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by Anthony Zaccagnini

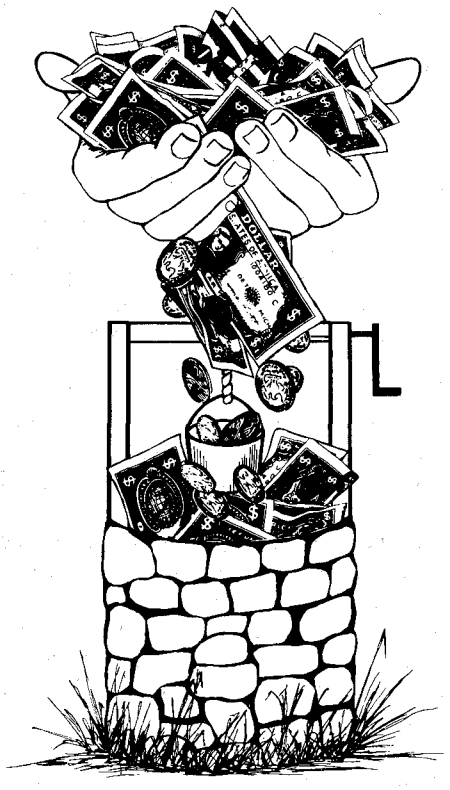
I. The Crisis

The inability of this nation's legal system to effectively and equitably compensate the victims of asbestos-related injuries has developed into a tragedy of catastrophic proportions. At present, there are an estimated 30,000 asbestos claims filed throughout the United States court system.[1] This number is increasing at a dramatic rate of approximately 500 additional claims each month.[2] Essentially, the court system is being overwhelmed by asbestos litigation.

This situation has led to an intense debate as to how the problem should best be solved. It has become readily apparent that the United States court system is ill-equipped to effectively resolve, in an expedient and judicious manner, the massive amounts of asbestos litigation. The enormous number of suits presently burdening the judicial system has led to excessive delays in dispute resolution. In the federal court system, a claimant can expect an average delay of three years between the filing of his claim and the initial trial date. As can be expected, those affected most by the delays are those persons with the most pressing and immediate needs – the injured worker.

II. A Possible Solution – The Creation of the Facility

In 1982, asbestos producers and their insurance carriers found themselves faced with extensive disputes among themselves over which policies were responsible for paying particular claims. In light of pending litigation against the carriers and producers, as well as potentially enormous expenses for the defense of personal injury law suits, representatives of both the producers and insurers began an extensive course of negotiations in an attempt to resolve the disputes. The disputes arose over an inherent peculiarity of the asbestos injury; that is, it may not result in an identifiable injury for up to forty years after the exposure.[3] As a result of the latency of the injury, many of the insurers could not agree as to which company was liable for which producers during a specific period. Carriers who had previously insured the asbestos manufacturers held the position that their exposure was limited only to claims filed during the dates of coverage and that the asbestos-related injury did not "occur" until the symptoms had manifested themselves in the claimant. Present carriers for the former asbestos producers had also denied culpability. It was their contention that the injury for which compensation is entitled occurred only upon exposure, and thus they should not be held liable for present claims. In an effort to resolve the major dispute among the insurance carriers, they ultimately agreed to divide and contribute settlement payments to the Facility based upon the length of their policy coverage for each producer.[4]



Finally, on June 19, 1985, the representatives of fifty asbestos manufacturers and insurance carriers signed the final document that formalized the creation of the Asbestos Claims Facility. The signing culminated almost three years of intense negotiations. The negotiations were chaired by Harry Wellington, retired Dean of Yale Law School, who directed the meeting under the auspices of the Center for Public Resources. The intent of this joint action by producers and carriers is to develop an unprecedented private sector solution to the asbestos personal injury problem. The Wellington Agreement, as the document is called by those familiar with the negotiations, signifies the final resolution of a series of disputes between the former asbestos producers and their insurance carriers.

It is anticipated that the creation of the Facility will offer a viable, voluntary alternative to the extremely costly and lengthy litigation process. A 1984 Rand Corporation study estimated that producers and insurers had already spent one billion dollars in compensation and legal aid expenses over the previous ten years.[5] The study concluded that the average claimant only received thirty-seven cents for every dollar spent by these same producers and carriers.[6] Of course, these numbers are heavily skewed downward by the mounting costs of legal representation on behalf of the defendant producers, but the effect of this misallocation of resources is felt mostly by the injured worker. Proponents of the Facility claim that a proper allocation of resources, preferably through the Claims Facility, will result in more benefits being disbursed to the claimant. John F. Shea, Jr., Vice-President and Claims Counsel for Aetna Life & Casualty, has estimated that the ultimate cost of present and future

claims to insurers could run somewhere between 4 and 170 billion dollars.[7] The disparity involved in this estimate is largely due to the unpredictable nature of punitive damage awards by juries and the uncertainty of how many workers were harmfully exposed to asbestos.

Specifically, it is proposed that the Asbestos Claims Facility will:

- Provide plaintiffs with an efficient and more equitable alternative to the court system.
- Establish a central and predictable forum in which to file and have claims evaluated.
- Reduce legal costs for plaintiffs and defendants alike by encouraging and coordinating the handling and settlement of asbestos-related injury claims.
- End disputes over insurance coverage by establishing a comprehensive coverage plan to fund liabilities and expenses in connection with asbestos-related injuries.
- Allow producers and insurers to manage their liabilities and to pursue realistic financial planning for the future.[8]

Naturally, there are many who question how the Facility proposes to attain these goals. To better understand this, it is necessary to examine the Facility and the proposed claims process.

III. The Facility

The Asbestos Claims Facility is a private, nonprofit organization, incorporated under the laws of Delaware. The membership of this corporation consists of the forty-five named signatories of the Wellington Agreement, as well as five unnamed, confidential signatories who have conditionally joined with an option to exercise full membership by December, 1986.[9] The names of these confidential signatories will only be released if they exercise their option to join the Facility.

Assuming leadership of the Facility will be Wade H. Coleman, former Senior Vice-President of Citicorp, who will serve as President and Chief Executive Officer.[10] The Facility will be governed by a thirteen-member board of directors comprised mainly of representatives from the named producers and insurers.[11] At present, the Facility is expected to be headquartered in Princeton, New Jersey with a regional office in San Francisco, California.[12] Current projections estimate the Facility to be fully staffed and operational by February, 1986. The Facility expects to employ approximately 140 people with an annual operations budget expected to approach twelve to fifteen million dollars.[13] Obviously, this figure does not contemplate aggregate amounts to be paid to claimants.

IV. The Claims Process

A. The Member's Liability

By signing the Wellington Agreement, each signatory designates the Facility as its sole representative to administer and arrange on its behalf for the evaluation, settlement, payment or defense of any claim filed against one of its members. Generally, liability is shared among the members as dictated by a formula that has been devised by an independent consulting firm. The formula is based upon each producer's previous litigation experience. The concept is to apportion to each producer a share of all liability payments and expenses.[14] The percentage share assigned to each producer is applied to each claim paid by the Facility.[15] It is important to note that the percentage assigned to each producer is based upon the entire market share of all asbestos producers. Thus, a member's percentage of liability is calculated on an industry-wide basis and not by what percentage of asbestos he produced in relation to other members. This rule reflects the Facility's general policy that it will duly compensate a victim for the liability incurred only by its members and not by all manufacturers of asbestos. Of course, it is the carrier who will actually compensate the victim, but the agreement does stipulate that the producers will be responsible for awards and expenses paid to a claimant in excess of policy limits.[16]

B. The Claimant's Role

Participation in the Asbestos Claims Facility is purely voluntary on the claimant's part. It is non-binding prior to the acceptance of a settlement and does not affect any legal rights a claimant may have against non-members.[17] Claimants have the right, but are not compelled, to employ their own counsel during the claims process.[18] Counsel fees will remain a confidential matter between the attorney and the client. It is hoped that plaintiffs' attorneys will take into consideration the relative ease with which a claim can be settled and correspondingly reduce their typical one-third share of the settlement.

C. The Standard for Compensation

In order to have a compensable claim by the Facility's standards an individual must have an asbestos-related "impairment and dysfunction" from exposure to asbestos or asbestos-containing products of a Facility member.[19] The basic requirement of "impairment and dysfunction" substantially removes from the Facility those workers who have been exposed to asbestos but do not currently suffer from a physical impairment and disability. The level of disability is measured by pulmonary function values, which is the standard test to determine if such impairment has occurred.

This standard has seemingly left out of the compensation scheme those claimants who have been diagnosed as having pleural thickening or pleural plaques and no interstitial fibrosis. This group comprises a majority of all victims of asbestos exposure. However, a recent development in negotiations by the Wellington Group, serving as interim liaison counsel until the Facility begins its operations, has given these victims some hope for future compensation. Since September 9, 1985, the Wellington Group has settled over twenty cases in California, Arkansas and Texas with claimants who did not meet the "impairment and dysfunction" standard.[20] Settlements in these cases averaged $130,000.00 per claimant.[21]

D. The Claims Process

A claim can be filed, at no cost to the claimant, at either the Facility's Princeton or San Francisco office by simply filling out a general information sheet. The basic file requirements for claim processing are: (a) work history, (b) dates of exposure to asbestos-containing products, and (c) trade names or manufacturers of the asbestos-containing products. The Facility will process only asbestos claims relating to bodily injury and will not consider any claim for workers' compensation benefits or property damage. It should be noted that producers and insurers are presently re-evaluating the property damage issue, and that eligibility for workers' compensation or other disability benefits does not affect a claimant's right to use the Facility.[22] Interestingly, the Facility will compensate the victim for loss of consortium in appropriate cases. Furthermore, claims may be brought to the Facility concurrently with a court action against the Facility members. The statute of limitations on the court claim may be tolled as long as the claim is in the Facility process.[23] The claimants are free to choose between the Facility and court system at any time prior to acceptance of a settlement or binding alternative dispute resolution.[24]

Once a claim has been filed with the Facility, an evaluation will be conducted according to pre-established guidelines by experienced claims personnel. Essentially, the claim will be evaluated based upon the level of impairment and dysfunction that is detected in relation to the level of exposure to products manufactured by Facility members. The Facility will not compensate an injured worker for any degree of in-

jury it deems was the result of exposure to products of non-members.[25] In practical terms, this means that if a worker's level of impairment and dysfunction is determined to be "X" and the Facility determines that its members' products are responsible for 30% of the worker's injury, the settlement offer will reflect a compensation generally along the line of 30% of "X". In essence, the Facility will not make the claimant whole for his asbestos-related injury. An injured party must still seek compensation against non-members through the court system.

Once a claim is evaluated, a settlement offer will be proffered to the claimant. If the offer is not satisfactory, the claimant will have the opportunity to choose from a full range of mediation and arbitration techniques at no cost to himself. This process is called the Alternative Dispute Resolution (ADR) procedure, and it is currently being developed by the Facility in conjunction with a representative group of plaintiffs' representatives. The ADR will provide an array of binding and nonbinding arbitration procedures. If this process should fail and it is determined that a final settlement cannot be reached, the claimant can exercise his option to return to the court system or utilize a less expensive process of binding dispute resolution. One interesting aspect of the Facility that will dramatically reduce defense costs for its members is the current plan to retain local counsel for all members in specific areas. The concept is to have one defense team to represent all of the Facility's members in a particular jurisdiction.[26] The practical application of this method is to reduce the number of defense teams appearing in a single case from an average of twenty to just one.

To date, the Facility has refused to utilize a predetermined schedule of benefits such as those used for workers' compensation. Instead, the Facility will evaluate each claim separately on its merits.[27] Ideally, the voluntary nature of the Facility and the claimant's right to return to the court system will ensure that settlement offers are fair and reasonable. The Facility does require that any final settlement is to include a full release of any claim for punitive damages against its members and that any settlement accepted by a claimant is a full and final settlement against all Facility members.[28]

V. Criticisms

As with any legal innovation, the Asbestos Claims Facility has come under a great deal of scrutiny and criticism. Ronald L. Motley, a partner in Blatt & Fales, a South Carolina law firm which represents over 5,000 asbestos claims nationwide, has taken exception to certain parts of the Wellington Agreement. He points out that the terms of the agreement by which a claimant must abide, strongly reflect the lack of involvement of victims and their representatives in the negotiations that resulted in the establishment of the Facility. Mr. Motley has stated that those parts of the agreement that stipulate no punitive damage settlements, payment only for physical impairment and dysfunction, and all defendants settle or none, "looks like a Manville wish list."[29]

It has become readily apparent that the United States court system is ill-equipped to effectively resolve . . . the massive amounts of asbestos litigation.

Motley's criticisms are shared by many who are representing the claimants' interests. It is only natural for adversary parties to be suspicious of one another, but many plaintiffs' attorneys feel they have just reason to be wary of the Asbestos Claims Facility. They readily point out that the Wellington Agreement is a method of dispute resolution devised by and for the defendant asbestos producers. Some plaintiffs' counsel have expressed great concern over the fact that claimant representatives were only recently asked to partake in refining certain portions of the claims process and operation of the Facility. Proponents of the Facility counter by claiming that it was necessary for the defendant producers and carriers to resolve their internal problems before they could present this concept to potential claimants.

Other representatives of the claimants' interests point out that certain actions and omissions on behalf of the Facility have amounted to acts of bad faith. As a case-in-point, in Maine, stays of litigation have been sought in 260 cases by local counsel on behalf of Facility members. The intent is obvious; if the stays are granted, the claimants will find application to the Facility a much more appealing prospect. The claimants will be put in a situation whereby they will be willing to accept drastically reduced amounts of compensation for a quicker resolution of the claim – all at a great savings to the Facility members. The Facility's response to this charge is only that they have not authorized any blanket stays. Claimants and their representatives also point out the Facility's decision not to publicize the existence of the Facility on a nationwide basis, and its unwillingness to incorporate into the body of the Agreement a stipulation not to seek legislative redress for the asbestos-injury compensation problem. These omissions are generally viewed as tactical decisions by the members to minimize their potential liability. However, some detractors of the Facility allege that the omissions indicate the Facility's unwillingness "to tell you they are here and how long they are going to be here."

Other criticisms of the Facility are directed at the terms of the Agreement itself. While the Facility has acknowledged that compensation of the claimants is based upon a liability share assigned to each member by independent analysis, the Facility has refused to divulge to the claimants exactly what percentage of liability is assigned to each member. This factor is increasingly relevant in light of the fact that not all asbestos producers and their insurers are members of the Facility. Most notably, Johns-Manville, who was generally regarded as the world's leading asbestos producer, is not a member of the Facility. The evaluation of Manville's percentage of liability by the Facility will be a significant factor in any settlement offer it may provide. If the assessed share of liability for Manville is significant, it will reduce any offer made by the Facility proportionately to Manville's perceived share. It should be noted that Johns-Manville is a conditional member of the facility and is awaiting disposition of its Chapter 11 reorganization request. An open-ended question in regard to this matter is whether, during the course of negotiations between the claimant and the Facility, the Facility will disclose its evaluation of the plaintiff's case at 100% of worth, the percentage of the Facility member's liability share relative to that 100% evaluation, the names of non-member manufacturers who the facility has determined to have contributed to the plaintiff's injuries, and the percentage of liability attributed to each such manufacturer.

There is also some concern as to the theory of insurance coverage utilized by the

Facility. Once policy limits are exhausted, the duty to compensate the claimant falls on the manufacturer. Some claimant representatives feel that this could lead to a rash of bankruptcy petitions being filed by manufacturers in order to avoid paying the compensation. Proponents of the Facility note that the so-called "triple trigger" theory is more than equitable. They readily point to the member insurer's willingness to cover, on a pro-rata basis, the gaps in insurance coverage caused by non-member insurers of member manufacturers. Critics reply by stating that the so-called "gap coverage" also applies against the insurer's total policy liability, thereby, accelerating the insurer's departure from the Facility.

One final prevalent criticism of the Facility is that it has created a vehicle by which asbestos victims will be enticed by easily obtainable but low cash-amount settlements. The theoretical argument is that, by accepting the anticipated low cash settlements, the claimants are denying themselves the opportunity to make themselves "whole" as would exist under general tort theory. Proponents of the Facility counter by noting the voluntary nature of the Facility and that, if settlement offers are too low, nobody would utilize the Facility.

VI. Conclusion

The uniqueness of the Asbestos Claims Facility lies in the fact that it is a private sector attempt to resolve a basically legal issue. The members are not asking the courts or Congress to bail the industry out of its own responsibilities. This is certainly commendable in light of past developments in the automobile and transportation industry. The members hope that it will be an alternative to the judicial process that is attractive enough to the injured parties that they will select the Facility over the costly and time consuming litigation process.

Undoubtedly, the Facility will provide savings for its members through cost reduction and spending containment. However, the purpose of the Facility should not be limited to expediting the needs of its members. The success of this concept rests largely on the willingness of the members to settle on legitimate claims and to settle at an amount satisfactory to both the plaintiff and the Facility member. Without a fair settlement procedure, plaintiffs will bypass the Facility and proceed directly to the courts. Obviously, it is in the Facility's best interest to properly compensate the claimants. Failure to do so will ultimately result in the failure of the Facility.

Should the Asbestos Claims Facility prove to be successful, its future implications could be immense. A standard will be set by which private industry may come to be expected to provide remedies for its own wrongs. Its effect on the judicial system will be just as telling. A workable method by which substantial amounts of similar-type litigation can be resolved could dramatically reduce the case load of an already overburdened trial system. Of course, the Facility is still in its infancy; its potential is immense but the possibility of failure is just as great. Its fate is predicated upon the willingness of both sides of the adversary process to communicate and mediate their differences. While there is nothing new about this formula, the Asbestos Claims Facility is certainly a radical departure of forum in which the formula is to be tested.

VII. Membership

AC&S, Inc.
Aetna Life & Casualty Co.
American Universal Insurance Group
Armstrong World Industries, Inc.
Bituminous Casualty Corp.
Carey Canada, Inc.
The Celotex Corporation
Certain Teed Corp.
C.E. Thurston & Sons, Inc.
CIGNA Property and Casualty Insurance Cos.
Continental Corp.
Crum & Forster
Dana Corp.
Eagle-Picher Industries, Inc.
Employers Insurance of Wausau
Fibreboard Corporation
Fireman's Fund, Inc.
First State Insurance Co.
Flexitallic Gasket Co., Inc.
The Flintkote Co.
Genstar Corp.
Harbor Insurance Co.
Hartford Insurance Group
H.K. Porter Company, Inc.
Hopeman Brothers, Inc.
Keene Corp.
Liberty Mutual Insurance Co.
Lloyd's of London
Maremont Corp.
National Gypsum Co.
Nosroc Corp.
Nuclear & Environmental Protection, Inc.
Nulturn Corp.
Owens-Corning Fiberglas
Ownes-Illinois, Inc.
Pittsburgh-Corning Corp.
Reliance Insurance Co.
Rock Wool Manufacturing Co.
Royal Insurance Co.
Shook & Fletcher Insulation Co.
Thorpe Insulations
Turner & Newall PLC
Unijax
U.S. Gypsum
Zurich-American Insurance Companies
Confidential (5)

VIII. Further Information

For additional information regarding the Asbestos Claims Facility, please contact Carolyn C. Tieger at (202) 833-8550. Ms. Tieger is a representative of Burson-Marsteller, a Washington, D.C. public relations firm. Her address is: International Square, 1825 Eye Street, N.W., Suite 950, Washington, D.C. 20006-5498.

Notes

[1]The Wall Street Journal, June 21, 1985, at 6, col. 5 [hereinafter cited as Wall Street].
[2]C. Tieger, News Release provided by Burson-Marsteller, a Washington, D.C. public relations firm (June 20, 1985) [hereinafter cited as News Release]; The Hartford Courant (Connecticut), July 8, 1985, at 9164, col. 1.
[3]Journal-Courier (New Haven, Connecticut), July 8, 1985, at 16, col. 1.
[4]Wall Street, *supra.*
[5]*Id.*
[6]News Release at 3.
[7]Waterbury Republican (Waterbury, Connecticut), July 3, 1985, at 1, col. 1.
[8]CLAIMS FACILITY, ASBESTOS LITIGATION REPORTER. (Andrews Publication), ¶ 10,578 (August 16, 1985). [hereinafter cited as Claims Facility].
[9]ASBESTOS, MEALY'S LITIGATION REPORTS. (Mealy Publications), ¶ 2,411 (June 28, 1985). [hereinafter cited as Asbestos].
[10]CLAIMS FACILITY, *supra*, at 10,578.
[11]*Id.*
[12]*Id.* at 10,579.
[13]ASBESTOS, *supra*, at 2,411.
[14]CLAIMS FACILITY, *supra*, at 10,579.
[15]*Id.*
[16]*Id.*
[17]*Id.* at 10,580.
[18]*Id.* at 10,579.
[19]*Id.* at 10,580.
[20]WELLINGTON SETTLEMENTS, ASBESTOS LITIGATION REPORTER (Andrews Publication), ¶ 10,835 (October 4, 1985).
[21]*Id.* at 10,836.
[22]CLAIMS FACILITY, *supra*, at 10,580.
[23]Wellington Agreement, VII(5), (June 19, 1985) (available upon request from Burson-Marsteller).
[24]CLAIMS FACILITY, *supra*, at 10,580.
[25]*Id.*
[26]*Id.* at 10,579.
[27]*Id.* at 10,580.
[28]*Id.* at 10,581.
[29]COMMENTARY, MEALY'S LITIGATION REPORTER (Mealy Publications), ¶ 2,413 (June 28, 1985).

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