

Testimony of  
**Mr. Craig Berrington**

January 11, 2005

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY

HEARING ON "THE FAIRNESS IN ASBESTOS INJURY RESOLUTION ACT"

January 11, 2005

Testimony of  
Craig A. Berrington, Senior Vice President and General Counsel,  
American Insurance Association Statement

Chairman Specter, Ranking Member Leahy, and members of the Committee, I am appearing today on behalf of the American Insurance Association (AIA), the National Association of Mutual Insurance Companies (NAMIC), the Property Casualty Insurers Association of America (PCI), and the Reinsurance Association of America (RAA). Our member insurance companies write all lines of property-casualty insurance across the U.S. As major stakeholders in this process, we very much appreciate the opportunity to testify here today.

**The Problem**

There can be no question that the asbestos litigation system is in deep crisis. Courts are being overwhelmed with claims filed on behalf of individuals who are not sick from asbestos. The number of claims is rising despite the fact that most workplace asbestos exposure ended in the early 1970s. More than 730,000 asbestos claims have been filed to date. Over 100,000 new claimants filed in 2003 alone - the most in a single year.

And the litigation net continues to spread ever wider. Claims have been filed against more than 8,400 defendants, up from 6,000 defendants in 2001. Because many of the asbestos manufacturers are already bankrupt, claims are expanding rapidly into non-traditional industries; such claims rose 107 percent from 1999 to 2000, and 71 percent from 2000 to 2001. Today, at least one company in virtually every US industry has been targeted for litigation.

The ongoing crisis is not being caused by people who are truly sick as the result of asbestos exposure. Professor Lester Brickman of the Benjamin N. Cardozo School of Law at Yeshiva University has commented on the "disconnect between medical science and our tort and bankruptcy systems, noting that "80% - 90% of asbestos claimants have no asbestos-related illness recognized by medical science." ("Asbestos Litigation," Center for Legal Policy, Manhattan Institute, March 10, 2004).

The crisis adversely affects not only the stakeholders before you today, but the entire U.S. economy. At least 74 companies have gone bankrupt as a direct result of asbestos liabilities. The number of bankruptcies has increased in recent years; the latest filing came this past week.

The crisis also is victimizing many thousands of hard-working Americans, whose jobs, pensions, and retirement funds are in jeopardy because of the costs of the ever-spreading litigation. According to one estimate, by 2003, as many as 60,000 jobs had been lost to these bankruptcies. In addition, workers at firms bankrupted by asbestos litigation have watched helplessly as the value of their 401(k)s drop by an average of 25 percent.

As the litigation environment has worsened, insurance industry asbestos losses have accelerated. This is despite the fact that, by and large, insurance contracts have not covered asbestos claims since the mid-1980's, and our connection to asbestos diminishes with each passing year.

We and other stakeholders have worked for several years with senators on both sides of the political aisle to enact a workable, politically feasible solution to our national asbestos litigation nightmare. We firmly believe that Congress can and must finish the job to resolve this critical public policy challenge. While we have not reached consensus on the details of such a legislative proposal, it seems that certain underlying aspects of meaningful reform are inarguable.

For example, we need a fair solution - one that is fair to both victims of asbestos disease and to those of us paying compensation to claimants. It is clear that we need a federal solution, and, Chairman Specter, we truly appreciate the thoughtfulness and leadership you have shown, as well as the considerable time and effort you, Judge Becker and your staff have dedicated to dealing with this problem. Senator Leahy, we also appreciate your long-standing commitment to resolving this crisis. And we appreciate the leadership of Senator Frist and Senator Hatch on this issue.

Insurers want to be part of developing a fair, workable federal solution. While we have had some success in obtaining reform at the state level in the last year, Congress must resolve this problem on a federal level to bring uniformity and certainty across the board.

In fact, the Supreme Court has on several occasions called on Congress to resolve the asbestos litigation crisis. To date, however, Congress has been unable to realize this goal. Just last week, President Bush once again directed national public attention to the asbestos litigation crisis. He called for a nationwide solution that meets these three principles: (1) "funds should be concentrated on those who are sick, not lawyers or claimants who are not ill;" (2) the process for delivering justice to deserving victims should be swift; and (3) the system must provide certainty. He urged Congress to pass a national solution this year.

As you know, throughout 2002, our industry explored a "medical criteria" approach to asbestos litigation reform. This was a federal solution that went directly to the heart of one of the principal problems with the current system. By creating a clear and objective standard for claimants to meet before proceeding in court, the plan would have allowed those who are truly sick from asbestos to bring suit, while holding off the claims of those who are not sick until such time as they actually do manifest an asbestos-induced illness. This would have benefited the real victims of asbestos - those who are sick - by providing a swifter way through a court system that would

not be overloaded with cases from unimpaired claimants. It also would have helped to preserve the limited amount of asbestos compensation for claimants who may not file for another decade or even longer. Our approach also included venue and consolidation reform, and other provisions along the lines of H.R. 1586 introduced by Congressman Chris Cannon in the last Congress.

However, the Judiciary Committee decided to pursue a trust fund approach in early 2003. Since then, we have been working with the members of this committee and with other stakeholders to try to create a well-constructed trust fund that would be equitable for all parties.

I would like to state that insurers would support any construct that would provide a truly effective, long-range solution to the staggering problems we are confronting. Whether the specific legislative vehicle turns out to be a trust fund or a medical criteria bill along the lines of H.R. 1586, or something else, it is imperative that Congress act now.

#### The "FAIR Act"

The hearing today is focused on the "Fairness in Asbestos Injury Resolution Act" (FAIR), which comprises a trust fund, so let me now turn to what we believe are the elements that are critical to making a trust fund effective and one that our industry could support.

? The solution must be national and utilize federal tools.

In addition to my earlier comments on the need for a federal solution, I would like to add that a federal solution means more than just a congressionally mandated solution. Several legislative drafts that we have seen retain the risk of reversion of claims to state courts under specific scenarios. The last thing that a national trust fund should do is to allow asbestos litigation to continue after the bill is signed into law or to be structured in a way that ever allows a return to the litigation system that caused the problem that we are all working so hard to solve.

? The funding must be fair - what insurers pay must be appropriate and equitable in total, as well as with respect to how payments are scheduled.

The \$46 billion obligation incorporated in S. 2290 represents the maximum, not a floor, and does not take into account the payments that have been made through the litigation and bankruptcy systems over the past year. The most recent draft contains no aggregate payment levels, making it impossible to determine the cost.

The fairness of the payment schedule is another critical issue. Insurers have expressed concerns about the acceleration of insurer payments into the fund. We understand that the insurance industry is being called upon to provide the majority of the up-front funding. Acceleration of insurer payments beyond reasonable levels would leave the industry in the position of having paid significant up-front funding, effectively increasing insurer funding obligations. This is exacerbated if the legislation contemplates a return to the litigation system at some point, thus leaving insurers in the position of having paid tens of billions into the trust fund, while still facing the prospect of decades of additional litigation should the trust fund go out of existence. Moreover, some of the medical criteria and awards structure create real concerns that the fund is "made to fail."

? There must be finality and certainty - the fund must be the exclusive remedy for resolving asbestos claims from the day the bill goes into effect - and there should be no leakage back into the tort system.

From the beginning of this process, insurers have been concerned that the fund should provide the exclusive remedy for resolution of asbestos claims. Absent inclusion of all asbestos claims in the fund, there is no real finality for the funding participants, since they could find themselves paying substantial sums into the fund and also paying in the tort system for claims that are permitted to "leak" outside of the fund.

There are a number of ways to avoid leakage from the fund. With respect to start-up, the bill should clearly terminate the litigation system when the bill is signed into law and then provide for the timely implementation of the trust fund. The bill should not allow the possibility of the litigation system being reasserted before the trust fund even gets going. As for sunset provisions, it is troubling for a bill to assume trust fund failure. The removal of a safe harbor period for trust fund operations is a move in the wrong direction. In this connection, the risk of sunset is exacerbated by increased claims values, particularly with respect to Level VII smokers and ex-smokers. In addition, it should be wholly unacceptable from a public policy standpoint to craft as a fallback, if one is necessary, a return to the same litigation system that has created the problem in the first place.

A trust fund should not be designed with failure assumed, yet this is implicit in the assumption that a return to the tort system is inevitable. The reason for that assumption is that many believe that Level VII cases will swamp the fund. It is imperative to remember that Level VII is the category for claims where the claimant has smoked, has lung cancer and, while exposed to asbestos, has never developed any underlying asbestos disease. A return to the tort system for these claims - or because of these claims - is a function of medical criteria that will place on the fund a huge financial burden of compensating lung cancer generally (even though this disease is caused overwhelmingly by smoking), rather than compensating lung cancer that was caused by asbestos exposure. If the fund is to compensate those whose illness is much more likely to be the result of smoking, then at the very least the award levels should be circumscribed accordingly, so those awards in the aggregate do not threaten the fund's existence.

## Conclusion

For us to be able to support a trust fund, it must meet these basic criteria. If the trust fund remedy proves elusive, another solution should and must be considered and advanced.

The insurance industry is committed to remaining at the table and to continuing our joint work toward a true and much-needed resolution to our nation's asbestos litigation crisis - whether through a properly constructed trust fund or medical criteria bill. The continuing impact of this crisis on the victims who are sick and on the economy calls for a solution - now.

Thank you very much for the opportunity to present our industry's views here today.