

ISSUE BACKGROUND

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The Public Policy Solution to Runaway Asbestos Litigation

In the past two decades asbestos litigation has sought some redress for those suffering with different cancers and other asbestos-related diseases. However, over the last decade, asbestos-claim trial attorneys have been “bundling” hundreds and thousands of plaintiffs who are not suffering injury by past asbestos exposure, delaying or thwarting recovery for legitimate claimants. According to the American Academy of Actuaries, 90 percent of asbestos cases involve plaintiffs that do not manifest serious asbestos-related diseases, the number of annual claim filings is increasing exponentially, and the size of awards made to settle claims is also increasing.

Because the primary historical manufacturers of asbestos are now bankrupt due to asbestos claims and litigation, trial lawyers have targeted hundreds of American companies with no, or the most attenuated past relationship, to the substance — oftentimes associated only by acquiring a firm that itself had a peripheral relationship to asbestos. By flooding the courts with claims for persons who can declare exposure to asbestos without any manifestation of medical injury or illness, not only are the sick and dying victims robbed, but healthy, productive businesses are threatened with serious financial ruin and bankruptcy.

As more and more large company defendants in asbestos litigation file for bankruptcy protection, small and medium-sized businesses outside the asbestos and building products industry continue to face unpredictable and potentially devastating liability, extending to thousands of wholesaler-distributors, hardware stores, plumbing contractors, auto parts dealers, and lumberyards. The adequacy of insurance coverage or capital to deal with this overwhelming liability exposure varies widely from company to company.

This *Issue Background* focuses on the public policy “way out” of out-of-control asbestos litigation. The National Paint and Coatings Association, a leader in establishing the Asbestos Reform Coalition of Small and Medium-Sized Businesses, actively supported a measure in Congress — the Fairness in Asbestos Injury Resolution Act of 2003 — a viable solution that would provide expedited relief for legitimate asbestos claimants, fundamental fairness, and economic security for American businesses.

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The Public Policy Solution to Runaway Asbestos Litigation

JUST THE FACTS

In March 2003, David Austern, president of Claims Resolution Management and general counsel for the Manville Personal Injury Settlement Trust — the largest of its kind — submitted testimony before the Senate Judiciary Committee demonstrating that victims of asbestos-related diseases are not receiving their due awards because the system by which they make claims is neither fair nor effective. Austern focused on the outrageous distortions in the system: some claimants receive great awards, others nothing; some die before their case is even heard. He testified that 89 percent of the Manville Trust paid claims have been to persons with non-cancer claims, 11 percent with cancer claims. He attributed these excessively skewed proportions to the “bundling” of non-sick claimants by trial lawyers. What’s more, he said, Manville Trust can pay victims only five percent of the

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value of a claim and the billions of dollars paid to claimants account for less than half of all the asbestos claims that will be filed with the Trust.

Asbestos litigation is the longest running mass tort litigation in U.S. history. While many U.S. companies have yet to feel the sting of asbestos liability, the threat of this attorney-driven litigation epidemic endangers virtually all of them. The dire consequences are that legitimate claimants are often pushed to the back of the line, while companies that do not warrant being involved as defendants suffer enormous transaction costs (legal fees) and even bankruptcy.

The statistics related to runaway asbestos litigation on this point are shocking: More than 70 bankruptcies since the late 1970s, half since 1998; some 75 sectors of the 83 industrial sectors identified by the U.S. Commerce Department are affected by asbestos litigation; between 52,000 and 60,000 U.S. jobs have been lost because of asbestos-related bankruptcies; transaction costs have consumed approximately

60 percent of the total monies spent on asbestos to date with 65 percent of the funds left over going to persons who had no asbestos-related illness and likely never would; and, despite decades of asbestos claims litigation, 70 percent of the total litigation and indemnity costs are yet to be paid.

A 2002 independent study evaluating the impact of asbestos liabilities on workers in bankrupt firms commissioned by the American Insurance Association led by Nobel Laureate Economics Professor Joseph Stiglitz found that each displaced worker at bankrupt firms will lose \$25,000 to \$50,000 in wages over his/her career and suffer roughly \$8,300 in pension losses. His findings also showed that the average worker at an asbestos-related bankrupt firm with a 401(k) plan suffered a roughly 25 percent reduction in the value of the 401(k) account!

Those are some of the *direct* costs of asbestos litigation. A 2003 study by the Financial Institutions for Asbestos Reform found a hidden “asbestos

penalty” to businesses, namely, that asbestos liability reduces a businesses’ earnings by the amount of any payout to claimants and costs incurred during litigation process. It also increases uncertainty of investors about future earning because of the unpredictable nature of this litigation process, translating to billions lost by shareholders and investors.

Costs arising from U.S. asbestos liability exposure have been estimated at \$200 to \$275 billion, with between \$78 billion and \$175 billion not covered by insurance. There can be no question that runaway asbestos litigation, or this “elephantine morass,” as the U.S. Supreme Court has called it, is a serious and growing drag on economic growth, jobs, and the availability of fairly priced insurance. Most everyone is losing, except for certain very affluent attorneys, and the situation is worsening.

A better solution is obviously needed.

THE FEDERAL TRUST FUND SOLUTION: FAIRNESS AND EXPEDITED PAYMENTS TO ACTUAL VICTIMS

The asbestos claims system as it exists is unfair to many victims, drains resources from impaired and future victims, and wreaks havoc on companies, workers and retirees. A national asbestos trust is needed to serve as a clearinghouse for claims to ensure fair and expedited recovery to impaired victims, prioritize claims of those with serious illnesses, preserve the rights of future claimants and provide certainty to all parties. It would reduce transaction costs and attorneys fees that dramatically reduce victims’ rewards.

The Fairness in Asbestos Injury Resolution Act, as outlined in 2003 and passed by the Senate Judiciary Committee, would do that. The Act would establish a

targeted and streamlined federal administrative and judicial process to pay legitimate claimants based on established medical criteria and a formula for recovery. It calls for a new \$150 billion federally administered trust fund to cap company liability and compensate victims with mesothelioma lung cancer and other asbestos-related cancers over the next 27 years via an asbestos claims court, paid for by insurers and industry defendants according to specified tiers, based on their asbestos liability exposure. Effectively, all federal and state asbestos litigation would be foreclosed by this Act, assuring innocent and industrious businesses that the net of asbestos liability does not ensnare them.

The measure with certain modifications is expected to be reintroduced in early 2004. NPCA and the Asbestos Reform Coalition of Small and Medium-Sized Businesses have urged all members of its various trade associations to contact their congressmen to support the Fairness in Asbestos Injury Resolution Act to protect asbestos victims and victims of asbestos litigation alike.

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NPCA

NPCA is a voluntary nonprofit trade association representing some 400 paint and coatings manufacturers, raw materials suppliers and distributors. As the preeminent organization representing the paint and coatings industry in the United States, NPCA's primary role is to serve as ally and advocate on legislative, regulatory, and judicial issues at the federal, state and local levels. In addition, NPCA provides members with such services as research and technical information, statistical management information, legal guidance, and community service project support.

