Approved: 4-26-06
Date

MINUTES OF THE SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

The meeting was called to order by Chairman Ruth Teichman at 9:30 A.M. on March 21, 2006 in Room 234-N of the Capitol.

All members were present.

Committee staff present:
Melissa Calderwood, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Ken Wilke, Office of Revisor of Statutes
Bev Beam, Committee Secretary

Conferees appearing before the committee:
Shannon Ratliff, Kansas Chamber of Commerce
Lew Ebert, Kansas Chamber (written only)
John Klamann, Klamann & Hubbard

The Chair called the meeting to order and opened the hearing on **(SB 592) - An act enacting the asbestos compensation fairness act; concerning asbestos claims.** She asked Melissa Calderwood for an overview.

Ms. Calderwood said (**SB 592**) has similarities to (**SB 512**) but instead of silicosis, the subject matter is asbestos. The bill has many of the same requirements in terms of claims being made based on physical impairment due to asbestosis and how those determinations would be made. There are some differences. Competent medical authority were the words used in (**SB 512**) and in (**SB 592**) a qualified physician is used. Some of the other standards that are different include exposure years.

The Chair called Shannon Ratliff, on behalf of the Kansas Chamber of Commerce. Mr. Ratliff said the primary purpose of this bill is to provide a fair method of adjudication while precluding the necessity for claimants to file prematurely when they cannot establish that they are, in fact, physically impaired or cannot establish that they have been diagnosed with either cancer related to asbestos or some other condition. Mr. Ratliff said this bill would establish an equitable system that is fair to both claimants and to companies who are named as defendants in cases by asbestos claimants. It does that by providing clear standards for establishing a prima facie case in cases involving claimants seeking compensation for non-malignant conditions claimed to be caused by exposure to asbestos. Mr. Ratliff said persons suffering from cancer associated with asbestos exposure are only minimally impacted by the provisions of this bill. He said persons seeking compensation for non-malignant conditions are required to meet certain minimal criteria in order for their case to proceed. Mr. Ratliff said this procedure is adopted to clear the dockets of trial courts and allow the truly sick to have their day in court and seek compensation. It also adopts an approach which does not penalize those who do not presently meet the criteria established. Instead of having to file to prevent the running of the statute of limitations upon the first indication of some possible condition, it allows those claimants to wait until they meet the criteria in the bill before limitations begins to run. He said only then must they bring suit and because they meet the criteria, their case will be processed unimpeded by thousands of cases where the claimants have no symptoms of asbestosis or any other asbestos related disease.

Mr. Ratliff said the features of the bill are: The claimant must establish a Prima Facie case; discovery is not allowed to proceed until the court has determined that the plaintiff has presented a prima facie case; joinder of claims is limited; cases are limited to those with substantial Kansas connections and punitive damages are prohibited. Mr. Ratliff said what this Bill intends to do is take those who are truly impaired and have been diagnosed as such and move them to the front of the line in terms of courthouse so that they may prosecute their case unencumbered by the claimants who have yet to suffer any impairment, loss of income or loss of any ability to function daily. Mr. Ratliff said he thinks this bill strikes a very fair balance between protecting businesses from what can be crushing contingent liabilities from claimants who felt compelled to file to protect their rights. (Attachment 1)

Written testimony of Lew Ebert, President and CEO of the Kansas Chamber, was also presented. (Attachment 2)

MINUTES OF THE Senate Financial Institutions and Insurance Committee at 9:30 A.M. on March 21, 2006 in Room 234-N of the Capitol.

Written testimony of Lew Ebert, President and CEO of the Kansas Chamber, was also presented. (Attachment 2)

The Chair called John Klamann, Klamann & Hubbard, who testified as an opponent to (**SB 592**). Mr. Klamann said there is no asbestos litigation crisis in Kansas, nor has there ever been one nor will there ever be one. Mr. Klamann said this Bill is unnecessary and patently unfair to victims. He said it is unscientific and 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. Mr. Klamann said for these reasons, the Bill should be rejected. (Attachment 3)

Senator Brownlee asked Mr. Klamann if someone should be able to bring suit on behalf of someone even though they have no medical evidence of any of these illnesses?

Mr. Klamann said the courthouse doors are open to everyone, Senator. They are open to people who didn't have car wrecks who claim they have car wrecks; they are open to people that claim they slipped and fell and didn't slip and fall; they are open to people who claim they hurt their back and didn't hurt their back so the courthouse doors should be open but, once we are in the courthouse, the judges are very careful and the standards are very strict about our ability to make our proof and there is a provision in rules of procedure for summary judgment but once we get into the courthouse these very skilled lawyers who are expert at these cases just like I am do file cases for summary judgment if those cases are not appropriate to file. That's the first thing they go after is authorization from the plaintiff to see all of the medical records and authorization from the plaintiff to see all of the employment records and they go out and get all that and have the capability of getting the case dismissed on a summary judgment motion. But at least then we are not barring people from the courthouse.

Senator Brownlee said, but when you're talking about significant money damages to the defendant and even to the point that you bankrupt companies, darned tootin' they better have medical evidence and what has been going on around the country -- the damages that are perpetrated against companies that don't even have anything to do with it – is ridiculous.

Mr. Klamann asked, "Senator, are you aware of a single case in Kansas where that has occurred?"

Senator Brownlee said, "Sir, we are not going to let it happen."

Senator Barnett asked who can present evidence in court? Does it have to be the treating physician or qualifying? I want to make sure I understand those differences.

Mr. Klamann said by definition, a qualified physician, for the requirements of this statute, is the treating physician.

The qualifying physician has to make the diagnosis of asbestosis. By definition, qualifying physician has to be a treating physician.

The Chair closed the hearing on (**SB 592**).

The Chair opened the hearing on (**HB 2553**) - **An act pertaining to the Kansas Department of Revenue; concerning the division of vehicles; prohibiting certain contracts relating to drivers' license renewal**. Senator Wysong asked, specifically from the insurance side, why do they have such a problem with this bill?

Larry Magill said, it is because it sets a precedent. It's basically prospecting.

The Chair said it is her understanding that this is a test case for the rest of the United States. AAA has put a lot of money into making sure this doesn't get passed in the state of Kansas because they want to continue the practice in the rest of the United States. If they want to continue this practice in the rest of the United States, there has to be some cause as to why this has been set up as a test case.

MINUTES OF THE Senate Financial Institutions and Insurance Committee at 9:30 A.M. on March 21, 2006 in Room 234-N of the Capitol.

Senator Barnett moved to pass the bill out favorably. Senator Brownlee seconded. Motion passed.

The meeting adjourned at 10:30 a.m. The next meeting of this Committee is scheduled for March 22, 2006.

TESTIMONY OF SHANNON H. RATLIFF, ESQ.
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ON BEHALF OF THE
KANSAS CHAMBER OF COMMERCE

IN SUPPORT OF SENATE BILL 582
AN ACT CONCERNING ASBESTOS CLAIMS

BEFORE THE KANSAS
SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

MARCH 21, 2006

Senate FI & I Committee
Attachment 1
March 21, 2006

TESTIMONY OF SHANNON RATLIFF ON BEHALF OF THE KANSAS CHAMBER OF COMMERCE

Good Morning Madam Chair and Members of the Committee. My name is Shannon Ratliff. I am a practicing lawyer admitted to practice in the States of Oklahoma and Texas and before the United States Supreme Court, the Courts of Appeals for the 5th, 6th and 9th Circuits. My firm is Ratliff Law Firm, PLLC and it is located in Austin, Texas at 600 Congress Avenue, Suite 3100. I am a graduate of the University of Texas Law School where I graduated with honors after serving as editor-in-chief of the Texas Law Review. After one year as a clerk on the United States Supreme Court I returned to Austin where I have been engaged in the active practice of law for forty years primarily involved in commercial litigation on behalf of plaintiffs and defendants. The Texas Bar Foundation named me The Outstanding Trial Lawyer in Texas in 2004.

Beginning in the 1980s, I became involved in efforts in Texas and elsewhere to reform certain aspects of the tort system. I have been involved in that endeavor since that time and have testified before numerous committees in the Texas Legislature on the subject of tort reform. I am appearing today on behalf of the Kansas Chamber of Commerce in support of SB 582, the Asbestos Compensation Fairness Act.

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Purposes of the Bill

The purposes of this bill, modeled after the legislation proposed by the American Legislative Exchange Council, are to establish an equitable system that is fair to both claimants and to companies who are named as defendants in cases by asbestos claimants. It does that by providing clear standards for establishing a prima facie case in cases involving claimants seeking compensation for non-malignant conditions claimed to be caused by exposure to asbestos. Persons suffering from cancer associated with asbestos exposure are only minimally impacted by the provisions of this Bill. Persons seeking compensation for non-malignant conditions are required to meet certain minimal criteria in order for their case to proceed. This procedure is adopted to clear the dockets of trial courts and allow the truly sick to have their day in court and seek compensation. However, it also adopts an approach which does not penalize those who do not presently meet the criteria established. Instead of having to file to prevent the running of the statute of limitations upon the first indication of some possible condition, it allows those claimants to wait until they meet the criteria in the bill before limitations begins to run. Only then must they bring suit and because they meet the criteria, their case will be processed unimpeded by thousands of cases where the claimants have no symptoms of asbestosis or any other asbestos related disease. It also prevents a defendant from settling a non-malignant asbestos claim and requiring a release from all future liability should a malignancy later appear which is asbestos related. By these provisions, the truly ill plaintiffs are allowed to proceed and those who have only been exposed are not penalized for not bringing suit earlier.

Background of Asbestos Litigation

While the number of diagnoses of mesothelioma, a cancer directly linked to certain asbestos exposure, has increased only slightly over the years, the number of asbestos cases has skyrocketed and has led to the bankruptcy of some 70 companies involved in the manufacture of asbestos products. While the original defendants in these cases were directly involved with the manufacture and distribution of asbestos products, the number and involvement of defendants have now multiplied. According to a Rand Corporation study, there are now over 8,500 defendants many of whom are only peripherally involved in asbestos either as premises owners where asbestos has been used in the past or in other industries who are on the outskirts of the use of asbestos products. As one noted plaintiff's attorney said, this litigation is "an endless search for a solvent bystander."

Does this explosion of asbestos cases mean that asbestos related diseases have likewise increased exponentially? No. The incidence of disease associated with asbestos has risen slightly but not in relation to the filings. So what other cause could there be? The explosion in asbestos cases is primarily the result of the use of roving vans equipped with X-ray machines and staffed by non-medical personnel. These vans are preceded by advertising seeking persons who will appear for a chest X-ray with, in some instances, the promise of money if an asbestos related condition is found. If the chest X-ray is read by a retained B Reader or physician to have some indication of the presence of asbestos fibers in the lungs, the person is signed up by lawyers and a suit is then filed. This is true whether the person has ever missed a day of work, has ever consulted his own doctor, has ever had a complaint or been rendered unable to perform his daily functions as before. These are the bulk of the cases that have created the logjam.

Is This Explosion Occurring in Kansas?

The short answer is "No." Kansas has not yet had an explosion of these types of cases. However, based on my experience in Texas and my study of the situations in Mississippi, Ohio and elsewhere, this is a particularly opportune time for the Legislature to act to put in place clear and fair standards to prevent Kansas from becoming the venue of the future for such cases. In Texas and elsewhere, when attempts are made to address the problem after it has manifested itself in thousands of filed cases, the response by the plaintiffs' trial bar is that it is "unfair" to change the rules in the middle of the game. While I believe this argument is specious since the Legislature always retains the right to define the rules so long as it does not interfere with a vested right, it has traction in the Legislature and, until this last session in Texas, successfully blocked any meaningful reform. Even in the last session, it was necessary to make some concessions which are not indicative of good policy in order to placate those who were convinced by the "unfair" argument. Therefore, the Kansas Legislature has the opportunity to get out front and define the rules early in a way that benefits sick workers and also prevents the bankruptcy of businesses because of claims by workers who have suffered no injury.

Acting now can also prevent what has happened in every jurisdiction that has enacted corrective legislation---the migration of cases to states where the rules are not yet established. A case in point is the transfer of a large number of cases from Ohio to Delaware after Ohio enacted remedial legislation to cure some of the evils that had developed in its tort system related to asbestos. This makes the case, I believe, for preventive action as opposed to the more difficult after the fact cure.

Overview of Features of the Bill

1. Claimant must establish a Prima Facie case.

Before a claimant's case can proceed, he or she must be able to establish a prima facie case.

For claimants alleging non-malignant injuries, that involves the claimant bringing forward a basic core of evidence including (1) diagnosis by a treating physician with certain credentials based upon a detailed medical and occupational history; (2) proof of a latency period between the date of exposure and the diagnosis consistent with the long latency periods observed in cases attributable to asbestos exposure; (3) radiological or pathological evidence of asbestos-related disease; (4) pulmonary function test results indicating the person is impaired; and, finally, (5) a finding by the doctor making the diagnosis that the exposed person's impairment was not more probably the result of causes other than exposure to asbestos.

For claimants alleging asbestos-related cancers, the claimant would be required to show: (1) a diagnosis by a treating physician of cancer; (2) that exposure to asbestos was a substantial contributing factor to the cancer; (3) a sufficient latency period between exposure and diagnosis; and (4) the diagnosing physician has determined that the impairment was not more probably the result of causes other than asbestos exposure.

2. Procedural Features of the Bill.

Discovery is not allowed to proceed until the court has determined that the plaintiff has presented a prima facie case. Some of the crushing expense for defendants is the broad and expensive discovery engaged in by plaintiffs before they are required to demonstrate the existence of a minimal case. In many instances, this discovery is carried on for the purpose of trying to find evidence that the plaintiff's attorney should have possessed before filing suit. Nor is discovery necessary for the plaintiff to make the prima facie showing. All of the information required and all of the diagnoses or tests are within the knowledge and control of the plaintiff and his or her doctor.

3. Joinder of Claims is Limited.

One of the techniques adopted by the plaintiffs' bar is to utilize the liberal joinder rules in most jurisdictions to amalgamate large numbers of claimants in a single action

even though their claims are not factually related. Courts have been convinced to allow this misuse of the joinder device based on misguided views of judicial economy. In fact, judicial economy is not achieved in most instances and the rights of individual plaintiffs and defendants are sacrificed. To prevent this perversion of the joinder rules, the Bill allows the joinder of any number and type of claims by consent of all parties. Absent such consent, a court may consolidate for purposes of trial only claims by the exposed person and members of his or her household. This allows for claims arising in the same factual circumstances to be joined but prevents the mass joinder of dissimilar claims.

4. Cases are Limited to Those with Substantial Kansas Connections.

To prevent forum shopping, the Bill only allows cases to be brought in Kansas if (1) the plaintiff is domiciled in Kansas or (2) the exposure to asbestos that is the substantial contributing factor to the physical impairment occurred in this State. Similarly, within the State the venue is set.

5. Punitive Damages Are Prohibited.

The statute recognizes that the imposition of punitive damages in these asbestos cases penalizes other potential claimants more than it does the defendant. It has long been recognized that punitive damages deplete the resources that should be available to injured persons and, therefore, the bill denies the recovery of punitive damages.

Legislative Testimony

SB 592

March 21, 2006

Testimony before the
Kansas Senate Financial Institutions and Insurance Committee

By Lew Ebert, President and CEO

THE KANSAS CHAMBER

The Force for Business

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Chairman Teichman and members of the committee;

The Kansas Chamber and it's over 10,000 members support SB 592, enacting medical criteria for asbestos claims. This bill will help compensate truly sick individuals without posing a threat to livelihood of an entire industry.

As asbestos 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.

SB 592 will not cut off litigation for 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. I have attached to my testimony an editorial on this issue that should appear in Kansas papers this week.

We urge you to support SB 592. Thank you for your time and I will be happy to answer any questions.

Senate FI & I Committee
Attachment 2
March 21, 2006

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.

Keep Kansans Safe from Frivolous Asbestos and Silicosis Lawsuits

By S. Lewis Ebert

The Kansas Legislature has a chance to keep us safe from bogus lawsuits, which have the real potential to take advantage of our courts, taxpayers, and business.

Proposed Kansas Asbestos and Silicosis reform legislation takes a no nonsense approach to ensure that our courthouses cannot be abused by those looking to make millions of dollars from frivolous asbestos and silicosis lawsuits.

Kansas Asbestos and Silicosis reform legislation requires strict medical criteria for defendants suing for exposure to asbestos and silicosis. Consequently, under this proposed legislation the only people allowed to sue in a Kansas courthouse must be sick, and their illness must be caused by such exposure.

Thankfully, Kansas is not a breeding ground for massive class action lawsuits filed on behalf of claimants who are not even sick. However, with millions of dollars at stake for some attorneys, this could change overnight.

As other states around the country pass medical criteria rules, plaintiff lawyers find new states in which to file frivolous lawsuits. The state of Delaware didn't pass a medical criteria law like the Kansas Asbestos and Silicosis Reform bill, and now Delaware courts are clogged with frivolous asbestos litigation.

Asbestos Abuse

A recent study done by a Stanford University professor found that 90 percent of people suing for asbestos exposure were not even sick. That leaves the 10 percent of people who are really sick in real trouble.

Asbestos exposure can cause deadly forms of cancer like mesothelioma, which can kill within months of diagnosis. These people should be entitled to fair and timely compensation to help them cope with their medical conditions and to provide for their families and loved ones.

But, when so many people who are not sick abuse the system and sue anyway, they bankrupt companies and deplete trust funds intended for victims. According to Rand Corporation, asbestos claims have already forced more than 70 companies into bankruptcy – wreaking havoc on local communities.

Rand also found that companies have spent over $70 billion in asbestos litigation costs. The *Los Angeles Times* recently reported that half of that amount has actually ended up in the pockets of trial attorneys. That means only $35 billion (out of $70 billion) paid by companies in asbestos litigation costs has gone to victims who are actually sick.

There are more problems for the 10 percent of bona fide asbestos victims in states without medical criteria rules and where some unprincipled lawyers have clogged the courts with bogus cases. For a victim who is sick, a clogged court docket can mean they won't live to see justice.

Sound Silicosis Steps

Silica is found naturally in gravel, sand, soil and rocks and in its natural form is not poisonous. Nevertheless, when fragmented into tiny particles (usually in industrial settings), it can be deadly when trapped in the lungs – just as asbestos fibers are.

Silicosis is a rare disease and nationwide diagnoses are declining. Yet, silicosis related lawsuits are on the rise, because certain lawyers are taking advantage of a flawed system with silicosis exposure like they do with asbestos.

Some legal firms are combining asbestos and silica cases – even though medical experts believe it is "medical rarity" for people to have both conditions. Judges around the country are tossing out these bogus cases.

Last July, Federal Judge Janis Graham Jack of Texas, wrote about 10,000 claims before her: "These diagnoses were driven by neither health nor justice…They were manufactured for money."

It is essential that the Kansas Legislature pass Kansas Asbestos and Silicosis reform legislation to make sure our state does not become a favorite hunting ground for unprincipled lawyers and frivolous lawsuits.

Let's put an end to the potential for lawsuit abuse in Kansas. We need this legislation to head off a disaster.

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S. Lewis Ebert is the President & CEO of The Kansas Chamber of Commerce

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Senator Ruth Teichman, Chair
Members of the Senate Financial Institutions and Insurance Committee

From: John Klamann, Klamann & Hubbard, PA
Callie Jill Denton, Director of Public Affairs

Date: March 21, 2006

RE: SB 592 Enacting the asbestos compensation fairness act

We are 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. We appreciate the opportunity to provide the Committee with comments on SB 592.

Attached to this testimony is the testimony of John Klamann, a member of KTLA who appeared in opposition to HB 2868 in the House Insurance Committee on February 21, 2006. HB 2868 is nearly identical to SB 592. After hearing Mr. Klamann's analysis of HB 2868 as part of four hours of testimony on the bill, the House committee voted to table the bill. One of the primary reasons for this action was that the committee felt that HB 2868 was problematic and should have received a review by the House Judiciary Committee.

I. Overview

SB 592 would impose significant burdens on Kansans suffering from a terrible disease without any showing whatsoever of the need for this type of legislation in Kansas. There is no "asbestos litigation crisis" in Kansas, nor has there ever been one nor will there ever be one. Kansas had no shipyards in World War II as they did in Cleveland, Ohio and in Georgia. Kansas has no petrochemical industry like Texas. Very little exposure to asbestos occurs in Kansas and even less asbestos disease results from these exposures. From the information KTLA has gathered, there have been less than ten asbestos personal injury and wrongful death cases in the Kansas in the last ten years. There is simply no need in Kansas for the onerous legislation that this committee is being asked to pass.

KTLA is very concerned with SB 592, first and foremost because of the complicated nature of the bill's subject matter. The public health issue of asbestos, and compensating

Senate FI&I Committee
Attachment 3
March 21, 2006

Terry Humphrey, Executive Director

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those that have developed the disease of asbestosis, is a weighty and difficult topic and not one that should be hastily reviewed and acted upon. Therefore, we request the following in order to provide the topics with the attention they deserve.

1. *Send SB 592 to the Kansas Judicial Council for review.* The Kansas Judicial Council was created in 1927 and it is responsible for continuously studying the judicial branch and recommending options, including legislation, that improve the administration of justice in Kansas. It includes a Civil Code Advisory Committee that is charged with reviewing the civil code and related areas of law. The Kansas Judicial Council has previously reviewed major policy changes to the code of civil procedure, and it should weigh in on SB 592. Specifically, it should review the status of asbestos litigation in this state, whether the changes in SB 592 are need, and the potential impacts of SB 512 on asbestos claims.

2. *Send SB 592 to an interim committee for further study by the Legislature.* There is no asbestos litigation crisis in Kansas that requires immediate action. The changes in SB 592 are significant and warrant appropriate and considerate review before they are enacted by the Legislature.

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.

The objective of SB 592 appears to be, first and foremost, to shield asbestos manufacturers from accountability for the products they've placed in the hands of consumers and in the workplace. The bill imposes new standards for asbestos claims that differ from other areas of Kansas' civil procedure laws. SB 592 disadvantages injured persons who have legitimate claims against 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 SB 592 have argued that "many excellent companies" have been bankrupted by asbestos litigation, and SB 592 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

specialist in occupational and environmental medicine. Many rural Kansans do not have access to these types of health care providers.

- Because "qualified physician" also requires that the physician be treating the injured person or have a doctor-patient relationship, Kansans may be forced to go outside their home towns to be seen by a doctor that meets the requirements of the bill.
- But Kansans could not consult a true asbestos physician expert since such an expert would probably not meet the requirements that they practice in state and that they not spend more than 10% of their practice on consulting. The "10%" standard is also in conflict with Kansas' standards for qualification of expert witnesses, K.S.A. 60-3412.
- The requirement that a "qualified physician" also not earn more than 20% from consulting would require lengthy and inappropriate review of the physician's confidential financial records.
- The "qualified physician" must be licensed to practice and actively practice in the state where the plaintiff resides or in which the plaintiff's civil action was filed. So a Missouri-licensed physician treating a Kansas resident in Kansas City would not meet the requirements of a "qualified physician".
- The bill also apparently precludes entirely wrongful death claims because of the requirements that the "qualified physician" conduct a physical exam of the person and treat or have a doctor-patient relationship with the person. We don't know how this would be possible if the injured person is deceased.

➢ The bill legislates medical standards and procedures for diagnosing asbestosis. It isn't apparent that these standards reflect generally accepted principles of care for the medical and scientific community. Even if they do, such principles could change over time and the bill will become outdated and obsolete. The definitions of concern include "pathological evidence of asbestosis", "radiological evidence of asbestosis", "predicted lower limit of normal", "FEV1", "FVC", "ILO scale" and "radiological evidence of diffuse pleural thickening".

➢ Requiring a certified B-reader to provide a diagnosis or review a particular case for purposes of diagnosing is inappropriate and misplaced. "Certified B-readers" are physicians and others who have passed an examination given by NIOSH (National Institute for Occupational Health and Safety). A B-reader certification is related to epidemiology and not personal, individual diagnoses. In addition, the information that KTLA has gathered indicates that there are very few if any B-readers in Kansas.

➢ The definition of "substantial contributing factor" is problematic because it is in conflict with Kansas' comparative negligence system. 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. The "substantial contributing factor" requirement moves away from our current system of apportioning accountability by requiring that exposure to asbestos be the "predominant" cause of the physical impairment.. In addition, the definition of "substantial contributing factor" includes requirements for a "qualified physician". As noted, we are concerned that injured persons will be unable to find a "qualified physician" as required by the definition of the bill, and therefore would also have trouble establishing that asbestos was a "substantial contributing factor" in their physical impairment.

Section 3. Requirements for a prima facie filing of an asbestos claim.

- Subsections (a), (b), (c), and (d) rely on defective and questionable definitions of "substantial contributing factor", "qualified physician", "pathological evidence of asbestosis", "radiological evidence of asbestosis", "predicted lower limit of normal", "FEV1", "FVC", "ILO scale" and "radiological evidence of diffuse pleural thickening". See above.

- In (b), (c), and (d), the "qualified physician" must go beyond a normal diagnosis of illness and is placed in the position of judge and jury. The "qualified physician" is prohibited from drawing a conclusion that "the medical findings and impairment are consistent with or compatible with exposure to asbestos", apparently because such a conclusion is not sufficient. Instead, the "qualified physician" must make findings and conclusions about not only whether disease is present but also all potential factors that are responsible for contributing to such disease. Not only does this go beyond the scope for a physician, it replaces the fact finding process and conclusions of law that should be left to the court.
    - The bill requires a "qualified physician" to provide a detailed occupational and exposure history that requires inclusion of information that is in the defendant's control and normally would not be available to the injured party absent a discovery process. This information includes the general nature, duration, and general levels of exposure and all of the airborne contaminants the injured person was exposed to. Since "qualified physician" and the exposed person likely do not have this information, the exposed person will be unable to make the bill's required "prima facie showing" and their claim is barred.
    - The bill requires a "qualified physician" to provide a detailed medical history of the exposed person's past and present medical problems, as well as the most probably causes of the medical problems. For example, the exposed person would have to disclose health conditions that are unrelated to their claim of asbestosis such as a hernia in order to simply get in the court room doors. Such information is excessive, unnecessary, and an improper violation of medical confidentiality.

- In (c) and (d), minimum exposure periods are required depending on the type of industry. These exposure periods are arbitrary and apparently without scientific

basis and the only intent appears to be to bar legitimate claims. Individuals have been exposed asbestos for time periods of less than those required by the bill and have developed asbestosis. There is no reason why such persons should not get their day in court.

Section 4.

- The bill is unconstitutional because it applies retroactively to claims already filed as of the date of the act. Such claims are required to be dismissed if they don't make the required prima facie showing.

- The bill prohibits the filing of any claim if the exposed person does not meet all the requirements of the bill for a prima facie showing. But the requirements for a prima facie showing are so onerous that many legitimate claims will be barred simply because the injured person could not locate a doctor that meets the requirements of a "qualified physician", or did not meet the minimum exposure periods, or any other of the many reasons we've identified as being problematic or a barrier.

Section 5.

- The bill appears to be in conflict with Kansas' one action rule. The one action rule requires that all claims against all defendants arising out of a single event be brought in one action, or they are thereafter barred. As a result of the conflict between the bill and the one action rule, future claims of asbestos-related cancer could be foreclosed and the exposed person would have no ability to seek compensation.

Section 6.

- The bill prohibits punitive damages, yet historically the defendants in asbestos cases have been shown to have committed egregious acts of intentional negligence and deception. There is no reason to prohibit the court from imposing punitive damages if it sees fit based on the circumstances of a specific case and the requirements of the law. Kansas law at 60-3701 et. seq. provides for a very specific process and criteria for a judge to determine whether punitive damages are appropriate. There is no public policy reason for holding asbestos manufacturers to different standards than other types of manufacturers.

- The bill is in conflict with Kansas' collateral source rule.

III. Conclusion

SB 592 is in need of attention that can only be provided through an interim study or review by the Kansas Judicial Council. We urge your opposition to SB 592.

HOUSE BILL NO. 2868

TESTIMONY OF JOHN M. KLAMANN, J.D.
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IN OPPOSITION TO HOUSE BILL 2868
AN ACT CONCERNING ASBESTOS AND SILICA CLAIMS

BEFORE THE KANSAS
HOUSE INSURANCE COMMITTEE

FEBRUARY 21, 2006

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 <u>not</u> 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.

<u>HB 2868, Section 3(b): "Non-Malignant Claims"</u>

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 as 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 <u>not</u> 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.

USGS
science for a changing world

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).

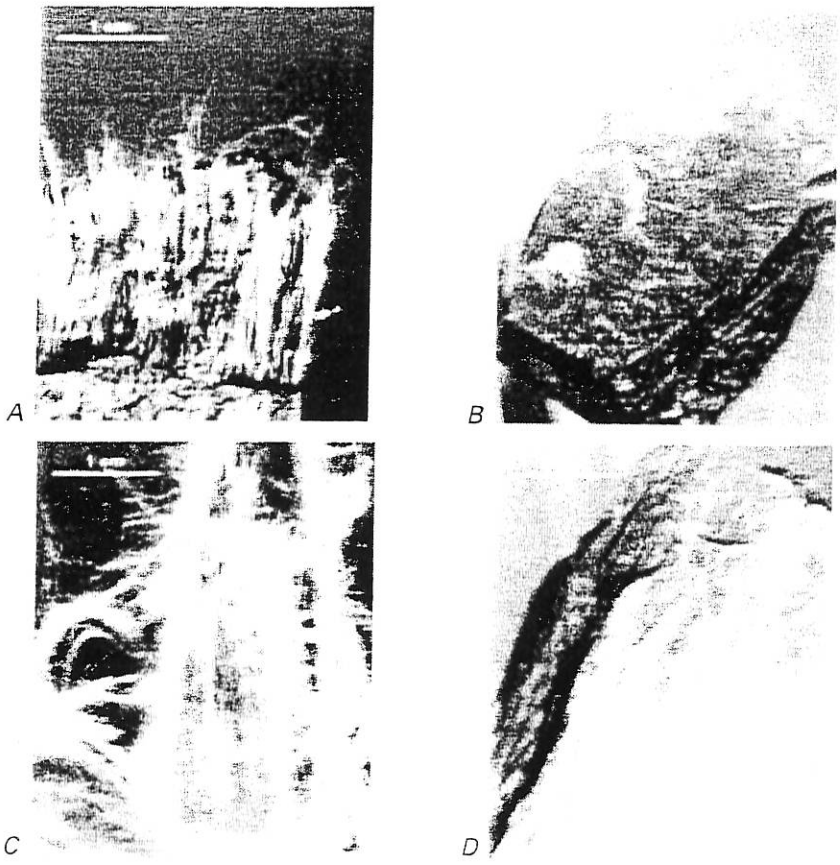

Figure 1. *A*, Chrysotile asbestos, a member of the serpentine group of minerals. *B*, Antigorite and lizardite, nonasbestiform serpentine minerals. *C*, Tremolite asbestos, a member of the amphibole group. *D*, Tremolite having a nonasbestiform habit. Serpentine and amphibole minerals can have fibrous 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).

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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).

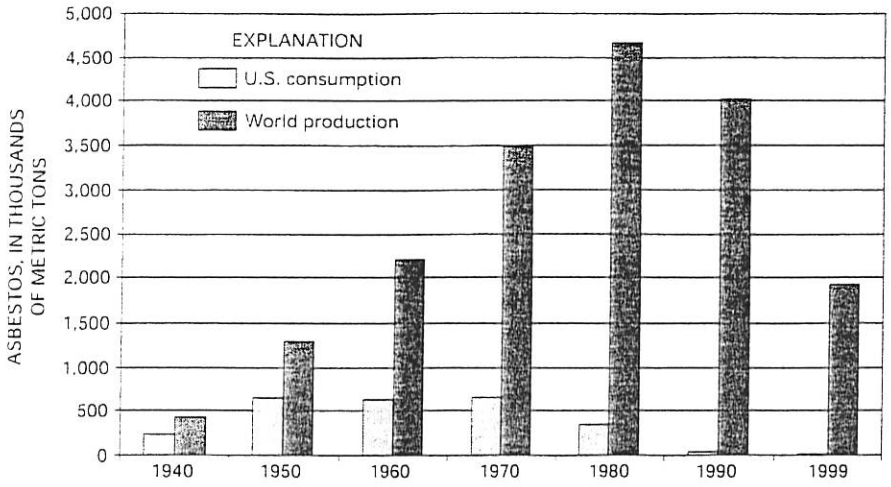

Figure 3. Asbestos consumption in the United States and world production of asbestos, which is used as a guide to world consumption. Peak U.S. consumption of asbestos was 719,000 metric tons in 1973. Peak world production was 5.09 million metric tons in 1975. Data from Minerals Yearbook, v. I (published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

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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 damaged 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).*

-- End --