

Testimony of

Dr. Mark A. Peterson

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STATEMENT OF MARK A. PETERSON BEFORE THE
SENATE JUDICIARY COMMITTEE HEARING ON S.1125
"FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT OF 2003"

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Mr. Chairman and Members of the Committee, I am Mark Peterson, and I am submitting this statement to provide data, quantitative analyses and comments that I hope will aid the committee in its consideration of the "Fairness in Asbestos Injury Resolution Act of 2003".

My Background and Expertise

First let me describe my background and knowledge about asbestos injuries and litigation. For over twenty years I have studied, written about and participated as an expert in asbestos litigation and other mass tort litigation. I have worked for four U. S. District and Bankruptcy Courts as the Courts' expert on how asbestos claims are valued and on asbestos claims procedures and trusts. For thirteen years I have been the "Special Advisor to the Courts" regarding the Manville Trust, serving Judges Jack Weinstein and Burton Lifland for five years and the Manville Trust and all of its beneficiaries for the past eight years. I am a consultant and expert for ten asbestos trusts. I have developed claims procedures for ten asbestos trusts. I am a trustee of an asbestos trust. I am a director of a nonprofit corporation that administers the process for allowing and paying claims for four asbestos trusts. I have worked as an expert on asbestos litigation for defendants, insurance companies, actuarial firms, other businesses, law firms and claimants' committees in bankruptcy. I have participated as an expert on asbestos liabilities in over 20 bankruptcies of asbestos defendants.

I have studied asbestos litigation for over twenty years as a founding member of the RAND Corporation's Institute for Civil Justice. I have published peer-reviewed scholarly articles on mass torts, asbestos litigation, claims facilities for paying asbestos and other mass tort claims, workers compensation and how medical and legal issues determine the values of asbestos bodily injury claims and other subjects related to asbestos litigation. I have taught courses on mass torts at UCLA Law School and the RAND Graduate Institute. I am a lawyer, a graduate of Harvard Law School and have a doctorate in social psychology from UCLA. I have been recognized by courts as an expert on all areas that I

address in this letter and all of my comments come from scholarship and work as an expert on asbestos litigation.

Asbestos Injuries and Compensation

The burdens and costs of asbestos litigation result from the large number of persons exposed, injured and killed by their workplace exposures to asbestos. Twenty five million workers had been exposed to asbestos in primary asbestos industries by 1980. Millions more were exposed in other industries and in more recent years. Diseases caused by these exposures have created a public health catastrophe. By now 300,000 workers have died because of their asbestos exposures. Almost as many more will die over the next three or four decades. Millions more exposed workers have or will develop asbestosis or pleural disease.

Others have described these diseases. My expertise includes collection and analysis of data on the "values" of these diseases, how much money is paid to compensate victims of asbestos related diseases.

The general values of asbestos diseases are well understood. There is enormous experience about this. Hundreds of thousands of claims have been settled by many defendants creating histories of claim values that are understood by professionals who work with these cases.

Victims of asbestos disease receive payment from many different defendants. There is no central database from which we can total the average payments for each disease across every defendant, so we cannot simply count up the total of recent settlement amounts across all settling defendants. But I have reviewed asbestos claims databases for many asbestos defendants, mostly databases provided in bankruptcy proceedings of a company's settlements prior to its bankruptcy, and can add up that portion of their compensation that victims receive from these defendants.

These databases show that the average recent settlements paid by eight defendants to mesothelioma victims add up to \$900,000. This \$900,000 paid by eight defendants would grow substantially if we added the rest of the money that victims received from the many other defendants. For this reason, the best evidence is that mesothelioma claimants now receive total settlements ranging from \$2 million to \$3 million and that lung cancer victims now receive more than \$1 million, ranges reported by plaintiffs lawyers throughout the country.

Future Asbestos Claims

To date asbestos defendants and their insurers have not been asked to pay the full costs of asbestos injuries and death, because most injured workers have not made claims. Among the 300,000 deaths to date from asbestos related cancers, fewer than a third have filed law suits.

This is now changing. The number of cancer claims is up sharply. In recent years the number of claims for each asbestos disease approaches published epidemiological estimates of the number of asbestos related deaths for each cancer.

While we must anticipate a high level of future claim filings, we cannot be certain of the number of future asbestos claims either within the tort litigation system as it now exists or within a national fund of the proposed act.

First, forecasting is inherently uncertain. Forecasts of future claims for specific defendants have been uncertain for many reasons. For example, eight forecasts for the Manville Trust in 2001 had almost a 4 to 1 range from a low of 747,726 to a high of 2,684,719 claims from 2001 to 2049. Such a range in forecasts is not unusual. Further, this uncertainty is not symmetrical: forecasts are more likely to be too low rather than too high. Past forecasts have been consistently wrong, consistently too low.

Second, the task here is more daunting. We have no data about the total number of asbestos law suits that have been filed against any and all defendants. All of our data is about the claims against specific defendants. There is no central data repository across defendants. Consequently, we lack the data required by standard forecasting methods, all of which look to past claim filings in order to forecast future filings.

Third, the number of claims that will qualify under each category of the Asbestos Injury Claims Resolution Procedures will depend greatly upon how those procedures are administered and who administers them. The Manville procedures are administered by trustees who have fiduciary duties to both present and future claimants. The administrators of the Claims Resolution Procedures under the proposed act will have different duties.

The Proposed Act Shifts Uncertainties and Risks to Victims

Because the National Fund would limit the amount of contributions by asbestos defendants and their insurers, it shifts risks and uncertainties to victims of asbestos diseases. Presently in our legal system when an insolvent defendant becomes unable to pay asbestos victims or when liabilities are greater than anticipated, solvent and responsible defendants continue to compensate victims. In contrast, under the proposed act victims bear the risks that insolvent defendants will not pay their contributions and that liabilities will exceed the \$108 billion fund limits.

These risks to victims are significant. While ultimate compensation under the proposed act is uncertain, it is likely that \$108 billion would not be sufficient to pay all claims at promised levels.

To examine these risks I estimated how much money would be needed to provide compensation under the act using varying assumptions

about the number of future claims and about the categories for which claimants may qualify. I assumed 294,800 pending claims, which I understand is the assumption used both by the AFL-CIO and the ASG, and that pending claims would have the same disease distributions as claims pending in current bankruptcies. I used two alternative assumptions of the number of future claims: 1,903,331 and 2,439,507 which differed only in the number of asbestosis and pleural disease claims. These assumptions are consistent with forecasts in current asbestos bankruptcy cases. To estimate how many victims would qualify for each category in the proposed act, I used a summary of the experiences of present asbestos trusts which produces an assumption of relatively "higher injury severity" for asbestosis and pleural disease claims and an alternative assumption of relatively "lower injury severity" for those claims.

I assumed that, contrary to the currently proposed legislation, future payments would be adjusted for inflation so that all claimants receive the same real value of compensation, using a future inflation rate of 2.5 percent from the Congressional Budget Office. The fund is proposed to compensate victims whose claims will arise over the next 50 years. Funds intended for such long periods must be adjusted for future inflation if they are to make meaningful and equitable payments to future claimants. The Fund's compensation obligation would be reduced by the present omission of any provision for future inflation, but even without an inflation adjustment, the fund could not pay all of its obligations with \$108 billion.

The table below shows the total compensation that would be needed for pending and future claims under these various assumptions.

TOTAL PROPOSED COMPENSATION
UNDER ALTERNATIVE ASSUMPTIONS
(Billions of Dollars)

Number of Injury Estimated
Futures Severity Compensation

1,903,331 Higher \$215
1,903,331 Lower 146

2,439,507 Higher \$254
2,439,507 Lower 163

This analysis indicates that under any set of these assumptions the total amount of money needed to compensate asbestos victims under the proposed act would exceed \$108 billion. Under any set of these assumptions, some future claimants would go without compensation. The Fund could become insolvent as early as year 2010 when it would have received claims whose values exceed all of the \$108 billion that the Fund could ever receive. Because the proposed act has no provision for reserving money for future

claimants, victims who suffer an asbestos disease and file claims as early as 2010 may expect to receive no compensation. Victims who had filed claims before them would have already consumed all of the money to be received by the Fund.

To reiterate, these analyses are estimates based on plausible assumptions about pending and future claims under the proposed act. I expect that the Fund's obligations would greatly exceed \$108 billion, but I cannot say with certainty what will happen -- no one can provide certainty. But at a minimum the analyses demonstrate that there are real risks that a proposed \$108 billion fund would be inadequate and that future claimants would be denied both compensation under the act and the opportunity to pursue legal claims for their injuries. Asbestos victims do not face such a risk now. It is a risk created by the proposed act.

Delays in Payments

There is no uncertainty, however, about the fact that claimants will have to wait many years to receive compensation under the proposed act, well beyond the three years that has been suggested. To examine how the Fund would operate, I ran an analysis of how long claimants would have to wait for payment if we assumed that the \$108 billion would be sufficient to pay all compensation. The analysis shows that, assuming an ultimate liability of \$108 billion, those asbestos victims who already have claims pending today will not receive full compensation until year 2011 or 2012, eight or nine years in the future.

For this analysis I assumed that the proposed Asbestos Injury Claims Resolution Fund would be operational and initially funded sometime in year 2005. This is optimistic. Both the claims process and the funding mechanisms proposed in the act are far more demanding than those of other, previous mass tort claims processes which typically have taken years to start.

Then when it begins the Resolution Fund will face a stark imbalance between its then present obligations for compensation and the money available to meet those obligations. The Fund's liabilities would be front loaded while its income would be paid evenly over at least twenty two years. With its formation, the Fund will be faced with pending claims which both the AFL-CIO and the ASG have estimated at 294,800 in number. (I expect that well over 294,800 persons have pending asbestos claims, but I use this estimate to provide continuity with work done by others.) The Fund will also face accrued claims that would have been filed in 2003 and 2004 as well as claims arising in 2005. Even assuming that these claims would come in and be allowed in amounts that would produce only \$108 billion in total liabilities for the Fund, about \$30 billion of that liability would arise in 2005 from pending claims and claims forecasted to be filed between 2003 and 2005. The Fund would be able to fully pay these claims that arrive in 2005 only when it had collected its first five or six payments of \$5 billion per year, the maximum available under the proposed act. Note that conversion of the assets of existing asbestos trusts

would not relieve the Fund's initial illiquidity. The estimated \$4 billion in assets of those trusts would be small in comparison to the Fund's early liabilities and, in any event, many of the assets of existing trusts are themselves illiquid.

More likely the Fund's total liabilities would substantially exceed \$108 billion, its obligations for claims arriving in year 2005 would exceed \$30 billion and victims who already have claims or whose claims arise by 2005 would have to wait beyond year 2011 to be paid in full.

Victims who file after the Fund's first year would face real threats of even longer delays. During the minimum five or six years while the Fund is collecting the annual payments that it will need to pay the claims that arose in 2005, the Fund will continue to receive additional claims, claims that the Fund could not pay until it had paid those claims that had arrived in 2005. So by year 2010 or 2011 when the Fund finally has fully paid its first year's claims, it will then face a new backlog of five or six years of filed, unpaid claims. Indeed under some of the scenarios discussed above, using likely assumptions about the numbers and categories of claims, victims who file claims in 2010 or 2011 would have to wait to be fully paid until the Fund has received all of its payments in year 2026. Victims filing later would never be paid.

Summary

While the creation of a national fund for asbestos victims offers an appealing alternative to the burdens of current litigation, the risks of underfunding and certainty of delay seem to make the current proposal unworkable. Total compensation under the proposal will almost certainly exceed the \$108 billion proposed funding level, most likely by a great amount. While total compensation is uncertain, asbestos victims alone would bear the risk that actual liabilities would exceed \$108 billion.

More specifically future asbestos claimants would bear this risk. The Fund could pay victims who have already filed claims and those whose claims arise in the next few years. But exposed workers who develop asbestos disease more than a few years in the future would have no assurance of payment. Thus the proposed act would abrogate the protections of Bankruptcy Code Section 524(g). The proposed act would also turn on its head the assurances of resolved bankruptcies and the obligations of existing asbestos trust to treat future claimants equivalently to present claimants. The Fund would take money that trusts have set aside for future claimants, pay that money to pending claimants and provide future claimants with no assurance that they would ever be paid.

The present proposal's failure to provide for inflation adjustments further disadvantages future victims. If payments are not adjusted for inflation, a future claimant would receive 22 percent less than current claimants if his or her disease arises

ten years in the future, 39 percent less if her or his disease arises 20 years in the future.

Both pending and future claimants would bear extended delays. Asbestos victims who have already filed claims would not be fully paid until years 2010 or 2011 under any circumstances. Victims who file claims within the first few years of the Fund would have similar delays. Victims who file later run the risk of far longer delays, if they receive compensation at all.

Finally, the Manville Trust's maximum values do not represent, and were not intended to represent, the full value of asbestos disease claims across all defendants. These maximum values were set to provide room for individual negotiations of claims that do not accept the Manville Trust's scheduled values, and were simply ratios of maxima used in the earlier Manville Trust distribution procedures. In fact, claimants who were exposed predominantly through Manville products and who must look only to Manville for their entire compensation can and do have their claims valued well in excess of the Manville maxima. I know of these matters both because I helped draft the Manville Trust distribution procedures and because I serve on the Manville extraordinary claims panel that decides on these matters. Also, because Manville has not participated in litigation for over 20 years, the notion of a Manville "share" now has little meaning. When Manville was participating in litigation, Earl Parker, Manville's general counsel, estimated that Manville represented about 25 percent of the liability of all asbestos defendants. Today, because the liability of other defendants has increased with Manville's absence from litigation, Manville's "share" would be less than 15 percent.

Thank you for the opportunity to comment on the proposed "Fairness in Asbestos Injury Resolution Act of 2003". I would be pleased to provide any further information that would help your committee in its consideration of the proposed act.

Mark A. Peterson