

Testimony of
Governor John Engler

President & CEO
National Association of Manufacturers
January 11, 2005

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On behalf of The Asbestos Alliance
Before the
Committee on the Judiciary
United States Senate
On
Draft Asbestos Legislation

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Executive Summary

I am testifying on behalf of the National Association of Manufacturers' Asbestos Alliance, a broad based coalition of companies and associations committed to seeking a fair resolution of the asbestos litigation crisis. Most of the members of the Alliance are NAM members. I am also speaking out of a great concern for victims, both medical victims and workers whose jobs and retirement savings have been affected. For the sake of asbestos victims and their families, the nation's workers and the overall economy, Congress must build on last year's efforts and pass fair and reasonable legislation.

We strongly support the trust fund approach. Removing claims from the tort system is the only way to ensure that victims receive fair and prompt compensation, stop the bankruptcies, and eliminate the fraud and uncertainty for both victims and defendant companies. While we are continuing our review of the draft bill, we do have some general comments:

? The draft does not address the central issue of funding. The maximum size of the fund must be \$140 billion, as agreed to last fall. Also, the funding schedule, especially in the first five years, must be reasonable.

? An asbestos bill must completely shut down the broken asbestos tort system. Provisions in the draft that call for a return to the tort system if certain deadlines are not met as the Administrator sets up the fund are unacceptable and could increase the cost of the program by tens of billions of dollars.

? This must not be a smokers' compensation bill. Claim values for lung cancer claimants who are current or former smokers should reflect those claimants' smoking history. This is essential to protect the fund against an avalanche of smokers' claims that have little to do with asbestos.

? The bill must contain stronger provisions to lock the backdoor so trial lawyers don't just convert tens of thousands of unimpaired asbestos claims into silica claims.

? We are deeply concerned about the medical screening program included in the discussion draft.

We will continue reviewing the draft and provide additional feedback shortly. We look forward to working with Senator Specter, members of the committee and other Senators to pass a bill that takes care of victims, stops the injustices of the current scandal-ridden system, provides certainty and finality to defendant companies and boosts the economy.

Introduction

Senator Specter, Sen. Leahy, and members of the Judiciary Committee: Thank you for the opportunity to testify before this committee on the need for asbestos liability reform. Today I speak on behalf of the National Association of Manufacturers' Asbestos Alliance, a broad based coalition of companies and associations committed to seeking a fair resolution of the asbestos litigation crisis. Most of the members of the Alliance are NAM members. I am also speaking out of a great concern for victims, both medical victims and workers whose jobs and retirement savings have been affected.

For two decades, Congress has struggled to find a legislative solution to the asbestos litigation crisis. Due to the extraordinary and persistent efforts of you, Senator Hatch, Senator Frist, Senator Daschle, members of this committee, and other Senators on both sides of the aisle, the last Congress made tremendous progress toward finally passing a bill. But that heroic effort fell short. For the sake of asbestos victims and their families, the nation's workers and the overall economy, Congress must not fail again.

As we begin the discussion on the specifics of legislation that will finally resolve the asbestos litigation mess once and for all, I think it is important to remember why we're here and why, despite the many obstacles in its path, the 109th Congress must succeed.

First and foremost, this is about asbestos victims and their families who have been victimized twice, first by a disease and second by a broken system. The heart of the problem is that too many claims are filed on behalf of people who are not sick and may never become ill from asbestos. These questionable claims force real victims to wait longer and longer for what is often reduced compensation. We cannot continue with a system that is hurting those it should be helping the most. As Supreme Court Justice Anthony Kennedy noted two years ago, "This Court has recognized the danger that no compensation will be available for those with severe injuries caused by asbestos...It is only a matter of time before inability to pay for real illness comes to pass."

Mary Lou Keener knows firsthand what Justice Kennedy was talking about. Her father served our country during World War II. On Veteran's Day of 2001, he died a painful death from mesothelioma, a fatal disease caused by asbestos exposure. His exposure to asbestos came during his naval service. Since his death, Mary Lou's mother's legal claims have languished in the courts and she has received little compensation. If and when she does receive compensation, her attorneys will take almost half of any award. Under a trust fund bill, this family and others like

them would receive fair, prompt and full compensation. And any attorneys' fees would be limited.

No one suffers from our broken litigation system more than asbestos victims and their families. But the unfairness of the system is having a broader impact on our workers, our communities and the nation's economy. With 8,400 defendants, the economic repercussions are absolutely incredible. As governor of Michigan, I saw firsthand the economic impact of runaway asbestos litigation on many of our fine companies.

Since the start of the litigation, an astounding 730,000 asbestos claims have been filed. A large percentage of those claims were filed on behalf of people who are not sick and may never become ill. This wave of questionable asbestos claims has forced more than 70 companies into bankruptcy, half of them since 2000. According to Nobel Prize winning economist Joseph Stiglitz, about 60,000 jobs, many in the manufacturing sector have been permanently lost due to these bankruptcies. A lot of those were union jobs. That is why a number of major labor unions sent letters to Senators Frist and Daschle last year urging them to reach an agreement on legislation. This includes the United Auto Workers, International Union of Operating Engineers, United Brotherhood of Carpenters and Joiners of America, International Union of Glass Molders, Pottery, Plastics and Allied Workers, Seafarers International Union and others.

Dr. Stiglitz reported that due to the bankruptcies, workers and their families have lost \$200 million in wages alone. But their job and income losses tell only part of the story. Communities are also affected as laid-off workers tighten spending or even move away in search of new jobs and bankrupt companies cut operations and reduce purchases. This has a significant impact on a wide range of local businesses. In fact, it is estimated that for every 10 jobs lost to an asbestos bankruptcy, a community will lose as many as 8 more jobs.

Bankruptcies also decimate workers' retirement savings. Dr. Stiglitz estimated that on average, workers at bankrupt companies experienced a 25% decrease in the value of their 401(k)s. Let me give you a real life story of what this means. For 15 years, Drew Anders worked for a company and diligently contributed to his 401(k). That firm is an asbestos defendant and eventually filed for bankruptcy protection. Mr. Anders' savings, which at one time totaled more than \$50,000 in company stock, are now worth about \$1,500. He can't count on that nest egg when he retires. There are thousands more stories out there like Drew Anders'.

These bankruptcies are a huge problem, but the asbestos litigation mess is also hurting thousands of other companies. This is exerting a tremendous drag on our economy. According to a study by Navigant Consulting, affected businesses pay an "asbestos litigation penalty" when raising capital, which increases the costs of borrowing. In some instances, it is impossible for these companies to raise capital to fund productive investments. Due to this penalty, Navigant estimated that failure to enact asbestos legislation could ultimately reduce economic growth by \$2.4 billion per year, costing more than 30,000 jobs annually.

It is also important to note that many companies dragged into this litigation never even made or used asbestos. And they are not all large companies. Last week President Bush visited my home state and came out strongly for a legislative solution. Bruce McFee, the owner of a small business in Michigan that manufactures air compressors, joined the President. Mr. McFee, who

employs about 100 workers, has been dragged into 53 lawsuits. Last Friday, he told the President, "We're being sued for things that we never made and we're being sued for things we never did." This is a perfect example of the madness of the broken asbestos litigation system.

So the record is clear. For the sake of the victims, for the sake of America's workers, for the sake of the economy, this Congress must pass fair and reasonable asbestos legislation that ensures that asbestos victims receive prompt and fair compensation, stops the bankruptcies and eliminates the fraud and uncertainty for both victims and defendant companies inherent in the current system.

We strongly support the trust fund approach. Removing claims from the court system is the only way to solve all of these problems. It is also the only way to eliminate the enormous transaction costs. According to RAND, asbestos victims receive only 43 cents of every dollar spent on asbestos litigation, with the remainder going to transaction costs, such as legal fees. That is a grave injustice. The money must go to victims, not lawyers.

The draft bill represents a prodigious effort by Judge Becker and others over a period of 18 months to address many complex questions and to frame the issues for the committee. We have not yet absorbed all of the details in the new draft, but we do have some general comments.

First, the discussion draft does not address a central issue - funding. The maximum size of the national asbestos compensation fund must be \$140 billion, the figure on which then-Minority Leader Daschle and Majority Leader Frist agreed last fall. The business community supported even this figure with considerable reluctance and at the cost of some support in our own ranks. We believe that \$140 billion is more than enough to pay all qualifying claims at fair values. In fact, we believe that a bill funded at this level must include potential funding holidays or step-downs when the trust proves overfunded.

Equally importantly, the funding schedule must be reasonable. The business community supports Senator Frist's proposals, which would provide approximately \$40 billion for the program over the first 5 years. With the borrowing capacity built into the bill, the Administrator would have access to approximately \$60 billion to pay the claims that are received at the "front end." That level will provide immediate relief to those victims who are the most sick and in the greatest need of having their claims resolved. For comparison, the RAND Institute puts the total cost of asbestos litigation in the tort system from the early 1970s through 2002, a period of over 30 years, at \$70 billion. The funding schedule proposed by Senator Frist is reasonable, and, frankly, at the outer limit of what the business community can support.

Second, and an essential component of this legislation, an asbestos reform bill must completely shut down the broken asbestos tort system. The business community cannot agree to fund the administrative program at the levels that have been discussed and at the same time risk exposure to continued litigation in the tort system. We understand concerns that have been raised regarding the potential for delays in start-up and possible unfairness in terminating litigation that is already at an advanced stage. Senator Frist proposed in July to accelerate the implementation and funding of the program, and we think that is the right approach. We are pleased to see that the discussion draft adopts most of Senator Frist's suggestions.

But the discussion draft creates an extremely serious problem in attempting to address this small residual risk. Even with his or her best efforts, the Administrator may be set up for failure. The draft bill arranges a multibillion dollar bet. If the Administrator implements the program on time, then fine, all goes as planned. Otherwise, all pending cases (and even many new cases) will be permanently grandfathered and will proceed in the tort system, increasing the total cost of the program by tens of billions of dollars. This is true even if the Administrator misses the deadline by a single day. Frankly, American industry cannot and will not play that game. The stakes are just too high.

Third, the bill must not be a smokers' compensation bill. Claims values for lung cancer claimants who are current or former smokers should reflect those claimants' smoking history. This is not only fair but essential to protect the fund against an avalanche of smokers' claims that have little to do with asbestos. We believe that the discussion draft's claims values for lung cancer in the smoker and former smoker categories generally reflect this principle, although we would prefer Senator Frist's values for Level VII cases.

Fourth, we believe that the bill must contain stronger provisions to lock the backdoor so trial lawyers don't just convert tens of thousands of unimpaired asbestos claims into silica claims. If that is allowed to happen, we will see the continuation of the asbestos litigation scandal under a new name. I say "under a new name" rather than "under new management," because the new silica litigation is being brought by the same lawyers who have created the asbestos scandal. As the Wall Street Journal reported, "asbestos attorneys are using the same legal machinery" to generate silica claims. One attorney was even brazen enough to tell the Journal, "why reinvent the wheel?" It is well-documented that this legal machinery includes mass screenings to recruit unimpaired claimants, fraudulent x-ray reports, and shameless forum shopping. When asbestos legislation first began moving forward a few years ago, silica claims skyrocketed. One company reports its silica claims tripled between 2002 and the first half of 2003 and increased 164 times over 1997. Defendants are concerned that millions of dollars of contributions to the asbestos compensation fund will merely result in the substitution of "silica" for "asbestos" in thousands of complaints. We cannot allow silica to be turned into the next asbestos.

Make no mistake: Pure silica cases that involve impairment not related in any way to asbestos are not and should not be covered by the bill. But, we must prevent entrepreneurial lawyers from evading the bill by relabeling true asbestos claims as silica claims.

Finally, the business community is deeply concerned about the medical screening program included in the discussion draft. Under the bill, people who have been exposed to asbestos, but have no indication of any asbestos disease, would receive medical monitoring that is similar, if less frequent, than that received by Level I claimants. These people do not have any claims in court, and they have no right to compensation under state or federal law. Every penny that goes to this program is taken from the money available to compensate the sick. Without debating whether medical screening is a good or bad thing as such, it has no place whatever in a bill to substitute a privately funded administrative compensation solution for a ruinous and failed tort system.

Conclusion

We will continue reviewing the draft and provide additional feedback shortly. Your leadership on this issue and dedication to passing legislation are greatly appreciated. We look forward to working closely with you, members of the committee and other Senators to pass a bill that takes care of victims, stops the injustices of the current scandal-ridden system, provides certainty and finality to defendant companies and boosts the economy. Thank you.

John M. Engler is president of the National Association of Manufacturers (NAM), the largest industry trade group in America, representing small and large manufacturers in every industrial sector and in all 50 states. Engler became NAM president on Oct. 1, 2004.

As NAM president, Engler is committed to educating the public and policymakers that manufacturing is critical to our future as a nation. Under his leadership, the NAM Campaign for Growth and Manufacturing Renewal will advocate policies that seek to level the international playing field and reduce the cost of doing business at home, with special attention to high health care and litigation costs. The Campaign will continue to emphasize that manufacturers are driving innovation and productivity growth in the economy, providing the bulk of U.S. exports and offering rewarding careers for highly-skilled workers.

Engler has observed that excellent U.S. jobs often go unfilled because too many young people do not have the basic math, science and communications skills needed to succeed in modern manufacturing. He sees the looming shortage of skilled manufacturing employees as a real and growing threat to American competitiveness in the 21st century's high-tech global economy. Engler believes better educating the next generation of manufacturing workers is imperative. He is adamant that we must make innovation and quality as central to our educational system as it is to U.S. manufacturing.

The former three-term Michigan Governor brings to the NAM a lifelong commitment to reducing the size of government as a means to boosting economic growth and job creation. Engler insists that lower taxes on businesses and individuals, and reasonable and scientifically-based regulation, will create more wealth, improve standards of living for all income groups and best sustain America's vital middle class.

As Governor, Engler inherited a \$1.8 billion state budget deficit and turned it into a \$1.2 billion surplus. He signed 32 tax cuts into law -- saving Michigan taxpayers some \$32 billion - and helped create more than 800,000 new jobs during his tenure, taking Michigan's unemployment rate to its lowest level ever. Engler's environmental record in Michigan included creation of the Department of Environmental Quality, strengthening the Department of Natural Resources and elevating to cabinet level status the Office of the Great Lakes.

The top priority of Engler's administration was improving education, with a focus on high standards, more accountability and strengthened local control to help student test scores climb to record highs. During his tenure, more than 180 charter schools were set up and every Michigan child received a foundation grant to the school of his or her choice.

Prior to becoming Michigan's 46th Governor in 1991, Engler had served for 20 years in the State legislature, including seven years as State Senate Majority Leader. He was the youngest person ever elected to the Michigan State House of Representatives.

Born in Mt. Pleasant, Michigan, in 1948, Engler graduated from Michigan State University and later earned a law degree from Thomas M. Cooley Law School in Lansing. He serves on the boards of Northwest Airlines, Universal Forest Products and is a past chairman of the National Governors' Association. He and his wife Michelle are parents of triplet daughters born in 1994 -- Margaret, Hannah and Madeleine.