

**TESTIMONY BEFORE THE HOUSE
JUDICIARY COMMITTEE**

HB 1428

MONDAY, JANUARY 11, 2016

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 have been representing the interests of mesothelioma victims for the last thirty-six (36) 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. 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.

I have with me today one such victim, Valerie Wade. Valerie's single mom died from mesothelioma at the young age of 51. Her mother, Leisa, left 5 children surviving her, who were ages 11 to 26 at the time of her death. As an adult, Val took on the job of caring for her younger siblings. After 5 years of bitterly contested litigation we were able to obtain some compensation for Val's family. Huge legal hurdles had to be overcome, as Pennsylvania has very stringent laws requiring product identification. Imagine the difficulty in proving exposure to specific products, which occurred nearly 50 years ago, to Val's mom's elderly father. On top of that, the bankrupt defendants paid only pennies on the dollar. This bill calls for a 100% credit for dollars not paid by the bankruptcy trust. Val and her family would have received next to nothing if HB 1428 was the law.

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. This bill, which apparently is the manifestation of the wish list of the companies which manufacture and sell asbestos containing products, will have the following direct impact on the rights of victims, while providing a resulting windfall to the asbestos defendants.

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 determined by the defendants, before proceeding against non-bankrupt defendants. Second, the law will burden the victims and, equally important, the asbestos trusts, by requiring massive document production, further delaying the process, when 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. 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.

The act vests virtually complete control of the course of the litigation in 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, product identification, required by Pennsylvania law, becomes extremely difficult, the jury will not have the opportunity to see the victim while he is living and suffering, 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 lungs, 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.

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. Individuals seeking compensation for these injuries in Pennsylvania are required to identify the asbestos containing products manufacturer by name, year and location. They are 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.

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 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. 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. The trusts have a pre-approved “scheduled value” as well as a pre-approved percentage of that amount which the victim actually receives. A review of the percentage chart supplied to you reveals that victims receive less than 25% of the traditional payment amounts, on average, from these trusts. The intent of the proposed bill, about which we are here today, is to give the defendants the control over the plaintiff’s bankruptcy process submission, and to provide the defendant with an offset against any verdict against them in the amount of the “scheduled value” of the bankruptcy trust claim, rather than the actual percentage paid to the plaintiff. Thus, we are here today based upon the fundamentally disingenuous premise, asserted by the proponents of the bill, that plaintiffs are “double dipping”. 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. The essence of the bill proposed is to provide dollar credits to the entities which caused the plaintiffs’ deaths, while taking those dollars directly from the plaintiffs’ pockets.

The simple reality is that the plaintiffs 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 plaintiffs, control the process, and delay the plaintiffs’ recovery until the plaintiff will almost assuredly have died.

Here are some of the specific facts:

- The number of deaths from asbestos related disease is declining. The majority of those deaths are caused by mesothelioma and other types of cancer.
- Even the asbestos-industry funded RAND study found 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 percent, but some trusts pay as low as 1.1 percent of the value of a claim. Thus, companies who go through the 524(g) bankruptcy process are allowed to shed all of their asbestos liability through the creation of the trust and go on to make huge profits while asbestos victims are recovering pennies on the dollar from those trusts.
- Trusts payments represent settlements of asbestos claims with former asbestos defendants. The trusts exist to step into the shoes of the former asbestos company. As is the case with other asbestos defendants, the amount paid to each individual

is generally kept confidential *at the insistence of defendants*. There is no reason why defendants in the tort system should get to keep settlement information confidential but then require public disclosure of victims' trust payments.

- Defendants can get any information *relevant* to their case through the state court system simply by proving that such information is necessary. State courts can and routinely do demand that both sides turn over all information relevant to a pending action. What defendants really want beyond what they can get now is information irrelevant to a case but which would serve to delay compensation to victims and shift blame.
- There is no record of fraud and abuse. Both the GAO and RAND looked into the question 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 and dismissed the claim.
- State rules on joint and several liability exist to ensure that every defendant, whether a traditional defendant or a trust, only pays its share of liability. Defendants routinely seek and are awarded off sets in accordance with law.

The bill represents a new attempt by the asbestos industry to delay and deny compensation to asbestos victims and to cripple the operation of the asbestos trusts that have been established for the sole purpose of compensating victims and their families. The bill is premised on the notion that a lack of transparency in the trust system permits victims to obtain more compensation than they should receive. This is completely incorrect. First, the trust system is already transparent. The claim values for each disease are publicly available and the trusts publicly report the value of the claims paid on an annual basis. Second, a fundamental principle of Pennsylvania law is that a person can recover from every defendant who substantially contributed to their injury. Thus, when an asbestos victim recovers from each defendant whose product contributed to his disease, that victim is in no way "double-dipping;" rather he is recovering a portion of his damages from each of the corporations that harmed him. In the case of asbestos litigation, some of those defendants will be responsible through the tort system and others will be responsible through the operation of their trust. Third, it is important to distinguish between the openness of the jury system and the confidentiality of settlements. Asbestos defendants in the tort system typically demand confidentiality of settlements because they don't want other victims to learn how much they've paid, yet these same defendants are now trying to force disclosure of a victim's settlement information with the trusts. Further, defendants are currently able to learn about all information relevant to a claim

against it, including information about a victim's trust claims, under state rules of discovery.

The Facts About Asbestos Disease

Even today, several people die of mesothelioma every day of the year in the United States, and these deaths are projected to continue at a decreasing rate. Professor Brickman has described mesothelioma as a "particularly virulent cancer, which is gruesome to behold and always results in death." Many other victims also continue to die and will continue to die of lung cancer and other cancers.

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. As a result, one-third of all mesothelioma victims are veterans. 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 Environmental Working Group (EWG) estimated that 12,000 to 15,000 Americans die each year from exposure to asbestos. Only California and Florida have seen more deaths from asbestos in recent years than Pennsylvania, where more than 14,000 have died from asbestos-related diseases since 1999.

The Asbestos Tragedy was Caused by Corporate Misconduct

We are here because these deaths have a cause. The courts and Congress have wrestled with asbestos litigation for decades because litigation was necessary, and litigation was necessary because there was fault. 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.”

The Asbestos Bankruptcy Trust System

In addition to claims made against defendants in state courts, plaintiffs also can make claims against asbestos bankruptcy trusts. These trusts have been set up to pay claims against companies that declared bankruptcy at some point in the past and many companies have used this device to avoid defending asbestos lawsuits.

In 1994, Congress amended the Bankruptcy Code to create Section 524(g) to specifically address asbestos-related bankruptcies. A trust that is created pursuant to Section 524(g) assumes the asbestos-related liabilities of the debtor company and must use all of its assets and income to pay qualifying asbestos claims.

An asbestos company that elects to establish a trust, pursuant to Chapter 11, section 524(g), can stop all of its pending asbestos lawsuits and set up a fund to settle all present and future asbestos claims. This automatic stay provision also extends to parent and subsidiary companies and protects them from future asbestos lawsuits. Because Chapter 11 requires the company to adopt a court-approved reorganization plan, payments on asbestos claims may be delayed as long as five to six years while the plan is developed, approved, and implemented.

Asbestos Victims are not Fully Compensated by Asbestos Trusts

The proponents of this bill argue that asbestos lawsuits and claims against the trusts constitute “double dipping,” since claimants may potentially recover both from defendants in the state court system and from bankruptcy trusts. The claim is false and reflects a basic, fundamental misunderstanding of the way both the bankruptcy system and state court lawsuits operate. If any court anywhere—any state or federal, trial or appellate court hearing asbestos cases, or any bankruptcy court—had found any merit in this contention, it might have credibility, but no court ever has.

The assertion is that large amounts of money are recoverable from bankruptcy trusts, and that plaintiffs routinely game the system so that they receive a full recovery in the bankruptcy system, and then a second, “double” recovery in the tort system. Neither premise is correct: there is no windfall of money available to claimants, and plaintiffs cannot and do not “game the system” such that solvent tort defendants pay the liability shares of bankrupt companies.

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, and that a typical qualifying claimant might receive significant compensation from them. But the description of the bankruptcy system as simply churning out bags of money to claimants is an outright lie.

The Existence of Asbestos Bankruptcy Trusts does not Disadvantage Solvent Defendants- No Legislation is Necessary

A related argument is that in asbestos trials today, defendants are paying an unfair share of the damages awarded to plaintiffs. This is supposedly because solvent 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.

Thus, 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-1428 should not be given any further consideration.