

**SUMMARY OF *NORFOLK & WESTERN RY. CO. v. AYERS*,**  
**538 U.S. (2003) AND ITS IMPACT ON THE FEAR**  
**OF CANCER CLAIM IN ASBESTOS LITIGATION**

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**I. Factual Background And Procedural Posture Of *Ayers*.**

*Ayers* stems from six former railroad employees bringing suit under the Federal Employers' Liability Act, ("FELA")<sup>1</sup> against Norfolk & Western Railway Company ("Norfolk"), alleging that Norfolk negligently exposed the workers to asbestos during their employment, which subsequently caused them to develop asbestosis.<sup>2</sup> As part of their damages, the plaintiffs sought to recover for mental anguish based on their alleged fear of developing cancer. Of the six asbestosis claimants, five had smoking histories and two continued to smoke in spite of their diagnosis.

Prior to trial, Norfolk moved to exclude all evidence referring to cancer on the basis that such evidence was irrelevant and prejudicial. The trial court, however, denied Norfolk's motion. As a result, the plaintiffs were permitted to introduce evidence relating to cancer, including expert testimony that asbestosis sufferers with smoking histories had a significant increased risk of developing lung cancer. The jury was also made aware that asbestosis sufferers had a 1 in 10 risk of dying from mesothelioma, a fatal cancer of the lining of the lung or abdominal cavity.

Given that the plaintiffs failed to show they were reasonably certain to develop cancer, the trial court instructed the jury that damages could not be awarded for cancer or any increased risk of cancer. Instead, the trial court explained that the testimony relating to cancer was relevant to the plaintiffs' fear of developing cancer. As a result, the trial court instructed the jury that a plaintiff who demonstrates a reasonable fear of cancer related to a physical injury from asbestos was

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<sup>1</sup>Enacted in 1908, the Federal Employers' Liability Act, 45 U.S.C. § 51-60, otherwise known as FELA, holds railroads liable for damages to employees who sustain work-related injuries caused "in whole or in part" by the railroad's negligence.

<sup>2</sup>In footnote 2 of *Ayers*, the United States Supreme Court defined asbestosis as "a non-cancerous scarring of the lungs by asbestos fibers; symptoms include shortness of breath, coughing and fatigue."

entitled to compensation for such a fear as part of the damages for pain and suffering. In providing this instruction to the jury, the trial court rejected Norfolk's proposed instruction, which would have precluded damages for the fear of cancer unless the plaintiffs proved a likelihood of developing cancer and physical manifestations of the alleged fear of developing cancer.

In addition, the trial court also rejected Norfolk's proposed instruction requiring the jury to apportion damages between Norfolk and other employers alleged to have contributed to the plaintiffs' injuries. Rather, the trial court instructed the jury not to reduce damages so long as the jury found that Norfolk was negligent, and that asbestos dust exposure at Norfolk contributed, however slightly, to each of the plaintiff's injuries.

The matter was submitted to the jury, which returned a damages award for each plaintiff, ranging from \$770,000 to \$1.2 million. After taking into consideration the comparative negligence from smoking and settlements with non-FELA parties, the final judgment totaled \$4.9 million.

Upon consideration, the United States Supreme Court granted certiorari and ultimately affirmed the jury instructions provided by the trial court on the issues of fear of cancer and apportionment.

## **II. Treatment Of The Fear Of Cancer Claim By The United States Supreme Court.**

In *Ayers*, two essential issues were presented to the United States Supreme Court for review: (1) whether an asbestosis claimant can recover under FELA for the fear of developing cancer as part of his pain and suffering damages; and (2) whether the railroad is entitled to apportionment of damages under FELA.

With respect to the latter issue, a unanimous Court determined that FELA does not mandate apportionment. Rather, under FELA, an injured worker is entitled to recover his/her entire damages from a railroad whose negligence caused the injury, thereby placing the burden on the railroad to identify and seek contribution from other responsible parties. Thus, a railroad can be held completely liable for an employee's claim, even if other employers or manufacturers/suppliers of asbestos contributed to causing the injury.

As to the first issue, the five justice majority held that under FELA, an asbestosis claimant can recover mental anguish damages resulting from the fear of developing cancer. Thus, the trial court properly instructed the jury that an asbestosis claimant, who demonstrates a reasonable fear of

cancer, can recover for such a fear as part of his/her pain and suffering damages.

It is significant to note that Justice Ruth Bader Ginsburg authored the Court's opinion, which was joined by Justice John Paul Stevens and Justice David Souter. Surprisingly, Justice Antonin Scalia and Justice Clarence Thomas, the more conservative members of the Court, also joined the majority opinion.

To support its position that an asbestosis claimant can recover damages for the fear of cancer, the Court relied heavily on its prior decisions in *Metro-North Commuter R. Co. v. Buckley* (1997), 521 U.S. 424, and *Consolidated Rail Corp. v. Gottshall* (1994), 512 U.S. 532.

A. ***Consolidated Rail Corp. v. Gottshall*** (1994), 512 U.S. 532.

In *Gottshall*, the FELA plaintiff sought damages from his employer after he witnessed the death of his co-worker, which caused him to suffer severe emotional distress. Upon consideration, the United States Supreme Court relied on the "zone-of-danger" doctrine to determine "the proper scope of an employer's duty under FELA to avoid subjecting its employees to negligently inflicted emotional injury[.]" *Gottshall* at 554. Under this test, a plaintiff can recover for "stand-alone" emotional distress claims if: (1) he/she suffers a physical injury as a result of the defendant's negligence; or (2) he/she is placed in immediate risk of physical harm by the defendant's negligent conduct, such that the plaintiff is within the "zone-of-danger" of physical injury. *Id.* at 547-548. As such, the Court reversed the lower court's judgment in favor of the plaintiff and remanded the matter for reconsideration under the zone-of-danger test. *Id.* at 558.

B. ***Metro-North Commuter R. Co. v. Buckley*** (1997), 521 U.S. 424.

In *Metro-North*, the plaintiff was exposed to asbestos while working as a pipefitter, and he sought damages for emotional distress. However, at the time of his lawsuit, he was disease-free. Upon consideration, the United States Supreme Court announced that exposure *alone* is insufficient to show physical impact under the zone-of-danger doctrine. *Metro-North* at 430. The Court reasoned that "contacts, even extensive contacts, with serious carcinogens are common." *Id.* at 434. To hold otherwise would lead to "unlimited and unpredictable liability." *Id.* at 435. Thus, the Court held that under FELA, emotional distress damages could not be recovered by a disease-free asbestos exposed worker. In

contrast, the Court observed that workers who suffer from a disease, such as asbestosis, may “recover for related negligently caused emotional distress \*\*\*.” Id. at 432.

C. Application of *Metro-North* and *Gottshall* to *Ayers*.

According to the Court, *Metro-North* and *Gottshall* describe two categories of claims for emotional distress damages: (1) the stand-alone emotional distress claims, which does not involve physical injury and limits recovery to those plaintiffs who are within the zone of danger; and (2) emotional distress claims resulting from a physical injury for which pain and suffering recovery is permitted.

With the foregoing in mind, the Court noted that each plaintiff in *Ayers* had a physical injury or disease as each was afflicted with asbestosis. As such, the plaintiffs in *Ayers* fell within the second category, to-wit: emotional distress stemming from a physical injury, for which compensation is allowed. Therefore, the Court held that under FEOLA, a plaintiff can recover mental anguish damages for the fear of cancer when that fear is accompanied by a physical injury.

D. The Trend In Lower Courts To Sustain The Fear Of Cancer Claim.

To further support its holding that the fear of cancer is a compensable claim, the Court relied on the fact that many lower courts have recognized such claims. According to the Court “[h]eightedened vulnerability to cancer \*\*\* ‘must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles,’ he knows it is there, but not whether or when it will fall.”

Arguing against this trend in the lower courts, Norfolk argued that an asbestosis claimant’s alleged fear of cancer is too remote from asbestosis to be included in a pain and suffering award. As to this point, the federal government, one of Norfolk’s amici, cited to the “separate disease rule.” Pursuant to the separate disease rule, a claimant who has already recovered for injuries resulting from asbestosis can bring another lawsuit if cancer develops, in spite of the “single action rule” which prohibits splitting a cause of action. From this, the federal government and Norfolk argued that because an asbestosis claimant may bring a second cause of action if he/she develops cancer, cancer-related damages were unwarranted in an asbestosis lawsuit. The Court, however, rejected this argument,

reasoning that the plaintiffs were seeking damages for their current injury, which included a present fear of developing cancer. Thus, according to the Court, the flaw in the argument of the federal government and Norfolk was that it excluded recovery for any fear experienced by an individual suffering from asbestosis who never develops cancer.

E. Relationship Between Asbestosis And Cancer.

Norfolk also urged that to be compensable as pain and suffering, the mental or emotional harm must have been directly brought about by a physical injury. Given that asbestosis does not cause cancer, Norfolk insisted that the fear of cancer was too unrelated to be an element of an asbestos sufferer's pain and suffering. The Court, however, found a correlation between asbestosis and cancer by referring to Norfolk's own expert, who acknowledged that asbestosis placed an individual in a heightened risk category for developing asbestos-related lung cancer. Furthermore, because 10% of asbestosis sufferers die from mesothelioma, the Court concluded that the plaintiffs in *Ayers* "would have good cause for increased apprehension" about developing cancer.

F. Restrictions Placed On The Fear Of Cancer Claim By *Ayers*.

While the Court held that an asbestosis claimant can seek compensation for the fear of cancer as an element of his/her pain and suffering damages, the Court limited its holding by requiring the plaintiff to prove his/her alleged fear of cancer is both "genuine and serious." This, however, is not of much help as the Court failed to define or specify how this standard of proof is to be shown or refuted.

**III. Justice Kennedy's Dissenting Opinion.**

A. The *Ayers* decision threatens the objective of FELA.

Justice Anthony Kennedy, with whom Chief Justice William Rehnquist and Justice Sandra Day O'Connor joined, dissented from the majority opinion as to its treatment of the fear of cancer issue. The focus of Justice Kennedy's dissent was on the purpose of FELA, and the consequences of allowing compensation for the fear of cancer:

[T]he purpose of FELA is to provide compensation for

employees protected under the Act. \*\*\* *The Court's decision is a serious threat to that objective.* Although a ruling that allows compensation for fear of a disease might appear on the surface to be solicitous of employees and thus consistent with the goals of FELA, the realities of asbestos litigation should instruct the Court otherwise.

Consider the consequences of allowing compensation for fear of cancer in the cases now before the Court. The respondents are between 60 and 77 years old. All except one have a long history of tobacco use, and three have smoked for more than 50 years. They suffer from shortness of breath, but only one testified that it affects his daily activities. As for emotional injury, one of the respondents complained that his shortness of breath caused him to become depressed; the others stated, in response to questions from their attorneys, that they have some 'concern' about their health and about cancer. For this, the jury awarded each respondent between \$770,640 and \$1,230,806 in damages, reduced by the trial court to between \$523,605 and \$1,204,093 to account for the comparative negligence of the respondents' cigarette use.

Contrast this recovery with the prospects of an employee who does not yet have asbestosis but who in fact will develop asbestos-related cancer. Cancers caused by asbestos have long periods of latency. Their symptoms do not become manifest for decades after exposure." \*\*\* *These cancers inflict excruciating pain and distress – pain more severe than that associated with asbestosis, distress more harrowing than the fear of developing a future illness.*

One who has mesothelioma, in particular, faces agonizing, unremitting pain in the lungs, which spreads throughout the thoracic cavity as tumors expand and metastasize. \*\*\* *Yet the majority's decision endangers this employee's chances of*

*recovering any damages for the simple reason that, by the time the worker is entitled to sue for the cancer [itself], the funds available for compensation in all likelihood will have disappeared, depleted by verdicts awarding damages for unrealized fear, verdicts the majority is so willing to embrace.*  
(Emphasis added.)

The central point of Justice Kennedy's dissent is that no compensation will be available for those plaintiffs who develop cancer because the resources that were available for such compensation will have already been exhausted by those plaintiffs who have a fear of contracting cancer. Stated simply, those plaintiffs with the most severe injury, to-wit: cancer caused by asbestos exposure, will not be able to recover any compensation, while those plaintiffs with a less serious injury, that is, the fear of contracting cancer, will have obtained monetary compensation for their injuries.

Is this an equitable result? Does this further the purpose of FELA? Of course not. As Justice Kennedy observed, such an outcome flies in the face of FELA and undermines its purpose, which is to provide compensation to employees:

It is only a matter of time before inability to pay for real illness comes to pass. The Court's imprudent ruling will have been a contributing cause to this injustice.

Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000. \*\*\* With each bankruptcy the remaining defendants come under greater financial strain[.] \*\*\*

In this particular universe of asbestos litigation, with its fast diminishing resources, the Court's wooden determination to allow recovery for fear of future illness is antithetical to FELA's goals of ensuring compensation for injuries. \*\*\* *As a consequence of the majority's decision, it is more likely that those with the worst injuries from exposure to asbestos will find they are without remedy because those with lesser, and even problematic,*

*injuries will have exhausted the resources for payment. Today's decision is not employee-protecting; it is employee-threatening.* (Emphasis added.)

B. No causal link between asbestosis and cancer.

Justice Kennedy also attacked the majority's conclusion that damages for the fear of cancer may be recovered as part of the pain and suffering caused by asbestosis. As to this point, Justice Kennedy posed the following question: "What relationship between a disease and associated emotional distress should entitle a person to compensation for the distress as pain and suffering?" Citing to *Gotthall*, 512 U.S. at 544, Justice Kennedy answered, "[t]o qualify as compensable pain and suffering, a person's emotional distress must be the *direct consequence* of an injury or condition." (Emphasis added.)

With that in mind, Justice Kennedy concluded that the fear experienced by the claimants in *Ayers* was not a direct result of their asbestosis:

Unlike shortness of breath or other discomfort asbestosis may cause, their fear does not arise from the presence of disease in their lungs. Instead, *the respondents' fear is the product of learning from a doctor about their asbestosis, receiving information (perhaps at a much later time) about the conditions that correlate with this disease, and then contemplating how these possible conditions might affect their lives.* (Emphasis added.)

Justice Kennedy further challenged the majority's statement that "there is an *undisputed relationship* between exposure to asbestos sufficient to cause asbestosis, and asbestos related cancer." (Emphasis added.) Justice Kennedy pointed out that there exists no causal relationship between asbestosis and cancer. Without such a direct link, damages based on the fear of developing cancer is not warranted:

To state that *some relationship* exists without examining whether the relationship is enough to support recovery, however, ignores the central issue in this case. There is a fundamental premise in this case – conceded \*\*\* by all parties – and it is this: *There is*

*no demonstrated causal link between asbestosis and cancer.*  
\*\*\* The incidence of asbestosis *correlates* with the less-frequent incidence of cancer among exposed workers, \*\*\* but this does not suffice. *Correlation is not causation.* Absent causation, it is difficult to conceive why asbestosis is any more than marginally more suitable a predicate for recovering for fear of cancer than the fact of mere exposure. This correlation the Court relies upon does not establish a direct link between asbestos and asbestos-related cancer, and it does not suffice under common-law precedent as a predicate condition for recovery of damages based upon fear.

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\*\*\* Although the anxiety generated by an increased awareness about a disease may be real and painful, it lacks the direct link to a physical injury that suffices for recovery. (Emphasis added.)

C. Recovery for the fear of cancer when cancer develops.

Justice Kennedy further pointed out that under the separate disease rule, an asbestosis claimant will be able to obtain recovery for the pain and suffering caused by cancer if and when that cancer develops. Thus, contrary to the majority's position, asbestosis claimants are not left without a remedy for their fear of contracting cancer. An asbestosis claimant can institute an action to recover for the fear of cancer when the cancer, in fact, develops. Such an approach, according to Justice Kennedy, "is more likely to result in an equitable allotment of compensation than the decision of the [Court.]" He further stated:

'Damages for fear of cancer are speculative \*\*\* To allow the asbestos plaintiff in a non-cancer claim to recover for any part of the damages relating to cancer, including the fear of contracting cancer, erodes the integrity of and purpose behind the [separate] disease rule.'

*Simmons v. Pacor, Inc.*, (1996), 543 Pa. 664, 677-678.

D. Inability of jurors to measure damages.

Another flaw in the majority's decision is that no jury will be able to place a fair estimate on the fear of developing cancer. The plaintiffs in *Ayers* sought compensation for the emotional distress caused by being told they have an increased likelihood of developing cancer and dying. However, the ability of the jury to place a fair and accurate monetary figure on such emotion distress is impossible:

The extent of the distress the respondents suffered is not calculable with a precision sufficient to permit juries to award damages, for the distress is *simply incremental from the fears already shared by the general population*. (Emphasis added).

**IV. Justice Breyer's Dissenting Opinion.**

A. Impossibility of evaluating the fear of cancer.

In a separate dissent, Justice Stephen Breyer stressed, as did Justice Kennedy, that "the increment in a person's fear of cancer due to diagnosis of a condition such as asbestosis seems virtually impossible to evaluate." Thus, Justice Breyer urged that speculation on the part of the jury in determining damages will lead to unlimited and unpredictable liability:

How is the jury, without speculation, to measure compensation for the augmentation of a cancer fear from, say two in nine to one in three? *Given the fact that most of us lead our lives without compensation for fear of a 22% risk of cancer death \*\*\* what monetary value can one attach to an incrementally increased fear due to a risk, say, of 30%?* The problem here is not the unreality or lack of seriousness of the fear. It may be all too real. The problem is the impossibility of knowing an appropriate compensation for asbestosis insofar as its appearance tears away that veil of disregard that ordinarily shelters most of us from fear of cancer, if not fear of death itself. The majority's verdict control measures \*\*\* will not help much in this respect. (Emphasis added.)

Like Justice Kennedy, Justice Breyer observed that in light of the limited funds available for compensation, those plaintiffs with cancer will not be able to recover any compensation, while those with the fear of contracting cancer will have obtained monetary compensation for their injuries. According to Justice Breyer:

[I]t would be perverse to apply tort law's basic compensatory objectives in a way that compensated less serious injuries at the expense of more serious harms. \*\*\* [T]hose concerns favor a legal rule that will permit future cancer victims to recover for their injuries, including emotional suffering, even if that recovery comes at the expense of limiting the recovery for fear of cancer available to those suffering some present harm.

B. Justice Breyer's test for denying recovery.

Although he embraced the majority's limitation on recovery to those plaintiffs who have both a genuine and serious fear of developing cancer, Justice Breyer would further limit recovery to instances "where the fear of cancer is unusually severe – where it significantly and detrimentally affects the plaintiff's ability to carry on with everyday life and work."

In fact, Justice Breyer created a test to deny recovery for the fear of cancer if the following factors are present:

(1) actual development of the disease can neither be expected nor ruled out for many years; (2) fear of the disease is separately compensable if the disease occurs; and (3) fear of the disease is based upon risks not significantly different in kind from the background risks that all individuals face.

V. **Impact Of Ayers On The Fear Of Cancer Claim In Asbestos Litigation.**

A. Lower Court trends in interpreting *Ayers*.

*Ayers*, decided on March 10, 2003, is only 3 months old. As such, it is too early to predict with any type of accuracy how the lower courts will attempt to interpret and apply

*Ayers*. However, it is without any doubt that plaintiff attorneys will attempt to expand the holding of *Ayers* and seek its application not only in FELA cases, but to virtually every state tort claim as well. In fact, it is foreseeable that even the most conservative state courts may be willing to extend the application of *Ayers* beyond FELA cases.

B. Mere concern about health insufficient for recovery.

To prevent *Ayers* from becoming misconstrued, defense attorneys must obviously argue for a narrow interpretation of the decision. The five justice majority did attempt to limit its holding by announcing that only plaintiffs whose fear is both “genuine and serious” may obtain recovery for the fear of contracting cancer. This, however, is of little help in light of the fact that the Court failed to define or specify how this standard of proof could be shown or refuted. The Court, however, did provide some significant clues.

For instance, the Court acknowledges that a general concern about one’s health is insufficient to support recovery for the fear of cancer. This is confirmed by the fact that the Court in *Ayers* cited to *Smith v. A.C. & S., Inc.*, (C.A. 5, 1988), 843 F.2d 854, 859, for the proposition that “‘general concern for [one’s] future health’ held insufficient to support recovery for an asbestosis sufferer’s fear of cancer[.]”

In applying its “genuine and serious” standard to the plaintiffs in *Ayers*, the Court noted that the proof supporting their fear of developing cancer “was notably thin.” This was because one plaintiff failed to testify about having any concerns about developing cancer, while another testified that “he was more afraid of shortness of breath from his asbestosis than of cancer.” The remaining plaintiffs had “varying degrees of concern” about developing cancer, and no plaintiff “presented corroborative objective evidence of his fear.” *Ayers*, fn.18.

Therefore, to combat against a broad interpretation of *Ayers*, defense attorneys must assert that more than a mere concern or an expression of fear of developing cancer is necessary to obtain recovery for the fear of developing cancer. As noted by Justice Breyer, such a general concern is universally experienced by all individuals and does not rise to the level of having a “genuine and serious” fear of cancer.

C. Fear of cancer must be severe and debilitating to be compensable.

In an attempt to define the “genuine and serious” standard set forth by the Court in *Ayers*, defense attorneys can examine the treatment of emotional distress cases in Ohio for some guidance. For instance, in *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131, the Supreme Court of Ohio held that “those injured by the negligent infliction of serious emotional distress should have the opportunity to recover damages.” *Id.* at 136. The *Schultz* Court further recognized that “[e]motional injury can be as severe and debilitating as physical harm and is deserving of redress.” *Id.* at 135.

Subsequently, *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, was decided on the heels of *Schultz*. In *Paugh*, the Supreme Court of Ohio defined “serious” emotional distress as being both severe and debilitating:

By the term ‘serious,’ we of course go beyond trifling mental disturbance, mere upset or hurt feelings. *We believe that serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case. \*\*\**

A non-exhaustive litany of some examples of serious emotional distress should include traumatically induced neurosis, psychosis, chronic depression, or phobia. (Emphasis added.)  
*Paugh* at 78.

In light of the foregoing, a persuasive argument can be made that to satisfy the “genuine and serious” standard set forth in *Ayers*, the plaintiff must present evidence to demonstrate that his/her fear of developing cancer rises to the level of being severe and debilitating, such that he/she is forced to seek medical or psychiatric counseling, is unable to work, or is otherwise unable to function in daily life. See, e.g., *Risch v. Friendly’s Ice Cream Corp.* (1999), 136 Ohio App.3d 109, 115 (holding that emotional distress does not rise to the level of being “severe and debilitating” when the plaintiff merely claimed that she suffered from stress and nightmares, and there was no evidence that the plaintiff “was forced to seek medical or psychiatric treatment or that she was unable to function in her daily life.”).

D. Objective evidence requirement under *Ayers*.

It is evident that the “genuine and serious” standard of proof set forth by the Court will be a difficult standard for trial courts to enforce and interpret. Such a subjective and fact specific test could lead to inconsistent and capricious results.

To counter against such an outcome, defense attorneys must urge that pursuant to *Ayers*, the claimant is required to produce objective corroborative evidence that he/she has a genuine and serious fear of developing cancer, other than the statements the claimant may have made in connection with the litigation. Such an argument is clearly advocated by *Ayers* in footnote 18. There, the Court stated that the evidence submitted by the plaintiffs at trial to support their fear of cancer claim “was notably thin[,]” and observed that “*no claimant presented corroborative objective evidence of his fear [of developing cancer].*” (Emphasis added.) Accordingly, defense attorneys can present a very persuasive argument that the plaintiff should be required to produce objective corroborative evidence from individuals not connected to the litigation to support the claim that the plaintiff has a genuine and serious fear of developing cancer. Such evidence can be presented through the testimony of individuals who are involved in treating or counseling the plaintiff for their asbestos related disease.

**VI. Conclusion.**

Norfolk & Western’s attorney described the Court’s ruling in *Ayers* as “‘disappointing’ but would not drastically increase the number of claims against railroads under FELA. ‘I don’t think it will mean more cases, because it only applies if the plaintiff has asbestosis[.] \*\*\* It also doesn’t help decide how much proof is necessary to show emotional injury, so I don’t think the railroads will easily agree to larger settlements based on this claim.’ He did suggest that railroad employers might be less willing to take cases to juries, because ‘the fear of damages claim is a wild card.’”<sup>3</sup>

The *Ayers*’ decision has added fuel to the fire surrounding the debate in the area of asbestos litigation. The United States Supreme Court’s determination that under FELA, asbestosis claimants can recover damages for the fear of asbestos-related cancer and that defendants are not entitled

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<sup>3</sup>Tony Mauro, *Courts Give Boost to Those Claiming Fear of Cancer from Asbestos Injury*, (Mar. 17, 2003), New Jersey Law Journal.

to apportionment of damages sends a double blow not only to businesses but to asbestos litigation. It is quite conceivable that the effect of the *Ayers* decision will be the ultimate draining of funds. As observed by Justice Kennedy and Justice Breyer, those plaintiffs who suffer from asbestos-related cancer will not obtain any compensation because the funds available for such compensation will have been depleted by unpredictable and inconsistent jury verdicts rendered in favor of asbestosis claimants who have a fear of developing cancer. Such a result is not only inequitable, it threatens the underlying objective of FELA, which is to ensure that all employees obtain compensation for their injuries. Hopefully, this commentary has presented some arguments to ensure that *Ayers* will be fairly interpreted by the lower courts.