

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Senate Bill 216

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House Judiciary Committee
Task Force on Civil Justice Law

Hearing Room No. 1
Ground Floor, North Office Building
Harrisburg, Pennsylvania

Thursday, June 14, 2001 - 10:07 a.m.

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BEFORE:

Honorable Timothy Hennessey, Majority Chairman
Honorable Harold James

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Written Testimony Submitted By:

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Chief Executive Officer
American Cancer Society
Pennsylvania Division, Inc.

1 CHAIRPERSON HENNESSEY: Good morning, ladies
2 and gentlemen. We're here today to convene a public
3 hearing as part of a task force, the Civil Justice Task
4 Force of the Pennsylvania House of Representatives
5 Judiciary Committee. Thank you for being here either to
6 testify or to witness what's going on or observe the
7 proceedings.

8 A special thanks to Judy Sedesse and Mike
9 Schwoyer, the Executive Director of the Judiciary Committee
10 on the Republican side; to Mike Rish, the Executive
11 Director of the committee, of the Judiciary Committee on
12 the Democratic side.

13 They've done the heavy lifting in setting up
14 this hearing, arranging witnesses, arranging a place for
15 testimony here today and notices to meet the Sunshine Act
16 requirements.

17 This is a public hearing. It's a public
18 hearing of the Task Force. Two of the members, when we set
19 this up, thought they could be here. The last minute
20 concerns have indicated they can't be here. But we'll take
21 the testimony, provide them with copies.

22 And then the Task Force, at the end of the
23 hearing, at some point after the hearing closes, we will
24 make a report to the Judiciary Committee about what has
25 been testified to, what the issues are. And then the

1 Judiciary Committee will take up the bill at some point
2 that is determined by the Chairman's office.

3 I'm told that Senate Bill 216 passed the
4 Senate early on in the session without a whole lot of
5 discussion. We're here today to have that discussion
6 because there have been a number of concerns that have been
7 raised about it and what some people concede as perhaps an
8 unwarranted extension of the so-called discovery rule.

9 We have with us today to start the proceedings
10 Donald Kockler from the office of Senator Christine
11 Tartaglione, the prime sponsor of Senate Bill 216. So Mr.
12 Kockler, if you wish to come up and take the microphone and
13 get this thing under way.

14 MR. KOCKLER: Thank you, Mr. Chairman. As you
15 stated, my name is Don Kockler.

16 CHAIRPERSON HENNESSEY: Let me just say -- can
17 people hear in the background? Maybe you need to pull the
18 microphone a little bit closer to you.

19 MR. KOCKLER: How's that?

20 CHAIRPERSON HENNESSEY: That's fine.

21 MR. KOCKLER: Thank you, Mr. Chairman. My
22 name is Don Kockler. I'm Executive Assistant to State
23 Senator Christine Tartaglione. And on behalf of Senator
24 Tartaglione, I do appreciate the opportunity to speak
25 before you today and read the testimony from Senator

1 Tartaglione with her apologies for not being able to be
2 here today.

3 CHAIRPERSON HENNESSEY: Thank you.

4 MR. KOCKLER: Thank you, Mr. Chairman, for the
5 opportunity to submit this testimony on Senate Bill 216,
6 Printer No. 223. The language in Senate Bill 216 has
7 passed the Senate unanimously in two legislative sessions.
8 In very simple terms, the bill changes the starting time
9 for the statute of limitations in asbestos injuries.

10 The statute of limitations remains at two
11 years but would start when the injured person is informed
12 by a licensed physician that the injury was caused by
13 exposure to asbestos. Current law provides that the clock
14 starts when an injured party has been diagnosed with an
15 injury or disease.

16 In situations where the cause and effect are
17 obvious and simultaneous, the application of this statute
18 may be appropriate. However, when the cause and effect are
19 not obvious to the injured party, as can be the case with a
20 creeping disease, the statute is certainly not appropriate.

21 Senate Bill 216 attempts to address that
22 problem, a problem which, despite interpretation to the
23 contrary, is not rectified by the discovery rule adopted by
24 the Pennsylvania Supreme Court. The discovery rule, which
25 represents a judicial exception to the strict application

1 of the statute of limitations, is not being applied
2 uniformly by the courts.

3 Court cases like *Ingenito v. AC&S,*
4 *Incorporated* and *Trieshock v. Owens Corning* illustrate the
5 difference in the court's application of the discovery
6 rule. What we are accomplishing with Senate Bill 216 is
7 giving the courts clear direction in these special cases.

8 We are saying that in a case involving an
9 asbestos injury, the responsibility of the injured party to
10 exercise reasonable diligence to ascertain the fact of a
11 cause of action despite the discovery rule should be
12 clearly delineated.

13 There should be no room for interpretation
14 which would lead to a different application of law. In
15 other words, Senate Bill 216 takes the burden off the
16 injured party and makes it clear that the determination of
17 a medical professional should guide the court.

18 Mr. Chairman, Senate Bill 216 attempts to
19 provide a measure of fairness in the application of law.
20 Under existing law governing statute of limitations, I
21 don't believe that the legislature ever meant to deprive
22 any Pennsylvanian of the right to seek proper legal
23 remedy.

24 The law provided for a common sense doctrine
25 to the time a person should be entitled to seek that

1 remedy. Common sense now tells us that when we're talking
2 about diseases caused by exposure to asbestos, we need to
3 apply the standard differently.

4 Mr. Chairman, there are untold numbers of
5 Pennsylvania workers who, through the course of their daily
6 employment responsibilities, are exposed to the dangers of
7 asbestos. Senate Bill 216 will allow those workers and
8 their families the peace of mind and the legal opportunity
9 to address the serious issues they face when confronted
10 with an injury or illness caused by the creeping nature of
11 asbestos exposure.

12 Once again, I appreciate the opportunity to
13 provide this testimony. And I hope that this committee can
14 look favorably upon Senate Bill 216. Thank you.

15 CHAIRPERSON HENNESSEY: Thank you, Mr.
16 Kockler. I realize that you are sort of pinch hitting at
17 the last minute for Senator Tartaglione. So I won't put
18 any questions to you about the specifics of the bill. But
19 you're welcome to certainly sit and observe the other
20 questions that might be raised by subsequent testifiers to
21 indicate those questions back to your office. Okay?

22 MR. KOCKLER: Thank you, Mr. Chairman. I
23 appreciate that.

24 CHAIRPERSON HENNESSEY: You're more than
25 welcome. Thank you very much. It occurred to me that I

1 didn't introduce myself. My name is Tim Hennessey. I
2 represent the 26th House District from Northwest Chester
3 County down in the southeastern part of the state. And I'm
4 Chairman of the Task Force on Civil Justice Law for the
5 House Committee on Judiciary.

6 We have, I think, our next testifier, Sam
7 Marshall, President of the Insurance Federation of
8 Pennsylvania. I know I saw Sam in the room. There he is
9 in the back. Good morning.

10 MR. MARSHALL: Good morning. Good morning.
11 Thanks for the chance to be here. I'm Sam Marshall with
12 the Insurance Federation. The Federation is a nonprofit
13 trade association representing all sizes and shapes of
14 insurers doing business in Pennsylvania.

15 Among our members are those who cover damages
16 arising from exposure to asbestos. We oppose this bill.
17 We do so because it's an unwarranted removal of the basic
18 principle of tort law, what I'll call today the should have
19 known standard of reasonableness that tort law imposes with
20 only limited exceptions on plaintiffs and defendants alike.

21 The current statute of limitations for
22 asbestos claims and for other creeping disease tort claims
23 is two years from when the plaintiff knew or reasonably
24 should have known that he has an injury and that the injury
25 was caused by exposure to asbestos.

1 That's what's known as the discovery rule. It
2 is a judicially created exception to Pennsylvania's
3 statutory two-year limitation which runs from the date of
4 the injury. It makes sense for these tort claims because
5 these creeping disease cases may not manifest themselves
6 for many years after exposure and they may not be easily
7 or, better phrased, reasonably connected to the cause of
8 the disease.

9 This bill changes this limitations period by
10 deleting the reasonably should have known standard. The
11 limitations period would be two years from when a person
12 was told by a doctor that he has an injury that's been
13 caused by exposure to asbestos.

14 I guess our objection to the bill is best
15 raised as a question. Why do this? Is the bill needed to
16 provide relief to a group of potential plaintiffs whose
17 asbestos claims are being barred by current law but whose
18 claims will be allowed under this bill?

19 I have spoken with asbestos lawyers on both
20 sides. Both sides have their views on asbestos claims, but
21 none of them have cited Pennsylvania's discovery rule as
22 something blocking a group of potential plaintiffs from
23 filing claims. I guess we'll hear more today, but I do
24 know that the Trial Lawyers Association isn't testifying.

25 The need to get a handle on a bill's true

1 impact holds true with any legislation, but it is
2 especially true with asbestos claims. A number of
3 companies have already filed for bankruptcy because of
4 their own potential exposure to asbestos claims.

5 If this bill opens a whole new group of
6 potential plaintiffs, you may be pushing more companies
7 into bankruptcy and you may be making matters worse for
8 those companies already in bankruptcy. I'm talking about
9 companies. I think it's important to note that that's also
10 the employees of those companies.

11 That may or may not be an unfortunate but
12 unavoidable consequence, but you should at least be
13 prepared for it. And that means a thorough examination of
14 the real impact of this bill. I appreciate the concern
15 with making sure that people with asbestos-related injuries
16 get their day in court. Although, I am still waiting to
17 hear what group is being blocked under the current law.

18 But the reality of companies filing for
19 bankruptcy -- and that is something that's clearly
20 identifiable -- should make everybody sensitive to measures
21 that may result in more bankruptcies.

22 Second question: Is this bill needed to
23 answer some inconsistent rulings in the courts'
24 implementation of Pennsylvania's discovery rule? My
25 research shows that there is some inconsistency. I believe

1 Senator Tartaglione's testimony also touched on that.

2 Frankly, it's not so much in the court's
3 rulings as in the language supporting them. So it may make
4 sense to codify that discovery rule by statute. But that's
5 not what this bill does. This bill changes the discovery
6 rule, taking out the requirement that plaintiffs act
7 reasonably in pursuing their claims.

8 Third question: Is this bill needed to keep
9 Pennsylvania in line with other states? My research shows
10 that all of our surrounding states have limitations periods
11 similar to Pennsylvania's. They all impose the reasonably
12 should have known obligation on plaintiffs.

13 Skimming over some of the other people's
14 testimony, I believe one witness is going to say that Ohio
15 is different. I've looked at the Ohio case law, and I
16 think it does have a reasonably should have known standard.
17 I'm happy to submit the cases on that.

18 I'm not aware of any other states in the
19 country who have the standard established by this bill, nor
20 am I aware of any efforts nationally to establish this
21 standard. I'm sure they're going on; but I'm not aware of
22 any legislation that's pending, certainly none that's moved
23 this far as is happened in Pennsylvania on this.

24 Sometimes when we ask the question, Why do
25 this, we hear the response, Why not? I'm never sure that

1 qualifies as an answer to the question of why, but I'd like
2 to address it today. Why not do this? Well, this bill
3 takes away a cornerstone of tort law, the obligation to act
4 reasonably.

5 Granted, it does it in a limited setting.
6 Only plaintiffs with asbestos claims need not act
7 reasonably and, even then, only when filing those claims.
8 And there are times when tort law takes away the
9 reasonableness standard for defendants, but that's when
10 strict liability is determined as a necessary safeguard for
11 plaintiffs. Of course, that's a different direction than
12 this bill.

13 There may even be times when the
14 reasonableness requirement is an unfair burden on
15 plaintiffs. But frankly, I don't know of any. And this
16 doesn't seem to be such a time.

17 Another question that you may have to the
18 Insurance Federation: How come you didn't raise these
19 concerns in the Senate? The short answer is, we should
20 have. We made a mistake. The bill was advertised as
21 codifying existing Pennsylvania case law or at least one
22 case.

23 When we took a closer look at both the bill
24 and existing case law, we discovered that it doesn't codify
25 existing case law. It doesn't even codify the one case

1 that was cited to us. We should have caught our mistake
2 sooner. We reasonably should have known it, I guess.

3 But our objections should not be time-barred
4 now. There is still plenty of time. We're still well
5 within the two-year period of the legislative session.
6 There's still plenty of time to correct what would be an
7 unwarranted and unprecedented and, based on what we've
8 heard so far, unnecessary erosion of the obligation of
9 reasonableness on the part of plaintiffs to pursue their
10 claims.

11 Thanks for the chance to be here. Happy to
12 answer any questions.

13 CHAIRPERSON HENNESSEY: Thank you, Mr.
14 Marshall. In looking over your testimony -- thank you for
15 submitting it thoroughly. I was looking over it last
16 night. And if I can refer to the second page of your
17 testimony, toward the bottom, you describe the standard as
18 two years from the day when the plaintiff knew or
19 reasonably should have known.

20 And it seems to me that Senate Bill 216 takes
21 that term reasonably should have known and says that's when
22 a doctor, who's a person qualified under the law to
23 practice medicine, to tell you causative relationship,
24 tells you there is such a relationship.

25 In that sense, is it really a deviation from

1 the reasonable, reasonably should have known standard?

2 MR. MARSHALL: To say that that's the only
3 instance when you'd reasonably know about something like
4 that, don't think that that's -- that may, depending on the
5 particular factual pattern, that may be when you reasonably
6 should have known. You may have had absolutely --

7 CHAIRPERSON HENNESSEY: There may be one
8 episode when you reasonably should have known.

9 MR. MARSHALL: When you reasonably should have
10 known. But you can also envision other factual scenarios
11 when you reasonably should have known that there might be
12 an asbestos claim at an earlier time than that, than when a
13 doctor makes that connection.

14 You know, for instance, you may, you may have
15 lung cancer. And you may have said, Geez. You know what?
16 And five of my colleagues also came down with asbestos, you
17 know, with some sort of, you know, some form of lung
18 cancer.

19 CHAIRPERSON HENNESSEY: None of us smoked.

20 MR. MARSHALL: None of us smoked and --

21 CHAIRPERSON HENNESSEY: None of us have any of
22 the other high risks. We all worked together in asbestos.

23 MR. MARSHALL: And we all worked together.
24 And the other five said, Gee. You know what? It turned
25 out that this was asbestos related. Well, I'd say that

1 that would be, that would mean even though a doctor may not
2 have told you that yours was an asbestos-related disease,
3 you might reasonably have known that it is because your
4 five colleagues also suffered from it.

5 I think that that's -- one of the reasons you
6 have reasonably should have known is because there are
7 different factual scenarios that apply. And it really goes
8 to the obligation on the plaintiff, on any plaintiff's part
9 with exercising due diligence in pursuing his claim.

10 I think it's fair to expect that of
11 plaintiffs. I think it's fair to expect that of -- the
12 defendants have the obligation to act reasonably as well.
13 I think it's fair to expect that of anybody who deals with
14 the judicial system, that they act reasonably in pursuing
15 their claims, in processing their claims, and handling the
16 defenses and the prosecutions.

17 CHAIRPERSON HENNESSEY: One other thought that
18 occurred to me when I read the proposal itself is that it
19 speaks in a general sense about when the person, two years
20 from the date the person was informed by a licensed
21 physician.

22 I think we probably need to rethink that when
23 they are first informed because, you know, you can be told
24 by one doctor that he thinks there's a causative
25 relationship, sort of ignore that. And I suppose it's

1 possible that someone would wait three or four, five years
2 and have another doctor tell them that there is a causative
3 relationship and then somebody say, Well, I should have two
4 years from the date the second doctor told me that.

5 That's not something you necessarily know
6 until you get into the discovery process yourself to find
7 out whether or not there have been any sort of advanced
8 warning or reason to suspect that there's a causation in
9 the conferences that you might have had with an earlier
10 physician.

11 MR. MARSHALL: I guess -- well, I'd agree with
12 you there. I guess there's also -- I mean, there should be
13 a requirement -- I mean, I think it's reasonable to expect
14 that plaintiffs ask questions themselves or, I mean, you
15 know, if a doctor said, Gee, I think you have some form of
16 lung cancer and he may not have known.

17 And I don't know that it's a burden on all
18 doctors to say, Here, now, let me ask you if this is
19 asbestos related. I think it's probably a pretty
20 well-known disease by now. It certainly is a well-known
21 disease. I suspect that within the medical community, it's
22 probably a pretty routine instance.

23 But it may be that there's also -- I think
24 it's reasonable to expect the plaintiff to say, Gee, let's
25 sort of figure out why that happened. I don't smoke, don't

1 eat whatever, you know, do any other things. I wonder how
2 that came about. Let's explore that.

3 You know, I'm just not sure why somebody would
4 want to take away the obligation to act reasonably. I
5 would say, I mean, if there is confusion as to what our
6 discovery rule is -- and I'll grant you that sometimes you
7 can find courts who come to the same result and think
8 they're saying the same thing but they use different
9 language and it might be unclear to plaintiffs and
10 defendants alike.

11 Maybe it does make sense for this committee to
12 explore codifying the discovery rule. But I'm not sure why
13 there is this rush to take away the discovery rule. I
14 haven't heard anybody say that the discovery rule is
15 unfair.

16 CHAIRPERSON HENNESSEY: That's sort of fraught
17 with its own type of dangers. I notice the bill itself is
18 only five sentences long. But the summary that you were
19 provided by our executive director is two and a half pages
20 long. So when we turn it over to the lawyers in the
21 committee, we might really end up with something that's
22 rather complicated.

23 MR. MARSHALL: I would not say that, of
24 course, about your executive director, certainly not on the
25 record.

1 CHAIRPERSON HENNESSEY: I've been known to be
2 a little wordy myself on occasion. Thank you very much for
3 your testimony.

4 MR. MARSHALL: Thank you.

5 CHAIRPERSON HENNESSEY: I'm sorry. Do you
6 have any questions? Go ahead.

7 MR. SCHWOYER: I'm Mike Schwoyer. I'm the
8 executive director that Chairman Hennessey just referred to
9 as being wordy. So I'll try to keep my questions brief.
10 On page 2 and page 3, Mr. Marshall, of your testimony, you
11 indicated that there doesn't seem to be, the discovery rule
12 doesn't seem to be blocking any potential plaintiffs from
13 filing claims.

14 And in the paragraph after that, you indicate
15 that if this becomes law, we're suddenly going to send
16 companies into bankruptcy. I don't see how. I don't see
17 the connection. Could you explain a little bit how, the
18 fact that no additional claims will put companies into
19 bankruptcy?

20 MR. MARSHALL: No. We're not aware -- we're
21 not the proponents of the bill, obviously. We're here
22 testifying against it. The question is, I'm not sure if
23 there is a significant block of plaintiffs out there. I
24 haven't heard anybody say that there is.

25 I've heard some people say, Gee, I don't think

1 there will be many. I'm not sure. But I think it makes
2 sense to identify whether there is. You know, clearly,
3 when, when you see something like this happen, if you are a
4 corporation and possibly have some asbestos-related
5 exposure, you see something like this and you think, God
6 almighty, if there's this big of a push to change the
7 discovery rule, we haven't heard a lot of complaints about
8 it.

9 But if there's this big of a push and we're
10 not really sure where it's coming from, there may be some
11 big block of plaintiffs out there. If there is, I think
12 you can rest assured that there may well be some further
13 bankruptcies to come.

14 I don't -- you know, I can't tell you if you
15 pass this bill, Gee, there will be some more bankruptcies.
16 I can say if there is some huge block of plaintiffs out
17 there, that may be a result. And I think we ought to be
18 sensitive to that.

19 You know, frankly, I appreciate legislative
20 interest in asbestos claims. I think, I think that you
21 probably need, as a general assembly, to look at the
22 asbestos problem in a much broader case, in a much broader
23 way than just looking at these claims and the statute of
24 limitations in filing claims.

25 I think there are a whole lot of procedural

1 problems that are affecting, yes, the insurance community
2 but also the general corporate and the employees of those
3 corporations with respect to asbestos. And I know that
4 there are efforts at the federal level to address the
5 problem of asbestos claims generally.

6 I think the problem needs to be done in a more
7 global way so that we have a better handle on it.

8 MR. SCHWOYER: Thank you.

9 CHAIRPERSON HENNESSEY: Thank you, Sam. Our
10 next testifier is Steven Elliott, President of the
11 Pennsylvania Association of Mutual Insurance Companies.

12 MR. ELLIOTT: Good morning, Mr. Chairman. My
13 name is Steven C. Elliott. I am the President of the
14 Pennsylvania Association of Mutual Insurance Companies.
15 That's PAMIC. PAMIC's membership consists of over 70
16 Pennsylvania domiciled mutual property and casualty
17 insurance companies.

18 Our membership includes larger companies such
19 as Harleysville as well as small single-county mutuals that
20 basically confine themselves to underwriting fire
21 insurance. Almost two-thirds of our companies generate
22 annual premium volumes of \$25 million and under. Thus, our
23 average member is quite small when compared with many other
24 insurance companies.

25 Thank you very much for affording PAMIC's

1 members this opportunity to make known their position on
2 Senate Bill 216. Senate Bill 216 would amend the general
3 two-year personal injury statute of limitations by
4 specifying the time the statute begins to run as the -- and
5 I'm quoting the language of the bill -- date the person was
6 informed by a licensed physician that the person has an
7 injury which is caused by such exposure, meaning asbestos
8 exposure.

9 Our reading of this language is that the bill
10 is intended to broaden the existing Pennsylvania law on
11 commencement of the statute's running in cases of latent
12 injuries but this broadening is to be confined to cases of
13 latent injury caused by asbestos only.

14 Under current Pennsylvania law, our
15 understanding is that the two-year statute begins to run at
16 the time the cause of action accrues, which is usually the
17 time the impact or exposure occurred that caused the
18 personal injury.

19 In cases of latent injuries; that is, injuries
20 that don't manifest themselves possibly until many years
21 later after the initial exposure, what Sam Marshall
22 referred to as the creeping injuries, the commencement of
23 the statute is two years from the time the injured party
24 knew or should have known that his or her injury was caused
25 by a past exposure.

1 Now, we understand the bill to broaden this
2 two-year discovery rule still further by fixing the
3 commencement as the time the injured party was actually
4 told by a licensed physician that the cause of injury was
5 indeed asbestos.

6 Now, we believe this expansion of the current
7 rule -- and we understand it is an expansion of current
8 case law -- is bad in three areas. We think it's bad for
9 the civil justice system in general as a public policy
10 concern. We think it's bad for the insurance industry in
11 particular. And we think ultimately it's bad for the
12 Pennsylvania consumer.

13 Now, as far as its impact on the civil justice
14 system, we have three concerns. First, we think it's
15 conceptually inconsistent with the idea of a statute of
16 limitations commencing when the tort cause of action
17 accrues. This would be when the final element necessary to
18 state the cause of action occurs.

19 Commencing the statute's running when the
20 injured party knew or should have known of the cause of
21 injury at least arguably could fit within this concept; and
22 we feel that's certainly not the case with this bill, 216.

23 Second, the bill requires no diligence or
24 prudence at all on the part of the claimant. He can know
25 he worked around asbestos for years, and he can know that

1 he is suffering from a respiratory complaint; but this has
2 no effect of putting him on notice that he may have a
3 claim.

4 Instead, he will be enabled to wait
5 possibly -- I emphasize possibly -- years longer until a
6 physician, perhaps a subsequent physician, connects the
7 dots for him. Those who seek the assistance of the courts
8 in shifting a loss from themselves to others should be held
9 to a reasonable degree of diligence in discovering and
10 prosecuting their claims. That's the thinking behind
11 having a statute of limitations at all in the first place.

12 And third, the bill would make a
13 differentiation between different latent injuries as to the
14 manner in which the statute of limitations applies to them.
15 There seems to us to be no reasoned stopping point for
16 different decision rules for different latent injuries
17 under this analysis.

18 And we also think -- and this is the heart of
19 our concern -- that the bill is bad for the insurance
20 industry and for PAMIC members particularly. And
21 basically, it is axiomatic. Liability insurance companies
22 need stability in a legal system.

23 They need stability both procedurally and
24 substantively in order to accurately price their products.
25 And the most important element in any price in any industry

1 is the cost of the goods sold. And for any industry except
2 insurance, that is a known fact.

3 But for the insurance company, the cost of
4 goods sold is unknown. It is the great unknown, I guess.
5 It's the claims the company will ultimately pay in the
6 future and the adjustment expenses, including litigation
7 that the company will find associated with paying those
8 claims.

9 We try, as insurance companies, to attempt, by
10 actuarial and statistical technique, to determine that cost
11 as accurately as we possibly can. But it's critical that
12 the assumptions about the legal environment that are
13 imbedded in that technique remain relatively constant.

14 In the case of asbestos injuries, I think it's
15 fair to say most of the insurance industry has long since
16 concluded that that exposure is not insurable. It's just
17 uninsurable at any price. And most modern commercial
18 liability policies contain what they have attempted to have
19 drafted as an absolute exclusion of these kinds of
20 injuries.

21 But the typical insurance policy does respond
22 to claims on an occurrence basis. So there could well be
23 older policies from years past that may be called upon to
24 respond to current asbestos claims.

25 Now, about half of our companies -- that's our

1 PAMIC membership -- write policies that cover some aspect
2 of commercial liability, smaller mutual insurance companies
3 underwriting smaller businesses. And that, I think, raises
4 the final problem with this bill. We think it's bad for
5 the consumer.

6 Most people probably think that asbestos
7 litigation is something from the '70s, from the 1970s and
8 from the 1980s. We think of the bankruptcy of Johns
9 Manville and we think of the other many, many
10 manufacturers' bankruptcies that have occurred and occurred
11 in the '70s and '80s.

12 And we all remember the asbestos litigation
13 played a large part in triggering the famous liability
14 insurance crisis of the 1980s and almost resulted in the
15 failure of Lloyds of London. But these memories and the
16 magnitude of them should not lull us into thinking that the
17 asbestos litigation explosion is totally spent and that an
18 expansion of liability would not result in expansion of
19 claims made and suits filed.

20 What we think will happen is that we may see a
21 migration of litigation down the food chain, if you will,
22 to the kind of insured covered by many PAMIC members, the
23 kind of small business person that can ill-afford the
24 defense of these kind of claims.

25 One PAMIC member company claims vice president

1 remarked to me that the asbestos claims he was starting to
2 see -- and I emphasize starting. There is no flood of
3 these new claims right now -- but he is starting to see
4 claims that generally involve plumbing contractors.

5 That's the kind of self-employed individual or
6 small business that is put to uncertain insurance coverage,
7 potentially costly litigation, and potentially devastating
8 liability by any measure, substantive or procedural, that
9 expands the number of claims.

10 Bear in mind that the manufacturers are long
11 gone. But the small contractor or the independent artisan
12 who worked with the material is still there, still solvent,
13 still potentially liable and, under Pennsylvania's joint
14 and several liability rules, still responsive to the total
15 judgment.

16 So we maintain that 216 is bad in all three
17 areas. It's bad conceptually for the civil justice system
18 as a public policy issue; it's bad for insurance companies
19 particularly, Mr. Chairman, because it changes the legal
20 environment that was a major factor in our calculation of
21 our cost of goods sold; and it's bad for the consumer
22 because we can confidently anticipate that it will be
23 increasingly the small contractor, the independent artisan,
24 the consumer by any other name that will be called upon to
25 foot the bill for any increased claims the measure will

1 trigger.

2 Now, when we use the words, when we use words
3 in discourse, we all have images of what they mean based on
4 our own life and work experience. Sometimes I fear that
5 the public, even the informed public like members of this
6 committee and this task force, visualize these cases as
7 David versus Goliath conflicts with an injured consumer
8 battling a gigantic industrial firm with unlimited
9 resources behind it, including insurance coverage.

10 I guess I invite you to think about what I
11 think will possibly be the more common scenario of the
12 future, not David versus Goliath but David versus David
13 with a worker versus an independent contractor that could
14 well be the worker's brother or uncle or neighbor down the
15 road operating a smaller plumbing company maybe with a few
16 employees and a panel truck or two.

17 These are the very kinds of insureds that my
18 companies, smaller mutual companies in the state typically
19 cover. And it's these consumers who will ultimately bear
20 the burden of S.B. 216 in our analysis. Well, again, thank
21 you, Mr. Chairman, for the opportunity to share PAMIC's
22 concerns. I'll be happy to try and answer any questions
23 you may have.

24 CHAIRPERSON HENNESSEY: Thank you, Mr.
25 Elliott. Just following up on the last line of thought

1 about whether or not this may be setting up a David versus
2 David type of situation, I'm going to put you on the spot
3 here. Isn't it the insurance companies that you represent
4 as an association that really creates that situation?

5 If your insurance companies are saying, We'll
6 cover you for every conceivable commercial liability
7 situation except for asbestos, there it's going to be -- in
8 every other situation, you have the insurance company who
9 has a contract with lawyers who can protect the small
10 businessman in a litigation setting.

11 But when it's asbestos, you're on your own.
12 And it's your members who are telling the small business
13 people that they're on their own.

14 MR. ELLIOTT: It's a -- and don't understand
15 me as saying that the insurance is completely unavailable.
16 It is unavailable in most commercial liability policies.
17 I'm confident in saying that. Insurance companies have to
18 make a calculation of how much risk that they can, they can
19 bear with their limited amount of capital and surplus.

20 Sometimes insurance companies make a
21 determination that covering a certain, certain
22 exposure -- although, maybe it could be covered -- would be
23 at a price that a consumer likely would not afford. It
24 would make the product unattractive in the market for them
25 to price it adequately.

1 It used to be when I was in the insurance
2 industry in the '80s during the liability crisis dealing
3 with Lloyds brokers, the old line in London was that there
4 was, that there was never a bad risk. It was just a bad
5 rate. Well, of course, London almost went down on that
6 philosophy. They just couldn't afford it. They couldn't
7 actuarially get their arms around it as to what it would
8 cost.

9 It's a reasoned business decision, but it just
10 costs too much money. And there are some specialty
11 companies, I'm sure, that are undertaking these exposures
12 now. But the cost is just prohibitive.

13 CHAIRPERSON HENNESSEY: One of the other
14 things that you testified to -- I guess it's toward the
15 bottom of the third page of your testimony that you
16 submitted earlier -- there seems to be no reasoned stopping
17 point for different decision rules for other latent
18 injuries aside from asbestos.

19 I guess I'm having difficulty with that in the
20 sense that if the legislature can expand the rule and limit
21 it to asbestos cases, it could take, you know, another
22 creeping disease case and create, if they thought
23 necessary, a separate rule.

24 I mean, it's not a situation like if you move
25 away from the discovery rule today, there's no telling

1 what's going to happen in the future because it's a
2 legislated decision as to what's going to happen in the
3 future.

4 So do we really have to worry about the
5 specter of untold hundreds of different rules and time
6 limitations out there and some sort of myriad of time
7 periods that attorneys have to figure out which one they
8 fit into?

9 MR. ELLIOTT: Well, in candor, Mr. Chairman,
10 that is a slippery slope argument. And I think that we can
11 rely on the judgment and self-restraint of legislators not
12 to start creating exception after exception after exception
13 to the discovery rule.

14 Our concern was, Why is it that it was felt
15 necessary to single out latent injuries that have asbestos
16 as their etiology for particular and special treatment?
17 And we don't -- we have a conceptual difficulty with that
18 manner of treating latent injuries.

19 If there is a desire to codify the two-year
20 discovery rule -- which I must confess was my original take
21 on what the Senate Bill was trying to do -- that might be
22 something that would be worthwhile for the legislature to
23 do. But I don't like the idea of separate and discrete
24 rules being embodied in the statute for different causes of
25 injury.

1 CHAIRPERSON HENNESSEY: One other thing that
2 your testimony highlighted was the, I guess, the very
3 nature of a litigation experience. And that is, you try to
4 find as many people as possible who might have some limited
5 liability in the hope that you can make the judgment stick
6 against any of them.

7 I mean, I think all of us can understand we
8 have the Johns Manvilles and companies who are actually
9 manufacturing and going through the decision process as to
10 whether or not this should be the curly kind of asbestos or
11 the straight kind or microscopically small pieces of
12 asbestos or larger.

13 As I understand it, the smaller -- you would
14 think that the smaller the piece of asbestos, the less
15 likely it would be to do, to cause harm. And yet it
16 appears from the scientific evidence that the smaller it
17 is, the farther it can become ingested into your lungs and
18 imbed itself deeper into your lungs and create even more
19 serious types of cancer.

20 So I can understand where there's a reason and
21 a will to impose liability on the companies that
22 manufacture the product. But in the litigation stream that
23 we've seen, you tend to name everybody. And I'm an
24 attorney. So, you know, I won't tar myself with the same
25 brush.

1 You try to find everybody who might have a
2 potential liability. And it is a concern if we're going to
3 be naming the independent plumbers or the independent house
4 builder who just happened to use asbestos at some point in
5 the past because it was pretty commonly used in our
6 society, as we all know, and extending the liability to all
7 those small companies where -- and I think it's a
8 legislative decision as to whether or not we want it to go
9 that far or how far we want it to go down that food chain
10 which you explained.

11 So thank you for highlighting that part of the
12 issue for us.

13 MR. SCHWOYER: You indicated in your testimony
14 that there's a change in your industry. Your modern
15 policies basically don't cover this sort of exposure or
16 injury or loss but that you had in the past. About when
17 did that transition occur? When did you stop insuring that
18 sort of coverage?

19 MR. ELLIOTT: My sense is, is that it was in
20 the 1980s. In the 1980s, there was a, a move to redraft a
21 lot of the commercial liability forms not only as far as
22 pollution exclusions and latent injury exclusions; but
23 also, there was an attempt made to move commercial
24 liability from its customary occurrence basis to a
25 claims-made form.

1 The feeling was that the industry could get
2 their arms around the scope of the exposure that they were
3 actually underwriting if it were limited by a claims-made
4 form of policy. All of those things were promulgated in
5 the, I think in the 1980s primarily by the large rating
6 organizations and service bureaus, the ISOs of the world,
7 the AIS and several others. I think that was the decade
8 where consumers really started to see that.

9 MR. SCHWOYER: Do you have any idea what the
10 percentage of the number of those policies are, those older
11 policies? I mean, where, where are we at? Where do we
12 currently stand in terms of policies that are out there?

13 MR. ELLIOTT: You know, that's hard to say.
14 And I can't quantify that for you. I guess the difficulty
15 you have with the litigation, a person who discovers them
16 self or a small business that discovers them self to be a
17 defendant in one of these asbestos litigations would look
18 at the immediate policy that he was holding and would
19 likely discover that there was an exclusion from this kind
20 of exposure.

21 And then probably there it would be put to an
22 archaeological enterprise to discover maybe who their
23 insurance carrier was 20 years ago. An insurance company
24 itself, unless there has been continuity of coverage for a
25 good number of decades, the company itself would not know

1 whether or not they were going to have something coming
2 back to get them in later years, particularly smaller
3 companies such as is a typical PAMIC member. So it's very
4 hard to quantify.

5 MR. SCHWOYER: Your member companies are
6 mutual property and casualty insurance. You don't
7 represent any health care?

8 MR. ELLIOTT: No health, no life. That's,
9 that's Sam Marshall's department, among other things.

10 MR. SCHWOYER: Thank you.

11 MR. ELLIOTT: Thank you.

12 CHAIRPERSON HENNESSEY: Thank you, Mr.
13 Elliott. We're pleased to be joined, as this hearing
14 progresses, by Beryl Kuhr, who's the counsel to the
15 Democratic Chair, Representative Kevin Blaum. Our next
16 testifier is Hap Campbell of the American Insurance
17 Association. Hello and welcome.

18 MR. CAMPBELL: Good morning, Mr. Chairman.

19 CHAIRPERSON HENNESSEY: Good morning.

20 MR. CAMPBELL: Good morning, Counsel Schwoyer
21 and Minority Counsel as well. My name is Loudon Campbell.
22 And I'm an attorney with the Harrisburg office of the Law
23 Firm of Eckert, Seamans, Cherin & Mellott. I'm here today
24 on behalf of the American Insurance Association, often
25 referred to as the AIA.

1 The AIA is the leading national property and
2 casualty insurance trade organization which represents more
3 than 370 insurance companies that write more than \$60
4 billion in premiums each year. AIA member companies offer
5 all types of property and casualty insurance, including
6 personal and commercial auto insurance; commercial property
7 and liability coverage, including for small businesses;
8 workers' comp; homeowners; medical malpractice coverage;
9 and product liability insurance.

10 Thank you for the opportunity to appear today
11 and present testimony on behalf of Senate Bill 216. And as
12 you know, that bill would create a separate statute of
13 limitations for injuries caused by exposure to asbestos.
14 For the reasons I'll explain -- and I'm sure it's no
15 surprise to you -- the AIA, as does the rest of the
16 insurance industry, opposes this bill.

17 Due to the widespread use of asbestos decades
18 ago, millions of people have been exposed to asbestos. Now
19 hundreds of thousands of asbestos-related cases are pending
20 in state and federal courts. And as Mr. Elliott previously
21 indicated, the asbestos crisis is not over.

22 We believe that the litigation landslide is
23 continuing at the rate of some 40,000 new cases being
24 brought every year. A large percentage of the plaintiffs
25 involved in these lawsuits do not have and probably never

1 will have diseases caused by exposure to asbestos. A very
2 high percentage of claims have been filed by persons who,
3 although they have been exposed to asbestos, have no
4 disease or symptomatic impairment.

5 This asbestos litigation crisis has evolved in
6 a number of waves, beginning with claims from workers at
7 asbestos mines and in industrial plants. Later, claims
8 began to surface from individuals who worked with
9 asbestos-containing products and in buildings where
10 asbestos was used in insulation as well as other
11 construction materials.

12 Dozens of the original targets of litigation;
13 for example, manufacturers of asbestos, have sought
14 bankruptcy protection. By the way, I'm led to understand
15 that manufacturers of about 90 percent of the market of
16 asbestos have now filed for bankruptcy.

17 Consequently, the plaintiffs' bar has
18 increasingly undertaken innovative strategies to find more
19 money from the shrinking number of potential defendants.
20 Increasingly, litigation is brought against parties that
21 are quite distant from the manufacturers of asbestos. And
22 often, these defendants are in fact small businesses.

23 With that as background, the AIA believes that
24 the existing two-year statute of limitations and the
25 judicial exceptions thereunder provide an equitable and

1 fair opportunity for injured persons to bring their claims.
2 We believe there is no justification to create a separate
3 asbestos-only statute of limitations.

4 Generally speaking, the two-year statute of
5 limitations begins to run in a tort case when the cause of
6 action accrues. The party asserting that cause of action
7 is under a duty to use all reasonable diligence to be
8 properly informed of the facts and circumstances upon which
9 a potential right of recovery is based and to institute
10 suit within the two-year statutory period.

11 And even under the general rule, lack of
12 knowledge, mistake, or misunderstanding does not toll the
13 running of the statute. Once the statutory period expires,
14 the party is barred from bringing suit unless it is
15 established that an exception to the general rule applies,
16 which would act to toll the running of the statute.

17 Now, the discovery rule, which we've been
18 talking about this morning, is in fact one such exception.
19 And that discovery rule arises from the inability of the
20 injured person, despite the exercise of due diligence, to
21 know of the injury or its cause.

22 The discovery rule basically provides that
23 where the existence of the injury is not known to the
24 complaining party and that such knowledge cannot reasonably
25 be ascertained within the statutory period, the limitation

1 period does not begin to run until the discovery of the
2 injury is reasonably possible.

3 A court which is presented with an assertion
4 of applicability of the discovery rule must address the
5 ability of the injured party while exercising reasonable
6 diligence to ascertain the fact of a cause of action.

7 The point at which the injured party should
8 reasonably be aware that he has suffered an injury is a
9 question of fact which is ordinarily decided by a jury.
10 These principles are clear and have been established over
11 many years in Pennsylvania jurisprudence, and they are
12 generally applicable to all cases.

13 This discovery rule exception is an equitable
14 one; and it is typically applied in latent disease cases or
15 creeping disease cases, as you've heard them referred to
16 earlier today. In those instances, the statute begins to
17 run when the plaintiff knows or reasonably should know that
18 he has been injured and that his injury has been caused by
19 another person's conduct. This ensures that injured people
20 in those circumstances have the same rights as those who
21 suffer an immediately ascertainable injury.

22 As stated above, the courts have recognized
23 that certain events may activate a duty on an injured party
24 to investigate with due diligence whether that party does
25 in fact have that disease. The Superior Court has held

1 that if such a duty were not imposed, a potential plaintiff
2 with a tentative diagnosis of asbestosis, for instance,
3 could wait indefinitely before bringing suit. And that
4 would be contrary to the purposes served by the statutes of
5 limitation.

6 And in fact, that's what Senate Bill 216 would
7 do. It would eliminate that duty of due diligence. And it
8 would create, instead, an empirical statute of limitation
9 which would result in the timeliness being determined
10 solely by reference to a point at which in this bill a
11 licensed physician advises that the injury or disease was
12 caused by exposure to asbestos.

13 And I parenthetically note that various
14 versions of this bill in the last session had different
15 provisions. One said a competent medical professional.
16 Another version said a licensed medical professional. And
17 now it's even tougher in the bill that didn't pass last
18 year which says a licensed physician.

19 Now, because this approach would eliminate the
20 long-standing requirement to exercise due diligence to know
21 of the injury or its cause, we believe it represents poor
22 public policy which is absolutely contrary to that which
23 underlies the development of statutes of limitations.

24 This inequitable result would be that injured
25 persons could indefinitely ignore facts suggesting that

1 injury or disease was present and ignore the duty to
2 exercise due diligence to ascertain whether they do in fact
3 have an asbestos-related disease.

4 Furthermore, changing the current statute, we
5 believe, for all practical purposes, eliminate or make
6 there be no effective statute of limitations. This is
7 because a determination that lung disease or cancer or
8 mesothelioma was caused by asbestos is usually made only
9 for the purposes of litigation and not made for the
10 purposes of medical treatment.

11 The fact is that medical treatment does not
12 depend upon a finding of asbestos as a cause. Typically, a
13 doctor diagnoses the patient as having restrictive or
14 obstructive lung disease or cancer. The cause of that
15 disease is irrelevant to the treatment for the disease.

16 Therefore, we believe that what the end result
17 of this is, that a plaintiff's lawyer effectively has
18 control of the running of the statute, an outcome which is
19 totally antithetical to the concepts underlying the
20 statutes of limitation.

21 Other considerations that the task force
22 should keep in mind include that at least since 1992,
23 Pennsylvania has been what's called a two-disease state.
24 That is, in Pennsylvania, recovery for a nonmalignant
25 asbestos-related disease such as asbestosis is subject to a

1 two-year statute of limitations, usually after the
2 application of the discovery rule.

3 However, if there is a subsequent malignancy
4 which occurs, you can bring a second independent suit for
5 later manifestation under the discovery rule exception.
6 This obviates the necessity to try and say, Gee, I've been
7 exposed. What injuries do I or could I have?

8 What it says is when you have symptoms of a
9 disease, you can come back and bring a second suit. First
10 suit for a nonmalignant disease, asbestosis, and when you
11 have that disease. And secondly, if you subsequently
12 develop cancer, you have a second cause of action. The
13 point being, of course, that this is a rule that protects
14 injured persons and plaintiffs.

15 Also, we believe that in Pennsylvania, the
16 diagnosis of asymptomatic pleural thickening or pleural
17 plaque or scarring of the lungs, which has no physiological
18 symptoms attached to it, does not trigger the statute of
19 limitations necessarily; although, it may trigger further
20 investigation.

21 Finally, the Task Force should be aware that
22 in several Pennsylvania counties, the courts have issued
23 orders setting up what's often referred to as a pleural
24 registry or an inactive docket concept in order to manage
25 the huge number of cases that have been filed.

1 Under this system, asbestos cases filed by
2 plaintiffs who are physically impaired go forward under
3 normal procedures. Cases, however, which are filed by
4 plaintiffs who are not physically impaired are placed on
5 the registry where they remain until such time as the
6 plaintiff becomes impaired.

7 At that point, the case is permitted to go
8 forward. The applicable statute of limitations is tolled
9 for cases placed on the registry. The court orders which
10 establish these registries specify objective medical
11 criteria for separating impaired and unimpaired cases.

12 It is particularly important, however, to note
13 that the establishment of a pleural registry does not
14 change current tort law. All cases proceed under the usual
15 system once the plaintiff actually becomes sick. The
16 pleural registry or inactive docket concept, we believe, is
17 a device that provides a safe harbor to plaintiffs by
18 allowing them to toll the statute of limitations by finding
19 a case which gets placed on the registry.

20 By the way, I should note that some years ago,
21 the Pennsylvania Supreme Court recognized this crisis in
22 asbestos litigation. And there's a special rule of civil
23 procedure because of a huge volume of cases which said all
24 the defendant has to do is enter an appearance and once
25 that appearance is entered, all of the allegations of the

1 complaint are deemed to be denied.

2 So it's not even an obligation to file a
3 response of pleading to the complaint just because of the
4 volume that goes on in the courts. That, by the way, I
5 think is Rule 1041.1.

6 CHAIRPERSON HENNESSEY: Mr. Campbell, why
7 don't you see if you can get a little closer to the mike,
8 please.

9 MR. CAMPBELL: Sorry about that, Mr. Chairman.
10 In conclusion, the AIA believes there really is no
11 justification for having a special statute of limitations
12 for asbestos cases that is different from the statute that
13 applies to all other tort cases.

14 You're going to start down this slippery slope
15 and say, Gee, we should have a separate statute for
16 Phen-Phen or a separate one for wireless telephone
17 radiation or a separate one that describes things for latex
18 exposure or whatever the attractive products liability case
19 of the times are.

20 We believe that the general rule certainly
21 applies that the courts have the ability to consider
22 whether due diligence was required and when and how the
23 discovery rule applies. And fundamentally, they are jury
24 questions. We believe there is a fair and equitable
25 remedy.

1 And sure there are going to be cases where the
2 questions come down. I can think of one, for instance,
3 where, a number of cases where plaintiffs filed workers'
4 compensation claims alleging asbestosis and then later
5 bring a third party action against the asbestos
6 manufacturer or another third party defendant trying to
7 say, Well, no doctor actually told me I had it; therefore,
8 I shouldn't be able to bring a case.

9 Point being is there is a rule of law in place
10 that is generally applicable and does work and does so with
11 fair results. And for those reasons, we suggest --

12 CHAIRPERSON HENNESSEY: Thank you very much.
13 Mr. Campbell, if I can refer to your testimony. On the top
14 of page 3, you're talking about current law. And you say
15 that -- it's the 5th line down or 4th line down -- "A party
16 asserting a cause of action is under a duty to use all
17 reasonable diligence."

18 And it seems to me that it might not
19 necessarily be the standard. And I'm familiar with using
20 reasonable diligence. If we scale that up and say all
21 reasonable diligence, it's almost as if we're saying that
22 you can leave no stone unturned. And your request to find
23 out whether or not you have --

24 MR. CAMPBELL: Well, I'd suggest that's
25 not -- reasonable is the key word.

1 CHAIRPERSON HENNESSEY: So it's really, it's a
2 jury question to decide whether or not this is reasonable
3 or not.

4 MR. CAMPBELL: Yes.

5 CHAIRPERSON HENNESSEY: And we're not
6 asking -- you're not saying the judges would have to
7 instruct them that if, that a plaintiff or potential
8 plaintiff has to rule out every other cause or --

9 MR. CAMPBELL: No, absolutely not. By further
10 comment on that, I'd say that it's reasonable diligence and
11 what would a reasonable man know, not necessarily what
12 would that particular plaintiff know. Of course, it's an
13 objective reasonable man standard as opposed to what that
14 plaintiff should have known.

15 CHAIRPERSON HENNESSEY: Okay. The testimony
16 is being videotaped. Perhaps I can just ask you to expand,
17 if you would, a bit on the public policy reasons that you
18 feel that the statute of limitations is in place in the
19 first place. What kind of stability are we looking for in
20 the system so that people who might view this can get their
21 arms around that?

22 MR. CAMPBELL: Well, of course, there's reams
23 of law school stuff on this. But the general theory is
24 that there -- it is appropriate to have a limited period of
25 time so that a plaintiff who is aware of his injuries must

1 prosecute his action. Failure to bring it within what the
2 legislature has specified as the period of time unfairly
3 prejudices the defendant because they become more distant
4 and more unable to properly defend the case.

5 The courts have said that in tort cases, even
6 where the discovery rule has been applied, that once you
7 reasonably, you know or you reasonably should know that you
8 had been injured, two years is certainly an adequate period
9 of time to consult a physician, to consult a lawyer, and
10 bring your action. And that's been stated many times over
11 by the courts.

12 CHAIRPERSON HENNESSEY: I think there's
13 probably some quest for predictability and the ability to
14 measure potential liabilities and set rates. Your clients
15 probably are looking for that kind of predictability, the
16 ability to statistically measure what the potential
17 liability is and make some reasoned judgment as to how much
18 they ought to charge for this and what they need to take in
19 for premiums so they can cover the potential cost.

20 And I gather the concern is if we just throw
21 open the floodgates to this, we'll never be able to get a
22 number or an idea of how many people are going to sue us.
23 So therefore, we'll never be able to make any accurate
24 predictions as to what our potential exposure is.

25 And therefore, we can't really tell you what

1 to charge. And the whole system starts to fall under the
2 weight of that.

3 MR. CAMPBELL: Well, I think -- remember, as
4 Mr. Elliott said, that many policies today exclude
5 liability for asbestos. Asbestos, when it was
6 manufactured, was not known to be a dangerous product.
7 Certainly the insurance industry didn't know; the
8 manufacturers didn't know; the users didn't know.

9 For decades, people used what was a safe
10 product. It's a sad state of affairs that it in fact has
11 turned out to be dangerous; that many, many people have
12 disease and injury from their exposure to asbestos. But it
13 certainly was completely unpredictable.

14 And we have insurance companies who are
15 probably paying claims based on occurrence policies because
16 they were in effect many years ago when the exposure took
17 place. It never collected premium based on the, you know,
18 comprehension of a risk.

19 And as I said, we're continuing to see more
20 and more and more cases that are putting companies out of
21 business that are overwhelming the courts. We believe that
22 because there is a fair rule in place generally applicable
23 to the discovery rule, that to expand that or depart from
24 the general rule in a situation where you already have, we
25 believe, a liability crisis is just bad, bad

1 decision-making.

2 CHAIRPERSON HENNESSEY: If you refer to the
3 middle of page 2 of your testimony at the end of the 4th
4 paragraph, you're saying a high percentage of claims were
5 filed by persons who, although they've been exposed to
6 asbestos, have no actual impairment.

7 Is that -- talk to me about that a bit. I
8 mean, are you saying that plaintiffs are admitting I'm not
9 really hurt by this but I was exposed to asbestos and
10 therefore I have a claim?

11 MR. CAMPBELL: Well, certainly there are those
12 cases. I think there are cases where X-rays may indicate
13 that there is some darkening or scarring of the lungs where
14 you can see there is some abnormality, but yet the person
15 is asymptomatic. He does not suffer from shortness of
16 breath. He does not suffer from any disease, but yet it's
17 obvious that there's --

18 CHAIRPERSON HENNESSEY: That he has scarring
19 of the lungs and darkening of the lungs. Isn't that a
20 symptom?

21 MR. CAMPBELL: No, I don't think it is. When
22 I say asymptomatic, I mean there's no shortness of breath,
23 there's no carcinoma, there's no whatever, there is no
24 disability. And really -- and of course, you can
25 understand that plaintiffs' lawyers are going to seek all

1 the plaintiffs that they can. It makes sense.

2 And anybody who realizes that they may have a
3 disease in the future because they have been exposed and
4 once they have this, they might have a much higher
5 likelihood presumably of cancer, courts have said, Well,
6 fear of a future disease isn't compensable with,
7 parenthetically, the possible measure of damages; in some
8 cases where you do fall into that high risk category
9 because of exposure, that some medical monitoring may be
10 appropriate. That's got a whole lot of little subarea of
11 damages.

12 CHAIRPERSON HENNESSEY: That was the registry
13 cases you were talking about, right?

14 MR. CAMPBELL: Well, the registry cases are
15 basically those that have had some exposure and may have
16 some indication that they have scar tissue or plaque in
17 their lungs.

18 CHAIRPERSON HENNESSEY: You said that's not
19 really a symptom.

20 MR. CAMPBELL: That's right.

21 CHAIRPERSON HENNESSEY: But it's an indication
22 you may have future symptoms or you may have a problem.

23 MR. CAMPBELL: And that's what I said. I've
24 heard estimates range from 50 percent to 90 percent of the
25 cases being filed are by plaintiffs who are asymptomatic.

1 I can't vouch for the accuracy of those numbers, but I
2 think it's probably fair to conclude that a large
3 percentage of plaintiffs in fact are asymptomatic.

4 Does that mean the statute has even begun to
5 run? Perhaps not. Maybe it has, but the safe harbor is
6 there with these pleural registries to toll the statute.

7 CHAIRPERSON HENNESSEY: Well, once they file
8 their claim, if they continue to be asymptomatic, never
9 really show up with any tumors or any asbestosis or
10 whatever the terminology might be, don't they run a risk of
11 being called to court and put on trial and, you know, yes,
12 there may be liability. What's your amount of damage?

13 And you say, Well, I really haven't developed
14 anything yet. The end result is zero. And the defense
15 lawyers are real happy about that.

16 MR. CAMPBELL: Yes. But remember, we're
17 talking about hundreds of thousands of cases, the trial
18 preparation of which is very expensive; therefore, the
19 nuisance value is significant. There's one school of
20 thought out there, is that the asymptomatic cases that
21 force settlements, because there are so many and such a
22 high percentage, what they are doing is they are depleting
23 the available dollars left from those defendants that
24 haven't gone into, into bankruptcy.

25 So that in effect, some people believe that

1 all of these asymptomatic cases and the settlements on them
2 and the litigation weight they impose is effectively taking
3 money that would otherwise be available for people who
4 truly have disease and are probably more entitled to be
5 compensated. It's a huge problem.

6 The AIA is trying to address this at the
7 congressional level with some kind of litigation to address
8 this very point. Our point today is that in this whole
9 context, Gee, it doesn't really make sense to open the gate
10 even wider in this instance.

11 CHAIRPERSON HENNESSEY: One further question
12 from me. And that is to the bottom of page 2, you
13 indicated parenthetically that 90 percent of the
14 manufacturers are already in bankruptcy. And I'm going to
15 ask you to differentiate between the types of bankruptcy.

16 Are most of them, like, bankrupt and totally
17 out of business, not manufacturing anymore, not operating;
18 or are they in the kind of bankruptcy that allows them to,
19 you know, realign your debt and continue to operate?

20 MR. CAMPBELL: First a clarification. I said
21 that the manufacturers of 90 percent of the market share.
22 It may not be 90 percent of the actual manufacturers. But
23 the large majority are in bankruptcy. And I really can't
24 quantify how many are, you know, wound up versus how many
25 are in the Chapter 11 reorganization.

1 I believe, however, that most of the original
2 manufacturers are in fact gone and out of business.
3 Perhaps subsequent witnesses can clarify that.

4 CHAIRPERSON HENNESSEY: Okay. Thank you.

5 MS. KUHR: Are you saying that the people who
6 file claims and are without symptoms but have some sort of
7 physical reading on an X-ray are filing those claims to
8 protect themselves because of the present statute of
9 limitations?

10 MR. CAMPBELL: Well, we don't believe that the
11 present statute of limitations necessarily is triggered by
12 that type of asymptomatic determination. There's at least
13 one case where the courts have said that type of thing
14 where you have a mass -- I think in that, the Trieshock
15 case, which you heard reference to today, was a situation
16 where the company physician, the employer had performed
17 routine chest X-rays, I suppose, of the, of the employees.

18 The company called a particular employee and
19 said, We think you have symptoms that could be related to
20 asbestosis, you better get checked out, something to that
21 effect. So he was put on notice. They scheduled an
22 appointment with the pulmonary specialist that he went to
23 see within two weeks.

24 He waited two years. Except he didn't make it
25 from two years from the first date, okay, the date that

1 they said you have a possibility here that you have
2 asbestosis, you need to see a specialist for further
3 determination.

4 And what the Superior Court said is, Well,
5 we're going to let him maintain his claim because he had it
6 within two years of the time he saw the pulmonary
7 specialist. Well, we recognize that once he was told in
8 the first instance, he had a duty to further investigate.
9 And we find that because he followed up on that duty, he
10 did see the pulmonary specialist, that the two-year period
11 runs then.

12 We also see other court opinions, I think,
13 that say the fact that you have that first type of
14 determination doesn't necessarily start the statute of
15 limitations running. On the other hand, if you're an
16 employee and whether you go through a mass screening
17 provided by a plaintiff's lawyer or a company or a labor
18 union, somebody says, Gee, you have something here that
19 indicates concern, you know, you're likely going to be a
20 plaintiff.

21 And even though your symptoms -- I glanced
22 quickly at the American Cancer materials, the Cancer
23 Society materials. I think there was something in there
24 that your chances of getting the disease if you've been
25 exposed are, you know, like 1 in 7 will have that.

1 Well, if everybody filed who was exposed, I
2 mean, sure, if that necessarily means that 1 in 7 will be
3 symptomatic. But we're talking a lot of people. Certainly
4 people -- I want to make it clear -- they deserve to be
5 compensated. But so far, the courts have said that until
6 you have symptoms, you shouldn't be compensated. But it's
7 just --

8 MS. KUHR: I was just wondering if the bill,
9 if it became law, would prevent these mass filings by
10 people who have some sort of finding on X-ray but no
11 symptoms because they would, they would be protected until
12 they actually did have symptoms and the doctor said, you
13 know, this is really --

14 MR. CAMPBELL: Well, that's a novel
15 interpretation. I think the general consensus is this
16 statute is proposed by people who want to make sure that
17 plaintiffs can in fact satisfy the statute of limitations.
18 We think the safe harbor is there.

19 And I don't think anybody that reviewed this
20 said it's going to reduce the amount of litigations filed.

21 MS. KUHR: Thank you, Mr. Chairman.

22 MR. SCHWOYER: Some of the injuries or the
23 diseases related to asbestos exposure I'm told start with,
24 they affect the immune system. So a person is just
25 generally sick, they got the flu, they're coughing, that

1 sort of thing.

2 What have the courts said -- does that start
3 the clock for some people? You know, if you have the flu
4 every flu season for the last ten years, you're out of
5 luck?

6 MR. CAMPBELL: I'm not sure. I'm not
7 prepared. There may be those things. But I'm not -- I
8 want to make this confession: I'm not a litigator on
9 either the plaintiff or defense side, obviously, in these
10 types of cases.

11 MR. SCHWOYER: Okay. Thank you.

12 CHAIRPERSON HENNESSEY: Thank you, Mr.
13 Campbell.

14 MR. CAMPBELL: Thank you, Mr. Chairman.

15 CHAIRPERSON HENNESSEY: Our next testifier is
16 Roger Wright, President of the Pennsylvania Civil Justice
17 Coalition. Good morning. Welcome.

18 MR. WRIGHT: Good morning. Mr. Chairman,
19 members of the Task Force, learned counsel, I want to thank
20 you for the opportunity to present testimony today on
21 behalf of the Pennsylvania Civil Justice Coalition. My
22 name is Roger Wright, and I am the President of the
23 Pennsylvania Civil Justice Coalition.

24 The Coalition is a nonprofit corporation
25 dedicated to lawsuit abuse reform in Pennsylvania. We have

1 a broad-based support group, 61 percent of which are local
2 governments, 13 percent are health care providers, 10
3 percent are trade associations and individual businesses, 6
4 percent are farm bureaus, with those remaining at less than
5 3 percent being CPA organizations, chambers of commerce,
6 individuals, and nonprofits. We are governed by a board of
7 directors. And we are considered a 501-C6 nonprofit
8 corporation under the Internal Revenue Code.

9 Our broad-based coalition has come together to
10 push for reforms that will bring fairness, common sense,
11 and a heightened focus on personal responsibility to our
12 civil justice system. But we also have concerns about
13 proposed legislation that expands the potential for abuse
14 or that erodes protections provided by existing law.

15 Today, you have kindly invited us to comment
16 on Senate Bill 216. This bill proposes, as other witnesses
17 have talked about already, a change in the standard to be
18 used when determining when a cause of action arises in
19 association with harmful exposure to asbestos.

20 Some of our members initially understood that
21 this bill merely codified existing law, but we have come to
22 find out that that was an inaccurate characterization. We
23 find that the proposal significantly changes existing case
24 law. And it's with this new awareness that we present our
25 comments today.

1 As our courts have interpreted our statute of
2 limitations, a party asserting a cause of action to recover
3 damages must file his action within two years of when the
4 right to institute and maintain a suit arises. Just when
5 the right to institute and maintain a suit arises with
6 regard to an asbestos-related injury of course is the focus
7 of Senate Bill 216.

8 The Pennsylvania Supreme Court has held many
9 times that a party asserting a cause of action is under a
10 duty to use all reasonable diligence to be properly
11 informed of the facts and circumstances upon which a
12 potential right of recovery is based.

13 Statutes of limitations are vital to the
14 welfare of society and are vital to the law so says the
15 court. They have as their purpose the stimulation of the
16 prompt pursuit of legal rights and the avoidance of the
17 inconvenience and prejudice resulting from deciding stale
18 cases on stale evidence.

19 In situations where an injured party is
20 unable, despite the exercise of due diligence, to know the
21 injury or its cause, an exception to the normal application
22 of the statute of limitations is permitted. And this is
23 known as the discovery rule, which has been addressed by
24 other speakers this morning.

25 In creeping disease cases, as the type

1 addressed by Senate Bill 216, the current law provides that
2 the cause of action accrues and the two-year statute of
3 limitations begins to run when the person knows or
4 reasonably should know that he has been injured and that
5 his injury has been caused by another party's conduct.

6 Now, a court presented with an assertion of
7 the applicability of the discovery rule must, before
8 applying the exception of the rule, address the ability of
9 the damaged party, exercising reasonable diligence to
10 ascertain the fact of a cause of action.

11 Although the purpose of the discovery rule, as
12 the court has stated, is to mitigate, in worthy cases, the
13 harshness of an absolute and rigid period of limitations,
14 the rule cannot be applied so loosely as to nullify the
15 purpose for which a statute of limitations exists.

16 Therefore, under current law, reasonable
17 diligence; that is, a reasonable effort to discover the
18 cause of an injury under the facts and circumstances of the
19 case on the part of the injured party, is required before
20 the discovery rule exception to the normal running of the
21 statute can be applied.

22 Now, what 216 would do, as we understand it,
23 is eliminate any obligation on the part of an injured party
24 in an asbestos-related case to exercise due diligence in
25 pursuing the cause of his injury. And this is a

1 consequence which we believe would nullify the purpose of
2 the statute of limitations concept as defined by the court.
3 And that is why the Pennsylvania Civil Justice Coalition is
4 opposed to Senate Bill 216. It would eliminate the
5 reasonably should have known portion of the standard.

6 Now, Senate Bill 216 would, in effect, take
7 the discovery rule exception to the normal statute of
8 limitations and permit the application of that exception
9 without any requirement of reasonable inquiry. Now, the
10 Pennsylvania Supreme Court had occasion to address this
11 construct in the case of Cochran v. GAF Corporation.

12 And the majority in that case characterized
13 the minority opinion as favoring a no diligence approach
14 regarding the discovery rule, in effect favoring what 216
15 would permit. And the court said that such a result would
16 dramatically expand the discovery rule and open the
17 floodgates to allow anyone with a good faith lack of
18 diligence to claim benefit of the rule.

19 Such a no diligence standard would severely
20 erode the finality of our statute of limitations, and that
21 would truly be a grievous error said the court. The Civil
22 Justice Coalition believes that the integrity of our
23 statute of limitations should be preserved and that Senate
24 Bill 216, as currently written, would unreasonably remove
25 the requirement that a plaintiff act reasonably and

1 diligently in pursuing the cause of his injury.

2 I thank you for this opportunity to present
3 our views on this very important subject and would be
4 pleased to respond to questions.

5 CHAIRPERSON HENNESSEY: Thank you, Mr. Wright.
6 The Cochran case you just cited at the end of your
7 testimony, I'm intrigued by the phrase that the court might
8 have used a good faith lack of diligence. What were they
9 saying? They're saying that no indication, no reason for
10 the people to think that they should have done or should
11 have suspected an injury was forming within them or cancer
12 was forming?

13 I mean, good faith lack of diligence seems
14 like a contradictory phrase to me.

15 MR. WRIGHT: Apparently, there are two
16 elements that the court felt were required in the current
17 situation. One was a good faith effort on the part of the
18 plaintiff, not trying to do harm to the process, not
19 intending to violate the process but rather, just not
20 taking any reasonable action to pursue the cause of their
21 injury, not doing it with any evil intent, so to speak,
22 just not doing it.

23 And the court is saying even take good faith
24 lack of diligence would erode, if that were the standard,
25 would erode the basis of the statute of limitations.

1 CHAIRPERSON HENNESSEY: We'll pull that case
2 and take a look at it because it is an intriguing idea.
3 Toward the bottom of the first page of your testimony, you
4 use the same phrase that Mr. Campbell before you had used
5 in describing the Supreme Court's determination.

6 And you characterize it as a requirement that
7 plaintiffs use all reasonable diligence. And that seems to
8 me to be a different standard than saying, Oh, you have to,
9 reasonably should have known that you had a problem. You
10 know, the word -- it's only three letters. But the word
11 all reasonable diligence seems to really scale up the
12 standard that's required for a plaintiff in order to avoid
13 being thrown out of court on the statute of limitations
14 violation.

15 And I notice that elsewhere in your testimony,
16 you said that there is a reasonable, you know, a duty to
17 either -- I'm sorry -- a situation state of mind where you
18 either knew or reasonably should have known and not a, you
19 know, a standard where you say knew or, after having run
20 through some of the encyclopedia-type of exercise, you
21 reasonably should have known.

22 I mean, you know, is the word "all" really
23 intended? Is that what the courts are saying, you have to
24 go through, leave no stone unturned before we're going to
25 let you have access to our courts?

1 MR. WRIGHT: I think, of course, the question
2 is one for the jury to determine from the facts. The
3 standard, as I understand it, was annunciated in the case
4 of Pocono International Raceway, Incorporated v. Pocono
5 Produce Company at 503 Pa. 80, page 84, a 1983 case,
6 Pennsylvania Supreme Court.

7 And in that case, the court indicated,
8 reiterated I should say, that a party asserting a cause of
9 action is under a duty to use all reasonable diligence to
10 be properly informed. I think the key word there is
11 reasonable, all reasonable diligence.

12 I suppose there can be unreasonable diligence,
13 but that's not the standard. The standard is the person
14 needs to be what is reasonable in following up on the cause
15 of their injury and whether they have an injury at all.
16 And that has been interpreted by the court many times as
17 requiring effort, if you will, on the part of the injured
18 party.

19 Otherwise, the exception to the running of the
20 normal statute of limitations; that is, the beginning of
21 the running of it at the point of injury, which would have
22 been, I suppose, when the exposure began, the exception to
23 that is provided by the discovery rule.

24 And therefore, if 20 years have passed since
25 the exposure and now that there is an apparent injury, that

1 puts the duty on the injured party to follow up. Well,
2 what caused this? What -- you know, to take reasonable
3 action in pursuing that. That's what's required. Senate
4 Bill 216 would no longer require that.

5 CHAIRPERSON HENNESSEY: Thank you. Mike, do
6 you have any questions?

7 MR. SCHWOYER: No.

8 CHAIRPERSON HENNESSEY: Thank you very much.

9 MR. WRIGHT: Thank you very much.

10 CHAIRPERSON HENNESSEY: Our next testifier is
11 Robert Norcross, Business Manager for the Asbestos Workers,
12 Local No. 23. Welcome.

13 MR. NORCROSS: Thank you.

14 CHAIRPERSON HENNESSEY: You didn't bring
15 copies of your testimony?

16 MR. NORCROSS: No, I do not have any prepared
17 copies. I just have some notes. First of all, Chairman
18 Hennessey, I would like to thank you and your committee for
19 affording me this opportunity to testify here this morning.

20 CHAIRPERSON HENNESSEY: You're very welcome.

21 MR. NORCROSS: Thank you. My name is Robert
22 Norcross. I'm the Business Manager of Asbestos Workers,
23 Local No. 23. I am not here this morning to testify as a
24 labor leader nor do I have a personal agenda. But I
25 believe I am here this morning as a concerned citizen to

1 testify on behalf of all many women and men in this
2 Commonwealth of Pennsylvania who may or may not know that
3 they have received an acute or chronic exposure to
4 asbestos.

5 And there's been a lot of talk this morning in
6 testimony about due diligence. One of the areas that I
7 want to focus on is the individual that has no knowledge
8 that they have received an exposure. What about the
9 college student who gets a job in the summertime working
10 for a contractor removing floor tile?

11 The contractor nor the person performing
12 that operation has no knowledge that there is
13 asbestos-containing materials in the floor tile or in the
14 adhesive that was utilized to put that floor tile down.

15 There's also a scenario where an individual
16 could be working to remove fireproofing material that
17 contains asbestos binders and has no knowledge whatsoever
18 that those binders exist in that material, yet they receive
19 an acute or chronic exposure.

20 And I don't believe that you should put the
21 onus of responsibility on a victim who has no personal
22 knowledge of the fact that they have been victimized until
23 a doctor, a licensed physician, can make a definitive
24 determination that yes, the injury you sustained and the
25 debilitating disease that you now have is directly related

1 and responsible to asbestos exposure.

2 Now, let me give you an example. I personally
3 installed asbestos and asbestos-containing products from
4 1971 to 1974. Therefore, if I would experience shortness
5 of breath, if I would experience pleural thickening, if I
6 would have any kind of symptoms, I would immediately
7 assume, correct or incorrectly, that those symptoms are
8 directly related to my exposure to asbestos.

9 I have been trained and certified. I hold a
10 supervisor license from the Commonwealth of Pennsylvania in
11 order to deal with asbestos-related removal procedures. So
12 I have an acute understanding and knowledge of the disease
13 and how it works. But I do believe there are individuals
14 in this Commonwealth that have no such knowledge and don't
15 even have any indication that they have possibly been
16 exposed.

17 And I will give you another example. Several
18 years ago, I received a call from a job site at Lafayette
19 College in Easton where the workers were threatening to
20 walk off the job site. These were not unionized workers.
21 They were nonunion workers.

22 But they were threatening to walk off the job
23 site because of what they believed to be a potential
24 asbestos exposure. Upon going to the job site, a bulk
25 sample was taken. And there was a contractor who was doing

1 renovation work in one of the classrooms.

2 And there was a pile of debris on the floor
3 that was suspect material and was analyzed and found to
4 contain asbestos particles. The contractor had the young
5 man cleaning up that debris with a Shop Vac, a Sears wet
6 and dry Shop Vac, under no controlled circumstances, under
7 no precautionary measures to protect that individual. Now,
8 I would have to assume that that contractor did not know
9 that that material contained asbestos.

10 I also believe that this legislation does not,
11 repeat, does not impose any kind of liability on anyone.
12 It simply affords an opportunity to a victim who has been
13 victimized to potentially pursue his interest in a court of
14 law to make a determination whether in fact yes, he does
15 have a case or he doesn't have a case.

16 I also believe it stops the government from
17 artificially locking the doors of a courthouse to somebody
18 who has been victimized if they have no realization or
19 indication that they have been victimized. And they would
20 not know that until the doctor made a definitive
21 determination that yes, you have an asbestos-related
22 disease.

23 I believe there are many frivolous cases out
24 there today. And it was brought out in testimony today
25 that as soon as an individual believes that, Hey, I work

1 with asbestos, I have a case. Well, let me give you the
2 reverse of that.

3 We had an individual in our local union. His
4 name was Bill Miller. He won two medals in the Olympics in
5 the sport of crew. He worked for years in a heavy, heavily
6 latent asbestos environment. He passed away at age 86 from
7 natural causes. Not everybody who receives an exposure to
8 asbestos contracts an asbestos-related disease.

9 The reverse of that was a very dear friend of
10 mine. His name was Wayne Earhardt. He was the president
11 of our local union. He developed mesothelioma. And in six
12 months from the time of that determination, he was dead,
13 leaving behind a wife, a daughter who was in college, and
14 two young sons who were still in high school.

15 So I believe that there has to be some kind of
16 recourse for individuals; that when we talk about due
17 diligence, due diligence is based on knowledge. I have a
18 personal knowledge that I have done something; and
19 therefore, I have an obligation and responsibility that if
20 I incur symptomatic problems, that I recognize that I work
21 with asbestos. So I need to make that a revelation and
22 need to bring that forward.

23 I also happen to believe that there are
24 individuals that go for a chest X-ray because they're
25 experiencing some type of respiratory difficulty. But

1 unless those chest X-rays are read by a "B" Reader -- and a
2 "B" Reader is an individual who is in the field of
3 radiology that has been trained to interpret X-rays to look
4 for asbestos-related diseases or asbestos-related
5 complications.

6 A normal X-ray technician has not been
7 schooled and trained to read a standard X-ray. So if an
8 individual does not request a "B" Reader to interpret those
9 X-rays, it's extremely possible that having had an X-ray,
10 the fact that the asbestos is there and manifests itself in
11 that person will not be brought to light.

12 There was a lot of testimony today about
13 companies and corporations and small mom and pop
14 operations. Well, I believe that any time a product is
15 introduced into the mainstream of commerce, the person that
16 develops that product, the person that distributes that
17 product for the intent and specific purposes of making a
18 profit have an obligation and responsibility to ensure that
19 that product is installed safely and that the workers are
20 protected in the institution of that product.

21 If you look at Pennsylvania, there might be
22 corporations in the state that have manufactured
23 asbestos-related products. And we'll talk about Armstrong
24 World Industries, for example. But there are also other
25 corporations who developed a product outside of

1 Pennsylvania and bring, bring that product in here for
2 distribution.

3 And I believe that those individuals have a
4 responsibility to the men and women of this Commonwealth to
5 follow the law. And I believe it's in the best interest of
6 the ladies and men in this great state that they have
7 another opportunity, another avenue that should they
8 contract this debilitating and terrible, terrible disease,
9 that they have an opportunity to go forward and to possibly
10 seek some kind of monetary restitution if in fact it can be
11 proven that that disease was relative to asbestos exposure.

12 I guess a simple analogy I'd like to make is
13 that if an individual smokes, they probably have a 20
14 percent greater chance of contracting lung cancer than an
15 individual that does not smoke. An individual that works
16 with asbestos products has a probability of about 20
17 percent greater than an individual that has never been
18 exposed to asbestos to contract lung cancer.

19 However, if you put those two factors
20 together, now you have a thing incorporated which is known
21 as the synergistic effect. And that means that the
22 combination of smoking and having worked with
23 asbestos-related products now greatly multiplies that
24 percentage to maybe 90 percent that you will in fact get an
25 asbestos-related disease or you will come down with lung

1 cancer.

2 Now, in that definitive determination, was
3 that cancer caused from smoking or was it caused from
4 exposure to asbestos or was it caused in a combination of
5 both? And therein would lie the liability. So I guess in
6 the scenario this morning of the David versus Goliath, I
7 would have to be the David because I am taking a contrary
8 point of view.

9 And I believe that Senate Bill 216 is a good
10 bill. And I also believe that probably, or maybe, maybe it
11 could reduce the amount of frivolous suits because if a
12 person goes to a licensed physician and it can be proven
13 and determined that the cause of his illness is directly
14 related to asbestos exposure, then he has a legitimate case
15 and he has a legitimate concern that can be explored in a
16 court of law. It's not just some frivolous attempt to
17 extract money from companies or insurance companies with no
18 basis or foundation.

19 And I guess in closing, I would like to say
20 that I believe the members of the Senate have done a great
21 justice to the population of this state. And I believe
22 that every elected official who represents their
23 constituency has an obligation and responsibility to ensure
24 that they make the best decisions for those people that
25 they represent.

1 And I believe personally that Senate Bill 216
2 is in that best interest because it gives somebody another
3 avenue to explore the possibility of having some kind of a
4 recourse if in fact they do contract this disease. Once
5 again, I want to thank you for giving me the opportunity to
6 speak today. And I would certainly answer any questions
7 anybody might have at this time.

8 CHAIRPERSON HENNESSEY: Yes. Thank you for
9 your testimony. If someone is injured in a car accident,
10 they have two years to file suit for the damages that
11 they've sustained, whatever injuries they've sustained as a
12 result of the car accident; is that right?

13 MR. NORCROSS: Yes.

14 CHAIRPERSON HENNESSEY: And that's certainly a
15 measurable thing. If it happened on November 4th of 2000,
16 you have until November 4th of 2002. But at that point,
17 you know that you're hurt because your knee's all banged
18 up, you have bruising, you know, you might have broken
19 bones or lacerations.

20 Do you have any problem with the idea that
21 those people have two years from the date of the accident
22 to file, to file a court action to get recommends for their
23 injuries?

24 MR. NORCROSS: No, sir, I do not. And the
25 reason that I say that is because if I leave here today and

1 I am involved in a car accident, okay, obviously the cause
2 of my injury was the accident. And I immediately sustained
3 the injury, which was damage to my leg or I broke my leg.
4 So I know what the cause and what the effect was
5 immediately.

6 Now, if I have an exposure to asbestos -- and
7 asbestos can be inhaled, it can be ingested, and it can
8 enter the skin, enter the body through the skin. You have
9 pleural cancer; you have peritoneal cancer, which is of the
10 abdomen. There has been evidence that asbestos has caused
11 colorectal cancer and intestinal cancer.

12 But there are individuals who get colorectal
13 cancer that have never been exposed to asbestos. There are
14 individuals that, because of that exposure, have also
15 gotten the same disease. So I think that until a
16 definitive determination is made that there is a definite
17 link between an exposure and that exposure can be proven
18 medically to have caused the cancer, I think it all has to
19 be taken into consideration. I think it's a different,
20 different situation.

21 And going back to one of my previous analogies
22 is that an individual that works in the summertime that
23 received an exposure and had no knowledge whatsoever of
24 that exposure is disadvantaged. And let me --

25 CHAIRPERSON HENNESSEY: Why doesn't he fall

1 within the escape clause of the discovery rule? It says he
2 had no reason to know that he had been exposed and
3 therefore no reason to know that he has to file suit within
4 that two-year statute of limitations? Because it's when
5 you know -- under current law, it's when you know or
6 reasonably should have known.

7 MR. NORCROSS: Right. But --

8 CHAIRPERSON HENNESSEY: If he never had known
9 that he had been involved in any kind of asbestos removal
10 and finds out when he's 42 that, you know, he's got
11 asbestosis and he is back in time and possibly could have
12 gotten this back when he worked that summer after my
13 sophomore year in Penn State -- what was the name of that
14 company? -- and I find out at that point, or he finds out
15 that they were removing asbestos, that's when his two years
16 starts to run under existing law.

17 MR. NORCROSS: Under existing law.

18 CHAIRPERSON HENNESSEY: And that would be
19 2001. So he'd have until 2003 to file action. I guess
20 what I'm getting at, you don't seem to have a problem with
21 the two-year statute of limitations from a definable
22 incident such as a car accident.

23 And the law, as I guess some of us, some of
24 the testifiers would characterize it, says that it doesn't
25 really run in these creeping disease kind of cases until

1 you have reason to know that there is a linkage between the
2 work that you were doing at a particular time and the
3 disease that you now have.

4 And if that's, if it's reasonable then to
5 start measuring it from the time that you reasonably have
6 grounds to know that there's some linkage, it seems to me
7 to be really sort of equating the person from that point in
8 time to you in your car accident when you hit the dashboard
9 and you cut your head and saw the blood and said, My God,
10 I'm injured.

11 And if we can accept the two-year statute in
12 the car accident case as a matter of sound public policy,
13 why can't we measure it from the reasonably should have
14 known date in these kind of creeping disease cases?

15 MR. NORCROSS: Permit me to give you a
16 personal example. And maybe this will shed some light on,
17 as to why I believe what I believe. In 1969, I became ill;
18 and I developed a very high fever for a prolonged period of
19 time. That fever reached 104 degrees at least once on a
20 daily basis, sometimes 105. I had an enlarged liver and
21 spleen.

22 Now, I was aware immediately at that time that
23 I was sick. So I sought medical attention. Without boring
24 you, I'll briefly relate what happened. Extensive blood
25 work sent down to the CDC in Atlanta, upper and lower GI

1 series, liver biopsy, multiple bone marrow aspirations,
2 gallium scans. And they even cut my feet open and did a
3 test for lymphoma. All of these things came back negative.

4 Now, the cause and effect. I knew I was sick.
5 I received medical treatment. Nobody could decide what the
6 cause was. That was termed or deemed fever of unknown
7 origin. Four years later, it recurred again. I went
8 through the same process.

9 Now, four years later, it recurred again. And
10 now we're in 1977. And finally, I was admitted to the
11 Hershey Medical Center. And they did an exploratory
12 laparotomy and where they found an internal mass which had
13 spread to the liver and spleen, and the lymph nodes were
14 infected.

15 Now, there was a team of six pathologists.
16 And three of them said you have Hodgkin's disease. You
17 have all the symptoms. You have an infected lymph tract.
18 And now the disease has spread into the fourth stage
19 because it is affecting different internal organs.

20 The three other pathologists did not agree.
21 They said that you have the absence of the Reed-Sternberg
22 cells. So therefore, we cannot categorize your problem as
23 Hodgkin's disease. We will say, however, you have a
24 malignant lymphoma.

25 Okay. And then I went through a prescribed

1 course of chemotherapy. And fortunately, I'm still here
2 today. But my point is, even when you had a medical
3 determination, you had a group of physicians that could or
4 could not agree as to what the actual cause was.

5 They knew that I was sick, and they knew I had
6 a cancer. But they couldn't pinpoint where it came from or
7 what it was. They just prescribed a course of treatment.
8 So I guess what I'm trying to say is I believe Senate Bill
9 216 would give the medical community an expanded
10 opportunity to try and make such a determination.

11 I guess it's like a basketball game, like the
12 Sixers the other night. You have an individual out there
13 who possibly doesn't know they've been exposed. And on the
14 other side, you have a client or a company who doesn't know
15 that they might have a liability at this point.

16 So you have a tie. So now we go into
17 overtime. And when we go into overtime, we decide if this
18 is valid. And somebody wins and somebody loses. And I
19 would look at Senate Bill 216 including a doctor's
20 determination to make a definitive analysis as an overtime
21 period to try and resolve an issue. I don't know if that
22 answered your question or not.

23 CHAIRPERSON HENNESSEY: Well, I appreciate the
24 information. Let me ask you this: In 1977 when you got
25 three doctors saying you had Hodgkin's disease and three

1 doctors saying they can't link it to that, would your
2 statute of limitations run? Under 216, it would seem to me
3 that it would because at least three told you that there
4 was a linkage.

5 Although, I guess we can amend it even further
6 and say that it should be the first uncontradicted
7 diagnosis of causation that triggered the statute of
8 limitations period to start to run. I'm a little confused
9 even in your example as to when you think that in your
10 situation the two-year statute period would have started to
11 run.

12 Would it have started in 1977 when you got
13 contradictory information?

14 MR. NORCROSS: Well, I think if I would have
15 went in and said I had this problem in 1969 and I received
16 medical attention and there was no problem because it went
17 away as mysteriously -- there was no cause, there was no,
18 you know, relevance to what happened.

19 CHAIRPERSON HENNESSEY: I think we can
20 understand that under current law, you would not face the
21 statute of limitations problem there because there was no
22 need to establish any kind of causation.

23 MR. NORCROSS: Okay. Yes.

24 CHAIRPERSON HENNESSEY: Okay. In 1973, it
25 happened again; and still no causation was determined.

1 MR. NORCROSS: Yes.

2 CHAIRPERSON HENNESSEY: So you wouldn't have a
3 statute of limitations problem. But in 1997, three doctors
4 said there was a causation problem and, problem or linkage
5 and three said no.

6 MR. NORCROSS: That's correct.

7 CHAIRPERSON HENNESSEY: Under 216, it would
8 seem to me that the statute of limitations starts to run.

9 MR. NORCROSS: From that point in time.

10 CHAIRPERSON HENNESSEY: Yeah. Even though
11 it's contradictory, you've at least gotten a determination
12 from a licensed physician that there's causation.

13 MR. NORCROSS: Okay. So based on due
14 diligence, I have made that determination. And now we can
15 move forward. The only difference is that there was no
16 lawsuit instituted. This was a purely insurance matter.
17 And through my local union, we are self-insured. So that
18 matter was handled that way, and the bills were paid.

19 But I mean, it was no -- I guess there was no
20 identification of a responsible party that had to assume
21 civil or punitive damages for having done something or not
22 done something. It's maybe --

23 CHAIRPERSON HENNESSEY: I guess what I'm
24 trying to get at is it seems to me you were protected under
25 current law certainly in 1969, 1973. In 1977, it becomes a

1 little more problematic.

2 MR. NORCROSS: Yes.

3 CHAIRPERSON HENNESSEY: But under section, or
4 Senate Bill 216, it's pretty clear that the statute of
5 limitations would have run even though it's arguable that
6 because you've had contradictory information from eminent
7 people, eminent doctors in the field, that you really
8 couldn't establish causation.

9 And therefore, when further studies in 1990
10 created the definite linkage, you should have from 1990 to
11 1992 to file your suit. Senate Bill 216, as drafted, is
12 clear that you would have been out of court in 1979. They
13 would have thrown the case out. The case is over because
14 you had one licensed physician tell you there is causation.

15 MR. NORCROSS: Well --

16 CHAIRPERSON HENNESSEY: I mean, the way you
17 characterized it, I think really you get hurt by 216 rather
18 than helped by it.

19 MR. NORCROSS: Well, I guess that's the chance
20 that I personally have to take. And I guess what I'm
21 trying to say is if there's a law enacted, then the law
22 establishes specific parameters when you can or cannot do
23 something, whether it's institute a lawsuit or whatever.

24 And as long as you have a situation that
25 develops within those parameters and you take the relative

1 action, then the court's either going to decide yes, you
2 are correct or no, you're not correct. And I guess that's
3 really what the basis is.

4 CHAIRPERSON HENNESSEY: Okay. Thank you.

5 MR. SCHWOYER: I just -- following up a little
6 bit on some of the questions that Chairman Hennessey asked
7 you, are you agreeing with him then that -- forgive me for
8 forgetting the year. But when you first developed your
9 fever and you went and you had six tests performed and
10 there was no identifiable source or cause of your infection
11 or for your fever, are you agreeing with him that at that
12 point, waiting then four years for symptoms to reoccur, the
13 courts would construe that as no lack of due diligence,
14 that the courts don't require you to seek other medical
15 attention, get other tests done throughout that four-year
16 period?

17 MR. NORCROSS: I guess what confuses me is I
18 believe in 1969 I exercised due diligence. Okay. But
19 there was no conclusion made other than the fact that you
20 have a fever of unknown origin. Now, once again, the
21 scenario presented itself in 1973.

22 I guess my question would be, in 1977, which
23 is eight years later, has my two-year period expired
24 because I exercised due diligence in 1969 but there was no
25 definitive conclusion and the same process repeated itself

1 four years later? And now four years later, which is now
2 eight years later, we have some kind of determination.

3 So am I entitled under the current law to seek
4 monetary compensation or restitution because I exercised my
5 due diligence eight years ago and certainly the two-year
6 period has expired? I just believe that in this situation,
7 you know, I might be off base here.

8 CHAIRPERSON HENNESSEY: Well, I think in 1969
9 you did what was expected of you. And nobody could
10 establish causation. So the potential for you to file a
11 lawsuit wasn't there because you couldn't prove that there
12 was any linkage between your disease and exposure that you
13 had. So you're safe. And you're safe in 1973 when the
14 doctors still can't tell you.

15 The problem I have is that in 1977 when three
16 of your doctors said there is a linkage, under Senate Bill
17 216, it's pretty clear that it starts to run even though
18 you can cite how can I -- I think I've acted reasonably
19 because three people said yes and three people said no.

20 What am I supposed to do? Am I really
21 supposed to file a lawsuit at that point? I think under
22 current law, until the medical science clears up and more
23 people come to some sort of consensus that yes, indeed this
24 is caused by your exposure to asbestos or whatever it was
25 that caused the linkage in your case, I think under current

1 law, you're more protected than you would be under Senate
2 Bill 216.

3 MR. NORCROSS: But doesn't in fact Senate Bill
4 216 facilitate the fact that now I have a definitive
5 diagnosis by a percentage of doctors? See, before -- by a
6 percentage of doctors meaning 50 percent. Prior to that,
7 there was no diagnosis other than the fact that it's
8 unknown.

9 But now in 1977 -- and you are correct -- a
10 certain percentage of doctors, three out of six, said this
11 is what it is. So now at that point, I believe from that
12 point forward, because the doctors have made that
13 determination, if I intend to do anything, the statute of
14 limitations gives me two years from the date of that
15 determination, that the fact that a doctor did link this
16 problem to this or make a definitive determination.

17 The only thing I want to go back and revisit,
18 sir, is that there are individuals out there that have no
19 knowledge of this. I just believe that if you can point
20 out or you can prove that a doctor has made a definitive
21 determination that your cause is related or linked to a
22 specific activity, a specific exposure, whatever that may
23 intend to be, that that, at that point the two-year statute
24 of limitations should start and the clock should start
25 ticking because somebody did in fact identify that.

1 CHAIRPERSON HENNESSEY: So you don't have a
2 problem with the two-year statute of limitations being two
3 years?

4 MR. NORCROSS: No, I do not.

5 CHAIRPERSON HENNESSEY: You're just worried
6 about when it starts, when the clock starts to run?

7 MR. NORCROSS: That is correct. And I just
8 believe that Senate Bill 216 helps to clarify that a little
9 bit and gives it a little bit of teeth. I mean, that's my
10 own personal opinion.

11 CHAIRPERSON HENNESSEY: But in your case, it
12 probably cuts you off back in 1979.

13 MR. NORCROSS: Uh-huh. But that's --

14 CHAIRPERSON HENNESSEY: And arguably, that
15 wouldn't be the case in the other situation. If you had
16 reason -- I'm not so sure that any court would cut you off
17 if you had one doctor that says I think there's a linkage
18 here, I believe I can show a linkage and 15 doctors said
19 no, there's no linkage.

20 Senate Bill 216, as it's worded, would seem to
21 say, Well, you got one doctor that says there's linkage.
22 Your time limit started running in 1977. But if there's
23 ten doctors that are saying no, absolutely not, there's no
24 way, and you sit there and say there's no way I can prove
25 this in court, I don't think that under today's law, that

1 the clock would start to run in 1977.

2 Maybe by 1990 when everybody agrees that yeah,
3 there is a linkage, then maybe it starts to run. But under
4 Senate Bill 216, if we adopt it, it clearly starts to run
5 in 1977. So it has the -- you know, it's the law of
6 unintended consequences. You know, it would have made your
7 situation worse, I think, than better.

8 MR. NORCROSS: But I believe that in any kind
9 of disease that has a latency period, whether it's 20, 30
10 years or whatever, I believe that if you institute some
11 kind of parameters, it's for the benefit of everybody,
12 whether it's the insurance companies, it's the claimant,
13 it's the victim or, you know, the people that are in
14 defense of something.

15 I think that if you, if you have a structured
16 way of handling a situation, regardless of what the
17 exposure period is, and that's defined and everybody knows
18 and understands that, then they take their chances. I
19 mean, that's one of the great, great principles in American
20 democratic system, that we have the opportunity and the
21 ability to go in a court of law or to make our case known
22 and be judged by a jury of our peers whether we're right or
23 we're wrong.

24 And I just -- I happen to believe that 216
25 adds more credibility to that process.

1 CHAIRPERSON HENNESSEY: Okay. Thank you very
2 much.

3 MR. NORCROSS: And once again, thank you for
4 this opportunity.

5 CHAIRPERSON HENNESSEY: Mr. McClure. We are
6 joined by Lamont McClure, an attorney of the Law Offices of
7 Peter C. Angelos. Thank you for coming today. Tell us,
8 within the law offices, are you an active litigator?

9 MR. McCLURE: I am.

10 CHAIRPERSON HENNESSEY: You are? Okay.

11 MR. McCLURE: My name, as you've noted, is
12 Lamont McClure. I'm an attorney with the Law Offices of
13 Peter Angelos. I practice for, in Mr. Angelos's offices in
14 Bethlehem, Pennsylvania. I have a brief statement.

15 CHAIRPERSON HENNESSEY: Sure.

16 MR. McCLURE: Mr. Angelos represents thousands
17 of individuals across the Commonwealth of Pennsylvania and
18 around the nation in several jurisdictions who have been
19 injured due to their exposure to asbestos-containing
20 products. The reason we felt it was necessary to appear
21 before this esteemed committee today is due to the harsh
22 result produced by several Pennsylvania Superior Court
23 decisions.

24 Steelworkers, building and construction
25 tradesmen, their widows, and other workers are often barred

1 from seeking compensation from the manufacturers of
2 asbestos-containing products due to the application of
3 Pennsylvania's two-year statute of limitations. The
4 application of the two-year statute of limitations to these
5 latent or creeping disease injuries creates the problem.

6 In a typical personal injury case such as a
7 car accident or medical malpractice case where the
8 operation is negligently performed, the injured person
9 becomes aware of both the injury and the wrong at the same
10 time. In the latent or creeping disease case, this is not
11 true.

12 These victims often are aware of an injury
13 such as lung cancer or mesothelioma but not the cause of
14 the injury or the wrong which caused the injury; for
15 example, the defective asbestos-containing product they
16 were exposed to.

17 Many workers never personally used these
18 products but were working in areas where others were using
19 them and causing their exposure to these products. In some
20 cases, a housewife who shakes out and washes her husband's
21 clothes suffers asbestos-related injuries.

22 In the Ingenito case, the statute of
23 limitation is commenced when an individual is diagnosed
24 with an injury by imputing knowledge to the injured person
25 that they should know the injury was caused by asbestos.

1 This is so even though no physician or other medical
2 professional has ever advised the person that the injury
3 could be related to asbestos.

4 The Superior Court in Love and Cochran
5 reaffirmed that the knowledge of the wrong on the part of
6 the worker is presumed or imputed. The net effect of this
7 line of cases is by the time the injured workers find out
8 that their disease may be related to toxic exposure, the
9 time for bringing suit against the manufacturers of these
10 products has expired.

11 Mr. Angelos's long experience representing
12 those injured by exposure to asbestos has seen situations
13 where a widow with a death certificate listing mesothelioma
14 as the cause of her husband's death does not know that she
15 may have a right of action against the manufacturers of
16 defective toxic products that her husband was exposed to in
17 his work place.

18 We have also encountered situations like the
19 one where a steelworker goes for a rehire exam and is told
20 he has lung cancer by the company doctors. Three years
21 later, he learns his lung cancer is likely caused by his
22 exposure to asbestos dust and fibers from working many
23 years as a steelworker.

24 And his family cannot seek redress for his
25 injury against the manufacturers. This is so even though

1 the steel company doctors never told him his lung cancer
2 could be related to asbestos. And although he never
3 suspected asbestos was the cause of his cancer, under
4 current Pennsylvania law, his right to seek compensation
5 for his injury would have expired.

6 Other jurisdictions have addressed this
7 problem. In Ohio, the legislature enacted legislation
8 which stated that a cause of action for injury from
9 asbestos arises on the date the person was informed by
10 competent medical authority that they were injured by
11 exposure to asbestos products. Therefore, the statute of
12 limitations runs not from when the injury was diagnosed but
13 when the person became aware of both the injury and the
14 wrong.

15 The legislation currently pending gives
16 injured and dying workers, their widows and families time
17 to deal with their current burdens of sickness, sadness,
18 and the loss of their dreams by allowing them a reasonable
19 time to learn if these types of injuries may be the result
20 of exposure to a defective and toxic product.

21 This legislation helps to remedy this unfair
22 situation and would bring the Commonwealth of Pennsylvania
23 in line with the great majority of states who distinguish
24 creeping latent disease from other types of injury. In her
25 ringing dissent in the Ingenito case, Judge Elliot, quoting

1 another Superior Court decision, the Trieshock case, made
2 it abundantly clear why this legislation is so necessary.

3 A plaintiff in a creeping disease case should
4 not be required to have greater knowledge than his
5 physicians about his medical condition. If those
6 physicians are not reasonably certain as to his diagnosis,
7 then he certainly cannot be bound to have the knowledge
8 necessary to start the statute of limitations running.

9 On behalf of the law offices of Peter Angelos,
10 I would like to thank Chairman Hennessey for the
11 opportunity to give voice to the plight of the sick and
12 dying who, due to a fatal flaw in our law, are turned away
13 from the legal system. Thank you.

14 CHAIRPERSON HENNESSEY: Thank you, Mr.
15 McClure. Let me turn, if I can, to the scenario we had
16 discussed just moments ago with Mr. Norcross. Under Senate
17 Bill 216, it seems clear to me that even though there may
18 be conflicting opinion, the type of thing that Judge Elliot
19 was talking about in her dissent, the statute of
20 limitations started running in 1977 because he had three
21 doctors, three doctors who said yes, there is linkage, you
22 know, which would seem to fall squarely within the language
23 of Senate Bill 216 which says that it starts to run once
24 the person was informed by a licensed physician that the
25 person has an injury which is caused by that exposure.

1 So in 1977 -- I know we're not talking about
2 an asbestos case. But in 1977, Mr. Norcross has the
3 statute of limitations starting to run against him even
4 though the state of medical science at that point seems to
5 be very unclear because he had a 50/50 split among
6 reasonably, people who we expect to be pretty good doctors
7 working at Hershey. But his statute of limitations starts
8 to run in 1977.

9 On the other hand, because of medical
10 discoveries, the consensus bills that in, by 1995, or
11 1990 -- I'll try to be consistent with earlier. If it was
12 by 1990 that 95 percent of the doctors are saying yes,
13 there is causation, it would seem to me that at that point,
14 he can argue that I didn't -- there was no, no general,
15 there was no general agreement among the medical community
16 as to causation until 1990.

17 So my statute of limitations should have
18 started in 1990, you know, sometime in 1990. So when I
19 filed my case in 1992, I was timely. Under Senate Bill
20 216, it says, I'm sorry. You heard in 1977. It might have
21 been only one doctor, not three.

22 Maybe neither of them said no, there's no
23 causation. But you and I know that when you go to court,
24 doctors can say different things and they have different
25 opinions on the same set of facts.

1 But under Senate Bill 216, it's clear that
2 he's out of court because he had one doctor maybe swimming
3 against the tide. But one doctor said that he had, there
4 was linkage there. And so in that kind of situation, it
5 seems to be clear that Senate Bill 216 really hurts him.

6 It doesn't help him. It doesn't protect him,
7 you know, but actually causes some -- Mr. Norcross, I see
8 your hand up. But let me just talk to him, and I'll get
9 back to you.

10 MR. McCLURE: Under current law, if in 1977
11 Mr. Norcross was diagnosed with an asbestos-related
12 condition and didn't come forward, he would be time-barred
13 if he hadn't come forward by 1979.

14 CHAIRPERSON HENNESSEY: If half the doctors
15 are saying there was causation and half saying there's not,
16 you think that he would be held to reasonably know that
17 there was causation? Is that what our courts have said,
18 that, you know, when there's a tie in the medical experts
19 and some say yes and some say no, you have to assume that
20 yes is the proper answer?

21 MR. McCLURE: Well, I think you hit it on the
22 head earlier.

23 CHAIRPERSON HENNESSEY: I see some people
24 shaking their heads yes. I wonder if that's --

25 MR. McCLURE: I think you hit it on the head

1 earlier. It goes to reasonableness of the investigation on
2 behalf of the injured person. And that's a jury question.
3 And one of the reasons that I'm here today and I think that
4 the bill's necessitated is if you look at the Ingenito
5 decision, the Love decision, and the Cochran decision -- I
6 had a law professor at Duquesne who always used to start
7 our review of the cases by saying, How did this case get up
8 here, matter of fact or a matter of law?

9 And we'd all look around and go, What's he
10 talking about? And of course, right in the caption,
11 there'd be summary judgment. Of course, it came up as a
12 matter of law. As a matter of law, these people can't get
13 to the jury to even determine whether their actions were
14 reasonable. And I think that's the problem, whether their
15 investigation was reasonable.

16 CHAIRPERSON HENNESSEY: I think you mentioned
17 the woman whose husband died from mes --

18 MR. McCLURE: Mesothelioma. It's pronounced
19 three or four different ways.

20 CHAIRPERSON HENNESSEY: Maybe a fifth way now.
21 Husband decides that because he's been a lifelong worker
22 for the company, he doesn't want to sue. If somebody says
23 yes, you know, we have, we think there's linkage here but
24 he chooses not to sue and then dies and the wife says,
25 Well, now I'm going to sue or, you know, as a widow, I have

1 a right to file that action on his behalf and I sue -- I
2 mean, that's probably an extreme case -- but should that,
3 the person -- if a person simply chooses not to sue and
4 then passes away, should the widow be allowed to say, Well,
5 I want to take advantage of the different statute of
6 limitations and file an action now?

7 MR. McCLURE: I think there are two answers to
8 that. I think the first answer, trying to be as candid as
9 possible, under 216, when was the injured worker told? If
10 he was told in excess of two years by a licensed physician
11 in the Commonwealth of Pennsylvania, then the action may be
12 time-barred.

13 There's another legal interest. There's the
14 wrongful death action, and there's the survivor action. So
15 there's the interest in the estate's interest, legal
16 interest in pursuing the claim. And I'm not prepared today
17 to render a judgment on whether the estate ought to be able
18 to pursue that claim or not.

19 I think, I think you touched upon an important
20 point, though. This does raise that question.

21 CHAIRPERSON HENNESSEY: As far as your
22 testimony is concerned, you agree with the, the public
23 policy reasons behind the statute of limitations. Is your
24 argument limited to when it starts to run?

25 MR. McCLURE: With the statute of limitations

1 in general?

2 CHAIRPERSON HENNESSEY: Yes. I'm sorry.

3 MR. McCLURE: Yes. I agree with the public
4 policy of having a statute of limitations.

5 CHAIRPERSON HENNESSEY: But two years is too
6 short. It should be five years, it should be ten. But
7 that's not an argument that's before us today. It's just a
8 matter of when the two years starts to run.

9 MR. McCLURE: Not from our perspective.
10 Correct.

11 CHAIRPERSON HENNESSEY: Okay. Thank you.

12 MR. SCHWOYER: I looked back over the
13 testimony of, written testimony of some of our earlier
14 speakers. And I'm seeing both -- it seems there are two
15 different rules. I'm seeing sort of, in the commentary,
16 people saying it's when you had an injury and medical cause
17 by exposure to asbestos.

18 And I'm seeing quotes from court cases and
19 other sort of commentary that says it's when you knew you
20 had an injury or you knew that you were exposed to
21 asbestos. I may have said the same thing twice. Is it or,
22 or is it and? Do you have to know both, or do you have to
23 know either? When does it start?

24 MR. McCLURE: Well, I think it's both. I
25 think, you know, I'm injured. I'm having -- I have lung

1 cancer. I've been diagnosed with lung cancer. I think
2 under the current law, if I wait three years to bring my
3 case, I'm out.

4 MR. SCHWOYER: Regardless of whether or not
5 you talk to anybody about the time that you worked as a
6 college student laying floor tiles?

7 MR. McCLURE: Then you get into the due
8 diligence analysis. What's reasonable? Certainly, courts
9 in the past -- I'm sorry. Go ahead.

10 MR. SCHWOYER: The due diligence analysis
11 starts when you learned that you have lung cancer.

12 MR. McCLURE: Correct.

13 MR. SCHWOYER: It doesn't start when you
14 learned about exposure to asbestos. The due diligence is
15 to determine, is based upon the plaintiff, a potential
16 plaintiff to determine whether or not his injury is related
17 to exposure to asbestos; am I correct?

18 MR. McCLURE: Yes.

19 MR. SCHWOYER: So for instance, again -- I
20 believe Chairman Hennessey will be making some information
21 that the American Cancer Society provided part of our
22 record. And in there, when it talks about asbestos-related
23 disease, it's talking about things like immunological
24 effects, skin lesions or warts, you know, pleural
25 thickening.

1 Lots of people have warts. Lots of
2 people -- you can't see pleural thickening. People are
3 often sickly. Is there -- do some people risk the statute
4 of limitations starting to run at that point? Gee, I've
5 had 10 warts removed in the last 18 months and I can't get
6 rid of this sneeze and cough. Am I at risk that my statute
7 is running?

8 MR. McCLURE: Well, I think what happens is
9 under the Ingenito case, Cochran, and Love and their
10 progeny is that if you're diagnosed with the injury, lung
11 cancer, I think it begins to run then. I think it begins
12 to run at that time.

13 I think they are impute -- I think when you
14 read the decisions and you read them together, I think they
15 are imputing the knowledge of the wrong, not just the
16 injury but the wrong that caused the injury. You know, we
17 used the car accident example and the medical malpractice
18 example.

19 If I have peripheral neuropathy of my right
20 foot and I need to have that amputated and I go in and they
21 cut the left one off and I wake up and my left one's gone,
22 I know the injury and I know what the wrong was. I just
23 had the surgery, and the wrong foot is gone.

24 Very often, these people don't even know they
25 were exposed to asbestos.

1 MR. SCHWOYER: Thanks.

2 CHAIRPERSON HENNESSEY: Mr. McClure, I have
3 just one follow-up question. In your testimony, you talked
4 about decisions in Love and Cochran from our Superior
5 Court. And you said the decisions reaffirmed the knowledge
6 of the wrong on the part of the worker's presumed or
7 imputed. Could you just tell us about that?

8 I mean, I guess what I'm wondering is if
9 everybody around you or everybody that you ever worked with
10 is dropping dead of lung cancer, does that person have, do
11 I have the obligation to say, My God, I might have it too,
12 you know, let me get some medical help?

13 Or can I simply wait for 5 or 10 or 15 years
14 and then say, Well, I never saw a doctor? Because I mean,
15 some people just don't go to doctors; and me being one of
16 them because he's going to tell me I'm overweight all the
17 time. But, you know, so you avoid going to the doctor.

18 But if he, if he -- you know, if I just am
19 dilatory and say I don't want to go to a doctor so I never
20 had a piece of paper from a doctor or a letter or a
21 diagnosis saying, you know, this is, you've got lung cancer
22 and it's related to your, your condition, can I then go in
23 and file suit 17 years later and say, Well, yeah, everybody
24 else around me died but I just, you know, I never got that
25 piece of paper from the doctor; and therefore, I'm still

1 within my statute of limitations? Or do I have --

2 MR. McCLURE: You mean under the bill? Under
3 the bill? Under Senate Bill 216?

4 CHAIRPERSON HENNESSEY: Under 216, it would
5 seem like I could be as dilatory as I wanted and avoid the
6 doctor as much as I want and then go in and say everybody
7 that I knew that I worked with died in the '80s but here it
8 is in 2001 and I finally got a doctor who said that I have
9 asbestos and asbestos-related cancer and maybe I'm one of
10 those kind of people who can smoke cigarettes and never get
11 lung cancer.

12 Somehow it assumes natural immunity. I would
13 ask under this situation, until 2001 -- I finally go to the
14 doctor. He finally gives me a piece of paper saying yep, I
15 think you have the same problem of those guys who are all
16 dead from 1986 and 1987. Under 216, I have two years from
17 2001 to file suit, right?

18 MR. McCLURE: That's correct.

19 CHAIRPERSON HENNESSEY: Yeah. I mean, does
20 that make any sense? If everybody else was dropping dead
21 around me -- I mean, you know the thing, that hang-up in
22 offices all over the country that says if everybody else is
23 cool, calm, and collected and you're frazzled, maybe you
24 just don't understand the situation, don't understand
25 what's going on.

1 But, you know, doesn't 216 lead to that kind
2 of situation? I can just ignore all the evidence, the
3 circumstantial evidence until I get a piece of paper from
4 the doctor that tells me what everybody else with the same
5 common sense would have told you, that back in the '80s
6 when everybody else was getting sick and dying, that you
7 ran the same risk.

8 MR. McCLURE: So -- and I think --

9 CHAIRPERSON HENNESSEY: 216 gives me the
10 opportunity to be as dilatory as I want, it seems, as long
11 as I never got that piece of paper from the doctor. And do
12 we really want that as the ultimate standard? I mean, Mr.
13 Norcross even said, Look, because of his experience and
14 training, he felt -- I wrote it down -- I think he said
15 that he had some responsibility.

16 I have a responsibility to recognize that
17 there may be a problem and seek medical help. But under,
18 under 216, you really, there's no responsibility at all.
19 It's wait until you get a doctor that says it, and then you
20 can run and you got two years from that date.

21 MR. McCLURE: I think that it's possible under
22 216 that that will occur. But I think that's an extreme
23 example. I think what is more likely to occur is this
24 because I've seen it: A guy comes back from the war, goes
25 to work.

1 CHAIRPERSON HENNESSEY: From the war?

2 MR. McCLURE: World War II. That's the guys I
3 work with every day. Goes to work at Bethlehem Steel. And
4 maybe he's there 3 years in his early 20's, goes to school
5 on a GI bill, does something else with his life. Now, I'm
6 not a medical doctor. But some of these diseases can take
7 15 to 30 years to develop.

8 In 1995, he develops lung cancer, has his lung
9 removed, asks the doctor what caused the lung cancer. And
10 the doctor said, Well, there's many etiologies for the
11 development of adenocarcinoma; and I don't know. Three
12 years later, in 1998, he may see an ad in the paper for the
13 Law Offices of Peter Angelos and call us.

14 He had no idea that his lung cancer could have
15 been related to his work at the steel for three years after
16 World War II. But under current law, he's out. Those
17 are -- I think those are the people you more likely want to
18 protect.

19 CHAIRPERSON HENNESSEY: If a doctor tells you
20 in 1995 I can't tell you it's related to your work in the
21 steel mill, it could have come from any number of different
22 scenarios, then at that point under the current law, he's
23 out?

24 MR. McCLURE: Yes.

25 CHAIRPERSON HENNESSEY: Is that right?

1 MR. McCLURE: Yes.

2 CHAIRPERSON HENNESSEY: Which case says that?

3 MR. McCLURE: Well, I think you have --

4 CHAIRPERSON HENNESSEY: Love and Cochran?

5 MR. McCLURE: Yeah. I think you have two
6 years from the time -- under current law, I think you have
7 two years from the time you learn of the injury. And I
8 think the reason --

9 CHAIRPERSON HENNESSEY: No, no. You have to
10 learn of the injury plus know, reasonably know that there's
11 some causation here, connection between the exposure and
12 the injury. You learn of the injury in 1995. But if the
13 doctor's saying, Well, it could have come from any number
14 of causes, is that enough under current law, as you
15 understand it, to trigger the beginning of the two-year
16 statute of limitations?

17 I mean, isn't the doctor really saying I don't
18 know what the cause is when he says it could have come from
19 any number of, 10 or 15 or 20 different reasons? Is that
20 enough to trigger, under your understanding of the current
21 law, that the two-year statute starts to run? Because
22 isn't that the equivalent of saying, Hey, I don't know what
23 caused --

24 MR. McCLURE: It's my understanding that
25 that's what the defense bar vigorously argues. It's my

1 understanding that that's what the asbestos defense bar
2 vigorously argues. And, you know, the facts of some of
3 these --

4 CHAIRPERSON HENNESSEY: I'm not worried about
5 what they argue or what you argue. I want to know what the
6 law is.

7 MR. McCLURE: Well, what happens when those
8 situations occur, which were the three cases that we cited
9 over and over this morning, what happens is they file
10 summary judgment motions. They get granted. And the
11 reasonableness in the investigation upon the plaintiff's
12 part never gets to a jury.

13 CHAIRPERSON HENNESSEY: Okay. Thank you very
14 much.

15 MR. McCLURE: Thank you.

16 CHAIRPERSON HENNESSEY: You know, if nothing
17 else, I'm intrigued by these cases. I'll take a look and
18 see what I can find out. I'm sorry. Mr. Norcross, I
19 promised to get back to you. Do you still want to say
20 anything else?

21 MR. NORCROSS: Yes, very briefly. I want to
22 apologize for this intrusion in the proceedings. But I
23 wanted to make it clear that the example I gave was in no
24 way related to any kind of asbestos association.

25 CHAIRPERSON HENNESSEY: Yeah. I understand

1 that.

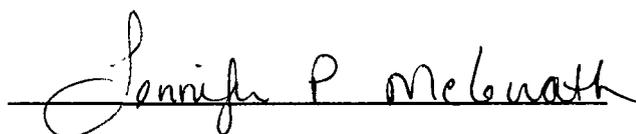
2 MR. NORCROSS: Okay. I just -- I didn't want
3 it to appear or assume that I had an asbestos-related
4 problem because it was not. I just utilized that as an
5 example why I felt it was important to get a doctor's
6 determination.

7 CHAIRPERSON HENNESSEY: Yes. Thank you. We
8 don't have any other testifiers. Nobody else is here to
9 testify, are they? (No response.) We do have a submission
10 dated June 7th from the American Cancer Society,
11 Pennsylvania Division in Hershey, Pennsylvania which sort
12 of gives background to us of the asbestosis and other
13 related diseases. And we'll make this part of the record.
14 I can't count the number of pages it is. But we'll make
15 that part of the record.

16 If there are no other testifiers, no other
17 questions, okay, we'll consider this hearing closed. And
18 as I indicated earlier, the Task Force will get together
19 and make a report up and submit it to the Judiciary
20 Committee for consideration when it considers Senate Bill
21 216. Thank you very much.

22 (Whereupon, at 12:21 p.m., the hearing
23 adjourned.)
24
25

1 I hereby certify that the proceedings and
2 evidence are contained fully and accurately in the notes
3 taken by me during the hearing of the within cause and that
4 this is a true and correct transcript of the same.

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11 JENNIFER P. McGRATH

12 Registered Professional Reporter

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17 My Commission Expires:
18 April 30, 2005

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