbestos diseases are sometimes said to be "progressive" - i.e., they can get worse even after exposure stops. It is well established that after heavy exposures, asbestosis can be progressive, and can result in serious disability and even death. People in this situation deserve compensation just as cancer victims do. With lower exposures, however, asbestosis usually does not "progress" in this way. For most people, asbestosis that does not result in decreased lung function will not impair lung function in future years. /

Moreover, non-malignant diseases do not "progress" to become cancer. Cancer is a completely different disease from either asbestosis or pleural changes. Both, of course, can be due to

asbestos exposure (and these non-malignant changes are certainly proof of asbestos exposure), but one disease does not turn into the other. /

Summary

Millions of people were exposed to asbestos before OSHA regulations and the deterrent effect of personal injury litigation led to drastic reductions in asbestos usage, beginning in the mid-1970s. Many of those individuals carry physical markers of their exposure--slight scarring of the lungs or pleural plaques --that do not affect their functioning at all. These people are the so-called "unimpaired." The words "impaired" and "unimpaired" will be used often in this statement and in these discussions; I want to be clear on what I mean. I use the term "impairment" in a common-sense way to mean that a person's bodily functioning is affected--in particular, that the functioning of his or her lungs is diminished to the point of interfering with daily life or the ability to earn a living. As I use the word, mere physical changes that cause no symptoms and do not lead to reduced functionality are not "impairment." /

While most people exposed to asbestos are not "impaired," thousands of people still will fall victim to asbestos cancers or serious asbestosis over the next 30 or more years. For those victims, asbestos continues to be a "public health catastrophe." / It also is a legal catastrophe, as, increasingly, people who are sick cannot be sure of compensation because payments to the unimpaired have drained massive amounts of defendants' financial resources and contributed to a recent flood of bankruptcy filings.

Asbestos Litigation: The Early Days

Asbestos litigation began in the late 1960s. / There had previously been state workers' compensation claims against asbestos manufacturers dating all the way back to the 1930s (although the manufacturers had largely succeeded in hushing them up through secret settlements). / Workers' compensation provided a completely inadequate remedy for workers seriously injured by asbestos. Benefits were, and still are, very low, and technicalities often kept workers with long-latency industrial diseases from obtaining any compensation at all. / One way of avoiding the problems of the workers' compensation system was to sue producers like Johns-Manville for negligence or strict product liability based on their sale of a dangerous product without any warnings to the workers who would be exposed. The Fifth Circuit validated this approach in its landmark Borel decision in 1973. /

Borel was a big step forward in part because it brought the asbestos catastrophe to the attention of plaintiffs' trial lawyers across the country. I first became involved in asbestos litigation in California in 1974. While Borel was important, it did not make asbestos litigation easy for injured plaintiffs. Defendants, led by Johns Manville, fought asbestos claims with a no-holds-barred approach. In case after case we had to relitigate the "state of the art" - even though company documents conclusively showed that manufacturers had known for decades that asbestos was dangerous. Moreover, in many states we faced archaic statutes of limitations, which, according to the manufacturers, barred asbestos claims even before injured workers knew (or could know) of their injuries.

The plaintiffs' bar was united then. We showed that the state-of-the-art defense was a lie. We proved that manufacturers like Manville and Raybestos Manhattan had been involved in a cover-up for years. Increasingly, juries handed down significant punitive damages awards. By the late 1970s and early 1980s, we were able to obtain just remedies for more and more workers facing death or disablement because of asbestos. Even after the Johns-Manville and UNR bankruptcies

in 1982, the plaintiffs' bar obtained recoveries for the injured by building a case against other, still solvent, defendants.

Asbestos Litigation: Warning Signals

By the mid-1980s a disturbing new trend was changing the shape of asbestos litigation: Some of my colleagues in the asbestos trial bar began arranging x-ray screenings to generate more and more clients, and this led to a sharp increases in filings by unimpaired plaintiffs. RAND recently described the new methods of recruiting unimpaired plaintiffs as follows:

"By the mid-1980s, however, plaintiff law firms in areas of heavy asbestos exposure (such as jurisdictions with shipyards or petrochemical facilities) had learned that they could succeed against asbestos defendants by filing large numbers of claims, grouping them together and negotiating with defendants on behalf of the entire group. . . .

"To identify more potential claimants, plaintiff law firms began to promote mass screenings of asbestos workers at or near their places of employment. Plaintiff law firms would bring suit on behalf of all of the workers who showed signs of exposure, sometimes filing hundreds of cases under a single docket number. Given the profile of asbestos disease, the majority of plaintiffs had little or no functional impairment at the time of filing . . . ." /

The number of asbestos cases pending in the federal courts alone more than quadrupled between 1984 and 1990. / Most of the new claims were for non-malignant conditions, and most of those were filed on behalf of people who were not sick.

In response to this sharp upturn, bankruptcy filings increased. / Between 1982 and 1989, asbestos liabilities led at least 16 companies to file for bankruptcy, and 9 more filed in the first half of the 1990s. In 1993, a leading plaintiffs' lawyer, Ron Motley, estimated that companies bearing more than three quarters of the liability in the early phases of the asbestos litigation had exited the tort system. /

Alarmed, Chief Justice Rehnquist appointed a committee of experienced Federal judges to study the asbestos litigation problem. The report of the Ad Hoc Committee on Asbestos Litigation, filed the following year, was prophetic:

We have described in the current state of asbestos litigation a very great problem, even a crisis, for many Americans. However, the worst is yet to come. The committee believes it to be inevitable that, unless Congress acts to formulate a national solution, with the present rate of dissipation of the funds of defendant producers . . . all resources for payment of these claims will be exhausted in a few years. That will leave many thousands of severely damaged Americans with no recourse at all. /

The Ad Hoc Committee Report lead to hearings in both Houses of Congress, but no legislation was introduced. Meanwhile, the defendants and some plaintiffs' firms tried to use the Federal class action rules to craft a solution to the asbestos litigation "crisis" identified by the Ad Hoc Committee. The first such effort was the so-called "Amchem" settlement, which was approved by the District Court in 1994. / Because I believed that the Amchem settlement provided too little to cancer claimants, I opposed it. However, my firm played a leading role as one of three class counsel in a second settlement class action which involved the Fibreboard Corporation.

At the end of the day, the Supreme Court concluded that these efforts to use class actions as a vehicle for a global resolution of the asbestos litigation crisis pushed the Federal class action rule beyond the breaking-point. The Supreme Court struck down the Amchem settlement in 1997 and the Fibreboard settlement in 1999. / In both cases, however, the Supreme Court emphatically called upon the Congress to take action. Thus, in Amchem, Justice Ginsburg's opinion for the

Court pointedly noted that "the Judicial Conference of the United States [had] urged Congress to act [at the time of the Ad Hoc Committee Report]," but that "no congressional response has emerged." / The Court was even clearer in Fibreboard. Justice Souter's opinion for the Court stated that "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation." / Moreover, Chief Justice Rehnquist and two of his colleagues concurred specially in order to stress that asbestos litigation "cries out for a legislative solution." /

Asbestos Litigation: Things Fall Apart

Almost immediately after the Court's decision in Amchem, the litigation began to spin out of control. The researchers at RAND summarized the new developments as follows:

"After the failure of the Amchem and Ortiz settlements, the landscape of asbestos litigation began to change. Filings surged . . . . As filings surged, many of the asbestos product manufacturers that plaintiff attorneys had traditionally targeted as lead defendants filed for bankruptcy. Plaintiff attorneys sought out new defendants and pressed defendants that they had heretofore treated as peripheral to the litigation for more money." /

The asbestos plaintiffs' bar recognized the dangers inherent in this dynamic. In 1999 and early 2000, plaintiffs' lawyers representing the vast majority of claimants concluded framework settlement agreements with Owens Corning Fibreboard - then the largest single defendant. Collectively, those agreements were known as the "National Settlement Program" or "NSP." In the NSP plaintiffs' counsel agreed to recommend to their clients a settlement that would require future non-malignant claimants to demonstrate medical impairment in order to qualify for cash compensation. / Thus, at the beginning of 2000, it could be said that essentially all of the asbestos plaintiffs' bar had agreed that, as a matter of policy, unimpaired non-malignant claims should not receive immediate compensation. Unfortunately, however, there was no way to police the NSP in the absence of a Federal class action, and lawyers newly entering the market, often offshoots of the law firms that had signed the NSP, began to file the very claims that the NSP signatories promised not to file. As a result the NSP first cracked and then fell apart. Owens Corning-Fibreboard filed its own bankruptcy petition in October 2000.

One way to obtain a quantitative picture of the changes in asbestos litigation that occurred after Amchem was decided is to examine Manville Trust data. Those data show the trend in claims since 1997, when Amchem was decided. First, as Table 1 demonstrates, claims filed with the Trust quadrupled from 1997 to 2001, and this increase was driven primarily by non-cancer claims.

Table 1: Recent Manville Trust Claims Experience

Filings /	1997	1998	1999	2000	2001
Cancer Claims	3,361	3,034	3,684	4,985	4,558
Non-Cancer Claims	18,125	24,425	25,290	49,380	64,054
Claims Denied/Unknown	2,188	1,965	2,759	3,676	20,826
Claims Filed	23,674	29,424	31,733	58,041	89,438

Second, as shown in Table 2, the percentage of claims filed by cancer victims has steadily fallen, from 15.6% in 1997 to only 6.6% in 2001. Non-cancer claims - half of which are now filed by people who have do not even claim functional impairment - have clearly driven the overall increase in filings.

Table 2: Recent Manville Trust Claims Experience
Percentage of Claims Filed: Cancer v. Non-Cancer /
1997 1998 1999 2000 2001
Cancer 15.6% 11.0% 12.7% 9.2% 6.6%
Non-Cancer 84.4% 89% 87.3% 90.8% 93.4%

Third, the filing trends have lead to a tragic misallocation of resources. In recent years Manville has paid more money to people who have nothing wrong with them than it pays to mesothelioma victims. / Indeed, as Table 3 shows, the percentage of settlement funds that went to cancer victims generally fell from 54.6% in 1997 to 22.8% in 1999, and it has never recovered. In 1999 and 2000, Manville actually paid out more for claims in which the claimant did not even assert impairment than it paid out for all cancer claims combined. In 2001, the percentages are almost exactly the same.

Table 3: Recent Manville Trust Claims Experience
Percentage of Settlement Dollars, by Disease Type & Year Paid /
1997 1998 1999 2000 2001
Cancer 54.6% 50.5% 22.8% 24.7% 24.3%
All Non-Cancer 45.4% 49.5% 77.2% 75.3% 76.7%
Claims for Compensation Levels 1 and 2 (Which Do Not Require Impairment) 22.6% 27.0% 37.0% 31.3% 24.1%

The recent RAND study demonstrates that the experience of defendants litigating in the court system has been similar to Manville's. According to RAND, "Claims for nonmalignant injuries grew sharply through the last half of the [1990s]," and "[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." / Those plaintiffs took in 65% of settlement and verdict dollars in the 1990s, and that percentage can only be growing. /
The sharp increase in cases has forced defendants into bankruptcy at an unprecedented rate, as Table 4 shows:
Table 4: Asbestos Bankruptcy Filings Since 1982 /
Years Number of Bankruptcies Rate per Year
1982-89 16 2.4
1990-99 18 1.8
2000-Present 22 8.2
Total 59 -

Over 50 companies have filed for bankruptcy since 1982, and 22 of these were forced into bankruptcy since January 1, 2000 - only 2 2/3 years. / Practically all of the defendants I battled against 25 years ago are bankrupt today.
Asbestos bankruptcies are a disaster for almost everyone. / Huge sums are swallowed up in transaction costs, and years are wasted in protracted and complex litigation. Stockholders - which today often means working people with their life savings invested in company 401(k) plans - usually lose their entire investment. / Financially strapped companies often cut back on employer contributions to such things as health benefits to retirees, as well as the investments

that create new jobs in their communities.
My main concern, however, is with the impact of these bankruptcies on cancer victims. Here, there are three main problems:
? The asbestos bankruptcies filed since February 2000 have resulted in an immediate cessation of hundreds of millions of dollars in expected yearly payments. History shows that in many cases this money will be off the table for a long time. The average time from filing a bankruptcy petition to approval of a plan of reorganization has been 6 years, and it takes even longer for funds to begin flowing once again. / This may be fine for people who aren't sick. My clients usually haven't that many years to live.
? The trusts formed to handle compensation of asbestos claimants have invariably paid claimants only a small percentage of the value of their claims. They cannot pay more, because they must reserve much of their funds to pay something to future claimants. / The percentage of full liability that is actually paid out depends on long-term predictions of claiming behavior that have always proven to be too low - primarily because the number of non-malignant claimants has depended on the economics of claims solicitation and not on the development of medically significant non-malignant diseases found by doctors caring for their patients. Thus, the same filing trends that have caused a crisis in the courts have also steadily reduced the amount of compensation available to sick claimants from bankruptcy trusts. /
? There is no assurance that the bankrupt share can or will be made up by seeking recovery from new defendants. In the last 20 years, many states have limited joint and several liability, so that even if the plaintiff can prevail against some defendants, the plaintiff will not receive full compensation. In my own state, California, defendants are not jointly liable for "non-economic" loss such as pain and suffering, even though these losses are enormous for elderly plaintiffs with devastating cancers. The more fundamental problem, however, is in finding a solvent defendant to sue. When all of the "usual suspects" have taken refuge in bankruptcy, it becomes much harder to find a viable defendant who can be held liable to pay compensation. Inevitably, and increasingly, some cancer victims find themselves without a claim against any significant solvent defendant.

Congress Must Act To Make the System Work Again
In my view, what is wrong with asbestos litigation is due almost entirely to the huge number of claims filed each year by lawyers who have found people who are not sick. The problem is not the cancer cases or the serious asbestosis cases. There are only a few thousand cancer cases filed every year in the entire country and an even smaller number of asbestosis claims involving death or significant impairment. The courts and the defendants could deal with those cases, if they did not have to deal with many tens of thousands of claims brought by people who are not sick. Moreover, I do not believe that we need any new Federal bureaucracy to manage the cancer cases or the advanced asbestosis claims. Courts and juries are at their best in evaluating the claim of a genuinely injured plaintiff, and the number of such claims can easily be handled by our existing civil justice system.
As I show below, the non-malignant claims problem is driven by litigation screening. Traditionally toxic tort litigation follows a medical model: a plaintiff sees a doctor to treat his illness or injury and then is referred to, or otherwise finds, a lawyer. Litigation screening substitutes an entrepreneurial model: the lawyer recruits the plaintiff - who usually feels fine, has no symptoms or impairment, and is unaware of any "injury" - and sends him to a screening company for an x-ray. The question is, what features of asbestos litigation have contributed most

to this shift to an entrepreneurial model? I focus on three: the failure of courts to enforce the principle that a person should not have a tort claim unless he is "injured"; interstate forum shopping, that allows these claims to flow to pro-plaintiff courthouses with no connection to the plaintiff or the case; and consolidations that are intended to force the settlement of cases whether or not they have merit under state law.

Litigation Screening: The Driving Force

The engine that drives the filing of non-malignant cases is litigation screening. The Manville Trust estimates that as many as 90% of non-cancer claims are generated through screenings. / People who are found, as a result of litigation screenings, to have what may seem to be some sign of a non-malignant condition, are often forced by the statute of limitations to file lawsuits before they are really sick. This can come back to haunt individuals who later develop cancer, because some states still maintain a "single disease" rule, which precludes a second lawsuit just when the individual is facing a serious injury and needs to provide for his family.

Litigation screenings have absolutely nothing to do with medicine - they are a device for recruiting clients. / Internet advertisements invite readers to "Find out if YOU have MILLION DOLLAR LUNGS!" while newspaper ads warn readers not to delay, reporting that "[b]ased upon recent national information, it is our belief that workers have only a limited time remaining in which to file cases against the manufacturers." / When participants arrive for a screening, they often must sign a retainer agreement before receiving their "free x-ray." /

Participants at many screenings never even meet with a doctor: a technician takes the x-ray, which is then sent to a doctor, whose report is sent in turn to the lawyer who arranged for the screening. / Moreover, if the doctor does not give the lawyer the right answer, the lawyer can get a second opinion, or a third, or a fourth ... as many as it takes. / Dr. David Egilman of Brown University, who regularly testifies as an expert for plaintiffs, including for my firm, said in a recent letter to the American Journal of Industrial Medicine, "I was amazed to discover, that in some of the screenings, the worker's X-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one of them." / A "slightly positive reading" usually does not even amount to a diagnosis of asbestosis - that requires a real physical examination and a great deal more information than is available from reading X-rays taken en masse in mobile vans. / Rather, the reader of the X-ray merely concludes that the x-ray is "consistent with" asbestosis. /

The results of such screenings are totally unreliable. That is why the court that oversees all federal asbestos litigation now dismisses all claims that are based on a mass screening. / Lawyers and public health advocates debate whether some sort of screening might be appropriate for people exposed to asbestos, or at least to some subset of that population. Since early detection is not helpful in the treatment of asbestosis or pleural changes, screening for non-malignant diseases has no justification, at least for workers that are no longer exposed to asbestos. Moreover, given the current state of medicine, screening is not likely to improve outcomes for mesothelioma. The real debate therefore focuses on screening for lung cancer. I personally believe that a screening program for lung cancer involving the use of high-resolution spiral CT scans is promising, though there is controversy even about that. / There is no legitimate scientific doubt, however, that litigation screenings are not calculated to provide real health benefits. The U.S. Preventive Services Task Force has concluded that "[r]outine screening of asymptomatic persons for lung cancer with chest radiography or sputum cytology is not recommended." / That conclusion matches the position of the American Cancer Society. / Chest X-rays are simply too inaccurate to be useful in screening asymptomatic people for lung cancer. /

This is true even when they are read by real doctors, practicing medicine, and even when they are appropriately followed up with physical examinations and any necessary additional tests - none of which typically occurs in litigation screening In view of the absence of any real benefit from traditional X-ray screening for lung cancer, the potential harms from such screening cannot be justified. Among other risks, false negative screening results can create a false sense of security that leads people to avoid appropriate medical consultations if symptoms develop; false positives may give rise to unnecessary fear and anxiety and changes in lifestyle; and screened individuals may be exposed to unnecessary and potentially harmful levels of radiation. /

Three Key Defects That Encourage the Recruitment of Unimpaired Claims

The flood of asbestos claims involving no physical impairment results from three key defects in the asbestos litigation system.

First, many state courts do not in practice require claimants to show impairment, using objective medical criteria. In almost all states, any tort plaintiff must show that he is "harmed" before he can bring an action for "personal injury." / In asbestos litigation, only a few state courts rigorously enforce this requirement, Pennsylvania being a leading example. / Other federal and state courts have adopted deferral dockets that, in effect, postpone the claims of people who are not sick until they meet certain objective medical criteria. / In many states, however, it is difficult for defendants to enforce the theoretically applicable rules at an early stage in the proceedings, and the risk of going to trial, especially in certain plaintiff-friendly jurisdictions in which thousands of asbestos claims are pending, forces defendants to settle claims that would have no merit if examined one-by-one.

Second, the absence of medical criteria is exacerbated by interstate mobility of claims. The existence of this strategic mobility has been forcefully demonstrated by RAND. / Claims are routinely brought in states that have no connection with the plaintiff or the facts of the case because they are perceived as being favorable. Unlike most tort cases, asbestos litigation is truly national in scope.

This strategic mobility has two effects. To begin with, it allows plaintiffs' lawyers to avoid the effect of state efforts to bring asbestos litigation under control. Thus, for example, if Pennsylvania requires functional impairment as a prerequisite for bringing an asbestos claim, Pennsylvania cases will migrate to other jurisdictions, such as West Virginia or Mississippi. / Moreover, non-malignant claims in particular accrue value they wouldn't otherwise have because they can find the courthouses with the most favorable procedural practices and most generous juries. In some of these jurisdictions, litigation generally (and asbestos in particular) has become the major economic activity. In Jefferson County, Mississippi, for example, the number of pending asbestos cases (more than 10,000) exceeded the population of the county (9,740). / The advantage of bringing asbestos claims in such jurisdictions is illustrated by a $150 million verdict returned last year in Holmes County, Mississippi, in favor of 6 men who had no impairment whatsoever. /

Third, consolidations in jurisdictions such as West Virginia force settlements of massive numbers of claims brought by people who aren't sick. Some "jumbo consolidations" involve thousands of plaintiffs. Typically, one jury considers the fault of numerous defendants, determining which of their products are defective, when the defendants should have known about the risks of asbestos, and (in some cases) whether defendants should be liable for punitive damages. The jury's decisions then apply to every plaintiff included in the consolidation. Issues pertaining to specific plaintiffs--which products they were exposed to and what injury they have--are saved for subsequent small-group or individual trials, but that rarely matters. That is because defendants

usually decide that they can't risk an adverse liability ruling (especially one for punitive damages) that would apply to thousands of plaintiffs, so they settle the whole lot. / This system creates an incentive for filing weak claims: plaintiffs typically need do no more than file a rudimentary complaint before the trial on the defendant's liability and the inevitable settlements, so the costs are low for each plaintiff and there is no opportunity to weed out bogus claims. / Conclusion

I have no sympathy for asbestos defendants. Many of these companies exposed millions of innocent people to a deadly poison without warning them of the risk to their health, and they should pay for the harm that they did.

I am worried about the working people who will be stricken with asbestos cancers this year and for years into the future. I have devoted most of my professional life to obtaining compensation for those people and their families. I cannot do that, however, if the defendants have been driven into bankruptcy because they have been overwhelmed by the claims of people who were exposed to asbestos but have nothing wrong with them.

Every person who has been exposed to asbestos should have his or her day in court if and when they develop cancer or a non-malignant condition that impairs their breathing. The people who have been exposed, but who are not sick, are the lucky ones. Most of them will never become sick, and that is luckier still. But unless Congress acts now, those who do become sick will suffer a double misfortune - when they contract cancer and again when they fail to receive the compensation they are entitled to because people who aren't sick have taken all the money.