

# Montana State Legislature

**Exhibit Number:** 3

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By Roger M. Sullivan  
February 17, 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 Senate on February 16, 1999 in successful opposition to Senate Bill 432, which would have allowed Grace to avoid being held accountable for its horrendous 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 not 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 Senate Judiciary 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," about 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 bill, 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.<sup>1</sup> 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 49% of "severe" 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.
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 lied 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

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<sup>1</sup>The medical criteria reviewed by Dr. Whitehouse in his 1/12/05 letter remains the same in the 2/07/05 "Discussion Draft."

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.<sup>2</sup>

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.<sup>3</sup> 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 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.<sup>4</sup> Unless the federal asbestos legislation is amended to ensure to that those suffering from Libby tremolite asbestos disease get the

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<sup>2</sup>*Finstad v. W.R. Grace & Co.*, 2000 MT 228, 301 Mont. 240, 8 P.3d 778.

<sup>3</sup>We have received authorization to use this document from the Grace PI Committee.

<sup>4</sup>Under our system of justice, the defendants are presumed innocent until proven guilty at trial .

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.

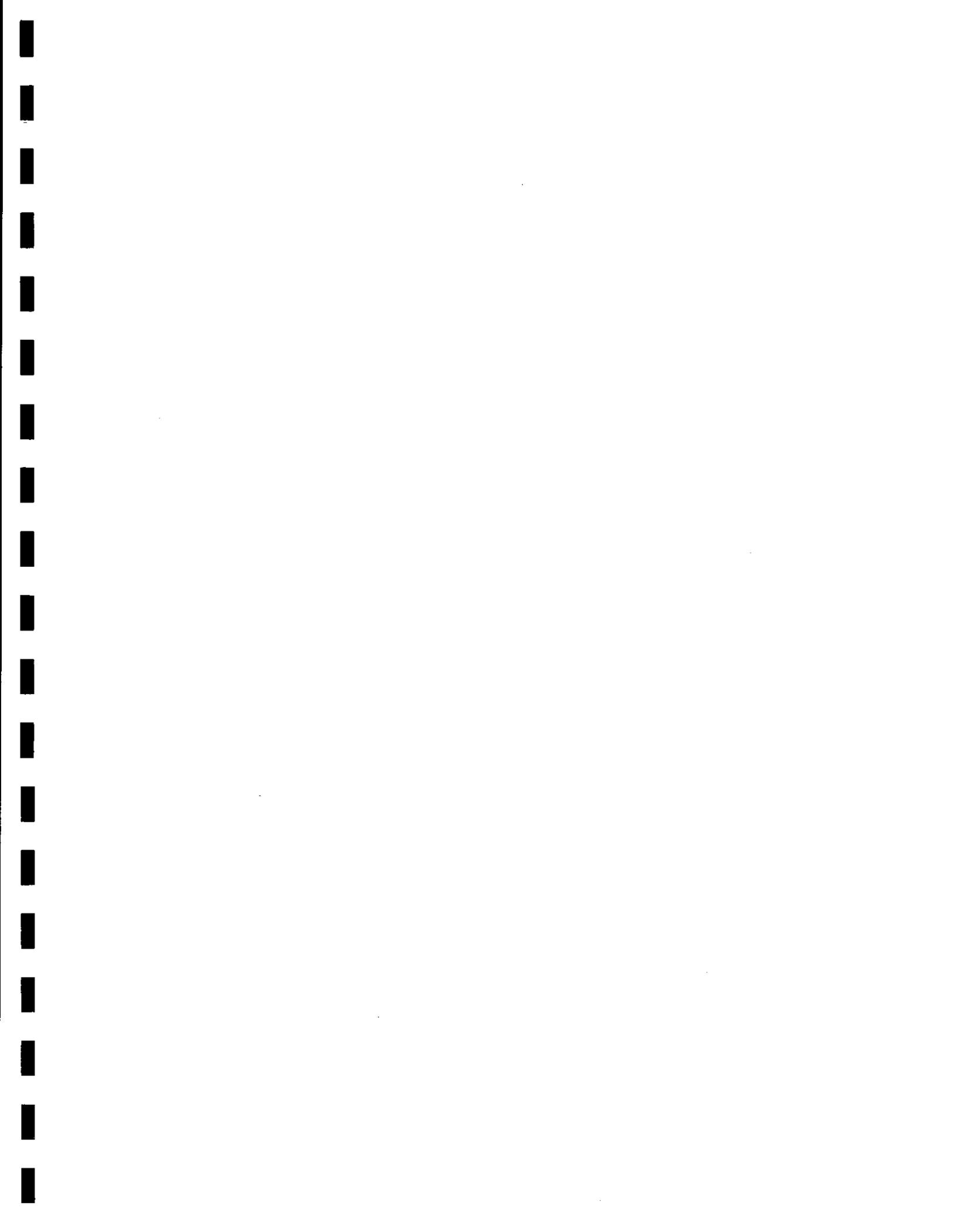
Senate Joint Resolution 27 asks Congress to do the right thing for Libby asbestos victims. We ask your support. Thank you.

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

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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.