



Richard Durbin

UNITED STATES SENATOR ■ ILLINOIS

FAX

TO:

Bruce Reed

ELIZABETH DRYE

OFFICE:

FAX NO:

() 456-5542

FROM:

Tom Faletti

PHONE:

(2 0 2)

DATE:

7-29-97

PAGES (including this cover sheet):

2

NOTE:

Original will be mailed.

RICHARD J. DURBIN
ILLINOIS

COMMITTEE ON THE JUDICIARY

COMMITTEE ON
GOVERNMENTAL AFFAIRS

COMMITTEE ON THE BUDGET

United States Senate

Washington, DC 20510-1304

July 28, 1997

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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

06/30/97
filed

FILED
DISTRICT COURT

Division
"M"

WALTER "BUDDY" KNOWLES,
NUMBER _____ DIVISION _____
AND JOHN ELLIOTT, SR. section 16

versus

97-11517

THE AMERICAN TOBACCO COMPANY, INC.;
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.;
LOEWS CORPORATION; PHILLIP MORRIS INC.;
UNITED STATES TOBACCO COMPANY;
UST, INC.; THE TOBACCO INSTITUTE, INC.,
WALGREEN LOUISIANA CO., WAL-MART STORES,
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.

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

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 Durharn 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 Lorillard 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., Quaglin 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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F. Gerald Maples, MS Bar Roll No. 1860
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By: _____

J. Burton LeBlanc, IV

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SERVICE INFORMATION:

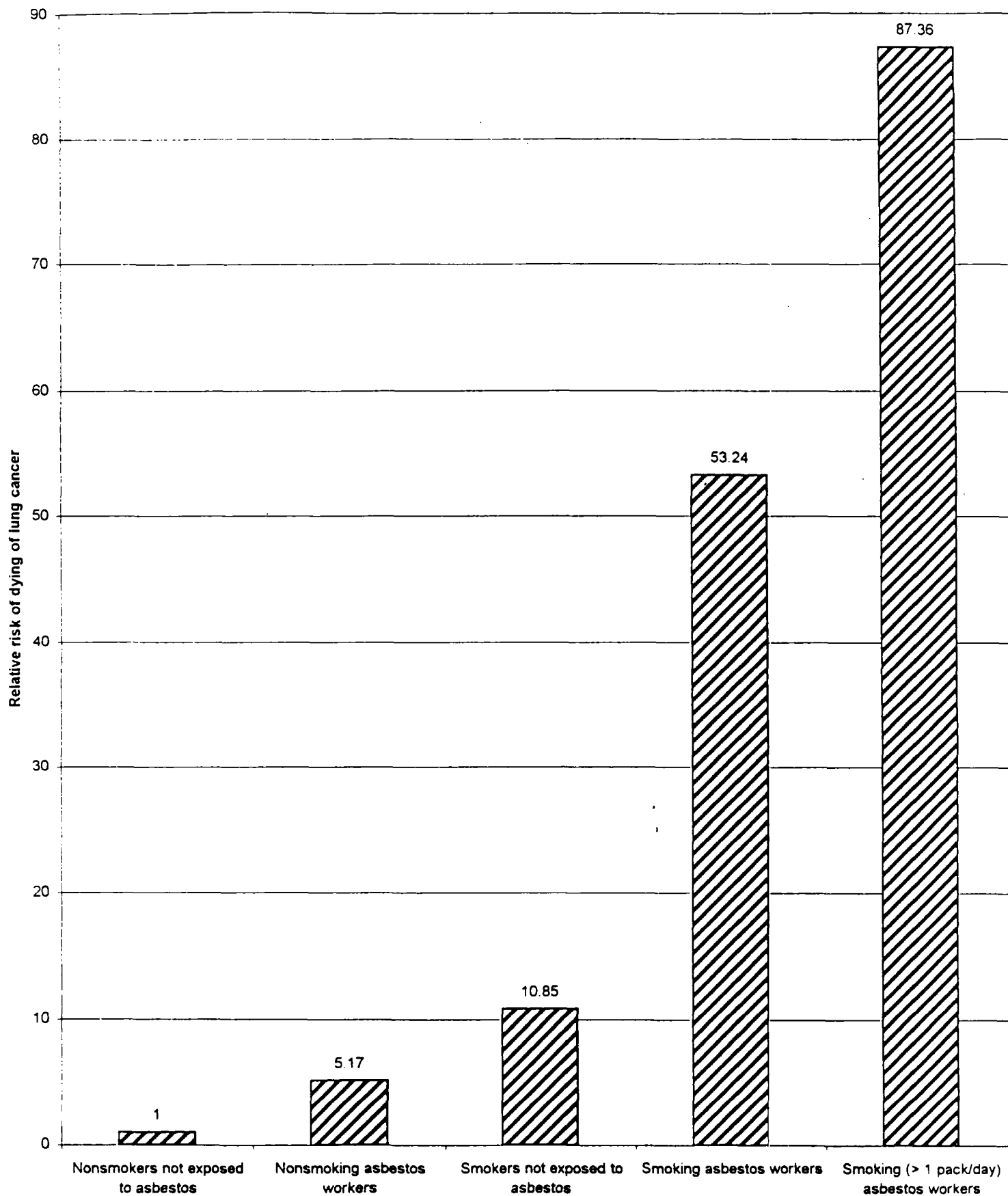
1. The American Tobacco Company, Inc.
Six Stamford Forum
Stamford, Connecticut
2. American Brands, Inc.
Six Stamford Forum
Stamford, Connecticut
3. Brown & Williamson Tobacco Corporation
1500 Brown & Williamson Tower
Louisville, Kentucky
4. Batus, Inc.
1500 Brown & Williamson Tower
Louisville, Kentucky
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.

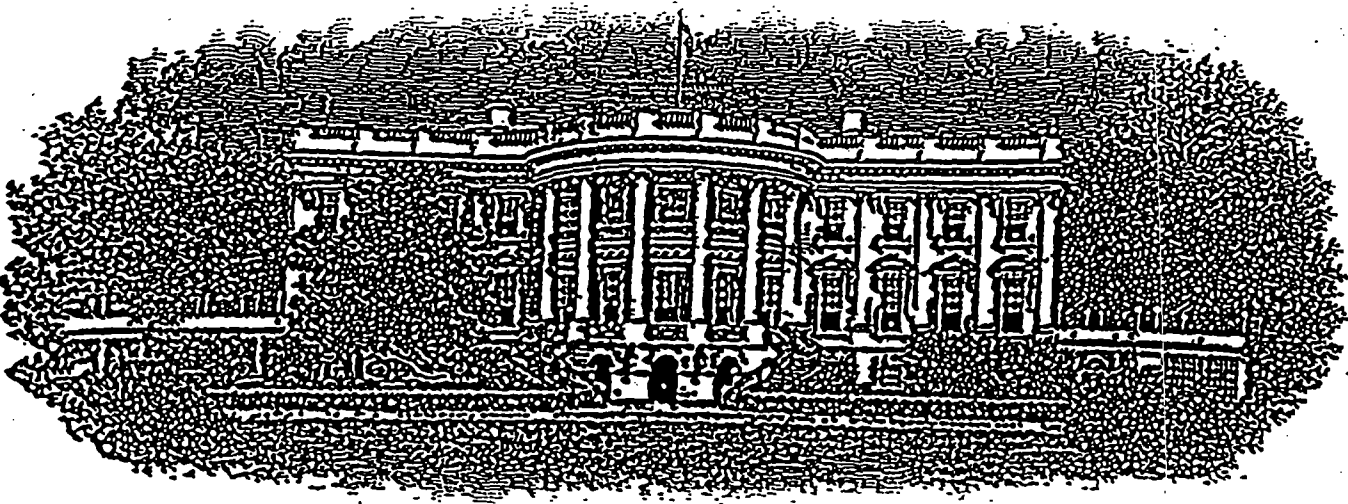
5615 Jefferson Highway
Harahan, Louisiana 70123

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

Relative Risk of Dying of Lung Cancer for Smoking and Nonsmoking Asbestos Workers and Smoking and Nonsmoking Control Group Members



THE WHITE HOUSE



DOMESTIC POLICY

FACSIMILE TRANSMISSION COVER SHEET

TO: Jennifer Dudley

FAX NUMBER: 6-2983

TELEPHONE NUMBER: _____

FROM: Elizabeth Drye

TELEPHONE NUMBER: _____

PAGES (INCLUDING COVER): 4

COMMENTS: Per our conversation - Note

that it is same of the same people
Lawler is asking Elena to meet with. Given

that, Elena or I should probably sit in on
the meeting, if Bruce is ok with that. Also,

please advise on whether Lawler needs
a call back or is already in the loop. Thanks.

SELIKOFF'S 1986 DATA RE INCIDENCE OF SMOKING AND ASBESTOSIS

- Studied 1,117 insulators.
- Divided insulators into those who smoked (894) and those who "never smoked regularly" (223).
 - 80% of the insulators were smokers
- 365 smoking insulators (41%) had lung scarring characteristic of asbestosis.
- Only 57 insulators who "never smoked regularly" (26%) had lung scarring characteristic of asbestosis.

SMOKING INCREASED THE INCIDENCE OF ASBESTOSIS BY 67%

✓ **Source:** R. Lilis, I.J. Selikoff, Y. Lerman, H. Seidman, and S.K. Gelb, *Asbestosis: Interstitial Pulmonary Fibrosis and Pleural Fibrosis in a Cohort of Asbestos Insulation Workers: Influence of Cigarette Smoking*, American Journal of Industrial Medicine 10:459-470 (1986)

**SELIKOFF'S 1991 DATA RE
INCIDENCE OF SMOKING AND ASBESTOSIS**

- Studied 2,790 insulators.
- 2,242 were current or ex-smokers; 548 were "non-smokers"
 - 80% of the insulators were smokers
- 1,439 smokers (64%) had lung scarring characteristic of asbestosis.
- 244 non-smokers (45%) had lung scarring characteristic of asbestosis.

**SMOKING INCREASED THE INCIDENCE
OF ASBESTOSIS BY 42%, AND BY 57%
AMONG "CURRENT SMOKERS"**

✓ **SOURCE:** R. Lilis, A. Miller, J. Godbold, E. Chan, and I.J. Selikoff, *Radiographic Abnormalities in Asbestos Insulators: Effects of Duration from Onset of Exposure and Smoking. Relationships of Dyspnea With Parenchymal and Pleural Fibrosis*, American Journal of Industrial Medicine 20:1-15 (1991)

**SELIKOFF'S 1991 DATA RE
SEVERITY OF ASBESTOSIS IN SMOKERS**

- Of 1,439 smoking insulators with asbestosis, 357 (25%) had severe asbestosis (defined as ILO level 2 or greater).
- Of 244 non-smoking insulators with asbestosis, 20 (8%) had severe asbestosis.

**SMOKERS WERE 3 TIMES MORE LIKELY
TO HAVE SEVERE ASBESTOSIS THAN
NON-SMOKERS**

✓ **SOURCE:** R. Lilis, A. Miller, J. Godbold, E. Chan, and I.J. Selikoff, *Radiographic Abnormalities in Asbestos Insultators: Effects of Duration from Onset of Exposure and Smoking. Relationships of Dyspnea With Parenchymal and Pleural Fibrosis*, American Journal of Industrial Medicine 20:1-15 (1991)

**WORKERS WITH MORE MODERATE
ASBESTOS EXPOSURE ARE EVEN MORE
DRAMATICALLY AFFECTED BY SMOKING**

- Ducatman, et al. studied over 32,000 civilian and military employees of the Navy with current or historical exposure to asbestos.
 - 70% of these Navy employees were smokers.
- Smokers were found to have lung scarring more than twice as often as non-smokers.
- "These findings in a large population suggest that parenchymal opacifications alone will not reliably differentiate between the impacts of asbestos exposure and smoking in patients who face both risks."

SOURCE: A.M. Ducatman, B.F. Withers, and W.N. Yang, *Smoking and Roentgenographic Opacities in US Navy Asbestos Workers*, Chest (April, 1990).

INFLUENCE OF SMOKING ON X-RAY EVIDENCE OF ASBESTOSIS

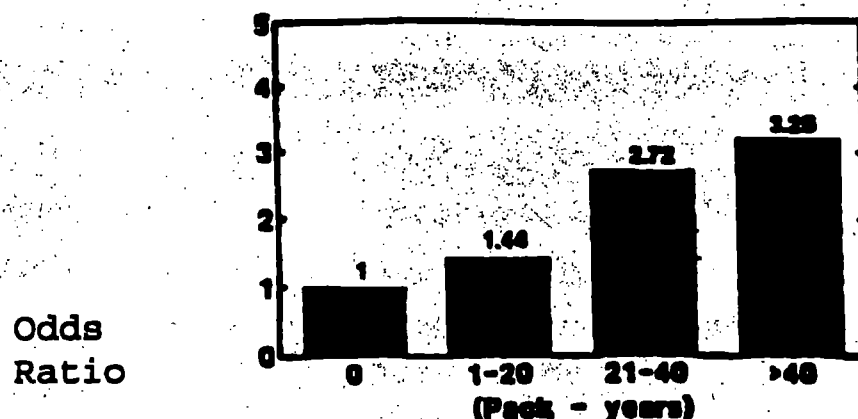


Fig. 1 Association between smoking (pack-years) and profusion $\geq 1/0$.

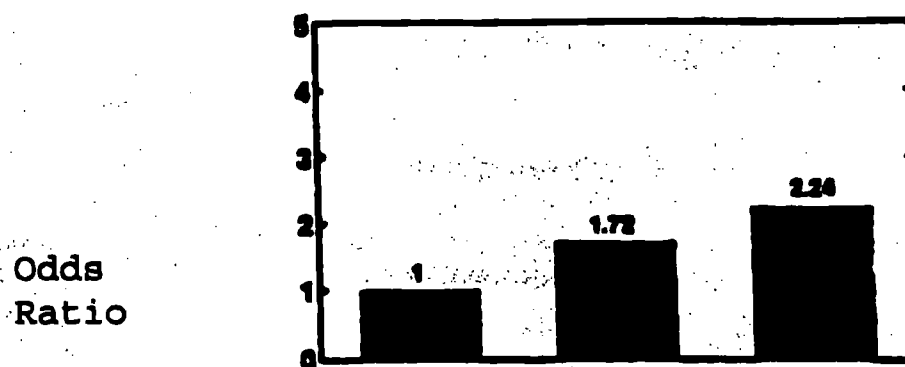


Fig. 2 Association between smoking category and profusion $\geq 1/0$.

✓ **SOURCE:** G.L. Delclos, R.K. Wilson, and B.L. Bradley, *Influence of Smoking on Radiographic Profusion and Pleural Changes in Asbestos-Exposed Subjects*, Journal of Occupational Medicine, Volume 32 No. 7 (1990).

INFLUENCE OF SMOKING ON
X-RAY EVIDENCE OF ASBESTOSIS

<u>Investigator</u>	<u>Odds Ratio*</u>	<u>Population</u>
Rosenstock, et al. (1988)	2.75	
Finklestein, et al. (1984)	1.8	Asbestos cement workers
Hnizdo, et al. (1988)	2.2	Asbestos miners

*Odds ratio adjusted for asbestos exposure.

✓ **SOURCE:** G.L. Delclos, R.K. Wilson, and B.L. Bradley, *Influence of Smoking on Radiographic Profusion and Pleural Changes in Asbestos-Exposed Subjects*, Journal of Occupational Medicine, Volume 32 No. 7 (1990).

TOBACCO CANCER FACTS

- (1) Tobacco smoke contains 43 different cancer-causing substances and is the single most lethal collection of carcinogens in the United States.
- (2) Tobacco was responsible for over 500,000 deaths in the United States in 1995.
- (3) Tobacco causes about 150,000 cancer deaths every year, about 30% of the total cancer deaths in the United States.
- (4) Tobacco causes 96% of the lung cancers in the United States every year.
- (5) Tobacco causes cancer of the lung, upper respiratory tract, esophagus, bladder and pancreas. It probably also causes cancer of the stomach, liver and kidney. It is associated with cancer of the colon, rectum and other organs.

SOURCES:

LUNG CANCER RISK:
SMOKING v. ASBESTOS EXPOSURE

The plaintiffs' position is that the risks are multiplicative:

Smoking risk	11 x background
Asbestos risk	<u>5 x background</u>
Combined risk	55 x background

This analysis, if correct, suggests that smoking is responsible for 69% of the lung cancer risk among smoking asbestos workers.

Defense position:

Smoking risk	22 to 24 x background
Asbestos risk	<u>0 to 2.7 x background</u>
Combined risk (in asbestotics)	50 x background

SMOKING CAUSES 80-90%
OF LUNG CANCER RISK IN
ASBESTOTICS AND 100%
OF RISK IN NON-ASBESTOTICS

SOURCES:

6-283

THE LAWLER GROUP, LLC

GREGORY E. LAWLER*

ROBERT L. FOOSE II

DANIEL N. SEGAL

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SUITE 400

BETHESDA, MARYLAND 20814

(301) 654-9737

FACSIMILE (301) 654-9738

*Not admitted in Maryland

FAX TRANSMITTAL COVER LETTER

Date: July 10, 1997

From: Gregory E. Lawler
Phone: (301) 654-9737
FAX: (301) 654-9738

To: Elena Kagan

Telephone Number:

FAX Number: 202 456-2878

Total Number of Pages: 25 (including this page)

Please deliver the following correspondence **as soon as possible** to the above person(s).

Notes:

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*Not admitted in Maryland

VIA FAX

July 10, 1997

Ms. Elena Kagan
Chief of Staff
Domestic Policy Council
White House
Washington, D.C.

Dear Elena:

Attached is some background information on the effect of the tobacco settlement on smokers who were exposed to asbestos --

- a two page summary of the issues;
- a longer piece describing the issues;
- a list of coalition members.

Unfortunately, the tobacco settlement is absolutely unfair to victims of tobacco who were exposed to asbestos, to the trusts established to pay for asbestos problems, which are paying for the health problems caused by tobacco and as a result are now paying only \$.10 on the \$1.00 for claims, e.g. the Manville Trust, and to asbestos defendants who have and will continue to pay for diseases caused primarily by tobacco.

The science is clear — for lung cancer and non-malignant lung disease, tobacco is primarily responsible. Lawsuits have targeted asbestos companies because it has been easier to recover from them under joint and several liability, but smoking and tobacco are a prime cause of the diseases.

In an extremely short period, prompted by the Manville Trust, a coalition of affected trusts and companies have come together to object to the settlement, and insist that tobacco pay its share of tobacco/asbestos claims. The coalition currently includes asbestos trusts and over a dozen major corporations. Given the speed with which this group has come together, I would expect it to grow very quickly. There are literally thousands of asbestos defendants, including scores of

major corporations.

The coalition objects to the settlement because the settlement guarantees that claims for disease caused by tobacco will be forever paid by asbestos trusts and defendants, effectively denying compensation to many victims and further damaging productive American companies which are paying claims and trying to earn an adequate return. The prohibition on class actions, the limitation on punitive damages, the bar to suits by trusts and defendants are a few examples of why this proposed settlement effectively prohibits claims against tobacco for diseases caused by tobacco in asbestos workers.

If this negotiated settlement is to proceed, it must be amended to include a process where tobacco pays the past and future costs of tobacco disease in asbestos workers. Without such a process, victims, trusts and defendants will be seriously and irrevocably harmed, and will vigorously oppose a settlement.

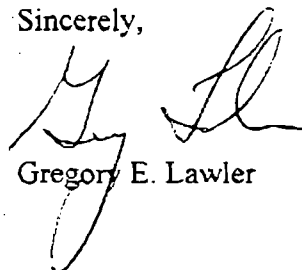
It is our hope that the Administration will examine this issue carefully and recommend that any proposed settlement include a mechanism to deal with the tobacco-asbestos problem. The solution can rely on the science — a panel of experts, scientific, medical and judicial, can determine the responsibility of tobacco and assign a value to it. The resulting funds would be dedicated to paying victims.

I would like to bring the following people by to meet with you:

- Brad Oelman, the acting Chair of the Coalition, from Owens-Corning;
- Ann Wexler, of the Wexler Group;
- David T. Austern, General Counsel, the Manville Trust;
- Jack McMackin, Williams & Jensen, from Owens-Illinois.

This issue will be an important part of any debate over a tobacco settlement. I hope you will have the time to review this material and we can set up a time to visit with you.

Sincerely,



Gregory E. Lawler

COALITION MEMBERS

ABB

Armstrong

Foster Wheeler

Kaiser Aluminum

Manville Trust

Owens Corning

Owens Illinois

Shipowners

Westinghouse

WRGrace

DRAFT 7/10/97

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 underfunded. 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.

DRAFT 7/9/97

**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 under funding 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.