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**Statement of Jillian Aldebron
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Public Citizen's Congress Watch
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Public Citizen is a non-partisan, non-profit organization founded in 1971 by Ralph Nader to advocate on behalf of consumer interests before the legislative, executive and judicial branches of government. It is committed to preserving a strong liability system that allows citizens to hold businesses accountable for deceptive, discriminatory, and fraudulent practices. Our 150,000 members include people from all walks of life, including doctors and lawyers and corporate executives. I am belaboring the introduction to make it clear that Public Citizen's opposition to the asbestos bail out bill, S. 852, is not made lightly, nor is it made in consideration of any special interest group. All of us are consumers and workers and live in some type of building structure, which puts all of us at risk of developing asbestos-related disease from the multitude of sources in our environment, and makes us all potential asbestos claimants.

In May, Public Citizen reported on the windfall that the proposed asbestos bail out would bestow on the biggest asbestos companies that have filed for Chapter 11 bankruptcy: a savings of \$20.3 billion—or, a 78.5 percent drop in liability in today's dollars. Companies such as Dow Chemical and Honeywell, which reaped enormous profits from intentionally keeping the lethal truth about asbestos from workers and the public alike, would be rewarded for their wrongdoing with a \$27.5 million per year cap on payments for resulting injuries over the 30-year life of the fund—whereas under the current system, Dow projects its liability over the next 15 years alone to be between \$1.6 billion and \$2.2 billion. Wall Street immediately responded to the bill's rewards for corporate coffers: its impending approval by the Senate Judiciary Committee sent the collective stock prices of major asbestos firms up an average 22.8 percent. Even W.R. Grace, which is facing \$280 million in criminal penalties for its massive asbestos cover up, saw its stock gain 22.3 percent in value.

But the market's exuberance has not been shared by victims of asbestos-related diseases—those who will be forced to give up their constitutional right to judicial redress of grievances in return for a byzantine, precarious, inadequate, unfair solution in search of a problem. After all, are the courts so clogged with asbestos cases that they cannot function? Is the cost to process cases so prohibitive or issues so complex, so beyond the comprehension of judges and juries as to demand that they be removed from state jurisdiction, removed from the court system altogether and subjected to an extraordinary federal administrative claims process? There is no evidence that asbestos lawsuits are

any harder to resolve than any other product liability lawsuit. The vast majority of asbestos claims, in any event, are settled out of court—and these settlements are largely possible because years of litigation, accompanied by discovery, testimony, scientific evidence, and the results of intervening medical research—have clarified and resolved many of the issues.

As for the length of time needed for asbestos cases to proceed through the courts, this has decreased as the courts devise mechanisms to improve efficiency and prioritize the most urgent cases. A number of jurisdictions, including some in Illinois, Maryland, Massachusetts, Michigan, New York, Texas, and Washington, have set up “inactive dockets,” without prejudice, for the cases of asbestos-exposed plaintiffs who have not yet manifested symptoms of illness, in order to move the cases of sicker plaintiffs ahead. Florida, Georgia, Ohio and Texas have all passed legislation regulating asbestos claims—which we do not endorse in substance, but which at least demonstrate that the states have the ability to expedite and manage cases, and are acting to do so.

There are two main causes of delay for asbestos claims at this point: one is the standard defense tactic of waging a legal war of attrition by filing endless motions that string out the process until plaintiffs are in such dire financial and/or medical straits that they are willing to settle for greatly reduced amounts. This strategy, incidentally, jacks up defense attorney fees in addition to plaintiffs’ legal fees: a May 2005 RAND report on asbestos litigation found that 31 cents of every asbestos litigation dollar went to defendants’ attorney fees and costs, as opposed to the 27 cents that went to plaintiffs’ legal costs.

The second thing delaying justice is the prospect that Congress will pass an asbestos bail out bill: defendants that have already entered into settlement negotiations stall every time it looks like a bill will pass because their liability would be significantly reduced under a federal trust fund.

So what “crisis” is this 2005 asbestos bail out designed to address? Liability—not litigation. Basically, the idea is to cut corporate losses and render payouts predictable so that companies can adjust for them as their cost of doing business. The bill will not compensate more victims, more fairly, nor more quickly than are currently compensated under the litigation system—which would be the only real justification for 1) depriving injured citizens of the right to go to court and 2) wholesale federal preemption of state law.

While some victims—most notably all residents of Libby Montana—will be covered by the fund who might otherwise have no legal recourse, the vast majority of potential claimants will get nothing or receive substantially less than they would have gotten in court. This is because the antiquated and arbitrary medical criteria—and, in particular, exposure criteria that have no sound scientific basis—will make many victims with meritorious claims ineligible for compensation. Even those with mesothelioma—which under the bill do not have to meet an exposure threshold—will receive less

compensation on average than they would have been awarded in court. This will leave the entirely blameless victims of painful, suffocating diseases without sufficient resources to cover treatment needs. And ultimately shift the cost burden to taxpayers.

Most significantly, the bail out bill fails to contemplate compensation for non-occupationally exposed victims of asbestos diseases. Potential categories of such victims include:

- The millions of residents who over the years have lived or worked in some 30 million building structures across the U.S. that have vermiculite insulation in their attics, according to the EPA. In 2003 the EPA published the results of a pilot study to estimate asbestos exposure from vermiculite attic insulation. It found that disturbed vermiculite attic insulation created a potential health risk, that performing common attic activities—such as doing wiring—was enough to launch asbestos dust into the air ready for inhalation, and that testing the insulation itself gave no reliable indication of whether asbestos fibers were present elsewhere in the attic or home.
- Then there are the people who have lived in proximity to industrial operations involving asbestos, including Superfund sites other than Libby Montana, such as Ambler Pennsylvania, where children played on the “white mountains” of pulverized asbestos materials that were sealed in the 1980s clean up operation and are now slated, despite community protest, for new housing construction. Or demolition sites such as the Cowtown Inn complex in Fort Worth Texas, or the 300 residences already torn down to expand the Lambert-St. Louis International Airport runway (out of a total 2,000 marked for destruction), where authorities have simply wet the asbestos-laden materials with fire hoses rather than following the more costly EPA regulations for safe asbestos abatement, involving containment and removal of contaminated material before leveling a building. It is unclear at this point whether the suit filed in May by St. Louis residents to compel the city to adhere to EPA regulations would be extinguished if the trust fund bill is signed, which would leave them with no recourse. The thousands of people living and working in proximity to the World Trade Center’s Ground Zero are at particular risk. There, the Agency for Toxic Substances and Disease Registry found asbestos in 18 percent of indoor dust samples and 43 percent of outdoor dust samples.
- And there are the residents of new housing developments, most notably places like El Dorado Hills California, where real estate companies have been allowed to dig into asbestos-laden serpentine rock. The soil, when churned up by, say, a kid bouncing a basketball in the driveway or riding a bike or by a dog out in the garden, sends asbestos fibers airborne, increasing the risk of cancer and other asbestos-related diseases, according to the EPA and a report just released by the University of California at Davis. Ironically, these homeowners moved to the Sierra foothills in search of a cleaner environment.

- It includes the untold numbers of high school kids in hundreds of factory towns across the U.S. who, instead of goofing off all summer, acted responsibly and earned money working summer jobs—shoveling asbestos-contaminated vermiculite ore out of boxcars. That ore was processed and made into over 3,000 consumer products, including ironing board covers and hair dryers and joint compound and brake linings. None of the consumers of these aggressively and deceitfully marketed, seemingly innocuous products would have thought twice about inhaling the dust from a ripped fabric or accidentally-smashed machine or sanded surface.

None of these individuals is recognized by the bail out bill. Nevertheless, those injured under the preceding circumstances would be precluded for the life of the trust fund, i.e., presumably 30 years, from bringing any legal claim for damages to their health due to asbestos exposure. Right now some 10,000 people die annually from asbestos-related diseases. Experts predict that because of the latency period, disease peaks will not be reached until about 2018, and future disease projections range anywhere from 750,000 to 2.6 million. The Congressional Budget Office estimates about 1.7 million asbestos claims over the next 30 years, and that does not take into account all potential exposure categories.

In order to cut future liability down to a size that can be readily absorbed by corporate balance sheets, the asbestos bail out erects medical hurdles that maximize exclusion of otherwise legitimate claims—most significantly, by relying on arbitrary, outdated, unscientific diagnostic criteria that, as one leading medical expert put it, “represent the best that 1950s medicine has to offer.”

For example, the bill:

- Requires claimants to show x-ray evidence of disease instead of more technologically accurate, sensitive and readily-available CT or PET scans. The AFL-CIO estimates that 25,000 to 30,000 victims of asbestos-related lung cancer would be denied compensation on this basis, even though many would qualify if permitted to use appropriate diagnostic technology.
- Sets fixed exposure thresholds contrary to epidemiological evidence, since there is no safe level of exposure to asbestos, and then to make matters worse arbitrarily discounts these so that a lung cancer victim who started working after 1985 would need 105 years of occupational exposure to qualify for coverage.
- Rejects most of the criteria for determining the existence and extent of asbestos-related disease established by the *AMA Guides to the Evaluation of Permanent Impairment*—standards widely accepted by the medical community and used by 42 states and some Canadian provinces as the basis for workers compensation claims.
- Ignores the recommendations of the American Thoracic Society (ATS), which were developed over the course of three years by the preeminent experts in the field of lung

disease, as set forth in its *Guidelines for the Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*.

- Relies on the term “substantial” as a determinant in a variety of contexts, a word that has no commonly understood meaning in the medical community, nor definition in medical literature. This means that an administrator will be left to make a decision tantamount to medical diagnosis, which should be made by a physician.
- It reduces the ability of lung cancer patients with a history of asbestos exposure and who smoked to receive the same level of compensation as those who did not smoke, despite the well documented synergistic effect of these two carcinogens. People exposed to asbestos are five times more likely to develop lung cancer than those not exposed. Smokers run a 10-fold risk of developing lung cancer compared to non-smokers. But a smoker who is also exposed to asbestos has 55 times the risk of developing lung cancer.

What happens to those excluded from the corporate bail out fund? They will have no right to sue in court. As diagnosed sufferers of asbestos-related diseases (although not eligible for financial assistance under the bill) they will be unable to obtain health or life insurance. Some will be unable to continue in their current trade or to work at all. The cost of their continuing medical care—which for someone stricken with asbestosis could be several thousand dollars a month for oxygen alone—will ultimately be borne by taxpayers, if at all. This is not just unfair, it is bad public policy, with potentially staggering socio-economic ramifications.

And all the medical criteria hurdles will have to be surmounted on a stricter evidentiary basis that will weigh heavily against claimants because the bill foresees the use of volunteer lawyers to represent plaintiffs. For plaintiffs who want to hire attorneys, contingent fees are capped at 5 percent—a rate far below the lowest level of compensation for legal counsel, and likely insufficient for a lawyer to take a case that requires medical and occupational documentation that is difficult to obtain and assemble.

Claimants can expect a long wait at start up, because cases already in the litigation or settlement pipeline will be sent back to square one, creating a 500,000 case backlog at the outset. Even then there is no opt out provision—it’s the bail out or a shut out. If there are insufficient funds for the trust to meet its obligations, the administrator has the discretion to do whatever it takes—even reducing payments or making the medical criteria more exclusionary—in order to keep the fund solvent.

Those asbestos victims who do make the grade will be shortchanged by damage caps pulled out of thin air, with no rational basis other than the willingness of corporate defendants to pay. A successful claimant could wait three to four years to receive any compensation, the time generally allowed the administrator to pay an approved claim.

And this nightmare scenario is what happens if the asbestos bail out *works!*

If past experience is any indication, the asbestos fund won't even perform this well. Connecticut University Professor Peter Barth studied similar trust funds and found that the Black Lung Program, the Energy Employees Occupational Illness Compensation Program Act, and the Radiation Exposure Compensation Act all failed because they underestimated potential claims and ultimately had to be bailed out themselves by taxpayers. Shortfall estimates for this asbestos fund range from \$16 billion by the CBO, to \$100 billion by the Environmental Working Group.

Seems like there is a history lesson here some place. The question is: are we ready to learn it?