

# THE ASBESTOS HEALTH HAZARDS COMPENSATION ACT: A LEGISLATIVE SOLUTION TO A LITIGATION CRISIS

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The United States and its courts are currently enmeshed in a litigation crisis.<sup>1</sup> This crisis is manifested by the growing number of personal injury and property damage actions against manufacturers whose products allegedly causing latent and occupation diseases, resulting from exposure to those products as much as 40 years ago. Nationwide, there are presently pending over 11,000 asbestos-related cases,<sup>2</sup> 600 DES-related cases,<sup>3</sup> 400-700 formaldehyde-related cases,<sup>4</sup> numerous benzene-related cases,<sup>5</sup> 400 toxic shock syndrome cases,<sup>6</sup> and 2,775

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1. See generally Winter, *Asbestos Legal 'Tidal Wave' Is Closing In*, 68 A.B.A. J. 397 (1982); Shea, *Product Liability: A Continuing Process of Change*, 68 A.B.A. J. 576 (1982); and *Toxic Torts: A Quagmire*, NEWSWEEK, Mar. 1, 1982, at 53.
2. Affidavit Under Local Rule XI-2 at 5, Debtor's Petition Under Chapter 11, *In re Johns-Manville Corp.*, No. 82 Bkcy. 11656 (Bankr. S.D.N.Y. filed August 26, 1982) [hereinafter cited as J-M Chapter 11 Affidavit]. We have cited Johns-Manville's figures since it was and is the largest free-world miner, manufacturer, and distributor of asbestos and, as such, is the most frequently named defendant in the third party actions. See *infra* note 53. Much of the discrepancy in the statistics is the difference in reporting the number of cases; some report the number of plaintiffs while others report the number of actual cases. In the reports following Manville's filing of their Chapter 11 Petition, most articles picked up the 16,000 figure which is actually the number of plaintiffs in the 11,000 cases. See *Manville Submits Bankruptcy Filing to Halt Lawsuits*, N.Y. Times, August 27, 1982, at 1, col. 6.
3. Telephone conversation with Bill Keough, Associate Editor, DES LITIG. REP. (ANDREWS) (Dec. 14, 1982). These 600 included two with more than 100 claims each and one case purporting to represent claims of 3,800 Massachusetts residents. Telephone conversation with A. Edward Grashof, member of the law firm of Winthrop, Stimson, Putnam & Roberts, New York, N.Y. (Dec. 16, 1982).
4. Ranii, *Punitive Damages Given In Formaldehyde Verdict*, Nat'l L.J., Sept. 20, 1982, at 7, col. 1. Note that urea-formaldehyde from insulation, the substance which is the subject of these cases, was banned in March of 1982. After only six months, attorneys involved in these formaldehyde cases estimate 400-700 cases are pending.
5. The authors were unable to compile accurate estimates of the total number of benzene-related cases currently pending. A number of attorneys for both the plaintiffs and defendants

Dalkon Shield cases.<sup>7</sup> In addition, approximately 2.4 million persons make up the class of plaintiffs in the Agent Orange case.<sup>8</sup> In the case of asbestos alone, cases are being filed at a rate of approximately 425 every month<sup>9</sup> and there is no end in sight. The courts are not equipped to handle these thousands of cases.<sup>10</sup>

Among the prime factors which have contributed to this crisis are: (1) the lack of adequate benefits available under federal and many state workers' compensation laws, particularly where benefits are sought for occupational diseases rather than accidents;<sup>11</sup> (2) latency periods of up to 40 years before diseases associated with exposure to various products become capable of clinical diagnosis;<sup>12</sup> (3) the recent expansion of tort law to encompass strict liability, a concept which provides that a manufacturer is liable without fault;<sup>13</sup> and (4) the retroactive application of strict liability to products manufactured and sold decades ago.<sup>14</sup>

Currently, there is no prompt and equitable system of compensation for persons disabled by occupationally-related diseases with long latency periods. Largely because of the inadequacy of existing workers' compensation programs, persons injured by latent occupational disease have sought relief through lawsuits. This surge of lawsuits has created a myriad of problems for plaintiffs and defendants alike and has proved to be an inefficient solution to the problem of compensating the injured parties.<sup>15</sup>

Most of the money spent on the cases goes to plaintiffs' lawyers, defendants' lawyers and the insurance carriers. Only a small percent of the money ever reaches the injured party.<sup>16</sup> Moreover, years may pass from the initial filing of a lawsuit until the case is tried or settled.<sup>17</sup> Often the case is not resolved until after the injured person's death. In addition, many of the plaintiffs in pending cases have either minimal

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in the benzene cases were questioned about the benzene cases. All agreed that the volume is substantial.

6. Sharkey, *Lilly Could Face Huge Loss from Recall of Oraflex*, BUS. INS., Aug. 16, 1982, at 3, col. 1. This article focuses on the potential liability claims and expenses incurred when a product is recalled and cites the problems faced by Procter & Gamble in its recall of Rely tampons. According to the article, Eli Lilly & Co. recently voluntarily recalled Oraflex, an arthritis drug, shortly after it was announced that the drug would be banned in England for 90 days.
7. Telephone conversation with Bradfute W. Davenport, Jr., member of the law firm of Mays, Valentine, Davenport & Moore, Richmond, Va. (Dec. 7, 1982). Mr. Davenport reported that there were 449 pending claims and 2,775 pending lawsuits as of September 30, 1982. The aggregate number of claims and cases that had been disposed of as of December 30, 1982 was 4,434—2,595 of which were claims, 2,239 of which were lawsuits.
8. *In re "Agent Orange" Product Liability Litigation*, Multidistrict Lit. No. 381 (E.D.N.Y.).
9. J-M Chapter 11 Affidavit, *supra* note 2, at 5.
10. See *infra* note 57 and accompanying text. See also Lauter, *Footing the Bill for Toxic Torts*, NAT'L L.J., Jan. 31, 1983, at 1, col. 1.
11. See *infra* notes 46-51 and accompanying text.
12. See *infra* text accompanying notes 37-39.
13. See *infra* text accompanying notes 69-71.
14. See *infra* text accompanying notes 71-75.
15. See *infra* text accompanying notes 58-68.
16. See *infra* note 63 and accompanying text.
17. See *infra* text accompanying note 58.

injuries or no disability but bring suit in hopes of a windfall or out of concern that a minimal diagnosis will commence the running of the statute of limitations and preclude recovery at a later date if serious disability develops.

Manufacturers are faced with liability which was never anticipated at the time the products were made and which may cost millions of dollars more than the profits made on the product. Insurance carriers dispute the application of product liability, general liability, and excess insurance policy coverage which was sold to the manufacturer to cover just these sorts of unknown latent problems associated with the manufacturer's products.<sup>18</sup> As a result, the viability of the manufacturers is seriously threatened by the litigation.<sup>19</sup> The detrimental economic effects on manufacturers will result in a loss of jobs and products which will adversely impact the economy of the United States.

Experience has shown that neither the workers' compensation laws nor the courts are equipped to adequately resolve the thousands of claims arising from latent occupational diseases. Injured parties are not receiving benefits in proportion to the severity of their injuries and, with the threatened viability of some manufacturers, some have opined that there may be no recourse available in future years.<sup>20</sup> A legislative solution is the only answer.

All of these factors are seen in the asbestos litigation. This article proposes a legislative solution to the product liability crisis by focusing on the asbestos litigation and the various statutes recently proposed to resolve that litigation.

## BACKGROUND

Asbestos is a term used to describe several naturally occurring mineral fibers, of which chrysotile, amosite, anthophyllite, and crocido-

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18. See generally Rowland, *The Asbestosis Battle*, INSTITUTIONAL INVESTOR 345 (Sept. 1982). See *infra* notes 77-78 and accompanying text.

19. See *infra* text accompanying notes 64 and 78-86. See also Joseph, *Firms that didn't mine or sell asbestos are also caught in the tide of litigation*, Wall St. J., Dec. 14, 1982, at 56, col. 1.

20. Commercial Union Insurance Companies told the United States Supreme Court on December 30, 1981 that "if the compensation criteria set by the D.C. Circuit becomes the law, both the insurance companies and the asbestos companies face insolvency." Motion for Leave to File Brief as Amicus Curiae and Brief as Amicus Curiae of Commercial Union Insurance Companies In Support of Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at v. Insurance Company of North America v. Keene Corporation, No. 81-1012 (Dec. 30, 1981).

Commercial Union, itself, is not facing insolvency. Commercial Union's president and chief operating officer recently wrote "I want to be quite clear about one thing. Commercial Union's exposure net of reinsurance, is much less than 1 year's serious underwriting losses—so our primary concerns are not short term financial ones." Ward, *Coverage for Exposure: Destructive Judicial Legislation*, FOR THE DEFENSE 10, 16 (March 1982) (Howard H. Ward is the President, Chief Operating Officer, and Director of Commercial Union Insurance Companies.) See also Lewin, *Asbestos Now Company Peril*, N.Y. Times, Aug. 10, 1982 at D2, col. 1; Noble, *Asbestos Claimants Angered by Filing*, N.Y. Times, Aug. 27, 1982 at D4, col. 5; and *Two Tales of Poison*, N.Y. Times, Aug. 27, 1982, at A22, col. 1 (Editorial).

lite are commercially important.<sup>21</sup> It is a unique thermal insulator, capable of withstanding very high temperatures without burning. In addition, some grades of asbestos fiber can be woven into cloth.<sup>22</sup> Asbestos has been used for centuries; Pliny the Elder wrote of it,<sup>23</sup> Charlemagne is reputed to have had a coat and tablecloth made of asbestos,<sup>24</sup> and the ancient Romans used it for lamp wicks and cremation cloths.<sup>25</sup>

Although asbestos remained largely a novelty until its use in steam engines in the 19th Century, in the late 1800's and early 1900's its use became widespread.<sup>26</sup> Because of its excellent fire retardation and binding qualities, asbestos was and is an essential part of the modern industrial world. It has over 3,000 applications, ranging from ironing board covers to rocket nose cones, from automobile brake linings<sup>27</sup> to theatre curtains,<sup>28</sup> and from insulating cement to filters for food and drug purification.<sup>29</sup> Perhaps the most common use of asbestos is in thermal insulation products.

Shipboard fire was the scourge of sailors for untold generations and was largely alleviated by asbestos insulation.<sup>30</sup> By 1937 the United

21. For an account of the commercial uses of asbestos, see R. CLIFTON, BUREAU OF MINES, U.S. DEP'T OF THE INTERIOR, ASBESTOS (Mineral Commodity Profiles, July 1979).
22. For accounts of the unique physical properties of asbestos, see Brodeur, *The Magic Mineral*, NEW YORKER, October 12, 1968, at 117. The entry in the 1910 edition of Encyclopedia Britannica entitled "Asbestos," is almost lyrical in its details of the industrial and commercial applications of asbestos making it fascinating and ironic to the contemporary reader yet explaining the allure of asbestos. 2 ENCYCLOPEDIA BRITANNICA Asbestos 714 (11th ed. 1910).
23. Brodeur, *supra* note 22, at 120. The first edition of the Encyclopedia Britannica reported that Pliny, a Roman naturalist, had "seen napkins made of asbestos, which, being taken foul from the table, were thrown into the fire, and better scoured than if they had been washed in water." ENCYCLOPEDIA BRITANNICA Asbestos 429 (1st ed. 1771).
24. Brodeur, *supra* note 22, at 120. See also 2 ENCYCLOPEDIA BRITANNICA Asbestos 714 (11th ed. 1910) which notes that Charlemagne was said to have cleaned his tablecloth by throwing it into the fire.
25. Brodeur, *supra* note 22, at 120; and 7 NEW ENCYCLOPEDIA BRITANNICA Fibres, Natural 288 (15th ed. 1974).
26. 7 NEW ENCYCLOPEDIA BRITANNICA Fibres, Natural 289 (15th ed. 1974).
27. O. BOWLES, BUREAU OF MINES, U.S. DEP'T OF THE INTERIOR, ASBESTOS: A MATERIALS SURVEY 1 (1959) (Information Circular No. 7880) [hereinafter cited as O. BOWLES, BUREAU OF MINES]. Bowles notes that "... virtually all brake lining and clutch facings of automobiles ... consist essentially of asbestos. Hence, a shortage of asbestos used in friction materials would tend to immobilize highway transport." *Id.*
28. "Back in the nineteen-twenties when the word asbestos frequently appeared in large block letters on the fireproof drop curtain that closed off the proscenium openings of theatre stages, it was customary in certain parts of the country for youngster[s] attending Saturday-matinee performances ... to greet the raising of the asbestos curtain with the chant "All School Boys Eat Stewed Tomatoes On Saturday!" Brodeur, *supra* note 22, at 117.
29. Letter from Roscoe W. Davis, President of AMF CUNO Microfiltration Products Division, to Glenn W. Bailey, Chairman of Bairnco Corporation (March 8, 1982) (notes that asbestos is not banned by the FDA and that it is currently used in Pharmaceutical and Food and Beverage Markets) (available upon request from the authors); and Brodeur, *Department of Amplification*, NEW YORKER, Oct. 23, 1971, at 147, 153-4.
30. A Vice Admiral of the Navy stated in a 1979 letter: "[e]ven though the use of asbestos as thermal insulation has been eliminated, there remain a few shipboard applications where technically acceptable substitute asbestos-free materials have not yet been identified. Therefore, all ships presently in service contain some quantity of asbestos." Draft Letter from T.J. Bigley to Robert F. Hughes, Ass't. Dir., G.A.O. (Jan. 5, 1979) (on file at offices of the JOURNAL OF LEGISLATION).

States specified the use of asbestos in thermal insulation products in navy vessels,<sup>31</sup> primarily for use in the pipes and pipe coverings.<sup>32</sup> The use of asbestos-containing thermal insulation products increased enormously with the United States Government's development of a modern navy during World War II,<sup>33</sup> and as late as 1969, the United States Navy was the largest user of asbestos in the country.<sup>34</sup>

The publication in 1965 of a study by Doctors Selikoff, Churg, and Hammond marked the first reported general recognition that asbestos presented a health hazard to insulators who had worked with asbestos-containing insulation.<sup>35</sup> The study indicated that asbestos may cause certain diseases in persons exposed to asbestos dust and fibers during insulation application. Prior studies, however, had indicated that insulation workers were not at risk.<sup>36</sup>

The possible health problem from exposure to asbestos was not recognized sooner because of the extremely long period of time before the purported asbestos-related diseases are capable of clinical diagnosis.<sup>37</sup> Asbestosis, a scarring of the alveoli which results in shortness of breath, and mesothelioma, a cancer of the pleura or the peritoneum which generally causes death within two years of development of a tumor, are seldom manifested less than twenty years following occupational exposure.<sup>38</sup> The incubation period for these diseases is twenty to forty or more years.<sup>39</sup>

31. Fleischer, Viles, Grade & Drinker, *A Health Survey of Pipe Covering Operations in Constructing Naval Vessels*, 28 J. INDUS. HYGIENE & TOXICOLOGY 9 (Jan. 1946) [hereinafter cited as the Fleischer-Drinker Report].

32. Lawton, Barboo & Sullivan, *Significance and Description of Exposures in the Fabrication, Installation, and Removal of Asbestos Material in U.S. Navy Shipyards*, in SAFETY AND HEALTH IN SHIPBUILDING AND SHIP REPAIRING, INT'L LABOUR OFFICE, GENEVA (1971) (on file at offices of the JOURNAL OF LEGISLATION). See also *supra* note 31.

33. *Occupational Health Hazards Compensation Act of 1982: Hearing on H.R. 5735 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2nd Sess., unpublished statement at 3-5 (1982) (statement of Victor L. Drexel, Vice-President and Corporate Counsel, Amatex Corporation, April 21, 1982). (The hearings have not yet been published, therefore, references to Mr. Drexel's testimony are made to his prepared statement which is on file at the offices of the JOURNAL OF LEGISLATION) [hereinafter cited as Drexel Testimony].

34. Drexel Testimony, *supra* note 33, at 3.

35. Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. SCI. 112 (1965) was the first study with enough subjects followed through a sufficient period of time for proof of a correlation between asbestos and disease.

36. Fleischer-Drinker Report, *supra* note 31.

37. See *infra* note 39.

38. The diseases are described in DISABILITY COMPENSATION FOR ASBESTOS-RELATED DISEASE IN THE UNITED STATES, REPORT TO THE U.S. DEP'T OF LABOR 19-29 (I.J. Selikoff, principal investigator) (ASPER Contract No. J-9-M-8-0165) [hereinafter cited as SELIKOFF LABOR REPORT]. Dr. Selikoff's report is available from Howard Vincent at the Department of Labor.

Plaintiffs have also alleged that bronchogenic carcinoma (lung cancer) was caused by exposure to asbestos. Whether lung cancer is actually caused by exposure to asbestos is currently in dispute. See *infra* notes 189-195 and accompanying text.

39. See Selikoff, Hammond & Seidman, *Latency of Asbestos Disease Among Insulation Workers in the U.S. and Canada*, 46 CANCER 2736-40 (1980), and Selikoff, *Cancer Risk of Asbestos Exposure in ORIGINS OF HUMAN CANCER*, BOOK C, HUMAN RISK ASSESSMENT, COLD SPRING HARBOR CONFERENCES ON CELL PROLIFERATION vol. 4 (1977) for discussions of

Estimates indicated that as many as 16,000 cases have been brought by more than 25,000 plaintiffs against manufacturers of asbestos and products containing asbestos,<sup>40</sup> and more than 11,000 cases are currently pending.<sup>41</sup> Exposure to asbestos aboard naval ships built at United States Government shipyards or United States contract shipyards has been estimated to account for more than fifty per cent of the pending asbestos cases.<sup>42</sup> Most of the 16,000 cases have been brought by insulation workers or persons in allied trades who worked near the insulators when they applied asbestos products.<sup>43</sup>

According to a recent study prepared for the Department of Labor, twenty-seven million persons were occupationally exposed to asbestos during the period of 1940 through 1979.<sup>44</sup> Claims in the asbestos lawsuits and current publicity regarding the health effects of asbestos are based upon contentions that many of those persons will develop diseases resulting, at least in part, from that occupational exposure, and some will die of asbestos-related disease. In addition, litigants have brought so-called "household exposure" cases, basing their claims for relief on studies that have indicated that mesothelioma may develop in a member of a household of a person occupationally exposed to asbestos.<sup>45</sup>

Currently, there exists no prompt, equitable, and reasonably uniform system of compensation for persons who develop asbestos-related diseases.

### WORKERS' COMPENSATION LAWS

Injured parties have found state and federal workers' compensation programs inefficient and inadequate.<sup>46</sup> Approximately one year passes

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latency as a medical phenomenon. The latter states "with but few exceptions, serious risk begins after 20 years from onset of first exposure and continues from that point on."

40. Feder, *Manville Submits Bankruptcy Filing to Halt Lawsuits*, N.Y. Times, Aug. 27, 1982, at 1, col. 6.

Estimates vary as to the true number of asbestos cases. The Administrative Office of United States Courts has responsibility for maintaining statistics on cases in the federal courts. Currently, that office only breaks down cases into broad categories, such as product liability; it does not further break them down into third-party liability suits resulting from asbestos-related disease. This record system, however, is being modified to enable data generation of statistics on finer categories and should be available in two to three years. Telephone interview with David Gentry, Branch Chief, Non-Criminal Section of the Administrative Office of U.S. Courts (Aug. 4, 1982).

41. J-M Chapter 11 Affidavit, *supra* note 2, at 4-5. Because of Manville's past and present dominant position in the use of asbestos and asbestos-containing products, it is a defendant in almost all third-party actions. See J-M Chapter 11 Affidavit, *supra* note 2, at 3-4. See also *In re Asbestos Related Cases* 23 BANKR. L. REP. (CCH) 523, 825 (N.D. Cal. 1982). Therefore, the statistics used in this article are drawn from Manville's Chapter 11 Affidavit.
42. *The Asbestos Dilemma*, Chicago Tribune, Sept. 1, 1982; and *infra* note 43.
43. Appellant's Brief at 3, *Keene Corp. v. United States*, No. 82-6023 (2d Cir. Brief filed May 1982) (appeal pending).
44. SELIKOFF LABOR REPORT, *supra* note 38, at 99.
45. See Anderson, Lilis, Daum & Selikoff, *Asbestosis Among Household Contacts of Asbestos Factory Workers*, 330 ANNALS N.Y. ACAD. SCI. 387 (1979).
46. See articles by Senator Gary Hary and Representative George Miller in which they explain their reasons for introducing asbestos compensation bills. Miller, *Don't Let Industry Shirk Its*

before a disabled worker begins to receive compensation for an occupational disease in contrast to an average wait of only two months before receiving compensation for a worker's accident claim.<sup>47</sup> According to a recent study cited by the Department of Labor, nearly ninety percent of occupational dust disease awards are initially contested, compared to only ten percent of accident awards.<sup>48</sup> Even more significant, studies show that those persons who receive compensation for their occupational diseases receive only about one-eighth of their expected lost wages from workers' compensation funds.<sup>49</sup>

In addition to the delays and insufficiency of workers' compensation for occupational diseases, a person injured as a result of occupational exposure to asbestos is often effectively barred from bringing a compensation claim because of the twenty to forty year latency period for asbestos-related disease. Some state workers' compensation laws require workers to file their claim shortly after their last day of work, a requirement which is often a practical impossibility in terms of claiming compensation for asbestos-related diseases.<sup>50</sup> Workers' compensation systems also provide no solution for those persons who allege they have contracted mesothelioma through household exposure. These injured parties are not eligible for benefits under any existing workers' compensation program since it was a member of their household, and not they, who were occupationally exposed to asbestos.

Recognizing the failure of the workers' compensation programs, persons alleging disability from asbestos-related diseases have fled to the courts for relief. Litigation, however, has proved to be an extremely slow, inefficient, expensive, and wasteful remedy and, to many, the only real winners in the asbestos litigation are lawyers and some insurance companies.<sup>51</sup>

### ASBESTOS LITIGATION

By the end of 1980, 5,087 cases brought by 9,300 plaintiffs were pending against Manville Corporation<sup>52</sup> (Manville), the largest free-world miner of asbestos and manufacturer of asbestos-containing prod-

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*Duty, and Hart, Let Government Bear its Share in Asbestos Legislation: Who Compensates the Victims*, N.Y. Times, Sept. 5, 1982, at 2F, col. 3. See also *Compensation System Fails Disease Victims*, AFL-CIO News, July 12, 1980, at 1, col. 1.

47. *Asbestos Health Hazards Compensation Act of 1980: Hearings on S. 2847 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 92 (1980) (statement of Nik B. Edes, Deputy Under Secretary for Legislation, Dep't of Labor) (citing P. BARTH & A. HUNT, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES (1980)).

48. DEPT OF LABOR, INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASES 71 (1980) (cites its sources as P. BARTH & A. HUNT, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES, 178 (1980)) [hereinafter referred to as INTERIM REPORT].

49. *Id.* at 74.

50. See Chart IV: Coverage of Occupational Diseases, U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKERS COMPENSATION LAWS 10 (1982) (column entitled "Time Limit on Claim Filing").

51. See *infra* note 63 and accompanying text.

52. J-M Chapter 11 Affidavit, *supra* note 2, at 5.

ucts.<sup>53</sup> By the end of 1981, 9,300 cases brought by 12,800 plaintiffs were pending and, six months later, Manville was a named defendant in 11,000 cases brought by 15,550 plaintiffs.<sup>54</sup> According to Manville, by July 1982, cases were being filed at a rate of approximately 425 per month by approximately 495 plaintiffs.<sup>55</sup> By July 1982, however, Manville had only disposed of 3,470 of the claims that had ever been brought against it.<sup>56</sup>

The enormous influx of lawsuits in the past few years, coupled with the continuing high rate of filings, has caused an even greater backlog in the already crowded court calendars. So great is the burden that some courts have appointed full-time "asbestos judges" and special masters who handle only asbestos-related claims. In another effort to solve the backlog, the Philadelphia courts have established a program of non-jury trials, with a right of jury trial *de novo*, to try the asbestos cases.<sup>57</sup>

Asbestos litigation has not proved to be the expeditious means of compensation that plaintiffs had hoped it would be. On the average, three to four years pass from the filing of a lawsuit to its resolution by settlement or trial.<sup>58</sup> Of the cases which have actually gone to trial, plaintiffs and defendants have each won about half.<sup>59</sup> Even after years of waiting, there is no guarantee of an equitable settlement or verdict in a given case. On the contrary, plaintiffs' awards and verdicts are often uneven and vary dramatically despite similar injuries. A prime example of the disparate results occurred in five recent asbestos cases in Texas. In the Federal Court for the Eastern District of Texas, Beaumont Division, five separate asbestos cases were tried simultaneously.<sup>60</sup> Five juries were empanelled, each sitting in a different case, and all five were brought into one courtroom where all the jurors heard the same evidence. After separately deliberating on the same evidence, the juries reached completely different findings regarding defendants' liability.

53. *Id.* at 3-4. See also O. BOWLES, BUREAU OF MINES, *supra* note 27, at 36. Some authors have indicated that Manville produces approximately 70% of the world's asbestos. Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 933 n. 115 (1980) (citing Sweeney, *The Asbestos Time Bomb*, TRIAL, Oct. 1978, at 17).

54. J-M Chapter 11 Affidavit, *supra* note 2, at 5.

55. *Id.* at 6.

56. *Id.*

57. See *Pittsburg Corning Corp. v. Bradley*, No. 70-Misc. Doc., 1982, slip op. at 1 (E.D. Sup. Ct. Pa. Dec. 14, 1982), which discusses the reasons underlying Philadelphia General Court Regulation 82-5. Note also that six asbestos judges have been appointed in the Philadelphia Court of Common Pleas alone. See *The Asbestos Mess*, Washington Post, Apr. 27, 1982.

58. *The Asbestos Mess*, *supra* note 57.

59. Hart, *Let Government Bear its Share*, N.Y. Times, Sept. 5, 1982, at 2F, col. 5. See also *The Asbestos Mess*, *supra* note 57.

60. *Marx v. Fibreboard Corp.*, No. B-80-621-CA (E.D. Tex. July 23, 1982); *Gracedel v. Fibreboard Corp.*, No. B-80-658-CA (E.D. Tex. July 23, 1982); *Robinson v. Fibreboard Corp.*, No. 8-81-488-CA (E.D. Tex. July 23, 1982); *Robinson v. Fibreboard Corp.*, No. B-81-488-CA (E.D. Tex. July 23, 1982); *Babineaux v. Fibreboard Corp.*, No. B-81-323-CA (E.D. Tex. July 23, 1982); and *Migues v. Nicolet Industries*, No. B-78-768-CA (E.D. Tex. July 23, 1982).



The verdicts ranged from no liability<sup>61</sup> to a finding of defendants' duty to warn, in 1935, of the dangers of asbestos.<sup>62</sup> In the latter case, the jury also held Johns-Manville liable for punitive damages.

As a system of compensating injured parties, asbestos litigation is a failure. Estimates have indicated that of every dollar paid by the defendants, only ten to twenty cents actually goes to compensate the person affected by asbestos-related disease or the person's survivors. Approximately eighty to ninety cents out of every dollar goes to lawyers, including defense lawyers, and to insurance companies.<sup>63</sup>

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61. Marx v. Fibreboard Corp., No. B-80-621-CA (E.D. Tex. July 23, 1982).

62. Gracedel v. Fibreboard Corp., No. B-80-658-CA (E.D. Tex. July 23, 1982).

63. Similar to the range of statistics for the number of asbestos cases brought to date, *see supra* note 2, the figures for the amounts going to lawyers, insurance companies and plaintiffs vary. Most of the variation in the figures is due to the different ways in which persons compute the figures, and the factors and costs of litigation each takes into consideration. In order to calculate how much of each dollar spent toward asbestos litigation goes to the claimant, we first cite the amount spent by the defendant; next we cite statistics from plaintiffs regarding how much of the dollars paid by the defendant actually goes to the claimant.

(a) *Money paid by defendant.*

"Executives from Commercial Union Insurance Co. testified [before the House Subcommittee on Labor Standards] that for every dollar paid to a claimant up to \$3.40 may be paid in additional legal fees." ASBESTOS LITIG. REP. (ANDREWS) 4,861 (April 23, 1982). Thus, of every dollar spent by Commercial Union, 77.3¢ goes toward defense costs while only 22.7¢ goes to the plaintiff and his attorneys.

In Mary Rowland's recent article focusing on the effects of *Keene v. INA*, (D.D.C. 1982), she quotes a representative from Travelers Insurance Co. as stating that Travelers pays an additional 30¢ in legal fees for every dollar paid to the claimant. In an asbestos-related disease case, however, for every dollar paid on a claim, Travelers pays around 81¢ in legal fees. Of every dollar spent by Travelers in an asbestos-related disease case, 44.8¢ goes toward defense costs, while only 55.2¢ goes to the plaintiff and plaintiffs' attorneys. Rowland, *supra* note 18, at 353.

(b) *Money paid to plaintiffs, lawyers, and for litigation expenses.*

When these companies refer to money paid to the plaintiff, they do not take into consideration the portion of the money which must be paid by the plaintiff for his or her legal costs. Victor E. Schwartz, a partner in the law firm of Crowell & Moring, Washington, D.C., and an adjunct professor of law at American University, said "that for every six cents paid to an asbestos victim, seven cents is paid to an attorney involved in the litigation." ASBESTOS LITIGATION REP. (ANDREWS) 4,679 (March 12, 1982). Using Mr. Schwartz' figures, of the money actually paid to the plaintiff approximately 53.8% goes to the plaintiff's attorney while only 46.2% goes to the plaintiff.

(c) *Money paid to claimants.*

Using Victor Schwartz' estimates, of the 22.7¢ that Commercial Union pays to the plaintiff, the plaintiff's lawyer receives approximately 12.2¢ while the plaintiff receives only 10.5¢. With respect to the 45¢ paid to the plaintiff by Travelers, the plaintiff's lawyer receives approximately 24¢ and the plaintiff receives only 21¢. The plaintiff must still, in many cases, reimburse the workers' compensation fund for any award or medical payments made under the workers' compensation system.

Regarding the plaintiffs' payments for attorneys, court costs, and repayment of workers' compensation, Unarco estimated that "while defendants were spending approximately \$150,000 for each case settled, plaintiffs netted approximately \$28,000." ASBESTOS LITIGATION REP. (ANDREWS) 4,861 (April 23, 1982). Unarco's estimates indicate that of every dollar spent on an asbestos case only 18.6¢ actually goes to the plaintiff.

The figures given by Manville in the Chapter 11 papers also appear to be in accord. *See* J-M Chapter 11 Affidavit, *supra* note 2, at 6-7.

*See also* Bulow, Jackson & Mnookin, *Winners and Losers in the Manville Bankruptcy*, Wall St. J., Nov. 4, 1982; Gibson, *When Lawyers Prosper*, FORBES, Mar. 30, 1983, at 43; *The Asbestos Dilemma*, *supra* note 42; *Courting Trouble*, Boston Globe, Sept. 1, 1982; *The Asbestos Mess*, *supra* note 57.

### The Viability of Defendants

Perhaps the most serious problem caused by the asbestos litigation is the threatened viability of some manufacturers. As of January 1, 1983, three manufacturers of asbestos-containing products have filed for relief under Chapter 11 of the Bankruptcy Code.<sup>64</sup> This problem directly affects the plaintiffs in asbestos cases since compensation can continue only as long as the assets last.<sup>65</sup> The cause of the threat to manufacturers is threefold: (1) the retroactive application of strict liability to asbestos products sold decades before the dangers of asbestos were known;<sup>66</sup> (2) the dispute over insurance coverage;<sup>67</sup> and (3) the number of pending and potential lawsuits.<sup>68</sup>

*Strict Liability in Asbestos Cases.* In recent years, tort law has developed the theory of strict liability, a concept which essentially provides that a manufacturer is liable for any harm caused by its product regardless of whether the manufacturer had knowledge of any possible defects and regardless of any negligence or fault on the part of the manufacturer.<sup>69</sup> Section 402A of the Restatement (Second) of Torts provides, in part, that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer. . . ."<sup>70</sup> The comments to 402A further provide that where a seller "has reason to anticipate that danger may result from a particular use, . . . he may be required to give adequate warning of the danger . . . , and a product sold without such warning is defective."<sup>71</sup>

In asbestos cases, courts are applying the strict liability theory to asbestos-containing products manufactured as long ago as 1930. Moreover, warnings have been found inadequate and a user's knowledge that he could have been injured by a product is deemed irrelevant unless he knew of the specific injury which might develop. For example, the plaintiff in *Borel v. Fibreboard*<sup>72</sup> testified that he thought he could get tuberculosis from exposure to asbestos.<sup>73</sup> "[The court] quoted Borel's testimony: 'A. Yes, I knew the dust was bad but we used to talk [about] it among the insulators, [about] how bad was this dust, could it

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64. See *infra* notes 78, 80, 85.

65. See *infra* notes 78-86 and accompanying text.

66. See *infra* text accompanying notes 69-75.

67. See *infra* text accompanying notes 76-77.

68. Manville predicted that the potential number of lawsuits that would be filed against it would be 52,000. Summary of Asbestos-related litigation projection (Sept. 9, 1982) (delivered by Manville to the Organizational Meeting of Creditors of Manville); Walker, Projections of Asbestos-related disease 1982-2009 (1982) (reports available upon request from the authors).

69. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963), is the landmark case on strict liability.

70. RESTATEMENT (SECOND) OF TORTS § 402A (1964).

71. *Id.* at § 402A comment h.

72. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973).

73. *Id.* at 1082, 1104.

give you TB, could it give you this, and everyone was saying no, that dust don't hurt you, it dissolves as it hits your lungs. That was the question you get all the time.'"<sup>74</sup> The *Borel* court held that such beliefs did not constitute knowledge that asbestos was dangerous and found that the warning to avoid breathing the asbestos dust was insufficient.<sup>75</sup>

*Disputed Coverage by Insurance Companies.*<sup>76</sup> Further compounding the asbestos litigation situation, the insurance companies dispute the coverage of product liability, comprehensive general liability, and excess insurance policies sold to the manufacturers from the 1930's through 1982.

Currently, more than fifteen lawsuits are pending between manufacturers of asbestos-containing products and their insurance carriers.<sup>77</sup> The insurance carriers have attempted to avoid defending their policyholders and to avoid providing the insurance coverage they sold to manufacturers. Many manufacturers have been forced to engage in extensive litigation to obtain the insurance coverage that they purchased.

*Potential Liability.* Until recently many persons voiced skepticism as to whether the viability of any of the defendant manufacturers was actually threatened by the asbestos litigation. On July 29, 1982, however, UNR Industries, Inc., the parent company of Unarco Industries, Inc., one of the asbestos manufacturers, filed for reorganization under Chapter 11 of the Bankruptcy Code.<sup>78</sup> The tremendous exposure to liability for asbestos-related claims and insurance coverage disputes with Unarco's insurance carriers were cited as the reasons for Unarco's financial difficulties.<sup>79</sup>

On August 26, 1982, Manville, formerly Johns-Manville Corporation, along with all of its North American subsidiaries, filed for reorganization under Chapter 11.<sup>80</sup> As with Unarco, Manville cited the asbestos lawsuits as the reason for its petitioning for reorganization.<sup>81</sup>

74. *Id.* at 1104.

75. *Id.* at 1104-1109.

76. For an analysis of the disputes see Oshinsky, Gilbert & Shulman, *Trigger and Scope of Coverage Under Comprehensive General Liability Insurance Policies in Toxic Substances Cases*, 3 LEGAL NOTE & VIEWPOINTS QUARTERLY 95 (Nov. 1982); Oshinsky, *Comprehensive General Liability Insurance: Trigger and Scope of Coverage in Long-term Exposure Cases*, 17 FORUM 1035 (Spring 1982); Oshinsky, *Insurance Coverage for Asbestos Tort Liability Litigation*, 5 J. PROD. LIAB. 69 (1982); OSHINSKY, GILBERT & LEVY, *TRIGGER AND SCOPE OF INSURANCE COVERAGE IN TOXIC SUBSTANCE CASES* (1982) (prepared for Defense Research Institute Seminar); Anderson & Levy, *Insurance Coverage for Personal Injury Occurring Over a Long Term or in Multiple Policy Years*, INS. ADVOCATE, June 5, 1982, at 21.

77. A complete listing of these cases is available from the authors.

78. Debtor's Petition Under Chapter 11, *In re* UNR Industries, Inc., No. 82B09841 (Bankr. N.D. Ill. filed July 29, 1982).

79. Lewin, *Asbestos Suits Divide Insurers*, N.Y. Times, Sept. 7, 1982 at D2, col. 1.

80. Debtor's Petition Under Chapter 11, *In re* Johns-Manville Corp., No. 82 Bkcy. 11656 (Bankr. S.D.N.Y. filed Aug. 26, 1982).

81. Manville Corporation Press Release, Manville Files for Reorganization (Aug. 26, 1982) (available at JOURNAL OF LEGISLATION offices). *Manville's Big Concern as it Files in Chapter*

In its press release announcing its Chapter 11 filing, Manville stated that the asbestos litigation "problem was made more acute due to Government refusal to accept responsibility for persons injured in shipyards during World War II and later, Congressional delays in dealing with the occupational disease compensation problem, and the failure of insurance companies to fulfill their obligations to Manville."<sup>82</sup>

Manville, as the largest free-world miner and manufacturer of asbestos and products containing asbestos, is the most frequently named defendant in the asbestos cases.<sup>83</sup> Thus, its filing Chapter 11 has already further delayed the pending cases as the Bankruptcy Court and other courts determine the effect Manville's action will have on the asbestos litigation.

The same week as Manville's Chapter 11 filing, another asbestos manufacturer omitted its annual dividend. In 1981, that same manufacturer reduced the dividend it has now omitted. The company has stated that it does not intend to file a Chapter 11 petition.<sup>84</sup>

A third asbestos manufacturer, Amatex Corporation, filed its Chapter 11 petition on November 1, 1982.<sup>85</sup> Once again, the asbestos litigation was cited as the reason for seeking reorganization. Unless and until measures are taken to prevent further bankruptcies, the issue of compensation for parties injured by asbestos-related diseases may simply become a race to the courthouse steps.<sup>86</sup>

### LEGISLATIVE SOLUTIONS

The first legislation proposing a compensation program for persons disabled by or who died as a result of an asbestos-related disease was introduced in the 93rd Congress.<sup>87</sup> Three bills were introduced in the 97th Congress. Each proposed a solution to the problem of compensating persons disabled by asbestos-related diseases. The three bills were: the Occupational Health Hazards Compensation Act of 1982<sup>88</sup>

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*11 is Litigation, Not Debt*, Wall St. J., Aug. 27, 1982, at 1, col. 6; Feder, *Manville Submits Bankruptcy Filing to Halt Lawsuits*, N.Y. Times, Aug. 27, 1982, at A1, col. 6; Lewin, *The Legal Issues in Manville's Move*, N.Y. Times, Aug. 27, 1982 at D4, col. 1. See also *Despite Strong Business, Litigation Forces Manville to File for Reorganization*, Wall St. J., Aug. 27, 1982, at 29 (paid advertisement).

82. Manville Corporation Press Release, *supra* note 81. See also *Manville Sues its Insurers for Still More*, BUS. INS., Sept. 6, 1982, at 31. (This article focuses on Manville's request to amend a 1980 suit against various insurers. "Claiming its insurers' wrongful conduct forced it into bankruptcy, Manville Corp. wants an additional \$5 billion in damages from some of them.")

83. See *supra* note 53.

84. *Manville's Big Concern As It Files in Chapter 11 Is Litigation, Not Debt*, *supra* note 81.

85. Voluntary Case, Debtor's Petition, *In re* Amatex Corp., No. 82-05220 (Bankr. E.D.N.Y. filed Nov. 1, 1982).

86. See generally *supra* note 20. See *In re* Related Asbestos Cases, *supra* note 41.

87. H.R. 6906, 93rd Cong., 1st Sess., 119 CONG. REC. 12,258 (1973). The Asbestosis and Mesothelioma Benefits Act was introduced by Representative Frelinghuysen with co-sponsorship by the entire New Jersey delegation.

88. H.R. 5735, 97th Cong., 2d Sess., 128 CONG. REC. H715 (daily ed. March 4, 1982) [hereinafter cited as the Miller Bill]. The co-sponsors of the bill are Representative Carl D. Perkins (D-Ky.), Pat Williams (D-Mont.), and Millicent H. Fenwick (R-N.J.). The bill was referred to

introduced by Representative George Miller (D-Cal.) (Miller Bill); the Asbestos Health Hazards Compensation Act of 1981<sup>89</sup> introduced by Senator Gary Hart (D-Colo.) (Hart Bill); and the Asbestos Health Hazards Compensation Act<sup>90</sup> introduced by Representative Millicent Fenwick (R-N.J.) (Fenwick Bill).

The myriad of problems faced in the pending asbestos litigation has resulted in support by all parties, in theory at least, of a legislative solution to the asbestos litigation problem.<sup>91</sup> While the introduction of these bills in Congress shows the recognition of a need for a legislative solution to the asbestos problem, none of them, by itself, is the answer. A "Model Asbestos Compensation Act" (Model Bill), however, is appended to this article. It is a composite bill drawing sections from each of the three bills together with some new proposals.

Through the Model Bill the authors attempt to resolve certain substantive aspects of the previously introduced bills over which there is considerable disagreement. Prime areas of controversy include:

- (1) Whether the federal government should contribute to an Asbestos Compensation Fund (Fund);<sup>92</sup>
- (2) Whether the Fund should be the exclusive remedy for injured parties;<sup>93</sup>
- (3) How contributions to the Fund should be apportioned;<sup>94</sup>
- (4) Whether certain diseases should be presumed to have been caused by exposure to asbestos;<sup>95</sup>
- (5) Whether those contributions required under the bill should be covered by the contributing entity's insurance policies;<sup>96</sup> and
- (6) Whether asbestos-related disease resulting from household exposure to asbestos should constitute a compensable disability.<sup>97</sup>

### Government Responsibility

Of the three bills, the Miller Bill and the Fenwick Bill largely exclude the United States from liability for its role in asbestos-related

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the Subcommittee on Labor Standards, Committee on Education and Labor; Representative Miller is the subcommittee's chairman.

89. S.1643, 97th Cong., 1st Sess., 127 CONG. REC. S10,033-38 (daily ed. Sept. 18, 1981) [hereinafter cited as the Hart Bill]. The 1981 Hart Bill is a modified version of Senator Gary W. Hart's (D-Colo.) Asbestos Health Hazards Compensation Act of 1980. S.2847, 96th Cong., 1st Sess., 126 CONG. REC. S7293-99 (daily ed. June 18, 1980). For a discussion of the Hart Bill see SCHRIBER, RECENT FEDERAL LEGISLATIVE PROPOSALS AND ENACTMENTS, TOXIC SUBSTANCES: PROBLEMS IN LITIGATION 291 (1981).
90. H.R. 5224, 97th Cong., 1st Sess., 127 CONG. REC. H9,670 (daily ed. Dec. 15, 1981) [hereinafter cited as the Fenwick Bill]. Representative Fenwick's first bill dealing with the asbestos problem was introduced in 1977 and was entitled "The Asbestos Health Hazards Compensation Act of 1977." H.R. 8689, 95th Cong., 1st Sess., 123 CONG. REC. 26,230 (1977).
91. Schechter, *Untangling the Asbestos Mess*, OCCUPATIONAL HEALTH & SAFETY, Feb. 1982, at 30.
92. See *infra* text accompanying notes 97-124.
93. See *infra* text accompanying notes 125-136.
94. See *infra* text accompanying notes 137-174.
95. See *infra* text accompanying notes 175-199.
96. See *infra* text accompanying notes 200-203.
97. See *infra* text accompanying notes 204-207.

diseases. This position is untenable, however, because the United States played a substantial role in the use of asbestos and products containing asbestos.

The United States has been an importer, manufacturer, buyer, seller, specifier, and stockpiler of asbestos. During World War II the federal government listed asbestos as a strategic mineral and thereby controlled its use.<sup>98</sup> As a seller, the government sold asbestos to domestic industry. To this day the government continues to stockpile asbestos.<sup>99</sup>

Beginning in 1937 the Government specified the use of asbestos in Navy ships being built by Government employees in its own shipyards and by civilians in shipyards under contract to it.<sup>100</sup> In many cases, in fact, manufacturers began to add asbestos to their products only in order to comply with government specifications.<sup>101</sup>

Shipyard workers, whose third-party lawsuits appear to account for more than fifty percent of the pending litigation, were exposed to asbestos in the course of building and maintaining ships for the Navy during World War II and thereafter when the government was developing a modern two-ocean navy.<sup>102</sup> It has been argued, with some justification, that these workers' injuries and disabilities are a delayed cost of World War II and the defense effort, whose cost should be borne by society as a whole.<sup>103</sup>

The United States assumed a key role in monitoring the health effects of asbestos. In a 1938 government report, a safety level for exposure to asbestos dust was recommended.<sup>104</sup> This standard proved to be "tragically incorrect." In 1946 the government issued a report on the health effects related to the use of asbestos-containing products in the

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98. O. BOWLES, BUREAU OF MINES, *supra* note 27, at 75-94.

99. Clifton, *Asbestos*, in U.S. DEPT OF THE INTERIOR, BUREAU OF MINES, 1978-1979 BUREAU OF MINES MINERALS YEARBOOK.

100. Appellant's Brief, *supra* note 43, at 3.

101. *Id.*

102. See *supra* notes 33, 42.

103. The Hart Bill, *supra* note 89, 127 CONG. REC. at S10033 (statement of Sen. Hart introducing S. 1643). At the Oversight hearing regarding the effect of the Manville and UNR bankruptcies on compensation for asbestos-related disease, the government made clear its position that "it has no tort liability to the victims of asbestos-related diseases." Thus, the government feels that it should not be required to contribute to any asbestos compensation fund. *Oversight Hearings on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims Before Subcomm. on Labor Standards of the House Comm. on Education & Labor*, 97th Cong., 2d Sess. (1982) (statement of J. Paul McGrath, assistant U.S. Atty. Gen. on Sept. 9, 1982) (not yet published) [hereinafter *Oversight Hearing*].

104. W. DRESSEN, J. DALLAVALLE, J. EDWARDS, J. MILLER & R. SAVERS, A STUDY OF ASBESTOSIS IN THE ASBESTOS TEXTILE INDUSTRY, Pub. Health Bull. No. 241 (1938). In this report, the authors recommended a standard for exposure to asbestos dust of five million particles per cubic foot. In 1970 the Government recommended a new standard of two million fibers per cubic foot. Currently, OSHA is considering revising this standard to either a 0.5-fiber level, as proposed in 1975, or a 0.1 fiber level, proposed in 1980. *Asbestos: Vance Sees OSHA Proposal By Late 1983; Industry Representatives Criticize Lag*, [Current Report] O.S.H. REP. (BNA) 339 (Sept. 23, 1982); and *Federal Curbs on Asbestos Found 'Grossly Inadequate'*, N.Y. Times, Apr. 18, 1980, at A18, col. 5.

shipyards.<sup>105</sup> Concluding that insulators were not at risk from the exposure to asbestos, the Fleischer-Drinker Report stated: "Since only three workers out of the 1074 x-rayed has asbestosis, and each of the three had been a pipe cover for more than 20 years, it would appear that *asbestos pipe covering of naval vessels is a relatively safe occupation*. . . . [I]t may be concluded that such *pipe covering is not a dangerous occupation*."<sup>106</sup>

At the time of the Fleischer-Drinker Report, the Government and its contractors were the principal users of asbestos in the United States and following World War II the United States continued to be the largest user of asbestos.<sup>107</sup> As the leading user of asbestos, the government was in the best position, in terms of access to data and resources, to monitor any asbestos-related problems.<sup>108</sup> The manufacturers, particularly the smaller companies, therefore, were entitled to rely on the government reports.

In 1943 the United States Government established standards for use of asbestos in its shipyards.<sup>109</sup> These regulations were insufficient. Despite their own regulations for the job sites and despite the government's control of much of the asbestos industry's work environment, the government failed to enforce its own regulations concerning the use of asbestos, well into the 1970's.<sup>110</sup>

*Government Liability Under Pending Legislation.* Currently, the United States is liable to its present and former employees under the Federal Employees Compensation Act (FECA).<sup>111</sup> It is liable to non-government employees through third-party claims under the Federal Tort Claims Act (FTCA).<sup>112</sup> Although there are approximately 13,000 administrative claims and 1,200 asbestos product liability actions pending against the United States under the FTCA, the Miller Bill and the Fenwick Bill would preclude these future third-party claims against the government and yet would not require government contributions to the Fund established by the bills. Under both bills the only claims for asbestos-related diseases for which the government would be responsible would be those of its employees brought under FECA.

105. Fleischer-Drinker Report, *supra* note 31.

106. *Id.* at 13, 15-16 (emphasis added).

107. Hart, *Let Government Bear Its Share*, N.Y. Times, Sept. 5, 1982, at 2F, col. 5. See *supra* note 98 and accompanying text.

108. The Walsh-Healy Public Contracts Act of 1936, ch. 881, 49 Stat. 2036 (codified as amended at 41 U.S.C.A. §§ 35-45 (West Supp. 1982)), authorized the Department of Labor to inspect government job sites. In addition, the Department of HEW conducted industry inspection.

109. U. S. DEPT OF NAVY AND U.S. MARITIME COMM., MINIMUM REQUIREMENTS FOR SAFETY AND HEALTH IN CONTRACT SHIPYARDS (Feb. 1943) (available upon request from the authors).

110. See Appellant's Brief, *supra* note 43, at 4-6. Note that in 1977 the United States agreed to pay \$5.7 million as part of a \$20 million settlement for 445 workers at an asbestos plant in Tyler, Texas. The case is not available, however, because it has been sealed by the court. See N.Y. Times, Dec. 20, 1977, at 30, col. 1; BUS. WEEK, Dec. 26, 1977, at 42.

111. 5 U.S.C. §§ 8101-8193 (Supp. III 1979).

112. 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (Supp. III 1979).

*Exclusion of Government.* Of the three bills, the Miller Bill and the Fenwick Bill largely exclude the United States from liability for its role in asbestos-related diseases. This position is untenable, however, because the United States played a substantial role in the use of asbestos and products containing asbestos.

The Fenwick Bill provides for the establishment of an Asbestos Health Hazards Compensation Fund to which certain specified classes of persons and entities would contribute.<sup>113</sup> Because the federal government is not listed in any of the classes, it would not be liable for contributions under the Fenwick Bill. Although the United States is not required to contribute to the Fund, the Fenwick Bill would shield the government from all third-party claims. Section 301 of the Fenwick Bill prohibits a claimant from bringing a third-party suit against any contributor to the Fund, the labor union which represented the claimant or the Federal government.<sup>114</sup> Pursuant to the Fenwick Bill, therefore, the government would be responsible only for obligations under FECA.

The Miller Bill also excludes the United States from all liability for compensating persons injured by asbestos-related diseases. The federal government is not included in the definition of a "responsible employer"<sup>115</sup> or an "employer"<sup>116</sup> and is thus excluded from making payments to the Fund created under the Miller Bill. Under the Miller Bill the government would be subject only to its employees' claims under FECA.<sup>117</sup>

*The Government As A Responsible Party.* The federal government has played a significant role in the use of asbestos, in establishing workplace standards which gave positive assurances of safety and as specifier, manufacturer, seller, and stockpiler of the mineral.<sup>118</sup> It would be unfair to ignore such significant roles by requiring the manufacturers and others to pay the Government's share in a system of compensation for persons disabled by asbestos-related disease. The Model Bill and the Hart Bill, therefore, require the government to bear part of the burden by contributing to their respective Funds.

Unlike the Fenwick and Miller Bills, the Hart Bill includes the federal government as a contributor to the Fund. Hart's definition of "responsible party" specifically includes the government and, as such, requires it to contribute to the Supplemental Fund.<sup>119</sup> Under the pro-

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113. Fenwick Bill, *supra* note 90, §§ 203-204.

114. *Id.* § 301(3).

115. Miller Bill, *supra* note 88, § 2(9).

116. *Id.* § 2(5). The definition of employer specifically excludes the Government. "The term 'employer' means any person engaged in commerce or in an industry affecting commerce, *but shall not include* the United States or any State or political subdivision thereof." *Id.* (emphasis added).

117. *See infra* notes 132 to 134 and accompanying text.

118. *See Oversight Hearing, supra* note 103.

119. Hart Bill, *supra* note 89, § 2(10).



visions of the Hart Bill, the government would be liable for the amount it would ordinarily pay under FECA to its own employees as well as for part of the contributions to the Supplemental Compensation Fund for all injured persons. The compensation is to be paid by responsible parties according to a set of criteria which clearly make the government liable for a substantial part of the Fund.<sup>120</sup>

The Asbestos Compensation Fund is created under section 13 of the Model Bill.<sup>121</sup> Responsibility for the payment of benefits is assigned to the claimant's last employer unless the employer proves that it did not expose the claimant to asbestos for two years or more.<sup>122</sup> If the claimant's last employer meets its burden, then the claimant's award is paid out of the Fund.<sup>123</sup> Section 13 of the Model Bill requires the federal government to pay thirty percent of the contributions to the Fund.<sup>124</sup> In exchange for these contributions, the government would be immune from any lawsuit or administrative claim under the FTCA or FECA.

As written, the Fenwick and Miller Bills constitute a "bail-out" of the federal government by manufacturers of asbestos and asbestos-containing products. Despite the government's leading role in the specification and use of asbestos with knowledge of its health effects, these two bills fail to recognize the government's role as anything other than an employer. This bail-out should be rejected. The government's culpability must be recognized and it should be required to pay its share of the compensation for asbestos-related disease.

### Exclusivity of Remedy

*No-Fault Compensation.* Workers' compensation statutes prohibit an employee from suing an employer for a work-related injury. In return for this, the employee need not meet the tort law requirement of proving negligence on the employer's part. Thus, workers' compensation is a "no-fault" system in which employer-funded workers' compensation insurance pays for any work-related injury or disability. Provisions in the pending legislation would effectively extend this "no-fault" compensation theory.

120. Section 8 of the Hart bill establishes the criteria for apportionment. In relevant part it provides as follows:

(c) The criteria developed by the Commission shall include the establishment of percentage ranges of liability for a variety of factors including, but not limited to:

(1) the party or parties responsible for the manufacture, design, formula, preparation, assembly, testing, warning, instruction, marketing, packaging, distribution, or labeling of any asbestos product;

(2) the party or parties responsible for control of the workplace environment and for publishing safe exposure limits for the workplace environment; and

(3) the party or parties responsible for establishing the criteria to which product specifications were designed and products manufactured.

Hart Bill, *supra* note 89, § (8)(c).

121. The Model Asbestos Health Hazards Compensation Act is appended to this article, *infra* page 55, and is hereinafter cited as the Model Bill.

122. Model Bill, *supra* note 121, § 12(b).

123. *Id.*

124. Model Bill, *supra* note 121, § 13(d)(3).

Each of the four bills proposes a system of compensation which requires not only employers but also manufacturers of asbestos and other "responsible parties" to compensate claimants on a "no-fault" basis.<sup>125</sup> Responsible parties would be required to contribute to the Fund without requiring the claimant to show negligence or fault on the contributor's part. This legislation reflects the tort law development of strict liability where neither negligence nor fault must be proved.<sup>126</sup> In exchange for this no-fault contribution to the Fund, third-party defendants would be immune from further claims and suits.<sup>127</sup> The injured party's exclusive remedy would be compensation from the Fund.

Absent the exclusive remedy provision to protect the contributors to the Fund from the third-party lawsuits, the tremendous burden on the courts, and enormous sums going to lawyers rather than injured parties, and the threat to the companies' viability would all remain unsolved problems. Yet, strong opposition to the exclusive remedy provision has been voiced by labor, trial attorneys, and public interest groups who consider such a provision a "bail-out" for the so-called "asbestos industry."<sup>128</sup> The defendants in the asbestos cases argue, however, that without such a provision, the legislative solution would be no solution at all.<sup>129</sup>

*Exclusivity Under Prior Bills and The Model Bill.* The Model Bill proposes a wholly exclusive remedy for persons affected by asbestos-related disease. Claimants would no longer file claims with state and federal workers' compensation boards nor would claimants be permitted to bring third-party lawsuits against those who contribute to the Fund.<sup>130</sup> The sole remedy under the Model Bill would be to file a claim for compensation with the Federal Office of Workers' Compensation.<sup>131</sup> All occupational asbestos-related disease claims would be processed through the one federal system.

The Miller Bill also proposes to process asbestos-disease claims through the one Federal Office of Workers' Compensation.<sup>132</sup> Under the Miller Bill, however, any person who was only exposed to asbestos while in the employ of the United States' Government, would not be eligible to seek compensation from the Fund.<sup>133</sup> Those government

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125. *Id.* § 10.

126. See *supra* text accompanying notes 69-75.

127. Model Bill, *supra* note 121, § 10. Note also, that any responsible party which fails to pay the amount assessed is not immune from third-party lawsuits. *Id.* § 13(h).

128. Historically, trial lawyers, including the American Bar Association, have argued against no-fault plans "which took business away from trial lawyers." J. DEAN, *BLIND AMBITION* 345 (1976).

129. See generally Schechter, *Untangling the Asbestos Mess*, *supra* note 91.

130. Model Bill, *supra* note 121, § 10.

131. *Id.* §§ 7(a)(1)(B), 10.

132. Miller Bill, *supra* note 88, § 7.

133. Those eligible to file claims under the Miller Bill are listed in section 3 which provides: "All employers and employees are defined in this Act shall be covered, and coverage shall be compulsory, rather than elective." Miller Bill, *supra* note 88, § 3.

An employee is defined as "any individual" [sic] who is employed by an employer, or

employees would continue to file claims under FECA and would be allowed to continue filing third-party suits against the manufacturers.<sup>134</sup> Since government employees appear to make up a substantial portion of the plaintiffs, this lack of exclusivity of the Miller Bill would serve to defeat the purpose of a legislative solution. Although certain government employees would not be effected by the Miller Bill, the exclusive remedy for all other asbestos-related claimants would be under the Miller Bill.

Although providing largely exclusive remedies, the Fenwick and Hart Bills permit claimants to file claims under applicable workers' compensation systems in addition to filing claims under the respective act.<sup>135</sup> Like the Model Bill, however, the Fenwick Bill and the Hart Bill prohibit claimants from filing third-party suits against contributors to the Fund.<sup>136</sup>

Removing the exclusive remedy provision would, in effect, place a greater burden on the manufacturers and other third parties than already exists. Requiring contributions to the Fund would simply add the expense of contributing to the Fund without removing any of the current burdens on the courts or the companies. Absent the exclusivity provision, the legislation would cause more problems than it would solve.

#### Apportionment of Contribution: The Asbestos Compensation Fund

The four bills differ dramatically in apportioning liability for compensating persons affected by an asbestos-related disease. The apportionment ranges from inclusion of the cigarette industry under the Fenwick Bill<sup>137</sup> to the specific exclusion of the federal government under the Miller Bill.<sup>138</sup> Because of the attempt to coordinate employers' liability under existing compensation laws, the differing structures

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who was employed by an employer," and employer is defined as "any person engaged in commerce or in an industry affecting commerce, but [such definition] shall not include the United States or any State or political subdivision thereof." *Id.* §§ 2(4), 2(5) (emphasis added).

An individual affected by an asbestos-related disease would not be eligible to file a claim under the Miller Bill if the only exposure to asbestos was while in the employ of the United States. Pursuant to section 5, the claimant must prove that he or she was an employee exposed to asbestos during the course of employment and that such exposure caused the disability for which the claimant is seeking compensation. *Id.* § 5(a). Because the Government is excluded from the definition of employer, a person would not be eligible to file a claim if the exposure to asbestos only occurred during the course of employment with the Government.

134. Pursuant to section 9 of the Miller Bill, *supra* note 88, compensation to which a claimant is entitled under the Miller bill constitutes the exclusive remedy for the claimant. Because a person who was exposed to asbestos while in the employ of the United States is not eligible to file a claim under the Miller bill, that individual would not be bound by the exclusive remedy provision. The Government employee, therefore, would not be barred from filing third party actions.

135. Fenwick Bill, *supra* note 90, §§ 206(b)(8), 206(d); Hart Bill, *supra* note 89, §§ 6, 10.

136. Fenwick Bill, *supra* note 90, § 301; Hart Bill, *supra* note 89, § 10.

137. Fenwick Bill, *supra* note 90, §§ 102(10)(c), 102(11)(A)(iii), 204(b)(3).

138. Miller Bill, *supra* note 88, § 2(5).

of the four bills must also be considered when asking the question: "Who will ultimately pay?"

*The Fenwick Bill.* The Fenwick Bill's apportionment of contributions to its Asbestos Health Hazards Compensation Fund is unique because it requires contribution from persons and entities engaged in the "first sale of cigarettes or cigarette tobacco."<sup>139</sup> It also requires contributions from importers, manufacturers and sellers of asbestos-containing products.<sup>140</sup> The miners of asbestos are not required to contribute to the Fund.

Three classes of contributors are established under the Fenwick Bill. Class I includes persons and entities who engage in the manufacture, import or sale of asbestos products whose handling "creates the likelihood that dust containing asbestos will be produced."<sup>141</sup> Class II includes those persons or entities in whose products asbestos is "suspended in a liquid or emulsion or otherwise locked into the substance or product . . . so that during handling . . . there is little likelihood that dust containing asbestos will be produced or asbestos exposure will result."<sup>142</sup> Class III, the provision unique to the Fenwick Bill, would require contributions from entities "engaged in the manufacture and first sale of cigarettes or cigarette tobacco."<sup>143</sup>

The contributions required by Classes I and II would be two percent and one percent, respectively, of the net domestic sales of products containing asbestos for the "quarter fifteen years preceding the year in which payment is made."<sup>144</sup> The contribution required by Class III is 3/10th of one percent of the "net domestic sales of cigarettes and cigarette smoking tobacco for the quarter fifteen years preceding the year in which payment is made."<sup>145</sup>

Noticeably missing from responsibility under the Fenwick Bill are employers and the government. Those affected by asbestos-related disease would still be permitted to seek employer contribution by applying for compensation under a state or federal workers compensation system. Awards under the Fenwick Bill, however, would be reduced by any award received under a workers' compensation program.<sup>146</sup>

With the exception of the average monthly payment under FECA, benefits under Fenwick are higher than those available under most compensation systems.<sup>147</sup> Because any award under the Fenwick Bill would be reduced by other awards, claimants undoubtedly would

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139. Fenwick Bill, *supra* note 90, §§ 102(11)(A)(iii), 204(b)(3).

140. *Id.* §§ 102(11)(A)(i), 102(11)(A)(ii), 204(b)(1), 204(b)(2).

141. *Id.* § 102(11)(A)(i).

142. *Id.* § 102(11)(A)(ii).

143. *Id.* § 102(11)(A)(iii).

144. *Id.* §§ 204(b)(1), 204(b)(2).

145. *Id.* § 204(b)(3).

146. *Id.* § 206(d).

147. The Fenwick Bill sets the rate of payment for permanent or temporary total disability at a "rate equal to the minimum monthly payment to which the Federal employee in grade GS-5

choose to seek compensation only through the Fund. The end result would be that the employers would not be required to compensate for asbestos-related disease caused by exposure to asbestos at their worksites.

In apportioning responsibility for asbestos-related disease, the Fenwick Bill fails in two respects: (1) by not recognizing the government's role other than that of an employer; and (2) by not providing a system that insures contribution by employers whose employees are disabled as a result of occupational exposure to asbestos.

*The Hart Bill.* Senator Hart's approach to the compensation contribution problem is to set minimum standards for state and federal workers' compensation programs as they pertain to the compensation for asbestos-related disease.<sup>148</sup> Through this legislation, Hart would void all barriers to compensation currently faced by persons disabled by asbestos-related diseases, such as "provisions relating to the time since the last exposure to asbestos."<sup>149</sup>

Under the Hart Bill, if the minimum standards for compensation were not met, an injured person would be able to seek the difference between the award under the workers' compensation system and the amount that would be awarded under the Hart Bill's minimum standards.<sup>150</sup> Awards would be made to claimants from the Supplemental Compensation Fund to which employers, including the United States Government, manufacturers, and distributors of products containing asbestos would contribute in amounts set by the state or federal workers' compensation board.<sup>151</sup> Miners and importers of asbestos, however, are not specifically named as responsible parties and contributors to the Fund.

The Hart Bill does not undertake to apportion contributions. Rather, it establishes a commission whose role is to "develop the criteria and factors which shall be used by State and Federal workers' compensation agencies in apportionment proceedings under [the bill]. . . ." <sup>152</sup> Establishment of the Apportionment Criteria Commission begs the question of who and in what proportions responsible parties would be required to pay awards. The Commission's role is to establish "percentage ranges for liability for a variety of factors."<sup>153</sup> It is the role of the workers' compensation agencies to first determine

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of the General Schedule who is totally disabled is entitled at the time of payment under Chapter 81 of title 5, United States Code." *Id.* § 206(b)(3).

Currently, the minimum payment at GS-5 is \$714.00 per month while the average monthly payment under FECA is \$758.00. See *Chart V: Income Benefits for Total Disability*, U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKERS COMPENSATION LAWS 15 (1982).

148. Hart Bill, *supra* note 89, § 1(b)(1).

149. *Id.* § 4(a)(10).

150. *Id.* § 6(a)(1).

151. *Id.* §§ 6-8.

152. *Id.* § 8(b).

153. *Id.* § 8(c).

which responsible parties are liable for the individual claim and then to apportion liability based on the Commission percentage ranges.<sup>154</sup> Thus, not until the claim is actually apportioned will the amounts paid by various responsible parties be known.

The system of apportionment and the awards process under the Hart Bill is unduly complex and inefficient because apportionment would be done on a case-by-case basis by the existing state or federal workers' compensation board. The solution to the problem of finding an efficient, exclusive, and adequate means of compensating persons affected by asbestos-related disease does not lie in a system which sends the claimants back to the workers' compensation systems which have already proved inefficient. Rather, the solution lies in a system under which one office or agency develops an expertise in asbestos claims by being the exclusive office to handle those claims.

*The Miller Bill.* The Miller Bill focuses not only on asbestos-related diseases but also includes uranium-related diseases in its coverage.<sup>155</sup> As such, the Miller Bill is designed as a prototype for a system of compensation for occupationally-related diseases and provides for the addition of other occupational diseases.<sup>156</sup> The Miller Bill establishes one fund to which employers, except the federal government, as well as manufacturers, distributors, and other responsible parties contribute.<sup>157</sup> Sections 11 and 12 of the Miller Bill assign the liability for payment to the Fund. Pursuant to those provisions, the last employer who employed the affected person for at least two years, during which time the employee was more than sporadically exposed to asbestos, is responsible for 100% of the compensation awarded to the claimant.<sup>158</sup> If, however, no employer can be determined, the compensation award will be paid from the Asbestos Compensation Excess Liability Fund established under section 12 of the bill.<sup>159</sup>

Pursuant to section 12, contributions to the Fund include: (1) twenty percent from "employers, [excluding the federal government], who expose employees to asbestos in the course of employment with such employers"; (2) fifty percent from "manufacturers and importers of asbestos and of products of which asbestos is a significant constituent element"; and (3) thirty percent from "manufacturers and importers of products which contain asbestos but of which asbestos is not a significant constituent element."<sup>160</sup>

The Miller Bill establishes a more efficient system through its use of one agency in handling all asbestos-related claims. Rather than coordi-

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154. *Id.* § 7.

155. Miller Bill, *supra* note 88, § 5(a).

156. *Id.* § 17.

157. *Id.* § 12.

158. *Id.* § 11.

159. *Id.*

160. *Id.* § 12(b)(2)(A).

nating efforts of separate existing workers' compensation agencies throughout the United States, as Hart proposes, Miller includes employer responsibility when apportioning contributions to the Fund. Despite the promise of being an efficient system of compensation, the Miller Bill's apportionment of liability fails in one crucial respect: it excludes the federal government as a responsible part.

*The Model Bill.* The Model Bill establishes the Asbestos Compensation Fund to which contributions are made by the federal government, employers, miners, importers, manufacturers, distributors, and other "responsible parties" involved in the use of asbestos and products containing asbestos.<sup>161</sup> The apportionment of contributions to the Fund is as follows: fifty percent of the contributions are made through a tier system based upon the location in the distribution tier of the contributor;<sup>162</sup> twenty percent of the contributions are made by employers;<sup>163</sup> and thirty percent of the contributions are made by the United States Government.<sup>164</sup>

#### Employers and Government Contributions

The Model Bill constitutes the exclusive remedy for persons disabled by asbestos-related disease.<sup>165</sup> Under the Model Bill, claimants are barred from filing claims under existing state and federal workers' compensation laws and may only file under the Model Asbestos Compensation Act.<sup>166</sup> Since employers, including the federal government, are relieved from liability under the existing programs by this exclusivity provision, they are required to contribute to the Fund and thereby carry their share of compensating for their role in the use of asbestos. Employers are responsible for twenty percent of the total contributions to the Fund.<sup>167</sup>

The government played a significant role in the use of asbestos; it was much more than an employer of persons applying asbestos insulation.<sup>168</sup> The government established workplace standards which gave positive assurances of safety to other employers, manufacturers, and employees.<sup>169</sup> In addition, it was an importer, manufacturer, buyer, seller, specifier, and stockpiler of asbestos. For its many roles in the use of asbestos, the government is responsible for thirty percent of the contributions to the Fund, in addition to its contributions as an employer.<sup>170</sup>

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161. Model Bill, *supra* note 121, § 13.

162. *Id.* § 13(d)(1).

163. *Id.* § 13(d)(2).

164. *Id.* § 13(d)(3).

165. *See supra* notes 130-31 and accompanying text.

166. Model Bill, *supra* note 121, § 10.

167. *Id.* § 13(d)(2).

168. *See supra* notes 97-109 and accompanying text.

169. *See supra* notes 106-09 and accompanying text.

170. Model Bill, *supra* note 121, § 13(d)(3).

### Tier of Distribution

. Contributions by miners, importers, manufacturers, fabricators, distributors, and wholesalers make up fifty percent of the Fund.<sup>171</sup> Apportionment of contributions are based upon what level of distribution of asbestos the responsible party was involved. The approach to a theory of contribution is one which reflects the reality of the marketplace.

Each level in the chain of distribution of asbestos is a separate market: (1) the primary market comprises the miners and suppliers of raw asbestos; (2) the secondary market comprises the fabricators of thermal insulation products which contained asbestos as one component part; and (3) the tertiary market comprises the distributors or wholesalers of thermal insulation products which contained asbestos as the component part.

Asbestos was placed in the stream of commerce by the members of the primary market, the miners and importers of raw asbestos, and was incorporated without change into various products. It is well accepted in tort law that a manufacturer of a component part should be liable for any harm caused by that component.<sup>172</sup> The miners and importers of raw asbestos correspond to the manufacturer in products liability law to whom retailers can pass back their liability if the product furnished them for sale proves defective and unreasonably dangerous.

Under the Model Bill, the financial resources of the companies in the primary market would be utilized to compensate the claimants.<sup>173</sup> If the resources of the mining companies and importers are exhausted, only then would those other tiers of distribution be called upon to contribute to the Fund.<sup>174</sup>

The goal of the Model Bill is to assess contributions in an equitable manner reflecting each responsible party's role in the use of asbestos. The fact that companies from several markets have been named as defendants in the asbestos cases is simply fortuitous and in no way defines the relevant market or markets.<sup>175</sup> In apportioning liability for asbestos-related disease, therefore, one must do more than count lawsuits. The role of the entity or the federal government in each and every market must be considered in determining what each responsible party's proportional share will be.

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171. *Id.* § 13(d)(1).

172. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 663-65 (4th ed. 1971).

173. Model Bill, *supra* note 121, § 13(d)(1).

174. *Id.* § 13(d)(1)(B)(i).

175. The defendants in the asbestos litigation come from various markets in the chain of distribution from mining to the application of insulation products. Some defendants are vertically integrated companies, such as Manville Corporation, which operated at all levels of distribution. Manville mined and supplied most of the asbestos to the other usual defendants who were fabricators. In addition, Manville fabricated for distribution or sale significantly more thermal insulation products containing asbestos than any other fabricator. Most other defendants or their alleged predecessors operated at only one or two levels.



## Presumptions

Presumptions in legislation enable a court or compensation board to assume that a certain fact exists without the necessity of proof. A rebuttable presumption is one which may be disproved by facts contrary to the presumption. An irrebuttable presumption, however, may never be disproved despite facts to the contrary. Of the four bills only the Miller Bill contains rebuttable and irrebuttable presumptions; certain specified diseases are presumed to have resulted from occupational exposure to asbestos.<sup>176</sup> These presumptions should not be permitted to stand.

*The Black Lung Act.* Presumptions have had a checkered history in compensation legislation. The Federal Coal Miner Health and Safety Act of 1969<sup>177</sup> was enacted, in part, to compensate coal miners who were disabled or died from pneumoconiosis, a chronic lung disease, which resulted from the inhalation of coal dust. The 1969 Act contained three presumptions relating to the cause of pneumoconiosis in miners.<sup>178</sup>

The Black Lung Benefits Act of 1972<sup>179</sup> (Black Lung Act), added another presumption,<sup>180</sup> and, in 1978, a fifth presumption was added to the Black Lung Act.<sup>181</sup> As part of an effort to salvage this first industry and government funded compensation system, Congress amended the

176. Miller Bill, *supra* note 88, § 5(b).

177. It stated:

(1) if a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more underground coal mines there shall be a *rebuttable* presumption that his pneumoconiosis arose out of such employment;

(2) if a deceased miner was employed for ten years or more in one or more underground coal mines and died from a respirable disease there shall be a *rebuttable* presumption that his death was due to pneumoconiosis; and

(3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed [indicates complicated pneumoconiosis] then there shall be an *irrebuttable* presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was disabled by pneumoconiosis, as the case may be.

30 U.S.C.A. §§ 801, 901 (1971) [hereinafter cited as The 1969 Act]. The 1969 Act is found at Pub. L. No. 91-173, 83 Stat. 742 (1970). See 1969 U.S. CODE CONG. AND AD. NEWS 2503 for the legislative history.

178. The 1969 Act, *supra* note 176, § 921(c)(1), (2), (3) (emphasis added).

179. The new presumption provided that if a miner was employed for 15 years or more in underground mines, even though the miner's X-ray is negative and does not establish pneumoconiosis, "if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment" then the miner is *rebuttably* presumed to have been impaired by pneumoconiosis.

Black Lung Benefits Act of 1972, Pub. L. No. 92-303, §§ 3(a), 4(b)(2), 86 Stat. 153 (current version at 30 U.S.C.A. § 901 (West Supp. 1982)).

180. This amendment provided benefits for the survivors of a miner who dies before March 1, 1978 if the miner had been employed in coal mines for at least 25 years prior to July 1971. The benefits would be paid unless it was established that the miner had not been partially or totally disabled due to pneumoconiosis. 30 U.S.C.A. § 921(c)(4) (West Supp. 1982) (emphasis added).

181. The Black Lung Benefits Reform and Revenue Acts of 1977, Pub. L. No. 95-239, 92 Stat. 96 (codified at 30 U.S.C. § 901, 921(c)(5)). For a general discussion of the Black Lung Act and the use of presumptions, see DeCarlo & Veiweg, *Federal Black Lung Law and Insurance in a Nutshell*, 11 FORUM 661 (1976); Bandolf & Humphreys, *Black Lung Benefits Reform: Mirage*

Black Lung Act in 1981.<sup>182</sup> As of January 1, 1982, three of the five presumptions were eliminated.<sup>183</sup> Under the three deleted presumptions, a claimant had been able to apply for and receive benefits with little or no proof that the miner had pneumoconiosis. Under the Black Lung Act as it exists today, claimants must prove the causal relationship between the work and the injury.

*Presumptions Under The Miller Bill.* The presumptions included in the Miller Bill are similar to those included in the Black Lung Act prior to the 1981 amendment. In both cases, claimants may avoid proof of causality through the use of presumptions. Thus, a claimant need not prove that the disease for which compensation is claimed is causally related to the occupational exposure to asbestos: a claimant need merely prove occupational exposure to asbestos and the existence of one of the presumed asbestos-related diseases.

The Miller Bill creates three presumptions. Occupational exposure to asbestos is: (1) *irrebuttably* presumed to cause mesothelioma of the pleura or peritoneum;<sup>184</sup> (2) *irrebuttably* presumed to cause asbestosis;<sup>185</sup> and (3) *rebuttably* presumed to cause lung cancer, except that, if the claimant provides evidence of "asbestotic changes" in the lung or pleura, the presumption becomes *irrebuttable*.<sup>186</sup>

In proposing these presumptions, the drafters of the Miller Bill ignore recent medical research. As a result, the manufacturers of asbestos and products containing asbestos would be forced to compensate persons whose diseases may have been caused by something other than exposure to asbestos.

The presumption that exposure to asbestos causes lung cancer is the most objectionable. By eliminating the necessity of proof of a causal relationship between lung cancer and exposure to asbestos, the presumption makes compensable a disease which asbestos may not cause by itself, and, moreover, ignores many known causes of lung cancer such as nickel,<sup>187</sup> beryllium,<sup>188</sup> and cigarettes. Such a presumption is tantamount to legislating a diagnosis which medical and epidemiologi-

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or Reality, 28 LAB. L.J. 555 (1977); and Note, *The Black Lung Benefits Reform and Revenue Acts of 1977*, 80 W. VA. L. REV. 539 (1978). See generally *infra* note 182.

182. The two which remain are: the first presumption which creates the rebuttable presumption that a miner's pneumoconiosis arises from working 10 or more years in coal mines; and the third presumption which creates the irrebuttable presumption that a miner suffering from a chronic dust disease has complicated pneumoconiosis if medical evidence indicates considerable lung damage. The Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1644 (to be codified as amended at 30 U.S.C. § 901) [hereinafter cited, as amended, as the Black Lung Act].

183. 30 U.S.C.A. § 921(c)(1), (3) (West Supp. 1982).

184. Miller Bill, *supra* note 88, § 5(b)(1).

185. *Id.* § 5(b)(2).

186. *Id.* § 5(b)(3).

187. Doll, Mathews & Morgan, *Cancer of the Lung and Nasal Sinuses in Nickel Workers: A Reassessment of the Period of Risk*, 34 BRIT. J. INDUS. MED. 102 (1977).

188. See O.S.H. REP. (BNA) 210 (July 29, 1982).

cal data does not support.<sup>189</sup>

Doctor Harry B. Demopoulus, who specializes in the diagnosis of asbestos-related disease, disputes any epidemiological data which claims a relationship between asbestos and lung cancer on the grounds that other significant variables have not been accounted for such as diet, smoking, and alcohol intake.<sup>190</sup> Other doctors and researchers have similarly concluded that in asbestos workers bronchogenic carcinoma is uncommon without the presence of some other factor such as cigarette smoking.<sup>191</sup> In a recent article, one author examined those studies which claim that asbestos, by itself, can cause lung cancer<sup>192</sup> and concluded from her own survey, that there is no scientific or medical proof that exposure to asbestos alone causes lung cancer.<sup>193</sup> The statistics from the studies she surveyed showed that, in individuals who were smokers and whose histories indicated a high concentration of exposure to asbestos, the incidence of lung cancer was higher than was expected in the general population.<sup>194</sup> In non-smoking individuals who were similarly exposed to asbestos, however, the incidence of lung cancer was lower than expected in the general population.<sup>195</sup>

By legislating the presumption that lung cancer was caused by asbestos exposure, the Miller Bill would place on the asbestos defendants the additional and onerous burden of compensating injured persons for an injury which was not necessarily caused by their product. Recent medical research has determined that zeolites, a natural substance found in many products, including toothpaste and chicken feed, causes mesothelioma.<sup>196</sup> In addition, a recent study published by the American College of Physicians and written by doctors who are on the staff of Mount Sinai Medical Center in New York concludes that there is no

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189. Weill, Hughes & Waggenpack, *Influence of Dose and Fiber Type Respiratory Malignancy Risk in Asbestos Cement Manufacturing*, 120 AM. REV. RESPIRATORY DISEASE 345, 353 (1979).

190. Demopoulus, *Summary of Conference: Major Discussion Points and Societal Interrelationships*, 3 J. ENVTL. PATHOLOGY & TOXICOLOGY 473-474 (March 1980) (summarizes symposium entitled "Cancer and the Environment: An Academic Review of the Environmental Determinants of Cancer Relevant to Prevention").

191. Craighead & Mossman, *The Pathogenesis of Asbestos-Associated Diseases*, 306 NEW ENG. J. MED. 1446, 1451 (1982). In *Asbestos: Vance Sees OSHA Proposal by Late 1983; Industry Representatives Criticize Lag*, *supra* note 104, Dr. Hans Weill, professor of medicine at Tulane University, is quoted as saying: "Slowly we have begun to realize that there are occupational groups and subgroups that demonstrate no excess lung cancer in the asbestos industry." *Id.*

192. B. Billauer, *Asbestos Causes Lung Cancer—Or Does It?* (Sept. 1982) (unpublished article).

193. *Id.* at 35, 38.

194. Billauer, *supra* note 192.

195. *Id.* at 31, 33, 35.

196. Newhouse, *Epidemiology of Asbestos-Related Tumors*, 8 SEMINARS IN ONCOLOGY 250 (Nov. 1981); Baris, *An Outbreak of Mesothelioma and Chronic Fibrosing Pleurisy in the Village of Karain/Urgup in Anatolia*, 33 THORAX 181 (1978); Artvinli & Baris, *Malignant Mesothelioma in a Small Village in the Anatolian Region of Turkey: An Epidemiologic Study*, 63 J. NAT'L CANCER INST. (July 1979); Baris, Artvinli & Sahin, *Environmental Mesothelioma in Turkey*, 330 ANNALS N.Y. ACAD. SCI. 423 (1979). See generally Storey, *Cancer that Killed Their Ancestors Now is Killing Their Turkish Village*, Chicago Tribune, Feb. 22, 1981, at 7.

asbestos connection for thirty percent of the mesotheliomas studied.<sup>197</sup> Although there are many unanswered questions concerning zeolites and other substances and their relation to mesothelioma, the irrebuttable presumption which ignores altogether the role of these substances is inappropriate.

To avoid the problems faced in the Black Lung Act and to avoid requiring the manufacturers to compensate for injuries for which no causal relationship can be drawn between the injury and the exposure to asbestos, the Fenwick, Hart and Model Bills do not include presumptions. Rather, these bills require that the claimant establish both the existence of disease and that the disease was caused by exposure to asbestos.

Two of the four bills go even further by recognizing the contribution not only of asbestos but also of other factors in causing asbestos-related disease. The Fenwick Bill provides for contributions by the cigarette industry on grounds that "lung cancer at rates dramatically and substantially above the general average occurs in persons who inhale asbestos coupled with the inhalation of cigarette tobacco smoke."<sup>198</sup>

The Model Bill attempts to apportion the liability for diseases in asbestos workers when the diseases are determined to result from other factors in addition to exposure to asbestos. Section 13(f) of the Model Bill provides that "[i]n addition to the entities described above, any entity shall contribute to the fund if the Secretary determines that it or its products had any role in contributing to the disease for which compensation is sought."<sup>199</sup>

Considering the uncertainty and differing conclusions as to the cause or causes of the diseases involved, presumptions are inappropriate. Cause and effect between the disease suffered and the exposure to asbestos must be established and proved.

### Application of Insurance Policies

The three asbestos companies which have filed for relief under Chapter 11 have cited the overwhelming litigation and the failure of their insurance companies to defend the lawsuits and pay awards and settlements as principal reasons for filing their petitions.<sup>200</sup> Many manufacturers of asbestos have been forced to litigate with their insurance carriers to obtain the coverage provided by the insurance policies they have purchased.<sup>201</sup> Many of the insurance coverage cases are still

197. Chahinian, Pajak, Holland, Norton, Ambinder & Mandel, *Diffuse Malignant Mesothelioma*, 96 ANNALS INTERNAL MED. 746 (July 1982).

198. Fenwick Bill, *supra* note 90, § 101(a)(3). See generally Selikoff, Seidman & Hammond, *Mortality Effects of Cigarette Smoking Among Asbestos Factory Workers*, 65 J. NAT'L CANCER INST. 507 (Sept. 1980); Selikoff & Hammond, *Asbestos & Smoking*, 242 J. A.M.A. 458 (Aug. 1979) (editorial).

199. Model Bill, *supra* note 121, § 13(f).

200. See *supra* note 79.

201. See *supra* note 76-77 and accompanying text.

pending and, until resolved, the manufacturers, and not their insurance carriers, must bear, in whole or in part, the financial burden for which they believe they were insured.

In an effort to avoid further insurance coverage litigation, the Hart Bill and the Model Bill provide for the application of insurance policy benefits toward a responsible party's contribution to the Fund. The Hart Bill provides that:

Each contractor of insurance under which compensation benefits are provided to or for employees of any responsible party made to cover occupational diseases, disabilities, or deaths as a result of exposure to asbestos shall be deemed to provide benefits in accordance with the minimum standards contained in section 4 of this Act.<sup>202</sup>

Any policies or contracts of insurance issued by a carrier to indemnify and/or defend a responsible party which policies or contracts of insurance would be applicable to claims against any responsible party for damage due to an asbestos-related disease shall be applicable to any contribution required or otherwise determined to be due from a responsible party under this Act.<sup>203</sup>

The inclusion of specific provisions concerning insurance coverage does not give additional rights to the responsible parties; it merely preserves existing rights under any new system of compensation. Thus, while coverage disputes may continue, new disputes by insurance carriers will not be generated by the adoption of an Asbestos Compensation Act.

### Household Exposures

Pending litigation includes cases brought by persons who allege they are suffering from asbestos-related disease although they have never been occupationally exposed to asbestos. The only exposure they know of, it is alleged, is indirect, as through a member of their household who was occupationally exposed to asbestos. In many of these so-called "household exposure" cases, plaintiffs rely on studies which conclude that mesothelioma may be caused by indirect exposure to asbestos, such as exposure to dust covered clothes of household members who were occupationally exposed to asbestos dust.<sup>204</sup>

Only the Miller Bill fails to recognize the need to compensate household exposure cases where a causal connection between the mesothelioma and the occupational exposure to asbestos of a household member is shown. The Fenwick Bill,<sup>205</sup> the Hart Bill<sup>206</sup> and the Model Bill,<sup>207</sup> on the other hand, recognize the need for relief for asbestos-related disease that was the vicarious result of occupational expo-

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202. Hart Bill, *supra* note 89, § 11(c).

203. *Id.* § 11(d).

204. See Anderson, Lilis, Daum & Selikoff, *supra* note 45.

205. Fenwick Bill, *supra* note 90, §§ 101(a)(2) and 102(2).

206. Hart Bill, *supra* note 89, § 3.

207. Model Bill, *supra* note 121, at § 4.

sure to asbestos. This relief is provided despite the fact that it was not the employee who developed the asbestos-related disease but rather a member of the employee's household.

### CONCLUSION

The Model Asbestos Compensation Act provides a prompt, adequate, exclusive, equitable, and reasonably uniform system of compensation for persons disabled as a result of exposure to asbestos.

The filing of claims with the Office of Workers' Compensation Programs allows that office to develop an expertise in handling asbestos compensation claims; this gives the system the efficiency to promptly dispose of asbestos claims. Adequacy of the system is assured by provisions which allow 100% of medical and rehabilitation expenses<sup>208</sup> and non-taxable wage-loss compensation of at least 66 2/3% of the affected person's average weekly wage.<sup>209</sup> Exclusivity is provided for parties required to contribute to the Asbestos Compensation Fund in exchange for their "no fault" contributions to the Fund. Finally, equitable compensation and reasonably uniform awards will be provided since awards will better reflect the degree of disability resulting from asbestos-related disease rather than the uneven awards resulting under current litigation.

The Model Bill does not absolve the United States from contributing its fair share of liability for asbestos-related disease;<sup>210</sup> includes an exclusive remedy provision;<sup>211</sup> apportions contributions on the basis of the roles the responsible parties played in the use of asbestos;<sup>212</sup> eliminates all presumptions of the cause of disease; specifies that contributions to the Fund will be covered by contributors' insurance policies;<sup>213</sup> and provides for compensation of persons disabled by asbestos-related disease caused by household exposure.<sup>214</sup>

Legislation similar to the Model Asbestos Compensation Act is a rational and fair solution to the asbestos compensation problem.

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208. *Id.* § 5(e).

209. *Id.* §§ 5(b), 5(e).

210. *Id.* § 3(a)(15).

211. *Id.* § 10.

212. *Id.* §§ 12-13.

213. *Id.* § 13(b).

214. *Id.* § 4.

## APPENDIX

# THE MODEL ASBESTOS HEALTH HAZARDS COMPENSATION ACT

### A BILL

To provide prompt, adequate, exclusive, and equitable compensation for diseases or death resulting from exposure to asbestos, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SHORT TITLE

SECTION 1. This Act may be cited as the "Asbestos Health Hazards Compensation Act."

### FINDINGS AND PURPOSE

SECTION 2. (a) The Congress finds that—

(1) a significant number of people suffer disability or death or both from occupational diseases caused by the inhalation or ingestion of asbestos;

(2) members of households of persons who are occupationally exposed to asbestos may suffer from asbestos-related diseases;

(3) asbestos-related diseases occur among individuals employed in both the private sector and public sector;

(4) diseases arising from exposure to asbestos constitute a substantial burden upon interstate commerce and have an adverse effect on the public welfare;

(5) diseased and disabled workers and their survivors deserve, and the public interest will be best served by, prompt, adequate, exclusive, and equitable compensation;

(6) the prime method for providing such compensation, State laws governing occupational disease and disability, do not in many cases provide prompt, adequate, exclusive, and equitable compensation;

(7) the inability of persons injured by such diseases to obtain adequate workers' compensation benefits places great strain on the family resources of the injured persons, and on public medical and income support systems;

(8) the general inability of workers' compensation laws to provide prompt, adequate, exclusive, and equitable compensation to occupational disease victims has encouraged those injured persons to seek compensation through liability suits and other judicial action;

(9) the burgeoning litigation associated with those occupational disease cases, places great strain on the judicial system of the United States; and

(10) all parties directly or indirectly responsible for the occur-

rence of occupational asbestos disease, including but not limited to the Federal Government and those who sold asbestos or products containing asbestos, should participate in the compensation of individuals who suffer from such asbestos-related disease; and

(11) the participation referred to in subsection (10) hereof should be in an equitable manner and should be the exclusive remedy for those suffering from an occupationally caused asbestos-related disease.

(b) It is the purpose of this Act—

(1) to establish a national compensation system to provide prompt, adequate, exclusive, and equitable compensation to—

(A) any person disabled by an asbestos-related disease resulting from occupational exposure to asbestos;

(B) any person disabled by an asbestos-related disease resulting from the occupational exposure to asbestos of a member of such disabled person's household;

(C) dependents of a deceased person whose death from an asbestos-related disease results from the occupational exposure to asbestos; and

(D) dependents of a deceased person whose death from an asbestos-related disease results from the occupational exposure to asbestos of some member of the deceased person's household;

(2) to provide a mechanism under which all responsible parties, including but not limited to the Federal Government and those who sold asbestos or products containing asbestos, equitably share the cost of such compensation.

### DEFINITIONS

SECTION 3. (a) For the purposes of this Act—

(1) The term "asbestos" means chrysotile, amosite, and crocidolite and, when they occur in fibrous form, tremolite, anthrophyllite, and actinolite.

(2) The term "asbestos-related disease" means asbestosis, mesothelioma causally related to asbestos exposure of the pleura or peritoneum, bronchogenic cancer causally related to asbestos exposure, or any other disease which the Secretary determines results from exposure to asbestos, and adds to the above list by regulation.

(A) In promulgating any regulation adding to, altering, or amending the list of asbestos-related disease as defined herein the Secretary shall comply with the rulemaking requirements of section 553 of title 5, United States Code, and the hearing requirements of sections 556 and 557 of title 5, United States Code. These sections shall apply as if the Secretary were the agency referred to therein.

(B) In determining whether any other disease results from exposure to asbestos, the Secretary shall determine whether any factors or substances, other than asbestos, contributed to the development of such disease. If the Secretary determines that other factors or substances contribute to such disease, the Secretary shall also determine the amount of contribution of each such factor and



shall accordingly adjust the contribution required under section 13 of this Act.

(3) The term "affected person" means—

(A) a person disabled by an asbestos-related disease resulting from occupational exposure to asbestos;

(B) a person disabled by an asbestos-related disease resulting from the occupational exposure to asbestos of a member of such disabled person's household;

(C) a deceased person whose death from an asbestos-related disease resulted from the occupational exposure to asbestos; or

(D) a deceased person whose death from an asbestos-related disease resulted from the occupational exposure to asbestos of some member of the deceased person's household.

(4) The term "child" means a natural or adopted child or a stepchild who—

(A) is unmarried; and

(B) (i) has not attained eighteen (18) years of age; or

(ii) is currently under a disability as defined in section 223(d) of the Social Security Act which began before such person attained the age of twenty-two (22) or, in the case of a student, which began before the person ceased to be a student; or

(iii) is a student, as defined in this Act.

(5) The term "claimant" means an individual who is eligible to seek compensation under this Act, by meeting one of the subsections of section 1(b)(1).

(6) The term "compensation" means benefits made available under this Act to a claimant, and shall include, but not be limited to—

(A) "monetary benefits" paid to a claimant;

(B) "medical benefits" including payments for or the provision of the services of physicians, hospital care, nursing, ambulance, prosthetic devices, and other related services, drugs, and medicines relating to the care or physical rehabilitation of an affected person.

(7) The term "dependent" means—

(A) a child of an affected person; and

(B) a spouse—(i) who is a member of the same household as the affected person; (ii) who is receiving regular contributions from the affected person for his support; (iii) whose spouse or former spouse is an affected person who has been ordered by a court to contribute to such person's support; or (iv) who meets the requirements of section 216(b)(1) or (2) of the Social Security Act.

(8) The term "disability" shall mean either a "total disability" or a "partial disability."

(A) The term "total disability" has the meaning given it by the regulation of the Secretary. Such regulation shall provide that an affected person shall be considered totally disabled when, by reason of an asbestos-related disease, such person's prior level of earnings had decreased 60 per centum taking into consideration age, training and local conditions. For purposes of this definition, an affected

person's level of earnings shall be his average annual earnings over the highest three of the last five years, excluding any compensation for overtime, immediately preceding the affected person's application for benefits under this Act. The level of earnings of an affected person who has not been employed within that period shall be measured by the affected person's earning capacity as if such person were not disabled. Such determination shall take into consideration the affected person's age, training and local conditions.

(B) The term "partial disability" means a condition that results in less than total disability as defined in this Act.

(9) The term "employee" means any individual who is employed by an employer or who was employed by an employer and, for the purposes of this Act, shall include members of the household of an employee occupationally exposed to asbestos.

(10) The term "employer" means any person employing individuals and engaged in commerce or an industry affecting commerce, and shall include the United States of America, any State or any public agency or political subdivision of such state or of the United States.

(11) The term "Federal workers' compensation laws" means the laws of the Federal Government which provide compensation for death and disability resulting from occupational diseases.

(12) The term "insurance carrier" means any person or fund authorized under section 11 to insure liabilities under this Act or any person, company or fund which provided insurance including product liability insurance to any person or entity which is required to pay any sums under this Act.

(13) The term "Longshore Act" means the Longshoremen's and Harbor Worker's Compensation Act (33 U.S.C. 901 et seq).

(14) The term "Office of Workers' Compensation Programs" means that agency of the United States Department of Labor which is established to receive, process, and pay workers' compensation claims under the various Federal workers' compensation laws.

(15) The term "responsible party" in each case shall include any corporation, partnership, individual, joint venture, or any other entity, or the United States, any State or any public agency or political subdivision of the United States or of any State, which—

(A)(i) employs or employed the affected person or a member of the affected person's household who was occupationally exposed to asbestos during such employment;

aa) there shall be no immunity from the provisions of this Act by reasons of any exclusivity provision of any workers' compensation act or similar immunity; or

(ii) engages or has engaged in the mining, import, manufacture, or sale of asbestos fiber or any product or substance containing asbestos which, by weight of reasonable scientific evidence, is determined to contribute to the incidence of asbestos-related disease, disability, or death; or

(B) is determined by the Secretary or the Commission to have contributed to the occupationally related asbestos-related disease or

death or whose products contributed to the asbestos-related disease or death for which compensation may be paid under this Act.

The term "responsible party" may include the Federal Government, any State or any public agency or political subdivision of such State or Federal Government regardless of whether such Government or agency qualifies under subparagraph (A) of this section.

(16) The term "Secretary" means the Secretary of Labor or the Secretary's designee.

(17) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(18) The term "State average weekly wage" means the average weekly earnings of workers on private payrolls with the State as determined by the Secretary of Labor.

(19) The term "State compensation insurance fund" means that fund which may be established in a State to underwrite the provision of workers' compensation benefits pursuant to the workers' compensation laws of such State.

(20) The term "State workers' compensation laws" means the laws of each State which provide compensation for death and disability resulting from occupational diseases.

(21) The term "student" means a full-time student as defined in section 202(d)(7) of the Social Security Act.

(22) The term "widow" includes the wife living or dependent for support on the affected person at the time of his death, or living apart for reasonable cause or because of his desertion, or who meets the requirements of section 216(c)(1), (c)(2), (c)(3), (c)(4), or (c)(5) and section 216(k) of the Social Security Act, who is not married. The determination of an individual's status as the widow of an affected person shall be made in accordance with section 216(h)(1) of the Social Security Act as if such affected person were the insured individual referred to therein. Such term also includes a surviving divorced wife who, for the month preceding the month in which the affected person died, was entitled to or receiving from the affected person at least one-half of her support, or was receiving substantial contributions from the affected person (pursuant to written agreement), or there was in effect a court order for substantial contributions to her support from the affected person at the time of his death.

(23) In the case of a claimant who is a woman, references in this Act to the wife or widow of such affected person shall be deemed to refer to the husband or widower. Terms in the masculine include the feminine and vice versa.

#### APPLICABILITY

**SECTION 4.** The provisions of this Act shall apply only to disability or death of an affected person resulting from such person's occupational exposure to asbestos, or resulting from the occupational exposure to asbestos of a member of such person's household.

**COMPENSATION FOR DISABILITY OR DEATH**

**SECTION 5.** (a) Compensation shall be available under this Act for death, for total disability, and for partial disability.

(1) Compensation for total disability shall be paid in any case in which, as a result of an asbestos-related disease, the affected person is totally disabled as defined in section 3(8)(A).

(2) Compensation for partial disability shall be paid in any case in which the affected person is partially disabled as a result of an asbestos-related disease and the post-disability wage earning capacity of the affected person is less than 70% of that person's gross weekly wage prior to the disability, taking into consideration age, training, and local conditions.

(b) Compensation for total disability or death due to an asbestos-related disease shall be as follows:—

(1) Monetary benefits for total disability or death due to an asbestos-related disease shall not be less than 66 2/3 per centum of the average gross weekly wage of the affected person for the highest three of the five years immediately preceding the beginning of total disability or prior to death, excluding any bonuses and compensation for overtime.

(2) If the case of an employee who was not employed at the time of the death or the onset of total disability, monetary benefits shall not be less than 66 2/3 per centum of the employee's average gross weekly wage for the highest three of the last five years during which the employee was employed, excluding any bonuses and compensation for overtime.

(3) Compensation provided for in this subsection shall be increased by 50 per centum of the difference between the compensation provided under section 5(b)(1) or 5(b)(2), whichever is applicable, and 80 per centum of the average gross weekly wage of the affected person for the highest three of the five years, excluding only any bonuses and compensation for overtime, immediately preceding the beginning of total disability or prior to death if the claimant has one dependent, and by 100 per centum of the difference if the claimant has two or more dependents, but compensation shall in no case be more than 80 per centum of the affected person's average weekly wage for the highest three of the five years immediately preceding the beginning of the total disability or prior to death, excluding any bonuses and compensation for overtime.

(c) Compensation for partial disability due to an asbestos-related disease shall be as follows:

(1) Monetary benefits for partial disability due to an asbestos-related disease shall not be less than 66 2/3 per centum of the difference between the average gross weekly wage of the affected person for the highest three of the five years immediately preceding determination of partial disability, excluding any bonuses and compensation for overtime, and the wage-earning capacity of the affected person after the

disability taking into consideration age, training, and local employment conditions.

(2) Compensation provided for in section 5(c)(1) shall be increased by 25 per centum of the difference between the compensation provided under section 5(c)(1) and 80 per centum of the average gross weekly wage of the affected person for the highest three of the five years immediately preceding the beginning of partial disability, excluding any bonuses and compensation for overtime, if the claimant has one dependent, and by 50 per centum of the difference if the claimant has two or more dependents, but compensation shall in no case be more than 80 per centum of the affected person's average weekly wage for the highest three of the five years immediately preceding the beginning of partial disability, excluding any bonuses and compensation for overtime.

(d) In the case of an affected person whose disability or death was caused by an asbestos-related disease resulting from the occupational exposure to asbestos of a member of such affected person's household, compensation shall be as follows:

(1) If such affected person was employed, the monetary compensation shall be calculated in accordance with section 5(b) or section 5(c).

(2) If such affected person was not employed outside of the home, the monetary compensation shall be 50 per centum of what the prime wage earner in the affected person's household would be awarded under section 5(b) or section 5(c), as though the prime wage earner was the affected person.

(e) Medical benefits on account of the death, or total disability or partial disability of any affected person shall be provided for all reasonable and necessary medical, hospital, surgical, and associated expenses resulting from treatment of the asbestos-related disease, including the expense of drugs or treatments or nursing care required in the treatment of such asbestos-related disease or in the rehabilitation of the affected person.

(f) With the eruption of section 5(d), Benefits shall be indexed on the basis of any change in the wage scale of the job which the affected person held and which the affected person would still hold if the affected person had not been disabled or had not died, except that benefits may be recomputed once the affected person attains the normal age of retirement or otherwise would have experienced a change in income if the claimant had remained on that job.

(g) Benefits shall be paid for the duration of the disability, or for the life of the claimant, whichever is less, without limitation as to the dollar amount or the period of payment.

(h) Benefits shall be paid to the widow or widower of a claimant for life or until remarriage or habitual cohabitation with a person as if in marriage. If a widow or widower remarries or is determined to be

habitually cohabiting, two years' benefits shall be paid by in a lump sum to such widow or widower, except that—

(1) if there is one or more surviving child, 50 per centum of the benefits payable under this subsection shall be payable to such surviving child or children who shall share equally;

(A) Benefits to each such surviving child shall cease when such person is no longer a child within the meaning of section 3(a)(4).

(2) if there is no surviving spouse, the amounts of benefits payable to any surviving children shall include the amount which would otherwise have been payable to such surviving spouse.

(i) Each employer shall make a reasonable effort to reemploy a rehabilitated affected person, who was an employee of that employer, in a position commensurate with his age, training, and medical condition.

(j) Any claimant, employer, or responsible party may apply to have monetary benefits previously awarded pursuant to this subsection redetermined based upon an increase or decrease in the degree of disability of the affected person; except that such redeterminations may be requested no more frequently than once every twelve months. Such application shall be made and determined in accordance with this provisions of sections 7 through 9 of this Act.

(k) The Secretary shall by regulation prescribe minimum standards for determining whether an affected person is disabled due to asbestos-related disease; or whether the death of an affected person was due to asbestos-related disease.

(1) Regulations required by this subsection shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of this Act, but in no event later than one hundred and twenty days after this Act is enacted.

(2) In promulgating such regulations the Secretary shall comply with the rulemaking requirements of section 553 of title 5, United States Code, and the hearing requirements of sections 556 and 557 of title 5, United States Code.

(A) These sections shall apply as if the Secretary were the agency referred to therein.

(3) Such regulations shall provide that—

(A) claimants seeking benefits under this Act must demonstrate that such affected person has, in fact, developed a disabling asbestos-related disease;

(B) in making the determination that an affected person has developed a disabling asbestos-related disease, all relevant evidence shall be considered, including the history of such person's exposure to asbestos which evidence shall include, but not be limited to, physical examinations, x-ray examinations, medical tests such as pulmonary function studies, blood gas studies and studies of ventilatory capacity at rest and during exercise, physical performance tests, and pathology studies;

(C) medical histories, hospital records, physician's reports, and in the case of a deceased affected person, autopsy report and death certificates, and other appropriate material shall be considered;

(D) the Secretary shall accept the interpretation of a physician who is board certified or board eligible in the fields of preventive medicine/occupational health, pulmonary medicine, or radiology, of a chest roentgenogram which is of acceptable quality submitted in support of a claim for benefits under this Act, if such roentgenogram has been taken by a radiologist or qualified radiologic technologist or technician, except when the claim has been fraudulently represented.

(4) The regulations shall further provide that— (A) for any disease which is known to have causes other than asbestos, a determination shall be made as to whether the claimant was exposed to such other causes.

(i) In the event that an affected person was exposed to such other causes, a determination shall be made as to the percent of the disease caused by exposure to asbestos and the percent attributable to other cause. When it is determined that some cause other than asbestos contributed to the affected person's asbestos-related disease, either the claimant's benefits under this Act shall proportionally be reduced or the Secretary shall require proportionate contribution to the Asbestos Compensation Fund by a responsible party pursuant to Section 13(f) of this Act.

(5) In no event shall there be any presumption of asbestos-related disease based solely on exposure of any person to asbestos or the length of exposure of any person to asbestos.

(7) (1) No compromise or release of any compensation or medical or rehabilitation benefits shall be effective unless approved by the Office of Workers' Compensation, based on a determination by such office that such compromise or release is in the best interest of the claimant, and will not adversely affect any program of rehabilitation.

(2) No waiver, release, or similar instrument relating to future coverage or compensation under any State workers' compensation law or under this Act that is executed prior to the death or onset of disability resulting from any exposure to asbestos or uranium ore shall be effective under any circumstances unless the release is given in consideration of payment received.

(m) Compensation paid pursuant to this Act will not offset or be offset by any other benefits paid to claimants nor be considered as income for tax purposes.

## ELIGIBILITY FOR COMPENSATION

SECTION 6. (a) A claimant shall be eligible for compensation under this Act upon a determination that—

(1) (A) the affected person was exposed to asbestos in the course of employment; or

(B) a member of the affected person's household was exposed to asbestos during the course of employment; and

(2) (A) (i) the affected person is or was disabled by a disease associated with exposure to asbestos; and

(ii) the disease was caused by exposure to asbestos; or

(B) (i) the affected person's death was caused by a disease associated with exposure to asbestos; and

(ii) the disease was caused by exposure to asbestos; and

(3) an award of compensation for such disability or death has not been made under a State workers' compensation law, the Longshore Act, the Federal Employees Compensation Act or in settlement or judgment of a claim or lawsuit based upon such disease or death and a judgment denying compensation for the disability or death has not been rendered.

(b) With respect to all claims for compensation based on disability or death from asbestos-related disease, the claimant shall be eligible for benefits pursuant to this Act upon proof that the exposure to asbestos significantly and substantially contributed to or aggravated the disabling disease or significantly and substantially contributed to the death. The contribution recoverable under this Act shall be reduced based upon the contribution by other causes to the disability or death unless such proportionate share is contributed pursuant to section 13(f) of this Act.

#### PROCEDURE FOR MAKING CLAIMS

SECTION 7. (a) The procedure for giving notice of a disability or death due to an asbestos-related disease is as follows:

(1) (A) Notice of a disability or death for which compensation is payable under this Act shall be given within one year after the onset of such disability or the date of death except that—

(i) with respect to a death which occurred prior to the effective date of this Act, or with respect to a disability the onset of which occurred prior to the effective date of this Act, and for which no award of compensation has been made under a State workers' compensation law or under the Longshore Act, Federal Employees Compensation Act or in settlement or judgment of a claim or lawsuit based upon such disease or death, a notice may be filed within one year after the effective date of this Act; and

(ii) the time for filing a notice shall not begin to run in any event, until the employee has a compensable disability and the employee or claimant is aware, or through the exercise of reasonable diligence should have been aware, of the causal relationship of the disability or death to the occupational exposure to asbestos.

(B) Such notice shall be—

(i) filed with the Office of Workers' Compensation Programs in the district in which the employee resides or the district in which the employee worked, and

(ii) given to the employer.

(C) Failure to notify the employer to whom ultimate liability is assigned shall not bar such a claim for compensation and failure



to file a notice with the Office of Workers' Compensation Programs shall not bar the filing of a claim under subsection (b), but the Secretary may provide by regulation to accord higher priority to the consideration of claims which are properly preceded by a notice.

(2) Such notice shall be in writing, shall be in a form which shall be prescribed by the Secretary, and shall contain the name and address of the claimant, the name and address of the affected person, the name and address of the employee who was occupationally exposed to asbestos, and the identity of the employer and the place of employment at which the claimant believes the employee was last employed and exposed to asbestos. Such notices shall be signed by the employee, the affected person, the claimant, or by some person on his or her behalf.

(b) A claim for compensation for disability or death shall be filed with the Office of Workers' Compensation Program in the district in which the claimant resides or the district in which the employee worked. Such claim for compensation shall be filed within two years after the onset of the disability or the death; except that—

(1) with respect to a death which occurred prior to the effective date of this Act, or with respect to a disability the onset of which occurred prior to the effective date of this Act, and for which no award of compensation has been made under a State workers' compensation law or under the Longshore Act, Federal Employees Compensation Act or in settlement or judgment of a claim or lawsuit based upon such disease or death, a claim may be filed within two years after the effective date of this Act;

(2) the time for filing a claim shall not begin to run in any event, until the employee has a compensable disability and the employee or claimant is aware, or through the exercise of reasonable diligence should have been aware, of the causal relationship of the disability or death to the occupational exposure to asbestos; and

(3) when a claimant has filed a notice of disability in a timely fashion pursuant to subsection (a) of this section, in a case in which the disability has not at that time resulted in a wage loss, a claim for compensation for disability filed pursuant to this subsection shall be timely if filed within one year after the occurrence of a wage loss due to such disability.

(c) There is no limitation on the filing of a claim for compensation due to disability or death under this Act based on the length of time since the employee was last employed, or last exposed to asbestos.

(d) In the case of an affected person whose household member was occupationally exposed to asbestos, any reference in this section, and subsequent sections, to the employer shall mean the employer of the household member who was occupationally exposed to asbestos.

#### **PROCEDURE FOR ADJUDICATION OF CLAIMS**

**SECTION 8.** (a) Upon receipt of a notice of disability, notice of death, or claim for compensation filed pursuant to section 7, the Office

of Workers' Compensation Programs shall establish a claim file, assign a designating number to that file, and notify the employer named in the notice or claim and the claimant of the file number within thirty days. Thereafter, the Office of Workers' Compensation Programs shall make or cause to be made such investigation as is necessary to ascertain whether the employer named in the notice or claim employed the employee, and whether the employee, while so employed, was exposed to asbestos in a manner and of a duration which would appear to make such an employer responsible for the payment of benefits pursuant to section 12 of this Act. If the Office of Workers' Compensation Programs determines that the employer named in the notice or claim did not employ the employee, or did not expose the employee to asbestos in the course of employment, or otherwise is not a responsible employer, the Office of Workers' Compensation Programs shall so notify the claimant and the employer named in the notice or claim, and shall include, in such notification, the reasons therefore. Such notice shall be served personally or by registered mail.

(b) The Secretary shall promulgate procedures to notify all responsible parties liable for contributions to the Asbestos Compensation Fund in the event that no responsible employer is identified after the investigation required under subsection (a) of this section.

(c) The Office of Workers' Compensation Programs shall make or cause to be made such investigations as is considered necessary with respect to the claim for compensation to confirm that the claimant has an asbestos-related disease and is disabled from such disease, which disease must be established by competent medical evidence, and shall order a hearing thereon upon application of the claimant, the responsible employer. If no hearing is requested within thirty days after notice is given pursuant to subsection (b) of this section, the Office of Workers' Compensation Programs shall issue an order awarding or denying compensation. If a hearing on such a claim is ordered, the hearing shall be conducted by an administrative law judge who shall give the claimant, the responsible employer, and the responsible employer's insurance carrier at least two weeks' notice of such hearing (served personally or sent by registered mail), and shall, within thirty days after the conclusion of such hearing, issue a decision awarding or denying compensation. Upon receipt of such decision, the Office of Workers' Compensation Programs shall issue an order awarding or denying compensation in accordance with such decision.

(d) Any hearing held under this section shall be conducted in accordance with the provisions of section 554 of title 5, United States Code. Such administrative law judge shall have all powers, duties, and responsibilities vested in hearing officers under the Longshore Act.

(e) (1) The order awarding or denying compensation shall be filed with the Office of Workers' Compensation Programs, and a copy thereof shall be sent by registered mail to the claimant and to the re-

sponsible employer and the responsible employer's insurance carrier, if such responsible employer is identified, at the last known address of each.

(2) The order awarding or denying compensation shall be filed with the State workers' compensation agency and the State insurance commissioner in the State in which the responsible employer or has a principal place of business.

(3) In the event that no responsible employee was identified, a copy of the order awarding or denying compensation shall be sent by registered mail to all responsible parties liable for contribution under section 13 of this Act.

(f) An award of compensation for disability may be made after the death of the disabled employee.

(g) At any time after a claim for compensation has been filed with the Office of Workers' Compensation Programs, such claim may be transferred to another district of the Office of Workers' Compensation Programs for the purpose of making an investigation, taking testimony, making physical examinations, and taking such other necessary action thereon as may expedite the adjudication of the claim.

### APPEALS

SECTION 9. (a) A compensation order shall be filed in the Office of Workers' Compensation Programs and copies of it sent in accordance with section 8(e) of this Act on the same day. The order shall become effective on the day of mailing. Unless proceedings for the appeal of such order have been instituted pursuant to subsection (b) of this section, such order shall become final at the expiration of the thirtieth day thereafter, *except that*, if the thirtieth day falls on a weekend or legal holiday, the order shall become final at the expiration of the next day which is not a weekend or a legal holiday.

(b) Any claimant, employer, responsible party or insurance carrier who is effected by an order awarding or denying compensation may file a petition for review of such order or award with the Benefits Review Board [hereinafter referred to as the "Board"] established by section 21 of the Longshore Act.

(c) (1) In review proceedings under this section, the decision of the Board shall be based upon the evidence in the record before the Office of Workers' Compensation Programs or the administrative law judge.

(2) The findings of fact by the Office of Workers' Compensation Programs shall be conclusive if supported by substantial evidence on the record as a whole.

(d) Any final order of the Board shall be enforceable and reviewable in accordance with section 21 of the Longshore Act.

### EXCLUSIVITY AND THIRD PARTY LIABILITY

SECTION 10. (a) The compensation to which a claimant is enti-

tled under this Act shall constitute the claimant's exclusive remedy against any employer or the parent or subsidiary or subsidiaries or predecessors or affiliates or successors thereto of such entities or past or present officers or directors or employees or shareholders thereof, the employer's insurer or collective bargaining agent of the employer's employees, or any employee, officer, director, or agent of such employer, insurer, or collective bargaining agent (while acting within the scope of his or her employment) for any illness, injury or death compensable under this Act.

(b) No person or persons entitled to file a claim for benefits pursuant to this Act or who would have been entitled to file such a claim but for the expiration of limitation of action periods as set forth in this act or such other persons whose claim would be derivative therefrom shall be allowed to recover for damages, including but not limited to actual, consequential, or survivorship, for bodily injury or death caused by an asbestos-related disease, loss of consortium, or for exemplary or punitive damages relating to such exposure, against a present or former

(1) miner, importer, manufacturer, distributor, seller, contractor, or applicator of asbestos fibers, or materials, or the parent or subsidiary or subsidiaries or predecessors or affiliates or successors thereto of such entities or past or present officers or directors or employees or shareholders thereof,

(2) any other responsible party as defined in this act,

(3) the United States of America,

(4) the insurers of those entities in (1), (2), and (3), or

(5) a union which has represented such persons for collective bargaining or the parent organization of such union.

(6) For the purpose of this subsection, liability actions against such third parties shall include, but not be limited to, all actions brought for or on account of personal injury, disease, physical or mental impairment, disability or death caused by or resulting from the manufacture, construction, installation, alteration, design, formulation, preparation, assembly, testing, warning, instruction, marketing, packaging, or labeling of any product. It shall include, but not be limited to, all actions for damages based upon the following theories: strict products liability; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether deliberate, negligent, or innocent; misrepresentation, concealment, or disclosure, whether fraudulent, negligent, or innocent, or any other action for damages based upon any theory hereinafter adopted by any court.

(c) Any recovery for disability or death from an asbestos-related disease obtained prior to the effective date of this Act against any third party whether by judgment, award, or settlement in a liability action described in this subsection shall be the claimant's and affected person's exclusive remedy and shall preclude the claimant from seeking recovery under the Act.

(d) Any lawsuit which a claimant or affected person pursued to final determination or settlement before the effective date of this Act shall bar a claimant from filing a claim under this Act even if the claimant or affected person received no award under such lawsuit.

(e) No employer or insurance carrier of such employer shall have any lien upon any judgment rendered in any such third party liability action brought as a result of any disability or death arising out of or in the course of employment with such employer, nor any right of subrogation in connection with any such third party liability action.

(f) (1) No third party may commence any action for indemnity, contribution, or other monetary damages against any party immune from suit by a claimant by reason of subsection (a), based on the liability of such third party to any claimant for any contributions or benefits paid under this Act.

(2) Section 10(b)(5)(A) shall not affect any action for indemnity, contribution or other money damages which was commenced prior to the effective date of this Act or which pertains to liabilities incurred other than under this Act.

#### **EMPLOYER RESPONSIBILITY FOR COMPENSATION AND INSURANCE**

**SECTION 11:** (a) (1) Every employer shall be responsible for payment of compensation which may be payable to its employees under this Act, and shall secure the payment of compensation under this Act—

(A) by insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, or State compensation insurance fund, while such person or fund is authorized—

(i) under the laws of the United States or any State, to insure workers' compensation, and

(ii) by the Secretary, to insure payment of compensation under this Act; or

(B) by furnishing satisfactory proof to the Secretary of its financial ability to pay such compensation and receiving an authorization from the Secretary to pay such compensation directly.

(2) The Secretary, as a condition to an authorization under paragraph (1)(B), may (A) require such employer to deposit in a depository designated by the Secretary either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the Secretary, and (B) require such additional conditions as the Secretary may prescribe, which shall include authorization to the Secretary in case of default to sell any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this Act. Any employer securing compensation in accordance with the provisions of paragraph (1)(B) shall be known as a self-insurer.

(b) In granting authorization to any carrier to insure payment of compensation under this Act, the Secretary may take into consideration the recommendation of any State insurance commissioner or other State authority having supervision over carriers or over worker's compensation, and may authorize any carrier to insure the payment of compensation under this Act in a limited territory. Any insurance corporation or association, authorized to write insurance against liability for loss or damages from personal injury and death or workers' compensation, shall be deemed a qualified carrier to insure compensation under this Act. The Secretary may suspend or revoke any such authorization for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence. No suspension or revocation shall affect the liability of any carrier already incurred.

(c) In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect to such liability, imposed by this Act upon the employer, as the Secretary considers proper in order to effectuate the provisions of this Act. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by the Office of Workers' Compensation Programs, the Board, or the Secretary, or any court under this Act shall be jurisdiction of the carrier, and (3) any requirement by the Office of Workers' Compensation Programs, any administrative law judge of the Department of Labor, the Board, or the Secretary, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

(d) (1) Every policy or contract of insurance issued under authority of this Act shall contain (A) a provision to carry out the provisions of subsection (d), and (B) a provision that insolvency or bankruptcy of the employer or discharge therein shall not relieve the carrier from payment of compensation for disability or death sustained by an employee during the life of such policy or contract.

(2) No contract or policy of insurance issued by a carrier under this Act shall be cancelled prior to the date specified in such contract or policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Office of Workers' Compensation Programs and to the employer.

## **ASSIGNMENT OF LIABILITY FOR PAYMENT OF COMPENSATION**

**SECTION 12.** (a) Upon the final award of compensation pursu-

ant to this Act, responsibility for the payment of compensation shall be established in accordance with the provisions of this section.

(b) If the claimant is determined to be eligible pursuant to section 6 of this Act, in the case of an employee whose disability or death was related to occupational exposure to asbestos, responsibility for the payment of benefits to such claimant shall be assigned to the employer who last employed such employee, unless such employer shall sustain the burden of proving that it did not expose such employee to asbestos for two years or more, or that the exposure was only casual and sporadic in nature. If the last employer which employed the employee did not employ the employee for two years or more, or did not expose the employee to asbestos (other than casually or sporadically) for two years or more in the course of such employment, the responsibility for the payment of benefits shall be assigned to the Asbestos Compensation Fund established pursuant to section 13 of this Act.

### **ASBESTOS COMPENSATION FUND**

**SECTION 13.** (a) There is hereby established the Asbestos Compensation Fund, for the payment of all compensation benefits awarded pursuant to this Act, where no employer responsible for the payment of such benefits has been identified. Compensation benefits shall be paid by the funds on a nonreserved basis.

(b) (1) Insurance coverage available to any manufacturer or importer of asbestos or asbestos containing products, including but not limited to general comprehensive liability coverage shall be available to pay any and all contributions to the Asbestos Compensation Fund or other contributions required under the Act.

(2) Insurance coverage available to any employer, including but not limited to workers' compensation insurance, whether from a licensed carrier or from a State compensation insurance fund established to secure payment to employees for occupationally related injuries or diseases, shall be available to pay any and all contributions to the Asbestos Compensation Fund or other contribution required under the Act.

(c) (1) (A) The Asbestos Compensation Fund shall pay all compensation benefits due on account of awards of compensation due to disability or death resulting from occupational exposure to asbestos where no responsible employer for the payment of such benefits has been determined pursuant to the provisions of section 12 of this Act.

(B) No later than September 1 of each year, the Secretary shall determine the amount of contributions to be made to the fund for the following calendar year. In making the determinations, with respect to the total amounts necessary to sustain the fund for the following year, the Secretary shall consider the past experience of the fund, anticipated obligations of the fund in the following year,

the relative obligations of the responsible parties, and other appropriate data and actuarial projections.

(2) On the basis of the amount established by the Secretary as the total amount of contributions to be made to the fund for the following calendar year, the Secretary shall determine the contribution of responsible parties according to the system of contributions established in this section. The Secretary shall notify the employers' workers' compensation carriers or State insurance funds, and all responsible parties, of the amounts of contributions required for the following calendar year.

(d) (1) 50 per centum of the contributions to the fund shall be made based upon the tier in the distribution process in which the contributor is based. The tiers shall be as follows:

(A) (i) *Tier 1.* 50 per centum of the amount needed for the fund in any one year shall be made by contributions from the miners or importers of asbestos.

(ii) For the purposes of Section 13(f), a manufacturer, fabricator, or processor of asbestos-containing products shall enjoy the limitations on third-party liability contained in Section 10 of this Act if it purchased asbestos directly or indirectly from a miner or imposition of asbestos which is required to or has made contributions under this Act.

(B) (i) *Tier 2.* In the event that the contributions from the miners or importers of asbestos is insufficient to provide 50 per centum of the amount needed for the fund in any one year than the additional contributions to the fund shall be made by the manufacturers, fabricators, or processors of products containing asbestos.

(ii) 70 per centum of any contributions to the fund made by manufactureres, fabricators, or processors of products containing asbestos shall be made by manufacturers, fabricators, or processors of products of which asbestos is a significant constituent element and 30 per centum of such additional contributions to the fund shall be made by manufacturers, fabricators, or processors of products which contain asbestos but of which asbestos is not a significant element.

(aa) an asbestos content or more than 30% of all be considered a product in which asbestos was a significant element;

(bb) In computing contributions in accordance with subsection (D), the sales figures for products containing significant amounts of asbestos shall be computed separately from products of which asbestos is not a significant element.

(iii) For the purposes of section 13(f), a distributor or wholesaler of products containing asbestos shall enjoy the limitations on third-party liability contained in Section 10 of this Act if it purchased products containing asbestos directly or indirectly from a manufacturer, fabricator, or processor which is required to make contributions or has made contributions under this Act or is protected by subsection 13(d)(1) (B)(ii).

(C) *Tier 3.* In the event that contributions from the miners, importers and the manufacturers, fabricators or processors of asbes-



tos is insufficient to provide 50 per centum of the amount needed for the fund in any one year, then contributions to the fund shall be made by the next tier in the distribution process, that is, distributors or wholesalers of products containing asbestos.

(D) In no event shall contributions to the fund from any party in any tier exceed 2 per centum of gross sales of products containing asbestos or 10 per centum of net profits of products containing asbestos, whichever is less. In determining these percentages a fraction shall be created with gross sales or net profits of asbestos-containing products from 1940 to the date of the contribution as the numerator of the calculation and the number of years from 1940 to the date of the calculation as the denominator of the calculation.

(2) In accordance with section 13, 20 per centum of the contributions to the fund shall be made by employers who expose or exposed employees to asbestos in the course of employment with such employers.

(3) 30 per centum of the contributions to the fund shall be made by the United States Government.

(e) (1) In addition to the contributions otherwise required under this Section, the Secretary shall determine whether any responsible party, employer, or the United States Government had an additional role in contributing to asbestos-related disease. If the Secretary determines that one or more of such persons or entities had an additional role in contributing to asbestos-related disease, the Secretary may require such party to make an additional contribution to the Fund. In determining whether such party had an additional role in contributing to asbestos-related disease, the Secretary shall consider the following:

(A) control of the workplace environment including establishing exposure limits for the workplace environment;

(B) the party or parties responsible for working conditions at the workplace;

(C) the party or parties responsible for the design, formula, testing, warning, instruction, marketing, packaging, distribution, or labeling of asbestos fiber or any asbestos-containing product which is determined to contribute to the incidence of asbestos-related disease, disability or death;

(D) the party or parties responsible for promulgating specifications pursuant to which products containing asbestos were designed, manufactured or sold; and

(E) the party or parties having knowledge of the connection between asbestos and disease prior to 1950.

(2) Any party required to make contributions under this subsection shall not enjoy the limitations or contributions found in subsection (d)(1)(D) to this section.

(f) In addition to the entities described above any entity shall contribute to the fund if the Secretary determines that it or its products had any role in contributing to the disease for which compensation is sought.

(g) Any contributions made pursuant to subsection (e) or (f) of

this section, shall be applied to the amount of contributions needed for the Fund for a given year, thereby reducing the total amount for which contributions will be required.

(h) Except as provided in subsections (d)(1)(B)(ii) and (d)(1)(C)(iii), no responsible party which has not paid its contribution as required pursuant to section 13(i), in accordance with a schedule prescribed by the Secretary for such payment, shall enjoy the limitations on third party liability provided in section 10 of this Act with respect to any liability action instituted during any period beginning on the date on which the contributor was due and ending on the date on which such contributor has paid in full that contribution and any succeeding contributions which have become due.

(i) There is established in the Treasury of the United States an Asbestos Compensation Fund. Such Fund shall be administered by the Secretary. The Treasurer of the United States shall be the custodian of such Fund, and all moneys and securities in such Fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

(1) The Treasurer is authorized to disburse moneys from such fund only upon order of the Secretary. He shall be required to give bond in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and the Comptroller General of the United States conditioned upon the faithful performance of his duty as custodian of such fund.

(2) (A) The contributions of miners, importers, manufacturers, fabricators, processors, and distributors, and importers of asbestos or of products containing asbestos shall be collected each year by the Secretary and deposited into the fund. The proportionate share of each contributor shall be based on the sale of asbestos or asbestos-containing products of each such contributor during the previous fifteen years, *except that*, if the Secretary determines that sales over the previous fifteen years do not accurately reflect the overall market share of any such responsible party, the Secretary may, for such responsible party, assess contributions based on sales over any fifteen-year period since January 1, 1940.

(3) (A) If a responsible party fails or refuses to pay an assessment required to be paid under this section within thirty days after notification thereof, or fails or refuses to comply with a rule promulgated pursuant to this Act, the Secretary is authorized to bring a civil action in the appropriate United States district court to require the payment of such assessment or compliance with such rule.

(B) A responsible party who fails or refuses to pay any assessment required to be paid under this section may be assessed a civil penalty by the Secretary in such amount as the Secretary may prescribe, but not in excess of an amount equal to 50 per centum of the assessment the responsible party failed or refused to pay. Such penalty shall be in addition to any other liability of the responsible

party under this Act. Penalties assessed under this paragraph may be recovered in a civil action brought by the Secretary and penalties so recovered shall be deposited in the fund.

(4) All amounts collected as fines and penalties under the provisions of this chapter shall be paid into such fund.

(5) To each contribution to the Asbestos Compensation Fund, shall be added the following surcharge:

(A) an amount equal to five per centum of each contribution, which shall be used by the Secretary to pay the costs incurred by the Office of Workers' Compensation Programs, the Division of Administrative Law Judges, and the Board in connection with claims filed pursuant to this Act, except that if in any year the amounts provided by this surcharge exceed the costs of program administration the Secretary shall direct that the surcharge for the following year shall be correspondingly reduced; and

(B) an amount equal to one per centum of each contribution, which shall be available for use in research in discovering and developing a cure for asbestos-related disease pursuant to the provisions of section 17 of this act.

(6) The Treasurer of the United States shall deposit any moneys paid into such fund into such depository banks as the Secretary may designate and may invest any portion of the funds which, in the opinion of the Secretary, is not needed for current requirements, in bonds or notes of the United States or of any Federal land bank.

(7) Neither the United States nor the Secretary shall be liable in respect of payments authorized under this section in an amount greater than the money or property deposited in or belonging to such fund.

(8) The Comptroller General of the United States shall audit the account for such fund, but the action of the Secretary in making payments from such fund shall be final and not subject to review, and the Comptroller General is authorized and directed to allow credit in the accounts of any disbursing officer of the Secretary for payments made from such fund authorized by the Secretary.

(9) At the close of each fiscal year the Secretary shall submit to the Congress a complete audit of the fund.

(j) If the amounts assessed and collected for the benefit of the fund in any year are in excess of the liabilities of the fund for such year, the contributions to the fund for the following year shall be adjusted to reflect the claims experience of the fund during the previous year. Such adjustments shall be made by the Secretary, in consultation with the State insurance commissioners, and shall be reflected in the following year's assessment rate, and the assessment reductions shall be allocated among the responsible parties in accordance with their allocated rates of contributions to the funds established in this section.

(k) Except as provided in subsections (d)(1)(A)(ii) and (d)(1)(B)(iii) no miner, importer, manufacturer, fabricator, processor, wholesaler, or distributor of asbestos or of products containing asbestos shall enjoy the limitations on third party liability provided in Section

10 of this Act if such miner, importer, manufacturer, fabricator, processor, wholesaler, or distributor does not participate in the Asbestos Compensation Excess Liability Fund established in this section.

#### PAYMENT OF COMPENSATION

SECTION 14. (a) Compensation under this Act shall be paid periodically, in accordance with the schedule for payment of workers' compensation benefits of the law of the State in which the employer responsible for the paying of such compensation shall reside or have its principal place of business, or, if no responsible employer is identified, in accordance with the schedule of workers' compensation benefits which shall be promulgated by the Secretary, upon the issuance of a final compensation order pursuant to section 8 or 9 of this Act.

(b) (1) Upon making the first payment of compensation, the employer or the employer's insurance carrier shall notify the Office of Workers' Compensation Programs, the State worker's compensation agency, and the State insurance commissioner of the commencement of the payment of compensation, the amount of compensation to be paid, and the schedule for the payment of compensation.

(2) Upon suspension of payment in any case, the employer or employer's insurance carrier shall immediately notify the claimant, the Office of Workers' Compensation Programs, the State workers' compensation agency, and the State insurance commissioner of such suspension, and the reason therefor.

(3) Annually, within thirty days after the anniversary date of the commencement of compensation payments under this Act, the employer or the employer's insurance carrier shall file with the Office of Workers' Compensation Programs, the State workers' compensation agency, and the State Insurance Commissioner, a report detailing the total amount of monetary benefits paid in connection with such claim and the medical benefits paid in connection with such claim during that year.

(4) The failure to file any of the notices required by this subsection shall be subject to a civil penalty of not more than \$1,000 for each such failure.

(c) (1) When the payment of compensation has been suspended, upon the request of any recipient of the compensation, the Office of Workers' Compensation Programs shall conduct an investigation of the case and the reasons for suspension of the payments, and shall make a determination with regard to the suspension of the payment. If the Office of Workers' Compensation Programs finds that such payments were improperly suspended, it shall order the employer to commence payment of the compensation, and all suspended payments shall be paid to the person entitled thereto with interest at a rate equal to 20 per centum per annum of the amount so ordered to be paid.

(2) Any person who is aggrieved by an order of the Office of Workers' Compensation Programs with respect to suspended payments may appeal from such order to the Board in accordance with the pro-

cedures in section 9 of this Act. Orders issued pursuant to this section shall be enforceable in accordance with section 21 of the Longshore Act.

(d) If any compensation payable under the terms of an award or order of compensation pursuant to this Act is not paid within twenty-one days after such award or order shall become final, or if any installment of compensation is not paid within twenty-one days after such award or order shall become final, or if any installment of compensation is not paid within fourteen days of the date of which such compensation is due, there shall be added to such compensation or compensation payment, an amount equal to 20 per centum thereof, which shall be paid to the person entitled to such compensation at the same time as, but in addition to, the compensation payment, unless review of the compensation award or order is pending pursuant to section 8 of this Act, and an order staying such payment has been issued by the Board, or the court.

### DISCRIMINATION

SECTION 15. (a) No responsible party may discriminate on the basis of race, creed, color, national origin, age, sex, handicapped condition, prior employment in the asbestos industry, or past exposure to asbestos, against a claimant or any other person directly involved in making a claim pursuant to this Act. No responsible party may discriminate against a claimant for exercising any rights under this Act or exercising any right under applicable State or Federal workers' compensation laws.

(1) Any claimant who believes that he has been discharged or otherwise discriminated against by any responsible party covered by this Act in violation of section 4, subsection 12 of this Act may, within ninety days after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code. Each hearing examiner presiding under this section shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5, United States Code. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action as the Secretary deems appropriate, but not limited to, the rehiring or reinstatement of the

claimant to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Secretary's findings therein.

### REPRESENTATION FEES

SECTION 16. (a) The Office of Workers' Compensation Programs, the administrative law judge, the Board, or court, as shall be appropriate, shall determine a reasonable representation fee taking into account the responsibility assumed by the representative, the complexity of the case, the care exercised in developing the case, the time involved, and the results involved, if—

(1) the employer or the employer's insurance carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the Office of Workers' Compensation Programs; or

(2) the employer or the employer's insurance carrier suspends payment of compensation, and the person seeking benefits, or the person seeking resumption of the suspended compensation payments shall thereafter have utilized the services of a representative in the successful prosecution of such claim;

(b) Such representation fee shall be paid to the representative in one lump sum, directly, by the employer or the employer's insurance carrier involved, within two months after the order of compensation shall become final.

(c) (1) In cases where a representation fee is awarded pursuant to subsection (a) of this section, there shall also be assessed an amount for the payment of costs, fees, and mileage for necessary witnesses attending the hearing at the instance of the claimant. Both the necessity of the witnesses and the reasonableness of the fees of expert witnesses must be approved by the administrative law judge, Board, or court, as the case may be.

(2) The amount assessed for such costs and fees shall also be paid to the claimant's representative, directly by the employer or insurance carrier, as may be appropriate, in one lump sum, for disbursement by that representative, to the witnesses, or as may be required.

(d) Any person who receives any fees or other consideration, or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved by the administrative law judge, Board, or court, or who makes it a business to solicit employment for an attorney at law or for himself in respect to any claim or award of compensation, shall upon conviction thereof, for each offense be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

### **ASBESTOS-RELATED DISEASE RESEARCH**

**SECTION 17.** (a) The Secretary, in conjunction with the Secretary of Health and Human Services, shall provide for the annual award of research grants to persons or entities conducting research or monitoring research whose purpose is to discover or develop a cure for any asbestos-related disease.

(b) In furtherance of this objective, the Secretary, in conjunction with the Secretary of Health and Human Services, shall establish a procedure to receive and evaluate proposals for research and development projects concerning the cure of any asbestos-related disease and to award research grants to those persons or entities whose proposals will best serve the objective of this section.

(c) Any person or entity receiving funding under this section shall annually report to the Secretary and the Secretary of Health and Human Services with respect to the research project undertaken pursuant to this section.

(d) All research programs undertaken pursuant to this section shall be conducted with funds available under the surcharge established in subsection (i) or section 13 of this Act.

### **MISCELLANEOUS**

**SECTION 18.** (a) The Secretary may prescribe such rules, regulations, and guidelines under this Act as he deems necessary. All such rules, regulations, and guidelines shall be published in the Federal Register at least thirty days prior to their effective date.

(b) The Secretary may make such grants, contracts, or agreements, establish such procedures, and make such payments, installments, and advance by way of reimbursement, or otherwise allocate or expend funds made available under this Act as he deems necessary to carry out the provisions of this Act. The Secretary may make necessary adjustments in payments on account of overpayments or underpayments.

(c) The Secretary is authorized, by cooperative agreement to carry out the duties of a responsible party under this Act for each department and agency of the Federal Government.

### **ASSIGNMENT OF CLAIM**

**SECTION 19.** An assignment of a claim for compensation under this subchapter is void. Compensation and claims for compensation are exempt from claims of creditors.

### **ANNUAL REPORT**

**SECTION 20.** Within one hundred and twenty days following the convening of such regular session of each Congress, the Secretary shall

prepare and submit to the President for transmittal to the Congress a report upon the subject matter of this Act and the progress toward achievement of the purpose of this Act.

#### **AUTHORIZATION OF APPROPRIATIONS**

**SECTION 21.** There are authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

#### **SEPARABILITY**

**SECTION 22.** If any provisions of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, except that Section 10 shall not operate to relieve any party of liability if any provision of this Act requiring payments or contributions is held invalid or if the application of such provision to such party is held invalid, exempt that if section 13(d) is held to be invalid as to any responsible party, then the entire Act is invalid as to that party unless that party affirmatively elects to make itself subject to the he Act.

#### **EFFECTIVE DATE**

**SECTION 23.** (a) Except as otherwise provided therein, the provisions of this Act shall become effective six months after the date of enactment of this Act.

(b) Any claimant who, as of the effective date of this Act, has pending in any Federal court or any court in any of the several States, an action at common law to recover damages on account of any asbestos-related disease, as defined in section 2 of this Act, may, within one hundred and twenty days of the effective date of this Act upon first dismissing with prejudice such action at common law, elect to proceed under the provisions of this Act. Any claimant no so electing, or who has pursued a claim to settlement or final determination in an action at law, shall not be entitled to benefits under this Act.

(c) Should the remainder of this Act be declared null and void, the claimant electing to proceed under the provisions of this Act shall, within one hundred and twenty days from the date of the final order declaring the remainder of the Act null and void, be permitted to reinstitute his or her action to recover damages with respect to asbestos-related disease.