

NLWJC - Kagan

DPC - Box 043 - Folder 003

Tobacco-Settlement – Asbestos

Cynthia Dillard 09/29/98 11:29:14 AM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP
cc:
Subject: I spoke to Perrelli about asbestos

Justice does not like the asbestos proposal, both on substantive grounds and because it is extremely vague. He summed up their views as follows:

1) By allowing the asbestos industry to seek contribution from the tobacco industry for judgments paid to asbestos/tobacco victims, this proposal gives an advantage to the asbestos industry that no other litigant enjoys -- including other industries, individual victims, and the federal government. This provides an unfair advantage to the asbestos industry -- something we would not support. Additionally, while the purported purpose of this bill is to require any funds recovered from the tobacco industry to be passed on to the victims, nothing in the bill's language specifically requires this; it does not make any new money available to victims, instead it just allows the company to seek contribution. Even if the companies went bankrupt and they paid only a portion of their claims, the bill language does not clearly require additional money to go to the claimants (because their claims would have been discharged in bankruptcy).

2) It is not clear whether the bill creates a new federal cause of action, or whether it just clarifies state law causes of action. If it does the latter, it raises significant federalism problems, by interfering with state law procedural doctrine.

3) the bill is extremely vague. Thus, even if we did want to support it, we would need a lot of clarification.

- ① asbestos industry seeks contribution
- ② funds go to victim.

change to procedural rules -

- ~~allows~~ ~~state laws~~ which allows contribution ^{axn} even though case settled
- allows consolidated axns = statistical evidence
- 1 yr statute of lim
- trust could assert claims of predecessor companies.
- do they have die hard objections to procedural q's? or is it just that it is unfair to give it to industry.

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

PRIVILEGED: ATTORNEY CLIENT COMMUNICATION AND ATTORNEY WORK PRODUCT REFLECTING LEGAL ANALYSIS MADE IN CONTEMPLATION OF LITIGATION WHICH MAY BE BROUGHT CHALLENGING THE LEGISLATIVE PROPOSAL DISCUSSED HEREIN

MEMORANDUM

TO: Thomas Perrelli

From: J. Patrick Glynn
Director, Environmental Torts

Date: September 28, 1998

Subj: Comments Regarding Legislative Proposal Pertaining To Tobacco-Asbestos Claims.

At your request, we have examined a legislative proposal submitted to Josh Gotbaum of the office of management and Budget by the Wexler Group on September 18, 1998. Please bear in mind that we have only had a brief time to contemplate the proposal. We have identified, however, a number of issues which we believe should be given additional consideration.

Several global issues that we had addressed in connection with provisions for an asbestos trust fund in connection with the previously proposed tobacco settlement legislation remain of concern in connection with this proposal. These include concerns that this legislation would give special treatment to asbestos exposure victims relative to other victims of tobacco exposure; that potential recoveries would go not only for asbestos-tobacco injuries but also for asbestos injuries that were not related to tobacco smoking; that the legislation would result in a substantial burden on federal and state courts to adjudicate a new phase of "asbestos" litigation; and that members of the asbestos-product industry, that have previously been found to have acted irresponsibly may enjoy a windfall benefit from the legislation, even accounting for the proposed limitation that proceeds would only go to asbestos claimants.

Our comments below track the designated sections and paragraphs of the draft legislation for the most part. We do have concerns about the legislation based upon notions of federalism, notions of fairness, and concerns regarding the practicality of the proposal.

Section 1. Findings and Purposes

We make no comments on the validity of the assertions contained in Section I., as we

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deem that outside of any special area of our expertise.

Section 2. Rules For Certain Claims Against Tobacco Companies

- * General Comment. It is unclear to us whether this legislation is attempting to create a federal cause of action for contribution for "Certain Claims" (and, pursuant to that federal claim, merely borrowing certain state law rules of decision, much as in a diversity action or FTCA claim), or merely to alter some (but not all) of the procedural and/or substantive rules of decision pertaining to contribution actions arising under state law. We believe this issue should be addressed at the outset, because it has important implications for the draft legislation as a whole and the various subsections of the draft legislation which follow. For example:
 1. If this is intended to create a federal cause of action, what is the Constitutional basis for the law? Although we assume the Commerce Clause is the most likely Constitutional justification for such federal legislation, we are also aware that recent Supreme Court cases have seemingly cut back on the breadth of legislation permissible under the Commerce Clause. See e.g. Lopez. Resolution of this question is certainly beyond our expertise; we raise the question merely for your consideration.
 2. If it does not create a federal cause of action, what would be the basis of a federal court's subject matter jurisdiction for such claims, as provided for in subsection 2(b)?
- * Would such an action permit the tobacco companies to join, as third-party defendants, other potentially liable parties who would otherwise have repose by now (including, among others, certain asbestos companies and/or their successors who may not have been sued in particular actions for various reasons, the United States, other chemical companies that provided products to which the claimants may also have been exposed,

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etc.). That is, under applicable rules of procedure, the tobacco companies would normally now be entitled to pursue third-party claims against such entities (and indeed, cross-claims against the entities bringing suit). Is that a wise idea?

- * Is it fair to permit asbestos trust funds and asbestos companies to receive relief from rules otherwise barring their suits, when no such relief is provided for other victims of tobacco exposure, including those involved in other occupational injuries attributable, at least in part, to tobacco exposure?

Subsection 2(a). Availability of Actions

- * This provides for actions for contribution and indemnification *or otherwise*. We have no idea what the "or otherwise" might entail.

The substantive elements of actions for "contribution and indemnification" vary from place to place, but basically it should be kept in mind that these actions allow for recovery of monies paid in excess of the pro rata share of the party seeking contribution. This seems a bit problematic in the context of what we perceive to be the purpose of this bill, namely, to secure increased payments for people injured by exposure to asbestos and tobacco. That is (even assuming the defendant paid more than its pro rata share of plaintiffs' damages), to the extent that an asbestos defendant actually made full compensation to an asbestos claimant, it seems illogical that the claimant should be the beneficiary of any amount secured by the asbestos-defendant via a contribution/indemnification action against a tobacco company, in that the claimant has already received full compensation. To the extent that the asbestos defendant has made something less than full compensation to the asbestos claimant, the defendant may or may not have paid more than its pro rata share of liability to the claimant. Again, even if it has, it is illogical that the claimant should be the

Federal cause of action?
Fair to give to
trusts but no one
e/SZ

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beneficiary.

Put another way, the upper limit that can be recovered in a contribution action^{4/} is that which has already been paid by the defendant/third party plaintiff; and, of that, the defendant/third party plaintiff can only recover the amount that can be shown to be in excess of its pro rata share of the judgment or settlement. Contribution/identification actions make the defendant/third-party plaintiff whole; they **do not increase the size of the pot available to pay the plaintiffs' claims.**

We are uncertain about the effect of the discharge in bankruptcy of the obligations of some of the asbestos defendants. We do not have substantial expertise in this area, and suggest that persons who do should be consulted. For instance, we raise the question whether, where a particular asbestos company has discharged its debt in bankruptcy and has paid, therefore, only a portion of the liability assessed against it to the claimants, that defendant can be said to have paid "more than its pro rata share" in such a manner that would support a post-discharge contribution action against a joint tortfeasor?

Subsection 2(a)(1).

This subsection raises substantial issues of federalism, legality, and practicality.

- * Many states have, through deliberate legislative action, decided that settling defendants forego the right to contribution from other joint tortfeasors (unless the settling defendant secures a release on behalf of that other joint tortfeasor as part of the settlement). It is argued that such a regime encourages settlements. That may or may not be true (indeed, other regimes are employed by various states), but it is a choice made by certain of the states. This bill overrides that choice.
- * This subsection raises the issue of a potential legal challenge predicated upon the equal protection clause of the 14th Amendment. For example, although there is a line of cases holding that the due process clause of the 14th Amendment is not violated if a statute of limitations is extended (or repealed) retroactively to allow claims that would have otherwise been time-barred (see discussion below

^{4/} It should be kept in mind that this legislation contemplates true contribution/indemnification actions, given that it pertains only to claims which have already been resolved via judgment or settlement. That is, the legislation does not contemplate a third-party action whereby the tobacco companies would be made a party to an ongoing lawsuit between the claimant and the asbestos defendant.

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regarding subsection 2(a)(3)), those same cases raise the specter of challenges predicated upon the equal protection clause of the 14th amendment. The proposed legislation singles out a particular class of defendants (tobacco companies), not merely all potential joint-tortfeasors against whom the asbestos companies/trusts could seek recovery. Although we recognize that the allegations of concealment against the tobacco companies included in Section I might provide a basis for singling out this class of defendants, it should be noted that similar allegations have been made against oil companies with respect to the harm caused by petroleum constituents (i.e. benzene), and there may be similar allegations regarding other substances to which the claimants likely were exposed.

- * As a practical matter, in those jurisdictions which do not allow contribution following settlement, there are no "substantive rules" governing such actions. Perhaps the proposed legislation intends that, in such situations, the court hearing such a claim should treat it as if it involved a contribution action for amounts paid following a judgment. The intent is unclear. Moreover, it is unclear whether such rules can be properly applied where there has been a settlement. For instance, in many states, a settlement requires a fairness hearing -- that is, a determination that the amount being paid is fair payment for the settling defendant's contribution to the harm. No such hearing would have been held regarding a judgment against a defendant. Should the court disregard the findings of the fairness hearing in an action brought pursuant to this proposed legislation?

Subsection (2)(a)(2).

This section is very problematic as applied to claims for contribution and/or indemnification.

- * As discussed above, these actions require a showing that the defendant/third party plaintiff paid more than its pro rata share of liability on the underlying claim. Where the underlying claims were litigated separately, the type of "aggregated proof" that would be required to support a contribution or indemnity claim is not clear.
- * The phrase "damages shall be assessed based upon degree of relative causation" seems likely to cause trouble for several reasons. First, as mentioned above, the limit of damages recoverable in a contribution/indemnification action is the amount already paid. Talking about "damages to be assessed" seems to anticipate that additional damages can be awarded pursuant to the action contemplated here. Further, even if this is read to mean only that the damages to be assessed in the action contemplated by this proposed legislation will be limited to some proportion of what the asbestos defendant has already paid because the asbestos defendant paid more than it should have, in normal contribution theory, that

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payment should go to the asbestos defendant, not the claimant. In other words, if this proposed legislation were applied to a case in which the asbestos defendant paid the full amount of a claim, there would be no basis for requiring a contribution award to be paid to the claimant, as that would constitute a double recovery. Correspondingly, only in those cases in which the asbestos defendants (or their successors in interest, the trusts) were unable to pay the full amount of a particular claim should recoveries from the tobacco companies go to the claimant. If the intent of the legislation is to increase the pot of money available for future claimants, why be so indirect? Why not simply allow the claimants themselves to bring additional suits against the tobacco companies or allow their joinder in future cases?

Market share

* The use of statistical data in a contribution action is highly problematic, on many levels. While such a system might make sense in the medicare recovery scenario, it does not make sense in a tort action where the issue is the relative liability of the purported joint tortfeasors. Even if allowed, aggregation would not be a simple matter. Any statistical model, to be minimally relevant, would have to account for different levels of exposure, smoking duration, date of smoking, age, gender, etc. to be meaningful. Market share might be relevant, but what if the defendant could show that a particular claimant (or entire group of claimants) never smoked its brand? Or only occasionally smoked its brand? This is a much more complicated matter than the proposed legislation seems to contemplate.

* Moreover, the language of this section, intentionally or not, seemingly would allow the contribution/indemnification claimant to recover even in instances where the tobacco company would not have been liable as a tortfeasor to the underlying claimant based upon the substantive law of the relevant jurisdiction. That is, the language seems to equate liability ("damages shall be assessed ...") with "the degree of relative causation [in fact of the illness], regardless of whether the tobacco company's relative contribution to causation of the illness was legally actionable in the first place. Perhaps this is not the intention, but the general language of subsection (b) regarding "substantive law rules governing liability" is expressly limited by the entirety of subsection (a). If it is the intention, we think it highly problematic that proposed legislation would so drastically change the substantive tort law of the states.

Subsection 2(a)(3)

This subsection pertains to statutes of limitation. We believe there are some potential legal difficulties here.

* Although there are a number of cases which hold that the due process clause of the 14th Amendment does not preclude a state legislature from retroactively

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extending (or eliminating) the statute of limitations, see e.g. Chase Securities v. Donaldson, 325 U.S. 304, 65 S.Ct. 1137 (1945), those cases also note that if, pursuant to the state constitution "due process clause", an expired statute of limitation constitutes a property right in favor of the defendant, the state constitution provides a separate and independent basis for challenging a retroactive extension of the statute of limitation. Id. at FN 9. A number of states have interpreted their constitutions in precisely this manner. That is, under their constitutions, a statute of limitations defense is a property right, which can not be taken without just compensation. Clearly, this is not the case pursuant to the federal constitution, which in this instance, provides less protection than the state constitutions. This raises an interesting question. Is this a case where the federal government is attempting to "ratchet down" protections afforded by the state constitution? Or is this merely an instance where the supremacy clause of the federal constitution allows Congress to do what the legislatures of those states could not, with respect to their own tort law and the related legislative enactments regarding statutes of limitations? Moreover, it may be that the answer is dependent upon our initial question: does this proposed legislation create a new federal cause of action, or merely purport to alter some (if not all) of the state law provisions applicable to state causes of action. Again, we have not had time to formulate a definitive answer, but raise the question for further consideration.

- * Moreover, the rule set out in Chase Securities is not absolute. Where a statute, in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law. See Chase Securities at FN 8, citing Danzer & Co. v. Gulf & Ship Island R. Co., 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126, and Davis v. Mills, 194 U.S. 451, 24 S.Ct. 692, 48 L.Ed. 1067.
- * Finally, as mentioned above, the rule set out in Chase Securities applies to challenges pursuant to the due process clause. That case suggests that challenges to retroactive extensions of statutes of limitation may be sustainable pursuant to the equal protection clause, given the right set of facts.

Subsection 2(a)(4)

This section raised the following issues for us:

- * Again, if the trusts are deemed to "step into the shoes" of the asbestos defendants, it would seem that they could do no better than recover that which their predecessors in interest could recover in a contribution/indemnification action.
- * We also concerned whether this provision could cause trouble in the following sense. Suppose that the predecessor in interest had tendered claims to its liability

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insurer(s), which then took a subrogation interest in whatever rights the insured might have to recovery from third-persons? As written, the proposed legislation would transfer ownership of that right from the insurer(s) to the asbestos trusts. That seems problematic to us.

Subsection 2(b) Certain Rules

- * As noted above, there seems to be some potential tension between this subsection and subsection 2(a)(2) with respect to the issue of whether or not the tobacco companies would retain certain defenses (i.e. assumption of risk, federal preemption, etc.) in the contribution action. If they do, it is our opinion that the legislation would not accomplish much. Further, aggregation of claims solely on the basis of a statistical measure of causation would be inconsistent with retention of defenses in individual cases.
- * Likewise, the substantive elements of contribution/indemnification claims discussed at length above may make this a meaningless exercise. That is, contribution actions under state law don't increase the pot; they merely make one of the joint tortfeasors whole.
- * If this proposed legislation does not create a federal question cause of action, then there is no subject matter jurisdiction for such cases in the federal district courts (absent an independent basis such as full diversity of citizenship).
- * Although we see no legal barrier to the provision precluding removal of such actions if filed in state court, it seems an unusual provision to us, especially if this legislation is read to create federal question jurisdiction.

Section 3. Preservation of Proceeds For Victims

- * Again, this notion seems entirely inconsistent with the elements of a contribution/indemnification action.
- * Moreover, there is no apparent limitation that any such payment of proceeds will be utilized to pay only the claims of asbestos claimants whose claims were settled or adjudicated prior to passage of the proposed legislation. That is, it seems that proceeds from actions brought pursuant to this proposed legislation could be used to pay claimants who could now sue the tobacco companies themselves (or, alternatively, have actions pending or future which postdate the alleged fraudulent concealment, and, in which, therefore, the tobacco companies could be meaningfully impleaded). Furthermore, of course, to the extent that asbestos defendants that are still in business are able to satisfy judgments and settlements from proceeds recovered from tobacco companies, rather than from their own

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corporate funds, the actual economic effect is no different than would be the case if there were no restriction upon the use of the proceeds. Stated differently, the restrictions upon use of the proceeds set forth in this section, insofar as operating companies (as opposed to claims trusts) are concerned, are largely illusory.

* The problem vis-a-vis insurers applies here as well.

I add the caveat that we have not had the opportunity to clear these comments with Donald Remy or any other components of the Civil Division, and, thus, reflect only our [admittedly limited] review of the materials submitted.

cc: Donald Remy

TITLE. TOBACCO-ASBESTOS CLAIMS**Sec. 1. Findings and Purpose.****(a) Findings.—The Congress finds that:**

(1) Tobacco manufacturers have concealed research results regarding the adverse health effects of tobacco, have misrepresented the addictive nature of their products, and have made improper claims of legal privilege concerning the evidence of their misconduct.

(2) As a result, tens of thousands of asbestos-tobacco claims have been brought against and resolved by asbestos manufacturers only, with no contribution by tobacco manufacturers. This unprecedented litigation burden has caused the asbestos manufacturers with the largest market shares to file bankruptcy, and the bankruptcy trusts that now stand in their place have insufficient funds to pay more than a fraction of the compensation owed to asbestos-tobacco claimants.

(3) It is now impractical to litigate and resolve contribution, indemnity and similar actions by asbestos trusts and asbestos defendants against tobacco companies on a claimant-by-claimant basis, and tobacco companies' prior misconduct should not be permitted to benefit them in existing and future litigation.

(b) Purpose.—It is the purpose of this Title: (1) to spread the costs of the harm suffered by asbestos-tobacco claimants arising from exposure to tobacco, which have been borne by asbestos defendants and trusts who have paid the tobacco companies' share of responsibility for asbestos-tobacco claims in the past, and (2) to provide fair and efficient rules for litigation of contribution, indemnity and similar claims against tobacco companies in light of the findings in this section. To accomplish this purpose, this Title shall apply retroactively to all actions described in this Title pending on or filed after the date of enactment of this Title, which are based upon or arise from asbestos claims and asbestos-tobacco claims which have been settled or the subject of a final judgment before the date of enactment of this Title.

Sec. 2. Rules for Certain Claims Against Tobacco Companies.

(a) Availability of Actions.—Asbestos trusts and asbestos defendants may elect to bring actions for contribution, indemnity or other relief arising from payments or obligations for payments to asbestos-tobacco claimants made or incurred on or before the date of enactment of this Title. Notwithstanding any other provision of law:

(1) Actions for contribution, indemnity or otherwise against a tobacco company may be maintained by an asbestos defendant or asbestos trust whether the underlying payments or obligations to asbestos-tobacco claimants were made pursuant to judgment

or settlement.

(2) An asbestos trust or defendant may aggregate its claims, and its damages shall be assessed based upon the degree of relative causation between tobacco and asbestos, as demonstrated by statistical data applicable to relevant disease categories;

(3) Any such action by an asbestos trust or defendant is timely if it is brought within one year from the date of enactment of this Title; and

(4) Asbestos trusts shall be treated for purposes of this Title as the owners of the claims of their predecessor companies against the tobacco manufacturers.

(b) **Certain Rules.**—Except as provided in subsection (a), the court shall apply the substantive law rules governing liability for indemnity, contribution, or other basis for recovery, that otherwise apply in the appropriate jurisdiction. United States district courts and state courts shall have concurrent jurisdiction over the actions described in subsection (a), except that no such action commenced in state court may be removed to a United States district court.

Sec. 3. Preservation of Proceeds for Victims.

Any proceeds from the actions provided for by this Title shall be used solely to pay asbestos claimants and asbestos-tobacco claimants, shall be paid or obligated to be paid by an asbestos defendant to such claimants no later than five years from the date that such proceeds become available, and may not be used for the costs of defending such claims, for payment of corporate dividends, for reimbursement of insurers, or for any other corporate purpose.

Sec. 4. Effective Date.

This Title shall take effect on the date of enactment of this Act, and shall apply to events occurring before, on and after the date of enactment of this Act.

Solution: Revision of Certain Procedural Rules:

- Asbestos defendants and trusts that have paid substantial sums to asbestos victims who smoked should be given the opportunity to recover for the harm caused by tobacco. Asbestos defendants and trusts should reserve any recovery facilitated by Congress for the payment of asbestos victims and tobacco-asbestos victims.
- Asbestos defendants and trusts should be allowed their "day in court" to make their case "on the merits" against the tobacco companies. The following procedural rules need to be changed or clarified so that tobacco companies are not able to escape responsibility on procedural grounds:

(1) the "settled defendant" doctrine in approximately 40 states (which prohibits contribution actions for cases that were settled, as opposed to tried to judgment) should be relaxed so that asbestos defendants and trusts may sue tobacco companies in contribution actions;

(2) asbestos defendants and trusts should be able to bring their claims for prior payment in consolidated actions (as opposed to case-by-case), and should be allowed to use reliable statistical evidence for the thousands of cases that were resolved many years ago;

(3) any contribution action by an asbestos defendant or trust against a tobacco company should be considered "timely" if brought within one year of the passage of this bill (to create a reasonable alternative to widely varying state statutes of limitations); and

(4) asbestos trusts should be allowed to assert the claims of their predecessor companies in these contribution actions (for example, the Manville Personal Injury Settlement Trust should be able to seek tobacco company contribution for tobacco-asbestos claims paid by the Johns Manville Company before it went bankrupt).

Solution: Preserve Litigation Proceeds for Asbestos Victims.

- The proceeds of any litigation enabled by this bill should be reserved for payment to asbestos victims and tobacco-asbestos victims only. Thus, an asbestos company could not use tobacco-company payments from this litigation to defend against other asbestos claims, pay corporate dividends, reimburse its insurers, or for any other corporate purpose.
- Asbestos defendants should be required to pay any litigation proceeds to asbestos victims and tobacco-asbestos victims in a prompt, timely manner.

AVA ASBESTOS VICTIMS OF AMERICA

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HEATHER R. BECHTEL-MAURER, EXECUTIVE DIRECTOR - AVA NATIONAL

September 23, 1997

EK/Am -
We'll need a
position on this
eventually. BR

Mr. Bruce Reed
Domestic Policy Council
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. Reed:

I am writing on behalf of the 23,482 members of the **Asbestos Victims of America**, a National, Non-Profit Education Organization. We are victims of asbestos disease who, with our families, have suffered a variety of diseases related to exposure to asbestos. Our organization also includes scientists, physicians, and other legal/social/medical professionals.

We are writing to express our disapproval that the proposed tobacco settlement hurts those with asbestos disease. As you know, most asbestos companies are bankrupt and the trusts set up to pay claims lack the resources to adequately compensate victims. For example, the Manville Trust, which is responsible for paying a substantial percentage of asbestos claims, has the funds to pay only ten cents on every dollar. Most other Asbestos companies only pay (if they pay at all) a *very small amount* to us and we can barely survive, least of all afford the costs of medical bills, doctors and the substantial related costs associated with our asbestos related diseases.

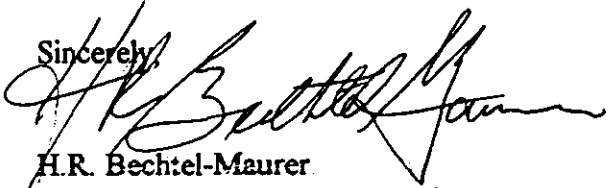
The science is absolutely clear that tobacco is a prime cause of many of the diseases suffered by those exposed to asbestos. For example, those who smoked more than a pack a day and were exposed to asbestos are eighty-seven times as likely to get lung cancer as a person who neither smoked nor was exposed to asbestos. The risk of an asbestos worker who did not smoke is less than five times that of a person not exposed asbestos, and the risk of a smoker of a pack a day is ten times the risk of a non-smoker.

Tobacco must be made to accept responsibility for the harm caused by smoking to those exposed to asbestos. If the Congress is to pass a law approving this settlement, we implore you to require that the tobacco companies pay **their fair share** for the harm they have caused us and others like us. Currently the settlement does just the opposite, guaranteeing that tobacco will never be forced to contribute a penny to the victims of tobacco/asbestos disease. Once again Asbestos victims and our families are shut out and forgotten. Once again we remain **uncompensated** for clear and knowledgeable injuries we have sustained.

The settlement is terribly unfair to asbestos victims. Please insist that the tobacco settlement require tobacco to contribute money to pay for the harm caused to those exposed to asbestos. If the settlement is not fixed to require tobacco to pay its fair share to victims of tobacco/asbestos disease, we urge you to oppose the tobacco settlement.

Thank you for your consideration of our request. We trust that we can count on your support for those struggling with the health effects of tobacco and asbestos. Should you require any documentation or additional information please contact me. We are pleased to assist you in this process.

Sincerely,

A handwritten signature in black ink, appearing to read "H.R. Bechtel-Maurer". The signature is fluid and cursive, with a large, sweeping flourish at the end.

H.R. Bechtel-Maurer
Executive Director - AVA National

MANVILLE PERSONAL INJURY SETTLEMENT TRUST

Tobacco settlement - as best as

TRUSTEES:

(EK)

July 29, 1997

Robert A. Falise, Esquire
Chairman and Managing Trustee
Bedford, New York

Louis Klein, Jr., Esquire
New York, New York

Frank J. Macchiarola, Esquire
New York, New York

Honorable Christian C. Markey, Jr.
Los Angeles, California

Patricia G. Houser
Executive Director

Mr. Bruce Reed
Domestic Policy Council
The White House
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20016

Dear Mr. Reed:

On behalf of the Manville Personal Injury Settlement Trust, I write to express our strong view that the Tobacco Settlement you and Secretary Shalala are presently reviewing is particularly unjust to those of our beneficiaries who are or were smokers. If enacted into law, in order to avoid this undesirable effect, this legislation should require that funds be set aside to pay the tobacco companies' fair share of the personal injury claims they have caused and will continue to cause to these victims.

The vast majority of the workers exposed to asbestos smoked or were exposed to second-hand cigarette smoke in the workplace. All smoking is injurious, but it is specially lethal to those who have been exposed to asbestos. There is a scientific consensus and an abundance of evidence that smoking causes lung cancer and other cancers in asbestos workers at a rate very much higher than it does in the general population. In addition, smokers who were exposed to asbestos suffer both an increased incidence and an increased severity of non-malignant asbestos-related disease.

Until now, the asbestos litigation and liability playing field has been tilted in favor of tobacco and against asbestos so severely that virtually all of tobacco's responsibility for smoking-caused harm in asbestos victims was either shouldered by the asbestos trusts and asbestos defendants or was borne by the victims. While the recent revelations and admissions concerning the tobacco industries' actions and products present an opportunity to redress this unfairness, the Tobacco Settlement takes away important rights from claimants, asbestos trusts, and defendants and gives virtually nothing in return to the asbestos victims. It is neither fair nor sensible to absolve one joint tortfeasor or create barriers to recovering against it, as the Tobacco Settlement does. Any resolution of the tobacco problem must contain a fair and expeditious mechanism for determining tobacco's share of the tobacco-asbestos problem and assuring that the tobacco companies pay it.

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Mr. Bruce Reed

July 29, 1997

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At least fourteen former manufacturers of asbestos products representing almost 70% the asbestos market have filed for bankruptcy during the last fifteen years. This Trust and other asbestos trusts have been established to pay compensation to meritorious claimants who are victims of asbestos-related disease by manufacturers who have entered bankruptcy. The Trusts are severely under-funded. This Trust, which is the largest, currently pays approximately 10 cents on the dollar on the amount it agrees it owes. To date, the 90% which the Trust owes to asbestos victims, an amount these victims are very unlikely ever to receive, exceeds \$5.6 billion.

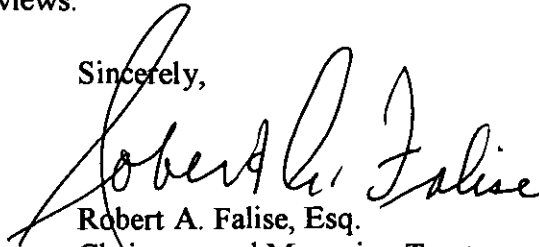
Unfortunately, the tide of asbestos litigation is not receding. Reliable estimates indicate as many asbestos claims may be filed in the future as have been filed to date. Not only do the tobacco companies limit their liability through the Tobacco Settlement, but they also intend to continue to manufacture their tobacco products. Not only does the Tobacco Settlement fail to require the tobacco companies to pay their fair share of the unique health problem their products cause and continue to cause, but the settlement does the opposite. As its principle drafters now concede, the settlement is intended to bar efforts by the asbestos trusts to assert any claims against tobacco companies for their fair share of past or future asbestos claims.

This aspect of the settlement is neither fair nor wise. To the extent the settlement is a template for legislation, such legislation must include a fair and expeditious mechanism for reimbursing asbestos trusts and defendants for compensation paid and to be paid for harm caused by smoking. Naturally, this payment by the tobacco companies should include a provision that all funds received by asbestos trusts and defendants must be reserved for and expended solely to pay injured victims.

I urge the Administration to state the requirement for this modification in its comments about the proposed Tobacco Settlement.

Thank you for considering our views.

Sincerely,

A handwritten signature in cursive script, reading "Robert A. Falise". The signature is written in dark ink and is positioned above the typed name and title.

Robert A. Falise, Esq.

Chairman and Managing Trustee

Manville Personal Injury Settlement Trust

Tobacco - settlement -
asbestos

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RICHARD J. DURBIN
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COMMITTEE ON THE JUDICIARY

COMMITTEE ON
GOVERNMENTAL AFFAIRS

COMMITTEE ON THE BUDGET

United States Senate

Washington, DC 20510-1304

July 28, 1997

Mr. Bruce N. Reed
Assistant to the President for Domestic Policy
The White House
Washington, DC 20500

Dear Mr. Reed:

The proposed tobacco settlement raises important questions about the ability of asbestos workers and former workers to recover from tobacco companies for health-related damages associated with tobacco use.

A significant proportion of the asbestos industry is in bankruptcy because of judgments made against the industry on behalf of workers who have suffered or face the risk of lung cancer and other respiratory illnesses. Many of these workers were smokers who suffered from the joint or "synergistic" effects of tobacco and asbestos, but the tobacco companies have never paid a penny for their share of the liability. Because of the bankruptcy of some companies, many plaintiffs have been able to recover only a small fractions of the claims due them — as little as 10 cents on the dollar.

The proposed settlement limits the ability of individuals to sue the tobacco companies for damages. At the same time, the proposed settlement would prohibit third-party payers such as the Manville Trust from suing to recover tobacco-related costs for claimants. Asbestos companies would not be able to sue on behalf of their workers. As a result, many workers with asbestos/tobacco claims would probably continue to receive inadequate judgments, while the tobacco companies continue to evade their responsibility for the effects of their products.

I urge you to give careful attention to the situation of asbestos workers and former workers as you review the proposed tobacco settlement.

Sincerely,

Richard J. Durbin
U.S. Senator

RJD:tf

Tobacco settlement - asbestos

Bruce R / Bruce L

MEMORANDUM FOR ELENA KAGAN

FROM: JENNIFER O'CONNOR

SUBJECT: TOBACCO MEETINGS

FYI
Elena

As I mentioned to you on the phone, we have held three meetings over the last two days related to tobacco. They were with: 1) representatives of a coalition of asbestos industry and trusts (Jack McMackin, Bert Carp and David Austern); 2) Frank Hurt, President of the Bakery Confectionary and Tobacco Workers union; and 3) representatives of union health and welfare benefits funds that are filing class action suits against the industry modeled on the state cases (David Molino Sr., and David Molino Jr.)

At the moment, only the asbestos coalition provided paper, which I have attached. This includes fact sheets, a copy of Senator Durbin's testimony on the issue; some Qs & As; a letter from Marcy Kaptur on the issue; and a copy of a class action suit filed against the industry on this issue.

Mr. Hurt is developing paper, which I will forward to you as soon as it is available. I will also seek copies of the legal filings from the health and welfare funds and forward those to you as well.

Please call me (219-6197) or Bill Samuel (219-2455) with any questions or follow-up.

ASBESTOS AND THE TOBACCO SETTLEMENT

Eighty percent of asbestos claimants smoked, and virtually all of the rest were exposed to high concentrations of smoke on the job. With respect to many of the diseases suffered by asbestos-exposed individuals, such as lung cancer, smoking bears far more responsibility than does asbestos. Until now, however, the litigation and liability playing field had been tilted in favor of tobacco and against asbestos so severely that *all* of tobacco's responsibility for *smoking-caused* harm in asbestos-exposed individuals was either dumped into the laps of the asbestos trusts and asbestos defendants or was borne by victims.

Plaintiffs lawyers chose to bring suits for harm that they themselves alleged was jointly caused by tobacco and asbestos as *asbestos* suits, not tobacco suits, proceeding against *asbestos* defendants, not tobacco companies, often under theories of joint and several liability. They did this for all the same reasons that plaintiffs, until now, seldom sued tobacco companies and never won. Of the many unjust consequences of this phenomenon, the worst was that many injured claimants received but a small fraction of the awards to which they were entitled from the depleted funds of the trusts set up to pay claims out of the assets of bankrupt defendants.

All of this was about to change dramatically. The recent revelations and admissions concerning tobacco companies' actions and products promised to begin to level the playing field. Tobacco could now be called to account for its share of the harm caused asbestos workers who smoked, both in suits (including class actions) brought by claimants, as well as in recoupment and contribution actions brought by the asbestos trusts and defendants.

Instead, the proposed tobacco settlement, by its most basic provisions, would tilt the playing field even more radically against asbestos trusts and defendants and in favor of tobacco, and it would do so irrevocably. An agreement that purports to be settling up tobacco's responsibility for the harm it has caused instead massively aids and abets the transfer of its responsibility for smoking-caused harm in asbestos workers to asbestos trusts, defendants and victims.

Even after elimination of the outrageous time bar which purports to prevent asbestos trusts and defendants from suing tobacco companies to recover the amounts they have paid for smoking-caused harm, the agreement will serve massively to channel litigation and liability away from the tobacco companies and toward the asbestos trusts and defendants. For instance, its provisions eliminating punitive damages, class actions, or other consolidation devices in smoking cases means that plaintiff lawyers will continue to bring suits that involve smoking and asbestos exposure as asbestos suits, proceeding under theories of joint and several liability. Legislation cannot affect fundamental aspects of the liability of one alleged "joint tortfeasor" without fundamentally affecting the other.

Unless the proposed tobacco settlement is modified to require that tobacco pay for the harm it caused and causes to asbestos-exposed workers, the settlement will inevitably make the tragic asbestos problem far worse. Unless any legislation resolving tobacco liabilities also resolves tobacco's liabilities with respect to smoking-caused harm in asbestos workers, asbestos victims will continue to go without adequate compensation, asbestos trusts will continue to be unable to pay them, and the beleaguered ranks of solvent asbestos defendants will continue to pay for harm in fact caused by smoking.

The tobacco companies are effectively asking Congress to declare that:

- asbestos-exposed victims of lung disease caused in large part by smoking, many of whom have not received the compensation to which they are entitled, will never be adequately compensated;
- the asbestos trusts, such as the Manville Trust, whose assets are grossly inadequate to meet their obligations, will forever be foreclosed from reimbursement for the payments they have made and will make for *smoking*-caused harm and will continue to be the target of liabilities and lawsuits that rightfully should be landing at tobacco's doorstep;
- the non-bankrupt asbestos defendants, who have paid and will pay for much of tobacco's share of the harm caused to asbestos workers exposed to smoke, will continue to do so, with the playing field tilted even more against them and in favor to tobacco.

A fundamental precondition of a reasonable and just tobacco settlement is that it establish an expeditious mechanism under which tobacco pays its fair share of the combined tobacco-asbestos problem. By contrast, the proposed settlement's irrevocable transfer of this tobacco responsibility to asbestos trusts, defendants and claimants is unconscionable.

Facts and Principles

* On the clear scientific and medical evidence, with respect to diseases such as lung cancer, tobacco causes far more of the harm suffered by smokers also exposed to asbestos than does asbestos. All told, in rough estimation, asbestos trusts and defendants have paid or will pay at least \$15 billion for harm in fact caused by tobacco.

* *Fifteen* of the manufactures of asbestos products have filed for bankruptcy, representing *seventy* percent of the market share of companies who once manufactured asbestos products. Most of the remaining solvent defendants were minor players, who held a very small percentage of the market for asbestos products, and who exited that market long ago, some in the 1950s and all in the early 1970s.

* The trusts created to pay the claims of the bankrupt defendants are severely under funded. The largest, the Manville Trust, for instance, is currently paying about *10 cents on the dollar* of the amount the trust agreed it owes. The shortfall in payments by asbestos trusts is borne both by claimants and by non-bankrupt defendants..

* While tobacco companies can pass along the costs of their liability in the form of higher cigarette prices, asbestos defendants, competing in diverse industries against companies who have no asbestos liability, cannot pass along their asbestos-liability costs. They certainly cannot pass along those costs as part of the price of asbestos products; these no longer exist.

* The proposed settlement's channeling of liabilities from tobacco companies to asbestos trusts and defendants turns sensible public policy upside-down. Even the American Bar Association, not an enthusiastic proponent of tort reform generally, has officially declared that some liability limitations are appropriate in asbestos litigation, because of the bankruptcies.

* The time bar, the most blatant of the ways in which the proposed agreement attempts to favor tobacco defendants over asbestos trusts and defendants, is patently unconstitutional. In exchange for their basic rights to seek legal redress, sacrificed as part of the consideration flowing to cigarette companies under the deal, the asbestos trusts and defendants are offered begging rights, in competition with "public health, governmental entities and other uses of the funds" before a political body dispensing monies, if any, that are left over after the tobacco industry's other obligations are paid under the "annual aggregate cap."

* In the recent Amchem Products, Inc. et. al. v. Windsor decision of the Supreme Court, Justice Ginsburg, like so many judges before her who have examined the asbestos-litigation travesty, pointed towards the appropriateness of a legislative solution. In the proposed tobacco legislation, Congress will either significantly improve the asbestos crisis by dealing directly with tobacco's role in it, or, Congress will make the crisis worse, and its ramifications more unjust.

What Must Be Done

Any legislation addressing tobacco's liabilities must include a fair and expeditious mechanism for resolving tobacco's liability to asbestos trusts and defendants for harm caused by smoking. The best mechanism would be a special commission, drawn from experts in science, medicine and the judiciary, with broad authority to establish the fair share owed by tobacco for past payments by asbestos trusts and defendants, rules for disbursement of amounts owed, and rules to govern the status of tobacco payments in the future for diseases caused by smoking in asbestos-exposed individuals. The legislation should assure that proceeds received under it by the non-trust asbestos defendants be used exclusively for the payment of victims, even in the event of additional bankruptcies, through the use of escrowing or similar devices.

[EXCERPT RE Durbin Asbestos Questioning]

1

HEARING OF THE SENATE JUDICIARY COMMITTEE

SUBJECT: TOBACCO SETTLEMENT REVIEW

CHAired BY: SENATOR ORRIN HATCH (R-UT)

WITNESSES:

RICHARD BLUMENTHAL, ATTORNEY GENERAL
STATE OF CONNECTICUT

HUBERT H. HUMPHREY III, ATTORNEY GENERAL
STATE OF MINNESOTA

RICHARD F. SCRUGGS, SENIOR PARTNER
SCRUGGS, MILLETTE, LAWSON, BOZEMAN AND DENT

GAIL A. NORTON, ATTORNEY GENERAL
STATE OF COLORADO

STANLEY M. CHESLEY, SENIOR PARTNER
WAITE, SCHNEIDER, BAYLESS AND CHESLEY

LAURENCE TRIBE, PROFESSOR
HARVARD UNIVERSITY LAW SCHOOL

STANLEY LEVY, SENIOR FELLOW
CATO INSTITUTE

226 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC

2:00 PM
WEDNESDAY, JULY 16, 1997

.STX

TRANSCRIPT BY: FEDERAL NEWS SERVICE
620 NATIONAL PRESS BUILDING
WASHINGTON, DC 20045

my view, undercut the best definition of states' rights, if you will?

MR. BLUMENTHAL: To be absolutely honest with you, Senator, we didn't do it eagerly or easily in accepting this preclusion on class actions. It was with the knowledge that so few have been certified that the barriers to certification, even under the current rules, are very, very formidable, given the disparate kinds of injuries and products and time periods and, as a principal, I have stood very firm and I think every one of my colleagues has been very steadfast as well, in trying to protect our state tort system, our state procedures and this was a very exceptional instance which offered exceptional benefits under a very important and significant plan. Perhaps we view the benefits as outweighing the detriments.

SENATOR FEINGOLD: I appreciate that answer.

General Norton.

SENATOR HATCH: Senator -

SENATOR FEINGOLD: Have I already used my time?

SENATOR HATCH: You have.

SENATOR FEINGOLD: Could I just have the answer to this question?

SENATOR HATCH: Sure. Sure.

MS. NORTON: Senator, if I can just supplement what General Blumenthal has just said, from the perspective of the individual litigants, while their position does become more difficult in terms of the efficiencies that are available from consolidation of action, they do receive some things on the other side. There will be available to them an entire library of documents from the tobacco companies that can be used by them in court to better establish their cases. Hopefully fairly quickly these cases will become routinized. We will see that the precedent will develop and eventually these cases will be settled quite quickly.

So I anticipate that while initially it may be more difficult for the litigants, they will have more evidence available to them and we will have a system that is more predictable for both sides.

SENATOR FEINGOLD: Thank you, Mr. Chairman.

SENATOR HATCH: Thank you.

Senator Durbin.

SENATOR DURBIN: Thank you, Mr. Chairman.

Ten years ago last Sunday, I called a bill for passage on the Floor of the House of Representatives and it passed by five votes and two of the people who voted with me on that legislation serve on this panel today. One, my colleague, Senator Torricelli from New Jersey and the other, Senator DeWine from Ohio. They were both House members as I was, at the time.

It was the first time the tobacco lobby had lost a head-to-head battle on the Floor of the House of Representatives and we managed to ban smoking on airplanes. It is hard to imagine it was 10 years ago.

I couldn't have imagined then that 10 years later any of us would have been sitting on either side of the table talking about the settlement that we are discussing and, let me say at the outset, while I may be critical of aspects of this agreement, I want to salute all of the parties involved, including my own home state attorney general, Jim Ryan, and all of those who are here today, including Attorney General Moore, who has not testified, for your courage and vision in undertaking this task. I understand the alliance that was necessary, the legal resources that had to be brought together for this to be successful. I am certain that it will be a small price to pay.

Let me say, though, that I don't believe the tobacco companies ever came to the negotiating table because of a suffering conscience. They came to the table, in my estimation, for two reasons. One was the point raised by General Humphrey in his opening remarks. There is damaging evidence in the millions of pages of documentation which has been turned over by these tobacco companies that scares the hell out of them. The thought that this information will become public is the reason they rushed to settle with Attorney General Moore rather than go to a lawsuit and trial. There must be information there that clearly evidences fraud, deceit and even criminal misconduct and once that becomes a matter of public record, it will dog their tracks in every litigation that is filed in this nation. And they, frankly, stand to lose a lot of money in the process.

Secondly, there is money at stake here. Merrill Lynch did an analysis I just read a couple days ago on the price of Phillip Morris stock, which is about \$48 today. With no settlement, they suggested that stock price might plummet to \$33. With the settlement, at least \$70 and maybe higher. They know there is money on the table here if they can negotiate a settlement. But the key to it is dealing with the question of their liability and that is why this Committee is convened.

I have two questions. They are somewhat complex in very little time but I want to address them. And let me say at the outset, and one of these questions is critical of your agreement and I don't want it to be taken as being critical of your motives or efforts, I just think there are ways to improve it.

First, I received a letter today from the Attorney General, Mrs. Reno, about the -- actually it was from her deputy, Ann Harkins, pursuant to a letter I had sent asking why the

federal government had not joined in this action by the state attorneys general.

She goes on to say that the recoveries from Medicaid will be apportioned to the benefit of the federal government and I don't know exactly what that means. Her letter is not that clear.

I would like comment when I finish the two questions from those on the panel who might be able to address that. Will the federal government be receiving anything back from this settlement for their Medicaid contribution?

As a footnote, I might add that, although \$780 billion, Mr. Chesley, is a huge amount of money, as has been said by two other members here, the federal taxpayers are paying for a third of it, since it is stipulated that it is deductible.

MR. : Would the Senator make that a part of the record, the response of the attorney general?

SENATOR DURBIN: I would be happy to.

Whereas, punitive damages are not, they have stipulated as a part of the record, anything the tobacco companies pay is tax deductible. So we are subsidizing to the tune of a third any dollars that are put on the table.

The second issue I want to address is one which troubles me greatly and that is the future of asbestos lawsuits as a result of this settlement. For those who have followed it, as I understand it, most, 80 percent of the workers, asbestos workers, who have brought claims against asbestos companies for health problems are smokers. The fact that they are smokers creates a synergy which makes the problem even greater.

These workers and their representatives have not sued tobacco companies because they didn't think they had a chance. And so some \$15 billion, if I am not mistaken, has been awarded to asbestos workers. However, the sources of money are starting to dry up because asbestos companies have gone bankrupt and the trust funds that have been created are paying as little as 10 cents on the dollar.

Now, there are many more potential suits to be filed by asbestos workers. But if this settlement goes through as agreed to, it will cut off not only past asbestos workers but future asbestos workers from holding tobacco companies liable for anything that they have done wrong that led to this condition.

By prohibiting class action suits and by limiting punitive damages, you have literally shut the courtroom doors for these people who will have been aggrieved and will continue to be aggrieved. Lawsuits already filed that might have been subject to a statute of limitations, could be tolled by the evidence of fraud in the documentation that has been presented by the tobacco companies.

I cannot understand how many of the attorneys that were involved, private attorneys who have brought asbestos litigation, could allow these two provisions to be put in the agreement that would preclude these asbestos suits.

Sorry for the long questions but those two things are of concern to me and it is a jump ball. Anybody on the panel, please, who would like to address it.

MS. NORTON: Senator, if I could jump in as to the allocation to the federal government, the federal government is going to receive payments to HHS that will go to cessation programs and so forth. There will be payments that will be going in that are specifically allocated as going to federal agencies. There is intended to be a presidential trust fund that will be utilized for health care issues. So the federal government will be receiving billions of dollars from this settlement.

The other part of that is that many of our claims are not based on Medicaid at all. Colorado did not base its claims on Medicaid, we based it on treble damages under antitrust laws, on many of the things where the recoveries would go entirely to the state.

SENATOR DURBIN: I guess specifically on Medicaid where there is an allocation in Illinois, 50/50, will the federal government get any of that money back?

MS. NORTON: That is an issue that is still under discussion and something -- it is my impression that that money that is going to the federal government should be considered as the federal government share that is already specifically earmarked for that. The remainder of the money should not be considered to be federal Medicaid share money.

MR. : Senator Durbin, to answer your question, on the allocation of the Medicaid, I can't really speak to it but I think that is an issue that Congress must take a look at and I put that in the hands of Congress.

SENATOR DURBIN: It is a lot of money at stake.

MR. : On the statement relative to the asbestos claimants, it is our view that these asbestos claimants -- and I might add asbestos is a good example, it has taken 40-some years to get compensation to these victims. But as far as we can see, there is nothing in this, with the exception of the class action, and I can talk about that in a moment, an individual smoker who is also an asbestos victim, would still have his ability to bring his lawsuit.

SENATOR DURBIN: There is a tolling as of June 9 under this, if I am not mistaken.

MR. : That is not correct, Senator.

MR. : Not as to individuals.

SENATOR DURBIN: Not as to individuals.

MR. : The individual would have a right to bring that action --

SENATOR DURBIN: What about class actions?

MR. : The class action, the future class action, and the reality is the give and take. Having been through class actions for 20-some years, having just been thwarted by Amchem and two Sixth Circuit cases, AMS and also the Rom-Platt case out of Illinois, the Seventh Circuit, it is pretty clear that physical injury claims by virtue of the fact that they are all different and they all come under different state laws, are very, very tough to get certified as class actions.

SENATOR DURBIN: But now will be impossible under this agreement.

MR. : And the question is, what did we get in return?

What we got in return, when we went to the negotiating table on April 3, it was the position of the industry that they should get total immunity for all past deeds. It was our position unified, that is the private lawyers together with the attorney general lawyers, under no circumstances would they get immunity. That was the hard bargaining. And now everybody has a right. And there is no cap.

SENATOR DURBIN: I just have to say one final word since my time is up. I don't believe your treatment of asbestos claims is fair. I think the companies that have paid in the past some \$15 billion and are liable for as much should have the right of third-party actions against tobacco companies that may be precluded by this settlement agreement. I think the precluding of bringing actions based on tolling the statute on the basis of fraud and documentation is unfair and I think limiting any future actions on asbestos, particularly when it comes to class actions, is something that shouldn't be part of this agreement.

It is understandable as you hear these why the tobacco companies are so anxious for this agreement to be enacted.

MR. : May I respond to that Senator?

I represent several thousand men with asbestos disease and have for the past 15 years. Our purpose here was not to limit the rights of asbestos victims. Asbestos victims, as Mr. Chesley pointed out, can file suit against tobacco industries. This only limits their ability for punitive damages which, in many places, are illusory anyway. This industry has never paid punitive damages. It really hasn't paid any compensatory damages under Mississippi got paid.

Class actions, as General Blumenthal pointed out, have formidable hurdles to be crossed. None has ever been successfully certified against the wishes of the defendant that has ever stood up on appeal. So our intent here was to trade largely illusory rights for public health gains.

And the concessions on punitive damages and on class actions were a very small price to pay, in my judgment, for the considerable public health gains that we extracted from the industry.

We purposely, and this is one of the things I was very vocal about during the negotiations, I don't want the assets of the tobacco industry to be subjected to the claims of asbestos companies or insurance companies. I think those assets should be available for the victims. I have seen in asbestos cases how funds can be absolutely raped at the expense of future victims.

We want to make sure that smokers not insurance companies and not asbestos companies have first call on that money and that is why we have that tolling agreement in there. That has nothing to do with individuals, though.

SENATOR HATCH: Okay, I am going to have to move on. I am going to have to go to another meeting for a while and I have asked Senator Sessions, if it is all right with you, Senator DeWine, to chair until I get back.

All right, but we are going to move to Senator Torricelli. As soon as he is through with his five minutes, then we will move to the second panel. But if I am not back by then, and I doubt that I will, let me just say for my closing remarks that I have been really pleased with this panel. You folks have really helped this Committee a lot on, I think, all aspects of this. Each of you has played a very significant role here today and I just want to personally compliment you. I think this has been a very stimulating panel.

As you can see, we have a wide variety of opinions on the Committee. On the other hand, I think you have answered a lot of questions that have been on the minds of people on the Committee and all I can say is we are going to try and approach this in as fair a manner as we possibly can and we are not going to ignore anything that has been said here today. But I hope we can resolve this because, I think, in the best interests of the Country, it would be great if somehow we could resolve this and have all sides brought together in a way that really does it for the benefit of the health and welfare of our country.

I just wanted to make those comments. I am pleased with how impressed I am with the testimony that has been given here today. I am very respectful of you attorneys general. You have really done a very good job under the circumstances, and General Humphrey, you've done an excellent job in explaining the difficulties you have with the settlement, and we're not going to ignore your explanation.

You two lawyers have really, I think, expressed a lot of very pertinent comments about this matter and I'm going to compliment both of you. I can see why both of you are so successful. I wouldn't want to be defending cases to either of you, although, in a really good sense, I kind of would enjoy it, I think. But I would much rather be on the plaintiff's side at this particular time in my career, okay?

QUESTIONS AND ANSWERS REGARDING THE TOBACCO SETTLEMENT

Question: What's wrong with the Tobacco Settlement?

Answer: If the Tobacco Settlement becomes law, the tobacco companies gain a license to continue to sell a product they concede is injurious and addictive on the condition they pay money out of their future profits to state and federal governments. No compensation is given either to those who have been and will continue to be most at risk by continued tobacco use – asbestos workers – or the asbestos trusts and solvent, former asbestos companies which pay the claims asbestos workers often bring.

Question: Tobacco companies say they will pay over \$360 billion under the settlement. Doesn't any of that money go to persons injured by smoking?

Answer: No, not a penny goes directly to compensate persons who have suffered injuries from tobacco, either in the past or in the future. Virtually all of the money goes to the federal and state governments for various programs.

Question: Can't persons injured by smoking in the future get any portion of that money?

Answer: Only by suing for it. Under the Tobacco Settlement, the tobacco companies restrict their present liability, which is now wide open, to a limited fund capped at approximately \$5 billion per year. In order to receive any of the money in that fund, any person claiming compensation from tobacco must file litigation which, of course, the tobacco companies will oppose.

Question: If an injured person does file a lawsuit against the tobacco companies, will it at least be governed by the rules that apply now?

Answer: No. Simply put, the Tobacco Settlement tilts the litigation playing field in favor of the tobacco companies. The Tobacco Settlement does this in many ways, but just for starters, it eliminates punitive damages, prevents consolidations or class actions, and appears to restrict any claims based upon addiction (even though the tobacco companies apparently now concede their product is addictive and should be regulated by the FDA as a result). It also puts caps on the size of any judgment under certain conditions.

Question: Why will asbestos-exposed persons who smoke be any worse off than other smokers under the Tobacco Settlement?

Answer: The Tobacco Settlement restricts the rights of all smokers to sue tobacco companies. However, this restriction is especially unfair to smokers exposed to asbestos. The reason for this is that while all smokers have an increased health risk from smoking, it is very much greater for asbestos exposed smokers.

While one can argue that some smokers knew smoking wasn't good for them, almost everyone agrees that asbestos workers could not have known about the special risks they faced from smoking. Worse, the cigarette companies' recently disclosed efforts to addict smokers (and keep them addicted) have caused and will continue to cause the most harm to former asbestos workers who smoke. This is why asbestos workers should have a separate fund set aside by the tobacco companies to compensate them for the special risk and injury smoking has caused to them.

Question: How wide-spread is smoking disease in asbestos workers?

Answer: Extensive. Dr. Selikoff in one study estimates that 80% of asbestos workers smoked. Smoking-related lung cancers have been extensive in this population and measured by the thousands of asbestos litigation claims that have been filed in asbestos litigation. Virtually none of these lung cancer claims would ever have been filed if those asbestos workers hadn't smoked. The evidence also indicates that smoking is also a component of a significant number of non-malignant claims of breathing impairments in asbestos cases.

Question: Can't these asbestos workers sue asbestos companies for the smoking component of their asbestos injuries?

Answer: That's a problem. Under the laws in most states, asbestos defendants are responsible not only for the injury cause by asbestos but for the smoking component of any injury in which asbestos played some role. Over the years, the asbestos defendants and trusts have paid billions of dollars in claims, including over \$1 billion for lung cancer cases alone.

The consequences of this are well known. At least 15 major asbestos manufactures have gone bankrupt. These bankruptcies represent 70% of what used to be the asbestos market share.

This means that the former asbestos manufacturers, as well as the asbestos trusts which have been set up to pay asbestos victims, must shoulder the burden of both the smoking component of these claims as well as the share of the absent defendants which have been driven into bankruptcy.

Question: Why didn't asbestos defendants sue the tobacco companies before?

Answer: For decades the tobacco companies vigorously asserted a formidable defense - that cigarette smoking was a voluntary act for which they were not legally responsible. The defense was not only backed up by the tobacco companies' massive legal and financial resources, its foundation was based on internal research and information known only to the tobacco companies themselves. Recent disclosures and admissions reveal that this information (much of it proprietary to the tobacco companies) actually proves their products were addictive and that the underpinnings of the tobacco defense were false.

Question: So why don't the asbestos companies sue the tobacco companies now?

Answer: The Tobacco Settlement puts major roadblocks in the way of any such lawsuits. The Tobacco Settlement by its terms would bar any law suits for money paid by third parties for the injuries tobacco caused in the past or causes in the future. Even without this bar, as a practical matter, the amounts paid by former asbestos defendants and trusts for the smoking component of past asbestos claims is now difficult, if not impossible, to collect given the passage of time.

Question: Why can't the trusts set up to pay the claims of the bankrupt defendants pay the claims?

Answer: These trusts which were set up to pay claims, are drastically under-funded. The largest, the Manville Trust, can now pay less than 10¢ on the dollar on

the claims it admits it owes.

Question: How long will it be before the asbestos/smoking problem is over?

Answer: Decades. The best scientific and legal estimates are that we are about half way through the asbestos litigations. This is true even though virtually all asbestos exposures have ended. The Tobacco Settlement ensures that smoking will continue. Thus, the smoking component of asbestos-related disease will only increase in the future.

Question: Is there any difference between the asbestos manufacturers and the tobacco companies?

Answer: There are very real differences. First, virtually all of the major asbestos manufacturers ceased making asbestos-containing products over a quarter of a century ago. Now, virtually none of the 30 major so-called asbestos defendants make or sell asbestos. They have been "asbestos companies" for decades only because they are solvent and are able to pay asbestos claims. The tobacco companies, of course, continue to manufacture cigarettes and the Tobacco Settlement Agreement grants them a license to continue to market nicotine-containing tobacco for at least another decade.

Second, the former asbestos manufacturers and distributors have been paying their asbestos claims, including the smoking component of these claims, for decades. Tobacco companies have resisted all smoking claims under the theory that smoking is voluntary and a life style choice. Now, decades after the asbestos litigation has begun, they

admit tobacco is addictive and that they knew it was addictive for years. The Tobacco Settlement is a way for them to continue to minimize their liability for the injuries their product has and will continue to cause.

Question: Won't the asbestos companies now profit from a subsidized compensation fund for asbestos workers?

Answer: Money for past smoking disease should go to a fund earmarked to compensate smoking asbestos workers in the future. Nothing will or should go to any asbestos companies. This is not a question of asbestos defendants escaping their liability. It is a question of the tobacco companies paying their fair share for past and future injuries as determined by a neutral and scientific panel and applying that money to the future smoking claims made by asbestos workers.

Question: Why can't the asbestos companies sue the tobacco companies?

Answer: Their rights have been taken away also. In the Tobacco Settlement, no third-party payor suits are allowed. Even if the Tobacco Settlement is amended to allow them, it's doubtful such an amendment could restore any semblance of fairness.

Question: So, what's the solution?

Question: A special commission drawing from experts in the scientific and medical community should be authorized to determine the relevant facts and then to establish reasonable measures to ensure the tobacco companies pay their fair share for past

and future disease caused by smoking and asbestos. Once that is decided, the Commission should set rules which would govern the prompt and efficient payment of all of the sums due, reserving them for past and future claims made by the smoking of asbestos-exposed persons.

PROPOSED STATEMENT OF POSITION TO THE WHITE HOUSE

The legacy of disease and death attributable to smoking is well-established. What is less widely recognized, but no less certain, is that smoking is uniquely harmful to people who were also occupationally exposed to asbestos. There is a scientific consensus that smoking causes lung cancer and other smoking diseases in asbestos workers at a rate even higher than it does in the general population. Smokers who were exposed to asbestos also suffer an increased incidence of non-malignant asbestos-related disease. Since eighty percent of asbestos workers also smoked, this means that asbestos-linked lung disease in these workers is caused at least as much by cigarettes as asbestos.

Until now, the asbestos litigation and liability playing field have been tilted in favor of tobacco and against asbestos so severely that *all* of tobacco's responsibility for *smoking-caused* harm in asbestos-exposed individuals was either shouldered by the asbestos trusts and asbestos defendants, or was borne by victims. The recent revelations and admissions concerning tobacco companies' actions and products demand action to redress this unfairness. Instead, the "settlement" negotiated by the tobacco companies will not pay a single dollar of compensation to injured smokers who were exposed to asbestos -- or any other injured smokers, for that matter. They are still required to pursue the tobacco companies in the courts, and the tobacco companies remain free to continue to dispute every one of those claims. As far as compensation to persons injured by smoking is concerned, all the "settlement" does is further tilt the playing field in favor

of the tobacco companies, imposing restrictions on the ability of smokers to win in court and, if they do win, to collect their awards.

Asbestos litigation has created a very real crisis in our courts. As the United States Judicial Conference's Ad Hoc Committee on Asbestos Litigation, which was appointed by Chief Justice Rehnquist concluded, real reform requires federal legislation creating a national asbestos dispute-resolution system. The tobacco "settlement" does just the opposite. It forces injured smokers into the courts and, by limiting their claims against the tobacco companies, channels their claims toward the asbestos trusts and defendants. It then by its provisions denies the asbestos trusts and defendants any meaningful recourse against the tobacco companies. The facts cry out for another, fairer solution to this problem.

Facts and Principles

* According to the clear scientific and medical evidence, with respect to diseases such as lung cancer, tobacco causes far more of the harm suffered by smokers also exposed to asbestos than does asbestos. All told, in rough estimation, asbestos trusts and defendants have paid billions for harm in fact caused by tobacco. Further, the tide of asbestos litigation is decades away from receding.

* *Fifteen* of the manufacturers of asbestos products have filed for bankruptcy, representing *seventy* percent of the market share of companies who once manufactured asbestos products. Most of the remaining solvent defendants were minor players, who held a very small percentage of the market for asbestos products, and who exited that market long ago, some in the 1950s and all in the early 1970s.

* The trusts created to pay the claims of the bankrupt defendants are severely under funded. The largest, the Manville Trust, for instance, is currently paying about *10 cents on the dollar* of the amount the trust agrees it owes. The shortfall in payments by asbestos trusts is borne both by claimants and by non-bankrupt defendants.

* While tobacco companies can pass along the costs of their liability in the form of higher cigarette prices, asbestos defendants, competing in diverse industries against companies who have no asbestos liability, cannot pass along their asbestos-

liability costs. They certainly cannot pass along those costs as part of the price of asbestos products; these no longer exist.

* The proposed settlement's channeling of liabilities from tobacco companies to asbestos trusts and defendants turns sensible public policy upside-down. Even the American Bar Association, not an enthusiastic proponent of tort reform generally, has officially declared that some liability limitations are appropriate in asbestos litigation, because of the bankruptcies.

Over the past two decades, the asbestos trusts and defendants have paid billions of dollars in compensation to smokers who were exposed to asbestos -- including the share that should have been paid by the tobacco companies. The proposed "settlement" not only fails to correct that unfair allocation of responsibility, it actually purports to bar, either in whole or in part, efforts by the asbestos trusts and defendants to assert a claim against the tobacco companies for their share of past or future compensation paid to injured smokers.

As currently drafted, the proposed "settlement" is fundamentally unfair both to injured smokers who were exposed to asbestos and to the asbestos trusts and defendants. Any tobacco settlement implemented through legislation must eliminate artificial barriers to claims by injured smokers and include a fair and expeditious mechanism for reimbursing asbestos trusts and defendants for compensation paid for harm caused by smoking. The tobacco companies, in addition to the obligations they have already undertaken, must pay their fair share of compensation for past and future injuries caused jointly by smoking and asbestos exposure. All funds received by asbestos trusts and defendants should be expended solely to pay injured claimants.

A fundamental precondition of a reasonable and just tobacco settlement is that it establish an expeditious mechanism under which tobacco pays its fair share of the

combined tobacco-asbestos problem. Information that would clarify and fix the specific responsibility of tobacco smoke for disease in workers exposed to asbestos is readily at hand. An expert commission should be given immediate and broad powers to (1) determine the relevant facts concerning the role smoking plays in causing disease in asbestos workers, (2) establish a reasonable measure of tobacco's fair share of responsibility, and (3) promulgate rules concerning the prompt and efficient payment of all sums due.

MARCY KAPTUR

— MEMBER
8TH DISTRICT, OHIO

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APPROPRIATIONS

SUBCOMMITTEES:

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AGRICULTURE, AND RELATED AGENCIES
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Congress of the United States
House of Representatives
Washington, DC 20515-3509

July 18, 1997

Mr. Bruce Reed
Domestic Policy Council
The White House
1600 Pennsylvania Ave NW
Washington, D.C. 20016

Dear Mr. Reed:

There is one particular aspect of the proposed tobacco settlement that I wish urgently to call to your attention as you and Secretary Shalala proceed with your review. The interests of asbestos trusts, asbestos defendants and asbestos victims are uniquely affected by the proposed agreement - and unfortunately harmed.

Virtually all of the workers exposed to asbestos smoked, and those who did not were exposed to second-hand cigarette smoke in the workplace. Most asbestos cases proceed on theories of joint and several liability under which defendants are required to pay for the harm attributable to tobacco. There is certain evidence that in many of the diseases that appear in asbestos-exposed workers, such as lung cancer, tobacco bears far more of the responsibility than does asbestos. Nonetheless, the asbestos trusts and defendants are the ones who are sued and the ones who pay.

Seventy percent of the market share of asbestos manufacturers is in bankruptcy. The trusts created from the assets of the bankrupts to pay claims are severely under funded. The largest, the Manville Trust, is paying ten cents on the dollar of its admitted liabilities. Because tobacco has not paid anything for its responsibility for the tobacco-asbestos problem, claimants are not receiving the compensation to which they are entitled, and the remaining solvent defendants, already picking up some of the share of bankrupt defendants, are also paying for tobacco's share of the problem.

There can be no sensible and fair settlement of tobacco liabilities without directly addressing and resolving tobacco's responsibility for the harm smoking causes to asbestos-exposed workers. You cannot absolve one joint tortfeasor, or in any fashion throw up barriers to recovering against it, without making the asbestos problem worse. Any resolution with tobacco must contain a

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Mr. Bruce Reed
July 18, 1997
Page 2

fair and expeditious mechanism for determining tobacco's share of the tobacco-asbestos problem and assuring that tobacco pays it.

The proposed settlement does just the opposite. Suits for jointly caused harm will be massively diverted from tobacco defendants to asbestos trusts and defendants. Class action devices and punitive damages, for instance, will be available against asbestos defendants, but not tobacco.

If we are to proceed with tobacco legislation, it must contain a resolution of tobacco's responsibility for the harm caused by smoking to asbestos-exposed workers. Specifically, the legislation should create a special commission, drawing from experts in the medical and scientific community and the judiciary, to determine the relevant facts and promulgate rules concerning the prompt and efficient payment of tobacco's full responsibility.

I urge the Administration to state the requirement for this modification very clearly in its comments about the proposed agreement.

Thank you for considering my views.

Sincerely,

Marcy Kaptur
MARCY KAPTUR
Member of Congress

MK:jmc

**THE JOINT TOBACCO-ASBESTOS PROBLEM
VERSUS THE SINGULAR TOBACCO SETTLEMENT**

As the mass litigation over asbestos rolls onward, well into its third decade, it has developed some defining characteristics that largely escape public notice. These include a pervasive and powerful association with the harm caused by smoking to individuals who were exposed to asbestos, the chronic underfunding of the asbestos trusts established out of the assets of fifteen bankrupt companies to pay claimants, 80 % of whom are current or ex- smokers, and the unfairness of putting the non-bankrupt companies at risk of paying the unpaid share of the bankrupt asbestos companies and the entire share of the tobacco companies.

Judging by the results, these things have likewise escaped the notice of those who negotiated the proposed settlement with the tobacco industry. Unless it is corrected, the tobacco settlement will work a massive injustice upon the victims of the combined effects of smoking and asbestos, who in many instances are being under-compensated for their injuries. It will add to the injustice experienced by the remaining solvent asbestos defendants, who in many instances are already paying for harm caused by others. And it will foreclose the asbestos trusts from the only significant source of additional assets to meet their responsibilities to claimants.

There are undoubtedly a number of important liability issues involving parties who are affected by the proposed tobacco settlement but who were not party to it. Among these, however, the situation of the asbestos trusts and defendants is unique. The enormous liability of the asbestos trusts and defendants has been created, and will continue to be created, in legal

actions in which they are held as responsible for the damages caused by tobacco because of what plaintiffs call the “synergistic relationship” between cigarette smoking and asbestos in causing disease. All damages, including the damages caused by tobacco and the bankrupt asbestos defendants, are collected from the non-bankrupt asbestos defendants. One precondition of a sensible and just tobacco settlement is that it establish an expeditious mechanism under which tobacco pays its fair share of the combined tobacco-asbestos problem. The proposed settlement does precisely the opposite.

asbestos litigation today

The principal actors in the asbestos tragedy have long ago left the scene. *Fifteen* asbestos defendants have been bankrupted, representing about *seventy* percent of the market share of companies who once manufactured asbestos-containing products. The largest of these, the Johns Manville Company, which produced nearly fifty percent of all asbestos products, filed for bankruptcy in 1982. Many of the remaining solvent “traditional” defendants were bit players, holding a small percentage of the market. This is certainly also true of the now thousands of “non-traditional” defendants. Moreover, most of these defendants exited that market long ago; some in the 1950s and all in the early 1970s. These defendants, nonetheless, are picking up the tab not only for the harm associated with their own products, but for harm caused by other, bankrupt asbestos manufacturers’ products, as well as the harm cause by tobacco.

Some of the fifteen bankruptcies have resulted in the creation of trusts to pay asbestos claims. The common characteristic of these trusts is severe under-funding compared to their admitted liabilities. The largest, the Manville Trust, for instance, is currently paying about ten cents on the dollar of the amount the trust agrees it owes.

Another fundamental aspect of the current state of asbestos litigation is that some of the tragically ill people are not being fully compensated. While there is tremendous waste and abuse in asbestos litigation, and while the asbestos-litigation business has over-compensated many people who are not impaired (including, it must be said, many lawyers), it is nonetheless true that, primarily because of the bankruptcies, some asbestos claimants, often those who are the most ill, have not received the compensation to which they are entitled.

With only *de minimis* exceptions related to a few strategic uses, asbestos-containing products have not been produced since the seventies. Even when they were produced, the manufacturers who produced the products containing asbestos then did not compete among themselves; they were not in the same businesses. They competed, as the remaining ones compete today, in their own industries, from boilers to auto parts, from building materials to containers, often against foreign competitors. The costs of their liability for the asbestos problem, and the costs they have borne for others, could not and cannot be passed along to their customers. They have been borne, through bankruptcies, through lost American jobs, through lost profits and through diminished share prices, by workers, managers, communities, shareholders and pensioners -- almost all of them wholly blameless as virtually none of the current workers, managers or shareholders were workers or owners of the defendants when the asbestos containing products were manufactured and sold more than two decades ago.

The contrast in these respects with the situation of the tobacco industry is rather stark. But, while that contrast certainly strengthens the imperative to structure any tobacco settlement to include tobacco's fair share of the problem being borne by the asbestos defendants for the smoking asbestos workers, it is not, of course, the heart of the matter. The imperative rests on

the facts that: the harm suffered by many asbestos claimants is a result of the unfortunate synergistic effects of tobacco and asbestos on asbestos exposed individuals, often with tobacco playing by far the greater role; a very high percentage of the monies paid by asbestos defendants represent tobacco's unpaid share; and a significant part of the shortfall in adequate compensation to claimants results from tobacco's failure to pay its share.

the joint tobacco-asbestos problem

The harm caused by tobacco to asbestos exposed individuals is huge. Only the exact magnitude of tobacco's contribution to the tobacco-asbestos problem needs to be determined. The basic facts are not truly disputable; they have long been a fact of life in asbestos litigation and they rest upon a solid scientific consensus and a wealth of statistical information. The reason that these facts have failed, to date, to draw tobacco companies into asbestos litigation is the same reason that smokers and those who pay for the costs of smoking, have not, until now, prevailed against tobacco defendants -- the eroding and erroneous belief, fostered by the tobacco industry, that it could not be successfully demonstrated that smoking was addictive, that tobacco companies acted culpably with respect to tobacco addiction, and that tobacco companies concealed essential information related to their legal liability. The existing facts and science with respect to tobacco's role in tobacco-asbestos diseases can now be matched with legal responsibility.

The most obvious example is lung cancer. Most victims of lung cancer who sue asbestos companies or seek relief from the asbestos trusts, as with most other asbestos-exposed claimants, were also heavy smokers. Asbestos exposure was primarily an occupational hazard, primarily among blue-collar workers, and it took place primarily in the middle decades of this century.

This defines a segment of the population that smoked in greater numbers and intensity than the general population. In fact, virtually all asbestos workers were directly or indirectly exposed to smoke.

There is significant scientific doubt that asbestos *is ever* the sole cause of cancer. There is no doubt that smoking causes lung cancer, and that smoking in conjunction with asbestos exposure causes cancer significantly in excess of the rate of cancer from smoking alone. This “synergistic effect,” in fact, is exactly what plaintiffs in such cases allege. They have simply chosen in the past, for the same ample and rapidly evaporating reasons that tobacco companies were seldom sued and never lost, to sue and recover from only one of the alleged joint-tortfeasors, asbestos manufacturers.

In very rough terms, the evidence would indicate that a heavy smoker is *four* times more likely to contract lung cancer than is a heavily-exposed asbestos worker who does not smoke. Smoking, thus, probably bears responsibility for eighty percent of the cancers in smoking asbestos workers. Continuing with this very rough estimate, asbestos defendants have paid in excess of \$3 billion, exclusive of defense costs, for lung cancers; that means, for lung cancer alone, asbestos defendants have paid approximately \$2.5 billion for harm that is the tobacco industry’s responsibility.

Tobacco plays a significant role in other forms of cancer for which asbestos workers recover from asbestos manufacturers, including laryngeal cancer and esophageal cancer. It is also linked directly to the non-malignant obstructive lung disease, such as emphysema, suffered by asbestos workers. Finally, it plays a definite role in increasing the incidence and severity of asbestosis itself. One good estimate of smoking’s contribution to the non-malignant harms

suffered by asbestos workers is at least fifty percent. All told, a very rough estimate of tobacco's liability to the asbestos trusts and asbestos defendants, past and future, exclusive of defense costs, fully reflecting amounts that awards may have been reduced to account for smokers' responsibility, is in the range of \$12 to \$15 billion.

the proposed tobacco settlement

Now that the barriers are falling to tobacco companies paying their share of harm caused by smoking generally, and of the smoking-caused harm paid by asbestos defendants and trusts in particular, any settlement with the tobacco industry enacted by Congress must set up a mechanism to determine expeditiously and settle promptly tobacco's contribution to the asbestos-tobacco problem. At the very least, any proposed settlement should have scrupulously preserved the rights of asbestos defendants and trusts vis-a-vis tobacco and provided them with some meaningful help in enforcing those rights. It is an outrage, a Constitutional affront, and a public-policy debacle that the proposed agreement instead bars asbestos defendants and trusts from seeking meaningful recoupment and meaningful future relief. Even after this facet of the agreement is removed, as one assumes it surely must be, there will remain inherent, deeply damaging aspects of the settlement that will worsen the plight of asbestos claimants, defendants and trusts relative to tobacco. The only remedy is an express mechanism for resolving tobacco's liability with respect to asbestos-tobacco litigation.

specific bar and limitations

Under its Title VIII, "Civil Liability," the proposed settlement lists three "permissible party" plaintiffs with respect to tobacco's "civil liability for past conduct," one of which is "third-party payor (and similar) claims not based on subrogation that were pending as of 6/9/97."

(Proposed Resolution, p.40). This language squarely encompasses an action by asbestos defendants and trusts to recoup monies paid by them for harm caused by tobacco -- and it purports to bar any such claim not already filed. Not satisfied with immunity for past conduct, under its provisions relating to liability for future conduct, the agreement expressly incorporates the same bar. (Id., p.42.)

Moreover, permissible "third party payor claims," those that were filed before June 6, are subject to the cap of a million dollars a year. This applies to any judgments in excess of that amount unless "every other judgment\settlement can be satisfied within the annual aggregate budget cap." Paragraph B(9), which sets out the million-dollar cap, provides: "For purposes of this provision, a third-party payor (or similar) action not based on subrogation is treated as having been brought by a single plaintiff and is subject to the \$1 million rollover on that basis." (P. 41.) In other words, should a case brought by asbestos trusts or defendants have somehow evaded the secretly-arrived-at time bar, the prevailing plaintiffs could collect the billions they have paid for harm caused by tobacco at the rate of \$1 million a year, without interest, of course. The other avenue left open to asbestos trusts and defendants is to compete, as supplicants before the discretion of a Presidential Commission, with "public health, governmental entities and other uses of the funds" for amounts, if any, by which the industry payments fall short of "the annual aggregate cap." (Id., p.41).

In one of the many ironies of the proposed settlement document, humorous if it were not so scandalous, the above provisions are followed immediately by "Title IX: Board Approval," stating that the terms of resolution are "subject to approval by the Boards of Directors of the participating tobacco companies." (P. 42.) One searches in vain for the requirement that it is also

subject to approval by the Trustees of the asbestos trusts or the Boards of Directors of asbestos defendants.

inherent prejudicing of asbestos defendants versus tobacco defendants

Once these specific provisions are struck, the agreement will still embody a fundamental injustice with respect to asbestos victims, trusts and defendants. It will still deeply prejudice the ability of the asbestos trusts and defendants to recover against the tobacco companies, and it will, moreover, serve to foster, finance and channel litigation and liability regarding harm caused jointly by tobacco and asbestos away from tobacco companies and toward asbestos trusts and defendants.

The key provisions are those regarding class actions and punitive damages. The proposal eliminates punitive damages from tobacco litigation; the only punitive damages for past conduct allowable will be the capped \$60 million payment, which will be used for specified purposes: “All punitive damages claims resolved as part of overall settlement. No punitive damages in individual tort actions.” (P. 39). The proposal also protects the tobacco industry from all procedural devices aimed at aggregating claims, leaving them subject only to individual lawsuits: “Individual trials only: i.e., no class actions, joinder, aggregations, consolidations, extrapolations, or other devices to resolve cases other than on the basis of individual trials, without defendant’s consent.” (Id.).

These two immense, unprecedented protections afforded tobacco will impact asbestos defendants and trusts in two different ways, one direct and one indirect. It directly impacts them in that it would severely restrict the legal tools they may utilize in seeking redress from the tobacco industry. The two weapons that were used devastatingly against asbestos defendants,

first, class actions and related consolidations, aggregations, etc., and, second, punitive damages, could not be used by asbestos defendants and trusts in their effort to recover the tobacco share. For instance, it might be that punitive damages would become an important part of asbestos and trust defendants' litigation against tobacco companies, depending particularly upon what discovery and documents show about tobacco industry knowledge and actions concerning such things as the addictiveness of cigarettes and the synergistic effects of tobacco and asbestos.

The second general way in which the bars to class actions, consolidations and punitive damages will prejudice asbestos defendants and trusts relative to tobacco defendants is less direct but even more significant. Both of these things will have an immense impact on channeling the lawsuits and liability that results from the joint operation of tobacco and asbestos away from tobacco and toward asbestos. If the lawsuit industry can choose whether to bring a suit against jointly liable defendants, one group of whom is subject to punitive damages, class actions and related devices, and the other is not, which will it choose? It may be that a retail lawsuit industry will develop to bring individual smoker cases, but the big guns, with the big procedural advantages and the hope of random but huge punitive recoveries, will have every incentive to bring those suits against the asbestos defendants, not the tobacco defendants.

In another of the proposed settlement's disturbing ironies, many of the plaintiff lawyers involved in negotiating the proposed settlement are also some of the country's leading asbestos-plaintiff attorneys. The deal which they negotiated will have the effect of encouraging, facilitating and financing the ongoing massive business of suing asbestos manufacturers -- at the same time it makes it virtually impossible for those manufacturers and the asbestos trusts, to seek a fair contribution from the tobacco companies for the harm they have caused but for which

the asbestos defendants and trusts have paid and will pay.

patent unconstitutionality

Presumably, the fundamental rights of asbestos trusts and defendants were sacrificed in the course of the negotiations as part of the consideration flowing to tobacco companies in return for their compromises on other issues. The irony of this -- the fallacy of the negotiators' apparent calculation -- is that because this attempted abridgment of the rights of parties not present is a Constitutional nullity, those who counted on it to balance the deal had better think again.

The case for the Constitutionality of the overall tobacco settlement rests upon analogies to workers' compensation, national childhood-vaccine legislation, and the black-lung compensation program. The core idea is that legislatures, in a process of carefully, conscientiously and rationally constructing an alternative means of redressing the injuries of injured parties, as well as achieving desirable social goals, may substitute sure and expeditious administrative-compensation schemes for the rights of those parties to seek legal redress in the courts. How this analysis will be applied to the situation of individual smokers under the proposed settlement is an interesting question. Under the proposed settlement, individual smokers were represented by parties at least purporting to represent them, and, more importantly, they have retained the right to sue, albeit without the benefit of class actions or punitive damages. Also, they receive other significant benefits. If enacted into law, will this pass Constitutional muster?

The lost rights of asbestos victims and trusts do *not* present an interesting question. This is the proverbial Constitutional slam dunk. The principle represented by the workers-compensation-type situations stops a Constitutional chasm short of justifying the proposed treatment of asbestos trusts and defendants, and, if it were to be stretched to cover it, the

principle would cease to represent a permissible rights trade-off and instead represent naked rights-extinguishment for the benefit of others. Consider the Constitutional analysis if the time bar and recovery cap were enacted: rather than sure and expeditious administrative compensation, the asbestos trusts and defendants are offered a ban on all of their suits not filed by a secretly-arrived-at, already-passed date, and begging rights before a political body dispensing a fund that may well not exist.

If tobacco companies would like the rights of asbestos trusts and defendants to be extinguished, or in any fashion abridged, in the interests of a proposed resolution of tobacco liabilities and regulation, they can negotiate with the holders of those rights. If that negotiation takes place, and if it results in an agreement, the outcome will not look anything like the relevant provisions of the proposed settlement. If tobacco companies do not wish to negotiate with the holders of those rights, they can ask Congress to extinguish and abridge them, thereby irrevocably transferring responsibility for tobacco's share of the joint tobacco-asbestos problem from the tobacco companies to the asbestos companies. Because of the egregious policy choices represented by that decision (as discussed in the following section), it is hard to believe that Congress will make this choice, and, as indicated above, if Congress were to so choose, the legislation would be struck down as patently unconstitutional.

In fact, even if a legislatively-imposed abridgment did not include the time bar and cap referred to above, and instead included "only" the denial of rights represented by the prohibition on use of class actions or any other form of consolidation of claims and by the prohibition on the recovery of punitive damages, the Constitutional question is almost as easy. This likewise constitutes a clearly unconstitutional rights deprivation. Asbestos defendants and trusts are not

being offered a reasonable and certain administrative reimbursement mechanism in exchange for these rights; they would be given, if anything, the virtually meaningless begging rights at the hypothetical fund. Moreover, they incurred the obligations for which they seek reimbursement in actions by plaintiffs proceeding with full rights to class actions and punitive damages; the denial of these rights comes, effectively, too late. This disconnect between the rights used in establishing the liability of asbestos trusts and defendants, as contrasted with the rights that would be available to them in seeking contribution from a joint tortfeasor for its share of that liability, vitiates any chance of a just extinguishment of rights. Looking at it prospectively, the injustice is even clearer: asbestos trusts and defendants would continue to incur liabilities for the harm jointly caused by asbestos and tobacco under rules that allow for class actions and punitive damages, but they could seek contribution for tobacco's share only under rules that forbade them.

Finally, any doubt about the outcome of the Constitutional inquiry is laid to rest when one considers the governmental or policy interest truly at issue: the governmental interest that would have to be cited to justify the blatant rights deprivation. This part of the Constitutional analysis is particularly important where, unlike the situation involved in constructing black-lung, workers'-compensation or childhood-vaccine legislation, the core interests which the legislature is attempting to advance are those *other* than the interests of some of the people or entities whose rights are being abridged. The governmental interest in this instance is *not* the entire amalgam of interests that would support a deal with the tobacco industry or its legislative imposition, such as the reduction of cigarette smoking among minors. No one can truthfully say, and a court would not find, that a deal or legislation turned on the sacrifice of the rights of asbestos trusts and defendants. All that is really at issue is the *level* of the cost imposed upon the tobacco industry,

and, the marginal increase of that level in order to avoid the abridgement of asbestos trusts' and defendants' rights is, relatively speaking, small. In the terms in which the tobacco settlement is discussed, it is pennies on a pack. Moreover, at least on its face, it would certainly seem that those pennies would advance, not hinder, the essential purposes of any reasonable tobacco legislation.

public policy considerations

The policy considerations reflected in the proposed settlement's aiding and abetting of the irrevocable transfer of tobacco liabilities to asbestos defendants and trusts could not be more upside-down. Even the American Bar Association, no fan of tort reform, has officially and explicitly recognized that limitations on liability *are* appropriate as to asbestos defendants, both because of the equities involved in litigation where most of the defendant product market is bankrupt and because of the need to preserve assets for payment of claims. Turning this on its head, the proposal would transfer liability from a group of very solvent defendants to a group of defendants more devastated by bankruptcy than any other class of tort defendants in history. What are they trying to do here? Assure that asbestos-tobacco victims will not be fully compensated? Encourage bankruptcies and job loss? Protect tobacco companies from their own liability so that it can be borne by defendants who are already paying the share of bankrupt defendants? Many shareholders in companies that manufactured asbestos containing products saw the value of their investments wiped out in bankruptcies; some of the non-bankrupt defendants have suffered huge decreases in their stock prices, in part because of the cost of picking up the bankrupts' share. To what end should they also bear the tobacco companies' share -- the propping up of tobacco stock prices?

The tobacco companies, moreover, can and will pay much or all of the proposed settlement, just as they could pay their share of the tobacco-asbestos harm, with little or no reduction in their profitability, by raising prices on cigarettes. The remaining asbestos defendants, competing in diverse industries with companies who do not have asbestos liabilities, cannot pass on their asbestos-related costs. They certainly cannot include these costs in the price of asbestos-related products, because they are no longer producing them. What is the point of favoring tobacco companies over asbestos defendants in this respect -- to keep down the price of cigarettes? A principle of any principled tobacco settlement is that tobacco companies, and thus cigarettes, bear the full costs they impose on society -- *not* that these costs be transferred to others who are in a far worse position to bear it and whose culpability is far less.

As for relative culpability, several factors are relevant. The remaining asbestos defendants, whether "traditional" or "non-traditional" have been and are paying for the harm caused by the bankrupt producers, as well as that of the cigarette manufacturers. All they are asking of the tobacco manufactures is that they pay the harm they have caused. Most of the remaining asbestos defendants stopped producing asbestos containing products more than two decades ago. Tobacco companies are not only still producing cigarettes, the major reason for the settlement, from their point of view, is so that they can continue to do so and do so profitably. Both tobacco companies and asbestos manufacturers began issuing warnings on their products in the 1960s; asbestos manufacturers did so voluntarily; tobacco companies did so pursuant to governmental mandate. Asbestos manufactures did not engage in the product manipulation that some cigarette manufactures are alleged to have done. In addition, with respect to smokers claims in general against tobacco companies there is an important issue of what individual

smokers knew about the dangers of smoking and their choice to assume the risks of smoking. With respect to the asbestos defendants' and trusts' claims against the tobacco industry arising out of the alleged "synergistic effects" of asbestos and tobacco, this issue is very different.

Consider, as one final example of the egregious policy and distributional choices implicit in the proposed settlement, the plight of a seriously ill asbestos worker. Consider a worker, for instance, who must look to one of the asbestos trusts for payment, and perhaps who has already had his award reduced by substantial payments to plaintiff lawyers. How does one explain to him the protection of tobacco companies at the expense of the trusts? How does one explain to him that he has been barred from joining with other workers, in any method of consolidation or class action, in suing the tobacco companies? Similarly, is the proposal playing fair with those unions which represent him and his fellow workers? As a general proposition, organized labor is not reconciled to having the rights and resources of its members, particularly its neediest members, bargained away in rooms to which they were not invited, by people who, evidently, were thinking of other things.

what must be done

Any legislation that implements the proposed tobacco resolution must also provide for a mechanism to resolve fairly and expeditiously tobacco's responsibility for reimbursing the asbestos trusts and defendants for past and future compensation paid to asbestos exposed individuals for lung disease caused, in whole or substantial part, by smoking. If the tobacco industry cannot, or will not, negotiate a resolution of this aspect of their responsibilities, any tobacco legislation enacted by Congress must provide a means of resolving them. An advisory panel could investigate the matter and make recommendations to the Presidential Commission to

be established under the proposed settlement, or to any comparable body Congress would create. Alternatively, a special panel could be established to resolve definitively this matter alone, rather than simply make recommendations to a broader commission. The deciding body would have broad authority to establish the fair share owed by tobacco for past payments, rules for disbursement, and rules to govern the status of tobacco payments in the future for lung diseases caused by smoking in asbestos exposed individuals. The panel would draw from the many experts in the scientific and medical communities, as well as from the federal and state judiciaries, who have expertise and knowledge with respect to the relevant issues.

The legislation, as implemented by the commission, should require that the tobacco industry's payments benefit the asbestos exposed claimants who smoked even in the event of additional bankruptcies of asbestos defendants. Hence, it should require that these proceeds be used solely for payments to asbestos claimants who smoked and that they be preserved by escrowing or similar means.

In one of its last decisions of this term, the Supreme Court struck down an effort by representatives of asbestos claimants and a large number of asbestos defendants to settle asbestos liabilities through the use of a broad, nationwide class action for future claimants. Amchem Products, Inc., et. al. V. Windsor 1997 WL 345149, at 5 (S. Ct. June 25, 1997). There has been speculation in the press that this decision may facilitate a legislative resolution of tobacco liabilities, by restricting the scope of class actions as an alternative means of resolving those liabilities, even on a consensual basis. Whether or not that is true, the Amchem decision has a very direct bearing upon the compelling case for Congress' inclusion of a mechanism for resolving tobacco-asbestos liabilities in any legislative resolution of tobacco liabilities.

In her opinion for the Court, Justice Ginsburg, like so many judges before her who have surveyed the past and anticipated the future of the mass asbestos litigation, makes pointed reference to the advisability of a legislative solution, citing in this respect the very clear recommendation of a series of reports by the United States Judicial Conference's Ad Hoc Committee on Asbestos Litigation. Justice Breyer, joined by Justice Stevens, in a separate opinion concurring in part and dissenting in part, relies on the Judicial Conference's reports to deliver a forceful critique of the inadequacies of asbestos litigation to meet the needs of victims: "Some of those who suffer from the most serious injuries . . . have received little or no compensation. . . . '[Recent years] have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments--if ever obtained--can be collected.'" (In the second sentence, Justice Breyer was quoting the Judicial Conference Report, which in turn was quoting the Rand Institute for Civil Justice.)

In fact, a number of asbestos defendants, under the auspices of a coalition known as the "Committee for Equitable Compensation," tried, in past Congresses, to work cooperatively with labor interests to establish a legislative solution. These efforts failed, running up against political realities -- including the political clout of trial lawyers.

While a comprehensive legislative solution to the asbestos problem, one that establishes an administrative claims mechanism similar to workers' compensation or black lung programs, may remain, at least for the present, beyond the realm of political practicality, one piece of a solution -- the expeditious resolution of tobacco's contribution for the lung disease of asbestos exposed claimants who smoked -- is now squarely before Congress. In the proposed tobacco legislation, Congress will either significantly improve the asbestos crisis by dealing directly with

tobacco's role in it, or, Congress will make the crisis worse, and its ramifications more unjust. It would be a gross injustice if tobacco liabilities were to be resolved legislatively without remedying the inherent prejudice involved in the tobacco proposal as to asbestos exposed claimants who smoked, trusts and defendants. It would be a missed opportunity of historic dimension if this were not done in a way that lessened litigation and waste endemic in the process of compensating the asbestos exposed claimants who smoked and whose lung disease is caused, in whole or in substantial part, by smoking.

06/30/97
files

FILED
DISTRICT COURT

Division
"M"

WALTER "BUDDY" KNOWLES,
NUMBER DIVISION
AND JOHN ELLIOTT, SR.

section 16

versus

97-11517

THE AMERICAN TOBACCO COMPANY, INC.;	CIVIL DISTRICT COURT
AMERICAN BRANDS, INC.; BROWN &	
WILLIAMSON TOBACCO CORPORATION;	
BATUS, INC.; BATUS HOLDING, INC.;	
R. J. REYNOLDS TOBACCO COMPANY;	
R.J.R. NABISCO, INC.; LORILLARD	
TOBACCO COMPANY, INC.; LORILLARD, INC.;	PARISH OF ORLEANS
LOEWS CORPORATION; PHILLIP MORRIS INC.;	
UNITED STATES TOBACCO COMPANY;	
UST, INC.; THE TOBACCO INSTITUTE, INC.,	
WALGREEN LOUISIANA CO., WAL-MART STORES,	STATE OF LOUISIANA
INC., ECKERD HOLDING II, INC., KATZ &	
BESTHOFF IN LOUISIANA, d/b/a K&B DRUG	
STORES, IMPERIAL TRADING CO.,	
BATON ROUGE TOBACCO CO., INC.,	
QUAGLINO TOBACCO AND CANDY COMPANY,	
INC., GEORGE W. GROETSCH, INC., J & R	
VENDING SERVICE, INC.	

CLASS ACTION PETITION

NOW INTO COURT, through undersigned counsel, come Walter "Buddy" Knowles, and John Elliott, Sr. ("Plaintiffs"), members and/or retirees of labor organizations holding membership in the Louisiana AFL-CIO appearing herein individually and on behalf of all other persons similarly situated, who respectfully aver as follows:

PRELIMINARY STATEMENT

This class action is brought on behalf of all members and/or retirees of labor organizations holding membership in the Louisiana AFL-CIO, or their survivors, heirs, dependents and estates, who reside in the State of Louisiana who have developed cancer of the lung, or will in the future develop cancer of the lung, and have a combination of exposure to injurious levels of cigarette smoke from cigarettes manufactured by the Tobacco Manufacturers and who were occupationally exposed to asbestos. The dual exposure to these substances has a synergistic effect which greatly increases an individual's likelihood of contracting various diseases, specifically lung cancer, such as bronchogenic carcinoma and adenocarcinoma.

PARTIES

1.

Plaintiffs herein are:

1. Walter "Buddy" Knowles is a person of the full age of majority and resident of the State of Louisiana, Parish of Jefferson. Mr. Knowles is a smoker who has been exposed to injurious levels of cigarette smoke from cigarettes manufactured by the Tobacco Manufactureres and was occupationally exposed to asbestos while a member of a labor organization holding membership in the Louisiana AFL-CIO. Mr. Knowles has developed cancer of the lung and is a member of the Class defined in paragraph 34 of this Petition and seeks to be named as a class representative of this Class; and,
2. John Elliott, Sr. is a person of the full age of majority and resident of the State of Louisiana, Parish of Jefferson. Mr. Elliott is a smoker who has been exposed to injurious levels of cigarette smoke from cigarettes manufactured by the Tobacco Manufacturers and was occupationally exposed to asbestos while a member of a labor organization holding membership in the Louisiana AFL-CIO. Mr. Elliott has developed an increased risk of contracting cancer of the lung as a result of his dual exposure to asbestos and cigarette smoke and is a member of the Class defined in paragraph 34 of this Petition and seeks to be named as a class representative of this Class.

2.

Made Defendants herein are:

A. Tobacco Manufacturers:

1. The American Tobacco Company, Inc., is a Delaware corporation whose principal place of business is Six Stamford Forum Stamford, Connecticut; The American Tobacco Company, Inc. manufacturers, advertises and sells Lucky Strike, Pall Mall, Tareyton, Malibu, American, Montclair, Newport, Misty, Barkley, Iceberg, Silk Cut, Silva Thins, Sobrania, Bull Durham and Carlton cigarettes through the United States, including the State of Louisiana, Parish of East Baton Rouge;
2. American Brands, Inc., is a Delaware corporation whose principal place of business is Six Stamford Forum, Stamford, Connecticut, and is the parent company of The American Tobacco Company, Inc.; American Brands, Inc. manufacturers, advertises and sells Lucky Strike, Pall Mall, Tareyton, Malibu, American, Montclair, Newport, Misty, Barkley, Iceberg, Silk Cut, Silva Thins, Sobrania, Bull Durham and Carlton cigarettes through the United States, including the State of Louisiana, Parish of East Baton Rouge;
3. Brown & Williamson Tobacco Corporation is a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky; Brown & Williamson Tobacco Corporation manufactures, advertises and sells Kool, Barclay, BelAir, Capri, Raleigh, Richland, Laredo Ell Cutter and Viceroy cigarettes throughout the United States, including the State of Louisiana, Parish of East Baton Rouge;

4. Batus, Inc., is a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky and is the parent company of Brown & Williamson Tobacco Corporation; Batus manufactures, advertises and sells Kool, Barclay, BelAir, Capri, Raleigh, Richland, Laredo Ell Cutter and Viceroy cigarettes throughout the United States, including the State of Louisiana, Parish of East Baton Rouge;
5. Batus Holdings, Inc., is a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky and is the parent company of Batus, Inc.; Batus Holdings, Inc. manufactures, advertises and sells Kool, Barclay, BelAir, Capri, Raleigh, Richland, Laredo Ell Cutter and Viceroy cigarettes throughout the United States, including the State of Louisiana, Parish of East Baton Rouge;
6. R. J. Reynolds Tobacco Company is a New Jersey corporation whose principal place of business is located at Fourth and Main Streets, Winston-Salem, North Carolina; R. J. Reynolds Tobacco Company manufactures, advertises and sells Camel, Vantage, Now, Doral, Winston, Sterling, Magna, More, Centry Bright Rite and Salem cigarettes throughout the United States, including the State of Louisiana, Parish of East Baton Rouge.
7. R.J.R. Nabisco, Inc., is a Delaware corporation whose principal place of business is 1301 Avenue of the Americas, New York, New York, and is the parent company of R. J. Reynolds Tobacco Company; R.J.R. Nabisco, Inc. manufactures, advertises and sells Camel, Vantage, Now, Doral, Winston, Sterling, Magna, More, Centry Bright Rite and Salem cigarettes throughout the United States, including the State of Louisiana, Parish of East Baton Rouge.
8. Lorillard Tobacco Company, Inc., is a Delaware corporation whose principal place of business is One Park Avenue, New York, New York; Lorillard Tobacco Company manufactures, advertises and sells Old Gold, Kent, Triumph, Satin, Max, Spring, Newport, and True cigarettes throughout the United States, including the State of Louisiana and Parish of East Baton Rouge;
9. Lorillard, Inc., is a Delaware corporation whose principal place of business is One Park Avenue, New York, New York; Lorillard, Inc. manufactures, advertises and sells Old Gold, Kent, Triumph, Satin, Max, Spring, Newport, and True cigarettes throughout the United States, including the State of Louisiana and Parish of East Baton Rouge;
10. Loews Corporation is a Delaware corporation whose principal place of business is One Park Avenue, New York, New York and is the parent company of LoffHard Tobacco Company, Inc. and Lorillard, Inc.; Loews Corporation manufactures, advertises and sells Old Gold, Kent, Triumph, Satin, Max, Spring, Newport, and True cigarettes throughout the United States, including the State of Louisiana and Parish of East Baton Rouge;
11. Philip Morris, Incorporated, a Virginia corporation whose principal place of business is 601 Poydras Street, New Orleans, Louisiana; Philip Morris, Incorporated manufactures, advertises and sells Philip Morris, Merit, Cambridge, Marlboro, Benson & Hedges, Virginia Slims, Alpine, Dunhill, English Ovals, Galaxy, Players, Saratoga and Parliament cigarettes throughout the United States, including the State of Louisiana and Parish of East Baton Rouge;
12. United States Tobacco Company is a Delaware corporation whose principal place of business is located at 100 West Putnam Ave., Greenwich, Connecticut; United States Tobacco Company manufactures and sells Sano cigarettes throughout the United States, including the State

of Louisiana and Parish of East Baton Rouge;

13. UST, Inc., is a Delaware corporation whose principal place of business is located at 100 West Putnam Avenue, Greenwich, Connecticut, and is the parent company of United States Tobacco Company. United States Tobacco Company manufactures and sells Sano cigarettes throughout the United States, including the State of Louisiana and Parish of East Baton Rouge;

(Defendants A1-13 are referred to as the "Tobacco Manufacturers");

14. The Tobacco Institute, Inc., is a New York corporation whose principal place of business is located at 1875 I Street N.W., Suite 800, Washington, D.C. The Tobacco Institute, Inc. was acting with the consent, permission and authorization of each of the Tobacco Companies. All actions of the Tobacco Institute, Inc. alleged herein were ratified and approved by the officers or managing agents of the Tobacco Companies.

B. Tobacco Distributors:

1. Walgreen Louisiana Co. ("Walgreen") is a Louisiana corporation, organized under the laws of the State of Louisiana, whose agent for service of process is Harold W. Wedig, 1006 Hibernia Bank Bldg., New Orleans, Louisiana 70112, and at all relevant times hereto was authorized to do and doing business in the State of Louisiana, as a retail distributor of tobacco products manufactured by the Tobacco Manufacturers;
2. Wal-Mart Stores, Inc. ("Wal-Mart") is a Delaware Corporation whose agent for service of process is C.T. Corporation Systems, 8515 United Plaza Blvd., Baton Rouge, Louisiana 70809, and at all relevant times hereto was authorized to do and doing business in the State of Louisiana, as a retail distributor of tobacco products manufactured by the Tobacco Manufacturers;
3. Eckerd Holding II, Inc., d/b/a Eckerd Drug Stores ("Eckerd") is a Delaware Corporation whose agent for service of process is Kean, Miller, Hawthorne, D'Armond & Jarman, 2200 One American Place, Baton Rouge, Louisiana 70801, and at all relevant times hereto was authorized to do and doing business in the State of Louisiana, as a retail distributor of tobacco products manufactured by the Tobacco Manufacturers;
4. Katz & Besthoff in Louisiana, d/b/a K & B Drug Stores ("K&B") is a Louisiana Corporation, organized under the laws of the State of Louisiana, whose agent for service of process is Virginia F. Besthoff, K&B Plaza, Lee Circle, New Orleans, Louisiana 70130, and at all relevant times hereto was authorized to do and doing business in the State of Louisiana, as a retail distributor of tobacco products manufactured by the Tobacco Manufacturers;

Defendants, Walgreen, Wal-Mart, Eckerd and K&B are Louisiana retailers of tobacco products with specialized knowledge of drugs and pharmacology as a result of their pharmacy operations. Said Defendants are collectively referred to as "Pharmacy Retailers".

5. Imperial Trading Co. is a Louisiana Corporation, organized under the laws of the State of Louisiana, whose agent for service of process is Gerald C. Pelias, 701 Edwards Avenue, Harahan, Louisiana 70123, and at all relevant times hereto was authorized to do and doing business in the State of Louisiana, as a wholesale distributor of tobacco products

manufactured by the Tobacco Manufacturers;

6. Baton Rouge Tobacco Co., Inc. is a Louisiana Corporation, organized under the laws of the State of Louisiana, whose agent for service of process is A. B. Lemoine, 2326 Sorrel Avenue, Baton Rouge, Louisiana 70802, and at all relevant times hereto was authorized to do and doing business in the State of Louisiana, as a wholesale distributor of tobacco products manufactured by the Tobacco Manufacturers.
7. Quaglino Tobacco and Candy Company, Inc., is a Louisiana corporation, organized under the laws of the State of Louisiana, with its agent for service of process in the Parish of Orleans, and at all relevant times hereto was qualified to do and was doing business in the State of Louisiana, Parish of Orleans, as a wholesale distributor of the tobacco products manufactured by the Tobacco Manufacturers.
8. George W. Groetsch, Inc., is a Louisiana corporation, organized under the laws of the State of Louisiana, with its agent for service of process in the Parish of Jefferson, and at all relevant times hereto was qualified to do and was doing business in the State of Louisiana, Parish of Orleans, as a wholesale distributor of the tobacco products manufactured by the Tobacco Manufacturers.
9. J & R Vending Service, Inc., is a Louisiana corporation, organized under the laws of the State of Louisiana, with its agent for service of process in the Parish of Orleans, and at all relevant times hereto was qualified to do and was doing business in the State of Louisiana, Parish of Orleans, as a wholesale distributor of tobacco products manufactured by the Tobacco Manufacturers.

Defendants, Imperial Trading Co., Baton Rouge Tobacco Co., Inc., Quaglino Tobacco and Candy Company, Inc., George W. Groetsch, Inc., and J & R Vending Service, Inc. are collectively referred to as "Commercial Suppliers".

JURISDICTION AND VENUE

3.

This Court has jurisdiction and venue is proper over this class action because this is a claim by residents of the State of Louisiana, against some Defendants that are foreign corporations and some Defendants that are Louisiana corporations, created under the laws of the State of Louisiana, with their domicile and principal place of business in the State of Louisiana, including a domiciliary and agents for service of process designated in the Parish of Orleans, State of Louisiana.

4.

Venue is proper in this Court pursuant to the Louisiana Code of Civil Procedure. The named Plaintiffs and numerous class members purchased and used cigarettes marketed, distributed, and sold by the Defendants in the Parish of Orleans. Defendants made material omissions and misrepresentations about their products in this Parish and breached expressed and implied warranties in this Parish. Some of the Defendants are domiciled in this Parish and/or have their principal place of business in this Parish thereby giving rise to both

jurisdiction and venue.

SUMMARY OF THE CASE

5.

For decades the Tobacco Defendants, as a group, have engaged in the design, manufacture, advertising and sale of cigarettes to the named Class representatives and other similarly situated. Although marketed and sold as non-addictive and non-injurious tobacco products, cigarettes were and are in fact sophisticated delivery systems for chemicals, carcinogens, highly addictive drugs, and other poisons. The exposure to cigarette smoke to those persons who are also occupationally exposed to asbestos increases the risk of contracting lung cancer to those persons by UP TO 90 times more than for the non asbestos-exposed population due to the synergistic effects of such dual exposure.

The defendants knew or should have known of the devastating effect their tobacco products would have on the health of those persons occupationally exposed to asbestos and to cigarette smoke. The defendants have continued to market these products as non-addictive and non-injurious tobacco products to an unwitting public, particularly those exposed to asbestos, through fraudulent advertising, fraudulent statements, and active concealment concerning the dangerous and addictive nature of their products thereby depriving the asbestos-exposed consumer of important information concerning these products.

6.

Plaintiffs, their survivors, heirs and dependents have suffered physical, psychological and emotional injuries, and have suffered great financial losses due in part or in whole to the fraudulent, deceptive and illegal practices of the Defendants.

7.

Defendants are liable to the plaintiffs based upon fraud, fraudulent concealment, intentional infliction of emotional distress, conspiracy, strict liability, negligence, breach of implied warranty of merchantability, and unfair and deceptive trade practices. Defendants are liable *in solido* for the injuries presently afflicting the plaintiffs and the represented Class and injuries which will be suffered by the represented Class.

STATEMENT OF FACTS

Synergistic Effect of Exposure to Tobacco Smoke and Asbestos

8.

Persons who have been occupationally exposed to asbestos and who do not smoke cigarettes have a 5 times greater risk of contracting lung cancer than the non-asbestos exposed population. Persons who smoke cigarettes but have not been occupationally exposed to asbestos have a 10 times greater risk of contracting lung cancer than the non-smoking population. However, persons who have been occupationally exposed to asbestos and who inhaled cigarette smoke experience UP TO a 90 times greater risk of contracting lung cancer than the non-asbestos exposed and non-smoking population due to the synergistic effects of such dual exposure. This synergistic effect has caused a particularly tragic legacy in the American industrial environment due to the exponential increase in the risk and rates of lung cancer among millions of workers with dual exposures to tobacco smoke and asbestos.

9.

From 1940 to 1979, more than 27 million American workers had significant exposure to asbestos. It is estimated that as many as one-quarter (1/4) of the more than 27 million workers who had significant exposure to asbestos and who inhaled cigarette smoke have developed or will develop and/or die from lung cancer. It is estimated that only twenty percent (20%) of people who develop lung cancer will survive for five (5) years or more.

10.

Even for those workers who had occupational exposure to asbestos and who were fortunate to cease smoking, the risk of developing lung cancer remains significantly higher than the non asbestos-exposed population for fifteen to twenty-five years or more after smoking cessation. In fact, the risk of developing lung cancer may never decrease to the levels of a worker who only had occupational exposure to asbestos but no exposure to cigarette smoke, or one who had no occupational exposure to asbestos but had exposure to cigarette smoke.

11.

The Tobacco Manufacturers, individually and in concert, have manipulated not only

the public, but the scientific community and government regulators, by the use of lies and the suppression of the truth concerning the nature and content of their products and the cancer-causing effects of the products, including to those persons who are exposed to tobacco products and are also exposed to asbestos.

12.

The Tobacco Manufacturers were under a duty to disclose their knowledge concerning the increased risk of contracting lung cancer from the dual exposure to cigarette smoke and asbestos. The synergistic effect of cigarette smoke and asbestos is non-public information over which the Tobacco Manufacturers had control and concealed this information from the Plaintiffs and others similarly situated. As a result of this fraudulent concealment, Class members were deprived of informed consent and were deprived of any choice on which to make a risk benefit assessment regarding their use of tobacco products.

13.

Furthermore, defendants were on notice at least as early as 1955 that occupational asbestos exposure and cigarette smoke together have a synergistic effect on exposed persons which creates a risk of contracting lung cancer up to ninety times greater than that of unexposed persons. Such information was withheld to the detriment and injury of the plaintiffs and the represented Class.

14.

As a direct and proximate contributing result of being occupationally exposed to asbestos and having inhaled cigarette smoke, the Plaintiffs have received injuries, both physically and mentally for the development of (i) lung cancer, (ii) increased susceptibility of developing lung cancer, and (iii) mental anguish associated with the preceding conditions, and the fear of developing the preceding conditions.

Conspiracy of the Tobacco Defendants

15.

The Tobacco Manufacturers have organized themselves into a powerful manufacturing, marketing and political group using The Tobacco Institute as the hub of their efforts to defraud an unsuspecting American Public concerning the insidious effects of their tobacco containing products. Throughout the period of time in question the Tobacco Manufacturers have

organized themselves for the purpose of denying the addictive and cancer-causing effects of their cigarettes.

16.

Each of the Tobacco Manufacturers has used sophisticated scientific techniques to test whether their cigarette products cause cancer. Additionally, the Tobacco Manufacturers have tested the effects of nicotine on laboratory animals and/or humans. The Tobacco Manufacturers have suppressed the disclosure of the results of these tests from the public.

17.

The defendants' efforts were designed to develop and produce addicted consumers, including plaintiffs. Much of the defendants' efforts were directed at plaintiffs and the class they seek to represent, many of whom began smoking at an early age unknowingly exposing themselves to an addictive and harmful product.

18.

The Tobacco Companies make, advertise and sell cigarettes despite their knowledge of the following facts: More than 10 million Americans have died as a result of smoking cigarettes; more than 400,000 Americans die every year as a result of smoking cigarettes; almost one death in every five is due to a smoking related illness; the leading cause of preventable death in the United States today is smoking cigarettes; smoking causes cardiovascular disease and is responsible for approximately one-third of all heart disease deaths; smoking causes lung and throat cancers and is responsible for approximately one-tenth of all cancer deaths; smoking causes various pulmonary diseases, including emphysema; smoking causes stillbirths and neonatal deaths among the babies of mothers who smoke; and cigarettes may contain any number of approximately 700 "additives", including a number of toxic and dangerous chemicals.

19.

The tobacco industry has used the guise of tobacco marketing to, in fact, market a product which has been so greatly adulterated that it is no longer simply tobacco. These cigarette products are, in fact, dangerous poisons and addictive drugs which are marketed as simple consumer products. A series of sophisticated lies and deceptive practices was

developed by the Tobacco Manufacturers working in concert and separately to make the American public, including government regulators and other health officials, believe that cigarette smoking does not cause lung cancer.

20.

When combined with asbestos exposure, millions of lives of working men and women have been harmed or taken by the synergistic effects of the exposure to the two substances. Much of the dangers of cigarette smoking result from the hundreds of chemicals and carcinogens which are contained in cigarette smoke. These substances have long been known to the Tobacco Manufacturers. However, the existence and effect of most of these substances has been suppressed from the consumers of cigarettes in a fraudulent and dishonest manner, including the synergistic effect of the occupational exposure to asbestos and to cigarette smoke.

21.

Failure to notify the general public, consumers of cigarettes, or government regulators of the existence of huge amounts of poisons in the cigarettes marketed by the defendants renders any cigarette warning labels of limited informational value based on the omission of material information. The Tobacco Manufacturers failed to adequately warn consumers, particularly those exposed to asbestos, that their tobacco products were unreasonably dangerous, and/or unreasonably dangerous per se.

22.

Plaintiffs are informed and believe that the Tobacco Manufacturers intended that their products contain sufficient nicotine to satisfy addiction on the part of smokers, and therefore controlled the levels of nicotine in these products to create and sustain the addiction. It is this scheme to deceive the plaintiffs and the class they seek to represent that enables the Tobacco Manufacturers to sell its life-threatening products to class members as their captive customers.

23.

In addition to the suppression of information concerning manipulated nicotine levels and the associated effects, the Tobacco Manufacturers possessed massive amounts of knowledge concerning the association between long-term cigarette smoking, occupational asbestos exposure and lung cancer. This information has shown unequivocally that there is

a dramatic increase of developing lung cancer for individuals who have an occupational exposure to asbestos and who inhale cigarette smoke.

24.

Through their individual advertising and public relations campaigns, and collectively through the work of The Tobacco Institute, the Tobacco Manufacturers have successfully promoted and sold cigarettes by concealing and misrepresenting their highly addictive and injurious nature. Further, the Tobacco Manufacturers were well aware, or should have been aware, that when combined with asbestos exposure, cigarette smoking creates a risk of lung cancer that no reasonable person could or would accept, but such information was withheld by each of the Tobacco Manufacturers.

25.

The Tobacco Institute, Inc., is a co-conspirator with the Tobacco Manufacturers, and is an alter-ego of said Tobacco Manufacturers. In doing the things alleged herein. The Tobacco Institute, Inc., was acting within the course and scope of its agency or employment, and was acting with the consent, permission, and authorization of each of the Tobacco Manufacturers. All actions of The Tobacco Institute, Inc., alleged herein were ratified and approved by the officers or managing agents of the Tobacco Manufacturers.

26.

Each Tobacco Manufacturer is sued individually, as a primary violator and as an aider and abettor that rendered substantial assistance in the accomplishment of the acts and/or omissions alleged herein. In acting to aid and abet and substantially assist the commission of the fraud and wrongful conduct complained of herein, each Tobacco Manufacturer acted with an awareness of the fraud and wrongful conduct and realized that its conduct would substantially assist the accomplishment of that fraud and was aware of; (1) its overall contribution to the conspiracy, scheme and common course of wrongful conduct alleged herein; and (2) the cancer-causing effects of the products and the misrepresentation, concealment and suppression of information regarding the synergistic effect of the dual exposure to both asbestos and cigarette smoke which greatly increases the likelihood of contracting a lung cancer by plaintiffs and the class they seek to represent.

27.

Each Tobacco Manufacturer is also sued as a co-conspirator, and the liability of each arises from the fact that each Defendant entered into an agreement with the other Defendants and third parties to pursue, and knowingly pursued, the common course of conduct to commit or participate in the commission of all or part of the unlawful acts, plans, schemes, transactions and artifices to defraud as alleged herein; and the misrepresentation, concealment and suppression of information regarding the synergistic effect of the dual exposure to both asbestos and cigarette smoke which greatly increases the likelihood of contracting a lung cancer by plaintiffs and the class they seek to represent.

28.

The Pharmacy Retailers knew that the tobacco products sold in their pharmacy stores contained the addictive drug nicotine and carcinogenic chemicals which caused disease and cancer. Said qualities rendered the product unreasonably dangerous for its intended use to the user/consumer. Despite said knowledge, the pharmacy retailers failed to disclose or warn its purchasers, including plaintiffs and the class they seek to represent of the defect or vice of the tobacco products.

29.

Plaintiffs, and the class they seek represent, purchased tobacco products from the Pharmacy Retailers on a regular basis. Plaintiffs' cancer was caused, in part, by the tobacco products sold by the Pharmacy Retailers without any warning about the synergistic effect tobacco has on those occupationally exposed to asbestos.

30.

Defendants, Imperial Trading Co., Baton Rouge Tobacco Co., Inc., Quaglino Tobacco and Candy Company, Inc., George W. Groetsch, Inc., and J & R Vending Service, Inc. were wholesalers and distributors of tobacco products to the pharmacy retailers and numerous retail outlets in Louisiana where plaintiffs and the class they seek to represent purchased the tobacco products that caused cancer.

31.

The tobacco products sold to plaintiffs by the Pharmacy Retailers were supplied by the

Commercial Suppliers, which products were unreasonably dangerous in their normal use because of their addictive and cancer-causing qualities. The unreasonably dangerous condition of the product existed at the time the tobacco left the control of the Commercial Suppliers.

PRESCRIPTION

32.

Because of the latency period of the above injuries and other injuries caused by cigarette smoke and asbestos along with the active concealment by some Tobacco Manufacturers of the causes and effects of exposure to cigarette smoke and asbestos, Plaintiffs and the class they seek to represent have only recently discovered their injuries, and not more than one year preceding the filing of this Petition.

Furthermore, prescription as to the Plaintiffs and all potential Class members has been interrupted by the Defendants' affirmative and intentional acts of fraudulent concealment, suppression and denial of the facts as alleged above to the public, including the Plaintiffs, potential class members, and the government.

The Plaintiffs are informed and believe that such acts of fraudulent concealment included intentionally concealing and refusing to disclose internal documents, suppressing and subverting medical and scientific research, and failing to disclose and suppressing information concerning the association between long-term cigarette smoking and lung cancer, the increased risk of lung cancer among people with dual exposures to tobacco smoke and asbestos, and the addictive properties of nicotine.

The Plaintiffs and the class they seek to represent could not reasonably have discovered the true facts until very recently, the truth having been fraudulently and knowingly concealed by the Tobacco Manufacturers for years. The acts of fraudulent concealment have suspended prescription as to the Plaintiffs and all Class members. Accordingly, the Plaintiffs and all potential Class members specifically plead the application of the doctrine of *contra non valentem*.

CLASS ACTION ALLEGATIONS

33.

The named Plaintiffs bring this class action individually and on behalf of all other persons similarly situated, for the purpose of asserting the claims alleged in this Petition on a common basis.

34.

The Class is defined as all members and/or retirees of labor organizations holding membership in the Louisiana AFL-CIO, or their survivors, heirs, dependents and estates, who reside in the State of Louisiana who have developed cancer of the lung, or will in the future develop cancer of the lung, and have a combination of exposure to injurious levels of cigarette smoke from cigarettes manufactured by the Tobacco Manufacturers and who were occupationally exposed to asbestos. Collectively, all of these persons shall be referred to as the "Class".

35.

Excluded from the Class are the Defendants named herein; any entity in which any of the Defendants has a controlling interest; any of the officers, directors, or employees of any of the Defendants; and the legal representatives, heirs, successors, and assignees of any of the Defendants.

36.

This action is brought and may properly be maintained as a class action pursuant to the provisions of Louisiana Code of Civil Procedure article 591, *et. seq.* This action satisfies the numerosity, commonality, adequate representation and superiority requirements of these statutory provisions and the jurisprudence of the courts of the State of Louisiana.

37.

It is estimated that as many as one quarter (1/4) of the more than 27 million workers who were occupationally exposed to asbestos and were exposed to cigarette smoke will develop and/or die from lung cancer and other related diseases. The Class is estimated to consist of thousands of persons and is, therefore, so numerous that the individual joinder of all its members is impracticable.

38.

Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These

common legal and factual questions arise from two central issues, which do not vary from Class member to Class member, and which may be determined without reference to the individual circumstances of any particular Class member: A) the defendants' collective course of conduct in manufacturing, selling, and/or distributing cigarettes in the State of Louisiana; and B) the synergistic effect on cancer development of the combination of the exposure to tobacco smoke and asbestos. These common legal and factual questions include, but are not limited to, the following:

- a. Whether there is a synergistic effect for developing lung cancer caused by the dual exposure to asbestos and cigarette smoke;
- b. Whether the risk of injury, including lung cancer, to a person exposed to asbestos and cigarette smoke is materially greater than that of persons not exposed to either substance;
- c. Whether the risk of injury to a person exposed to asbestos and cigarette smoke is materially greater than that of persons exposed to either asbestos or cigarette smoke alone;
- d. Whether and when the Defendants knew that the risk of injury to a person exposed to asbestos and cigarette smoke is materially greater than that of persons not exposed to asbestos or cigarette smoke;
- e. Whether the Defendants knew or should have known that the risk of injury to a person exposed to asbestos and cigarette smoke is materially greater than that of persons not exposed to either substance;
- f. Whether the Defendants' conduct constitutes negligent misrepresentation; La. Civ. Code art. 2315;
- g. Whether the Defendants' conduct constitutes negligence; La. Civ. Code art. 2315;
- h. Whether the Defendants violated the Louisiana Products Liability Act; LSA-R.S. 9:2800.51, *et seq.*;
- i. Whether the Defendants breached expressed warranties; LSA-R.S. 9:2800.58;
- j. Whether the Defendants breached any implied warranties of merchantability;
- k. Whether the Defendants are liable for intentional infliction of emotional distress; La. Civ. Code art. 2315;
- l. Whether the Defendants negligently designed their cigarettes; LSA-R.S. 9:2800.57;
- m. Whether the Defendants failed to warn adequately or notify the Class regarding the synergistic effect on the risk of injury caused by the dual exposure to asbestos and cigarette smoke; LSA-R.S. 9:2800.57;
- n. Whether the consistent presence of certain levels of nicotine in Defendants' cigarettes and Defendants' course of conduct in marketing them constitute a manufacturing, design, and/or marketing defect for purposes of strict products

liability; LSA-R.S. 9:2800.51, *et seq.*; La. Civ. Code art. 2317;

- o. Whether the synergistic effect caused by the dual exposure to asbestos and cigarette smoke in Defendants' cigarettes and Defendants' course of conduct in marketing them constitute a manufacturing, design, and/or marketing defect for purposes of strict products liability; LSA-R.S. 9:2800.51, *et seq.*; La. Civ. Code art. 2317;
- p. Whether the Defendants are strictly liable in tort for selling a dangerously defective product; La. Civ. Code art. 2317;
- q. Whether the Class members are threatened with irreparable harm and whether they are entitled to injunctive and other equitable relief, and, if so, the nature of such relief;
- r. Whether the Class members are entitled to medical monitoring at the Defendants' expense;
- s. Whether the Class is entitled to compensatory damages, and, if so, the nature of such damage; and
- t. Whether the Class is entitled to exemplary damages, and if so, the nature of such damages.

39.

The Plaintiffs' claims are typical of the claims of the members of the Class. The Plaintiffs have been diagnosed with, or have a high risk of being diagnosed, with the injuries listed in Paragraph 14, including lung cancer; have significant exposure to cigarette smoke from cigarettes manufactured by the Tobacco Manufacturers; and have been occupationally exposed to asbestos. The Plaintiffs and all members of the Class have sustained and/or will continue to sustain damages and injuries and are facing irreparable harm arising out of the Defendants' common course of fraudulent and/or negligent conduct which has resulted in the extraordinary risk of injury as described *supra*, which was unknown to the Class members. The claims of the named representatives arise out of the same wrongful conduct that has harmed the members of the class and will fairly insure the adequate representation of all members of the Class. The interests of the named representatives do not conflict with the interests of the members of the Class they seek to represent.

40.

The Plaintiffs have retained counsel competent and experienced in the prosecution of complex consumer fraud, mass tort, occupational disease litigation and products liability class actions, and they intend to prosecute this action vigorously for the benefit of the Class. The interests of the members of the class will be fairly and adequately protected by the Plaintiffs and their undersigned counsel.

41.

A Class action is superior to other available methods for the fair and efficient adjudication of this litigation since individual litigation of the Class members' claims is impracticable. It would be unduly burdensome to the courts of this State if individual litigation of the facts of thousands of identical cases were to be required. Individual litigation increases the delay and expense to all parties and the courts in resolving the complex legal and factual issues of these cases. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. La. Code Civ. Pro. art. 593.1. Notice of the pendency and of any resolution of this class action can be provided to Class members by publication and broadcast.

CLAIMS FOR RELIEF and CAUSES OF ACTION

42.

Defendants are liable to the plaintiffs and the represented Class *in solido* for causing or contributing to the injuries suffered by the plaintiffs and the represented Class and for injuries which will be inflicted on the represented Class.

43.

The Defendants have designed a scheme to market lethal products that, when used in conjunction with asbestos exposure, produce devastating health effects on the Class of persons represented herein. Persons within this Class have been, or will be, seriously injured and/or killed in tragic numbers as a result of the intentional conduct of the defendants.

44.

The acts and omissions of Defendants that were the direct and proximate cause of Plaintiffs' injuries were willful, malicious, wanton, undertaken with reckless disregard of the rights of Plaintiffs and the Class, and were grossly negligent.

45.

The Defendants are liable to the plaintiffs and the represented Class as a result of fraud, fraudulent concealment, negligent misrepresentation, and conspiracy to defraud the plaintiffs, all of which has caused or contributed to or will in the future cause or contribute

to the injuries and damages suffered by the plaintiffs and the Class of persons represented by the plaintiffs.

46.

The Defendants are liable to the plaintiffs and the represented Class as a result of breach of the duty to warn, design, manufacture and sell a reasonably safe consumer product and are liable to the plaintiffs and the Class in strict liability.

47.

The Pharmacy Retailers sold plaintiffs the tobacco products with full knowledge of the products' vices, defects and cancer causing qualities and failed to disclose said vices and defects to plaintiffs. Therefore, the Pharmacy Retailers are liable to plaintiffs under the provisions regarding redhibition of the Louisiana Civil Code and such laws regarding implied and express warranties of merchantability for all resulting injuries and damages to plaintiffs.

48.

The Defendants have intentionally inflicted physical injuries and emotional distress on the plaintiffs and the represented Class and are therefore liable for all injuries and damages resulting from such conduct.

49.

The Defendants are liable to the plaintiffs and the represented Class as a result of unfair and deceptive trade practices and as a result of fraud, fraudulent concealment, negligent misrepresentation, and conspiracy to defraud the plaintiffs, all of which has caused or contributed to or will in the future cause or contribute to the injuries and damages suffered by the plaintiffs and the Class of persons represented by the plaintiffs.

DAMAGES

50.

By reason of the defendants' fault, as described above, and because of the injuries to the plaintiffs' health, resulting in their disability and physical harm, plaintiffs and the Class are entitled to damages for past medical expenses and medical expenses which the plaintiffs prove that they will, more likely than not, incur in the future; on-going medical monitoring; past and future disability (including loss of earnings or earning capacity); loss of enjoyment

of life, past and future physical and mental pain and suffering in an amount which the evidence may show proper at trial. In addition, due to the enormous increased risk which is experienced by the Class of persons described, on-going medical monitoring is required and the defendants, individually and in solido, are responsible for the costs associated with such monitoring.

51.

Under Louisiana Civil Code Articles and in addition to general and special damages, plaintiffs and the Class are entitled to an award of exemplary damages. The Plaintiffs and Class therefore request exemplary damages in an amount which the evidence may show proper at the

time of trial be awarded to plaintiffs and the Class and against all the defendants, individually, jointly and *in solido*.

52.

As a direct and proximate result of the acts of the Defendants, Plaintiffs and the Class suffered serious bodily injury, endured and will continue to endure great pain and suffering, incurred and will continue to incur medical expenses, suffered and will continue to suffer mental anguish, lost earnings and earning capacity, requires medical monitoring, and was otherwise damaged.

JURY DEMAND

53.

The Plaintiffs and the members of the Class request a trial by jury on all their claims and requests for relief.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs, on behalf of themselves and all other persons similarly situated, pray for judgment against the Defendants and each of them, jointly, severally, and *in solido* as follows:

- a. Certification of the Class of plaintiffs as set forth herein together with any sub-Classes deemed necessary and appropriate by the Court, including compensatory, exemplary and special damages to which plaintiffs are entitled;

- b. Monetary damages to fully compensate the plaintiffs and the represented Class;
- c. For medical monitoring whether denominated as damages or in the form of equitable relief;
- d. All costs associated with a regular on-going medical monitoring program;
- e. Pre-judgment interest;
- f. Any equitable and injunctive relief to which the represented Class is entitled or which will aid the Court in fashioning an appropriate remedy or enforcing an appropriate remedy; and
- g. For any other general and special relief deemed necessary and appropriate to compensate and protect the plaintiffs and the represented Class.

Respectfully Submitted:

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SERVICE INFORMATION:

1. The American Tobacco Company, Inc.
Six Stamford Forum
Stamford, Connecticut
2. American Brands, Inc.
Six Stamford Forum
Stamford, Connecticut
3. Brown & Williamson Tobacco Corporation
1500 Brown & Williamson Tower
Louisville, Kentucky
4. Batus, Inc.
1500 Brown & Williamson Tower
Louisville, Kentucky
5. Batus Holdings, Inc.
1500 Brown & Williamson Tower
Louisville, Kentucky
6. R. J. Reynolds Tobacco Company
Fourth and Main Streets
Winston-Salem, North Carolina
7. R.J.R. Nabisco, Inc.
1301 Avenue of the Americas
New York, New York
8. Lorillard Tobacco Company, Inc.
One Park Avenue
New York, New York
9. Lorillard, Inc.
One Park Avenue
New York, New York
10. Loews Corporation
One Park Avenue
New York, New York
11. Philip Morris, Incorporated
through its agent for service of process:
C.T. Corporation System
8550 United Plaza Boulevard
Baton Rouge, Louisiana

12. United States Tobacco Company
100 West Putnam Ave.
Greenwich, Connecticut
13. UST, Inc.
100 West Putnam Avenue
Greenwich, Connecticut
14. The Tobacco Institute, Inc.
1875 I Street N.W., Suite 800
Washington, D.C.
15. Walgreen Louisiana Co.
through its agent for service of process
Harold W. Wedig
1006 Hibernia Bank Bldg.
New Orleans, Louisiana 70112
16. Wal-Mart Stores, Inc.
through its agent for service of process
C.T. Corporation Systems
8515 United Plaza Blvd.
Baton Rouge, Louisiana 70809
17. Eckerd Holding II, Inc.
through its agent for service of process
Kean, Miller, Hawthorne, D'Armond & Jarman
2200 One American Place
Baton Rouge, Louisiana 70801
18. Katz & Besthoff in Louisiana
through its agent for service of process
Virginia F. Besthoff
K&B Plaza, Lee Circle,
New Orleans, Louisiana 70130
19. Imperial Trading Co.
through its agent for service of process
Gerald C. Pelias
701 Edwards Avenue
Harahan, Louisiana 70123
20. Baton Rouge Tobacco Co., Inc.
through its agent for service of process
A. B. Lemoine
2326 Sorrel Avenue
Baton Rouge, Louisiana 70802
21. Quaglino Tobacco and Candy Company, Inc.
through its agent for service of process
Iona Ball
2400 South Claiborne Avenue
New Orleans, Louisiana 70125
22. George W. Groetsch, Inc.
through its agent for service of process
George J. Groetsch, Sr.

5615 Jefferson Highway
Harahan, Louisiana 70123

23. J & R Vending Service, Inc.
through its agent for service of process
John M. Holahan
228 St. Charles Avenue #616
New Orleans, Louisiana 70130