

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

LABOR AND INDUSTRY COMMITTEE
PUBLIC HEARING

STATE CAPITOL
HARRISBURG, PA

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MONDAY, MAY 6, 2019
11:00 A.M.

PRESENTATION ON
H.B. 1234
WORKERS' COMPENSATION EXCLUSIVE REMEDY

BEFORE:

HONORABLE JIM COX, MAJORITY CHAIRMAN
HONORABLE CRIS DUSH
HONORABLE TORREN ECKER
HONORABLE MINDY FEE
HONORABLE RICH IRVIN
HONORABLE DAWN KEEFER
HONORABLE KATE KLUNK
HONORABLE DAVID MALONEY
HONORABLE LORI MIZGORSKI
HONORABLE MICHAEL PUSKARIC
HONORABLE PAUL SCHEMEL
HONORABLE PATRICK HARKINS, DEMOCRATIC CHAIRMAN
HONORABLE MARIA DONATUCCI
HONORABLE JEANNE MCNEILL
HONORABLE DAN MILLER
HONORABLE GERALD MULLERY
HONORABLE ED NEILSON
HONORABLE ADAM RAVENSTAHL
HONORABLE PAM SNYDER

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*Pennsylvania House of Representatives
Commonwealth of Pennsylvania*

COMMITTEE STAFF PRESENT:

JOHN SCARPATO

MAJORITY EXECUTIVE DIRECTOR

SHANNON WALKER

MAJORITY RESEARCH ANALYST

JENNIFER DODGE

MAJORITY LEGISLATIVE ADMINISTRATIVE ASSISTANT II

HALEY SALERA

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I N D E X

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SUBMITTED WRITTEN TESTIMONY

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P R O C E E D I N G S

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MAJORITY CHAIRMAN COX: I'd like to call this meeting to order. Before we begin, I'd ask that all of you stand, as able, and say the Pledge of Allegiance with me.

(The Pledge of Allegiance was recited.)

MAJORITY CHAIRMAN COX: All right. Again, I'd like to welcome everyone to this hearing of the House Labor and Industry Committee. I would like to remind everyone that the meeting is being recorded, and so if you would please silence your phones and any other electronic devices that you may have.

Because this is a hearing, we're not going to call the roll, but I know we have a lot of things going on this morning, as you can see by the sparse attendance. I myself am going to get the meeting started, and then I need to return to a Health voting meeting on some bills that are coming out or actually a bill is coming out. And so they are as thinly populated as we are if not more so, so we want to make sure we are able to move the legislation. And I'll return to this hearing as able.

When I do leave, I will be asking Representative Cris Dush to chair the Committee in my absence. I'd like

1 all of you to know that that doesn't diminish my interest
2 in this bill at all. Obviously, I'm the prime sponsor of
3 the bill, so I do have some interest in it.

4 But I called this hearing today on House Bill
5 1234. This bill was introduced to get the discussion
6 started about issues related to workers' comp as the
7 exclusive remedy for workplace injury and occupational
8 diseases. We've invited some key stakeholders today, and
9 we're going to let them weigh in on the issues and the
10 legislation itself. It's my hope that everyone's going to
11 provide some constructive feedback so that we have the
12 ability to make our best decisions going forward.

13 I would ask this. I know you were asked this in
14 advance as well. Being as specific as possible about
15 concerns in the language of the bill and so forth, that's
16 going to help us craft a better product, and so changes are
17 made, the more specific you are, the more we're going to be
18 able to respond to that.

19 So I am going to turn this over to John Scarpato
20 to provide a brief technical overview of the legislation,
21 and then we're going to separate into our panel discussion.
22 As I said, I'm going to step away to go to the voting
23 meeting, and I'll be back as soon as I am able. But in my
24 absence, Representative Dush will be handling things.
25 Thank you.

1 MR. SCARPATO: House Bill 1234 amends the
2 Workers' Compensation Act to allow claims for occupational
3 diseases with a latency period of more than 300 weeks.
4 Claimants will have 300 weeks from the date of diagnosis or
5 the date the disease was detectable to file a claim. The
6 bill also provides that the Workers' Comp Act will provide
7 the exclusive remedy for disease or injury arising from
8 hazardous occupational exposure.

9 And finally, the bill clarifies that the
10 exclusive remedy of the Workers' Comp Act extends to an
11 employer's parent company, holding company, or affiliates.

12 REPRESENTATIVE DUSH: Thank you, John. Now, I'd
13 like to ask the panelists to give a brief introduction and
14 go into their testimony. We're going to have most of the
15 time allotted for Q&A, so if we would, we have today R.
16 Burke McLemore, Adjunct Professor of Law, PSU Dickinson Law
17 School; Kristopher Kachline, Swartz Campbell, LLC; Rebecca
18 Oyler, Legislative Director of the NFIB; Michael Dryden,
19 Esquire, Partner at Willig, Williams and Davidson with the
20 PA AFL-CIO; Robert Daley, Esquire, Robert Peirce &
21 Associates, PA Association for Justice; and Sam Marshall,
22 President and CEO of the Insurance Federation of
23 Pennsylvania.

24 Before we begin, I'll remind everyone to limit
25 their opening remarks to about five minutes, and Shannon

1 will signal you, as has become normal in this Committee,
2 when you have about 30 seconds remaining.

3 So, Burke, I'll start with you.

4 MR. MCLEMORE: Thank you, Representative. Thanks
5 for having us here this morning. I've been asked to try to
6 give you an overview of the Pennsylvania Workers'
7 Compensation Act and the *Tooe* decision. My purpose of
8 being here is not to be for or against any particular
9 legislation. I'll be happy to answer questions you may
10 have. But my role is simply to try to give you background.

11 I have to take you all the way back to 1915 when
12 the Pennsylvania Constitution was amended to provide for
13 workers' compensation benefits. Up till that point in
14 time, employees could sue employers, and the liability was
15 open-ended. On the other hand, it was very difficult for
16 an employee to get to that point where they could sue and
17 recover, and consequently, throughout the country, there
18 was a movement called the Grand Bargain. And the Grand
19 Bargain was to limit the liability of the employers and at
20 the same time provide for a certain amount of benefits for
21 injured employees and their families who were injured as a
22 result of occupational injuries.

23 Diseases came into the law in 1939 with the
24 Occupational Disease Act, and then in 1972, the Legislature
25 passed and it was signed into law significant amendments to

1 the Workers' Compensation Act. And that's pretty much
2 where the act is right now, the 1972 amendments.

3 Section 303 of the act provides that the act is
4 an exclusive remedy for all liability under the act that's
5 in place of all other remedies for an employee against his
6 employer for injuries covered under the act. And that's
7 the key focus here today. The immunity is broad and almost
8 total, but it's not exclusive and there are exceptions to
9 the immunity existing in the act right now.

10 The courts have always said that there must be an
11 available remedy for someone injured in the course of his
12 or her employment, and the *Tooley* decision really deals with
13 that question of how you craft that remedy and whether the
14 remedy is under the act or not.

15 So let's just talk for a few minutes about the
16 *Tooley* decision. In 2013 the Pennsylvania Supreme Court was
17 confronted with a case of two individuals, one of whom
18 actually I had as a comp claim 30 years ago, Mr. Landis.
19 In any event, both of these individuals had been exposed to
20 asbestos during the course of their employment, and
21 asbestos-related diseases, as you may know, may have a
22 latency period of 30, 40, 50 years. And consequently, the
23 statute involved Section -- and this is important. It's
24 only section 301(c)(2) of the act, and I'll get into that
25 in just a moment.

1 But that provision of the act says that if an
2 individual has an injury, quote, "arising in the course of
3 employment" in order to be compensable, the act shall only
4 apply to disability or death resulting from such disease
5 occurring within 300 weeks after the last date of
6 employment in an occupation or industry to which he was
7 exposed to the hazards of such disease." And that's the
8 crux of the *Tooley* decision.

9 Now, the court took the approach that "occurring"
10 meant "manifestation," and instead of getting embroiled in
11 constitutional arguments, the court took a very simplistic,
12 straightforward approach to the law, and they say, okay,
13 let's look at the simple language of the statute. What
14 does it say?

15 Using the plain-language argument, they said
16 that, well, if the manifestation falls outside of that 300-
17 week window, then it's not covered under the act. Now,
18 Superior Court has said that the 300-week provision was
19 essentially a statute of limitations or statute of repose,
20 which got rid of the right, the remedy, everything. Bang,
21 you're done, you're out. And the *Tooley* decision changed
22 that, and instead it said the language means what the
23 language means. If it's not within 300 weeks, then it's
24 not covered under the act. And consequently, they reversed
25 a long-standing Superior Court authority and held that both

1 Mr. Tooley and Mr. Landis must have their day in court.

2 And what they said was that if you followed the
3 Superior Court reasoning, the employee would be barred on
4 what you call both tracks, the civil track and the workers'
5 compensation track. And that wasn't appropriate. No fewer
6 than five or six times in the *Tooley* decision you will see
7 the court emphasize how the Workers' Compensation Act was
8 to be liberally interpreted in favor of employees.

9 Now, there are four points that I'd like to raise
10 with you that are unanswered questions under the *Tooley*
11 decision, and the first of course is that no ruling by the
12 court was made under section 301(c)(1) of the act as to
13 whether there should be a *Tooley* application to that. And
14 section 301(c)(1) defines injury and personal injury as "an
15 injury to an employee regardless of his previous physical
16 condition arising in the course of his employment and
17 related thereto and such disease or infection as naturally
18 results from the injury or is aggravated, reactivated," et
19 cetera. "And whenever death is mentioned as a cause, it
20 shall mean only death resulting from such injury and its
21 resultant effects on occurring within 300 weeks after the
22 injury."

23 Now, why is this important? Go back 25 years and
24 there was a Supreme Court case called *Pawlosky*, and
25 *Pawlosky* involved an individual who worked in the brewing

1 industry for many, many years. And Mr. Pawlosky filed a
2 workers' compensation claim. It went to the workers' --
3 sorry, am I up, time up?

4 MALE SPEAKER: Thirty seconds.

5 MR. MCLEMORE: Okay, 30 seconds. All right. I'm
6 going to get to the four questions that are left open.

7 Number one, whether *Tooey* covers section
8 301(c)(1).

9 Number two, *Tooey* leaves open the question of
10 whether it would permit injuries or diseases such as those
11 under *Pawlosky* to be covered under its breadth.

12 Number three, it leaves open the question of
13 whether co-employee immunity is abrogated by *Tooey*. If you
14 throw out the immunity of the employer because it's not
15 under the act, do you also throw out the immunity of the
16 co-employee?

17 And number four is the statutory employer
18 immunity still viable in light of *Tooey* for cases that
19 arise more than 300 weeks?

20 That's it.

21 MAJORITY CHAIRMAN COX: All right. And I know
22 I'm going to mispronounce this name. I'm going to try with
23 Kachline.

24 MR. KACHLINE: Kachline it is.

25 MAJORITY CHAIRMAN COX: All right.

1 MR. KACHLINE: Thank you very much.

2 MAJORITY CHAIRMAN COX: Please begin.

3 MR. KACHLINE: Thank you. My name is Kristopher
4 Kachline. I'm an attorney at Swartz Campbell, and I
5 represent both employers and insurers who have both
6 workers' compensation liability and now *Tooley* liability.

7 I suppose my purpose here is to explain a little
8 bit of the legal landscape since 2013. I provided written
9 testimony that's a bit broader, but to focus on what's
10 happening in cases right now, when this decision was
11 circulated, this opinion was circulated, employers were
12 joined to existing asbestos and other toxic tort-like
13 litigation. Then, since that time, employers have been
14 named as mostly the primary defendant in asbestos cases,
15 benzene cases, and other toxic tort-like cases.

16 The problem is real, and I think that's why we're
17 here. There are hundreds of cases going at any time where
18 an employer is being sued directly by a former employee for
19 a disease that manifested out of the workplace or at least
20 alleged to have manifested out of the workplace. There are
21 some cases where the employer is the sole defendant. And
22 for 98 years from 2015 to 2013, that was never the case.
23 Employees couldn't be sued, as Mr. McLemore said, because
24 the exclusive remedy for injuries or diseases arising out
25 of workplace was the Workers' Compensation Act.

1 The exclusive remedy provision of 303 had been
2 challenged in those 98 years almost every year and was
3 resolute in limiting exposure for workplace injuries or
4 diseases to the Workers' Compensation Act in what Mr.
5 McLemore identified as a Grand Bargain. The bargain is
6 that the Workers' Compensation Act is a no-fault disability
7 statute. The employee him or herself can contribute to a
8 negligence standard that would still produce reliable and
9 discernible workers' compensation benefits. And I'm sure
10 there will be questions about what type of benefits are
11 available to people with diseases, and I'm happy to answer
12 those questions.

13 The landscape now is that employers are being
14 sued for exposure to mostly asbestos, in other disease
15 cases other substances that date back into the '60s,
16 sometimes the '70s, rarely the '80s, and mostly those
17 employers are bearing the cost of defending those lawsuits,
18 settling those lawsuits, and going to trial.

19 Insurers also have a significant stake in this
20 landscape. There's insurance coverage that was very rarely
21 utilized. It's called the B side of workers' compensation
22 policy or employer liability insurance, and typically those
23 policies were capped at \$100,000 per disease. These
24 policies again were written in the '60s, '70s, and early
25 '80s, and now claims on those policies are being made.

1 There are also umbrella coverage policies that might apply
2 to these cases or access insurance.

3 But mostly what we're seeing are employers
4 bearing the cost of these cases. Sometimes it's a large
5 employer who has enough money to handle a settlement or a
6 verdict if they decide to go that route, but I see
7 companies that have, you know, \$1 million, \$2 million of
8 annual revenue being sued in negligence cases and having to
9 come up with hundreds of thousands of dollars for a
10 settlement or, if they dare to go to trial, potentially
11 millions of dollars in a verdict. And it may have already,
12 but it will be putting businesses out of business in
13 Pennsylvania.

14 And I think the immeasurable risk that cases like
15 this pose is preventing businesses from coming to do
16 business in Pennsylvania. If I'm a manufacturer in Ohio or
17 New York and I'm looking to expand my business,
18 Pennsylvania would be the last place I would come because
19 this liability exists here and nowhere else in the country,
20 so basically any other State is a better option.

21 I'll wrap up my remarks now, but I'm happy to
22 answer any questions about the landscape of workers'
23 compensation or these *Tooley* cases.

24 MAJORITY CHAIRMAN COX: All right. Thank you.
25 Next, we'll hear from Mrs. Oyler.

1 MS. OYLER: Good morning. Thank you, Chairman,
2 for having me here today. I'm happy to talk to the
3 Committee about the *Tooley* case on behalf of Pennsylvania's
4 small employers, whom NFIB represents.

5 A typical NFIB member business employs about five
6 or fewer employees actually and generates gross sales of
7 about 400,000 per year. So, as you can imagine, as
8 Mr. Kachline mentioned, an unexpected lawsuit costing a
9 business like this potentially millions of dollars would be
10 devastating. It could easily cripple one of these small
11 businesses and threaten its viability. In the case of
12 businesses that are affected by these specific lawsuits, it
13 could shutter an institution that's been part of a
14 community for many years.

15 Prior to the *Tooley* decision, employers could
16 count on workers' compensation benefits to cover any
17 workplace injury or illness experienced by their employees
18 without facing the threat of a lawsuit, as we've talked
19 about. The Grand Bargain allowed businesses to allocate
20 resources in their business planning for any workplace
21 injuries that may occur by securing appropriate workers'
22 compensation coverage.

23 All of that changed for many businesses with the
24 *Tooley* decision. Following the court's decision, employers
25 were all of the sudden on the hook for diseases that

1 employees developed many years after leaving their
2 employment. These cases have led to expensive litigation
3 that was not anticipated by these businesses, so expensive
4 in fact that they do threaten to put small businesses out
5 business in some cases. Though we certainly sympathize
6 with individuals impacted by latent occupational diseases
7 and we believe there should be recourse for their
8 suffering, it does little good for a case such as this to
9 crush small business employers under the weight of
10 unplanned jury verdicts.

11 For the purposes of my testimony, I'm going to
12 summarize four specific impacts that the *Tooley* decision has
13 on small businesses and the remedy that House Bill 1234
14 would provide if it passed.

15 First, the *Tooley* decision opens up potentially
16 unlimited liability for businesses that never planned for
17 such a situation. For an average small business with gross
18 annual revenue of 400,000, one of our typical members, a
19 multimillion dollar lawsuit could be a nail in its coffin.
20 Returning these cases to the workers' compensation system
21 will restore the Grand Bargain and limit liability for
22 small businesses.

23 Second, unpredictability for the business and the
24 employee makes the future unknown. Businesses cannot plan
25 costs associated with latent diseases by former employees.

1 Until the *Tooley* case was decided, civil liability for
2 latent diseases was never even on an employer's radar.
3 Many employers may not even have in the source of the
4 disease exposure and therefore cannot know whether or to
5 what extent lawsuits may arise, much less the cost of any
6 litigation.

7 For employees, workers' compensation has always
8 been a reliable and efficient system to seek redress for
9 work injuries in a timely and predictable fashion. Under
10 the *Tooley* system of civil liability, the worker must prove
11 that the business is liable for his or her illness. For a
12 person suffering the effects of latent diseases, suffering
13 the further burden of years in court with no guarantee of
14 success or appropriate compensation is unfair. Handling
15 latent disease cases in the workers' compensation system
16 would provide more certainty to the affected worker so they
17 can get appropriate treatment and compensation.

18 Third, by abrogating the Grand Bargain, the *Tooley*
19 decision effectively changed the rules of the game many
20 years after latent disease exposures occurred, making it
21 difficult for employers to defend themselves and for
22 employees to prove negligence. Because no one anticipated
23 having to go to court over disease exposure years ago, both
24 plaintiff and defendant may suffer for lack of evidence in
25 a court proceeding, for example. Changing the rules this

1 late in the game ignores the fact that everyone operated
2 under the assumption of no-fault previously and therefore
3 did not retain or prepare materials and evidence essential
4 to common-law processes.

5 And fourth, incentivizing legal action as a
6 remedy implicates other businesses. NFIB has heard from
7 members who have become defendants in *Tooey* lawsuits who
8 are being pulled into cases because they may have been the
9 source of materials or equipment used or because the
10 affected worker worked on their property. These businesses
11 did not employ the injured worker and in most cases they
12 did not supply any hazardous materials that could cause the
13 injury, but because they are unable to defend themselves,
14 they are forced to settle or suffer consequences of a
15 decision against them.

16 Although we understand that the remedy in this
17 bill will not prevent lawsuits such as those against many
18 small businesses, we believe that if former employees
19 affected by latent diseases are able to obtain remedy and
20 medical treatment through the workers' compensation system,
21 they would not have to resort to costly litigation.

22 One NFIB member is a small electrical distributor
23 of bearings and power transmission electrical equipment.
24 His company has been party to three of these lawsuits,
25 alleging asbestos exposure from equipment his business sold

1 years ago even though he knows the equipment did not
2 contain asbestos. Two of these lawsuits settled for
3 \$40,000 each because the attorney involved believed it
4 would be cheaper to settle than to continue to defend the
5 company. But the costs are not just direct legal costs.
6 In all, he and his employees have spent over 80 hours
7 managing the cases, including preparing to testify, and he
8 expects his insurance costs to rise as a result of the
9 litigation.

10 If the workers provided a remedy through workers'
11 compensation, it may prevent future litigation and save
12 small businesses like this the hassle of defending
13 themselves for doing nothing wrong. Other NFIB members
14 have told us similar stories. Returning the cost
15 associated with latent disease injuries to workers'
16 compensation would restore certainty and predictability to
17 employers and employees alike and prevent the need to go to
18 court in situations where neither party has a real fair
19 chance. It will also limit the detrimental financial
20 impact of legal fees and multimillion dollar awards that
21 hurt Pennsylvania's business climate and easily put small
22 employers out of business.

23 Thank you. Happy to take questions.

24 MAJORITY CHAIRMAN COX: All right. Next we'll
25 hear from Mr. Dryden.

1 MR. DRYDEN: Good morning. I'm Michael Dryden.
2 I'm a partner in the law firm of Willig, Williams and
3 Davidson, and head of the firm's workers' compensation
4 department. I concentrate my practice on representation of
5 injured workers, claimants throughout Pennsylvania, mostly
6 unions, but in every corner of Pennsylvania, we're
7 representing people who are injured on the job.

8 I've been involved in the investigation and
9 litigation of hundreds of occupational disease claims
10 during my career. I appear here today in our firm's
11 capacity as counsel to the Pennsylvania AFL-CIO, so on
12 behalf of AFL President Rick Bloomingdale, State Treasurer
13 Frank Snyder, and approximately 800,000 working men and
14 women whose unions are affiliates with the AFL-CIO, we
15 applaud the Committee's interest in this bill and interest
16 in providing benefits for injured workers.

17 We must, however, oppose House Bill 1234 as it's
18 written. While we're strongly in support of the *Tooey*
19 decision, which I think gets some bad evaluation at times
20 from the stakeholders in this matter who refer to even this
21 legislation as a *Tooey* fix, we really don't see *Tooey* as
22 needing to be fixed. *Tooey* corrected something that was a
23 problem for decades, for a very, very long time. Now due
24 to *Tooey*, working men and women in Pennsylvania have a
25 continuity of access. They either are covered by workers'

1 comp or their tort rights pick up. For years prior,
2 decades prior to be out of comp and not able to pursue a
3 tort action, so it would be a large gap of workers who
4 would have no remedy, which is unconstitutional.

5 It's our position that, as drafted, House Bill
6 1234 does not close that gap. It actually creates a gap.
7 And to understand that, I think you have to first
8 understand how diseases are claimed in Pennsylvania.
9 First, there's the occupational disease provisions, which
10 this law seems to be, as written, aimed at. The provisions
11 of the law with regard to occupational disease are found in
12 section 108, so you can claim a listed occupational disease
13 through section 301(c)(2). The discovery rule applies to
14 that, so even if someone is sick or made ill or dies within
15 300 weeks, even years later, they can still file a claim if
16 that claim is listed in section 108 of the act.

17 The problem is with the claims that are not
18 listed in 108. The claims that are compensable through
19 section 301(c)(1) we refer to disease as injury claims. So
20 you can claim a disease the same way you can claim a back
21 injury, an ankle injury, or a knee injury. The problem is
22 that for those claims under 301(c)(1) the discovery rule
23 does not apply, so you have to file your petition within
24 three years of the last date that you worked or really your
25 last exposure.

1 So there's going to be a group of people who
2 cannot establish a disease that is listed in section 108
3 but also file after -- but it manifests itself after the
4 300-week period that will be shut out.

5 As a quick example, if you take a client of mine
6 who we're working on a case for, a woman is diagnosed with
7 non-Hodgkin's lymphoma 12 years after she leaves a job with
8 the manufacturer. As we investigate the place, we find
9 that she's exposed to a known human carcinogen called
10 trichloroethylene. Trichloroethylene is related to non-
11 Hodgkin's lymphoma. Twelve years after she leaves, we
12 figure out that the non-Hodgkin's lymphoma is related to
13 her occupational exposures.

14 That disease, non-Hodgkin's lymphoma, and her
15 occupation are not listed in section 108, so she has no way
16 to come and make a traditional occupational disease claim
17 through section 301(c)(2). She's left only with a
18 301(c)(1) claim that at this point she cannot pursue. She
19 cannot pursue the 301(c)(1) claim under the way House Bill
20 1234 is drafted and under the current Workers' Compensation
21 Act, so we've referred her out to have her case evaluated
22 by third-party counsel to see -- I shouldn't even call them
23 third-party counsel now -- to have them sent out for an
24 evaluation of her tort rights.

25 But with that part of our challenge to 1234 I

1 think is clear in the statute and needs to be corrected so
2 that this continuity of access to a remedy that the Supreme
3 Court confirmed -- didn't give us but confirmed in the
4 *Tooley* decision -- continues so that no one is out of court.
5 When they have an injury, they have a right to redress.

6 While saying that about the law, it is also
7 important to understand the AFL-CIO firmly applauds the
8 idea of bringing these cases into the workers' compensation
9 system. We think the workers' compensation system is the
10 best place to have these cases litigated. And while my
11 brothers in the trial bar may get the individual person
12 more money, maybe even hundreds of people more money per
13 claim, the volume of people that will benefit from the
14 ability to make a workers' compensation claim for a disease
15 dwarfs anything that they're going to be able to do for
16 asbestos or benzene.

17 There's a lot more types of diseases that are
18 related to other things that people encounter on the job
19 that are going to be lost in that scenario, and just the
20 plain number of people that we're talking about who would
21 benefit from the ability to bring these claim in workers'
22 compensation is so significant that our belief is for our
23 800,000 members plus all Pennsylvania workers is that they
24 will benefit much more from the Workers' Comp Act's
25 indemnity benefits, medical benefits, and if someone passes

1 away, fatal claim benefits.

2 Now, there are things that we have to work out.
3 There are things regarding statutes of limitations, how
4 they work, how much somebody gets paid, when they don't get
5 paid. Many of those things workers' comp law has already
6 sort of set to do. With a big part of my practice being
7 disease claims, we deal with claims that go back a while.
8 We deal with claims that go back where maybe there's four
9 insurance companies back that we're sifting for. They're
10 sort of our problem in the litigation. The idea is the
11 access to available remedy and the better remedy for a
12 Pennsylvania worker in our opinion is the workers' comp
13 law.

14 Thank you for your time. I'll be taking any
15 questions.

16 MAJORITY CHAIRMAN COX: All right. Thank you.
17 Next, we'll hear from Mr. Daley.

18 MR. DALEY: Thank you, Chairman Cox, Chairman
19 Harkins. Thank you all for inviting me here today. I'm
20 here on behalf of the Pennsylvania Association for Justice,
21 its 2,000 members, and the clients of those 2,000 members.

22 I have a particular interest in this bill because
23 I represented Mr. Tooley and Mr. Landis in the appellate
24 courts, and I had the privilege of arguing before the
25 Pennsylvania Supreme Court in what ultimately resulted in

1 what has colloquially been referred to as the *Tooey*
2 decision.

3 And I want to start by pointing out that
4 Mr. Landis and Mr. Tooley are more than just names on the
5 case caption. They were hardworking Pennsylvanians, both
6 of whom are diagnosed with an invariably fatal disease
7 called mesothelioma caused only by exposure to asbestos.

8 Mr. Tooley in particular was diagnosed in 2007.
9 He underwent chemotherapy, oftentimes -- most times in fact
10 in mesothelioma cases chemotherapy is ineffective. It was
11 not effective for him. He died less than a year later. He
12 left behind a wife of 20 years, three children, 15
13 grandchildren and step-grandchildren, and a work history of
14 45 years of hard work throughout the Commonwealth of
15 Pennsylvania and four years of honorable service in the
16 United States Navy.

17 Mr. Landis was also diagnosed in 2007, and he too
18 underwent chemotherapy. Against the odds, the chemotherapy
19 worked for him, so he battled his disease for five years,
20 went through six courses of chemotherapy. But in the end,
21 mesothelioma always wins, and he died of mesothelioma in
22 2012, leaving behind a wife Mary of 53 years and a work
23 history of 35 hard years.

24 What *Tooley* did, as was pointed out, is it did
25 nothing more than define the law. And it's important to

1 remember that from 1915 through 2013 not one latent disease
2 claim was compensated in Pennsylvania either through the
3 workers' compensation system or through the civil justice
4 system. Employees such as Mr. Landis and Mr. Tooley were
5 between a rock and a hard place. If they filed a civil
6 case, they would be met with a workers' comp exclusivity
7 defense, and that defense was successful nearly always. If
8 they filed a claim petition in comp, they would be met with
9 the 300-week statute of repose present in section 301, and
10 that statute of repose served to bar their comp claim. A
11 case like mesothelioma, a latent disease, the latency
12 period is 30, 40, even 50 years, so there is no case of
13 mesothelioma, none, that would ever fit within the workers'
14 compensation system. So for nearly 100 years these workers
15 had no remedy, none whatsoever against their employer.

16 *Tooley* corrected that, and they corrected it the
17 correct way by allowing these cases to proceed in the tort
18 system. *Tooley* is not a panacea. It did not open
19 floodgates of litigation, as was feared. What *Tooley* did
20 was give the employee an opportunity to prove negligence
21 against his or her employer. It gave the negligent or
22 potentially negligent employer defenses, the same defenses
23 they have in many other common-law lawsuits. They can
24 allege they weren't negligent because they didn't have
25 knowledge of the dangers of asbestos, and they do. They

1 can allege alternative means of causation such as smoking
2 in the case of lung cancer, and they do. They can allege
3 that the employee was contributorily negligent by not
4 following safety rules or not wearing appropriate
5 respiratory protection, and they do. And they do this with
6 the aid of experienced, competent asbestos counsel who have
7 been working on these cases for decades.

8 Their defenses are serious, and we take them
9 seriously. This is not a slam dunk. This is not a case
10 where we go and we sue an employer and we know we win
11 because we have a burden, and we take that burden
12 seriously. And that burden is defended against very
13 effectively by a lot of seasoned defense counsel.

14 Beyond that, though, there are some
15 constitutional issues with the bill, House Bill 1234, as
16 has been referenced. There is an article 3, section 18
17 problem, article 3, section 18 being the constitutional
18 provision that sort of blessed the Workers' Compensation
19 Act of 1915 from a constitutional perspective. That
20 provision was at issue in *Tooley*. The court did not get to
21 *Tooley* because, as has been indicated, it instead made a
22 straightforward statutory interpretation argument. But
23 that argument I felt was very strong in *Tooley* because it
24 requires reasonable compensation in exchange for giving up
25 your rights to sue an employer. And for folks like Mr.

1 Landis and Mr. Tooley, they were entitled to no compensation
2 prior to the Tooley decision. So that still remains with
3 us, and that will be a major issue should this bill pass.

4 Additionally, there's a section 303(a) issue,
5 which involves piercing the corporate veil to give immunity
6 to subsidiaries and affiliates and holding companies, none
7 of whom ever employed a potential workers' compensation
8 claimant.

9 Lastly, this detectability standard that's within
10 the bill is bound to result in litigation within
11 litigation. What is detectable? It's not defined.
12 Oftentimes, mesothelioma, lung cancer, asbestos-related
13 cancers develop years after they might first be detectable.
14 But the symptomatology, the means to go and see a doctor
15 don't exist for years. So once detectable, it's going to
16 be a battle of experts, it's going to be a battle of
17 science. If I'm diagnosed with stage IV lung cancer
18 tomorrow, my stage IV lung cancer might have been
19 detectable five, six, eight years ago if I had a CT or an
20 MRI, but there would be no need for me to have a CT or an
21 MRI.

22 And lastly, I want to wrap up by saying if these
23 cases go into the comp system, there will be serious issues
24 with medical treatment. The utilization and review process
25 of the Workers' Compensation Act will pose an issue.

1 Mesothelioma, lung cancer, chemotherapies oftentimes are
2 experimental, particularly mesothelioma. If these
3 treatments are subject to utilization review and stopped,
4 the results would be catastrophic and fatal. That doesn't
5 happen under the civil litigation system. Under the civil
6 litigation system, the majority of these treatments are
7 paid for by Medicare. If there's a recovery, then Medicare
8 is reimbursed from the recovery. So in the end, there's no
9 drain on the Medicare system. The responsible employers
10 and manufacturers pay for the treatment. But there's no
11 chance of interruption like there would be if this case
12 went to the comp system.

13 I thank you for your time, and I just want to end
14 by saying that Tooey leveled the playing field, and that's
15 really all it did. For 100 years the playing field was
16 uneven and slanted against employees, and now it's level.
17 And I'll be perfectly glad to answer any questions you
18 might have.

19 And to the extent you have any questions on
20 workers' compensation intricacies, I'm not an expert, but I
21 did bring along an expert, Tom Baumann, so perhaps if
22 there's a question, you might let him tag in for me if I
23 can't help you. Thank you very much for your time.

24 MAJORITY CHAIRMAN COX: All right. And next
25 we'll hear from Mr. Marshall.

1 MR. MARSHALL: Okay. Thank you. Sam Marshall
2 with the Insurance Federation. And you have my remarks.

3 I think just to go into them, as insurers, our
4 real problem with the bill is that it has a retroactive
5 effect. For insurance companies to impose retroactive
6 liability without allowing for retroactive premium is just
7 not the way you can operate the insurance business. It's a
8 fiscally unsound approach. I think it also raises -- and
9 we've been through some retroactive issues in this General
10 Assembly over the past few years. It raises legal
11 concerns, constitutional concerns as to what happens when
12 you do that.

13 As we hear a lot of the discussion, you know, we
14 get the underlying argument, you know, from the proponents
15 of the bill. These are work-related injuries. They ought
16 to be covered in the same way that all other work-related
17 injuries are. And as has been pointed out, for many years
18 there was a gap that was missing. These were work-related
19 injuries that weren't covered under the workers' comp
20 system and were effectively not covered under the civil
21 system either. You know, now they are covered, but they're
22 covered with both the remedy and the rights under the civil
23 system.

24 We think that that is best done and I think it's
25 the spirit of the bill and it's a little bit what the

1 gentleman from Labor recommended. I think you can have
2 these cases covered whether you put them into the workers'
3 comp system or you put them into the civil system, but you
4 have the relief as to what is available to all other
5 injured workers and all other work-related injury claims.
6 You have the relief dictated by the workers' comp system
7 rather than the traditional tort system. I think that will
8 assure both, you know, an equitable way in terms of dealing
9 with all injured workers regardless of the cause of their
10 injury in the same way. I think it will also ensure that
11 there will be money there to compensate all of the victims
12 and it's not just a first come, first serve or little bit
13 of a random, you know, roll-of-the-dice approach.

14 The one thing that we would recommend, and there
15 was reference by the previous fellow, quantify this first.
16 You know, this Supreme Court ruling came out in November of
17 2013. There was a cottage industry of seminars from, you
18 know, all sides, plaintiffs' bar, defense bar, insurance
19 companies, businesses, everybody. And the concern was that
20 the floodgates of litigation would now be open. That
21 hasn't happened. I'm not saying that there hasn't been
22 litigation. It just hasn't been a floodgate. And I think
23 that you want to first quantify and that will help you
24 define what your solution will be because it will help you
25 define just what the financial exposure is.

1 The one thing I would say I appreciate the
2 fellow, you know, before me said that if you move these
3 into the workers' comp system, that somehow its utilization
4 review mechanism will interrupt care. With all respect to
5 the panel, we can have our disagreements as to whether we
6 can do it in a polite way, I've spent a little bit of time
7 in the workers' comp system myself. That's not our
8 experience with the utilization review system, that it
9 results in interrupted care, and I think you'd find that
10 same would be said from the Bureau of Workers' Compensation
11 itself in terms of how that utilization review process
12 works.

13 We would have no interest and I don't think
14 anybody has an interest in seeing care interrupted that's
15 dated, in fairness to the workers' comp system. You know,
16 we have our objections to the URO process, but it certainly
17 isn't that it somehow is resulting in interrupted care. So
18 I think you can move these claims into the workers' comp
19 system, and they will be both fairly resolved in terms of
20 the recompense that goes to the injured worker but also
21 that the medical treatment will be fairly provided. Thank
22 you.

23 MAJORITY CHAIRMAN COX: Thank you. As I
24 mentioned in some of my opening comments, the most helpful
25 to us as we move through the process of working on

1 legislation is that specific concern or language, changes
2 that might be needed, language that needs to be stricken,
3 language that needs to be added, things like that. Mr.
4 Dryden, you seemed like you had some things in mind. And I
5 don't want to get into a big technical discussion here
6 necessarily, but is there language in particular -- you
7 mentioned a couple of areas. It sounds like you're
8 supportive of the concept behind the bill. Your main
9 concern is that we -- if we're going to close the gap, that
10 we close it completely --

11 MR. DRYDEN: Yes.

12 MAJORITY CHAIRMAN COX: -- and that we don't
13 leave people out there hanging that still have no recourse.
14 And that's our hope under the bill as well. You know, we
15 don't want to leave people out there.

16 So I guess my question is this. The focus on the
17 detectability, would you put that as kind of your hinge
18 point that --

19 MR. DRYDEN: I agree that's going to be an issue
20 and precise language would be helpful there. To litigate
21 over what is detectable I think the comp system is handling
22 that. I'm involved in maybe 130 firefighter cancer cases
23 following the Act 46 amendments to the law, and there was
24 some language in there that, as it turns out, provided a
25 fair amount of wrestling for us in the courtroom. And the

1 detectable would be that type of word, so to be precise
2 amongst yourselves as legislators about what you mean, when
3 it starts, I think -- and to use the cancer cases for
4 firefighters, and the example of someone who had -- you
5 know, God forbid had stage IV lung cancer, detectable for
6 us in that world would be when they develop the symptoms
7 that led them to court, and that's the way that that's
8 being resolved by the judges in the workers' comp world.

9 The Pennsylvania AFL-CIO has sort of offered or
10 suggested kind of a mediated response to this problem in
11 extending the 300-week period, so make it 600, make it 900,
12 whatever number you want, but also carve out that if
13 anything is not covered by the comp system, then that tort
14 right continues. The biggest thing for us is this
15 continuity of access to a benefit. In that scenario, you
16 would still have -- I think you would maybe address
17 bringing more claims into the comp system while still
18 leaving claims that fairly or unfairly or just by where you
19 have to draw the line then would fall to the tort side of
20 things but they would still have a remedy there.

21 You know, the availability of a no-fault
22 disability statute in this area -- and we're talking about
23 providing mostly medical benefits to people even after they
24 retire. I saw some comments from stakeholders that there
25 was -- how much does someone get paid? You know, what are

1 they going to get paid for this? Well, for me and my
2 clients, if they've retired already, if they've already
3 removed themselves from the workforce, it's understood in
4 the law and they'd be told by me and most of them
5 understand that monetarily they may not get anything from
6 this claim, but what they're going to get is the medical
7 benefits that they need and they're going to get protection
8 for their spouses going forward.

9 And one last thing I would like to be heard on
10 the URO procedures, there is no workers' compensation judge
11 in this State who, after a person receives an award for
12 cancer or cancer is acknowledged as a work injury would
13 find the cancer treatment to be unreasonable. I might quit
14 if I ever see that. I can't imagine that that would ever
15 happen. It's never happened in any of the cases I've been
16 involved in for any disease where care that was provided --
17 we're not talking about going around the corner to some guy
18 who specializes in treating work-related knee injuries.
19 We're talking about somebody treating with Fox Chase Cancer
20 Center and they say they need this, a workers' comp judge
21 is going to provide that every time.

22 But the bill, to answer your question, Chairman,
23 I think that there is some wording that can be more
24 precise, but in general, the precision needs to be aimed at
25 providing this continuity of benefits.

1 MAJORITY CHAIRMAN COX: Okay. Thank you.

2 MR. DRYDEN: Thank you.

3 MAJORITY CHAIRMAN COX: I'm going to move on to
4 questions from other Members. At this time, we have a
5 question that's going to be asked by Representative Miller.

6 REPRESENTATIVE MILLER: Thank you, Mr. Chairman.
7 I want to applaud the Chair as well for a very balanced
8 panel here today, so thank you, Chair, for your work on
9 that.

10 The Chair went into some questions regarding
11 detectability, which were highlighting some of my concerns.
12 So I won't go back into it except to say that it seems ripe
13 with innumerable problems without more definition that
14 applies to that.

15 And I also want to thank the members of the bar
16 who were involved in dealing with this case that brought us
17 here today. The reality of it to me is, look, continuity
18 of access to remedies, I don't know how -- to be honest, I
19 don't know how that went on for that long that people
20 weren't giving -- especially as science continues to
21 develop and we become a better understanding of what
22 chemicals are doing, what products are doing, what health
23 comes about in things, and I get very concerned with a
24 system that kind of is saying, well, look -- and this is
25 where it comes to detectability -- it's up to the employee

1 to somehow get scans weekly to be able to chart some sort
2 of biochemical change that may take seven years to get to a
3 dangerous level of something, right? So I'm concerned
4 about how far, again, you do that. But there's no doubt to
5 me that providing a remedy that this decision did, to me,
6 is the right way to go.

7 That being said, I was a little -- I just was
8 hoping to try to get some clarity because if I'm getting it
9 from both the counsel for the State AFL-CIO and for the PA
10 Justice, the question for me seems to be is you guys have a
11 lot in common, all right, so there are -- a lot in common,
12 but yet there is some concern as to the value of the
13 remedies provided under each direction. So if I'm getting
14 it, sir, you're believing that the workers' comp system
15 will be able to address the needs appropriately, and from
16 what I'm understanding from the bar with more is that,
17 look, this is not good enough given the types of claims
18 that we're talking about in particular. So I'm wondering
19 if I could just in brief have the two of you just clarify
20 your positions as to why you think this would work and why
21 you think it won't.

22 MR. DALEY: Well, I think that we're both
23 obviously in favor of continuity. It's just where we draw
24 the line on continuity. And I think that putting diseases
25 that manifest greater than 300 weeks after the date of last

1 exposure, the so-called latent diseases into the civil
2 justice system has proven to work. It's tried-and-true
3 since 2013, as has been indicated. there has not been a
4 floodgate of litigation. And what the civil system does is
5 it does guarantee -- or it does offer the opportunity for
6 fair and reasonable compensation. And, as has been
7 indicated, if someone is diagnosed at age 82 or 83, then
8 there may be no attempts or no availability for indemnity
9 benefits. That's not the case in the civil justice system.

10 Additionally, we can go round and round on the
11 utilization resource question, but what I know about the
12 civil system is Medicare or a private insurer pays
13 secondarily to the ultimately responsible tortfeasor. And
14 so when recovery is made from the tortfeasor, the insurance
15 funds are reimbursed. So the people actually responsible
16 are the ones that are paying for the medical care in the
17 civil system, and there's no chance -- and I don't know if
18 a judge has ever seen a mesothelioma case, an experimental
19 chemotherapy that costs \$250,000 or a surgery that takes 14
20 hours and costs \$600,000, I don't know if that's ever been
21 part of the workers' compensation system. But I do know
22 it's part of the civil justice system, and I do know that
23 Medicare and Medicaid and other insurers do pay for it and
24 are eventually reimbursed for it. So it's working in the
25 civil side.

1 And again, in 2013, as was indicated, you know, I
2 received dozens of calls, isn't this going to open the
3 floodgates, won't this result in litigation disaster? And
4 it just has not. And the civil justice system is perfectly
5 able to take care of it. It has been taking care of it,
6 and people are fairly and reasonably compensated if they
7 deserve so.

8 MR. DRYDEN: From the workers' comp side of that,
9 I think the difference between the trial bar and workers'
10 comp bar particularly for me who represents unions or
11 particularly the AFL-CIO is to look at the volume of people
12 who will be helped, that it's probably true that in any one
13 given case that if, you know, my grandfather had one of
14 these cases, that counsel would probably get a bigger
15 recovery in the amount of money that would be available.

16 But in looking at things globally with 800,000
17 members and all the unions that my law firm represents,
18 we're looking at it in the level of good that can be done
19 and defining it differently. We're defining it as good for
20 the most possible people. And the workers' compensation
21 system I think clearly provides that good.

22 REPRESENTATIVE MILLER: Thank you. And I'll
23 thank you both. And I'll close with this last comment.
24 You know, look, we just got done with workers, Memorial
25 Day, right, so we just got done with it, and the reality of

1 it is we continue to lose too many people. The fight for
2 disease coverage, it was not something that was won
3 overnight. Somebody mentioned the firefighters with it.
4 As a firefighter, I'm pretty aware of the struggle that
5 happen in relation to that.

6 Since I've been here for six years, we've been
7 struggling with aspects of people in my opinion trying to
8 weaken aspects of the utilization review. It concerns me
9 that we are in our balancing act between trying to say, oh,
10 we're all for a grand compromise, that there are aspects to
11 this compromise that are not working enough for the workers
12 especially down the line, so my hope is that, as the Chair
13 perhaps looks at ideas from you and others as to this bill,
14 that we look to be sure that the compromise is worth the
15 compromise. And that's where I question.

16 But thank you, Mr. Chair, for your time.

17 MAJORITY CHAIRMAN COX: I thought I saw some hand
18 motion, something down here at the end.

19 Mr. McLemore, did you want to make a comment
20 on --

21 MR. MCLEMORE: Thank you, Mr. Chairman. I wanted
22 to bring up a couple of additional points. In terms of
23 manifestation, the courts have looked at it in terms of
24 when a person knew or should have known that he or she has
25 the disease, and I think that's an important concept. It's

1 not a specific day. And, you know, they always say the
2 good Lord helps those who help themselves, and people who
3 -- we all know people who have cancer and they want to deny
4 it to themselves. They just don't want to go to the doctor
5 and find out that they've got it. So the courts have
6 looked at it in terms of known or should have known when
7 the manifestation occurs.

8 I did want to mention that, and I also wanted to
9 mention that -- and this is me speaking I think for the
10 greater good of everybody -- if you keep these cases under
11 the Workers' Compensation Act by providing that the statute
12 of limitations, for example, would simply say that the
13 employee must bring his claim within a certain number of
14 years after manifestation of the disease, boom, a simple
15 cutoff date like that, what would that do for you? Well,
16 first of all, it would comport more with an actual statute
17 of limitations or repose, okay? So you'd have an actual
18 statute of limitations or repose, not an artificial one
19 such as what's in the act right now.

20 Number two, as has been pointed out by Mr. Dryden
21 and others, it would bring these claims under the Workers'
22 Compensation Act. Well, what does that do? It avoids
23 lawsuits, which is a costly problem.

24 Number two, it would bring more certainty to the
25 claims being compensated, and I think Representative Miller

1 was concerned about that.

2 Number four, it would allow for insurance
3 coverage to be more accurately ascertained because if
4 you're looking at lawsuits, then you get into the multiple
5 triggers and all that other kind of stuff and who's got
6 coverage.

7 Number six, it would permit employers to exercise
8 rights to subrogation, and that is an absolute bedrock
9 principle in the act that the employer is entitled to
10 subrogation.

11 Number seven, it would be more in line with the
12 remedial purposes of the act.

13 Number eight, at the same time it would preserve
14 the immunity provisions of the act protecting not just
15 employers but co-employees because, as I mentioned earlier,
16 if you abrogate the immunity for the employers, you've
17 abrogated the immunity for the co-employees.

18 Number eight, it's a simple fix. It's a very
19 simple fix.

20 Number nine, it avoids excess liability exposure
21 for the small employers who may not have the insurance
22 coverage. And it avoids questions as to what standard is
23 to be used in a civil case for adjudicating liability
24 because, as counsel had pointed out, when you're involved
25 in these multiparty litigations, you've got defendants who

1 are subject to strict liability and tort, you've got
2 presumably a negligence standard, as set forth in the *Tooley*
3 decision, although I think honestly that's dictum. And, in
4 any event, I think those are some points that you might
5 want to consider when crafting this bill.

6 MAJORITY CHAIRMAN COX: And, Mr. Kachline, you
7 have some additional comments?

8 MR. KACHLINE: Thank you. There are two things
9 that I wanted to raise. Seeing this as a remedies issue
10 that an employee would be absent a remedy is kind of the
11 wrong way to think about this. And remedies challenges
12 have been made all across the country most recently in
13 Illinois. There was a similar provision in the Illinois
14 Workers' Compensation Act that bars occupational diseases
15 after a period of time. Some plaintiffs went to the
16 Supreme Court of Illinois and said this is a remedies
17 problem. We don't have a remedy. And the court didn't
18 agree. The court said, no, this person has a remedy. A
19 person can sue if they're exposed to asbestos and have
20 asbestos-related disease, any number of product
21 manufacturers who manufacture the products with asbestos in
22 them.

23 And when I have a case, sometimes my cases have
24 25 to 30 defendants. After *Tooley*, it had 26 to 31
25 defendants. All it did was add a defendant to an existing

1 disease case. So thinking of it as a person without a
2 remedy is just not accurate in any way. Asbestos
3 litigation has been going strong for decades. Tooley just
4 opened the door to add one more defendant, and that was an
5 employer.

6 So in Illinois when this remedies challenge
7 didn't work, the Illinois Legislature saw the problem, and
8 a bill very similar to House Bill 1234 was passed by both
9 the House and the Senate in Illinois and is on the
10 Governor's desk waiting to be signed. And it does almost
11 exactly what House Bill 1234 does.

12 So I wanted to bring those two points up because
13 I think it's been said a couple times that the remedy
14 wouldn't be reasonable and workers' compensation -- they'll
15 already have a products case going, any person with
16 asbestos-related disease, so adding that single more
17 defendant to the case hasn't changed at least in
18 Pennsylvania in the last five years the number that a
19 person would get from a settlement perspective. The
20 average settlement in asbestos case is identical. The
21 average jury verdict is similar with or without an
22 employer. So a person who files an asbestos case will
23 still have the same recovery. With this bill, they'll just
24 have access to the workers' compensation remedies as well.

25 Regarding the UR process, I would argue that the

1 workers' compensation access to medical would exceed what
2 Medicare would pay for. Reasonable and necessity is not --
3 there's no experimental treatment exclusion under the
4 Workers' Compensation Act. If it's reasonable and
5 necessary and a doctor says it is, like Mr. Dryden said, no
6 judge would deny that coverage. We can't get people who
7 are on maybe three of maximum doses of pain medication
8 through the UR process to have that medication turned off
9 essentially. We can't get those cases through the URO
10 process in a way that's beneficial to employers, so there's
11 just no reasonable argument to say that cancer treatment is
12 going to be turned off for people who need it.

13 The workers' compensation system has no co-pays,
14 has no deductibles. It's paid at 100 percent of whatever
15 that cost containment number is, so, you know, another
16 thing to think about with Medicare. Medicare and other
17 coverage, that person is paying out of their own pocket
18 sometimes huge amounts of money. That would also be a
19 consideration in the workers' compensation system.

20 MAJORITY CHAIRMAN COX: Okay. Next, we have a
21 question from Representative Dush.

22 REPRESENTATIVE DUSH: Thank you, Chairman, and
23 thank you for this bill.

24 And for those of you who are saying we have to
25 get this out of the tort and into workers' comp, I agree

1 with you completely. I've got a business that has never
2 produced anything with asbestos, yet they get named now
3 since 2014 constantly with asbestos-related stuff, and they
4 have to settle because they can't afford to go to court.

5 So what I would encourage everyone to do is
6 actually sit down and talk with the Chairman and the staff
7 about how we get the language done to actually complete the
8 grand compromise and make it more complete because the
9 tort, it has the effect on businesses that affect families
10 that employers scale back, people lose jobs. It's not just
11 the one person that you're dealing with. You're talking
12 about families who are losing their jobs and their means of
13 taking care of themselves as a result of these tort cases,
14 businesses that don't get to expand and hire new people
15 because of these tort cases.

16 We need to bring this back into the workers'
17 compensation, and I've heard some good ideas, and my
18 encouragement is that let's get the language right so that
19 we can get this thing fixed and do it in a responsible way.
20 Thank you.

21 MAJORITY CHAIRMAN COX: Next, we have
22 Representative Mullery.

23 REPRESENTATIVE MULLERY: Thank you, Mr. Chairman.

24 One of the issues that I have with this bill that
25 was touched on briefly by Sam and no one else is the

1 retroactivity aspect of it. The way I read 1234, the
2 changes provided would apply retroactively. To me, the way
3 I read it, that means that essentially all claims currently
4 pending would be invalidated. So we have four lawyers on
5 the panel who deal with this on a daily basis. I guess my
6 question to each and every one of you is what happens to
7 those cases that are currently in the pipeline? What
8 happens to those cases that may be in the discovery
9 process, et cetera? Could you tell me, you know, your
10 opinion as to where those cases go if this bill were to
11 pass as written?

12 MR. DRYDEN: From my perspective, my view would
13 be that the retroactivity issue would be played out in the
14 workers' compensation setting, and that if workers'
15 compensation coverage was extended to a claim that counsel
16 had brought if, you know, there's an asbestos case now,
17 that asbestos case most likely is going to have multiple
18 defendants. So the employer as a defendant, I believe,
19 would have the ability to motion out of the third-party
20 case but then would have to deal with the litigation in
21 front of a workers' comp judge with us. That's how that
22 would be handled I believe. At least from a workers' comp
23 standpoint, that's what we would expect to happen.

24 MR. DALEY: From my perspective, I think there
25 are serious constitutional issues with the retroactivity

1 provision. Keeping in mind that under both the
2 Pennsylvania and Federal Constitutions, individuals have a
3 right to take their grievances to court, and those are
4 fundamental rights both under the State and Federal
5 Constitutions. And for those cases that already exist in
6 the tort system, you're talking about people who have
7 already exercised that right. And now to come in with a
8 statute and purport to eliminate an already exercised
9 constitutional right is going to run afoul of various
10 constitutional provisions I believe.

11 And it's been referenced here that there are
12 remedies available to asbestos victims, for example, and
13 while it's true that many asbestos cases do have multiple
14 defendants, I think that multiple-defendant argument is a
15 bit of a red herring. From an initial point of view, I
16 have several cases right now where the only defendant is
17 the employer.

18 But beyond that, you're entitled to a remedy
19 against anyone that may be liable to you, and so just
20 because happenstance is you have 15, 20 other defendants,
21 that does not mean you're not constitutionally and legally
22 entitled to a remedy against your employer.

23 So I think there are major constitutional issues
24 with the retroactivity, and I think you can't take away a
25 constitutional right of both a Federal and State

1 constitutional right already exercised.

2 MR. KACHLINE: I think from the defense bar's
3 perspective, I agree with Mr. Dryden. Him and I sort of
4 for the last eight years have been litigating these
5 firefighter cancer cases, the Act 46 cases, and we argued
6 about the retroactive effect at the Commonwealth Court, and
7 it played out in a way that seemed to be reasonable for all
8 parties.

9 I think we would have a similar -- like Mr.
10 Dryden said, if there was an employer sued in an asbestos
11 case likely if the bill would pass there would be a new
12 comp remedy, and the exclusive remedy provision would
13 provide grounds for that employer to file a motion and be
14 removed from the existing asbestos litigation and then
15 would have a renewed workers' compensation right.

16 Understanding that there would be constitutional
17 challenges on both sides probably in the asbestos case and
18 in the workers' compensation system, I think they would
19 play out similar to the way the retroactivity arguments
20 played out with the cancer presumption for firefighters.

21 MR. DRYDEN: If I could just add one thing
22 quickly on that point, I think this is another area where
23 the Legislature will have to draw some lines and likely I
24 think we probably both would agree that either way that you
25 draft it, there's going to be litigation over it. It's

1 just the nature of the way the world works. But I would
2 look at and quantify -- again, go back to the value, why we
3 think that these claims should be more in the workers' comp
4 system because of the volume.

5 My understanding of the civil litigation that's
6 followed the *Tooley* decision primarily falls in the areas of
7 asbestos, benzene, and certain leukemias that are the
8 claims that are being pursued. There's a lot of other
9 diseases and illnesses and conditions that people are
10 coming in contact with by hazards they are exposed to as a
11 work to earn a living that we're not touching right now
12 that are effectively being blocked still in the comp world
13 and don't really have a means to go pursue a negligence
14 action over. And understanding the limits of the number of
15 personal injury claims maybe something that's useful when
16 you're trying to draw that line.

17 REPRESENTATIVE MULLERY: Thank you. And a
18 follow-up question. In theory, we're talking about cases
19 that are in excess of five and a half years after date of
20 last employment. Some of the examples that were given here
21 today by the practitioners are cases that are decades-old.
22 In your practice, how many instances are you running into
23 where the employer no longer exists, and what if any burden
24 are we going to be placing on the UEGF, which we already
25 know is underfunded? And that will be my last question.

1 Thank you.

2 MR. DRYDEN: Thankfully for me my practice
3 involves a lot of municipalities, so city of Philadelphia
4 hasn't ducked out or, you know, city of Pittsburgh.
5 They're still around for us to have these claims against.
6 I really have not seen it with who we are bringing these
7 claims against. They are larger employers, and who is
8 responsible as far as paying the insurance issue, generally
9 in my experience gets resolved. There is case law that
10 helps.

11 Mr. Kachline and I have even had cases where
12 there's more than one insurer that's involved and there's a
13 change in insurer, and the way the workers' comp law works
14 I think it comes out of the asbestos workers' compensation
15 case that's sort of the last insurer that's potentially on
16 the risk that bites the bullet for it even though, as
17 counsel say, the latency period could be 40 years. So the
18 law, the workers' comp law doesn't make us track back 40
19 years to find a responsible carrier. You know, we are able
20 to pursue benefits for people, and I haven't had a problem
21 with that.

22 MR. DALEY: Could I tag in Mr. Baumann for this
23 answer?

24 MR. BAUMANN: One of the things you asked about
25 is --

1 MAJORITY CHAIRMAN COX: Excuse me. Would you
2 mind coming up to the microphone just for the help of our
3 viewing audience?

4 MR. BAUMANN: One of the things that came up in
5 the question was what if the employer is out of business?
6 Presumably, there is insurance coverage due to the
7 retroactivity provision. The issue will be, though, will
8 there be actions for declaratory judgment between the
9 carrier on the hook at the time of the exposure against the
10 now out-of-business employer, and what will be the result
11 of that litigation? Will there be a finding that there is
12 no insurance coverage as a result of the declaratory
13 judgment? Those circumstances could put the UEGF into
14 significant play. And as you cogently remarked, it's
15 chronically underfunded, and that's been a problem that the
16 Legislature has been dealing with probably since its
17 inception.

18 MAJORITY CHAIRMAN COX: Mr. Marshall had a
19 comment, and then we'll come back to you, Mr. Kachline.

20 MR. MARSHALL: Just following up on that, yes, if
21 you seek to impose retroactive liability on an insurance
22 company without any retroactive premium, there will be a
23 legal challenge. You know, I mean we've gone through that
24 on a far tougher issue frankly, you know, with the
25 constitutional problems of any sort of retroactive

1 liability like that.

2 The one thing I would say -- and I appreciate the
3 concern with the hit on the UEGF because we as insurers pay
4 for that. You know, that goes, though, to the issue that
5 we've talked about which is a need to try to quantify this
6 at the outset. As I think a lot of people have said, when
7 this first came out, everybody anticipated just a floodgate
8 of litigation. That hasn't happened. I can't tell you,
9 though -- and maybe, you know, it's a duty for the staff to
10 try to generate from all of us. I can't tell you whether
11 the trends on the claims being filed under this are going
12 up, going down, what the settlements are, how that's
13 unfolding. And I think as you wrestle with this, you'll
14 want to have some sense of the parameters of the problem
15 that you're trying to solve.

16 MAJORITY CHAIRMAN COX: Mr. Kachline, you had an
17 additional comment on that?

18 MR. KACHLINE: I did. I think it's not as much a
19 UEGF concern. In Pennsylvania you're obviously required to
20 have workers' compensation insurance. And should the
21 employer no longer be in business, it's the insurer who
22 insures the employer on the last date of exposure that is
23 responsible for that defense or if there's a finding that
24 it's compensable, those benefits. So the guarantee fund
25 that guarantees no longer existing insurance companies

1 might be implicated, but I don't see the UEGF as an
2 uninsured -- looking at uninsured employers being
3 implicated hardly ever.

4 MAJORITY CHAIRMAN COX: So just so I fully
5 understand, are you saying you disagree with the impact
6 it's going to have on the UEGF?

7 MR. KACHLINE: That's right.

8 MAJORITY CHAIRMAN COX: And you think it'll
9 actually be negligible?

10 MR. KACHLINE: I don't think there will be a
11 significant impact on the UEGF.

12 MAJORITY CHAIRMAN COX: Okay. Okay.

13 Next, we have Representative Schemel.

14 REPRESENTATIVE SCHEMEL: Thank you, Mr. Chair.

15 I think this question in particular might be
16 relevant to Mr. Marshall and the insurance industry. I
17 share a concern about retroactivity liabilities. So the
18 business of an insurer is to insure the customer for sort
19 of unquantifiable liabilities. So I've never -- in this
20 case I don't quite understand how your concern about a
21 retroactive liability with no retroactive premium --
22 premiums are prospective. You're insuring against an
23 unquantifiable -- on the part of the insurance customer --
24 liability. If this is a liability that really doesn't
25 become patent until much later so, you know, that was

1 unquantifiable I'd say, you know, isn't that really what
2 insurance is for, to cover that kind of liability on behalf
3 of of the employer?

4 MR. MARSHALL: What we don't do when -- and it's
5 a problem with retroactivity. When we took on these
6 policies back -- you know, to the extent that we -- as was
7 mentioned, a lot of these employers are self-insured. But
8 to the extent that there are employers there who had
9 workers' comp insurance back in the 1960s and 1970s, when
10 we charged that premium, we evaluated the risk. We
11 understood the danger of latent diseases. We also
12 understood that the act, as has been mentioned, it had a
13 300-week period of time. After that, there would be no
14 liability under that workers' compensation policy. We
15 priced it accordingly.

16 If you say -- and therefore, after, you know, the
17 policy period is ended, we have no reserves for these types
18 of claims. We wouldn't be able to establish reserves for
19 these and hold reserves because somebody would say but
20 you're not liable for them. There's no potential to the
21 claim; therefore, you can't hold a reserve for it.

22 So when you -- now, going forward, when you say
23 here we're going to make this open-ended, we'll have to
24 make that evaluation on a going-forward basis. It's not
25 that it's not quantifiable. It's that when you have

1 unlimited exposure, you'll hold back something in reserve
2 for that and you will make an actuarial -- you know, that's
3 what you have actuaries for and people who track through
4 the data who would be able to say, you know what, I have a
5 claim, and it exists in perpetuity. The potential for it
6 exists in perpetuity. And as an actuary, I'm going to say,
7 okay, I realize that I might get hit with a claim, you
8 know, 50 years from now, so I'll have to set up a reserve
9 that will handle that. I'll also realize that most of the
10 claims are going to be paid for and filed and, you know,
11 settled, you know, within, you know, a much shorter period
12 of time.

13 But, you know, I mean, we deal right now with
14 unlimited duration for claims to be filed. It's just that
15 we know that going in. Here what you're talking about
16 retroactively is we didn't know that going in, and that's
17 why you haven't been able to collect a premium for it.

18 MAJORITY CHAIRMAN COX: All right. Our next
19 question comes from Representative Snyder.

20 REPRESENTATIVE SNYDER: Thank you, Mr. Chairman.

21 My concern under this bill if the injured worker
22 is put back in the workers' comp system and if his
23 treatment is challenged, then the insurer would discontinue
24 payment until it's resolved under the utilization review
25 process, and that could take anywhere from 30 to 45 days.

1 What if the cancer victim is undergoing necessary treatment
2 that could cost in excess of \$20,000 but then under the
3 review process they may come back and only say it's worth
4 maybe \$5,000? What happens to that injured worker's debt
5 while it's being litigated and the cost of his health care?
6 If anyone can answer that and make that clear for me, I'd
7 appreciate it.

8 MR. DRYDEN: Pardon me. I think that's a
9 terrific question. The gap in time or the break in medical
10 care just by filing a utilization review petition is a
11 problem that we deal with all the time in workers' comp
12 And in a cancer setting it would be problematic why we
13 waited for that initial review because under the
14 regulations of the workers' compensation law, the workers'
15 comp insurer is allowed to withhold payment while they wait
16 for that initial outcome. That's a problem. I mean,
17 that's a problem that we're going to have to deal with.

18 You will not be able, in my experience, to just
19 walk that over to the health insurer and have them start
20 paying because the injury will be acknowledged as work-
21 related. It is something that I think the success or
22 really in this situation the lack of success for insurers
23 who file UROs in cancer cases, they would see themselves
24 throwing good money after bad, and it would stop. But your
25 point is very well-taken. That is an issue that in the

1 comp system we're going to deal with. And if they file a
2 URO for 30 or 45 days, there may not be a payer.

3 My experience, though, in other disease cases is
4 the providers won't stop providing care, that the bill will
5 just pile up and then will eventually be resolved with the
6 workers' comp insurance company, that they don't -- the
7 cancer centers of the world, the Fox Chases, the Penns, the
8 places, UPMC, they don't stop providing care thankfully.
9 But again, I think if there's some way to fix that
10 legislatively, all I may be doing for you is telling you
11 you're onto something that needs fixing, but it would be --
12 maybe if I were king and I could write the law, I would say
13 UROs for these cancer cares, the care continues until you
14 get a decision that it's unreasonable and unnecessary, and
15 until that happens, you have to keep paying it if it were
16 up to me. So I think you're onto a very, very important
17 issue.

18 REPRESENTATIVE SNYDER: Thank you. Yes, I think,
19 you know, someone who's dying of cancer and fighting this
20 disease, you know, the last thing they need is to have to
21 worry about how they're going to continue their care, so I
22 think it's very important that we get this right.

23 Thank you very much, Mr. Chairman.

24 MAJORITY CHAIRMAN COX: Mr. Kachline.

25 MR. KACHLINE: Thank you. Like Mr. Dryden, I've

1 been involved in hundreds of occupational disease cases
2 dealing with cancer, and I've never seen a URO filed in a
3 cancer case. First, you would have to have an opinion from
4 a doctor who's of similar specialty that the treatment was
5 not reasonable or not necessary to even have a colorable
6 UR, to even put it out for a UR. And then, you know, that
7 opinion would come back and the employer or its insurer
8 would have to make a decision about whether or not they're
9 going to pursue seeking to stop a certain treatment. So
10 while it's a possibility, it's not a reality on a day-to-
11 day case-by-case basis.

12 REPRESENTATIVE SNYDER: But it could be possible?

13 MR. KACHLINE: It's possible.

14 REPRESENTATIVE SNYDER: Okay. Thank you.

15 MR. BAUMANN: Mr. Chairman --

16 MAJORITY CHAIRMAN COX: Yes, sir. Take the
17 microphone again would be fine.

18 MR. BAUMANN: The one thing I want to point out
19 is that if you pass the bill, it doesn't apply only to
20 cancer cases. You're going to be throwing a lot of
21 different problems into the system. This is section 108 of
22 the Workers' Compensation Act. You're looking at 36
23 different exposures with at least 36 different industries.
24 And you could have people facing lifesaving treatment
25 through this process if it goes into that, and they would

1 all be subject to utilization review.

2 While I appreciate my learned colleague's
3 comments about not seeing this in the cancer field, that
4 will not necessarily hold forth in all these other problems
5 if this falls within the act.

6 MAJORITY CHAIRMAN COX: Okay. Thank you.

7 Next, we have Representative Irvin.

8 REPRESENTATIVE IRVIN: Thank you, Mr. Chairman.

9 This is a very difficult issue we're facing, I
10 mean, especially when you're talking about individuals
11 facing cancer treatments and life-ending diseases. But
12 there was -- one of the panelists actually indicated that
13 we are the only State in the union that is actually dealing
14 with a court case that is dealing with the issue that needs
15 to be in a legislative fix. And we really do need to come
16 together I think as a Legislature to try to actually, you
17 know, fix this and compromise this bill to come up with
18 something.

19 One of my concerns is, you know, always as a
20 State, you know, I think is whether you're representing the
21 union or whether you're an independent business is trying
22 to attract business to Pennsylvania. And it does concern
23 me that, you know, if you have an out-of-state business
24 that maybe wants to put a satellite or a branch company
25 here in Pennsylvania, they would be liable even though

1 they're located outside of Pennsylvania, to this Tooley bill
2 or Tooley case. So maybe some of the panelists could
3 actually comment on, you know, how this will affect
4 bringing business into the State of Pennsylvania.

5 MR. KACHLINE: Thank you. I think that's exactly
6 right. The Workers' Compensation Act provides stability
7 and predictability and benefits. These tort cases can run
8 away from a business. In the last eight years, there was a
9 \$7.2 million verdict in Philadelphia County, and only
10 160,000 of that was medical benefits. There was a massive
11 pain and suffering, loss of consortium award, so I think if
12 I were a business owner, I wouldn't be coming to
13 Pennsylvania where I have automobiles with engine exhaust.
14 Engine exhaust contains particulate matter and gas matter
15 that is related to developments of cancers. Even in the
16 baking industry, bakers who inhale flour have higher
17 incidence of lung cancer. I mean, the correlations between
18 seemingly innocuous things and cancer is growing every day.

19 And to something Representative Miller said, the
20 occupational disease provisions that are part of the
21 Workers' Compensation Act were written in the '30s. And
22 there is a huge amount of scientific knowledge that has
23 progressed. Now we know what causes certain diseases.
24 It's more easily proven, and I think a fix like this to the
25 Workers' Compensation Act brings Pennsylvania up to speed

1 with what science is able to prove.

2 Three hundred weeks is just never going to be
3 long enough for a cancer to develop from a last date of
4 exposure. They even tested after the atomic bombs were
5 dropped in Japan people took almost a decade to develop
6 cancer even from the highest dose radiation that one can
7 imagine. So cancer just will not develop in time for a
8 workers' compensation claim under the act that we have, and
9 this is an updating to science for Pennsylvania, and I
10 think it puts businesses at ease to come to Pennsylvania to
11 know exactly what their exposure will be, meaning financial
12 exposure, if they have an industry that might be risky. So
13 I think this brings us up to speed.

14 MAJORITY CHAIRMAN COX: Ms. Oyler?

15 MS. OYLER: Yes, I will just back that up. Thank
16 you for your comments. Pennsylvania is already known as a
17 State that has a particularly litigious business climate,
18 and this is just one more area where we're an outlier,
19 which really does need a legislative fix to it. So I would
20 really suggest -- and thank you, Representative Irvin, for
21 your comment because things like this do impact the
22 business climate in Pennsylvania and do not put us in a
23 favorable light for attracting new businesses to
24 Pennsylvania. It leads to a lot of uncertainty.
25 Businesses do not like uncertainty. So I would suggest

1 that that's an excellent reason to fix this from a
2 legislative standpoint. Thank you.

3 MAJORITY CHAIRMAN COX: Mr. Daley?

4 MR. DALEY: Thank you. Let me make a suggestion
5 that perhaps a little contrary to what we've heard.
6 Everyone seems to be presupposing that if you are an
7 employer and someone in your employ develops a work-related
8 injury, then you're automatically responsible in the tort
9 system. That's not the case. You need to be negligent and
10 you need to be proven negligent.

11 So I think what this bill encourages, what the
12 *Tooe* decision encourages is new businesses to come into
13 Pennsylvania and existing businesses to come into
14 Pennsylvania and practice safe work practices, warn of the
15 dangers, explain the dangers, offer protections to the
16 dangers, make sure your employees know of the dangers, and
17 make sure your employees know how to avoid the dangers if
18 it's avoidable, use alternatives to dangerous substances if
19 possible. These are things that never happened in the
20 '50s, '60s, and '70s, and people developed -- hundreds of
21 thousands of people have died as a result of mesothelioma,
22 lung cancer, and other asbestos-related disease, hundreds
23 of thousands if not more.

24 This bill encourages -- rather the *Tooe* decision
25 doesn't discourage business. It encourages new business,

1 and it also encourages safe work practices because if you
2 do not act negligently, you will not be found liable in the
3 civil justice system. So I think that's the other side of
4 the coin. It's not automatic liability. It's liability
5 only if you're negligent, and it encourages businesses to
6 act responsibly and act safely and to protect their
7 employees, which is important to all of us.

8 MAJORITY CHAIRMAN COX: On the flipside of that,
9 do you feel that if this bill were to become law that it
10 would have the opposite effect?

11 MR. DALEY: Well, I don't think there would be
12 quite the impetus to put in place workplace safeties. Now,
13 I'm sure companies -- by and large, if you're a responsible
14 company, you put in appropriate workplace safety. But with
15 the strict liability system like in the comp system,
16 perhaps the impetus is a little less, and I've seen that
17 over time. And I don't want to draw any particular
18 distinctions between businesses but certainly I think
19 there's a little less impetus. But again, you need to be
20 negligent under the *Tooley* decision, and I think this
21 decision would discourage that to a certain extent or
22 rather this bill would.

23 MAJORITY CHAIRMAN COX: Mr. Dryden?

24 MR. DRYDEN: If I can just briefly in response, I
25 think even if these claims were brought into the workers'

1 compensation system, you can still encourage employers to
2 provide a safe workplace, maybe even do it as part of how
3 their premium gets adjusted. I've sort of loosely been
4 working on some legislation about a sort of separate fund
5 for firefighters through SWIF where the premiums for
6 volunteer fire companies would be adjusted based on safe
7 practices, diesel fuel capture system, gross decon after a
8 fire, wearing a mask, through overhaul, things like that,
9 that then you would then qualify for a reduction in your
10 premium.

11 Maybe that's what the whole system needs. Maybe
12 then it uses comp in a different way and uses comp to
13 encourage people on maybe a monthly basis -- I'm not sure,
14 maybe it's quarterly, how the premiums are paid for for
15 workers' compensation, but if people were evaluated or
16 rather, excuse me, employers were evaluated by their
17 procedures and their practices and you could reduce your
18 premium that way, I think you may get, again, a broader
19 impact than you would just leaving it in the civil
20 litigation system. But I do also agree that, you know,
21 nothing gets employers in shape like getting sued once or
22 twice.

23 So there is an impact to this either way for the
24 Pennsylvania AFL-CIO. That's why this continuity of
25 benefit is valuable to us as we see it as a health and

1 safety measure. We see it as something that, regardless of
2 where the Legislature decides to draw the line, that the
3 holiday that employers had from 19, what, 15 to 2013 is
4 over. If people are made sick by what they do at work,
5 we're either they're going to deal with them in my world or
6 we're going to deal with them in his. And hopefully, that
7 makes them safer.

8 REPRESENTATIVE IRVIN: Mr. Chairman, to follow up
9 on that, and I'm sorry to interrupt there. Go ahead if
10 you --

11 MAJORITY CHAIRMAN COX: There are two other
12 panelists that want to, I think, weigh in on that before --

13 REPRESENTATIVE IRVIN: Okay.

14 MAJORITY CHAIRMAN COX: I'll allow you to follow
15 up after that.

16 REPRESENTATIVE IRVIN: Okay.

17 MAJORITY CHAIRMAN COX: Mr. Marshall?

18 MR. MARSHALL: Just one thing. Workplace safety
19 is actually a paramount concern in the workers'
20 compensation system to the point that, you know, the
21 Workers' Comp Act mandates a discount for employers who
22 have a workplace safety committee. I mean, I represent
23 both workers' comp insurers and general liability insurers,
24 but I would say if the concern is by moving these cases
25 over into the workers' compensation system, are you somehow

1 going to reduce any given employer's incentive to have a
2 safe workplace? I'd say the answer is no, and in fact the
3 Workers' Compensation Act produces unique incentives on
4 employers to have, you know, a unique focus on workplace
5 safety.

6 MAJORITY CHAIRMAN COX: And, Mr. McLemore, you
7 had a comment as well.

8 MR. MCLEMORE: So just two comments real quickly.
9 First of all, in distinction from a civil suit, the
10 Workers' Compensation Act has specific benefits provided
11 for widows and children, which is something that you would
12 never see in a tort suit. So that's one additional reason
13 perhaps to keep it under the compact.

14 The second is something that perhaps hasn't been
15 considered. If you abrogate these immunities by saying
16 everything's outside and we can sue in tort, the very real
17 possibility exists that the president of the company or the
18 foreman or the supervisor or a co-employee can be sued and
19 brought into this. Now, where's their insurance coverage?
20 It's a very real possibility.

21 MR. DALEY: If I could respond briefly, as to
22 survivor benefits, wives and spouses -- or rather spouses
23 and children, certainly in a case like mesothelioma where
24 you have a wrongful death case along with a garden-variety
25 survival case, spouses and children have their own claims

1 under the Wrongful Death Act, so they don't have specific
2 enumerated benefits, but they do have their own independent
3 claims that a jury will evaluate down the line. So I don't
4 think it's quite accurate to say there are no claims for
5 survivors in the civil justice system.

6 Additionally, of course, there's a loss of
7 consortium claim for a spouse as well that can be
8 encompassed within these cases, so --

9 MAJORITY CHAIRMAN COX: And, Representative
10 Irvin, you had a follow-up.

11 REPRESENTATIVE IRVIN: Yes. Operating under the
12 tort system, every employer this day and age I'm hoping is
13 striving to have the safest workplace possible. And if
14 they're a parent company, they have a company in Ohio, they
15 have a company in Pennsylvania, they have one in Arkansas,
16 they find that, well, it's safer if we do it this way in
17 Arkansas, so we're going to put a memorandum out to all of
18 our other subsidiary companies to say you need to change
19 this to make sure that we are operating in a safer way in
20 Pennsylvania and Ohio just the same as we are in Arkansas.

21 So those interoffice memorandums could, under the
22 tort system, actually be used against the business in
23 claiming negligence. So, you know, it puts our companies
24 in a damned if you do, damned if you don't situation
25 because they don't want to be admitting that they could

1 have been doing something wrong whenever they're actually
2 just trying to improve work safety. So if you take it
3 under workers' comp, that may actually in the future
4 promote better workplace safety. So just get a few
5 comments on that as well.

6 MR. DALEY: So my experience in the jury system
7 is if there's a memo, hey, we see an unsafe work practice
8 here, we're going to fix it, and then it's actually fixed,
9 that's a compelling piece of evidence for defendants from
10 my perspective, not plaintiffs. Now, obviously, as you
11 say, plaintiffs will sometimes say, hey, look, you knew you
12 had a problem and we're going to try to use this against
13 you, but a well-run safety group, a well-run safety
14 committee that acts on recommendations and is proactive
15 towards its employees, that's compelling evidence for
16 defendants, not plaintiffs. That's evidence that in a
17 civil litigation setting I don't really want to see because
18 that tells me I have a responsible company. And I try not
19 to sue responsible companies so, you know, that's sort of
20 the flipside of the coin.

21 MR. DRYDEN: And from the workers' compensation
22 side, I think that our system for most large and well-
23 meaning and thoughtful employers encourages workplace
24 safety because your cases are always going to be litigated
25 by ZIP Code, right? I represent steelworkers at Merck.

1 Those cases are generally in three different counties.
2 Most judges think Merck is a pretty good employer to their
3 employees, that they run a relatively safe shop and that
4 when you go in there in front of a workers' comp judge who
5 is a bench trial, that's judge and jury, the employer knows
6 that because of the way they conduct their business that
7 there's a perception that they're not doing things in a
8 backward way or an unsafe way.

9 So, again, I think the volume of good that can be
10 done by the workers' comp system when it's used right, this
11 is just another area that shows that. It's a benefit. Of
12 course, Mr. Kachline could probably speak to it better.
13 When you're counseling employers, you don't want to be in a
14 setting where every day I'm walking and saying here they go
15 again, here they go again, here they go again in front of a
16 judge because I'm starting to slant the field toward my
17 clients. The reverse is true. When we come in and
18 everything seems to be run a certain way, run to a high
19 standard, I think the employer does better in that setting,
20 and it's just another reason that they would be encouraged
21 in the worker's comp system to maintain the health and
22 safety of their employees in my experience.

23 MAJORITY CHAIRMAN COX: Thank you. Next, we have
24 a question from Chairman Harkins.

25 DEMOCRATIC CHAIRMAN HARKINS: Thank you,

1 Chairman. Just Attorney Daley piqued my curiosity. In the
2 last few years it seems like we've noticed more strange
3 cancers people being exposed to. Do you think that's due
4 to problems in the employment section of it or are we just
5 dealing with things that we never dealt with before or --

6 MR. DALEY: I think to a certain extent we're
7 dealing with things that we've never dealt with before, but
8 I also think that from a perspective of litigation, you're
9 seeing different cancers because now there is a remedy for
10 a latent disease. Wegener's granulomatosis, for example, I
11 had a case. I don't know what it is today, but I knew at
12 the time, trust me. But that's latent disease that is
13 caused by exposure to silicon. And that case was non-
14 compensable prior to Tooley, and so I think that's why
15 you're seeing these perhaps different types of diseases
16 than the traditional mesothelioma, lung cancer, the
17 leukemias, and the like that are, you know, from the
18 benzene. So I think it's really kind of -- I think people
19 can now be compensated on a level playing field, and I
20 think that's why you're seeing different disease processes
21 come forward.

22 DEMOCRATIC CHAIRMAN HARKINS: I know I had 25
23 years with UPS and all day every day I was in and out of
24 businesses and I see some of these chemicals listed, and I
25 remember being in a janitor's warehouse and just seeing

1 barrels of this stuff, you know, free-flowing like water
2 and people having it all over their hands and smelling it.
3 It smelled good, but realizing what it does to you now --

4 MR. DALEY: That's something that a good safety
5 committee could take care of.

6 DEMOCRATIC CHAIRMAN HARKINS: Right, right.

7 Also, Sam Marshall, what impact do you think this
8 will have on premiums?

9 MR. MARSHALL: Going forward, as I think was
10 mentioned, there will be some added exposure, you know, and
11 it's going to vary depending on the industry
12 classification, and it's going to vary depending on whether
13 that particular employer has an effective workplace safety
14 committee.

15 You know, with the retroactive aspect, that's
16 going to be very unevenly imposed because it's going to be,
17 you know, who happened to have the policy in 1968 or 1974
18 or whenever it might be. And that goes to the underlying
19 question we mentioned a couple times, the value of trying
20 to quantify what the exposure is here.

21 You know, if you had asked me in, you know, late
22 November of 2013 what might be the impact, I might have had
23 -- you know, I would've thought, God, it's going to be
24 severe. You ask me that question now in May of 2019, it's
25 seems to be less than what was initially feared.

1 The other question that's going to have to be
2 dealt with for the insurance industry on the retroactive
3 end, how many of these employers were self-insured versus
4 had insurance coverage? You know, the initial wave has
5 been that it's largely self-insured, but we're not sure if
6 there's going to be a second or third wave.

7 DEMOCRATIC CHAIRMAN HARKINS: Thank you.

8 MR. DALEY: And if I could just comment briefly.
9 And I think, you know, obviously plaintiffs' bar very
10 rarely agrees with the Insurance Federation. In *Tooey*, we
11 were arguing, for example, about the placement of commas in
12 a statutory section. But I think it's a good point that's
13 raised that there has not been a floodgate of these claims.
14 And I think quantification to a certain extent might be a
15 good idea, but it's not what everyone expected in 2013 and
16 early 2014. If you read the legal journals 2013 and 2014,
17 they were expecting litigation Armageddon, and it just
18 simply hasn't happened.

19 MAJORITY CHAIRMAN COX: Another comment from our
20 special guest.

21 MR. BAUMANN: Thank you, Mr. Chairman. I've
22 actually had the pleasure of testifying before this august
23 Committee before, and one of the things that always comes
24 up is what will happen with the lost-cost filings? What
25 will the Compensation Rating Bureau do? And in due respect

1 to our other commenters, what they raise is not the only
2 issue in terms of competitiveness for our companies in this
3 State. We also see the workers' comp issue being brought
4 up as a competitiveness issue, and there's no question that
5 if the bill passed, this body has to understand there will
6 likely be an interim lost-cost filing and then a permanent
7 lost-cost filing. And what that is going to cost everyone
8 in section 108, those 36 or more industries, has to be
9 taken into consideration. It's not a panacea what you do
10 here moving it from tort to comp. It's something we all
11 have to consider.

12 MALE SPEAKER: But who studies that? Who
13 determines that?

14 MR. BAUMANN: That would be the Pennsylvania
15 Compensation Rating Bureau. They would have to make a
16 decision. As you'll recall with the case, there was an
17 interim lost-cost filing as a result of that decision and
18 then another one when the bill was passed. Now, if this
19 bill passes, if 1234 passes, hopefully the next time the
20 ratings bureau adjusts this, it won't do so on the basis of
21 that information, as we all know from the papers.

22 MAJORITY CHAIRMAN COX: Mr. Kachline had a --

23 MR. MARSHALL: If I could, when the Rating Bureau
24 makes its filing, that's actually just stage one. What
25 happens after that is that each individual company makes

1 what's called a lost-cost modifier, multiplier. And that's
2 where the company goes to what I was referencing before.
3 Each company will be making its own decisions with the
4 employers, and that will be based on that particular
5 company's actuarial projections and on, you know, the
6 experience or what the individual insured is committed to
7 in the area of workplace safety.

8 MAJORITY CHAIRMAN COX: Mr. Kachline?

9 MR. MARSHALL: That's why it's such an open
10 issue.

11 MAJORITY CHAIRMAN COX: Right. Mr. Kachline?

12 MR. KACHLINE: Regarding the quantification of
13 the problem and the argument that the floodgates have not
14 opened, I've tried every way to quantify this. I've talked
15 to companies that have settled cases. Very few cases are
16 going to verdict. Most is settlement. Public companies
17 aren't willing to share their settlements. They're not
18 willing to share the number of cases that they have. So
19 over the last couple months I've tried to do my best to
20 anecdotally put together what is a reasonable
21 quantification of the problem from clients of my firm. I'm
22 on the board of the Pennsylvania Self-Insured Association,
23 through those members and through some other large
24 Pennsylvania companies, and it's easily, comfortably in the
25 hundreds of millions of dollars since 2013.

1 I can't get any closer to a number than that.
2 The average settlement is \$1.4 million. The average
3 verdict is \$2.4 million. So maybe the best way to do it
4 would be to look at the dockets from Allegheny County,
5 Philadelphia County to have some extrapolation, but I think
6 it's comfortably and easily in excess of \$100 million in
7 these five years.

8 MAJORITY CHAIRMAN COX: And, Mr. Dryden?

9 MS. OYLER: Thank you. If I could just piggyback
10 off that and what Chairman Harkins said. I think you're
11 seeing more cancer claims, more unique types of cancer
12 claims because the science of relating a disease outcome to
13 an exposure is improving all the time. I mean, it's
14 improved since I've been sitting here. I mean, medical
15 science is amazing. They are getting better at it all the
16 time, which I think has an impact looking forward because
17 looking forward I think these claims will increase. So
18 whatever the experience has been thus far, that experience,
19 you can expect, regardless -- pardon me. If you leave it
20 in the tort system or you move it to comp or you do some
21 hybrid, come up with some hybrid legislation, there will be
22 more of these claims. There will be more people who suffer
23 a disease that we can relate to their employment is my
24 belief.

25 MAJORITY CHAIRMAN COX: Mr. Daley?

1 MR. DALEY: And if I may, I think a good data
2 point can be had from United States Steel Corporation's
3 September 30th, 2018, filing with the United States
4 Securities and Exchange Commission, their form 10-Q, where
5 they've looked at their historical claims December 15th
6 through September of 2018. And essentially, they're
7 dealing with 275 claims, 250 claims, 250 claims, 210
8 claims. And they're obviously one of the, you know, larger
9 employer defendants in this type of litigation.

10 And they state in their papers, "The amount U.S.
11 Steel accrues for pending asbestos claims is not material
12 to U.S. Steel's financial condition." So I think you're
13 seeing a relatively small amount of claims, 250, and that's
14 nationwide of course, but no increase, no dramatic increase
15 in cases from 2015 on. So, again, it just speaks to the
16 fact that I don't think the floodgates have opened and, you
17 know, quantification is difficult. I agree.

18 MR. DRYDEN: One last quick follow-up to that.
19 Again, on behalf of the PA AFL-CIO, I want to focus more
20 than just on asbestos. Those asbestos claims are going to
21 drop because, God willing, we're getting asbestos out of
22 the places where people work, and there's going to be less
23 of them because there's less asbestos. But the work that
24 the Committee is tackling is on a broader issue, and that's
25 diseases suffered by people at work that are beyond

1 asbestos, beyond benzene.

2 MALE SPEAKER: I think of Friday night having the
3 TV on, within 15 minutes there was five ads for a fever
4 exposed to Roundup. I mean, these things are coming to
5 people's attention. Good point.

6 MAJORITY CHAIRMAN COX: Mr. Kachline?

7 MR. KACHLINE: Thank you. If I could just add
8 one bit of food for thought. For a small employer, it only
9 takes one case to put them out of business. I think that's
10 something that should be in the back of everybody's head.
11 I'm not allowed to use the name of the company, but there
12 was an Erie manufacturer that is a small metal manufacturer
13 who's had two cases recently. One was an \$800,000
14 settlement, and one was a \$600,000 settlement, and they
15 were inches away from filing bankruptcy.

16 So while the U.S. Steels of the world and large
17 corporations can absorb and have had history of experience
18 with claims, like Mr. Dryden said, heavy metals being
19 associated with more and more cancers, now lunchmeat and
20 red meat are group-one carcinogens according to the IARC,
21 we're going to see expansion of cancer litigation and for
22 these small companies, it just takes one.

23 MAJORITY CHAIRMAN COX: All right. Next, we had
24 our second round. I think we've gone through all the
25 initial questions from Members, and we're going to go to a

1 second round with Representative Dush.

2 REPRESENTATIVE DUSH: Thank you, Chairman.

3 Mr. Dryden, you said if you were king for a day.
4 Let's put you in that position. What language could be
5 added? What specific things could be added to this to
6 address this and get it into the workers' comp to the point
7 where the AFL-CIO would be on board?

8 MR. DRYDEN: Well, as I'm sure you know,
9 Representative, I'm on a bit of a leash when talking
10 specifically for the AFL-CIO. So our proposal to increase
11 it to 600 weeks is what the AFL-CIO is willing to do at
12 this point. Things I think we would consider if I can
13 answer the question in that vein, I am not speaking for me.
14 I am not opposed to tying the statute of repose to latency
15 periods, as has been suggested. I think that's workable
16 given today's medical science.

17 For me, the bigger issue always falls back to
18 301(c)(1), disease as injury claims in that there has to be
19 some way to allow a person to either have an ongoing
20 301(c)(1) disease as injury claim, which you could do by
21 legislatively deciding that the discovery rule applies to
22 those cases and overrule a case called *Armco Inc.* *Armco*
23 *Inc.* prohibits the discovery rule from applying to the
24 three-year statute of limitation for a disease as injury
25 claim. If that were overruled legislatively, then those

1 claims for 301(c)(1) claims could be tied to their latency
2 periods and brought within the coverage of a bill similar
3 probably with other -- there's other things we would want
4 to address in House Bill 1234, but in the platform that it
5 provides, if 301(c)(1) disease as injury claim could be
6 brought in, that would be helpful.

7 Another thing I would look to in that same regard
8 is, I mean, the proposed legislation, I think it's 303(c)
9 where the law talks about "This act provides the exclusive
10 remedy for any injury or disease that may arise out of a
11 hazardous occupational exposure whether the disease is
12 compensable as an occupational disease or not." With that
13 language, you're shutting the doors. You're shutting the
14 doors on third-party liability. So understand what that
15 does.

16 And, you know, for me, I would take out whether
17 the disease is compensable as an occupational disease or
18 not, and I would add where it says, "This act provides the
19 exclusive remedy for any," I would add the word
20 "compensable." Now, I've been in -- for 25 years we've
21 been fighting over what the word compensable means, but I
22 think that this Committee could create a statutory language
23 that defines compensable as tenable under the workers' comp
24 act. So it's not time-barred, that it's covered, however
25 you decide to do it.

1 If you lift or give us the discovery rule in
2 301(c)(1) claims, then that I think would probably suck
3 most diseases into the workers' comp law if you changed and
4 put the word compensable in there and confirmed that
5 compensable meant not time-barred. You could have the
6 platform that's been created here, bring all of the cases
7 into the workers' compensation system.

8 I have yet to even discuss it with the AFL-CIO or
9 really even put a lot of thought into it myself as to
10 whether that's necessarily a completely good thing. I do
11 think that more likely than not if I were king I would move
12 the line somewhere so that there's a lot more cases that
13 come in to the workers' comp system maybe with the help of
14 the insurance industry and actuaries to figure out how we
15 best do that and leave cases that are maybe a little older,
16 a little more aged out into the tort system or exclude
17 things like asbestos, exclude certain types of civil
18 litigation that could still be brought. I think they are
19 all options.

20 You know, again, for the AFL-CIO, this continuity
21 of access to a remedy is the key. It's where you put it.
22 Do you put it where it's at the very end where everything
23 is in comp, or is there some compromise somewhere in the
24 middle where many more things go into the workers' comp
25 system but there still are workers that would have access

1 to the civil litigation system if they get to the point
2 that their rights under the workers' compensation system
3 end?

4 So if I were king, the law would be drafted in
5 such a plain way that it made clear that the workers' comp
6 rights end here, and when they end here, your rights to
7 tort pickup. If I were king, that's what I would do.

8 REPRESENTATIVE DUSH: Kris, it looks like you had
9 a follow-up.

10 MR. KACHLINE: I think Mr. Dryden identifies a
11 gap, and it is a gap. The provisions under the act in 108
12 again were drafted in 1939. People don't get caisson's
13 disease anymore, yet caisson's disease is an occupational
14 disease in Pennsylvania.

15 So in addition to what Mr. Dryden was saying
16 about having these 301(c)(1) claims become cognizable, the
17 other way to do it would be to add a section into 108 like
18 the Act 46 2011 did for firefighters with cancer and
19 provide that any person who has any disease that they can
20 relate to an exposure that they had in employment could
21 make an occupational disease claim. That's sort of the
22 purpose of disease-as-injury cases. The disease is not the
23 injury in those cases; the exposure is, and the disease is
24 simply a symptom of what the injury is. And it's a really
25 old way of looking at those cases.

1 So I agree that there is a gap with 301(c)(1) and
2 how those cases are worked, and I think if we are sort of
3 wholesale redoing the occupational disease sections of the
4 act, adding a section that would allow any person to make
5 any claim -- the only way to do that now under 108 would be
6 if there was substantial -- the incidence of the disease
7 that you're claiming is substantially increased in your
8 occupation and you can prove that there's a causal reason
9 for that increased incidence of the disease. It's a fairly
10 high burden, so, you know, if you're a painter and painting
11 in and of itself is designated as a group-one carcinogen,
12 so that job is easy. That case for Mr. Dryden would be
13 pretty simple. But what if you're a nurse and you have
14 cancer and you can prove that the type of cancer that you
15 have is directly related to the x-ray machine that you
16 operated for 20 years? But the incidence of that type of
17 cancer has not substantially increased among nurses, then
18 you can't make an occupational disease claim. So I
19 acknowledge the gap, and there is a way to close that gap
20 within section 108 of the act.

21 REPRESENTATIVE DUSH: Thank you. Mr. Chairman,
22 can I have one more to --

23 MAJORITY CHAIRMAN COX: You're really pushing it,
24 Dush. Go ahead.

25 REPRESENTATIVE DUSH: Rebecca, with the uninsured

1 versus the insured, what's the difference for our
2 Pennsylvania businesses, especially since the *Tooey*
3 decision? What are they facing?

4 MS. OYLER: That's a question that we've not
5 looked into directly, so I'll have to get back to you to
6 see if I have some specific feedback from them.

7 REPRESENTATIVE DUSH: Okay. And then if this
8 bill goes in, have you considered what the effects will be
9 between the two?

10 MS. OYLER: Not yet, no. Thank you.

11 REPRESENTATIVE DUSH: Okay. Thank you.

12 MAJORITY CHAIRMAN COX: And the last individual
13 before I have a closing question is Representative Miller
14 for the second time.

15 REPRESENTATIVE MILLER: Thank you, Mr. Chairman.

16 I want to thank all the counsel in particular for
17 all their conversation today, again, very engaging.
18 There's going to have to be for me in relation to my
19 consideration of the issue I'm going to have to read a
20 little bit more of your statements that you submitted and
21 to, you know, put some more thought into it.

22 I'll be honest. My initial push is I'm not
23 really sure that I've heard enough of a reason to change,
24 so to me I'm still not sold on that there. My thought
25 being -- I know someone had referenced something about the

1 -- you know, look, we're sitting here in Pennsylvania with
2 the lowest unemployment I think that we've probably ever
3 had. We've had some very good revenue numbers that are
4 working. We've taken steps to cut business taxes multiple
5 times.

6 By the same token, don't kill your workers. I
7 don't know. And it's tough, somebody comes up and they
8 say, well, you know, product liability. Okay. Look, I get
9 product liability. We're talking about something
10 different. So we're talking about this compromise that we
11 have to decide if we're going to be putting something back
12 in and what is the benefit to the system as a whole.

13 We've had a lot of questions about UEGF,
14 different things coming into play. I'll be honest. I find
15 it to be a very complicated question here that we have.
16 There's no doubt to me that we want to do something that is
17 appropriate in the system. By the same token, don't
18 negligently kill your employees, right?

19 So, you know, so I get a little bit lost. So
20 what I would ask as we go forward with it, look, I'm more
21 than willing to take a look, and I appreciate my friends in
22 labor as well for their point about the workers' comp
23 system. I want to be open to the workers' comp system with
24 it, but I have to also feel that there is -- that the
25 benefit -- and somebody mentioned difficulty in quantifying

1 numbers with it. Okay. Well, then I thought I was even
2 hearing one of the comments that we maybe should be
3 studying this a little bit more than taking the last couple
4 of years and pushing through.

5 We hear some people say, well, look, some people
6 don't want to give the numbers up, and I'm like, well,
7 okay, well, if the numbers are that bad, I think they would
8 give them up. I don't know. If you're trying to make a
9 case against the system, well, then why wouldn't you give
10 the numbers as to how bad the system is treating you?

11 So I have a bunch of questions with it. As I
12 said, I have a general sense for it. I wanted to thank
13 everybody's testimony for it. My view and my lens to which
14 I view this thing here is, first and foremost, are we
15 keeping a system that provides benefits to employees that
16 are harmed by their exposure at work? That's my number-one
17 priority for it. And if your business can't reasonably do
18 that, then I'm not so sure you should be in business. So
19 that's just the reality of the situation.

20 Now, everything we could do, whether it be on
21 frivolous lawsuits, fraudulent claims, problems in the
22 system with it, we could talk about it in my opinion, but
23 again, I want a system that is funded, I want a system that
24 works, I want a system that protects workers and gives
25 benefits along the line for that scenario.

1 And as we go more into the world of knowing what
2 the petrochemicals and what the plastics and everything
3 else is doing, I appreciate the example regarding asbestos
4 as something that could be diminishing. But like I think
5 we all keep referring, I don't think that that is the end
6 of our cancer-related scenarios here. So I think that we
7 are going to continue to go down this frame. I just
8 believe that we need a little more information. I need a
9 little bit more information before I could say that pulling
10 one log out and pushing another one in is somehow going to
11 make the system better.

12 But thank you very much for your testimony. I
13 look forward to receiving any other information, and I
14 thank the Chairman for the second time.

15 MR. DRYDEN: If I could just have one second,
16 Representative Miller, before you step off. The reason I
17 think that labor would like this moved into workers' comp
18 is in the no-fault disability system, that there are claims
19 as it sits right now that are being litigated in tort that
20 are predominately asbestos, benzene, certain leukemia
21 cases.

22 I think that there are a lot of people -- and I
23 represent truck drivers, UPS drivers among them who are
24 exposed to diesel exhaust and diesel exhaust for years that
25 will develop lung cancer or bladder cancer many, many years

1 later that is a very, very tough if not impossible case to
2 bring in a third-party setting because you have to go back
3 20 years and figure out how UPS or Motor Freight, you know,
4 negligently operated their vehicles. So that person is
5 effectively shut out by the type of case. So just, as we
6 go, I'd like you to consider that.

7 REPRESENTATIVE MILLER: [inaudible].

8 MR. DRYDEN: No, I appreciate your comment,
9 though. I think it's --

10 REPRESENTATIVE MILLER: Thank you.

11 MR. DRYDEN: -- a reasonable position.

12 MAJORITY CHAIRMAN COX: All right. We're closing
13 in on the last few minutes. I do have one question. I
14 wanted to kind of give a perspective just to make sure my
15 understanding is accurate. In my mind I'm thinking, you
16 know, Mr. Kachline and Mr. Daley might be the two people to
17 answer the question. That doesn't mean others can't chime
18 in.

19 But the attorney's fees from each of those types
20 of settings, I know people in the workers' comp world
21 aren't working for free obviously, but I understand there
22 are restrictions, limitations. Can you briefly, you know,
23 give me that 30,000-foot view of what fees you are
24 permitted to pass on to your clients, and then I'll ask you
25 to do the same as far as, you know, whether there are

1 statutory limitations or conventional limitations if you
2 will. So, Mr. Kachline --

3 MR. KACHLINE: Are you referencing the fees that
4 attorneys representing the injured workers can receive?

5 MAJORITY CHAIRMAN COX: Ultimately, what you
6 would receive as part of your representation, correct.

7 MR. KACHLINE: Well, Mr. Dryden is probably the
8 guy for that, but it's pretty simple. It's statutorily
9 capped at 20 percent of any benefit that was generated from
10 the case, so Mr. Dryden should probably jump in there
11 because he's the one that receives those fees.

12 MAJORITY CHAIRMAN COX: Okay. Go ahead.

13 MR. DRYDEN: That's correct. I mean, they're
14 statutorily capped at 20 percent. If you're in a union, if
15 you're a Teamster who happens to be a UPS employee, we
16 reduce the fee. But it is capped at 20 percent, so
17 workers' comp practitioners cannot receive more than 20
18 percent of the indemnity benefits that they successfully
19 claim for their clients.

20 MAJORITY CHAIRMAN COX: Okay. And Mr. Daley?

21 MR. DALEY: In civil litigation, there's no cap
22 per se. The fee just needs to be reasonable, commensurate
23 to the work you do. Traditionally in these type of cases
24 at least our firm charges 33 1/3 percent, one-third, and of
25 course pays litigation expenses along the way as well.

1 MAJORITY CHAIRMAN COX: Okay. And from your
2 perspective, Mr. Kachline, what is ultimately the cost that
3 you're seeing this have to the businesses? Like you
4 mentioned a couple are teetering on the edge of bankruptcy,
5 et cetera, the smaller businesses.

6 MR. KACHLINE: So --

7 MAJORITY CHAIRMAN COX: And I know you don't --
8 this is really going to disclose, you know, fee arrangement
9 for retainer fees or anything else you might have, but what
10 are you seeing happening to the businesses that you
11 represent?

12 MR. KACHLINE: In cases where an employer is sued
13 directly in an asbestos case or, you know, what's been
14 happening so far, they're typically uninsured for that
15 risk. And the reason they're uninsured for that risk,
16 there may be an employer's liability policy that would have
17 insured that employer on the last date of exposure.
18 Typically, those policies have a 36-month tail that a claim
19 must be made on that year's policy within 36 months from
20 the last date of the policy being effective. So if its
21 1972, you get 36 months from there.

22 When these claims are being made now, typically,
23 coverage is denied, and the employer is then left to cost
24 of defense, settlement, and if they go to trial, cost of
25 defense at a trial and a verdict. Those numbers vary

1 greatly. We heard a number today of \$40,000. I've heard
2 numbers as high as \$2 million. There was a verdict in
3 Philadelphia County in 2015 that was the Busby case. That
4 was a \$1.7 million verdict against just the employer.

5 To date, there's only been one policy of
6 insurance that's been offered for employers to sort of
7 bridge this gap of -- they call it a Tooley gap policy not
8 surprisingly. It was a half-million dollar premium at the
9 half a million dollars of self-retention of the risk with a
10 cap of \$5 million. So they were essentially buying \$4
11 million of insurance for \$1 million. I don't think any
12 companies have taken that policy, although it is, I
13 believe, still being offered.

14 So if the exposure continues the way it's
15 continuing for employers, it will be uninsured risk with
16 really unknown caps, unknown maximums. Like I said, there
17 was a \$7.2 million verdict in Philadelphia County a few
18 years ago. That's certainly possible again. There was
19 another State -- I believe it was Illinois -- who had a
20 several-hundred-million-dollar verdict, most punitive
21 damages, so there are no caps. There's no surety on what
22 the exposure can be, but it is quite significant.

23 MAJORITY CHAIRMAN COX: Okay. One last comment.

24 MS. OYLER: Yes, thank you. I just wanted to add
25 -- and I thank you for sort of quantifying it a little bit

1 from a small business standpoint. But I want to sort of
2 counter the implication that employers are keeping
3 employees safe or incentivized to keep their employees safe
4 only by threat of a lawsuit. I think that's unfair to say
5 that because employees are the biggest asset that employers
6 have, and particularly in small businesses, many of them
7 treat their employees like families. And just to think
8 that the threat of a lawsuit is going to be what
9 incentivizes them to take care of their workers I think is
10 a little unfair.

11 But I think the issue here is the
12 unpredictability. That employer just doesn't know if and
13 when a lawsuit is going to arise and come about. And like
14 Mr. Kachline said, it only takes one. It only takes one
15 lawsuit to put a small business like this out of business.
16 And that's why we're very concerned and we really want to
17 see the Grand Bargain back in place for small employers so
18 that they have some predictability and dependability that
19 there's always a venue to handle these liabilities.

20 MR. DALEY: I think one thing the Committee could
21 look at is experience of railroad workers under the Federal
22 Employers Liability Act. Railroad workers are not covered
23 by any workers' compensation system, and to recover for a
24 work-related injury, they need to sue their railroad
25 employer and prove negligence with a standard less than

1 what common-law negligence is in Pennsylvania.

2 And I've handled many FELA cases as well, and I
3 can assure you that the safety conditions in the railroad
4 industry since the passage of the FELA in the 20th century
5 has dramatically improved, and it is in part due to
6 litigation and the threat of litigation. And I recognize
7 that of course most companies do value their employees and
8 do want to keep their employees safe naturally, but the
9 experience we see in the FELA I think is directly relevant
10 here. It's dramatically improved workplace safety in the
11 railroads.

12 And additionally, speaking to Mr. Dryden's point,
13 you know, I personally tried a diesel case against a
14 railroad for diesel exposure to diesel exhaust in a rail
15 shop. And while it's a difficult case, it's not an
16 impossible case. And so it was tried and, you know, just
17 before the verdict the case settled, so all the evidence
18 went on and, you know, it was an effort, but it's not an
19 effort that's insurmountable, so --

20 MAJORITY CHAIRMAN COX: Well, I do want to thank
21 everyone for taking the time to testify. We've had a lot
22 of expertise shared today, and that is valuable to us as a
23 Committee as we move forward on this.

24 I would encourage each of you if you're willing
25 to provide us with specific language changes -- I'll put it

1 this way. Put out your wish list and we'll see what we can
2 incorporate. And we're not trying to keep any one party
3 away from the table. That's not the way I'm going to be
4 doing things going forward. And this is the reason I have
5 the hearing structure this way is so that it becomes more
6 of a dialogue between the panel and our Members, and I hope
7 that we've been fair in offering the input, again, from all
8 sides of the table and from the perspective of the Members
9 as well.

10 So, again, thank you for your testimony, and I
11 appreciate any additional input you'll have going forward.
12 Please work with John and Shannon and my staff on this and
13 myself of course and any of the Members that you see fit to
14 work with. It's always appreciated.

15 Again, thank you, and have a good day.

16
17 (The hearing concluded at 1:05 p.m.)

1 I hereby certify that the foregoing proceedings
2 are a true and accurate transcription produced from audio
3 on the said proceedings and that this is a correct
4 transcript of the same.

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