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MYTHS AND FACTS ABOUT ASBESTOS LITIGATION

Myth: Asbestos lawyers represent people who are sick from asbestos.

FACT: Today, over 600,000 individuals have filed asbestos claims. Each claimant sues on average 20 defendants. Of the 200,000 claims currently pending in our courts, the majority are filed by people who are not sick. The *New York Times* recently reported that the latest surge in asbestos claims includes many healthy plaintiffs: “[v]ery few new plaintiffs have serious injuries.”ⁱ

Both the RAND Institute (2002) and Tillinghast-Towers (2001) accepted estimates that about 90 percent of claims are filed by plaintiffs who do not have cancer.

U.S. Supreme Court Justice Breyer acknowledged in the 1990s that many modern asbestos cases do not involve claimants who are impaired, quoting one source who estimated that “up to one-half of asbestos claims are now being filed by people who have little or no physical impairment.”ⁱⁱ

In a recent Mississippi asbestos case, which resulted in one of the largest asbestos awards ever, a jury awarded six plaintiffs \$25 million each in compensatory damages alone. None of the plaintiffs in this case claimed to have missed a day of work due to an alleged asbestos-related disease.ⁱⁱⁱ Not one claimed any prior medical expenses due to asbestos exposure.^{iv} None of the claimants had cancer.

Myth: Congress does not need to reform the asbestos litigation system.

FACT: For more than a decade, the U.S. Supreme Court and lower courts have urged Congress to pass laws to curb the absurdity of asbestos litigation. More than 10 years ago, Chief Justice Rehnquist appointed a United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, which drafted a report that forecast the crisis we now face. The Committee “concluded that the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively.”^v

In 1999, eight years later, Chief Justice Rehnquist again noted that the crisis had worsened in the absence of Congressional action, writing that asbestos-related claims were having a “massive impact” on the court system.^{vi} In early 2003, the Court again specifically called on Congress to resolve the asbestos litigation crisis.

Myth: Our economy can handle the flood of asbestos claims filed in our courts.

FACT: Asbestos litigation has already bankrupted nearly 70 companies, and the pace of asbestos-related bankruptcies is accelerating. Some experts estimate that the total economic toll of asbestos liability on businesses will reach \$275 billion, more than cost estimates for all Superfund cleanup sites combined, Hurricane Andrew or the September 11 terrorist attacks.^{vii}

The bankruptcies to date have led to the loss of about 60,000 jobs, and workers at those bankrupt firms have seen their 401(k) plans dwindle by an average of 25 percent, according to a study done by Nobel Prize-winning economist Joseph E. Stiglitz.^{viii}

Today, at least 8,400 companies are named in lawsuits, most of which never manufactured asbestos and had only some peripheral involvement with the substance.^{ix}

Myth: Asbestos claims are proliferating because the rate of asbestos-related disease is rising.

FACT: Asbestos was phased out of most non-essential uses by the late 1970s and early 1980s. Contrary to medicine and common sense, the number of claimants is expanding exponentially. At the current rate, the total number of claims could top 2.5 million. This confounds the experts, who—going by the actuarial tables—expected that by now we would see the number of cases stabilizing.

These new asbestos cases are driven largely by mass X-ray screenings, actually sponsored by trial lawyers but often advertised as free medical exams. Medical audits by independent experts have shown that high percentages of asbestos claimants have little or no impairment. For example, in one notorious case, only 16 out of the 439 tire workers who had filed lawsuits, or 3.6 percent, exhibited chest abnormalities that could have resulted from asbestos.

While mass X-ray screenings serve no real medical purpose, they do, however, serve their intended purpose. They swell the asbestos plaintiff class with thousands of people, many of whom either are unimpaired and quite healthy or are suffering from medical conditions not caused by exposure to asbestos.

Myth: Juries decide if asbestos claims deserve compensation.

FACT: If the cases of unimpaired people were handled one by one, they would not get far in most courtrooms in this country. But that is not the way the system currently works. The asbestos lawyers who bring these mass cases lump them all together in large quantities, mixing in a few very sick claimants with hundreds of non-sick ones. *Most*

of these cases never go to a jury, because trying them is too expensive for the defendants. This leads to big settlements.

Myth: The defendants in the asbestos lawsuits should be held accountable because they caused people to be exposed to a harmful substance.

FACT: Asbestos litigation defendants are more than just a “few asbestos manufacturers.” In fact, many of the miners and sellers of asbestos are already out of business. Asbestos lawyers are turning to new defendants under the doctrine of “joint and several liability.” The litigation has begun to involve small businesses that were only peripherally connected to asbestos. One report estimated that asbestos cases had hit eighty-five percent of U.S. industries. Today, it has become commonplace to hear household names involved in asbestos suits. In April 2000, a jury rendered a \$34 million dollar verdict against a division of Royal Dutch/Shell Oil Company. Shell never manufactured an asbestos-containing product, but like other oil companies, used such a product in its refineries.^x

Other companies like Campbell’s Soup and Procter & Gamble are viewed as deep pockets as well. Both were added to a pending complaint in California Superior Court in San Francisco, alleging that asbestos was found at company factory sites.^{xi} In another San Francisco court, a former insulator has sued Dow Jones & Company, publisher of *The Wall Street Journal*, claiming asbestos exposure at a Journal printing plant.^{xii}

RAND estimates that at least one company in every U.S. industry is involved in asbestos litigation. By 1998, according to RAND more than 60 percent of asbestos defendants were in “non-traditional” industries, including food and beverage, paper, textiles and glass.^{xiii}

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ⁱ Alex Berenson, “A Surge in Asbestos Suits, Many by Healthy Plaintiffs”, *New York Times*, April 10, 2002, at A1.

ⁱⁱ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (quoting Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 Harv. J. on Legis. 383, 384, 393 (1993)).

ⁱⁱⁱ See Parloff, *supra* note 15; Trial Tr., *Simeon Johnson v. AC&S*, Civ. No. 2000-181 (Cir. Ct. Holmes, Miss. 2001).

^{iv} *Id.*

^v Summary of the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 2 (Mar. 1991).

^{vi} *Ortiz*, 527 U.S. at 865.

^{vii} See Raji Bhagavatula, et al., “Asbestos: A Moving Target,” 102 No. 5 *Best’s Review* 85 (Sept. 1, 2001) (estimating \$270 billion in cumulative asbestos liability); see also Michael Angelina, Jennifer Biggs, “Sizing Up Asbestos Exposure,” 16 No. 20 *Mealey’s Litigation Report: Asbestos* 32-38 (Nov. 26, 2001) (estimating \$200 billion); “Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost \$200 Billion,” *Business Wire* (June 12, 2001); Lisa Girion, “Firms Hit Hard as Asbestos Claims Rise,” *Los Angeles Times*, December 17, 2001, at A1 (noting that \$200 billion in estimated asbestos liability exceeds costs associated with Superfund, Hurricane Andrew and September 11 terrorist attacks).

^{viii} *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, Joseph E. Stiglitz, Jonathan M. Orszag, Peter R. Orszag, December 2002.

^{ix} *Facts and Figures About Asbestos Litigation*, RAND Institute, Stephen Carroll and Debra Hensler, January 2003

^x See F.T. McCarthy, "Still Killing: Asbestos Claims: Asbestos Strike[s] Again," *The Economist*, August 19, 2000.

^{xi} See Richard Schmitt, "Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial," *Wall Street Journal*, March 5, 2001.

^{xii} Id.

^{xiii} *Facts and Figures About Asbestos Litigation*, RAND