

**TESTIMONY BEFORE THE HOUSE
JUDICIARY COMMITTEE**

HB 1150

MONDAY, APRIL 8, 2013

OFFERED BY LAWRENCE R. COHAN, ESQUIRE

**ON BEHALF OF PENNSYLVANIA
VICTIMS OF ASBESTOS DISEASE**

Good morning, my name is Larry Cohan. I would like to thank you for giving me the opportunity to testify here today concerning the legislation which has been proposed which will dramatically alter the rights of individuals with mesothelioma and other asbestos related diseases. I am with the law firm of Anapol Schwartz Weiss and Cohan, and have been representing the interests of mesothelioma victims for the last thirty-four (34) years. My clients include individuals who are alive and diagnosed with mesothelioma, who have all been given the certain prognosis of death in their immediate future by their physicians. I also represent widows and widowers, children and other dependents on those whose lives have been taken by this disease. Still other clients are those suffering from breathing disorders and other forms of cancer caused directly by their exposure to asbestos. It is on behalf of these individuals that I address you today. I think it is critical that you have an opportunity to hear from them at some point in time to fully comprehend the magnitude of the insult they have suffered, as well as the difficulties they already encounter in obtaining compensation in our civil justice system.

In just a moment, I will offer you an overview of the current state of asbestos litigation, and the relevant history which has brought us to where we are today. But first, I would like to offer a brief comment on the proposed bill, and at least an initial understanding of the impact it will have on mesothelioma victims. To be clear, the only proponents of this bill are the companies which manufacture and sell asbestos containing products and their front groups. The bill will only provide a windfall to asbestos defendants, while directly impacting the rights of victims.

At the outset, we must recognize the irony of this bill: that companies who for decades covered up the dangers of asbestos, leading to the deaths of thousands of Americans, are now coming to the Pennsylvania Legislature and demanding "transparency" by way of a bill that only benefits them. We must also note that the bill is entirely one-sided, only putting new burdens on asbestos victims while asking nothing of the asbestos industry.

The bill hurts victims, and benefits asbestos defendants, in the following ways. First, asbestos victims will find it nearly impossible to ever bring a case to trial with the onerous burden of having to first resolve all potential bankruptcy issues, as dictated by the defendants.. Second, the law will burden the victims and, equally important, the asbestos trusts, by requiring massive document production, further delaying the process for victims. This is especially offensive to victims and clearly only serves the defendants' interest in delaying justice since our own state court discovery rules already provide the necessary mechanisms for the defendants to obtain the relevant document production. Third, the asbestos defendants will receive a massive windfall in the nature of a full setoff for monies that the plaintiff never received. Far from being a "double dip", the plaintiffs, under the scenario proposed by this new law, will receive a fraction of what their case is worth, and far less than what they have received historically for the

same catastrophic injuries in the civil justice system. Fourth, the bill puts all of these new burdens on victims, while doing nothing to alter the right of defendants to demand confidentiality when it benefits them. Defendants routinely hide or fail to disclose information about their asbestos-containing products, including where these products ended up and how the victims were exposed. Finally, the vast majority of living mesothelioma victims will most assuredly die before their case can possibly reach trial under the provisions of this act.

If that weren't enough, the bill does all of these things without any objective justification. Defendants claim they are paying an unfair share of the damages awarded to plaintiffs. This is supposedly because defendants are prevented from learning the true facts about a plaintiff's asbestos exposure, since plaintiffs are also filing bankruptcy claims, but in secret. This argument betrays a hopeless lack of awareness about how asbestos cases are actually litigated.

Defendants routinely and vigorously assert their rights to place other responsible parties on the verdict form that is filled out by jury, including bankrupt entities. Defendants in civil lawsuits can conduct discovery to vindicate these rights. Such discovery includes interrogatories and requests for production of documents and admissions to the plaintiff, and depositions of the plaintiff, his family members and any co-workers. Materials submitted by plaintiffs to bankruptcy trusts are discoverable. Defendants obviously conduct their own unilateral investigation into plaintiffs' claims as well.

The fact is that nothing is being hidden from defendants. Under current Pennsylvania law, defendants are free to obtain any information they need in order to defend themselves. What they aren't able to do, and what this bill would allow, is to give virtually complete control over the course of a case to the defendants, who, ironically, supplied the asbestos which will kill the plaintiff, allowing the defendant to easily delay the litigation until the plaintiffs have long since passed away. Without a living plaintiff obtaining the evidence necessary to prove a claim according to Pennsylvania law, becomes extremely difficult and the victim will never have an opportunity to achieve resolution before his or her death.

Background of the Asbestos Litigation

I'd like to address some of the fundamentals of the asbestos litigation. Asbestos is a naturally mined mineral which has been used for a multitude of purposes, all relating to heat resistance and insulation, both industrial, commercial and residential, for nearly one hundred (100) years. The fibers released from these products find their way into the lung, where they eventually cause scarring, fibrosis, lung restriction, and the impairment

of lung function. In many individuals, the fibers cause the development of cancers, including mesothelioma, which is caused only by asbestos. While these diseases are disabling to varying degrees, mesothelioma is virtually always fatal regardless of treatments rendered. Nearly 10,000 people die every year from asbestos-related diseases, the majority of which are caused by mesothelioma and other types of cancer.

The evidence overwhelmingly demonstrates that the companies that sold products containing asbestos were aware of the potentially deadly effects of asbestos, but continued to sell their products. Asbestos defendants have given up attempting to defend claims by suggesting that the dangers of asbestos were not known to them or their suppliers. The evidence also overwhelmingly shows that most asbestos victims were exposed to a number of asbestos-containing products over the course of his lifetime. The law recognizes an asbestos victim's right to recover from every asbestos company that contributed to his disease. This is no different than if you were mugged by five people on the street; all five people would be prosecuted for your injuries.

It isn't easy for an asbestos victim to pursue a claim. Individuals seeking compensation for these injuries in Pennsylvania are required to do a number of things under Pennsylvania law including identify the asbestos containing products manufacturer by name, year and location. They are also required to offer testimony, usually given by the victim, him or herself, attesting to their exposure to a specific product, over a protracted period of time, at a specific job site. In addition to exposure history, confirmation of the individual's medical condition by medical examination, pulmonary tests, x-rays and pathology are required to be performed by board certified experts. These cases are complicated and require a great amount of evidence to move forward.

Asbestos claims have two essential components. First, the plaintiff can file suit in the civil system seeking compensation against the non-bankrupt suppliers of asbestos containing products. Pennsylvania court rules and decisions have satisfactorily governed the handling of these cases for more than thirty (30) years.

Second, the victims can also file claims against various bankruptcy trusts, which have been established pursuant to Federal law to protect the interests of many of the suppliers of asbestos containing products. Many times a victim will file both in the court system and in the trust system. This is simply because multiple companies are responsible for a person's disease. There is nothing hidden or inappropriate about this system, and yet asbestos defendants claim that asbestos victims, by virtue of theoretically being able to recover compensation through both systems, are somehow recovering too much or in an unfair manner.

The proponents of this assertion describe an imaginary asbestos bankruptcy trust system awash in cash, in which mesothelioma victims need only file a few forms to

recover large sums of money. This is entirely false; trusts are only able to pay a fraction of the scheduled value of a claim. A “scheduled value” of a particular disease claim is what the approved trust documents provide for as the sum available to a plaintiff who meets the trust criteria; a “payment percentage” is what the plaintiff actually receives. So, for example, while a certain trust may officially “value” a mesothelioma claim at, say, \$100,000, the payment percentage may be 15%, resulting in an actual payment of only \$15,000. An asbestos industry funded study by The RAND Institute for Civil Justice finds that “[m]ost trusts do not have sufficient funds to pay every claim in full and, thus, set a payment percentage that is used to determine the actual payment a claimant will be offered.” The median payment percentage is 25%, but some trusts pay as low as 1.1 percent of the value of a claim.

It must also be borne in mind that no claimant would ever qualify for payment from all, or even close to all, of the trusts. For example, a Navy seaman might well have worked around a Babcock & Wilcox boiler, but would not have worked with U.S. Gypsum joint compound. A plasterer, conversely, would have used joint compound but would not have worked on marine boilers. It is certainly true that a number of bankruptcy trusts exist, but the description of the bankruptcy system as simply churning out bags of money to claimants is an outright lie.

Additionally, the process of identifying the correct trust for a particular plaintiff is complex, and requires expertise in the asbestos workers occupational history, knowledge of the asbestos products and their use, awareness of the bankruptcy court rules and procedures, and extensive medical and product exposure documentation. And again, once a plaintiff collects the information important to claim, the plaintiff almost never recovers the full value of his claim.

Thus, claims of so-called “double dipping” are premised on a fundamentally disingenuous premise.. Much to the contrary, the truth is that the plaintiffs in asbestos litigation receive far less than 100% of the value of their claim, and the defendants seek to further diminish that recovery by seeking credits for money which the plaintiffs have never received.

Further, there is **no** record of fraud and abuse; such allegations are simply being offered as the reason to put forward a bill that will help the asbestos industry limit accountability. In recent reports both the Government Accountability Office and The RAND Institute looked into the question of fraud and found none. And where a defendant believes there is fraud, state courts are fully equipped to handle such allegations. In fact, in *the one example* cited by asbestos defendants (out of the thousands of trust claims filed each year), the system worked: the defendant complained to the state court which took immediate action.

The simple reality is that the victims in the State of Pennsylvania today seeking compensation for mesothelioma and other asbestos diseases are already receiving a fraction of what they historically received. Defendants' bill appears to do nothing other than further reduce that recovery, enrich themselves at the expense of the victims, control the process, and delay the victims' recovery until the victim will almost assuredly have died.

It is crucial to remember that we are here today because asbestos companies are responsible for causing a public health crisis, one which continues to this day. Even today, seven or eight persons die of mesothelioma alone every day of the year in the United States, and these deaths are projected to continue at a decreasing rate for many more years.

According to the National Institute for Occupational Safety and Health, the leading occupations for deaths due to asbestos exposures are plumbers, pipefitters and steamfitters. Many were exposed while serving in the U.S. military. Others were exposed as a result of working in an industry in which asbestos was utilized. Examples of such industries are construction, shipbuilding, asbestos mining and processing, chemical manufacturing and metalworking. Because the latency period between the first exposure to asbestos and clinical disease is typically 20 to 40 years, many are not yet identified.

There is an international consensus that asbestos causes mesothelioma (a cancer of the lining of the lung), lung cancer, and asbestosis, and is associated with an increased risk of other cancers, including stomach, colon, and esophageal cancer. Victims of mesothelioma typically only live for 4 to 18 months after their diagnosis. The Occupational Safety and Health Administration ("OSHA") first regulated asbestos exposures in 1972. EPA adopted a regulation, later overturned in Court, banning asbestos use. Almost two decades ago, OSHA observed that "it was aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." 51 Fed. Reg. 22,615 (1986).

The states with the highest number of mesothelioma cancer victims (> 500) between 1999-2005 are: California, Pennsylvania, Florida, New Jersey, New York, Texas, Illinois, Virginia, Ohio, Massachusetts, Washington, and Michigan.⁵ During 1999-2005 the national rate of mesothelioma deaths was about 11.5 per million population per year, but more than half the states had higher rates. The states with the highest rate of mesothelioma deaths are: Maine, New Hampshire, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Louisiana, Wisconsin, Minnesota, Utah, Wyoming, Montana, Idaho, Alaska, Washington, and Oregon. In addition, asbestosis was a contributing cause in over 1400 deaths between 2000-2005, a sharp rise from the rate of death in 1998.

We are also here because these deaths have a cause. Juries and judges hearing these cases in state courts around the country for the last 40 years have consistently heard evidence of corporate concealment of the dangers of asbestos exposure. A corporate official for Bendix Co., for example, wrote to Johns-Manville in 1966 that "if you have enjoyed a good life while working with asbestos products why not die from it? There's got to be some cause."

Now that we've come to a point in time when the asbestos industry is tired of being held accountable, they've come to the legislature seeking protection.

Asbestos Victims are not Fully Compensated by Asbestos Trusts

In conclusion, there is no need for legislation other than for the unstated purpose of inappropriately providing a windfall to defendants at the expense of victims. Plaintiffs are already receiving recoveries far less than their historical compensation. Plaintiffs do not in any way receive a "double payment", but rather receive a small percentage of a single payment. The proposed bill is replete with language which will do nothing other than allow the defendants to delay the resolution of victims' claims until long after they have died. For all of the foregoing reasons, and those which can only be expressed by the victims themselves, I respectfully submit that HB-1150 should not be given any further consideration.