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# The American Academy of Actuaries

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# Overview of Asbestos Issues and Trends

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## American Academy of Actuaries Mass Torts Subcommittee

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# History

- Asbestos once considered a “miracle mineral”
  - Used in numerous products/industries
  - Perhaps more than 100 million people exposed
- Use has curtailed significantly
  - OSHA passed in 1970
  - Ongoing exposure
- Linked conclusively to disease
  - Mesothelioma
  - Lung cancer, other cancers
  - Asbestosis
  - Pleural injuries

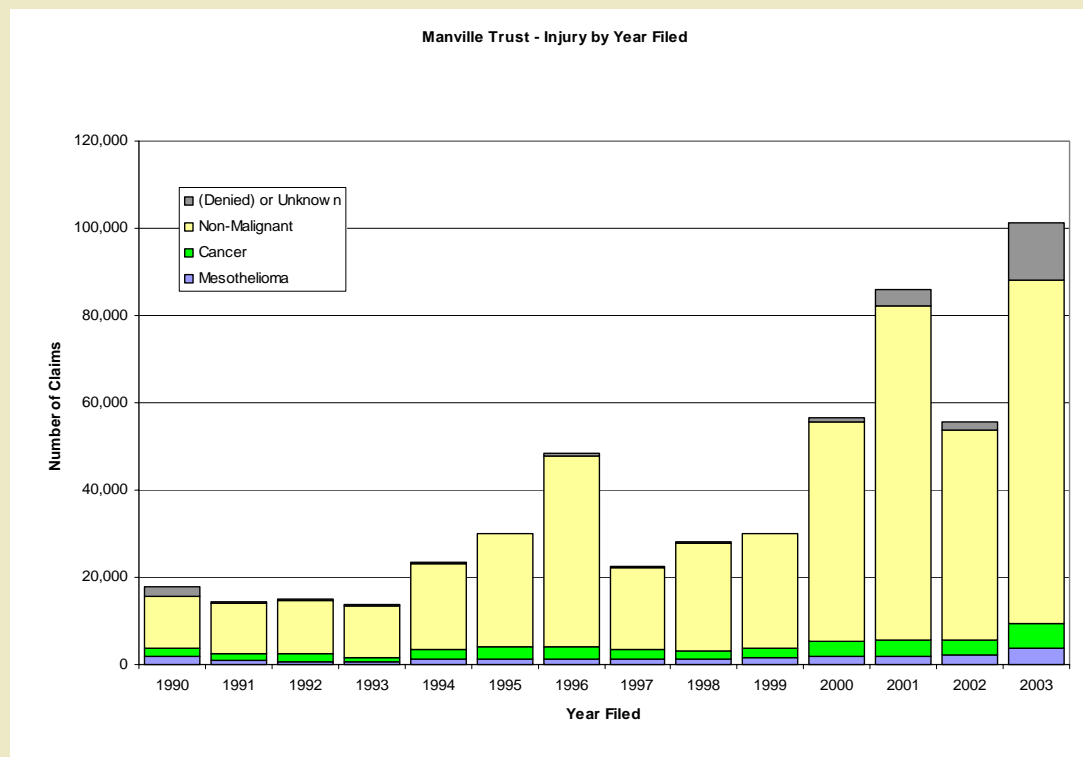


# Current Personal Injury Claim Situation

- Dramatic increase in number of claims filed
  - Greater propensity to sue
  - Increase in estimates of exposed population
  - “Catch-up” after Georgine
  - Beat bar dates and potential legal reform
- Approximately 730,000 claims filed through 2002
- Estimates of the ultimate number of claimants range from 1 million to 3 million
- Mix of claims has changed
- Increase in costs and number of defendants



# Surge in Claim Filings



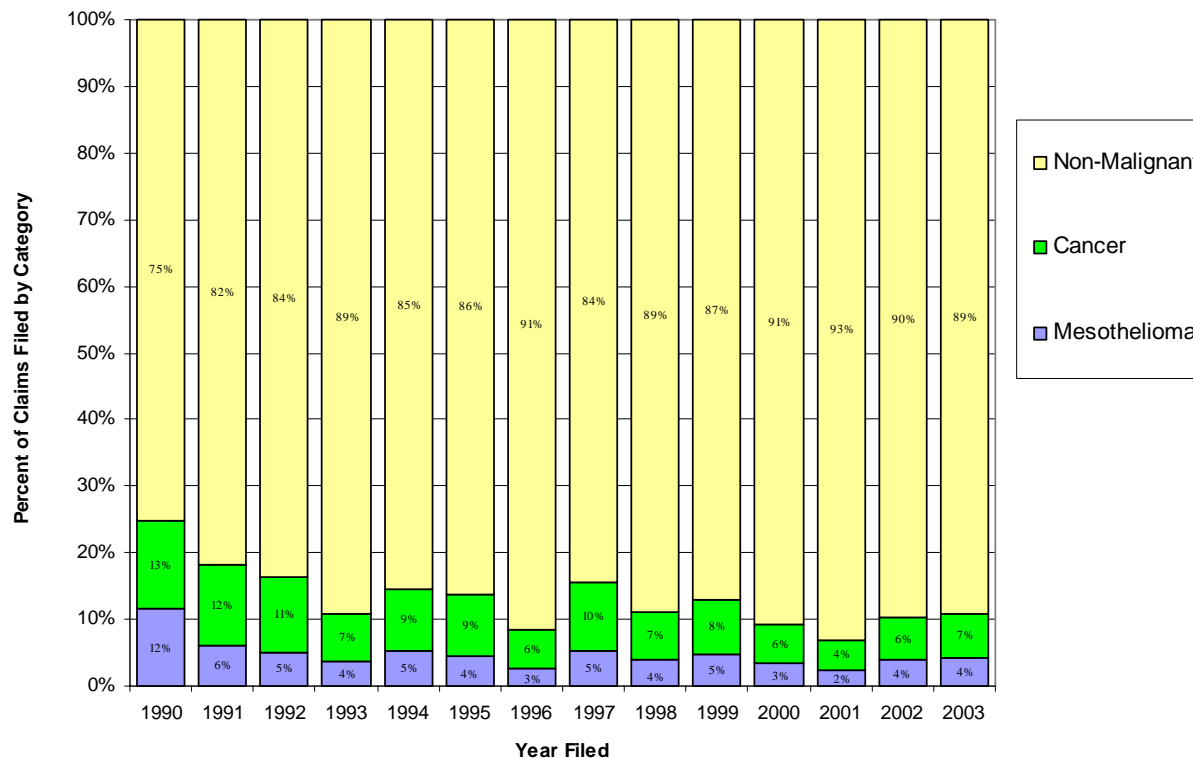
Johns-Manville was the most prominent defendant in early asbestos litigation. The company declared bankruptcy in 1982 and The Manville Trust was formed in 1988.

We note that the high level of claim filings in 2003 was influenced by a deadline to file claims under the criteria of the 1995 Trust Distribution Process (TDP). The new 2002 TDP applies more stringent medical criteria for compensation and shifts compensation toward claimants with more severe injuries.



# Change in Disease Mix

Manville Trust - Injury by Year Filed



# Increasing Numbers of Claimants Are Unimpaired

1982

4% of claims showed no manifest asbestos-related injury  
(RAND)

1993

Up to one-half of all asbestos claims have little or no physical impairment  
(*Harvard Journal of Legislation*)

1998

No evidence of disease in 57% of asbestos claims  
(Manville Trust)

2001

74% of pending claims are unimpaired  
(confidential report prepared for a defendant)

Two-thirds of claims show no evidence of impairment  
(Babcock & Wilcox)

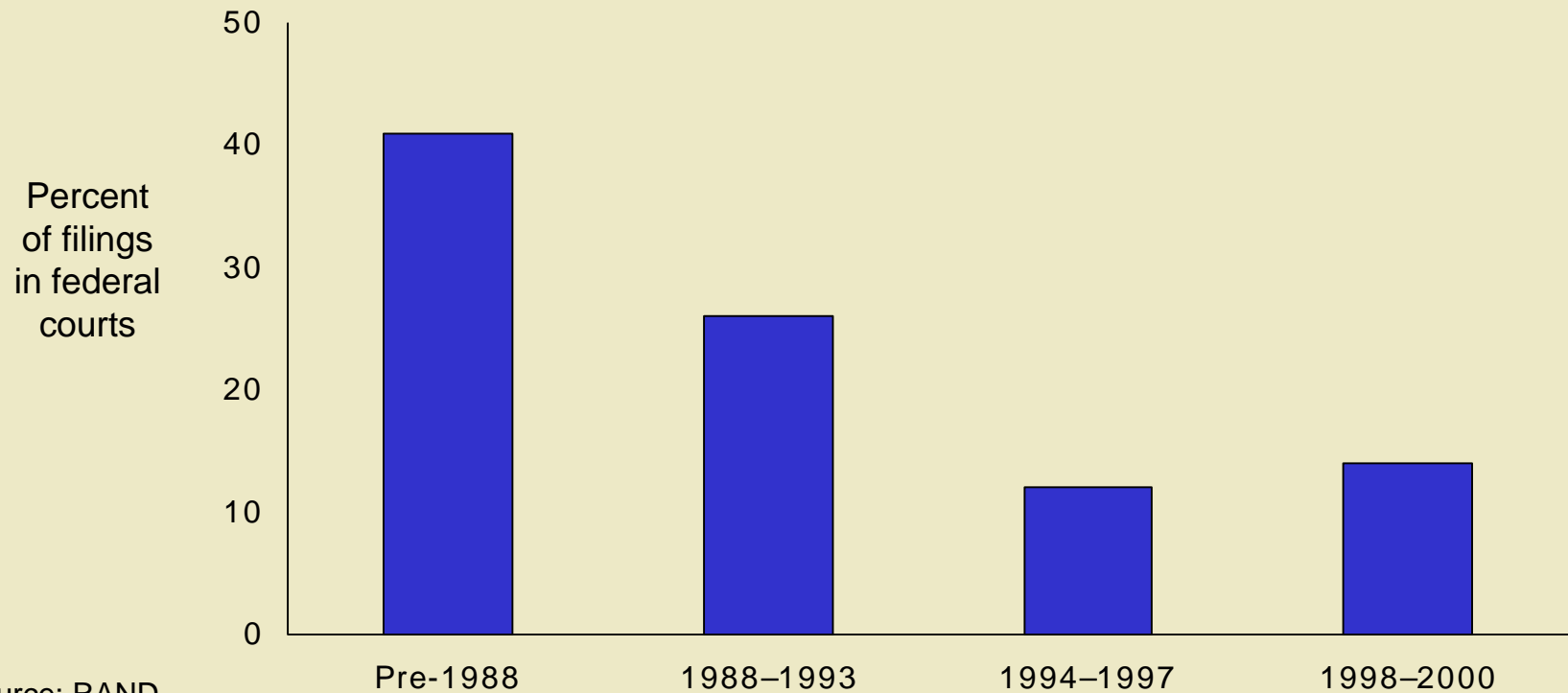
Vast majority of claims provide no evidence of impairment  
(W.R. Grace)

Source: RAND



# Other Trends in Claim Filing Activities

## Filings Moved from Federal to State Courts

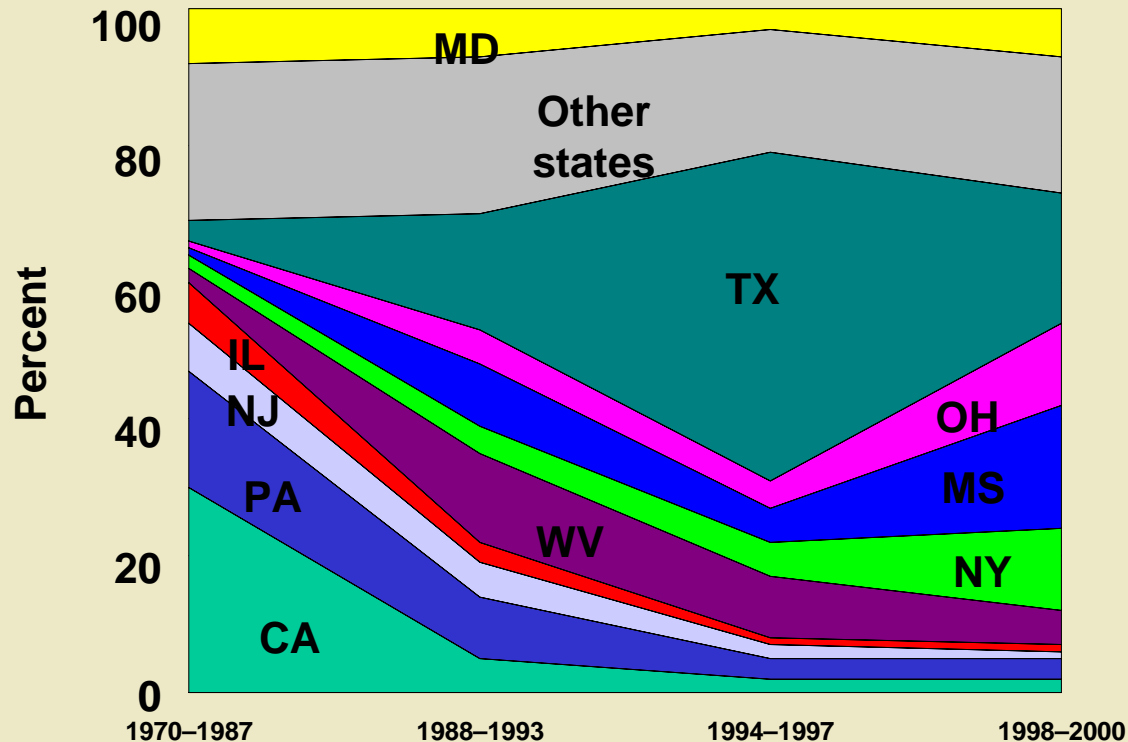


Source: RAND



# Other Trends in Claim Filing Activities

...and from some states to others



Source: RAND, January 2003



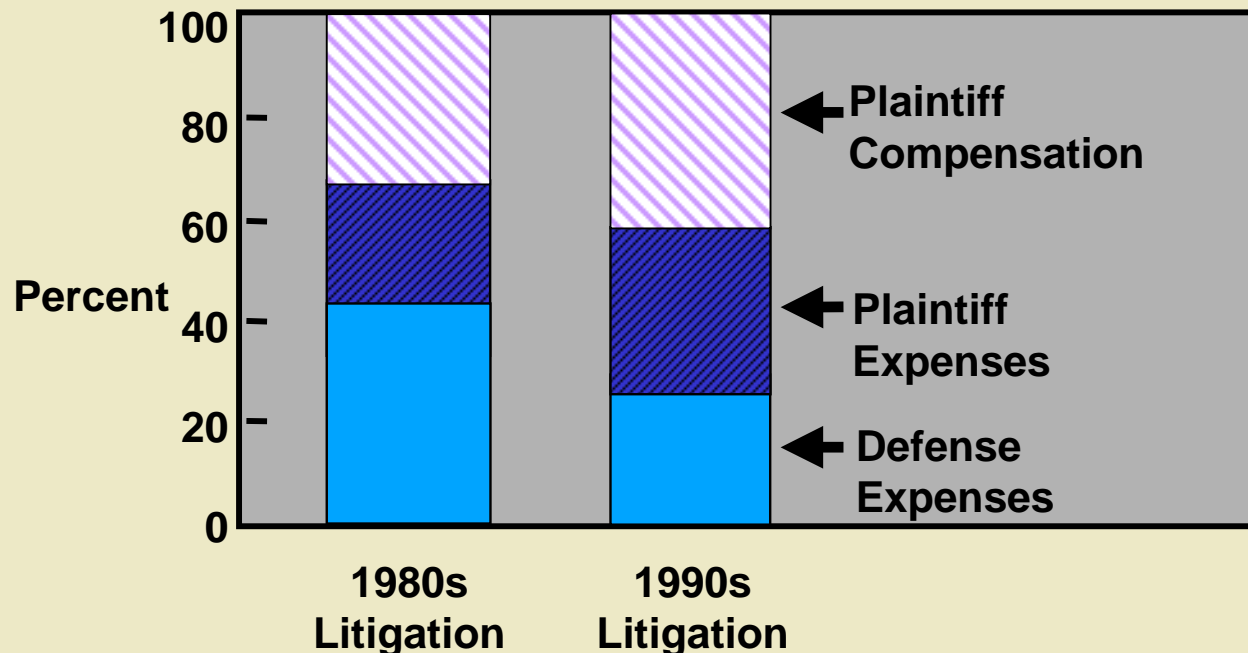
# Individual Claim Costs Also Increased

- Mean verdicts to plaintiffs increased dramatically from 1998 to 2001 (RAND)
  - Mesothelioma: ~\$2M to ~\$6.5M
  - Other cancer: ~\$1M to ~\$2.5M
  - Asbestosis: ~\$2.5M to ~\$5M
- Damages paid by many individual defendants also increased dramatically, reflecting
  - increase in plaintiff awards
  - higher shares for remaining defendants



# Frictional Costs in the System are High

- According to RAND, transaction costs have consumed more than half of total spending



- And they are likely to go back up in next decade

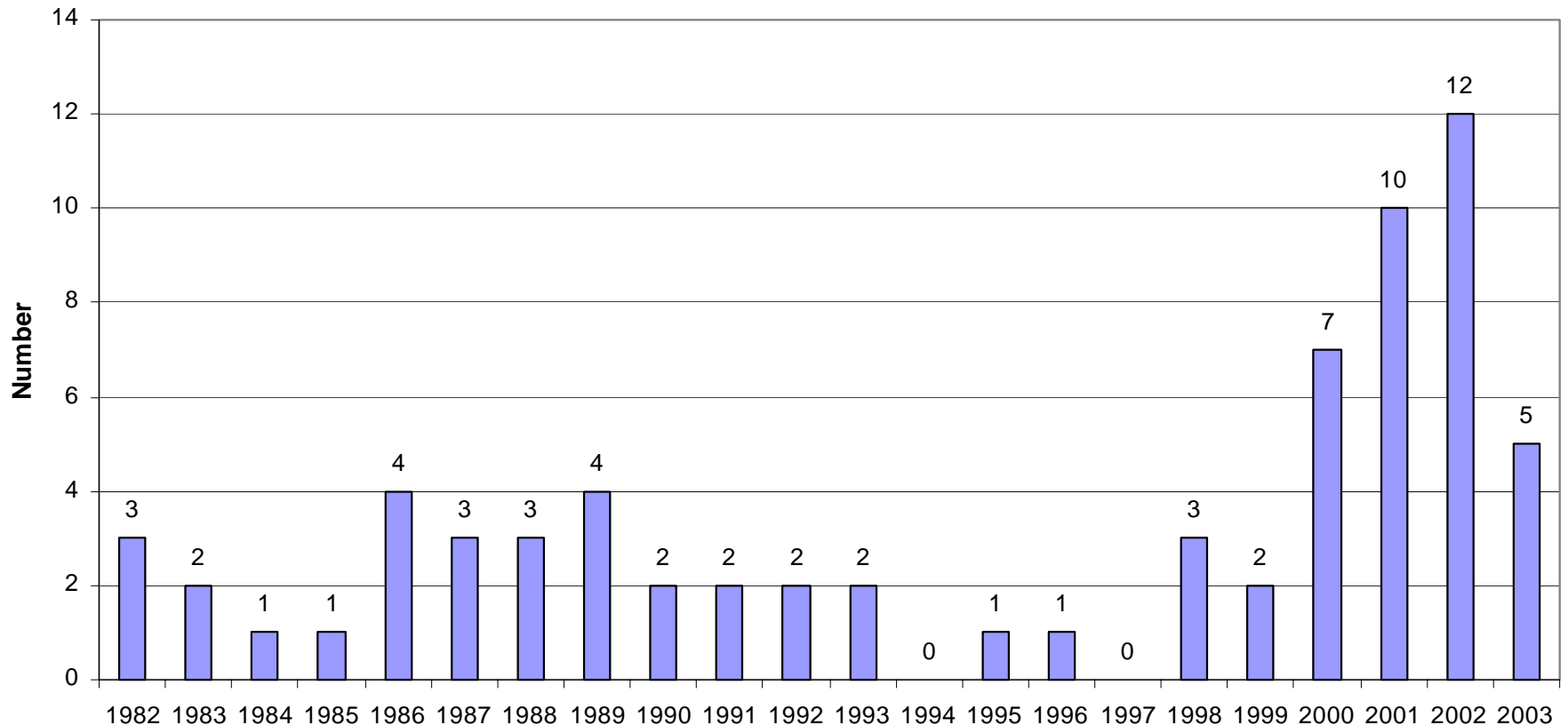


# Bankruptcy of Defendants

- Currently approximately 72 bankruptcies of companies with asbestos-related problems, based on comparison of lists maintained by the American Academy of Actuaries, RAND, and the Asbestos Alliance
- Bankruptcy cited as “legislative solution” by Babcock & Wilcox
- New bankruptcies may:
  - Increase costs for remaining defendants
    - Several defendants cited higher settlement demands as a cause of bankruptcy
  - Cause need for additional defendants
    - Approximately 300 asbestos defendants in early 1980s
    - Estimates of ~2,000 published a few years ago
    - RAND estimates over 8,400 today
      - Firms in current list of defendants span 75 of 83 possible 2-digit SIC industry codes



# Number of Asbestos Related Bankruptcies per Year



Note: Graph excludes a bankruptcy in 1976 and one bankruptcy for which no date is available.



# Differences Between Traditional and Pre-Packaged Bankruptcies

## Traditional

- Can take years to complete<sup>1</sup>
  - File petition
  - Negotiate with creditors
  - File reorganization plan
  - File disclosure statement
  - Solicit votes
  - Confirmation hearing
- Insurance coverage generally exhausted or settled, or insurers included in negotiations
- Court appoints claimant representatives
  - Future's Rep involved in negotiation for >50% equity

<sup>1</sup> Johns Manville filed bankruptcy in 1982 and its plan was not confirmed until 1988; Babcock & Wilcox filed bankruptcy in 2000 and its plan has not yet been confirmed.

## Pre-Packaged

- Intended to be completed within a few months of filing
  - Negotiated and voted on before filing
  - Combined hearing to confirm Plan and Disclosure
- Insurers interests are not represented in pre-petition negotiations
- Commonly include a pre-petition trust to pay near full value on current claims
  - Plaintiff attorneys with large inventories negotiate matrix agreements that benefit their own clients, but do not owe a duty to all claimants
    - Disease criteria broadly defined
    - Generous awards to lower disease severity classes
  - Significant portion of equity can be secured (therefore not available to bankruptcy trust)



# The Asbestos Tort Claim Process

- Multiple plaintiffs
- Multiple defendants
- Exposure over a number of years to various products
- Long latency
- Broad discretion for plaintiff to file claim in forum of choice
- Lengthy claim resolution process
- Single plaintiff claim paid by multiple defendants, insurers, and reinsurers

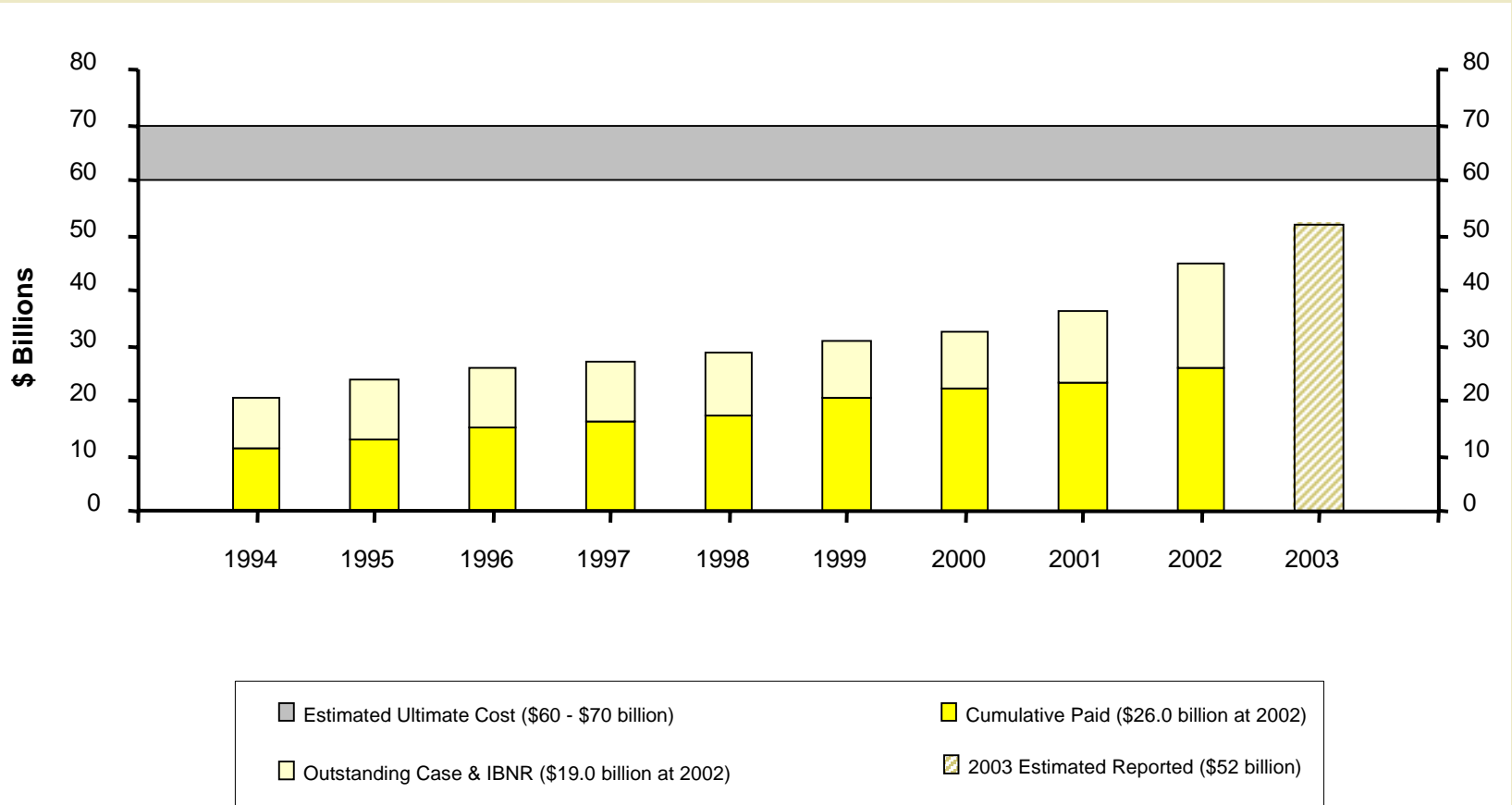


# Economic Impact

- Actuarial estimates of ultimate personal injury related costs range from \$200 to \$265 billion
  - Of this amount, \$60 to \$70 billion to be borne by the U.S. P/C market
  - Remaining uninsured and non-U.S. insured amounts also significant
- RAND estimates \$70 billion was paid as of 12/31/2002
  - Plaintiff / Defense attorney costs have exceeded 50% of total payments



# Paid and Reported Loss and Expense Compared to Estimates of Net U.S. Ultimate Asbestos Liability



# Concerns of Major Parties Involved in Asbestos (Personal Injury) Litigation

- Seriously Injured Claimants
- Nonseriously Injured and Unimpaired Claimants
- Plaintiffs Attorneys
- Judges
- Major Asbestos Defendants
- Peripheral Defendants
- Insurers and Reinsurers
- Workers in Bankrupt Firms
- The General Economy



# Concerns of Claimants

- Seriously Injured
  - Short life expectancy / claims resolution
  - High transaction costs
  - Availability of compensation for late developing disease
- Nonseriously Injured and Unimpaired
  - Statute of limitations
  - Availability of compensation for late developing disease
- Plaintiffs Attorneys
  - Similar to their clients, above
  - Compensation for cost of acquiring and developing cases
  - 2/11/2003 House of Delegates of the ABA voted to support legislation that would establish specific medical criteria to file a lawsuit based on a nonmalignant disease and toll the statute of limitations until such criteria were met



# Concerns of Defendants

- Major Asbestos Defendants
  - Fair trial, especially in certain state courts
  - Grouping of seriously injured and nonseriously injured claimants
  - Compensation to unimpaired claimants
  - High frictional costs
  - Finality
- Peripheral Defendants
  - Similar to major defendants above, plus
  - Culpability
  - Substituting as payor for bankrupt firms, non-U.S. firms



# Concerns of Insurers/Reinsurers and Judges

- Insurers and Reinsurers
  - Similar to concerns of their policyholders, major and peripheral defendants, above
  - Interpretation of contracts
  - Settlements without product identification or a clearly-identifiable injury
  - Predictability of financial results / finality
- Judges
  - Trial docket pressures
  - Fairness of results



# Concerns of Workers in Bankrupt Firms

- “The Impact of Asbestos Liabilities on Workers in Bankrupt Firms” by Joseph E. Stiglitz, Jonathan M. Orszag, Peter R. Orszag – December 2002
  - Bankruptcies across the nation
    - headquarters in 19 states
    - facilities in 47 states
  - Pre-bankruptcy, 200,000 workers employed by bankrupt firms
  - Loss of 52,000 – 60,000 jobs with each displaced worker losing an average of \$25,000 – \$50,000 in wages
  - Average 25% reduction to their 401(K) account
    - approx. \$8,300 each
  - Direct cost of bankruptcy: \$850M – \$1.7B



# Concerns in the General Economy

- “The Secondary Impacts of Asbestos Liabilities,” NERA, 2002
  - \$2 billion of secondary impacts on the economy
  - For every 10 jobs lost due to an asbestos bankruptcy, the surrounding community will lose an additional 8 jobs
- “Reducing the Asbestos Litigation Penalty: An Economic Benefit of Asbestos Reform Legislation,” Navigant Consulting Group, 2003
  - Asbestos defendants pay an “asbestos litigation penalty,” increasing their borrowing costs and making it difficult/impossible for some firms to raise capital
  - Failure to enact legislation could reduce economic growth by \$2.4 billion per year, costing 30,770 jobs annually
  - Extended over the 27 year timeframe contemplated by S1125 could mean 830,000 jobs will not be created and \$64.8 billion in economic growth will be lost



# Prior Efforts to Solve the Asbestos Litigation Process

- Industry-based
  - Wellington Agreement
  - Center for Claims Resolution
  - CCR Futures Deal
  - Fibreboard class action settlement
  - Owens Corning Fiberglas National Settlement Program
  - Coalition for Litigation Justice



# Prior Efforts to Solve the Asbestos Litigation Process

- Judicial Actions
  - Borel v. Fibreboard
    - Fifth Circuit U.S. Court of Appeals
    - Shifted asbestos awards from the workers compensation system to the court system
  - Beshada v. Johns-Manville, Halpen v. Johns-Manville
    - Held asbestos defendants liable due to failure to warn even if the defendant did not know of asbestos risk
  - Amchem v. Windsor (Georgine)
    - U.S. Supreme Court No. 96-270
  - Ortiz v. Fibreboard
    - U.S. Supreme Court No. 97-1704
  - Metro North v. Buckley
    - U.S. Supreme Court No. 96-320



# Prior Efforts to Solve the Asbestos Litigation Problem

- Historical Legislative Involvement
  - 1977 / 1981 Rep. Fenwick (R-NJ) introduced a bill to compensate asbestos victims through a federally administered fund
  - 1980 / 1981 Sen. Hart (D-CO) introduced a bill to administer asbestos claims by the states according to federal minimum standards; barred suits from the tort system
  - 1994 Bankruptcy Reform Bill enacted
    - Section 524g establishes asbestos trust/channeling injunction
    - Allows stay on claims, requirement of medical criteria, representative for future claimants, estimations / provisions for the liquidation of claims
  - 1999-2000 H.R. 1283 – Fairness in Compensation Act passed out of the Judiciary Committee but never considered by the full House
  - 2001 H.R. 1412 – Retroactive Tax Relief



# Asbestos-Related Bills Introduced into the 108th Congress

- 5 relating to asbestos reform
  - HR1114 – Kirk (R-IL) – office of Asb. Comp./court
  - HR1586 – Cannon (R-UT) – court
  - HR1737 – Dooley (D-CA) – court
  - S413 – Nickels (R-OK) – court
  - S1125 – Hatch (R-UT) – trust
- 2 to ban the use of asbestos
  - HR2277 – Waxman (D-CA)
  - S1115 – Murray (D-WA)
- 1 to change the tax code, such that asbestos-related settlement funds would be exempt from tax
  - HR2503 – Collins (R-GA)



# Senate Bill 1125

- Preliminary negotiations involved insurers, defendants, and labor
- Initially called for a privately funded trust totaling \$108 billion comprised of:
  - Insurers - \$45B
  - Defendant companies - \$45B
  - Current bankruptcy - \$4B
  - Voluntary contributions - \$14B
- Funding contribution
  - Insurers still negotiating allocation; subject to insurer commission
    - Funding is concentrated: 20 insurers likely to contribute 90%
  - Defendants grouped to tiers based on historical payments
    - Separated into sub-tiers based on revenues



# Senate Bill 1125 - Compromises

- S 1125 passed out Senate Judiciary Committee on July 10, 2003 (10-8) with significant compromises
  - Revised medical criteria – 10 Disease Levels
  - Revised awards (\$20,000 for Level II to \$1 million for Level X)
  - Increased funding
    - Demands of up to \$153 billion = \$135 billion from defendants and insurers plus \$18 billion from existing trusts and other sources
- Latest offer by business group and insurers is \$114 billion
  - Defendant companies - \$57.5B
    - Additional contingency fund - \$10B
  - Insurers - \$46B
- Department of Labor to process claims



# Current Status of S 1125

- Unresolved issues
  - Negotiations with labor
    - Amount of funding
    - How trust would begin / end
  - Insurer allocation
    - Non-U.S. funding
    - Transition issues
    - Reinsurance pipeline
  - Solvency / Finality



# Possible Federal Legislation

- Likely prospective proposals supported by the Asbestos Alliance (led by the American Insurance Association and the National Association of Manufacturers) will focus legislation on four areas
  - Establishing objective medical criteria of asbestos-related impairment
  - Liberalizing statutes of limitations
  - Eliminating consolidations
  - Eliminating forum shopping



# State Reform Efforts

- Focus on medical criteria / statute of limitations
  - Inactive dockets being considered / created in several states
  - Penalize frivolous lawsuits (e.g., MS, TX)
- Focus on forum shopping / consolidations
  - E.g., reforms in MS, TX
- Focus on joint and several liability
  - E.g., NY



# Role of Actuaries

- Quantification of Liabilities
- AAA Public Policy Monograph
- AAA Congressional Briefing

