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Toward Greater Judicial Leadership on Asbestos Litigation

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TOWARD GREATER JUDICIAL LEADERSHIP ON ASBESTOS LITIGATION

By Steven Hantler, Assistant General Counsel, DaimlerChrysler.

This speech was delivered to the Alabama Lawyers Chapter of The Federalist Society, and as part of The Federalist Society's National Lawyers Convention in 2002.

It is always a privilege and an honor to appear before the Federalist Society. Justice Clarence Thomas once said that the debates of this Society spark "a dialogue between lawyers and judges, and even at times amongst judges themselves."[1] It is therefore fitting that the remarks that follow are directed to our Nation's state and federal judges.

There is a need—as never before—for judges to reflect, talk and lead in cleaning up the problem of asbestos litigation, the biggest single tort crisis in American history. I spotlight the role of the courts because the Congress has refused to act. Several years ago, the United States Supreme Court lamented that "[t]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."[2] Usually, when the Supreme Court speaks, Washington, D.C. listens. Three times, however, the nation's highest court has urgently pleaded for Congress to stem the flood of asbestos cases-each time, to no avail.[3]

Under our current, flawed system, healthy people are allowed to snatch compensation that rightfully belongs to the sick. America's stockholders and employees are threatened by bankrupting verdicts. America's leading corporations are treated as pinatas by irresponsible juries in a handful of notorious venues. And America's courts are buried under an avalanche of asbestos litigation.

While Congress refuses to act, however, some judges are assuming leadership and a growing number of their colleagues are heeding the call. For the sake of a still fragile national economic recovery, for the sake of injured plaintiffs and innocent defendants, the time has come for judges to take the lead.

The time has come for judges to take control of asbestos lawsuits, and impose standards of peer-reviewed science to medical claims. Judges

need to inform juries when other defendants settle out of a case—often the best evidence of which party was the most responsible; juries need to hear all of the facts in order to avoid gross over-compensation.

Judicial leadership in asbestos litigation has become a matter of urgent national importance. To explain why, allow me to briefly review how we got here and the magnitude of this crisis. I will then outline some of the roles that courts can play in working toward a just and equitable solution.

I. The Three Catastrophes of Asbestos Litigation

Anyone old enough to remember the 1970s recalls the appearance of strange, white-suited workers with respirators removing asbestos from one building after another. Asbestos seemed especially insidious because it was all around us—in our walls and ceilings, in our schools and factories. It was a secret thing, an unseen menace, yet it was everywhere.

We now know that in many instances it was safer to leave inert asbestos alone than to disturb it. However, time has only confirmed the link between asbestos and lung disease. This link was firmly established when inordinate numbers of shipyard workers who had installed asbestos-insulated pipes into U.S. warships during the Second World War contracted lung disease. Other workers in industries with high exposures to asbestos also showed signs of lung disease. Some suffered from severe asbestosis, a stiffening of lung tissue that can overwork the heart. Some suffered from a far worse condition, mesothelioma—a deadly malignancy.

The injury was real. The responsibility was undeniable. It is for cases like these that America's civil justice system exists. Trusts were set up and formulas devised to get compensation to injured people as expeditiously as possible.

What should have been a straightforward matter of justice and compensation, however, was complicated by inventive legal strategies driven more by the profit motive than any quest for justice. With the aging of potential plaintiffs, and the abandonment of widespread use of asbestos decades ago, one would expect cases to follow a bell-shaped curve, with the crest of the wave at least within sight. In fact, National Cancer Institute data shows the number of annual mesothelioma deaths declined in the 1990s.[4] A medical text described asbestosis as a "disappearing disease."[5]

The incidence of asbestos-related disease may be beginning to crest in life, but in law it is building to tsunami-like proportions. It is already at the heart of the longest-running mass tort litigation in U.S. history. Instead of decreasing, new cases continue to increase. Analysts believe

that some trusts could see 2.5 million claims in the near future.[6] This piling on has resulted in not one but three catastrophes.

A. The First Catastrophe: Stealing from the Sick

The sustained boom in asbestos litigation is happening, in large part, because trial lawyers began to actively recruit plaintiffs who, by any reasonable standard, are not sick, injured or even necessarily exposed to asbestos. Motions filed in federal court attest to the fact that across America, hordes of people have been lured into mobile vans to undergo free lung examinations performed by companies sponsored by trial lawyers. Before each exam, the prospective plaintiff is required to sign a representation contract, enrolling as a potential plaintiff.[7]

These plaintiffs are being signed up even though they do not have an asbestos-related disease. When independent academic researchers studied X-rays from the mid-1980s of tire workers (whose case had subsequently bankrupted a defendant), they found that "possibly 16, but more realistically 11 of the 439 tire workers evaluated may have a condition consistent with exposure to an asbestiform material." Audits of claimants' X-rays in other cases have found similar disparities between diagnoses-from the highly dubious to the outright bogus.[8] "In many cases," writes Lester Brickman of the Benjamin N. Cardozo School of Law, "reading the X-ray is like taking a Rorschach test; whatever is there is totally in the eye of the beholder."[9]

Courts were clogged with cases involving plaintiffs with pleural plaques-a scarring of the lungs with many possible causes, and a syndrome that most doctors regard as harmless. More recently came cases filed by thousands of people who suffer from incipient or marginal asbestosis-a benign condition that bears at least a superficial resemblance to more than 130 lung inflammations, including those caused by smoking or airborne particles.[10] In the early 1980s, traditional plaintiffs-people with obvious asbestos exposure and disease-accounted for about three-quarters of expenditures. By 1997, Supreme Court Justice Stephen Breyer noted that "[u]p to half of asbestos claims are now being filed by people who have little or no physical impairment."[11] This disturbing trend has continued-more and more cases are being filed by plaintiffs who have not suffered an injury. In fact, the RAND Institute for Civil Justice estimates that nonmalignant cases now account for 90 percent of filings.[12]

So what should have been a large, but finite, group of plaintiffs-persons who had actually suffered a legally cognizable injury from their exposure to asbestos-has taken on freakish proportions. RAND reports that more than 500,000 claimants have filed asbestos-related litigation, typically against several dozen defendants. At least five companies have

been hit with at least 300,000 claims each, with some reporting more than 500,000 claims. Three bankruptcy trusts have received 360,000 claims or more.[13]

The ever-expanding pool of asbestos plaintiffs is attributable to the fact that asbestos litigation is a very profitable industry for trial lawyers. As Stephen Kazan, a leading plaintiffs' attorney, has candidly explained: "The asbestos companies are really cash cows that we should care for and cultivate so we can milk them for years as we need to. But I have colleagues who would rather kill them, cut them up and put them on the grill now. We'd all have a great time, but there are people who would be hungry in five years."[14]

The tragedy is that as plaintiffs' lawyers enroll the healthy and those with minor complaints into their lawsuits in order to line their own pockets, less and less money has been available for those who are actually sick and dying. The Manville Trust—set up to compensate the injured—can now only pay out about 5 cents on the dollar to sick people.[15] Moreover, for someone suffering from mesothelioma, justice delayed is truly justice denied. But, because of the jamming of dockets with meritless cases, asbestos lawsuits, according to Justice Stephen Breyer, "are subject to a delay that is twice that of other civil suits."[16]

The U.S. Supreme Court was so alarmed by this state of affairs that—11 years ago—it empanelled the Judicial Ad Hoc Committee on Asbestos Litigation to rationalize the system. This panel of jurists found that "unless Congress acts to formulate a national solution . . . all resources for payment will be exhausted . . . That will leave many thousands of severely damaged Americans with no resource at all."[17] Unfortunately, for the genuinely sick, that day is here.

B. The Second Catastrophe: Targeting the U.S. Economy

The biggest threat to our economic health may not be the ebbing recession or Enron-like accounting scandals. As incredible as it may seem at first glance, asbestos litigation is emerging as a prime threat to corporate investment and renewed job creation. Consider the following disasters:

- The California Northridge earthquake, which devastated much of the Los Angeles area, cost insurers $17 billion.
- Hurricane Andrew, which ravaged the Southeast, cost insurers $21 billion.
- The September 11th terrorist attacks cost insurers $43 billion.
- Asbestos litigation will cost insurers alone $130 billion. Total costs for insurers and defendant corporations could reach as high as $200 billion.[18]

Where will those billions come from?

As professor Christopher Edley, Jr. of Harvard Law School has noted, "[t]here is no 'asbestos industry' anymore. . . . And many, perhaps most, of today's defendants cannot accurately be described as 'asbestos companies.'"[19] Nonetheless, more than 1,000 American corporations, across half of the Department of Commerce's industrial categories, today find themselves in the crosshairs of asbestos litigation firms.[20] U.S. insurers have spent approximately $21.6 billion on asbestos claims to date. At least five companies reported spending more than $1 billion in asbestos litigation costs prior to filing for bankruptcy.[21]

Following the bankruptcy of Johns-Manville, once ranked 181st on the Fortune 500 list, companies have fallen like tenpins.[22] Since January 2000, at least 16 asbestos defendants have entered Chapter 11, including boilermaker Babcock & Wilcox; glassmaker Pittsburgh Corning; insulation maker Owens Corning; floor manufacturer Armstrong World Industries; roofing-materials firm G-I Holdings; chemical giant W.R. Grace; construction-materials manufacturer USG Corp.; auto-parts conglomerate Federal-Mogul Corp; and most recently, Kaiser Aluminum Corp. of Houston, employer of 6,000 people.

Owens Corning's general counsel, Maura Ablyn Smith, explained why the company that invented glass fiber had to file for bankruptcy. "We looked at our position and said, 'We can't be paying $27 million to $30 million for 10 to 12 individual plaintiffs—even if they were sick.'

That would be an incredible amount of money to have to pay out per person for a company that was [already] trying to meet its obligations to hundreds of thousands of people."[23]

In the asbestos feeding frenzy, small companies are treated like hors d'oeuvres. One Lancaster, Pennsylvania insulation contractor, which had never performed contracts at any of the sites where the plaintiffs worked, and sold few asbestos-containing products anywhere, was dragged into a courthouse in Mississippi. The jury slammed this little company with an $83 million judgment that was ten times its valuation.[24] Many such companies close their doors, unable to even afford the appeal bond some states require. Companies that merge to become more competitive (like Halliburton, which acquired Dresser Industries in 1998) often find that they have connected themselves to huge and unforeseen liabilities.

As company valuations are hit hard, loyal employees are the real losers. When Federal-Mogul filed for bankruptcy, its employees—who held 16 percent of the company's stock—saw their assets fall by 99 percent. About 14 percent of Owens Corning's shares—which lost 97 percent of their value in the two years before its filing—were owned by employees. Hardest hit are those building savings through Employee Stock Ownership Plans and 401(k) plans.[25]

RAND reports that "[b]oth plaintiff and defense attorneys also told us that as one defendant has followed another into Chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on these defendants."[26] Or as the CEO of now-bankrupt Federal-Mogul grimly joked, "The last man standing gets to pay the entire liability."[27]

As a result, companies that seem unlikely or at least tangential targets—from Chiquita Brands, to General Electric, to Sears Roebuck—have been hit with asbestos suits seeking huge damages. Ford Motor, General Motors and DaimlerChrysler have seen claims alleging injury by auto mechanics from asbestos in brakes and clutches rise significantly over the last two years,[28] although about a dozen, well-controlled epidemiological studies have come to the remarkably consistent finding that there is no relationship between exposure to trace amounts of asbestos during brake-repair work and disease.[29] In fact, auto mechanics are somewhat less likely to develop mesotheliomas than people in other occupations, including teachers, librarians and secretaries.[30]

C. The Third Catastrophe: Degrading the Law

The Supreme Court's ad hoc committee determined that: "What has been a frustrating problem is becoming a *disaster of major proportions* to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively."[31] And that was more than a decade ago. As this "elephantine mass" of asbestos litigation overwhelms dockets, judges are pressured to let standards of due process slip in the name of administrative fairness. The worst abuses arise from absurd extremes of venue shopping, referred to as "magic jurisdictions" by Mississippi state attorney general Mike Moore.[32] One such venue, the courthouse in rural Jefferson County, between 1995 and 2000, has processed twice as many plaintiffs as its county has residents.[33] Dick Scruggs has posed the question, "Why don't defendants try more cases if they are sure the science is on their side and if they are sure the plaintiffs are not sick?" The answer in many cases is these "magic jurisdictions." I'd like to quote from an esteemed member of the Mississippi bar about these magic jurisdictions: "There, where the judiciary is elected with verdict money, the trial lawyers have established relationships with the judges. They've got large populations of voters who are in on the deal. And it's almost impossible to get a fair trial if you're a defendant in some of these places. It's pretty tough to handle a $100- or $500 million judgment. It ties up your credit, your company. Stock gets hard-hit and they're forced into a settlement. Any lawyer fresh out of law school can walk in there and win the case, so

it doesn't matter what the evidence or the law is."[34]

In the name of efficiency, courts often allow small and questionable venues like these to handle some of the biggest collections of cases—thereby setting national standards. In the name of efficiency, courts tolerate the acceptance of standards of proof that are minimal to non-existent. In the name of efficiency, courts are allowing cases for healthy claimants to move forward absent any proof of any injury or even connection to a defendant's products.[35] In the name of efficiency, the courts allow plaintiffs' attorneys to seek batch settlements by lumping a few very sick people with many without symptoms—a cynical use of the dying as "trump cards" to up the ante for meritless cases.

Then there is the question of causation. In the name of efficiency, all lung abnormalities are presumed to be caused by the defendant's products, even if the plaintiff is a smoker. Moreover, in many cases, plaintiffs cannot remember which asbestos product—if any—they might have been exposed to decades ago. To skirt this problem, many courts have simply relaxed the standards of proof to a degree to which practically any asbestos defendant can be linked to any plaintiff's injury. Trial lawyers facilitate this end-run around traditional tort principles by essentially advising their clients to lie. One memo handed out to asbestos plaintiffs, later revealed in court, advises claimants: "Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case. You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered . . . ."[36]

When it comes to obvious manufacturing of plaintiffs, too many judges are looking the other way. Claims based on shoddy medical exams, the fruit of free mass screenings, are accepted at face value. Federal Judge Charles R. Weiner concluded: "The court finds that the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."[37] Judges, concerned that some defendants may go bankrupt before a plaintiff develops a disease, have even allowed large verdicts to go to plaintiffs who seek compensation for their *fear* of cancer. In some states, nonmalignant cases outnumber cancer cases by margins as wide as 47 to 1.[38]

The courts—again, in the interest of administrative efficiency—are also ignoring their mandate under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Under *Daubert,* now part of Rule 702, a plaintiff must show that the defendant's product was more likely than not the cause

of the disease. The Supreme Court also directed the lower courts to act as "gatekeepers" to ensure that scientific evidence is not only relevant, but also reliable.[39] In fact, Supreme Court rulings and Federal Rules of Evidence make it clear that such judicial "gatekeeping" is not only desirable, it is required. Expert opinion evidence must be rejected when "there is simply too great an analytical gap between the data and the opinion proffered."[40] If any batch of cases has ever met this condition, asbestos is it.

II. Time For Judges To Take Control

One judge, Reynaldo Garza, said: "I implore the Congress to heed the plight of the judiciary and the thousands of individuals and corporations involved. Congress alone has the power to devise a system . . . in response to the asbestos litigation crisis."[41] In many ways, Judge Garza is right. So was the U.S. Supreme Court. Only Congress can enact national reforms that cut to the heart of the asbestos litigation problem.

Congress should establish objective medical criteria for asbestos-related impairments. Congress should set standards to eliminate abusive forum shopping, so that the whole U.S. judicial system does not tilt toward a handful of small jurisdictions well-known for their propensity to lavish huge awards on questionable claims. Congress should limit lawyers' fees in asbestos litigation cases to the same pay-outs delivered in workers' compensation cases. And Congress should enact a uniform national statute of limitations that reasonably accommodates latent disease claims, so that healthy plaintiffs who have a legitimate fear of later developing asbestos-related illnesses won't be stampeded by fear into crowding the dockets.

All of these are good and necessary reforms. But despite pleas from the Supreme Court and elsewhere, Congress has been unable, or unwilling, to act. As a result, the time has come for the courts to exercise greater responsibility in managing the flood of asbestos litigation.

- Judges should refuse to allow plaintiffs' attorneys to park cases packed with specious claims for the express purpose of gaining economic leverage over defendants.
- Judges should use the tools available in their jurisdictions to batch similar cases so that *Daubert* standards can be applied to them. In a mass-tort context, that is the only way to obtain, as one legal expert put it, "a single, uniform, fair, and efficient resolution of all claims growing out of a set of [related] events."[42]
- Judges should broom out their dockets. Where no disease exists, no case should either. Judges should either transfer these cases

to an inactive file (so they can be reactivated if healthy plaintiffs should develop an asbestos-related disease after the tolling of the statute of limitations), or dismiss them without prejudice.

- Judges need to inform juries when other defendants settle out of a case—often the best evidence of which party was most responsible; juries need to hear the all of the facts in order to avoid over-compensation.
- Judges should place limits on punitive awards. Defendants deserve to be protected from excessive awards. We also need to ensure the first plaintiff to the courthouse—or the one who happens to file in a "magic jurisdiction"—doesn't walk away with tens of millions of dollars, at the expense of future plaintiffs.

Above all, judges should do the job the Supreme Court assigned to them. For the sake of the injured, for the sake of the economy, and for the sake of the law itself, it is time for judges to become the nation's gatekeepers. The courts must stem the tide of abusive asbestos litigation before it overwhelms us all.

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[1] www.fed-soc.org/whatpeoplearesaying.htm (last visited June 26, 2002).
[2] *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 821 (1999).
[3] *See generally* www.asbestossolution.org.
[4] SEER Data, National Cancer Institute *available at* http://seer.cancer.gov.
[5] *See* W. Raymond Parkes, Occupational Lung Disorders 464-78 (3d ed. 1994).
[6] Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 12 (RAND Inst. for Civil Justice Aug., 2001).
[7] Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise,* L.A. Times, Dec. 17, 2001, at A1.
[8] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p. 154. For an excellent discussion, *see* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation,* 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 281-94 (2001).
[9] Brickman, 26 WM. & MARY ENVTL. L. & POL'Y REV. at 283.
[10] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, *at* p. 154.
[11] *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (citing Edley & Weiler, *Asbestos: A Multi-Billion-Dollar Crisis,* 30 HARV. J. LEGIS. 383, 384, 393 (1993)).
[12] Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 29 (RAND Inst. for Civil Justice Aug., 2001).
[13] *Id.* at 3.
[14] Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise,* L.A. Times, Dec. 17, 2001, at A1.
[15] David Austern, *Mem. to Attorneys Who File Manville Trust Claims,* Claims Resolution Mgmt. Corp., Jun. 21, 2001; *see also,* Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 13 (RAND Inst. for Civil Justice Aug., 2001).
[16] *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part).

[17] Report of the U.S. Judicial Ad Hoc Committee on Asbestos Litigation (1991).
[18] Michael Freedman, *The Tort Mess is Worse Than You Think: Out-of-Control Lawsuits Are Shutting Down Medical Practices, Killing Businesses and Costing the Economy $200 Billion a Year,* Forbes, May 13, 2002, at p. 90.
[19] Christopher Edley, Testimony before the Judiciary Committee of the House of Representatives, (1999), quoted in Douglas McLeod, *Asbestos continues to bite industry,* Business Insurance, Jan. 8, 2001.
[20] Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 11 (RAND Inst. for Civil Justice Aug., 2001).
[21] *Ibid.* at 8-9.
[22] See Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p. 154.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 25 (RAND Inst. for Civil Justice Aug., 2001).
[27] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p. 154.
[28] *Ibid.*
[29] To name three: Kay Teschke et al., *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, 88, CANADIAN J. PUB. HEALTH 163 (1997); Robert Spirtas et al., *Malignant Mesothelioma: Attributable Risk of Asbestos Exposure,* 51 J. OCC & ENVTL. MED. 804 (1994); Aaron Blair et al., *Mortality Patterns of U.S. Veterans by Occupation,* 75 J. NCI 1039 (1985).
[30] Otto Wong, *Malignant Mesothelioma and Asbestos Exposure Among Auto Mechanics: An Appraisal of Scientific Evidence,* 34 REG. TOXIC. & PHARM. 170, 174 (2001); *see also* Kay Teschke, et al. *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos,* 88 CANADIAN J. PUB HEALTH 163 (1997).
[31] Report of the U.S. Judicial Ad Hoc Committee on Asbestos Litigation (1991).
[32] John Porretto, *Moore says serious discussions needed on tort reform,* AP Business Wire, June 9, 2002.
[33] Robert Pear, *Mississippi Gaining As Lawsuit Mecca,* N.Y. Times, Aug. 20, 2001, at A1.
[34] See Richard Scruggs original quotation in Additional Materials section.
[35] For a discussion of the "special asbestos law" created by courts for this purpose, see Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need for an Administrative Alternative?,* 13 CARDOZO L. REV., 1819, 1840-52 (1992).
[36] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p.154. For a detailed discussion of how medical evidence is used, see Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation,* 26 WM. & MARY ENVTL. L. & POL'Y REV. at 273-81.
[37] Admin. Order No. 8, *In re: Asbestos Prods. Liab. Litig. (No. VI),* MDL No. 875 (E.D. Pa.), entered Jan. 16, 2002.
[38] Roger Parloff, *The $200 Billion Miscarriage of Justice,* Fortune, March 2002, at p.154
[39] *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579 (1993)
[40] *General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997)
[41] *Cimino v. Raymark Indus.,* 151 F.3d 297, 339 (5th Cir. 1998) (Garza, J., concurring)
[42] Edward H. Cooper, *The (Cloudy) Future of Class Actions,* 40 ARIZ. L. REV. 923, 947 (1998).

ADDITIONAL MATERIALS:

The following is excerpted from a program held Tuesday, June 18, 2002 at the National Press Club in Washington, D.C.

MR. FRED BARON: I represent people. They are ordinary, everyday people who go to work and do what they are told, and unbeknownst to them, were for years exposed on a daily basis to an extremely hazardous material, asbestos. Each of the people I represent has been diagnosed with some form of an asbestos-related disease. I represent people who come to my office complaining: "Wait a minute, I just went to work. Nobody told me asbestos was there on the job; if they had told me about it, I would have done something to protect myself. Unlike tobacco, I am not addicted to asbestos. I would have avoided it because I do not want to have the problems that I am now having." That is what I routinely hear.

My job as a lawyer for victims is to find a way to deal with their individual problems. So, when I look at the issue of asbestos litigation, I view it as a sad human tragedy because even a cursory review of the history of asbestos-related diseases, clearly shows that by at least the turn of the last century, in the United Kingdom, and certainly, by the '20s, and if you want to stretch it, the '30s and '40s, in the U.S., there was no question but that exposure to asbestos could cause fatal diseases.

Asbestos, though, is different than most other hazards that kill you because it takes a very long time to happen. When you are exposed to asbestos—and particularly nowadays, when exposures are not particularly heavy, it can take 30 or 40 years for the disease manifest. There are two types of diseases: malignant and non-malignant. In most of the asbestos malignancies, life expectancy is less than a year. Non-malignant disease, some believe that non-malignant asbestos diseases are worse because they always progress, they are irreversible, and they can be terminal if you do not die of something else first.

So, again, my job as a plaintiff's lawyer is to help each individual family that is faced with the reality of asbestos related injuries. Of course, the issues, such as fair allocation of assets and other similar issues are indeed very significant problems that I have to be concerned about. But like so many of you in the Federalist Society, I believe in the efficacy of state law. I particularly believe in the importance of state common law, interpreted by in the state courts. I believe that people who work hard, pay their taxes and are good citizens have an absolute right to use the state courts to adjudicate whatever claims they have, legitimate or otherwise.

I would like to try to debunk some of the myths that seem to surround asbestos litigation.

Myth 1: Plaintiffs' lawyers notoriously go out with x-ray vans, find people who work in factories, and develop large numbers of clients. Quite honestly, I am offended when somebody criticizes me for providing free medical services to a person who is working in a factory and who has been exposed to asbestos. If you are an executive at a company, you are probably going to get a free physical every year, and it is probably going to be the best doctor in the city. But if you are working in some industrial facility, maybe a petroleum plant in Brazoria County, Texas, you are not likely to have ready access to free medical examinations by specialists.

Hundreds and hundreds of people who have developed cancer have first learned that they had cancer, hopefully early enough to save their life, as a result of x-ray screenings that were provided either by their union or by plaintiff's counsel. I am offended when people tell me that, "it's terrible that you are giving free medical treatment to working people who end up filing suits." I do not buy that argument. When a victim is diagnosed with a disease and somebody is legally responsible under state law, there should be no barrier to that individual filing a suit to reclaim their rights.

Myth 2: Unimpaired asbestos claimants are flooding the courts. Let me stop for a minute before I discuss this issue. I have a genetic defect: I went to law school. That defect causes all kinds of problems, as so many of us know, but it particularly binds those of us who have it to the doctrine that we were taught in our torts course in our first year: "If someone does something negligently and causes injury to another person, that person is entitled to seek recompense in court." I can't remember anything in the law anywhere that says "if someone does something negligently and causes impairment to somebody, only then can that person can seek recompense."

It is like somebody is trying to re-write the law only as it applies to asbestos injuries. Many of us know that people who are involved in automobile accidents often develop a sore neck. Maybe that is a minor injury but we all agree that the injured party is absolutely entitled to recover whatever medical expenses and other damages from that injury. There is no requirement that the injured party lose work. There is no requirement of total disability. So why is it now that some of our great scholars are telling us that asbestos injury cases, unlike auto injury cases, should not be filed unless the plaintiff is impaired? There is absolutely no such requirement under any state law. Yes, I do represent people who are at the beginning stages of non-malignant asbestos-related diseases who are not yet impaired. These people should have the same rights as anyone who is involved in an automobile accident to file a claim for recompense. Juries evaluate those cases all the time.

Myth 3: New non-traditional companies are being wrongfully added to the litigation. Who are these "new defendants?" Obviously the old

defendants were the manufacturers of asbestos, who manufactured this horrible material and put it onto the stream of commerce. It is a fact that more people ultimately died from asbestos-related disease as a result of working in the shipyards in World War II, than died in the United States Navy during the War.

In the early stages of asbestos litigation, it was easy for us to just sue only the manufacturers because they were clearly liable. They never warned anybody; they never told anybody of the deadly hazards that they had internally identified. But, unfortunately most of these companies have sought protection under Chapter 11 of the bankruptcy code. I would emphasize that Chapter 11 reorganization has been the route that most of these manufacturers have taken—Johns Manville today, as you probably know, is owned by Berkshire Hathaway and employs more people than it did when it went into bankruptcy in 1982. In these reorganizations, companies put up some money and their stock into a trust for victims and re-enter the open market—so nobody is losing jobs in asbestos-related bankruptcies. So as counsel for victims it is our job to look for other defendants who are legally responsible under the laws of the state that are applicable.

I do not see any great problem with us doing that. That is what we are paid to do. When somebody comes in my office and says, "I have got an asbestos-related disease and I want to sue somebody for my losses because I want to be sure my family is taken care of," it is my job to identify defendants who are legally liable under the laws of the applicable jurisdiction. If they are not legally liable, the odds are that they will get out of the case.

Myth 4: Anybody exposed person can file a case even if they are not ill: If my client cannot prove that he has an asbestos-related disease, we are going to lose the case. It is totally false to believe that claimants are people that just come in off the street and say, "I was exposed to asbestos," and then file a lawsuit. In all 50 states, it is required that the plaintiff produce qualified medical testimony that he has an asbestos-related disease before a case can get past summary judgment.

In summary, I am a believer that the state laws work and that it should remain intact and not be operated under a different set of values for asbestos victims who have worked hard all of their lives and are now merely trying to redeem their rights, as they are entitled to under our Constitution.

Myth 5: The courts are hopelessly clogged with asbestos cases. Although commentators speculate about clogged courts, the best source of empirical data on this issue is a journal that is published every year that tracks each of the state and federal court trials in asbestos cases every year. Let me give you some quick statistics. During the year 2001, there were

61 asbestos trials in all 50 states in all the state and federal courts. The year before, there were 55 trials. The year before that, there were 52. Last year, about 35,000 claims settled. The year before that, it was about the same number. Does this system work? Are the courts clogged? Any system that produces 35,000 settlements without the necessity for a trial, and only 60 trials per year in all of the state and federal courts in the United States, is, in my judgment, working very well.

So, what is the pressing problem with this litigation? The problem is simply that there are too many victims of asbestos disease and too great a need to find adequate resources for the victims. The asbestos defendants and the insurance companies who insure them do not like that fact and the unfortunate truth that they cannot see light at the end of the tunnel. I sympathize with that; if I was representing a large company that had a significant asbestos liability, I would be concerned, too.

But, by and large, the position papers that have been sent out by industry advocates have been dramatically misleading—and when I say "sent out" I mean it literally—in Texas. I started getting calls from judges telling me that they were getting inundated with literature, mailed, *ex parte,* from lawyers for the asbestos defendants, telling them how they should do their jobs as judges, which, needless to say, they found offensive. I was amazed that somebody would have the chutzpa to send out such *ex parte* communications to judges telling them how to do their jobs. But, it is still happening. I believe the spin meisters on K Street in Washington, D.C. have made more money from asbestos litigation than probably any other faction of this whole industry. Every year, K Street hucksters promise that they can deliver restrictive legislation. Their clients want a fix. And every year they are promised a strong public relations campaign to make it look like all the plaintiffs are not sick, that the courts are clogged, and there is a major crisis in asbestos litigation.

If you are a client of these PR and lobby firms, I have got to tell you, before you fall for that song and dance and before you write your checks, take a look at history. Asbestos legislation was first proposed in 1979 by Millicent Fenwick, a House member from Manville, New Jersey. She tried her best to create what was then called the White Lung Act, not unlike the recently passed Black Lung Bill for coal miners. By the way, the coalminers' bill estimated to cost $300 million a year at the time of its passage. By the early '80s, its actual cost was over a billion dollars per year. By now, it is a couple of billion dollars a year. Congress would not legislate asbestos then and certainly in this atmosphere, with tight budgets and deficit spending, it will not do it now. After 20 plus years of repeated efforts to get restrictive legislation, and 20 plus years of failure, I think it is very unlikely that anything will happen on Capitol Hill regarding an asbestos litigation "fix."

So, what has been the fallback position of the industry advocates? Try to pollute the jury pool through national public relations campaigns complaining about how the system is being manipulated by uninjured victims and greedy lawyers. Trust me, if the system were indeed being manipulated, the state courts would have straightened it out by now. Occasionally there are some aberrant verdicts and there are indeed some cases where people get a large sum of money when they really do not have a significant injury. But, in my judgment, those represent only two, three, four, perhaps five individual cases every year of the tens of thousands that are resolved each year. Any system that delivers 99.99 percent appropriateness is a pretty damned good system. In reality those big verdicts for people who do not seem to be particularly injured that you hear about all the time almost always get reversed. Anecdotal cases should not be the basis to formulate public policy.

In conclusion, the thought that I would leave you with is that before you start drawing conclusions about how asbestos litigation actually works (or doesn't) to compensate victims-and particularly the myths that I have identified-take a closer look at the facts, and take a closer look at what really happens. When you look under the covers, you are going to see something very different than has been presented by those who have a private rather than public agenda.

PROFESSOR THEODORE EISENBERG: I am an empiricist. Most of my scholarship counts things, and I find asbestos a little frustrating in that some of the best studies on asbestos done by, for example, the Rand Institute for Civil Justice, say how difficult it is to know what is going on in the asbestos world. There seems to be agreement that there is something going on that is very significant.

Our legal system is simply deficient in the way it gathers data, because I do not think anyone really knows the number of asbestos cases, or the number of future asbestos cases, or the number of settlements. And, asbestos is one of the most studied areas. I think the implications for other mass torts, or the mass torts of the future, are a little discouraging because it may be that we are ten years into a crisis before we even know what is going on. As some of you may know, the Administrative Office of U.S. Courts created a category for asbestos in the late '70s or early '80s, but we do not know what was happening before then, and only for asbestos do we know now. We do not even know the number of cases in other mass tort areas.

What we have in asbestos is an illustration that in some sense is truly frightening. And that is, what if we actually sought to achieve justice for everyone who was harmed? What if everyone exposed to asbestos, or if not impaired in the sense of being able perform life functions, impaired in

that under state law they are entitled to recover something—the vast majority of asbestos victims—filed a claim? We see a system that to some people is just broken down. At least to most neutral observers, it is in need of serious study, if not reform.

What if we really had a system where victims—not just of asbestos but of everything—systematically abandoned their low rates of litigation and really did file and try to seek justice? I think the asbestos crisis gives us a little bit of a hint that we just cannot afford that system. We cannot afford mass justice for every tort that occurs in society, and asbestos may be this frightening window on what happens when we become serious about providing mass justice. I am not sure if it should be frightening, but we should be prepared to recognize that full compensation for all harms is not easily attained, nor perhaps do we really want to attain it as a society.

What solutions have been proposed for asbestos? There, it seems to me, I have one comment and one set of skepticisms. It is sort of interesting to me that the legislative solutions are written off—"It's not going to happen," or, I guess from others, we get "Perhaps it shouldn't happen; the judges can handle it." It seems to me that the judges handling the litigation provide an interesting angle on how we feel about, for want of a better term, judicial activism—if people do come in with what is a traditional claim under state law and we have creative solutions that may well be the right solutions. If the judge says, "You have a valid claim under state law, but you're not as sick as this other guy, so I am going to move this claim ahead of yours and you are not going to get paid anything." That may be the right answer from the point of view of justice and economic efficiency. But it is hard to see how judges have the authority to do that.

If the traditional tort law of a state is that if you have got a claim within the meaning of Texas law, you come to court and you get paid, I do not think there is anything in Texas law that says the sickest get paid first. I do not think there is anything in Texas law that says the judge gets to decide which of the suits that get filed get treated better, more quickly, or more efficiently than others. The more creative judges, like Judge Weinstein, have been highly criticized for their creativity.

If we were writing on a slate in which we think that judicial creativity is the answer to the asbestos crisis, we ought to at least pause to think that somewhere down the line, someone is going to say that those judges are activists. That is because they have ignored the law of the state or imposed their own vision of justice, when the people speaking through their legislature or through the common law really have a different set of rules. Judges who do that are probably going to pay a price in reputation with at least some groups.

This leads one to ask the question, why is legislation not on the table here? Perhaps people are just more realistic and it just cannot happen.

Why not? Well, one reason, it seems to me, is a fairly common pattern, and that is the legislature and perhaps also the executive really like having the courts—and if not just the courts, juries especially—as the fall guys.

It is really very convenient to say "It's terribly complicated; we will leave it to the courts, and business, you should really be upset with those judges and those juries because they are the ones that caused that problem. If we could just have good judges and juries, everything would be okay." And the legislature and the executive remain stunningly silent on what is recognized as a widespread social problem. I think the political economy of asbestos plays out the way a lot of things do.

The other branches like the courts as fall guys. The courts cannot stand up for themselves; they are very weak at defending themselves; they have a lot less lobbying power. And juries are the weakest of all. They are not repeat players and they do not have offices. Very few people stand in the shoes of jurors and try to represent them in the national scene.

Then, I take a step back. What would legislation look like if we could get it? Suppose we could push a button and say, "You will legislate." It seems to me that asbestos raises an enormous set of problems. Just to highlight one, that is the problem of long-range planning.

Let us say serious asbestos litigation was born in the 1970s and blossomed in the 1980s. You can say, "Well, I have a crystal ball and I can see that in 2002, we may be less than halfway through cycling the asbestos claims through; let's sit down in 1982 and plan for 20 years in the future." If you really have a major social problem that requires 20 years of foresight, I think that is pretty close to hopeless because I do not know anyone who can plan well 20 years ahead.

We can barely do it—and I am not sure we do it so well—for social security, where things seem to be almost purely numerical. Social security does not have all the issues that asbestos litigation has. So, if you think of your own life, what did things look like five years ago compared to today? Did you have any idea 20 years ago where you would be today? Do you want to sit down and project what should be solved for society 20 years from now? To the extent that we have long-range planning needs for major social problems, that is the nature of asbestos, I guess.

The following is excerpted from a panel held at The Federalist Society's National Lawyers Convention on November 14, 2002.

MR. RICHARD SCRUGGS: Along about the late 1980s, early 1990s, one of the defendants—paradoxically, Owings-Corning—started an outreach program. Owings-Corning was a traditional defendant. The company manufactured thermal insulation products containing asbestos, and

decided that it was paying too much of the asbestos load. So, they took it on themselves to discover all of the other companies that sold products that contained asbestos and put the finger on them. As a result of the so-called outreach program by Owings-Corning, the asbestos litigation proliferated to companies that had theretofore been ignored and not been sued, but nevertheless probably had some liability and should have been responsive to some of the claims of people who were injured by asbestos-containing products.

That is especially true as some of the more traditional asbestos defendants, like Johns Manville, went into bankruptcy. Owings-Corning exhausted its assets and insurance paying claims. It was a very widespread problem, and companies that sold asbestos-containing products need to step up.

You have to remember what we all learned—those of you who are lawyers—in law school about the whole theory of products liability law. That is to spread the loss over society. The innocent workers, the shipyard workers, thousands of whom I represented, were exposed to asbestos, not knowing the product was dangerous and was going to cause them cancer and various other lung illnesses years later. They were innocent in the deal. As between a worker who is innocent and someone who sells a product, makes money on it, and has an obligation to know the dangers or the propensities of that product, I think that company ought to pay for the illness as opposed to the worker. I think that is why the asbestos litigation has evolved to this point.

I think it is a fair criticism that asbestos litigation has somewhat evolved into the endless search for the solvent bystander. There are many companies that probably should not be liable because their responsibility to the various people who had just very insubstantial exposure was probably insubstantial in itself.

But what has happened now is that asbestos litigation has not become just a legal issue, and that is one of the reasons a lot of you are here. It is a political issue. There is an element of politics in the litigation because trial lawyers bringing asbestos cases are generally perceived to be supporters of Democratic candidates.

It may be something that happens, but it is bad public policy to start special legislation for one industry, or for any industry. The American civil justice system is a wonderful mechanism; it is not perfect. It is sort of like Democracy. Like Winston Churchill said, "It is the worst system except for all the rest."

As a societal regulatory mechanism, the courts have served us well. They have served as a safety net for abuses of government or inaction by government. Now that we have got closely divided government—we have got a Senate that is almost even, we have a House that is almost even,

a president who won narrowly—and as a result of that, we have impasse in the legislative branch. Normally, when you have that and you have powerful societal issues, there is a default to the courts, to the civil justice system, to remedy those perceived defaults.

The argument that, "Well, no action by the legislature is action"—that the status quo is acceptable—is really a false argument. Nobody likes the status quo. That is when the courts end up having to be the safety net to change things. We would not have many of the civil liberties that we have today if it were not for the courts correcting things that the legislative or executive branches of government failed to act on.

One of the things that I find a bit amusing is the complaint that the litigation has proliferated to defendants that have no liability and is being brought by victims who have no illness. If that is true, then the cases should be able to be successfully defended.

The companies that are being sued are enormously wealthy, by and large. They have huge insurance policies. They hire the best and brightest lawyers to defend their cases. If the cases are so frivolous, why don't they try them?

I have great confidence in the American jury system. I can promise you that the typical American jury in a tort case is far better informed about the issues at the end of a trial than the American electorate is after a campaign before they vote. There is no question about. The adversarial system works.

So, the idea that the jury's discretion should be limited is no more persuasive to me than the notion that the electorate at large should be limited. There are many on juries that are uneducated, perhaps, but there is a huge difference between education and intelligence. I have a great deal of confidence in the basic intelligence and common sense of the American jury.

Good lawyers can defend bad cases. They should be able to defend bad cases. One of the problems that virtually no one addresses now is that the big law firm defense model, the business model rather, of the large defense firms is process-oriented. The longer they can protract the case and drag it out, the more money they make. Their business model is based not on success, but on process. I think that it is essentially a willful refusal by very bright, educated defense lawyers to find solutions. There is no reason in the world why lawyers of that caliber, with that intellect, cannot come up with clever ways or ingenious ways to resolve mass tort litigation.

We just did that, for example, in the Sulzer orthopedic hip implant litigation. Sulzer, a Swiss company, sold artificial hips and knees that were defective, and had to be recalled, after some 30,000 had been implanted in Americans. A storm of lawsuits followed. People were

advertising for cases all over the country. Thousands of cases were being filed in various courts, very similar to the asbestos phenomenon. The litigation was a little smaller because there were not that many people had the company's hip implants, but there were still far more than enough claims to bankrupt the company. In a year and a half, we resolved that litigation successfully.

So, I do not think legislation is the answer to the asbestos problem. I think it is ingenuity. Big companies need to examine who they are hiring and what the economic incentives of their lawyers are when they start to defend these mass tort. Asbestos cases are no different from any other mass torts.

There are non-legislative solutions to this problem, but the economic incentives are against creating such a solution. I think the idea of prioritizing claims is, in theory, a good idea. I think a mesothelioma case ought to get first call on the money over a pleural plaque case—for those of you who are familiar with asbestos litigation. I am not sure how claim prioritization would work. Anybody can claim he has got a mesothelioma case when it is really an adenocarcinoma case, and you have to litigate the case to establish that. I do not think this approach would work in practice, although in theory, I think it is a good idea to pay the sickest and most severely injured people first.

I also do not think that addressing the litigation based on a defendant's percentage of fault will work either. First of all, if there is some percentage of fault by a solvent defendant where the majority of fault is with an insolvent defendant, I think the solvent defendant who made money selling the product has an obligation under the law to step up. As between that defendant and the innocent worker who was truly injured by the product, the defendant ought to step up. That is the whole theory of product liability law, to spread the loss across society as a whole so that the poor welder in the shipyard, or his family, does not end up having to shoulder that burden without any help.

The idea that the playing field needs to be leveled in asbestos litigation is a bit ludicrous when you consider the mismatch in legal and financial resources that the defendant companies and their insurers have.

The following is excerpted from "Asbestos for Lunch," a Prudential Financial Research Financial Services Group Conference, held on June 11, 2002.

MR. RICHARD SCRUGGS: […Another fundamental cause for asbestos litigation's explosion into the hundreds of thousands] which is probably the biggest threat to you right now, is what I call the "magic jurisdiction," or jurisdictions where the judiciary is elected with verdict

money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're populous. They've got large populations of voters who are in on the deal, they're getting their place in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. Now a lot of times those get set aside on appeal, like in Texas, for example. A lot of you folks have succeeded in electing a very conservative Supreme Court, that reverses a lot of these things, but in order to get there you got to find it. It's pretty tough to handle a hundred or five hundred million-dollar judgment; it ties up your credit, your company; stock gets a hard hit; and so they're forced into a settlement.

There are probably a dozen magic jurisdictions around the country where this is really a dangerous thing. The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is. The jury is going to come back with a large number and the judge is going to let it go to the jury, often on punitive damages. The proliferation of these magic jurisdictions, where plaintiffs join together in large groups even if they're not from those counties, is one of the reasons that the asbestos phenomenon has proliferated—the litigation has proliferated like it did.

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