Sections on occupational disease legislation and distribution of liability between the federal government and its contractors were included under a general measure opposing the enactment of a federal product liability statute. Sections on workers' compensation and uniform standards for punitive damages were rejected. Because each section of the resolution was found to be separable from the others, the ABA committee asked that each one be considered separately.

The text of the occupational disease recommendation urged that the ABA body support "federal legislation which addresses the issues of liability and damages with respect to claims for damages against manufacturers by those who contract an occupational disease (such as asbestosis) when: (a) there is a long latency period between exposure to the product and manifestation of the disease; (b) the number of such claims and the liability for such damages in fact threaten the solvency of a significant number of manufacturers engaged in interstate commerce; and (c) the number of such claims have become clearly excessive burdens upon the state and federal judicial systems."

Problem 'Unique, Catastrophic'

In a report prepared as a supplement to the recommendations, the special committee said it believes that "the current social problem presented by occupational latent diseases, such as asbestosis, is unique and has been a catastrophic phenomenon on a national scale to asbestos workers and to the asbestos industry."

Citing the "unique national scope and magnitude" of compensation problems and the effects they have on the financial stability of specific industries, the committee made an exception to its general "reluctance" to recommend federal intervention in the tort liability and common law systems of the states. Federal attention to the problem would be "neither premature nor precipitous," the panel said, "and would not result in harmful violation of the inherent values" of state systems.

Speaking of the federal government role as a general matter of "attention" to the problem, the committee endorsed no specific legislative proposal. It said it believes, however, that any approach "should carefully balance the interests of both injured parties and manufacturers."

It based its recommendations on the large number of claims, "the perception by a significant number of manufacturers that their solvency is threatened," the interests of claimants in receiving prompt and adequate compensation and the burden that pending claims appear to be placing on state and federal courts.

An introductory passage cited recent court decisions allowing workers to make claims against their own employers in certain cases of alleged intentional conduct, federal bankruptcy filings by three asbestos companies (see related article in this issue), and reports that the number of claims being filed is growing monthly.

Government Liability

Also approved by voice vote was a section supporting enactment of federal legislation allocating product liability risks between the federal government and its contractors and providing, in certain instances, indemnity against those risks." The committee's report noted that, in cases of product-related injury, "the product feature or characteristic causing the injury may in a particular instance be attributable to a government specification" reached through a trade-off between safety and utility, as in cases involving national defense.

Although the report drew examples from Agent Orange litigation in Vietnam and a case concerning a helicopter accident in which two Virginia National Guard pilots died, the issue of the government's liability for hazardous exposures occurring during work under government contract is one that also has been actively argued in asbestos cases. It was not clear, however, whether the committee's general treatment of the issue could be applied to the problem of shipyard asbestos exposures during World War II and the Korean Conflict, when the U.S. government specified the use of asbestos for warship insulation.

Workers' Compensation

Defeated by a voice vote was a section of the resolution that would have recommended federal legislation to allow a tort defendant found liable in a product liability action to deduct the injured party's workers' compensation benefits from the judgment, regardless of employer negligence. The resolution also called for the elimination of any right of subrogation the employer would have against the manufacturer, and would have prevented the manufacturer from seeking indemnity or contribution against the employer.

Debate centered on the interests of manufacturers of products used in the workplace, with supporters arguing that the current workers' compensation system places a disproportionate burden on manufacturers even in cases of gross employer negligence, and opponents saying that legislation would create a windfall for manufacturers, harm the present workers' compensation system, and potentially increase insurance rates. Opponents also warned against federal intervention in state workers' compensation systems.

By a vote of 185 to 113, the ABA body renewed its general position on the issue of varying tort liability laws and accepted the special committee's recommendation to adopt a resolution opposing "enactment of broad federal legislation that would codify the tort laws of the 50 states as they relate to product liability."

Asbestos

MANVILLE BANKRUPTCY ACTION MAY ENDANGER CO-DEFENDANTS, FUTURE VICTIMS, PANEL TOLD

The bankruptcy action filed by Manville Corporation last summer as a means of contending with thousands of health liability claims based on worker exposure to asbestos has raised legal problems concerning the interests of future claimants and of Manville co-defendants whose cases have not been frozen, witnesses told a Feb. 10 hearing of the House Education and Labor Subcommittee on Labor Standards.

The subcommittee session was called by Rep. George Miller (D-Calif) to continue the panel's scrutiny of Manville's decision to seek protection from lawsuits by filing a petition under Chapter 11 of the federal bankruptcy code (Current Report, Sept. 16, 1982, p. 324). Miller, who chairs the subcommittee, said he will reintroduce a bill "within a couple of weeks" to establish an occupational disease compensation system to address the asbestos problem.

Lawrence P. King, professor of law at New York University, warned that the bankruptcy move, while it may end up satisfying the claims of disease victims with suits pending, may not be applicable to the claims of those who have yet to file actions against the company. Manville has proposed putting future claimants into a single class with current plaintiffs for the purposes of paying out assets to meet claims (Current Report, Feb. 10, p. 756).

DUP 0501657

DBE 130283

PLAINTIFF'S
EXHIBIT
DUP-810

DU 001391

King suggested that serious legal problems would be raised by including future claimants in the general class of asbestos creditors and added that if future claimants cannot be put in the class of creditors, insolvency could result after pending claims were satisfied and Manville emerges from the bankruptcy's protection against litigation.

'Skeptical' of Representation

The law professor said he was "extremely skeptical" that the claims of future plaintiffs can be discharged in the current bankruptcy proceeding. He observed that the reorganization plan required under Chapter 11 must be accepted by a two-thirds majority of creditors and then commented, "I can't see how unknown plaintiffs can vote on the plan or how people can say they are representing them."

Issues raised by this problem, including the constitutional question of due process or lack of notice, would have to be resolved by the U.S. Supreme Court, King maintained, a process that in normal course could take three years, assuming the court agrees to hear them. In addition, he said, three years run from a contest of a reorganization plan. The result, he stated in response to questioning by Miller, is that "the time is considerable before claimants can collect."

In a situation in which claimants "don't even know they're claimants when the plan is voted on, negotiated, and confirmed by the [bankruptcy] court," Manville's liability could continue, King said. "The major purpose of the bankruptcy would be lost," he concluded.

Co-Defendant Issues

A coalition of asbestos defendants that have not filed for bankruptcy protection from lawsuits told the subcommittee that Chapter 11 filings by Manville and two other companies "have made an unbearable situation even worse." The coalition, called the Committee for Equitable Compensation, consists of 12 companies that have asbestos actions pending against them. It was formed when six firms joined former members of the Asbestos Compensation Coalition, which disbanded after three of its members filed for protection under Chapter 11, according to an attorney for the group.

"When one co-defendant drops out of a case, the others must pick up the slack," John L. Baldwin, president of Pittsburgh Corning Corporation and head of the group, said. "Not only must they bear the entire cost of defense, but in many states, they may be required to pay the entire amount of any judgment rendered under the law of joint and several liability."

In Manville cases where judges have not stayed the co-defendant litigation, Baldwin said, pending proceedings have been allowed to go forward against the other companies, and filing of new suits against them also has not abated. None of the other companies, to his knowledge, is contemplating a Chapter 11 filing, he stated. Their financial situation has worsened, however, as a result of the Manville filing, he reported, citing a Moody's bond survey predicting that the "full weight" of the liability litigation costs "will be shared by the remaining companies."

Baldwin also warned of harm to future claimants, "who may be left without compensation if the assets available for compensation are depleted by the present horrendously costly and inefficient situation." He proposed a five-point legislative plan for an exclusive, no-fault administrative remedy to remove the compensation problem from litigation. The plan included contributions to a compensation fund by all responsible parties, a category that included companies in Chapter 11, the other defendants, their insurers, and the federal government.

'Empty Chair' Defense

George W. Kilbourne, a plaintiffs' lawyer from Pleasant Hill, Calif., accused Manville of "ducking behind the velvet curtain of the Bankruptcy Act," making it difficult for claimants to obtain compensation as they continue "to grow old and die." Negotiations with co-defendants have been fruitless since the Manville filing, he said.

In addition, Kilbourne reported, recent cases tried before juries have resulted in absolution of the co-defendants because the court panels have been "unwilling" to allocate Manville's responsibility to them, finding that they have not made a "substantial contribution" to the harm.

This development recalls the "empty chair" defense Manville lawyers used to implicate the tobacco industry for lung cancer cases, the California attorney said. In a recent suit against the tobacco industry and Manville, the court indicated that Manville, because of the bankruptcy filing, would be severed from the proceedings. Plaintiffs' attorneys "are now faced with the prospect of the tobacco industry asking, 'Where is Manville?' as they point to the empty chair," Kilbourne said.

Also testifying at the hearing were representatives of the Asbestos Victims of America headed by the group's founder, Jim Vermeulen; and James E. Sullivan, chairman of the board of PACOR Corporation, a small Philadelphia insulating firm.

Litigation

COURT FINDS LABOR DEPARTMENT NEGLIGENT IN PROSECUTION OF SECTION 11(c) CLAIM

The U.S. Department of Labor's negligence in representing an employee's interests in an antidiscrimination action warrants recovery from the government of the amount the employee would have received from the company which was a party to the suit, according to the U.S. District Court for the District of Oregon.

This decision, issued Jan. 5 in *William W. Chadsey v. United States of America* (Civil No. 81-469FR), followed a previous court ruling which had dismissed the Section 11(c) discrimination claim filed by the Labor Department on behalf of Chadsey.

This case arose after William Chadsey was fired from his job as a chipper operator with Lumco, Inc. The termination followed a series of complaints or threats of complaints made by the employee to Lumco management or government agencies concerning working conditions at the company mill. Since the date he was hired in 1971, Chadsey had reported to Oregon State's Safety Division that the chipper machine he operated lacked an extension to keep chips from flying out, and complained to company supervisors about the absence of a railing on the walkway around the top to the equipment's hopper.

As a result of his complaint to the state of Oregon, company officials added the extension to the chipper. However, they failed to install a guardrail on the top of the machine. Following an incident in which Chadsey nearly fell into the chipper's hopper, the employee notified company officials that he intended to contact the Labor Department concerning the lack of a railing. Immediately subsequent to this communication, Chadsey was terminated from his employment with Lumco. He then requested that the government file a complaint against the company charging that he was subjected to unlawful discrimination for threatening to report unsafe working conditions.