

Exhibit Number: 3

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COMMENTS IN SUPPORT OF SJ 27

By Roger M. Sullivan
April 4, 2005

1. Introduction.

Good morning. My name is Roger Sullivan. I am a lawyer with the Kalispell firm of McGarvey, Heberling, Sullivan & McGarvey. We represent over 500 individuals from Libby, Montana, who have been injured through no fault of their own by tremolite asbestos originating at W.R. Grace's mine near Libby. What has been called the largest environmental catastrophe in American history was avoidable — but inevitable given W.R. Grace's ruthless conduct in putting profits over the health of its workers, the families of its workers, and indeed the entire Libby community. I made my first detailed presentation to a committee of the Montana Legislature on February 16, 1999 in successful opposition to Senate Bill 432, which would have allowed Grace to avoid being held accountable for its reprehensible acts. On that day six years ago I reviewed incriminating documents which have since been the subject of unprecedented attention, spawning books, movies, and criminal indictments. There is no need for me to repeat this tragic story this morning, since most of you are familiar with it. Rather, my purpose this morning is to ask the your committee to endorse Joint Resolution 27. Simply stated, this Resolution asks the Montana Congressional Delegation, and indeed the entire Congress and the President, to allow no further harm to befall the victims of Libby tremolite disease through passage of federal asbestos legislation which as currently drafted excludes the vast majority of people suffering from Libby tremolite asbestos disease from receiving any compensation.

2. Under the "Fairness in Asbestos Injury Resolution Act of 2005," 80% of Libby patients will receive nothing.

Over the course of the last six years, Congress has considered a number of asbestos bills. Senator Arlen Specter, Chairman of the Senate Judiciary Committee, has stated his intention to introduce the "Fairness in Asbestos Injury Resolution Act of 2005" in the immediate future. My office has carefully reviewed the "Discussion

Draft” of Senator Specter’s bill¹, and we have concluded that passage would be disastrous for the people of Libby. A copy of my detailed comments to Senator Specter are attached at Tab 1.

Dr. Alan Whitehouse, a pulmonologist from Spokane, Washington, is a preeminent expert on the tremolite asbestos diseases that affect the people of Libby. I am attaching at Tab 2 a copy of Dr. Whitehouse’s letter of January 12, 2005, wherein Dr. Whitehouse reviews the medical criteria in the “Discussion Draft” of the federal asbestos legislation as applied to his Libby patients.² Dr. Whitehouse concludes that the bill’s medical criteria exclude the vast majority of his Libby patients. In addition, at our request Dr. Whitehouse performed a review of chest x-rays for 79 of his patients. Dr. Whitehouse has set forth the results of this review in a report entitled, “Preliminary Report on 79 Chest Xrays Reviewed Relative to the Asbestos Injury Resolution Act of 2005,” attached at Tab 3. We extended Dr. Whitehouse’s results by lung function category to 494 clients and found about an 80% exclusion rate. *See* chart, “Preliminary Estimate of Numbers of Asbestos Patients Excluded Under Medical Criteria in the Fairness in Asbestos Injury Resolution Act of 2005,” attached at Tab 4.

The results are alarming: Only 4 of 15 patients on oxygen qualified. Only 16 of 33 of “severe” (PFT <60%) patients qualified. Of seven dead of asbestos disease, two did not qualify.

It is important to understand that the bill continues to exclude Libby asbestos victims for two fundamental reasons:

1. The vast majority of Libby claimants have pleural disease caused by tremolite asbestos, not interstitial disease caused by chrysotile asbestos.
2. The medical criteria are based on chrysotile asbestos induced diseases.

¹The most recent of Senator Specter’s “Discussion Drafts” was made available to the public on 2/07/05.

²The medical criteria reviewed by Dr. Whitehouse in his 1/12/05 letter remains the same in the 2/07/05 “Discussion Draft.”

3. Grace should not be rewarded by the asbestos legislation.

As currently drafted, Grace profits enormously from the federal asbestos legislation. This is a reprehensible result given that the people of Libby were poisoned with tremolite asbestos for decades by W.R. Grace, a company that withheld critical information to its workers and the community about the deadly dust to which it was exposing its workers, their families, and the residents of Libby. Scores of civil lawsuits were filed in Montana courts seeking to hold W.R. Grace accountable for the injuries and deaths caused by its reckless conduct. My firm successfully tried cases to verdict against W.R. Grace in 1997, 1998 and 1999. In 2000, the Montana Supreme Court upheld a jury verdict we obtained awarding punitive damages against W.R. Grace based on its malicious and/or fraudulent disregard of the health and safety of its Libby workers.³

On April 2, 2001, W.R. Grace filed for bankruptcy protection, thereby terminating prosecution of the civil suits in Montana courts.

Current estimates of the present value of the total amount of Grace's contributions under the federal asbestos legislation are \$424 million. This is the fifth column of the document entitled, "Summary of Chapter 11 - Asbestos Companies," which is attached at Tab 5.⁴ Column 4 of that same document indicates a present dollar value of \$2,151 million, which is the official W.R. Grace Asbestos Personal Injury Claimants Committee estimate of monies for the Grace bankruptcy personal injury trust from non-insurance assets. Thus, this allows something of an "apple and apple" comparison of what Grace could owe under the asbestos legislation versus what Grace could owe under the Grace bankruptcy for personal injury claims. Grace, on the other hand, has put forth a \$1.48 billion figure (which is \$1.613 billion if future claims are included) as the amount which Grace seeks to pay for asbestos-related liabilities through its nonconsensual Reorganization Plan dated November 13, 2004, relevant pages of which are also attached at Tab 5. Under either scenario, Grace benefits enormously from the asbestos legislation as compared with payments it would have to make for its asbestos liabilities under bankruptcy reorganization.

There is a strong public policy argument against rewarding Grace in this

³*Finstad v. W.R. Grace & Co.*, 2000 MT 228, 301 Mont. 240, 8 P.3d 778.

⁴We have received authorization to use this document from the Grace PI Committee.

manner, which is all the more compelling given the criminal indictments handed down against Grace, as reported in the extensive media coverage of the U.S. Attorneys news conference of 2/07/05. *See, e.g.*, Tab 6.⁵ Unless the federal asbestos legislation is amended to ensure to that those suffering from Libby tremolite asbestos disease get the compensation that they need and deserve, the Libby victims would be better off pursuing their claims through the bankruptcy system.

4. Conclusion.

With or without the legislation, the medical expenses for Libby patients will march forward. The medical expenses for a Libby asbestos disease victim are conservatively estimated at \$400,000, which amount represents the low end of life care plans carefully prepared as evidentiary exhibits in pre-bankruptcy litigation against W.R. Grace. If over 80% of Libby patients are excluded under the bill, the taxpayers will pick up the tab through Medicare or Medicaid, and the suffering of the victims of Libby tremolite disease will be needlessly compounded.

The conscience of the country has been aroused, and there is a growing chorus asking the question: Why should Grace be rewarded by the federal asbestos legislation? *See, e.g.*, editorials at Tab 7.

Senate Joint Resolution 27 asks Congress to do the right thing for Libby asbestos victims. We ask your support. Thank you.

Please do not hesitate to contact me should you have any questions or want further information.

Roger M. Sullivan
McGarvey, Heberling, Sullivan & McGarvey, P.C.
745 South Main
Kalispell, Montana 59901
(406) 752-5566
email: rsullivan@mcgarveylaw.com

⁵Under our system of justice, the defendants are presumed innocent until proven guilty at trial .

Law Offices of
McGarvey, Heberling, Sullivan & McGarvey, P.C.

Dale L. McGarvey
Jon L. Heberling
Roger M. Sullivan, Jr.
Allan M. McGarvey
John F. Lacey

745 South Main
Helispell, Montana
59901-5399

Telephone
(406) 752-5566
1-800-345-1763
1-800-406-7544 (out-of-state)
Fax (406) 752-7124
Email: rsullivan@mccgarveylaw.com

January 12, 2005

VIA FACSIMILE

Senator Arlen Specter
Chair, Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

Re: Fairness in Asbestos Injury Resolution Act of 2005 (Discussion Draft)

Dear Senator Specter:

This office represents over 500 individuals from Libby, Montana, who have been injured through no fault of their own by tremolite asbestos originating at W.R. Grace's mine near Libby. This environmental catastrophe was avoidable — — but inevitable given W.R. Grace's ruthless conduct in putting profits over the health of its workers, the families of its workers, and indeed the entire Libby community. Together with attorney Milt Datsopoulos of Missoula, we have been actively involved in reviewing and commenting on the several asbestos bills proposed over the last several years. We have carefully reviewed the "Discussion Draft" of the "Fairness in Asbestos Injury Resolution Act of 2005," and have concluded that passage would be disastrous for the people of Libby. Our reasons are set forth below. We also want to acknowledge the considerable efforts that have been made by Senator Baucus and his staff to address the unique circumstances and needs of the people of Libby. Senator Baucus is continuing with his efforts at this critical juncture, for which we are most grateful.

A. Under the "Fairness in Asbestos Injury Resolution Act of 2005," over 90% of Libby patients will receive nothing.

In terms of the medical criteria contained in the "Discussion Draft," very little has changed from S. 1125 that was reported out of the Judiciary Committee in July of 2003 and in S. 2290 introduced in 2004. Under the "Discussion Draft," the result for Libby patients remains just as devastating. Dr. Alan Whitehouse, a pulmonologist from Spokane, Washington, is a preeminent expert on the tremolite asbestos diseases that affect the people of Libby. I am attaching hereto a copy of Dr. Whitehouse's letter of January 12, 2005, wherein Dr. Whitehouse reviews the medical criteria in the "Discussion Draft" as applied to his Libby patients.

It is important to understand that the bill continues to exclude Libby asbestos victims in a number of insidious ways. The bottom line remains the same, over 90% of Libby claimants will receive nothing. There are two reasons for this:

1. The vast majority of Libby claimants have pleural disease caused by tremolite asbestos, not interstitial disease caused by chrysotile asbestos.
2. The medical criteria are based on chrysotile asbestos induced diseases.

For compensation, pleural disease requires "diffuse pleural thickening, or bilateral pleural disease of B2 or greater." (Section 121(d)(3)(A); Level III, pleural disease.) First, "B2" means "pleural thickening or plaque with a maximum width of at least 5 millimeters." (Section 121(a)(3).) Many Libby patients die before pleural thickening reaches 5 millimeters thickness, which is the thickness of an orange rind. This criteria alone excludes over 90% of the Libby patients.

Second, "diffuse pleural thickening" requires "blunting of either costophrenic angle." (Section 121(a)(5).) The blunting requirement would exclude over 90% of the Libby patients because pleural disease from tremolite exposure generally does not cause blunting. As the vast majority are excluded from Level III (\$100,000), they fall into Level I (\$0). Libby patients may die of asbestos pleural disease and remain in Level I. This is manifestly unfair.

As pointed out by Dr. Whitehouse, neither the B2 requirement nor the requirement for blunting of the costophrenic angle have support in the medical literature. Nor is it viable at this point to amend the medical criteria for Libby tremolite disease. As Dr. Whitehouse has explained on several occasions, the development and publication of medical literature upon which to base medical criteria for Libby tremolite disease is still some five years away.

The B2 requirement in the bill is based on the inapposite "B reader" system which has no marker between 0 and 5 millimeters thickness. Adding an interim marker at 2 or 3 millimeters would require revamping the B Reader system. There are no B readers in Montana. It is an academic system dependent upon chest x-rays and is of no use of clinical practice in treating Libby tremolite asbestos disease. No medical literature finds a correlation between B2 and severity of disease. The B2 requirement simply acts as an artificial marker to exclude the vast majority of Libby tremolite disease patients.

As Dr. Whitehouse also points out, the medical criteria in the bill are very hard on ex-smokers who have some smoking disease along with their asbestos disease. These patients are classified at Level II (mixed disease) even if they are dying of asbestos disease. With Libby patients, the tremolite asbestos pleural disease is progressive and deadly with or without a history of smoking. (See Dr. Whitehouse's 01/12/05 letter at p. 3.) In addition, asthma patients who never smoked may fall into the Level II (mixed disease) category,

because their FEV1/FVC ratio is under 65. (*Id.*)

An additional flaw in the medical criteria *vis a vis* Libby tremolite asbestos disease patients is that even the "severe" category (Level IV) does not have a standard for diffusion capacity (the lungs' efficiency at passing oxygen into the blood). Diffusion capacity is one of the three main lung function tests for asbestos disease. Exclusion of DLCO from the medical criteria in the bill is also at odds with the American Medical Association, *Guides to Permanent Impairment*, 5th Ed., Table 5-12, which relies upon DLCO as an indicator of impairment. To the point here:

Exclusion of DLCO from the medical criteria would operate to exclude a significant number of Libby patients with impaired lung functions and shortness of breath. Some patients with severe shortness of breath are severe only in DLCO defect.

(Dr. Whitehouse's 01/12/05 letter at p. 4.)

B. The Libby provisions in the "Discussion Draft" do not protect the people of Libby.

In recent years, there has been considerable discussion among members of the Senate, their staffs, and interested parties concerning the failure of the medical criteria to address the tremolite asbestos disease suffered by Libby victims. Critical to an effective legislative exception for the unique circumstances of these people are three critical provisions:

- 1) A waiver of the five-year occupational exposure requirement to permit recovery by Libby community members;
- 2) Recognition that Libby tremolite asbestos disease is an exception to the chrysotile asbestos disease paradigm used in the medical criteria; and
- 3) A provision of fair compensation for the victims of Libby tremolite asbestos disease.

Unfortunately, while some effort has been made to address these concerns, the bill as it presently stands is critically deficient.

First, the bill at Section 121(c)(4) (entitled "Waiver for Workers and Residents of Libby, Montana") reduces the five-year exposure requirement in the bill to one year in the case of Libby. Even the one year requirement will exclude some, like Federal Magistrate Judge Thomas Murray, who worked one summer at the Libby mine in his youth, and died of asbestos lung cancer. Nevertheless, the exposure provision for Libby is a substantial

improvement that will cover the large majority of Libby asbestos disease victims.

As to deficiencies in the bill's medical criteria, Section 121(f)(8) allows for the designation of Libby claims as "exceptional medical claims" which are referred to a "Physicians Panel for review." Unfortunately, the current medical literature available for review is based primarily upon the study of chrysotile-induced asbestos disease. As Dr. Whitehouse has explained, the development of medical literature relating to the evaluation and treatment of asbestos-related disease resulting from exposure to the tremolite asbestos fibers found in Libby is anticipated to take at least five years for peer review and publication.

Because the medical criteria continue to reflect the chrysotile asbestos disease paradigm, to the exclusion of the tremolite disease suffered by Libby victims, Senator Baucus and his staff have vigilantly attempted to add a provision to the legislation that would automatically recognize the unique and deadly disease suffered by Libby victims, and provide for commensurate compensation. However, such a provision is omitted in the "Discussion Draft." The most logical position for the omitted provision is at the end of § 131, as subparagraph (c). It would provide:

For all non-malignant claims filed by Libby, Montana claimants, as defined in § 121(c)(4), once the Administrator or the Physicians Panel issues a certificate of medical eligibility to a Libby, Montana claimant, and notwithstanding the disease category designated in the certificate or the eligible disease or condition established in accordance with § 121, or the value of the award determined in accordance with § 114, the Libby, Montana claimant shall be entitled to an award that is not less than that awarded to claimants who suffer from Asbestosis, Level IV. For all malignant claims filed by Libby, Montana claimants, the Libby, Montana claimant shall be entitled to an award that corresponds to the malignant disease category designated by the Administrator or the Physicians Panel.

C. Other provisions related to Libby.

As in earlier versions of the bill, the "Discussion Draft" includes a provision which allows for the "formation of a fund for the payment of eligible medical expenses related to treating asbestos-related disease for current and former residents of Libby, Montana." § 407(a). However, such a fund would be of no real benefit to the people of Libby if the benefit payments that they would otherwise receive under the legislation are reduced as "collateral source compensation" pursuant to § 134. Thus, we request inclusion of the following sentence at the end of § 407(a):

The payment of any such medical expenses shall not be collateral source compensation within the meaning of § 134(a) of the Act.

January 12, 2005

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In addition, the "step up" provision contained in Section 113(b)(3), is too uncertain. Under this provision, a claimant's entitlement to additional compensation depends on the development of another "injury." Injury is not defined. It should properly depend upon the development of an "additional disease or increased severity of condition which meets the criteria of another level."

In conclusion, the "Discussion Draft" contains fatal flaws which would have a disastrous impact on the people of Libby who suffer from tremolite asbestos disease originating at W.R. Grace's mine near Libby. This is a particularly unjust result given the outrageous misconduct by W.R. Grace in causing injury to the people of Libby. Absent the proposed legislation, Grace would have to pay through the bankruptcy proceeding at least \$1.5 billion for its asbestos-related liabilities, as compared with total payments under the legislation with a present value of some \$400 million. Without the changes requested herein, the Libby victims would be better off pursuing their claims through the bankruptcy system. With or without the legislation, the medical expenses for Libby patients will march forward. The medical expenses for a Libby asbestos disease victim are conservatively estimated at \$400,000, which amount represents the low end of life care plans carefully prepared as evidentiary exhibits in pre-bankruptcy litigation against W.R. Grace. If over 90% of Libby patients are excluded under the bill, the taxpayers will pick up the tab through Medicare or Medicaid.

Please do not hesitate to contact me should you have any questions regarding these matters.

Sincerely yours,

McGARVEY, HEBERLING, SULLIVAN
& McGARVEY



Roger M. Sullivan

RMS/lmr

Enclosure as stated

cc: Senator Max Baucus
Senator Conrad Burns
Senator Patrick Leahy
Representative Denny Rehberg