

MINUTES OF THE HOUSE INSURANCE COMMITTEE

The meeting was called to order by Chairman Clark Shultz at 3:30 P.M. on February 21, 2006 in Room 527-S of the Capitol.

All members were present.

Committee staff present:

Melissa Calderwood, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Ken Wilke, Revisor of Statutes Office
Sue Fowler, Committee Secretary

Conferees appearing before the committee:

Lew Ebert, Kansas Chamber of Commerce, Topeka, KS
Wendy Harms, Kansas Aggregate Producers Association, Topeka, KS
Ken Daniel, KsSmallBiz.com, Topeka, KS
Dave Hanson, Property Casualty Insurers Association of America, Topeka, KS
Corey Peterson, Associated General Contractors of Kansas, Inc., Topeka, KS
John Klamann, Kansas Trial Lawyers Association, Overland Park, KS
Callie Denton, Kansas Trial Lawyers Association, Topeka, KS
Jim DeHoff, Kansas-American Federation of Labor and Congress of Industrial Organizations, Topeka

Others attending:

See attached list.

Representative Grant recommended without objection the committee members approve the committee minutes of February 16, 2006.

Discussion and action on:

HB 2159: Consumer protection; car rental agreements

Representative Dillmore moved to adopt the balloon amendment to HB 2159. Seconded by Representative Carter. Motion carried. Representative Dillmore moved to recommend HB 2159 favorable for passage as amended. Seconded by Representative Carter. Motion carried. Representative Mitch Holmes will carry the bill.

HB 2858: Service contract - definition

Representative Carter moved to adopt the balloon amendment to HB 2858. Seconded by Representative Dillmore. Motion carried. Representative Carter moved to recommend HB 2858 favorably for passage as amended. Seconded by Representative Schwab. Motion carried. Representative Trimmer will carry the bill.

SB 207: Insurance department; fraud prevention program

Ken Wilke, Revisor of Statutes Office, gave a brief overview of **SB 207**.

Representative Dillmore recommended SB 207 be amended and designated as House Substitute for SB 207. Seconded by Representative Schwab. Motion carried. Representative Dillmore recommended SB 207 favorable for passage as amended. Seconded by Representative Carter. Motion carried. Representative Shultz will carry the bill.

Continued hearing on:

HB 2868: Enacting the asbestos and silica compensation fairness act

CONTINUATION SHEET

MINUTES OF THE House Insurance Committee at 3:30 P.M. on February 21, 2006 in Room 527-S of the Capitol.

Proponents:

Wendy Harms, Kansas Aggregate Producers Association, (Attachment #1), gave testimony in support of **HB 2868**.

Lew Ebert, Kansas Chamber of Commerce, (Attachment #2), presented testimony in support of **HB 2868**.

Ken Daniel, KsSmallBiz.com, (Attachment #3), appeared before the committee in support of **HB 2868**.

Dave Hanson, Property Casualty Insurers Association of America, (Attachment #4), presented written testimony in support of **HB 2868**.

Corey Peterson, Associated General Contractors of Kansas, Inc., (Attachment #5), presented written testimony in support of **HB 2868**.

Opponents:

John Klamann, Kansas Trial Lawyers Association, (Attachment #6), appeared before the committee in opposition to **HB 2868**.

Callie Denton, Kansas Trial Lawyers Association, (Attachment #7), gave testimony in opposition to **HB 2868**.

Jim DeHoff, Kansas-American Federation of Labor and Congress of Industrial Organizations, (Attachment #8), presented written testimony in opposition to **HB 2868**.

Hearing closed on **HB 2868**.

Discussion and action on:

HB 2659: Title insurance - title examination standards for title insurance policies

Matthew Goddard, Heartland Community Bankers Association, gave a brief overview regarding language in a proposed amendment for **HB 2659**

Representative Schwab moved to adopt proposed amendment for **HB 2659**. Seconded by Representative Kelsey. Motion carried. Representative Dillmore moved to recommend **HB 2659** favorable for passage as amended. Seconded by Representative Schwab. Motion carried. Representative Kelsey will carry the bill.

HB 2771: Insurance agents; disciplinary actions by another state for failure to pay income tax in such state

Representative Peck moved to adopt the balloon amendment to **HB 2771**. Seconded by Representative Schwab. Motion carried. Representative Peck recommended **HB 2771** favorable for passage as amended. Seconded by Representative Carter. Motion carried. Representative Peck will carry the bill.

HB 2690: Motorists - suspension of driver's license until damage judgment paid

Representative Carter moved to adopt the balloon amendment as substitute for **HB 2690**. Seconded by Representative B. Sharp. Motion carried. Representative Carter moved to recommend **HB 2690** favorable for passage as amended. Seconded by Representative B. Sharp. Motion carried. Representative Schwab will carry the bill.

HB 2868: Enacting the asbestos and silica compensation fairness act

Representative Dillmore moved to table **HB 2868**. Seconded by Representative Kirk. Motion carried. A division was requested. The motion passed with a 6 to 5 vote. Motion carried.

Meeting adjourned at 7:20 P.M.

CONTINUATION SHEET

MINUTES OF THE House Insurance Committee at 3:30 P.M. on February 21, 2006 in Room 527-S of the Capitol.

Next meeting will be posted at a later date.

KAPA

Kansas Aggregate
Producers' Association

TESTIMONY

Edward R. Moses
Managing Director

By the
Kansas Aggregate Producers' Association

Before the
House Insurance Committee

February 16, 2006

Regarding HB 2868 - Silicosis and Asbestos Claims

Good Afternoon Mr. Chairman and Members of the Committee, I am Wendy Harms, Associate Director for the Kansas Aggregate Producers' Association. The Kansas Aggregate Producers' Association is an industry wide trade association comprised of over 175 members located or conducting operations in all 165 legislative districts in this state, providing basic building materials to all Kansans. We appreciate the opportunity to appear before you today in support of HB 2868.

Silicosis is a disease of the lung when small particles of silica usually from industrial sand operations become imbedded in the lung. In Kansas, our rock, sand & gravel actually contain very low amounts of silica content. As a matter of fact, so low, that in some cases they are not measurable. However, this has not prevented the Kansas industry from getting embroiled in what has become a national silica debate.

This is a very important issue to our industry as over the last 12 to 24 months, many of our members have seen their insurance coverage for silicosis claims excluded on their general product liability policies. The reason for this has been the explosion of silica cases, occurring primarily in the eastern and southern United States. This is critical for the small family owned businesses we represent, who due to their size do not have sufficient net worth to defend or pay out awards on potential silica claims, possibly forcing bankruptcy. As the Enron collapse illustrated, bankruptcies represent more than the demise of a business. They can cost employees their jobs, ordinary citizens their retirement savings and deeply impact entire communities.

HB 2868 is a bill similar to measures that have been passed in Georgia, Florida, Texas and Ohio providing a statewide policy that would put reasonable limits on circumstances under which a silica claim could arise. The peanut of this bill, requires any potential third parties wishing to lodge a silica claim against a producer, would have the duty of providing a bona fide medical diagnosis prior to filing their claim. It is hoped by providing such a requirement that in Kansas we may avoid a similar situation in Texas where over 11,000 silicosis claims were filed by parties alleging exposure to the disease. By passing this law, we feel the legislature would take a positive action towards providing an environment in which insurance coverage for silicosis claims could be restored.

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Attachment # 1

Given our apprehension and lack of knowledge on asbestos, our industry is sponsoring a similar "silica" only bill (SB 512) which is currently in the Senate Financial Institutions & Insurance committee. We believe the passage of HB 2868, with the silica provisions, will lead to the restoration of liability coverage which would shield small producers from the threat of bankruptcy, and yet maintain responsible coverage for those claimants with a legitimate diagnosis of silicosis providing assurance that responsible parties will have the actual means available to pay their claims. With this in mind, we ask that the committee recommend HB 2868 favorable for passage. Thank you for the opportunity to appear before you today and would answer questions at the appropriate time.

✓ Silica or Silica Mixed Dust Exclusion

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.	Producer	Add'l. Prem	Return Prem.
					\$	\$

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

**Commercial General Liability Coverage Part
Products-Completed Operations Liability Coverage Part**

The following additional exclusion is added to **2. Exclusions of Section I. Coverages:**

2. Exclusions

This insurance does not apply to:

Silica or Silica Mixed Dust

- A. "Bodily injury", "property damage" or "personal and advertising injury" caused directly or indirectly, in whole or in part, by the actual, alleged or threatened inhalation, ingestion, absorption, exposure to, existence of or presence of "silica"; or
- B. Loss, costs or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any manner responding to or assessing the effects of "silica" by any insured or by any other person or entity.
- C. For the purposes of this exclusion, the following definition applies:
"Silica" means:
 - (1) Any form of crystalline or non-crystalline (amorphous) silica, silica particles, silica compounds, silica dust or silica mixed or combined with dust or other particles; or
 - (2) Synthetic silica, including precipitated silica, silica gel, pyrogenic or fumed silica or silica-flour.

Trial Bar Cleanup

It's amazing what a little courage from the bench can do to clean up the justice system. Now that word is out that most silicosis lawsuits are shams, ever more judges are helping to expose the corruption.

The latest is Florida state Judge David Krathen, who in a recent hearing rebuked plaintiffs lawyers for inventing silicosis suits, and declared "mind-boggling" the effect that phony suits were having on the "economic well-being of this country." He vowed to ride herd on the claims in his court, separating the good cases from the fake.

This isn't the way trial lawyers are used to being treated, and credit for this tougher approach goes in part to Texas federal Judge Janis Graham Jack. Judge Krathen made specific reference to the litigation Judge Jack presided over last year, in which she exposed how lawyers, doctors and X-ray screening companies had "manufactured" some 10,000 bogus silicosis suits "for money."

Of the 10,000 suits that Judge Jack sent back to state courts, more than half have already been dismissed—often at the request of the lawyers who first filed them. Even the wizards of the plaintiffs bar are wary of re-entering court sporting discredited doctors and screening companies, many of which are now the focus of federal and Congressional investigations. Separate silicosis suits have also been dismissed in Ohio.

Those plaintiffs attorneys who continue to roll the dice are having to resort to ever more desperate practices. In the Florida case, lawyers rushed to file most of their claims the day before a new state statute curbing asbestos and silicosis suits took effect. They also filed all 111 in Broward County, which is notoriously friendly to the trial bar—or at least it was until they met Judge Krathen, a former trial attorney himself.

The judge allowed defense attorneys to present what they'd uncovered so far about those 111 claims. The stunner was that 72% of the plaintiffs had filed both asbestosis and silicosis suits—despite the medical rarity of having both ailments. Defense lawyers also noted that one of the X-ray screening firms (N&M) singled out in Judge Jack's courtroom also had a role in the Florida suits.

When a trial lawyer defended the practice of driving mobile X-ray vans to do mass screening, Judge Krathen cut him off, noting that N&M "reeks from fraud." He went on to say: "I'm offended, and I've practiced law for 30 years and now on the bench for three years,

that lawyers resort to drive-up buses or vans, unmarked, to sit there, and it looks like . . . are involved in bilk-

ing our society and our institutions out of money for no valid reason."

The judge has since ordered the trial lawyers to pony up fact sheets about their clients. These questionnaires are arguably the most detailed a judge has ever requested in such a suit, demanding not only exhaustive information about plaintiffs' diagnoses, but specifics about any prior asbestos lawsuits.

Judge Krathen also took aim at the plaintiffs lawyers' scattershot approach to naming defendant companies—80 in all—and demanded that their clients start identifying specific products that supposedly caused them harm. This was after a lawyer representing a construction-related firm called Vulcan Materials told the judge that while his company had been named in 17,000 claims, its products had only been positively identified by plaintiffs in 23. The lawyer estimated it can cost Vulcan up to \$17,000 to get dismissed from a case.

The judge summed things up this way: "In the years I've practiced law, the toughest time was getting a good legitimate case bought into by the jury because of all the horrible publicity that comes out from the negative kind of stuff that goes on in [the Jack suit]. . . I'm concerned about the good clients, the good cases, and I'm concerned about the economic well-being of our economy and our companies that support jobs here in the U.S. . . I want this information [about patients and products] up front."

That's the sort of fair-minded approach that has unfortunately been missing from judges in the many years that the asbestos and silicosis blobs have been destroying honest companies and clogging courtrooms. It's good to see a few more judges standing up to the trial bar's transparent corruption.

['Reeks from fraud' ...
'bilking our society.']

Kansas Aggregate Producers' Association
SB512

An illustration:

Assume average cost of defense is \$8,500 (\$17,000 / 2):

For Vulcan Materials, a limestone producer in
Tennessee:

$$\$8,500 \times 17,000 = \$144,500,000$$

For a Kansas producer (assume 200 claims):

$$\$8,500 \times 200 = \$1,700,000$$

Legislative Testimony

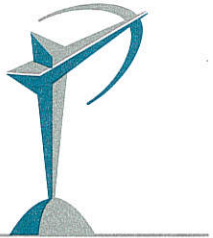
HB 2868

February 16, 2006

Testimony before the Kansas House Insurance Committee
By Lew Ebert, President and CEO

Chairman Schultz and members of the committee;

The Kansas Chamber and its over 10,000 members support HB 2868, enacting medical criteria for silica and asbestos claims. This bill will help compensate truly sick individuals without posing a threat to livelihood of an entire industry.



**THE KANSAS
CHAMBER**

The Force for Business

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Topeka, KS 66612-1671

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As asbestos and silica-related diseases may be disappearing from American hospitals, lawsuits by alleged victims are on the rise. Companies have paid out an estimated \$70 billion on approximately 730,000 asbestos injury claims, making it the most expensive type of litigation in U.S. history. Because the system is clogged with questionable asbestos lawsuits, people who truly have been injured by exposure are not receiving the compensation they need and deserve. Additionally, the asbestos litigation system has forced bankruptcy on more than 70 companies, costing as many as 60,000 Americans their jobs. Total corporate asbestos liability is now expected to exceed \$200 billion. The problem is also escalating as plaintiffs who have already received a recovery in asbestos claims are double-dipping and filing silica lawsuits. This is a real problem for many affected industries and many feel that silica claims are on the same litigation path as asbestos.

Because silica claims and diagnosis have mirrored asbestos litigation, Kansas, like other states, is seeing an insurance marketplace that is excluding companies with silica and asbestos exposure. We need to address the concerns of these industries so that they can continue to compete in Kansas and employ Kansas workers. HB 2868 will not cut off litigation for silica or asbestos claims where the injured party truly is suffering an injury. With this bill in place, we believe that the insurance market may open up and again offer insurance to the affected industries.

We urge you to support HB 2868. Thank you for your time and I will be happy to answer any questions.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

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Date: 2-21-06
Attachment # 2

KsSmallBiz.com

ADVOCATES FOR KANSAS SMALL BUSINESS

P.O. BOX 1246 • TOPEKA, KS 66601-1246 • 785.232.4590. x205
www.KsSmallBiz.com

Presentation to the House Insurance Committee February 16, 2006

**By Kenneth L. Daniel
Publisher, KsSmallBiz.com
C.E.O., Midway Wholesale**

Mister Chairman and Members of the Committee:

My name is Kenneth Daniel. I own a small business, publish a small business e-newsletter, and work as a volunteer advocate for small business.

I would like to testify in favor of House Bill 2868 on behalf of myself and thousands of other Kansas small businesses.

This bill will help to restore sanity and fairness for all parties involved in this All-American mess.

Hundreds of thousands of people who have no symptoms of asbestos or silica related health problems have filed lawsuits hoping to win the legal lottery. Many of those suits are simply bogus. Many more have been filed by people who are afraid problems may show up later.

This legislation will allow the second group to wait until they actually have a problem.

Asbestos litigation has bankrupted many excellent U.S. companies, including several of our suppliers including Johns-Manville and Owens-Corning Fiberglas. The

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litigation has cost tens of thousands of high-paying jobs, and unless the current situation is fixed, it will cost many more.

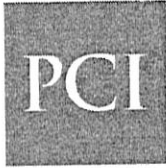
As more and more of these huge manufacturers declare bankruptcy, the legal scavengers cast about for other victims, including small manufacturers, distributors like me, even retail dealers and contractors.

When the manufacturers are driven to bankruptcy, their warranties on everything they make, whether they contained asbestos or silica or not, become virtually worthless. This hurts the final consumer more than anyone else. Do you have a JM or Owens-Corning roof on your house? Good luck with your warranty. For years, Kansas State University would only allow Owens-Corning roofs on their buildings. Asbestos drove OCF out of the commercial roofing business, and it became almost impossible for KSU to benefit from all the 25-year OCF warranties they bought.

My company fabricates some windows, doors, and gutter parts, but we manufacture nothing. Over the past 35 years we have handled very small quantities of materials that contain asbestos and silica, but only in sealed packages or products where these minerals were encapsulated in asphalt or other materials.

Nonetheless, sooner or later, we expect the sharks to get around to us. We aren't afraid of having done something wrong, we are only afraid of being shaken down by trial lawyers using the courts to extort money from us.

House Bill 2868 is your chance to help fix this problem in Kansas. I encourage you to support it.



**Property Casualty Insurers
Association of America**

Shaping the Future of American Insurance

Statement of the
Property Casualty Insurers Association of American
David A. Hanson, Kansas Local Counsel
House Bill 2868
February 16, 2006

The PCI is a national property and casualty trade association composed of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association. PCI members write \$173.6 billion in annual premium, 39.1 percent of the nation's property/casualty insurance. PCI members provide over 41 percent of the property and casualty insurance coverage in Kansas.

Asbestos and silica litigation reform is a PCI institutional goal. Today, the unimpaired claimants are clogging the court systems and in some cases, potentially prohibiting the truly sick claimant with a severe asbestos or silica related illness from receiving both legal and financial remedies. The current asbestos litigation crisis has been caused by fraud, forum shopping and a flood of unimpaired claimants.

In 2004, Ohio enacted asbestos and silica medical criteria legislation. In 2005, Georgia, Texas, and Florida enacted asbestos and silica medical criteria legislation as well. Kansas can now join these states to ensure that only the truly ill claimants from asbestos or silica exposure will be able to pursue an action in the state tort system.

Mass torts have become a lucrative revenue stream for some plaintiff attorneys throughout the country. House Bill 2868 proactively aims to stop asbestos and silica claims from becoming the next mass tort crisis in Kansas. The number of asbestos potential defendants and claimants are exponentially increasing in this country due to abusive litigation.

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Kansas House Bill 2826 is designed to ensure that those individuals truly sick from exposure to asbestos or silica will receive prompt, fair and efficient adjudication of claims against those actually responsible for their injuries. It will preserve the right of all truly sick victims of asbestos or silica related diseases to recover full compensatory damages while enhancing the ability of the most seriously ill to receive prompt recovery.

Following are the highlights of the legislation:

- Establishes reasonable, medical standards for asbestosis, silicosis and cancer claims considered to be the minimum standard necessary to verify these illnesses.(This requirement will go a long way toward weeding unimpaired claims out of the system.)
- Places no additional burden on mesothelioma victims.
- Requires diagnosis by a qualified physician.
- Requires a work and medical history.
- Requires recognized diagnostic tests (i.e. Chest x-ray, lung capacity, pathology report, etc.)
- Suspends the statute of limitations, preserving the right of claimants to sue whenever they become ill.
- Requires that each asbestos case be tried on its own merits, not as part of a “bundle” of claims that may include a few truly sick claimants and dozens of unimpaired claimants. (This change will also assure that compensation that should go to the truly sick is not diverted to pay claimants with no asbestos or silica-related illness.)
- Requires that claimants filing in Kansas courts must be Kansas residents or document that their exposure to asbestos and/or silica occurred in Kansas.

This legislation can help to shut down the “mass screening” of potential asbestos and silica claimants that has resulted in tens of thousands of unimpaired claims in our courts. In June of 2005, U.S. District Court Judge Janis Graham Jack issued a very significant opinion in which she recommended that all but one of the 10,000 claims on the MDL silica docket be dismissed on remand because she concluded that the diagnoses were fraudulently prepared. The screening abuses described by Judge Jack would not be able to occur in Kansas with this legislation.

Kansas House Bill 2868 gives priority to true victims. PCI urges you to support this legislation.


David A. Hanson, Kansas Local Counsel



Building a Better Kansas Since 1934
200 SW 33rd St. Topeka, KS 66611 785-266-4015

**TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE HOUSE COMMITTEE ON INSURANCE
HB 2868**

February 20, 2006

By Corey D Peterson, Associated General Contractors of Kansas, Inc.

Mister Chairman and members of the committee, my name is Corey D Peterson, Executive Vice President of the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

The AGC of Kansas supports House Bill 2868 and requests that you report it favorably for passage.

As bogus silicosis and asbestos lawsuits grow in number, our members are put at an unreasonable disadvantage as fewer insurance companies are willing to provide coverage. This in turn drives up the cost for our members who can find it.

Contrary to some belief, the majority of AGC members are small businesses. This bill would protect small businesses from bogus claims, while maintaining the right of individuals who have actually been negatively affected. In addition to providing the proper protection for these individuals, limiting non-substantiated cases would most likely prompt insurance companies to remove policy exclusions for silica and mixed dust, which would result in a more affordable policy.

In closing, AGC of Kansas urges you to recommend **House Bill 2868** favorably for passage. Thank you.

House Insurance
Date: 2-21-06
Attachment # 5

HOUSE BILL NO. 2868

TESTIMONY OF JOHN M. KLAMANN, J.D.
KLAMANN & HUBBARD, P.A.
7101 COLLEGE BLVD. SUITE 120
OVERLAND PARK, KANSAS 66210

913-327-7600

IN OPPOSITION TO HOUSE BILL 2868
AN ACT CONCERNING ASBESTOS AND SILICA CLAIMS

BEFORE THE KANSAS
HOUSE INSURANCE COMMITTEE

FEBRUARY 21, 2006

House Insurance
Date: 2-21-06
Attachment # 6

**TESTIMONY OF JOHN M. KLAMANN, J.D.
KLAMANN & HUBBARD, P.A.**

Mr. Chairman and Members of the Committee, thank you for this opportunity to provide testimony and information in opposition to H. B. 2868, the "Asbestos and Silica Compensation Fairness (sic) Act."

Background

I am a shareholder and principle in the law firm of Klamann and Hubbard, P. A. in Overland Park, Kansas. For the past twenty-seven years, it has been my privilege to represent the victims of asbestos disease and their families in the State of Kansas. I have also taught "Complex Litigation" as a member of the adjunct faculty at the University of Missouri - Kansas City Law School and have published on the topic of asbestos litigation in the legal encyclopedia publication, Am Jur Trials. I have lectured on the subject of asbestos in numerous Continuing Legal Education forums. I have also been a lecturer for the U.S. EPA's "National Asbestos Training Center" from 1985 to 1995, at which time I wrote and spoke on the topics of asbestos liabilities and insurance on more than fifty (50) occasions, nationwide. I have been an invited speaker on the topic of asbestos disease and disability before Annual Meeting of the American Academy of Disability Evaluating Physicians in New York City. I have spoken on the topic of asbestos at the National Convention of the American Hygiene Association, at the American Society of Civil Engineers, at the National Meeting of the Midwest Insulation Contractors' Association, and in a variety of labor forums.

I received by J. D. from the University of Kansas in 1978 and graduated from Kansas State University in 1974. I am testifying as an advocate for the victims of asbestos disease and their families across the State of Kansas.

The Situation in Kansas – There is No Need for this Legislation

House Bill No. 2868 would impose significant hardships upon an already suffering class of individuals — the victims of asbestos disease — without any showing whatsoever of a need for such legislation in Kansas. The facts are these. There is no “asbestos litigation crisis” in Kansas, nor has there ever been one nor will there ever be one. We had no shipyards in World War II as they did in Cleveland, Ohio and in Georgia and we have no giant petrochemical industry the likes of Texas. The simple fact is that we have had very little exposure to asbestos occur in our state and even less asbestos disease resulting from those exposures. I have been retained in virtually every asbestos personal injury and wrongful death case filed in the eastern part of Kansas in the last decade, or more. The total number of such cases is less than five in the last ten years. Simply stated, although the Chambers of Commerce and their Washington D. C. lawyers are crying fire in a theater, there’s nobody in the theater. These attempts by these foreigners to create a hysteria in our State over asbestos litigation is simply unwarranted.

Further, the law as it currently exists in the State of Kansas is already so bad for asbestos victims that victims suffer a significant chill in enforcing their rights to be compensated fairly. I got a kick out of the name selected for this bill: “The Asbestos and Silica Compensation Fairness Act.” If Kansas is intent on changing the law to make it fair for the true victims of asbestos, it ought to do so to account for the other litigation crisis – the one which emasculates victims of their rights and abandons them to special interests that care not one whit for Kansas or its people. But that Bill is for another day. Today, we are dealing with what might much more accurately be called the “Asbestos and Silica No-Compensation and Unfairness Act.” Here is why that is true.

In an apparent appeal to principle, the proponents of the House Bill No. 2868 don the

mantle of concerned corporate citizen and contend that “sick claimants would receive priority and would no longer be forced to wait behind earlier-filing unimpaired claimants.” However, we find nothing in the Bill which actually gives priority to “sick claimants.” Nor do proponents offer evidence that, in fact, any sick claimant in Kansas has ever been forced to “wait behind earlier filing unimpaired claimants.” Furthermore, there is nothing in this Bill that accelerates the claims of sick or dying patients. In fact, all claims — of all asbestos victims — are significantly slowed by the wholly unnecessary, unduly burdensome, and unconstitutional interference with due process which this Bill imposes. What this Bill does is establish prerequisites – for all asbestos victims — to their ability to file and maintain an action for their injuries. New barriers are imposed and new hurdles erected. And, all of these new burdens fall upon the shoulders of the weak, the sick and the dying. Why are there no new burdens imposed upon the defendants who caused all of this suffering? What, then, is it about this Bill that makes it a “fairness” act? At least let’s be honest enough to call a spade a spade.

Proponents also take up the mantle of the “truly sick” by arguing that if we restrict or deny access to the courts for the less injured, there will be more money in the end for the more injured. Citing the bankruptcy filings of past nationwide defendants in asbestos lawsuits, proponents of House Bill 2868 claim that unless the claims of the sick and injured, but “unimpaired.” are barred, there will be no money left in the end for the seriously ill. However, what the proponents have failed to tell this Committee is that many of these so-called “bankruptcies” are actually Chapter 11 reorganizations in which the companies with the highest net worth and the most grievous fault — companies such as Johns Manville — are allowed to escape their civil liabilities by simply filing for Chapter 11 reorganization. Manville is still in business; Eagle Picher is still in business; Armstrong is still in business; Owens-Corning is still

in business; numerous companies on the list of “bankrupt companies” are prospering by filing for Chapter 11 reorganization and thereby having all of their past sins forgiven. Moreover, proponents have also failed to come clean with this Committee about the reasons why the National Asbestos Bill failed; i.e., that ultimately, it will be the taxpayers and their governments who will foot the bill for those who cannot obtain access to the Courts because special interests and their Washington D.C. lawyers cried wolf in the henhouse and the farmer was found incapable of resisting their hysteria.

Finally, Proponents state that “Although Kansas has not historically seen a number of cases involving asbestos and silica, this legislation can help preserve that record.” They speak as if the absence of cases is a good thing, per se. But what if the absence of cases is due to an unfair, draconian burden placed upon the infirm and the weak, the sick and the dying residents of Kansas? Would a lack of cases still be a good thing in its own right? Why have any tort laws and why have courts if that be so? Yet, what the proponents of this Bill have shown in Section 4(c) is that they have the ability to fashion legislation which retroactively solves the problem of too many cases by imposing this Bill on pending cases within a short 60 day time frame. Thus, should Kansas ever find itself with an “asbestos litigation crisis,” it has the solution in its pocket. Until that time comes, however, this Bill is an entirely unnecessary piece of legislation which severely impacts the victims of asbestos disease in this State.

What the proponents of HB 2868 have not done is guide the Committee through a careful and contextual consideration of the provisions of House Bill 2868. Thus, allow me to do just that.

HB 2868, Section 3(b): “Non-Malignant Claims”

Pursuant to section (a), the Bill changes the standard in the common law for standing to

bring a claim. Whereas an “injury” is sufficient to bring any other kind of tort action, here the claimant must show “moderate (not mild) impairment.” Thus, asbestos victims are singled out from among all of the victims of tortious conduct and may not sue for injury or even mild impairment.

In order to bring a civil action for an asbestos-related non-malignant disease, the victim must first prove up a “prima facie case” at the time he or she first files their Complaint. This requirement is impractical or impossible for the following reasons.

First, the victim of a non-malignant asbestos disease must show “impairment.” This change in the common law has been discussed above. It is unfair and unduly restrictive in light of the lack of any rational reason for this requirement in the State of Kansas.

Next, the impairment must be result of a medical condition to which asbestos exposure was a “substantial contributing factor.” A “substantial contributing factor” is defined by the statute in Section 2(ff) to mean that: (1) asbestos was the “predominant cause” of the impairment while under Section 3(b), (2) the exposure took place “on a regular basis over an extended period of time,” and (3) a “qualified physician,” i.e., the treating physician, has determined that the impairment of the person would not have occurred but for the asbestos exposure.

A “contributing” cause under the common law is sufficient to make a prima facie case under most all other tort claims. But, for asbestos victims, only, a contributing cause is no longer sufficient. This is significant for very important reasons, one of which has to do with the fact that lung disease in asbestos workers (a great number of whom, were smokers long before the hazards of smoking were known) is often a combination of cigarette-induced disease (called “obstructive” disease) and asbestos-induced disease (“restrictive” disease). It can also be the bi-product of concurrent genetic disease (e.g., from rheumatoid arthritis) and asbestos disease.

Thus, mixed lung disease, where the treating physician is incapable of identifying which was the “predominant factor” would disqualify an asbestos victim from his or her recovery. Further, in a mixed disease case, it can be impossible for any doctor, let alone a local treating physician, to state with medical certainty that in the absence of one of two contributing conditions, the impairment would not exist.

Art Elmore’s case is an example of this where the treating doctor testified that the restrictive component of his lung disease (asbestosis) was responsible for 50% of his impairment and the obstructive component (caused by cigarettes) was responsible for 50%. Art’s recovery was \$162,000 for his asbestosis, which he got after a lifetime of work as an “asbestos worker.” Had this Bill been in place, he and his wife would have received nothing.

A “Substantial contributing factor” also means that the exposure to asbestos took place “on a regular basis and over an extended period of time.” While these terms are vague and would require judicial interpretation, they could be interpreted to mean as often as “daily” or for as long as many years. If that were to be the case, then the case reported in the peer-reviewed scientific literature by Dr. Jerrold Abraham, one of the leading experts in the world on asbestos disease, would not be asbestosis, not because the experts said so but because the Kansas Legislature said so. Dr. Abraham’s case was exposed to asbestos for one Summer in a power plant and developed asbestosis that was diagnosed under both pathologic and radiologic standards accepted in the scientific community. Clearly, then, this provision of the Bill is too vague and too restrictive to be scientific. The evidence of the case should determine whether asbestosis exists, not the prescriptions of an unscientific Legislative Bill.

The “prima facie showing” of an asbestos-related physical impairment must be made at the time of the filing of the Complaint by way of evidence verifying that a “qualified physician”

has taken a “detailed occupational and exposure history” from the victim. This requirement imposes at least two fundamental problems over which the victim may have no influence or control. First, the Bill defines “qualified physician” inappropriately and impractically, and, second, no treating doctor ever takes a “detailed occupational and exposure history from the victim.

In order to meet the requirements for a “qualified physician,” the victim’s doctor must: (1) be Board Certified in a designated specialty; (2) have physically examined the victim; (3) be the treating physician; (4) spend limited time and earn limited monies in an expert witness capacity; and (5) be licensed in the victim’s state of residence or the state where the action has been brought. These requirements for a “qualifying physician” are inappropriate. First, there is no showing that in order to be competent to diagnose asbestosis, a physician must be “board certified” in those specialties spelled out in the statute. Second, in order to be a “qualified physician,” the doctor must be a “treating” physician. Treating physicians in the State of Kansas are, more often than not, not experts in the diagnosis of non-malignant asbestos disease. The best example is a treating physician is in a small one doctor town or county and who happens not to be board certified in one of the requisite specialties and who is not an expert in diagnosing asbestos disease. What if that doctor sends his case to Dr. Sam Hammar of Spokane, Washington or Dr. Victor Roggli of Duke, or Doctor Rom of NYU? All of these physicians are Board Certified and nationally recognized authors of medical textbooks on asbestos disease that happen to make more than 10% of their income and spend more than 20% of their time on expert medical-legal consulting. The doctor who physically examines the patient is incompetent to make the diagnosis and the doctors who are unquestionably competent to make the diagnosis are not the patient’s treating physicians.

Further, in order to be a “qualified physician,” the doctor diagnosing the Kansas resident must be licensed in Kansas. What about cases diagnosed in Kansas City? Must a Kansas resident and a veteran, like Mike Allen — a Mesothelioma victim from Olathe, Kansas who died four weeks ago and who was diagnosed and treated at the VA in KC, Mo. — abandon his VA benefits and go to Kansas doctors in order to satisfy the whims of this Bill?

Section 3(b) requires that the “qualified physician” take a “detailed occupational and exposure history” from the victim, or the victim’s survivors. As a practical matter, no treating physician ever does this, nor should they be expected to. It is an unreasonable thing to ask of treating physicians to do this. And, frankly, many of them simply will not do it, nor are they qualified to do it. Neither diagnosis nor treatment of a non-malignant asbestos disorder requires a “detailed occupational and exposure history.” Ironically, the Bill rejects physicians who make medical-legal work their priority, while seeming to require that medical-legal work become a priority for doctors to whom it matters not. In all of the cases I have handled over the years, I have never once seen a “detailed occupational and exposure history” taken by even the best, most conscientious treating physicians. Can the Legislature really think that treating physicians will: (A) identify all of the exposed person’s principal places of employment and exposure, not just to asbestos but to any “airborne contaminant”, (B) note the “nature, duration, and level of any such exposure?” What if the treating doctor simply refuses?

Finally, a detailed occupational history is a much more difficult thing to take than might be thought on the surface. For example, because asbestosis and other asbestos-related diseases are “latent” diseases, exposures occurring decades prior to diagnosis are a part of the relevant occupational and exposure history. Thus, the detailed occupational and exposure history — especially one so broad as to require divulging all exposures to all “airborne contaminants” — is a

near impossibility. This fact is borne out in the literature which is rife with examples where experts in taking occupational histories have failed to get them right. Dr. Roggli's study of brake workers is one admitted example. Dr. Churg's study of ambient asbestos exposures is another. The fact that many suppliers of asbestos-containing products did not disclose their asbestos content further compounds the problem. The medical records of a mesothelioma victim (Mr. Randall) which my office just resolved for a Leavenworth, Kansas man who had been a sheet metal worker all of his life is an example of a case where the treating doctor stated that there had been no asbestos exposure when in fact Mr. Randall had worked with asbestos –covered ductwork in the homes of literally hundreds of people spanning a career of more than thirty years.

This prima facie case from the treating doctor must also include evidence showing a 10-year latency period between time of first exposure to asbestos and the date of diagnosis. It must also show a “detailed medical and smoking history.” What is a “detailed smoking history” and why does it matter if the definition of “smoker” is so broad as to include anyone who “has smoked cigarettes or used other tobacco products in the last 15 years?” Why not just answer that question? Further, what is the relevance to a prima facie case of non-malignant asbestos disease of “a detailed medical history . . . including a thorough review of the exposed person's past and present medical problems and their most probable cause”? Do Uncle Max's hemorrhoids really have anything to do with his asbestotic lungs? Why are we putting the treating physicians to these onerous requirements? I respectfully suggest that none of these requirements has anything to do with “fairness.” They are deliberately onerous and unfair hurdles erected to make it more difficult for deserving victims to seek justice.

The “qualified” (treating) physician must also show a diagnosis of asbestosis “based at a

minimum on radiological or pathological evidence of asbestosis.” “Radiological evidence of asbestosis” is defined by the Bill more restrictively than the peer reviewed medical literature. Specifically, a chest x-ray (but not a more sensitive CT scan) must be read and graded by a “certified B- reader” to show at least 1/1 on the ILO scale. How many treating physicians in the State of Kansas are certified “B-readers”? How many treaters in Kansas know what the “ILO scale” is or what “1/1” means? I respectfully suggest to the Committee that there are no more than a very small handful of certified B-readers in all of the State of Kansas. (I personally know of none.) Further, the concept of a “certified B-reader” is misplaced in everyday medical practice. Certified “B-readers” are physicians and others who have taken a special course and passed a special examination administered by NIOSH. The purpose of the course, the exam, and the “B-reader” certification is related to epidemiology (the statistical study and comparison of large cohorts) and not personal, individual diagnostics. Dr. Gerald Kerby is a pulmonary physician from KU who has testified in hundreds of cases, for the defense, all over the country in the past thirty years. He routinely performs IMEs for asbestos company defendants in asbestos-related litigation. He has been an expert medical witness in virtually all of the asbestos cases pending in this eastern part of this state over the last 30 years. He is not now and never has been a “B-reader.”

The grade “1/1” designation is likewise an inappropriate requirement for maintenance of an asbestosis claim. Numerous peer-reviewed and nationally accepted and cited asbestos epidemiological studies have adopted an ILO rating of “1/0” as the accepted diagnostic criteria for asbestosis. A “1/1” standard is therefore overly restrictive, unscientific, controversial, and biased heavily in favor of the defense in these cases. The Legislature has no business legislating a medical standard of this type which is against the weight of generally accepted scientific

evidence.

Pathologic evidence of asbestosis is defined in the Bill as a statement by a Board Certified Pathologist (who, by the way would not be a “treater”) that “more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies. This definition likewise defies accepted medical standards which require only one section of tissue showing fibrosis adjacent to an asbestos body. Again, the Legislature would be legislating science in a controversial, overly restrictive, biased, and non-accepted way if it were to adopt this standard.

Finally, the “prima facie” case requires a determination by a “qualified physician” that asbestosis rather than Chronic Obstructive Pulmonary Disease (COPD) is a “substantial contributing factor” based upon: (A) Total Lung Capacity (TLC) below the predicted lower limit of normal, (B) forced vital capacity (FVC) below the lower limit of normal, and a ratio of FEV1 to FVC equal to or greater than the lower limit of normal, and (C) a chest x-ray graded by a certified B-reader at least 2/1 on the ILO scale. These requirements are both beyond scientific minimums for asbestosis and they operate as a bar for mixed disease claims which are frequently present in asbestosis cases. First, a combination of COPD and asbestosis may cause ambiguous and offsetting PFT (pulmonary function test) results, causing TLC or FVC results of appear “normal.” Furthermore, a “2/1” ILO reading is beyond diagnostic for asbestosis by anyone’s criteria where a “1/0” grade is diagnostic of asbestosis regardless of the presence or absence of COPD. (The ILO grading system reads the first number as the most likely indicator and the second number and the second-most likely indicator. Thus, a “1/0” would be interpreted to say that the reader’s “most likely” diagnosis is asbestosis whereas the second-most likely diagnosis

is normal lungs.)

In sum, the criteria established by the bill as a statutory minimum for proceeding with an asbestosis claim are controversial at best and unscientific at worst. In essence, they are highly biased and line the Kansas Legislature on the side of the asbestos defense and against Kansas residents who are victims of asbestos disease asbestosis, a progressively debilitating and sometimes fatal form of respiratory illness caused exclusively by exposure to asbestos fibers.

HR 2868, Section 3(c) – Lung Cancer

The prima facie showing required in order to file a claim for lung cancer is even more onerous than that required for asbestosis. Yet, the seriousness and severity of the lung cancer case is greater in most cases for lung cancer victims than it is for asbestosis victims. Thus, the claim by the proponents that the Bill would serve the interests of the sickest of claimants is obviously and patently false.

The prima facie case required for lung cancer requires a diagnosis by a “qualified physician . . . that exposure to asbestos was a substantial contributing cause.” Most treating physicians are not going to be able to do this for two reasons: (1) they are not trained nor familiar enough with the nuances of asbestos-related cancers to be able to make such distinctions as are required to eliminate other possible or contributing causes (a problem which arises in the context of the “substantial contributing factor element described above), and (2) even the world’s greatest expert could not eliminate the contributing factor of smoking where the smoking history is substantial.

Since 1965, it has been known among medical experts in the asbestos medicine field that there is a “synergistic effect” between asbestos and cigarettes with regard for the causation of lung cancer. Whereas the lung cancer risks of tobacco or asbestos alone are in the range of 12

times expected normal, or less, the combination of asbestos and tobacco is highly lethal and produces a synergistic risk of 99 times expected normal. Asbestos heightens the risk from tobacco many times over, and vice versa. However, the smoking history must be significant to produce this synergism. Yet, according to the standard set by this Bill, in effect, any smoker, no matter how light or insignificant his history of smoking might have been (thereby establishing a legislative standard not justified by the Surgeon General's report on smoking), is prone to having his case thrown out on account of the inability of treating physicians to parse exposures and risk in a synergistic model. This is unfair, unscientific and highly biased and restrictive of the rights and entitlements of asbestos victims in this State. It will close the courthouse to virtually all asbestos victims with lung cancer.

Even in the case of a non-smoker — i.e., someone who has not touched a pipe, a cigar, “chew,” or a single cigarette in the last fifteen years — the provisions of this bill are onerous and unconstitutional. Radiological and/or pathologic evidence of asbestosis (discussed above as inherently unfair and unscientific) must be produced as a part of the “prima facie case” at the time of filing. Most asbestos experts will say that underlying asbestosis is not required to make a diagnostic connection between lung cancer and asbestos exposure. This requirement of underlying asbestosis comes from a highly controversial position taken by defense experts in the asbestos litigation. In effect, what the Legislature would be doing is taking sides in a highly disputed matter, without any evidence of the correctness of its position. Many non-smoker lung cancer victims whose only exposure to a carcinogen involved asbestos would be denied their day in court because they do not have asbestosis as well. Asbestos is a carcinogen. The prevailing theory of carcinogenesis accepts a “one hit” model for the initiation of cancer. How does it even make sense that underlying asbestosis, which requires exposure to millions or billions of fibers

must be a prerequisite to even bring a claim? This requirement is unscientific, biased, and unfair.

Further, for non-smokers, the Bill would establish certain minimum exposure periods, depending upon the victim's occupation, this legislative establishment of absolute five-year minimums and absolute five year intervals is patently absurd, highly unscientific and completely arbitrary. Five years exposure are required for insulators, shipyard workers, ship fitters, steamfitters, "or other trades performing similar functions," whatever that might mean. Not even the defendants in these cases believe this is a fair or accurate minimum. In case after case, defendants raise shipyard exposures in World War II as the sole cause of the lung cancer and/or asbestosis. How could that be? The war lasted less than four years.

In contrast, ten years exposure is required for powerhouse and utility workers "or other trades performing similar functions." Danny Lewis was a powerhouse worker. He died of asbestosis. His final 60 days of life were spent in the hospital gasping for breath. At the time of his deposition, he could not utter the words "yes" or "no," he was so short of breath. Powerhouse workers do get sick and die from asbestos. What scientific evidence does the Legislature have to distinguish these workers from "boilermakers"?

Construction workers, maintenance workers, and chemical and refinery workers must have fifteen years of exposure before they may litigate their claim for lung cancer under this Bill. Does any legislator know why that is? Has there been any scientific testimony to even suggest that this is sound? My client, Mr. James, was a resident of Shawnee Mission, Kansas. He died within the last few years of asbestosis. He was a construction worker who worked with drywall compound. Who is to say that his work was any less dangerous than an insulator, many of whom never get sick at all? What is the scientific and rational basis for the selection of the specific

years of minimum exposure and for distinguishing between trades on a hard and fast basis?

Finally, “marine engine room personnel and other personnel on vessels” must have fifteen years of exposure before they would be allowed to bring a lung cancer case. What is the difference in exposure between these workers and so-called “ship fitters” who need only show five years exposure?

This Bill is an abomination for lung cancer victims across the State. There is simply not better way to put it. It is unfair, unscientific, and biased. Kansans deserve better.

**HR 2868, Section 3(d) –
Cancers of the Colon, Rectum, Larynx, Pharynx, Esophagus, and Stomach**

This section of the bill suffers from the same defect as Section 3(c) relating to lung cancer. Those defects will not be reiterated here and the Committee is respectfully directed to the comments above.

HR 2868, Section 3(f) – Silica Claims

This section is beyond the expertise of this witness and I will not attempt to address the specific provisions relating to lung disease caused by Silica.

HR 2868, Section 3(h)(3)(i)(C) – Admissibility of Court’s Findings

Section 3(h)(3) ((i)(C) states that “Presentation of prima facie evidence meeting the requirements of subsection (2), subsection (3), . . . shall not: . . . (C) Be admissible at trial.” Further, section (h)(3)(i)(A) states that no presumption of impairment may be made at trial as a result of the prima facie showing. So, what this Bill does is create two trials in one. A claimant must satisfy a burden of proof, not once but twice, on matters of exposure to asbestos, diagnosis of an asbestos disease, causation, and damages. You’ve got to prove your case when you file it and again in front of the jury. That is a terrible burden, an unnecessary waste of judicial

resources, and a one-sided tilt of the playing field in favor rich and powerful special interests.

HR 2868, Section 4 – Consolidation, Venue, and the Prima Facie Submission

Section 4(c) of the Bill requires a plaintiff to file a written report and supporting test results constituting the “prima facie evidence.” For new cases, that report must be filed with the Complaint, a difficult or impossible task, as described above. For existing cases, such a report must be filed within 60 days of the effective date of the Bill.

What’s lacking from this Bill is any sense of balance. The Bill affords defendants “a reasonable opportunity to challenge the adequacy of the proffered prima facie evidence of asbestos-related impairment but does not impose any time frame within which such a challenge must be made. Apparently, defendants have an unlimited amount of time to make such a challenge or, if it suits them, they may challenge the showing immediately and before any discovery may be taken which would enable Plaintiff to show exposure levels, asbestos content, and other necessary prerequisites. Thus, the burden is not equal. Further, there is no provision in the Bill imposing upon defendants the same or similar restrictions that plaintiffs face. Why are defendants not required to make prima facie showings concerning their products and sales at the same time they file their Answers? Why are defendants not limited to treating physicians for their defense? Why are defendants not limited to “B-readers”? Why is everything tilted away from the victim’s rights? A “fair” Bill would be a balanced Bill, which this Bill is not.

HR 2868, Section 6 – Punitive Damages; Collateral Sources

There is a reason why the common law allows punitive damages. Nevertheless, there are already in place severe restrictions placed upon the ability to claim and recover punitive damages under Kansas statutory law. This Bill would wipe out all punitive damages. Thus, the most culpable, the most egregious conduct would go unpunished and undeterred in this State and for

no good reason.

The proponents argue that “multiple punitive damage awards for the same course of conduct is likely in violation of constitutionally protected due process rights.” That defense has been raised in virtually every case and has rarely been accepted by the Courts. The proponents would have the Legislature usurp the judicial authority to make rulings on constitutionality. This Committee should defer to the judicial branch which has already addressed and continues to address these arguments on a case-by-case basis.

Punitive damages are not used to inflate settlements. If a party’s conduct is so egregious as to warrant submission of punitive damages under the special provisions of Kansas law, then perhaps the public policy of the State is best served by taking cognizance of the prospect of punitive damages. However, I routinely advise my asbestos clients that they should never — especially in Kansas — consider the prospect of punitive damages in considering the reasonableness of a settlement offer. Cases in this State are tried and/or settled on their merits. Punitive damages must be preserved in order to deter and punish when appropriate. The record of corporate indifference and disregard for safety and human values is no worse in any area of tort law than in the sad and sordid history of asbestos. Punitive damages are highly appropriate in certain cases and the courts should have the right and power to impose them on a case-by-case basis.

“Collateral source payments” are required to be disclosed under the provisions of this Bill. This is a highly ironic piece of legislation for it would abrogate the very thing that asbestos defendants insist upon in every settlement, to wit: confidentiality. Virtually every defendant with whom I have settled asbestos cases in the past twenty-seven years has insisted on confidentiality of the settlement amount as a material term of the settlement agreement. The

reason for this is that companies do not want to set precedents with the payments they make on certain cases. Granted that the settlement amounts are disclosed only to the parties but keep in mind that some defendants are defendants in other cases and do not want their co-defendants to know what they pay.

Furthermore, such disclosures of case settlements work against the public policy favoring settlement. It will cause defendants to hold out until others have paid so as to gain the benefit of the knowledge of their settlements amounts measured against anticipated total case value. This will have the certain effect of causing cases to settle later and later in the litigation timeline as defendants play this wait and see game. This in turn will make litigation more expensive and time consuming and will clog the courts with cases that should have settled early on.

Finally, collateral source payments which are not from settlements are frequently insurance or other contract entitlements for which the plaintiffs have paid and to which tortfeasors have no just or equitable claim. Yet, if collateral sources were disclosed, they would have the effect of causing defendants to claim the advantage of these “windfalls” to them and they would impact the ability of plaintiffs to achieve the full recovery they deserve.

HR 2868, Section 7(a) – Sellers

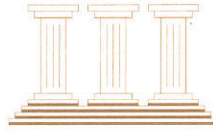
This Bill inappropriately excuses sellers from their own liability without due process being afforded to plaintiffs who have been harmed by sellers’ conduct. The Bill limits causes of action against sellers to negligence (with restrictions), breach of warranty and intentional tort claims. It does away with product liability claims. This change in the law is unwarranted and should not be made.

CONCLUSION

This Bill is unnecessary. It is patently unfair to victims. It is unscientific. It legislates a

bias in favor of asbestos defendants and their insurers. It makes it unduly difficult for victims to make their claims in civil cases and it imposes unconstitutional barriers to the exercise of victims' due process rights. For these reasons, the Bill should be rejected.

Respectfully submitted by John M. Klamann, J. D.



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Representative Clark Shultz, Chair
Members of the House Insurance Committee

From: Callie Jill Denton, Director of Public Affairs

Date: February 21, 2006

RE: HB 2868 Enacting the asbestos and silica compensation fairness act

I am submitting testimony on behalf of the Kansas Trial Lawyers Association, a statewide nonprofit organization of attorneys who represent consumers and advocate for the safety of families and the preservation of Kansas' civil justice system. I appreciate the opportunity to provide the Committee with comments on HB 2868.

KTLA is very concerned with HB 2868, first and foremost because of complicated nature of the bill's subject matter. The public health issues of asbestos and silica, and compensating those that have developed the diseases of asbestosis and silicosis, are weighty and difficult topics and not ones that should be hastily reviewed and acted upon. Therefore, we request that the subject matter of HB 2868 be sent to interim committee in order to provide the topics with the attention they deserve.

The need for HB 2868 is predicated on an assumption that there is a tort crisis in Kansas. However, review of Kansas court cases shows that the so-called "litigation crisis" is a myth (see attached fact sheet). In fact, only 2% of cases filed in Kansas are torts, and of that 2%, only 115 were decided by a jury. The median award in 2004 was \$18,757, down from \$23,416 in 2003. KTLA strongly discourages the Committee from shaping public policy based on the fiction that there is a crisis in Kansas.

In addition, Kansas does not need additional "tort reform" measures because Kansas already has in place strict laws that rigorously control tort cases. Kansas' comparative negligence law (K.S.A. 60-258a) requires that juries divide damages between the plaintiff and negligent defendants according to relative fault. For example, if the jury determines that a defendant is 70% at fault and a plaintiff is 30% at fault, the defendant would be accountable only for 70% of the damages. Kansas also has a cap on non-economic damages that limits recovery of so-called pain and suffering to \$250,000 (K.S.A. 60-19a02). Given these laws, and the lack of a tort crisis, we strongly question the need for HB 2868.

House Insurance
Date: 2-21-06
Attachment # 7

Terry Humphrey, Executive Director

Asbestos has been used to make an estimated 3,000 different consumer products, ranging from paper products to brake linings. Its most common application has been in insulation used for schools, office buildings, and ship yards. Asbestos becomes dangerous when it is damaged or deteriorates because it breaks down into tiny, invisible fibers that are released into the air. When breathed, these fibers can cause devastating illnesses and death in humans.

The causal link between asbestos exposure and illness and death are well-established in the medical and scientific communities. Breathing asbestos—which has been called “White Death” because it is white in appearance--can cause mesothelioma, asbestosis, lung cancer, and pleural disease. Symptoms usually take from 15-30 years after exposure to develop.

Silicosis is a respiratory disease caused by inhalation of silica, which leads to inflammation and scarring of the lungs. Silica is a common, naturally-occurring crystal. It is found in most rock beds and forms dust during mining, quarrying, tunneling, and work with many metal ores. Silica is a main component of sand, so glass workers and sand-blasters also receive heavy exposure to silica.

Any work that includes exposure to silica dust puts the individual at risk for silica, including mining, stone cutting, quarrying, road and building construction, work with abrasives manufacturing, sand blasting and many other occupations and hobbies. Intense exposure to silica may result in disease in a year or less, but it usually takes at least 10 or 15 years of exposure before symptoms develop.

The objective of HB 2868 appears to be, first and foremost, to shield asbestos and silica manufacturers from accountability for the products they've placed in the hands of consumers and in the workplace. The bill imposes new standards for silica and asbestos claims that differ from other areas of Kansas' civil procedure laws. HB 2868 disadvantages injured persons who have legitimate claims against silica or asbestos manufacturers, which KTLA believes is unfair and not warranted.

KTLA questions the public policy merit of protecting companies who may have had a history of concealing the dangers of their products from the public. The proponents of HB 2868 have argued that “many excellent companies” have been bankrupted by asbestos litigation, and HB 2868 is needed to protect other asbestos manufacturers from the same fate. But the example of one of these “excellent companies” is disturbing. Owens-Corning Fiberglas made an insulation called Kaylo that contained asbestos and was used in steel mills, refineries, and shipyards. Workers did not know the risks associated with the product and routinely sawed Kaylo, which sent asbestos fibers everywhere, without knowing the risks. Owens-Corning went bankrupt when its attorneys admitted that it stamped warnings only cartons containing asbestos products but not on the products themselves, and did not even begin this practice until many years after it knew the dangers of asbestos.

KTLA believes that passage of multi-state anti-consumer bills that favor asbestos manufacturers like HB 2868 will provide a “windfall” to corporations that act irresponsibly at the expense of Kansans injured by asbestos. Asbestos manufacturers have a financial stake in legislation that would shield them from accountability. As you may know, the issue of an asbestos trust fund has been the subject of debate in Congress. On February 14, 2006, the U.S. Senate rejected S. 852, a \$20 billion corporate bailout bill for asbestos companies. As early as 2004, anticipation that a bailout bill might pass led to growth in stocks of companies that would be affected by the bailout. In November of 2004, when the broad market rose 4%, Owens-Corning stocks rose about 800%, jumping from 54 cents a share to \$4.85 between Election Day and November 30. Other companies such as Congoleum, Crown Holdings, and W.R. Grace also experienced higher-than average increases.

KTLA also believes that the protections in HB 2868 for industries involved with silica is unwarranted. Silicosis and silicosis litigation is not an issue in Kansas: the amount of silica in Kansas rock is so low that in some cases it is not measurable and the risk of exposure to silica is therefore low; there is little, if any, silicosis litigation in Kansas; and less than 1.1% of mortality in Kansas is from silicosis. In fact, the last known civil case involving silicosis was in 1968.

The issues presented in HB 2868 are complex and require careful analysis and dissection before a bill is passed. While four states have passed their own version of the American Legislative Exchange Council (ALEC) asbestos and silica bill, other states have recently rejected them, including Virginia and Arkansas. KTLA believes that Kansas courts are effectively handling all cases, not just silica and asbestos cases, and that there are protections in place for dealing with fraudulent or frivolous filings. More study is needed to determine if there is any need for silica/asbestos legislation in Kansas, and if so, how it must be crafted so that legitimate claims are not impaired or barred altogether and corporate wrongdoing is not hidden or protected.

On behalf of the Kansas Trial Lawyers Association, I urge your opposition to HB 2868.

Some Facts About Asbestos

This Fact Sheet briefly reviews what asbestos is, how it is identified, where it is found, and how it is used. The U.S. Geological Survey (USGS) provides information on asbestos geology, mineralogy, and mining; other agencies listed on page 4 provide information on regulations and health effects of asbestos exposure.

What is asbestos?

Asbestos is a generic name given to the fibrous variety of six naturally occurring minerals that have been used in commercial products. Asbestos is made up of fiber bundles. These bundles, in turn, are composed of extremely long and thin fibers that can be easily separated from one another. The bundles have splaying ends and are extremely flexible.

The term “asbestos” is not a mineralogical definition. It is a commercial designation for mineral products that possess high tensile strength, flexibility, resistance to chemical and thermal degradation, and high electrical resistance and that can be woven.

What minerals occur as asbestos?

The minerals that can crystallize as asbestos belong to two groups: serpentine (chrysotile) and amphibole (crocidolite, amosite, anthophyllite asbestos, tremolite asbestos, and actinolite asbestos). Amphiboles are distinguished from one another by the amount of sodium, calcium, magnesium, and iron that they contain. Serpentine and amphibole minerals can have fibrous or nonfibrous structures (fig. 1); the fibrous type is called asbestos (see sidebar on Serpentine and Amphibole Crystal Structure and Shape).

Asbestiform varieties of several other amphiboles have been identified. Other minerals are similar to asbestos in their particle shape, but they do not possess the characteristics required to classify them as asbestos (see definition of asbestos above).

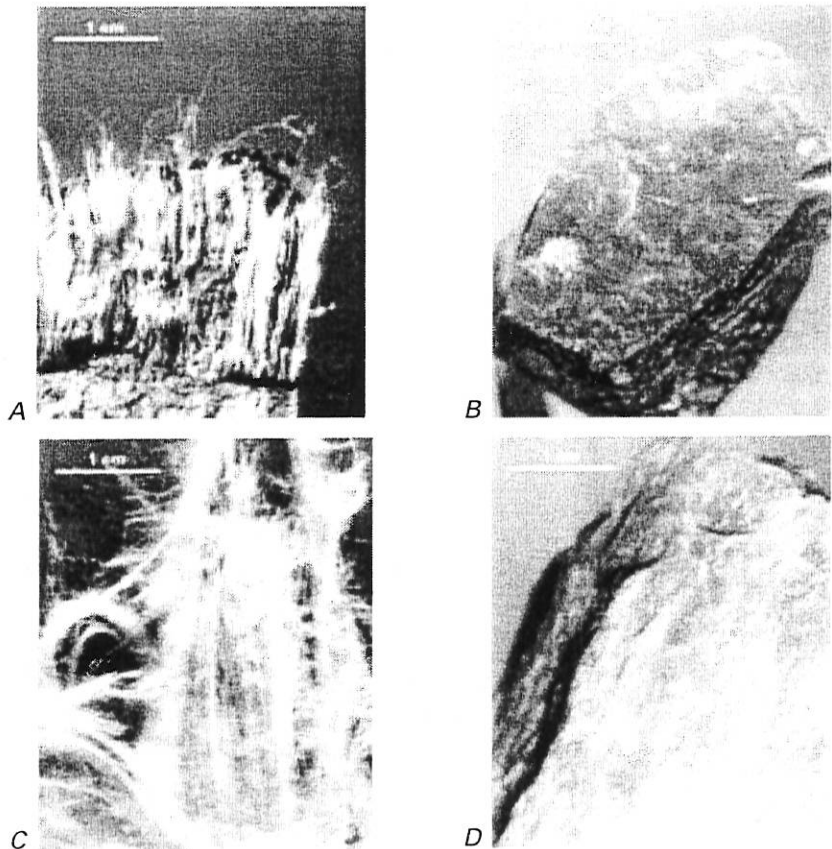


Figure 1. A, Chrysotile asbestos, a member of the serpentine group of minerals. B, Antigorite and lizardite, nonasbestiform serpentine minerals. C, Tremolite asbestos, a member of the amphibole group. D, Tremolite having a nonasbestiform habit. Serpentine and amphibole minerals can have fibrous or nonfibrous structures; the fibrous type is called asbestos. Photographs by Garrett Hyde from U.S. Bureau of Mines Information Circular 8751, 1977.

How is asbestos identified in a mineral sample or product?

The best way to identify asbestos is to use a microscope to examine samples that have not been ground. Even with finely ground samples, there is no problem identifying chrysotile because its particle shape is distinct from the nonasbestiform varieties of serpentine.

With amphiboles, however, the distinction between asbestiform and nonasbestiform varieties is much less clear when examining samples through a microscope. The reason is that amphibole particles have a spectrum of shapes from blocky to prismatic to acicular to

asbestiform. Also, amphiboles break (or cleave) into smaller fragments when finely ground. Long, thin cleavage fragments resemble asbestos fibers.

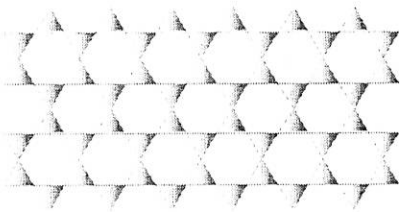
To resolve this problem, the analyst can compare the shapes of *several hundred* amphibole particles in the sample with those of asbestos reference materials and determine whether a sample is asbestiform with a fair degree of certainty. However, unless a fiber bundle has splaying ends, it is impossible to determine if a *single* long, thin particle grew that way (as asbestos) or is a cleavage fragment (nonasbestiform).

SERPENTINE AND AMPHIBOLE CRYSTAL STRUCTURE AND SHAPE

The frameworks of silicate minerals are composed of oxygen and silicon. These elements are arranged in the shape of a pyramid or tetrahedron, with silicon in the center and oxygen at the four corners. For many silicate minerals, these tetrahedra are arranged in rows, and the rows are repeated to form the crystal structure.



In serpentine, the element magnesium is coordinated with the oxygen atoms in the tetrahedra. The tetrahedra are arranged to form sheets. Serpentine is a sheet silicate.



The framework for all amphiboles is a double chain composed of two rows of tetrahedra aligned side by side. Attached to these tetrahedra are elements such as aluminum, calcium, iron, magnesium, potassium, and sodium.



Among the three principal serpentine minerals, the distinction between asbestos and nonasbestiform varieties is apparent. In the nonasbestiform antigorite and lizardite, the silica tetrahedra are arranged to form a sheet structure, and the crystals are platy;

that is, they have one short dimension and two longer, approximately equal dimensions, like a saucer.



In the asbestiform variety of serpentine, chrysotile, sheets are rolled up tightly to form fibers.



With amphiboles, the distinction is not so clear. When short double chains are arranged side by side, blocky or equant crystals form.



If growth is along the length of the double chains, rather than across their width, the amphibole crystals will be longer relative to their width. Slightly elongated crystals are prismatic.



As the length increases relative to the width, the crystals are called acicular.



When the length is extremely long compared with the width, the crystals are called asbestiform or fibrous.



Unlike serpentine, which is either nonasbestiform (platy) or asbestiform (fibrous), amphiboles have a gradational transition from blocky to prismatic to acicular to asbestiform. This gradational change makes it difficult to distinguish between asbestiform and nonasbestiform amphibole particles under the microscope.

Does it matter whether an amphibole is asbestiform when it comes to health risk?

Yes, the Occupational Safety and Health Administration (OSHA) conducted a review of the health effects of inhalation of nonasbestiform amphiboles. The agency determined (Federal Register, v. 57, no. 10, June 8, 1992, p. 24310) that "available evidence supports a conclusion that exposure to nonasbestiform cleavage fragments is not likely to produce a significant risk of developing asbestos-related disease."

Breathing high levels of asbestos fibers for a long time can lead to an increased risk of asbestosis, lung cancer, and mesothelioma. Asbestosis is a noncancerous lung disease related to scarring of the lungs. This disease occurs in people heavily exposed to asbestos in the workplace and in household contacts of asbestos workers. Lung cancer is a relatively common form of cancer, which has been linked to smoking and a variety of occupational exposures. Cigarette smoking significantly increases the risk of lung cancer for people exposed to asbestos. Mesothelioma is a rare cancer of the membranes lining the lungs, chest, and abdominal cavity. Almost all cases are linked to occupational asbestos exposure. The symptoms of these diseases do not usually appear until 20 to 30 years after the first exposure to asbestos.

Particle shape, particle solubility, and duration of exposure are reported to be the three most important factors that determine lung damage. Many researchers believe that amphibole asbestos particles pose a greater risk than chrysotile particles because they are less soluble and more rigid than chrysotile, allowing the amphibole asbestos particles to penetrate lung tissue and remain longer.

What is the most common type of asbestos?

Chrysotile is the most common type of asbestos in the United States and the world.

What types of asbestos are mined?

Currently, chrysotile is the only type of asbestos mined on a large scale. It makes up over 99 percent of present-day production in the world. Only chrysotile is mined in the United States. In 1999, one firm in California accounted for all U.S. chrysotile production.

Small amounts of tremolite asbestos are mined in India and possibly a few other countries, but production is very limited. Commercial production of crocidolite and amosite ended about 4 years ago in South Africa. Anthophyllite asbestos has not been mined for an even longer period of time in the United States.

Where does U.S. asbestos occur?

Asbestos has been identified in 20 States (fig. 2) and mined in 17 States over the past 100 years. It is found in many common rocks. Serpentinite, the most widely occurring host rock for chrysotile, is present throughout the Appalachians, Cascades, Coast Ranges of California and Oregon, and other mountain belts.

In general, chrysotile and amphibole asbestos varieties occur in areas where the original rock, under elevated temperatures and pressures, has been changed by heated fluids (a process referred to as metamorphism). This type

of altered rock occurs predominantly along the eastern seaboard from Alabama to Vermont, along the western seaboard from California to Washington, and in the upper Midwest in Minnesota and Michigan. Small occurrences of asbestos are in other areas, such as Arizona, Idaho, and Montana.

Although asbestos can be present in most of the metamorphic rocks described above, the bulk of the rock mass does not contain asbestos. In fact, most commercial asbestos deposits contain less than 6 percent asbestos by volume. Only a few deposits contain 50 percent or more asbestos (such as chrysotile deposits near Coalinga, Calif.).

Is asbestos still used in the United States?

Yes, about 15,000 metric tons (t) of asbestos was used in the United States in 1999; most was imported from Canada. Major manufacturing uses in the United States are as follows: asphaltic roofing compounds used on commercial buildings, 61 percent; gaskets, 19 percent; and friction products, such as brake shoes and clutches, 13 percent. Most of these products are installed on a commercial basis under conditions regulated by OSHA. Although very few asbestos products have been banned in

the United States, there are almost no asbestos-containing products manufactured specifically for use by the general public.

Is 15,000 metric tons a lot of asbestos?

Relatively speaking, no. The peak year of asbestos use in the United States was 1973, when approximately 719,000 t of asbestos was used for manufacturing friction products, flooring, caulks, gaskets, packings, electrical and heat insulation, plastics, roofing, textiles, and a host of other consumer and commercial products.

There have been thousands of applications for asbestos. Most were viewed as practical solutions to difficult problems. For instance, asbestos helped make the braking systems in automobiles much more dependable, it enabled the production of inexpensive cement-based water-supply pipes, and despite the dire consequences to the installers, asbestos insulation made the warships of World War II much safer.

In the late 1960's and early 1970's, the consumption of asbestos increased at the rate of 3 to 4 percent annually. In the 1980's and 1990's, consumption declined 5 percent annually (fig. 3).

What caused the decline in asbestos use?

Concerns over health risks posed by high exposures to airborne asbestos brought on much of the decline. From the 1970's onward, public pressure to reduce exposure to asbestos resulted in lowered exposure standards and spurred the quest for alternatives to asbestos. Exposure standards were reduced from 5 fibers per cubic centimeter (f/cc) of air over an 8-hour time period to 0.1 f/cc in the workplace. Also, spraying of asbestos insulation onto steel girders and consumer sales of raw asbestos and artificial fireplace logs containing asbestos were banned. Commercial products such as asbestos-containing insulations, plasters, ceiling tiles, cement products, and caulks were slowly phased out. Many companies ceased production of asbestos products because of liability issues. As a result, asbestos consumption in the United States declined rapidly.

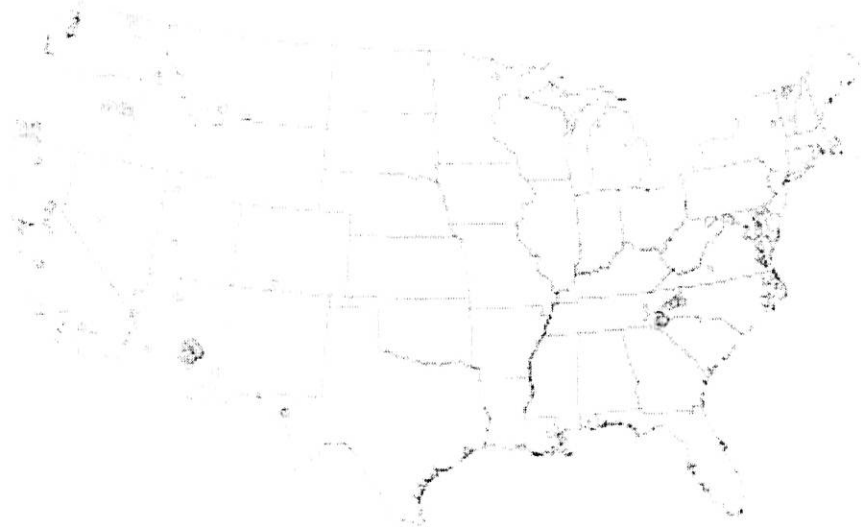


Figure 2. Occurrences of asbestos in the contiguous United States. Major asbestos-bearing deposits occur in the mountain belts in the Eastern and Western United States. Data from USGS Digital Data Series DDS-52 (E.J. McFaul and others, 2000, U.S. Geological Survey Mineral Databases—MRDS and MAS/MILS).

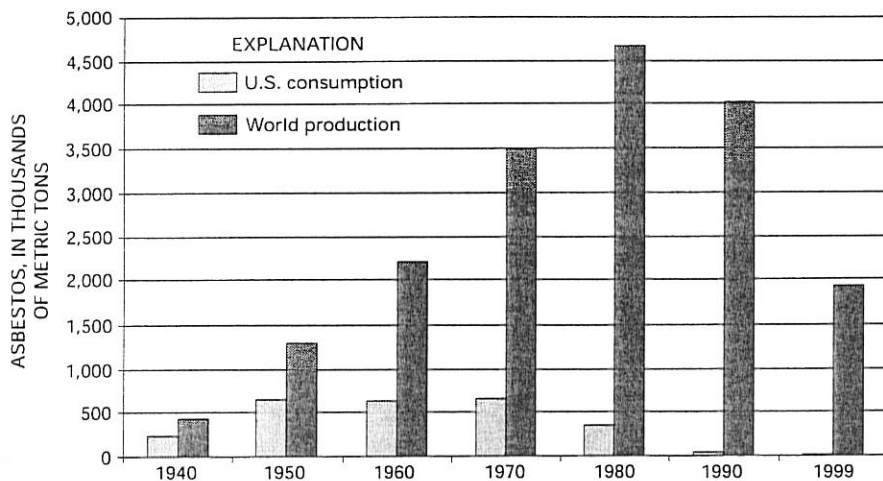


Figure 3. Asbestos consumption in the United States and world production of asbestos, which is used as a guide to world consumption. Peak U.S. consumption of asbestos was 719,000 metric tons in 1973. Peak world production was 5.09 million metric tons in 1975. Data from Minerals Yearbook, v. I (published by the U.S. Bureau of Mines until 1995 and by the U.S. Geological Survey after 1995).

What about worldwide use of asbestos?

Worldwide, the use of asbestos has declined, particularly in Western Europe. Asbestos production is used as a rough guide for consumption (fig. 3). Production declined from 5.09 million metric tons (Mt) in 1975 to about 1.93 Mt in 1999. Several Western European countries have banned some or all asbestos products.

In other regions of the world, there is a continued demand for inexpensive, durable construction materials. Consequently, markets remain strong for asbestos-cement (A/C) products, such as A/C panels for construction of buildings and A/C pipe for water-supply lines.

What is the connection between asbestos and vermiculite?

The connection between asbestos and vermiculite was first brought to public attention recently because of a vermiculite mine near Libby, Mont. Vermiculite consists of clay minerals that expand when heated to form wormlike particles. Vermiculite is used in concrete aggregate, fertilizer carriers, insulation, potting soil, and soil conditioners.

The Libby mine opened in 1921 and once accounted for almost 80 percent of the world's vermiculite produc-

tion. The Libby deposit is unique among commercial U.S. vermiculite deposits in having an average amphibole asbestos content of 4 to 6 percent. Miners and millers were, at times, exposed to high levels of asbestos-containing dusts. Many workers developed health problems as a result of those exposures. Some residents of Libby who were exposed to high levels of asbestos also have been diagnosed with asbestos-related symptoms.

Officials are concerned about the asbestos content of the soils around Libby, about workers who processed the Libby vermiculite ore in manufacturing plants scattered throughout the United States, and about the customers of those plants. USGS scientists are using a hyperspectral remote-sensing survey of Libby to help map the distributions of the asbestiform amphiboles in soils.

Is this vermiculite still being sold?

The Libby vermiculite mine closed in 1990, and shipments of vermiculite from the Libby mill site ended in 1992. However, products made from the Libby vermiculite may still be available from retailers who sell from old stocks. The only certain way to know whether vermiculite came from the Libby mine is to ask the manufacturer.

Is more information available on asbestos?

Yes. For questions concerning geology, mineralogy, and the asbestos industry, contact the U.S. Geological Survey online at <http://minerals.usgs.gov/minerals> or by fax from Mines FaxBack at (703) 648-4999.

For information on regulations and health effects of asbestos exposure, contact these agencies online:

- Consumer Product Safety Commission (www.cpsc.gov)
- U.S. Environmental Protection Agency (www.epa.gov)
- Mine Safety and Health Administration (www.msha.gov)
- Occupational Safety and Health Administration (www.osha.gov)
- National Institute for Occupational Safety and Health (www.cdc.gov/niosh/)
- National Institutes of Health (www.nih.gov)

For information on this Fact Sheet, please contact:

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Asbestos: A Clear & Present Danger

The latency period for diseases caused by asbestos can be up to 40 years, meaning that more Americans will be stricken in the future. Even today more than one million workers annually are exposed to asbestos. Asbestos is pervasive throughout America, embedded in different products from roofing compounds to brake linings. The U. S. Geological Survey estimates that 29 million pounds were used in industrial products as recently as 2001.

As a result Americans will continue to suffer asbestos-related diseases. It is estimated that between 750,000 and 2.7 million new asbestos claims will be filed in the next 50 years.

Although it is impossible to predict how many people will get sick from asbestos exposure, the Hatch bill sets a strict cap on total funding that could leave future victims with nothing and unable to sue the companies if the fund is bankrupt.

Asbestos in Home Attics

Vermiculite insulation, containing asbestos, is in the attics and walls of an estimated 12-to-35 million homes and other structures, according to the U. S. Environmental Protection Agency, (EPA). The agency warns that homeowner and others can be exposed to asbestos if the insulation is disturbed.

The insulation that raises the most concern is called Zonolite, derived from vermiculite ore in a now-closed, 80-year-old mine in Libby, Montana, last owned by W.R. Grace & Co. Hundreds of Libby miners and their relatives have died of asbestos-related diseases. The ore was sent to more than 700 locations throughout North America.

The type of asbestos contained in Zonolite is known as tremolite, and the latest research done on victims from Libby has shown that tremolite is highly toxic.

EPA investigators have discovered that even a minor disturbance of Zonolite can release high levels of asbestos into the air people breathe. The insulation can also leak asbestos into a room through cracks in the ceiling, around light fixtures or around ceiling fans.

In addition, the U.S. Geological Survey found that 9,250 tons of asbestos was used in asphaltic roofing compounds in 2001.

Asbestos in Apartments & Office Buildings

A study conducted on behalf of the EPA dated, May 16, 2003, estimates that there is 2.7 billion square feet of exposed asbestos-containing floor tile in 1.5 million buildings.

The demolition or destruction of older high-rise buildings often means that people in the surrounding area are newly exposed to asbestos.

The attack on the World Trade Center spread a storm of asbestos-contaminated dust throughout lower Manhattan, creating a risk as high as one additional cancer death for every 10 people exposed. Air conditioning units on rooftops and in windows sucked in the dust, covering floors, walls, window coverings and furniture of apartments and offices within several blocks of ground zero.

The levels of asbestos measured in some apartments was as high as in Libby, Montana, the location of a notorious vermiculite ore mine that is now a Superfund site.

Asbestos on the Job

The U. S. Occupational Safety and Health Administration (OSHA) reports that more than one million American workers are still exposed to asbestos each year as it disintegrates or is removed or repaired. Heaviest exposures occur in the construction industry, particularly when asbestos is removed during renovation or demolition.

More than one million tons of easily crumbled ("friable") asbestos is in place in buildings, ships, factories, refineries, power plants and other facilities.

Six hundred and eight tons of asbestos was used in 2001 in brake linings and facings, according to the U.S. Geological Survey. In November 2000, the Seattle Post-Intelligencer analyzed samples of dust from 31 brake-repair garages across the country and detected dangerous levels of asbestos in 21 of the locations. In some locations the exposures were enough to cause a 10 percent cancer rate among mechanics working without protective gear.

Asbestos in Imported Goods

About 30 million pounds of lethal asbestos fibers are imported into the United States each year. The U.S. Geological Survey, which tracks the import and export of minerals, says an additional "untold millions" of pounds of asbestos material crosses U.S. borders unlabeled and mixed with other products.

In May a blue-ribbon panel funded by the EPA called on Congress to ban the import, production and distribution of such products.

Illnesses Caused by Asbestos Exposure

Asbestos is a mineral compound used in an estimated 3,000 different products from brake linings to insulation. Workers, backyard mechanics and people involved in home improvement can be exposed to asbestos and never know it. It can break into fine fibers invisible to the eye that can cause devastating illness and death to anyone who inhales them into their lungs.

Asbestos companies and their insurers have known these facts for at least 30 years, and perhaps as long as 70 years. Yet they continued then and now to expose their workers to the deadly fibers without warning them of the dangers. Even though there was clear evidence that asbestos was a cause lung of disease in workers, the asbestos industry has taken the public position that their workplaces were and are completely safe.

That's what asbestos companies and insurers said in public. Privately there was another story. One of the original asbestos manufacturers, Johns Manville acknowledged "The fibrosis of this disease is irreversible and permanent so that eventually compensation will be paid to each of these men."

Contrary to public perception asbestos has not been banned and is still being used today, exposing hundreds of thousands of workers throughout the nation. Most workers being exposed are in construction trades or working as mechanics.

The U. S. Geological Survey (USGS) says 13,100 metric tons of asbestos was used in America in 2001. Major manufacturing uses are asphaltic roofing compounds (9,250 tons), gaskets (2,300 tons), and friction products, such as brake linings and clutch facings (608 tons).

Asbestos is a public health catastrophe that has killed 300,000 Americans so far and will eventually kill an additional half a million or more. Millions more people exposed to asbestos suffer from asbestosis and pleural diseases. Hundreds of thousands more workers suffer from a debilitating scarring of the lungs.

Asbestos is associated with four specific diseases:

Mesothelioma: Malignant mesothelioma, a cancer of the lung lining or the abdomen, is the most serious of the asbestos-related diseases. It is considered a "signature" cancer because it is caused by virtually nothing besides asbestos. Mesothelioma is almost always fatal, and the life expectancy at diagnosis is usually about one year.

Lung cancer: Various forms of lung cancer are caused by asbestos. People exposed to asbestos have a 5-to-10 time's greater risk of developing lung cancer than those with no exposure. For people who have had a significant exposure to asbestos, and who also smoke, the risk of cancer is 50-to-90 times greater than normal.

Asbestosis: This is a scarring of the lung tissue that slowly reduces the ability of the lungs to function. It is progressive and irreversible. Symptoms often start with shortness of breath. In later stages the damage to the lungs is so severe that the victim can barely walk or talk and ultimately it can be fatal. An X-ray or a breathing test usually diagnoses asbestosis.

Pleural Disease: This is a thickening of the lung lining that interferes with breathing. Pleural disease increases the risk of developing asbestosis or lung cancer.

Damage Develops Slowly but Begins Early

Mesothelioma takes a long time to develop and often does not strike until 25 to 45 years after a person is first exposed to asbestos. Lung cancer generally develops 20 to 30 years after exposure. For asbestosis the length between exposure and diagnosis is usually 20 years and for pleural disease about 15 years.

Nonetheless asbestos causes a physical injury from the beginning that worsens progressively. Evidence obtained through litigation corroborates that the asbestos industry itself and its insurance carriers were well aware of the corrosive effects of exposure.

“The undisputed medical facts are that actual bodily injury, in the form of tissue or cellular damage caused by lodged asbestos fibers, begins shortly after such fibers are first inhaled.” Statements of Pittsburgh Corning Corp. in Pittsburgh Corning Corp. v. The Travelers Indemnity Co. v. PPG Industries, Inc., U.S. District Court (E.D. Pa) (October 24, 1984).

“The injury to the body begins at the first inhalation of the asbestos fibers. Although the eventual change in the lungs begins to develop at this time, it is not until the disease is relatively advanced that a firm diagnosis of asbestosis can be made.” Internal Memo of the Travelers Ins. Co., Liability Claims Administration, Injurious Exposure Claims at sec. 18.1.

“The only conclusion that can be drawn from the medical evidence is the conclusion that is virtually uniform in the medical literature – asbestos-related injuries are the result of a continuous injurious process, beginning with first exposure and continuing through clinical manifestation.” Post-Trial Phase III Brief of Policy Holders on the Medical Evidence, Superior Court of State of Ca, City & County of San Francisco (Dec. 9, 1986).

Once the lungs are injured due to asbestos exposure they do not recover.

“The accumulation of scar-like tissue decreases the functional volume of the lungs, stiffens the passage ways, and impedes the transfer of gases in and out of the blood. If the process continues, the functional capacity of the lungs becomes inadequate to support normal activities and may eventually be unable to support life.” Brief of The Travelers Insurance Co., re Exposure v. Manifestation, Commercial Inc., Co. v. Pittsburgh Corning, (U.S.D.C., E.D.Pa) (July 14, 1981).

“[a]s the fibrotic process progresses, shortness of breath becomes apparent at lesser levels of physical activity and ultimately occurs at rest. . . . As the disease progresses, lung volume reduction leads to a pattern of rapid, shallow breathing.” Post-Trial III

Brief of Policy Holders on the Medical Evidence, Superior Court of the State of Ca, City and County of San Francisco (Dec. 9, 1986).

“Asbestos fibers may alter, or cause serious mutations in, the chromosomal structure of the cells of the pleura.” [This immediately renders the person a candidate for developing lung cancer.] Affidavit of Dr. John Craighead, M.D. (November 3, 1992), filed as an expert witness on behalf of Insurers American Motorist, Republic and Constitution State, in Stonewall Ins. Co. v. Nat’s Gyp. (S.D.N.Y. 86 Civ. 9671).

Merely on the basis of exposure asbestos workers routinely have difficulty obtaining life, health, and workers compensation insurance.

“In the practice of American and Canadian life insurance companies asbestos workers are generally declined on account of the assumed health injurious conditions of the industry.” (Frederick Hoffman, Prudential Life, Mortality from Respiratory Diseases in Dusty Trades, U.S. Dept. of Labor Bulletin 231, 1918).

An insurance industry training manual recognized that: work involving the use of toxic materials like asbestos would cause severe losses and cautioned against writing workers compensation policies where asbestos was involved. (Insurance Company of North America Education Department, Casualty Insurance Course, 1947).

“A diagnosis of pleural disease affects the underwriting process of an applicant’s insurance policy, often causing an increase in the applicant’s insurance premium, or causing the applicant to be declined coverage.” (Affidavit of Dr. Lawrence D. Jones, M.D. (March 12, 1991) in Multi District Litigation-875).

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Esta página en
Español

Preventing Silicosis

U.S. Department of Labor
October 31, 1996

What Is Silicosis?

Silicosis is a disabling, nonreversible and sometimes fatal lung disease caused by overexposure to respirable crystalline silica. Silica is the second most common mineral in the earth's crust and is a major component of sand, rock, and mineral ores. Overexposure to dust that contains microscopic particles of crystalline silica can cause scar tissue to form in the lungs, which reduces the lungs' ability to extract oxygen from the air we breathe. Typical sand found at the beach does not pose a silicosis threat.

More than 1 million U.S. workers are exposed to crystalline silica. Each year, more than 250 American workers die with silicosis. There is no cure for the disease, but it is 100 percent preventable if employers, workers, and health professionals work together to reduce exposures.

In addition to silicosis, inhalation of crystalline silica particles has been associated with other diseases, such as bronchitis and tuberculosis. Some studies also indicate an association with lung cancer.

Who Is at Risk?

Working in any dusty environment where crystalline silica is present potentially can increase a person's chances of getting silicosis. If a number of workers are working in a dusty environment and one is diagnosed with the silicosis, the others should be examined to see if they might also be developing silicosis.

Some examples of the industries and activities that pose the greatest potential risk for worker exposure include:

construction (sandblasting, rock	stone cutting (sawing, abrasive
drilling, masonry work, jack	blasting, chipping, grinding)
hammering, tunneling)	
	glass manufacturing
mining (cutting or drilling through	
sandstone and granite)	agriculture (dusty conditions from distur
	the soil, such as plowing or harvestin
foundry work (grinding, moldings,	

shakeout, core room)

shipbuilding (abrasive blasting)

ceramics, clay, and pottery

railroad (setting and laying track)

manufacturing of soaps and
detergents

manufacturing and use of abrasives

More than 100,000 workers in the United States encounter high-risk, silica exposures through sandblasting, rock drilling, and mining. Workers who remove paint and rust from buildings, bridges, tanks, and other surfaces; clean foundry castings; work with stone or clay; etch or frost glass; and work in construction are at risk of overexposure to crystalline silica.

What Are the Types, Symptoms and Complications of Silicosis?

There are three types of silicosis, depending upon the airborne concentration of crystalline silica to which a worker has been exposed:

Chronic silicosis usually occurs after 10 or more years of overexposure.

Accelerated silicosis results from higher exposures and develops over 5-10 years.

Acute silicosis occurs where exposures are the highest and can cause symptoms to develop within a few weeks or up to 5 years.

Chronic silicosis, the most common form of the disease, may go undetected for years in the early stages; in fact, a chest X-ray may not reveal an abnormality until after 15 or 20 years of exposure. The body's ability to fight infections may be overwhelmed by silica dust in the lungs, making workers more susceptible to certain illnesses, such as tuberculosis. As a result, workers may exhibit one or more of the following symptoms:

- shortness of breath following physical exertion
- severe cough
- fatigue
- loss of appetite
- chest pains
- fever

How Can Workers Determine If They Have Silicosis?

A medical examination that includes a complete work history and a chest X-ray and lung function test is the only sure way to determine if a person has silicosis. Workers who believe they are overexposed to silica dust should visit a doctor who knows about lung diseases. The National Institute for Occupational Safety and Health (NIOSH) recommends that medical examinations occur before job placement or upon entering a trade, and at least every 3 years thereafter.

How Can Silicosis Be Prevented?

Beginning tomorrow, workers and employers will be able to get a package of free materials on how to prevent silicosis by calling a toll-free telephone information service operated by NIOSH in the U.S. Department of Health and Human Services (1-800-35-NIOSH; select option 2, then option 5). The package contains a tip sheet of ideas for preventing silicosis, a guide for working safely with silica, and stickers for hard hats to remind workers that, *If it's silica, it's not just dust*. Spanish - language versions of materials also will be available soon.

Department of Labor staff will distribute silica materials when they inspect mines, construction sites, and other affected industries.

This page was last updated: October 31, 1996

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Silicosis Fact Sheet for Construction Workers

NIOSH

National Institute for Occupational Safety and Health
Delivering on the Nation's Promise: Safety and Health at Work for
All People...through Prevention

Important Information for Construction Workers
on
Deadly But Preventable Dust Exposure

Silicosis has taken a serious toll in the United States, attacking workers in many settings. Here is a real-life story...

A West Virginia driller will not see his 10 year old daughter grow up. He will not be there when she gets married. He will not be there when she starts a family of her own. During the fall of 1988 a driller in his late 40's had chest pain. So he went to a hospital in Morgantown West Virginia. The doctors told him he had silicosis (lung damage). He continued to work and support his family as many workers do. He died from silicosis during the spring of 1994 after 18 years of drilling. After his death his lungs were examined. His lungs were hard because of all the dust in them. It was difficult to cut them even with a scalpel.

Thousands of People are exposed to crystalline silica dust at work every day.

Early Deaths From Dust - Don't Let It Happen To You!

- * 42 year old construction worker in Pennsylvania
- * 37 year old construction worker in Ohio
- * 49 year old construction laborer in Oklahoma
- * 41 year old construction worker in Indiana
- * 44 year old construction laborer in North Carolina
- * 39 year old construction painter in Ohio

What Is Silicosis?

Silicosis is lung damage caused by breathing dust containing extremely fine particles of crystalline silica. Crystalline silica is found in materials such as concrete, masonry and rock. When these materials are made into a fine dust and suspended in the air, breathing in these fine particles can produce lung damage.⁽¹⁾ Silicosis can lead to heart failure and increase the risk of other diseases such as TB (tuberculosis).^(2, 3, 4)

Symptoms of Silicosis:

- * Initially there may be no symptoms.
- * Later there may be difficulty in breathing and cough may be present.
- * Infectious complications may cause fever, weight loss, and night sweats.

See a physician if you experience these symptoms and suspect that you are exposed to crystalline silica.

How Do Construction Workers Get Exposed?

Most crystalline silica comes in the form of quartz. Common sand can be as much as 100% quartz. Concrete and masonry products contain quartz in the form of sand. Therefore, there are many ways to be exposed at construction sites.

Some Activities In Which Quartz Dust May Be Present In The Air Include:

- * Abrasive blasting using silica sand as the abrasive.
- * Abrasive blasting of concrete.
- * Chipping, hammering, and drilling rock.
- * Crushing, loading, hauling, and dumping rock.
- * Chipping, hammering, drilling, sawing, and grinding concrete or masonry.
- * Demolition of concrete and masonry structures.
- * Dry sweeping or pressurized air blowing of concrete or sand dust.

How Is Silicosis Prevented?

The key to silicosis prevention is to prevent dust from being in the air. The Occupational Safety and Health Administration (OSHA) requires administrative or engineering controls be used whenever possible. A simple control may work. Example: A water hose to wet dust down at the point of generation. Here are some steps you can take to protect yourself:

- **Always use the dust control system** and keep it in good maintenance.
- **When sawing concrete or masonry use saws that provide water to the blade.**
- **During rock drilling use water through the drill stem** to reduce the amount of dust in the air.
- Use dust collection systems which are available for many types of dust generating equipment.
- Use local exhaust ventilation to prevent dust from being released into the air.
- **Minimize exposures to nearby workers** by using good work practices.
- **Use abrasives containing less than 1% crystalline silica during abrasive blasting** to prevent harmful quartz dust from being released in the air.
- **Measure dust levels in the air.**
- **Respirators should only be used after dust controls are in place.** Respirators should not be the primary method of protection. If controls cannot keep dust levels below the NIOSH Recommended Exposure Level (REL) then respirators should be used. Select respirators that provide enough protection. **Keeping respirators fit for use requires continual maintenance.**

When respirators are used OSHA requires employers to establish a comprehensive respiratory protection program. Respiratory protection programs are outlined in the NIOSH Guide to Industrial Respiratory Protection.⁽⁵⁾

All workers breathing crystalline silica dust should have a medical examination. Medical Examinations:

- Chest X-ray (classified according to the 1980 International Labour Office (ILO)

International Classification of Radiographs of Pneumoconioses⁽⁶⁾.

- Pulmonary function test.
- Annual evaluation for TB (tuberculosis)⁽⁷⁾.

Want More Information?

Two NIOSH Silicosis Alerts available:

1. Preventing Silicosis and Deaths From Sandblasting⁽⁸⁾;
2. Preventing Silicosis and Deaths in Rock Drillers.⁽⁹⁾

For free copies call NIOSH at 1-800-35-NIOSH.

Your Comments

The National Institute for Occupational Safety and Health (NIOSH) requests assistance in controlling exposures of construction workers to respirable crystalline silica. The need is urgent to inform construction workers, coworkers, and construction managers about the respiratory hazards associated with respirable crystalline silica.

Your comments on how best to inform construction workers about this preventable disease are welcomed. Please send your comments to: Ken Linch, Industrial Hygienist, NIOSH, Division of Respiratory Disease Studies, 1095 Willowdale Road, Morgantown, West Virginia 26505-2888.

Acknowledgments


The principal contributors to this fact-sheet were Ken Linch, M.S., Dennis Groce M.P.H., John Parker, M.D. and Karl Musgrave D.V.M. of the NIOSH Division of Respiratory Disease Studies, Dorothy Tan, Intern, Association of Schools of Public Health, Cynthia Robinson, Ph.D., and Carol Burnett of the NIOSH Division of Surveillance, Hazard Evaluation, and Field Studies.

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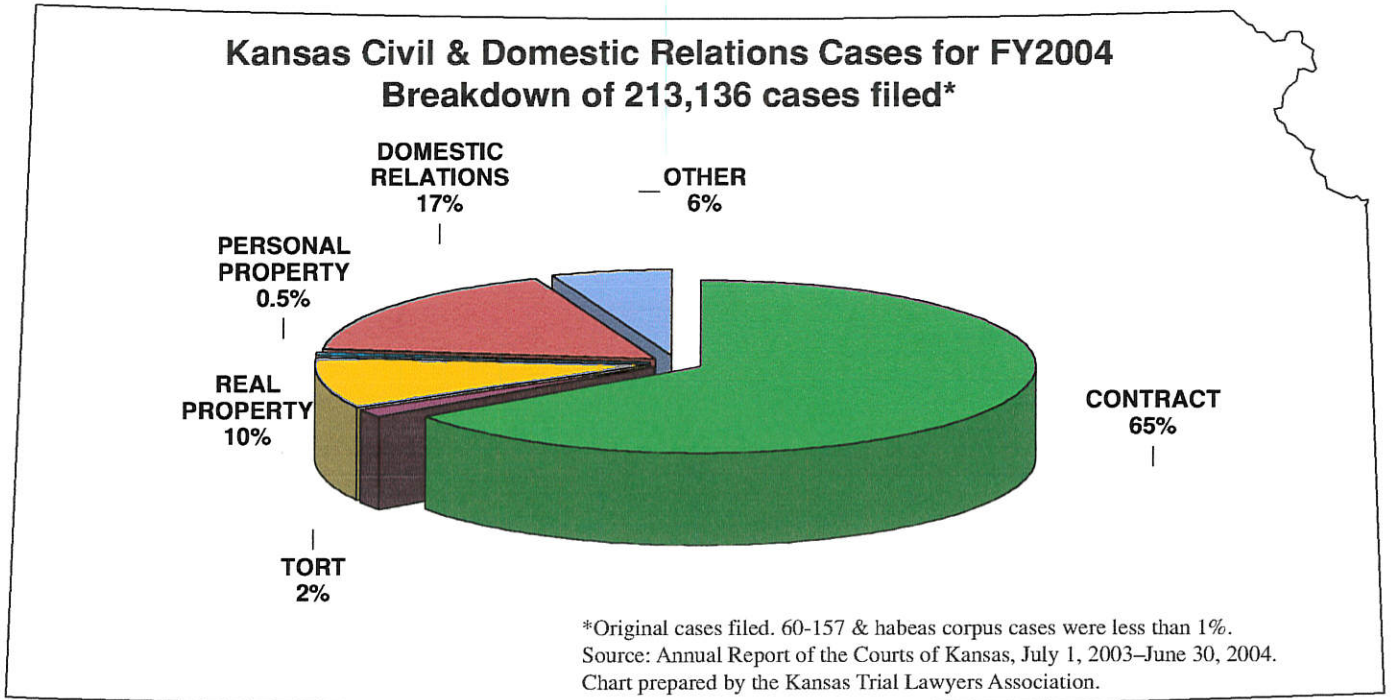
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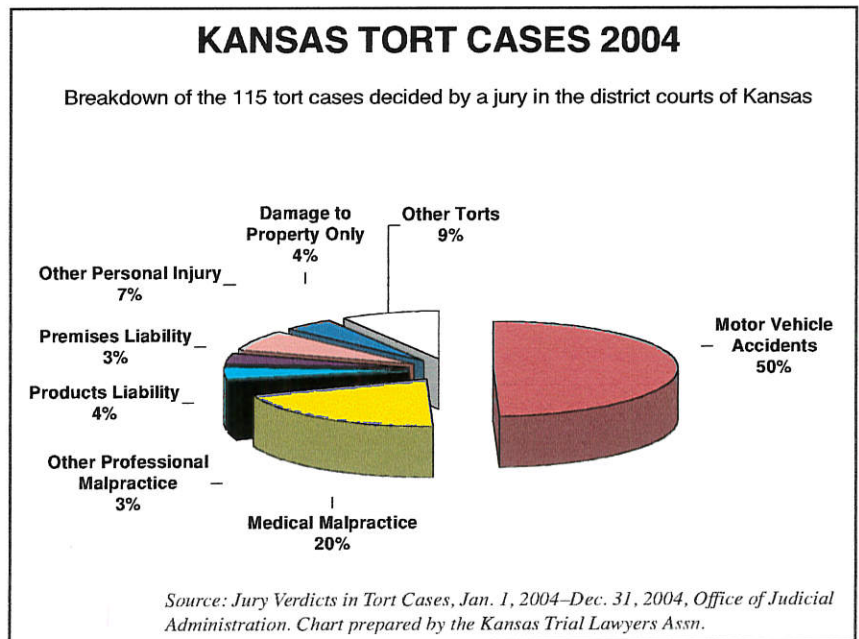
Occupational Safety & Health Administration
200 Constitution Avenue, NW
Washington, DC 20210

There is no “litigation crisis” in Kansas

Only 2% of cases filed in Kansas are torts.



- ✓ Only 2% of cases filed in FY2004 were torts, or personal injury cases.
- ✓ 115 tort cases were decided by Kansas juries in 2004, down from 135 cases in 2001.
- ✓ Half of all tort cases involved auto accidents.
- ✓ The median award in 2004 was \$18,757, down from \$23,416 in 2003.
- ✓ Punitive damages were awarded in only 5 cases in 2004.



Check Your Facts Before You Change the Law

Kansas AFL-CIO

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HOUSE INSURANCE COMMITTEE
HB 2868 ASBESTOS AND SILICA COMPENSATION
FAIRNESS ACT
FEBRUARY 21, 2006
JIM DEHOFF, KANSAS AFL-CIO

Members of the House Insurance Committee:

I appear before you today on behalf of the Kansas AFL-CIO in opposition to HB 2868.

The Kansas AFL-CIO is very concerned about the implications of this bill for workers in industries where silica dust is produced, such as construction, sand blasting, railroads, and agriculture. It isn't clear what impact the bill would have on workers compensation coverage or if the bill would limit the protections of current law in other ways. The bill might even have the unintended consequence of encouraging employers to cut corners or not stay current on safety practices that protect workers from silicosis.

With regard to the bill's protections for asbestos manufacturers, we believe HB 2868 would cut off legitimate claims of workers who were exposed to asbestos in the workplace. The Occupational Health and Safety Administration (OSHA) reports that more than one million workers annually are exposed to asbestos. Asbestos is still a risk in auto repair shops and construction, particularly asbestos-abatement. OSHA has established a permissible exposure limit to asbestos but has also stated that the exposure limit is a target only and it does not establish a level of "safe" asbestos exposure.

On behalf of the Kansas AFL-CIO, I urge you to reject HB 2868:



House Insurance
Date: 2-21-06
Attachment # 8

