

ASBESTOS LITIGATION CRISIS -- (Senate - November 22, 2003)

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Mr. FRIST. Mr. President, before entering into the debate on Medicare, I will comment on an issue that the Democratic leader and I have worked on very aggressively over the last several months, and it relates to the current asbestos litigation crisis. The current asbestos litigation system is broken, and it is clear that we in this Congress should fix it. We have an obligation, a real responsibility, to fix it.

I would like to lay out what our plans are to resolve this asbestos litigation crisis early next year. We have made very good progress toward enacting Chairman *Hatch's* FAIR Act, which is the Fairness in Asbestos Injury Resolution Act. I have made it a personal priority that the Senate participate aggressively in resolving this challenging issue.

Why do we call what is occurring today a crisis? First, the events that are occurring are overwhelming. The torrent of asbestos litigation has wreaked havoc on asbestos victims, on American jobs, and this havoc has extended into our economy.

Over 600,000 claims have been filed and those 600,000 claims have already cost about \$54 billion in settlements, judgments, and litigation costs. Yet even after 600,000 claims and \$54 billion, the current asbestos tort system has become nothing more than a litigation lottery at this point in time.

Why do I say that? First, a few victims receive adequate compensation but far more suffer long delays for what ends up being unpredictable rewards--also, if one looks at the data, inequitable awards. Some deserving victims do not receive anything at all. It is a system that there is only one real consistent winner, and that is the plaintiffs' trial lawyers.

I say that because of all of these settlements. They are taking as much as half of every dollar that is awarded to the victims.

If you look to the future, it is a problem that only gets worse. It is accelerating in the negative aspect. But if you look to the future, it gets even worse.

Future funds for asbestos victims are threatened because company after company after company is going bankrupt. About 70 companies have gone bankrupt, and about a third of those have gone bankrupt in the last 2 1/2 to 3 years. The pace of bankruptcies of very large companies with thousands and thousands of employees is accelerating.

Again, this is an issue for us to address. That is why I want to set a schedule for that in a few minutes.

Companies such as Johns Mansville, bankrupt; Owens Corning, bankrupt; U.S. Gypsum, bankrupt; and, W.R.

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Grace, bankrupt: these are large reputable companies that have gone bankrupt because of this crisis with the associated job losses.

Now the hunt is on to get new targets and to go out and sue. People say this is easy money, and the easy way is to go out in terms of bringing a lawsuit and filing a lawsuit. Thus, the hunt is on for new targets to sue. What is unfair and inequitable is that many of these lawsuits have no connection at all to asbestos. If you really look at the connection between asbestos and the victims, it is just not there.

Victims aren't the only ones who suffer but also the workers of these companies that are going bankrupt suffer. Asbestos-related bankruptcies spell doom for these workers' jobs; thus, their families, and, of course, incomes and retirement savings. Already, these lawsuits have cost more than 60,000 Americans their jobs. For those who lose their jobs, the average personal loss in wages over a career is as much as \$50,000, and that doesn't include the loss of retirement wages or the loss of health benefits. Workers at asbestos-related bankrupt firms with 401(k) plans lost about 25 percent of the value of their 401(k) accounts because of this.

The economic reality of this crisis is not lost on my colleagues in this body. They understand that under the status quo the national asbestos crisis could cause our economy more than the savings and loan crisis of the 1980s and 1990s, and more than the Enron debacle or the WorldCom debacle. Member after Member from both sides of the aisle has voiced their agreement with the assessment of the Supreme Court that the system is broken and the Congress should fix it.

There is only one question: what can we do? Can we create a system better than the status quo? The answer is yes.

The FAIR Act--the Fairness in Asbestos Injury Resolution Act--has already made significant headway, and we look forward to progress today. Under the leadership of Chairman *Hatch*, it was passed by the Senate Judiciary Committee last July, and there have been ongoing discussions and negotiations since then.

I commend Chairman *Hatch* and the ranking minority member, Senator *Leahy*, for their hard work on the bill.

I also want to recognize Senator *Specter* for his hard work in conjunction with Judge Becker.

I also want to note that my Democratic colleagues,

organized labor, and other stakeholders have been deeply involved throughout the process. Led by Senator *Hatch*, bipartisan breakthroughs have been made on issues that previously have proved impossible to address, including such issues as--and there are many of them--the linchpin issue of the medical criteria that had proven historically to be so difficult and controversial.

In addition, agreements among stakeholders following the committee markup have resulted in even more modifications. The resulting bill creates a system that, while not perfect, is far superior to the current tort system for resolving asbestos issues.

I became deeply involved in the post-Judiciary Committee negotiating process, working in concert with Senator *Daschle*, as well as Chairman *Hatch* and Senators *Leahy*, *Specter*, *Dodd*, and *Carper*, and some others on both sides of the aisle. We have made good progress. I know during the debate over this legislation all of the relevant issues have been unearthed. They have been exposed to public debate, and all parties have had an opportunity to get involved to contribute their points of view.

What emerged under S. 1125 and the current negotiations is a streamlined national trust fund for paying asbestos claimants quickly, paying them fairly, and paying them efficiently. The new system provides more certainty and efficiency for claimants, and more certainty and predictability for businesses.

Passing this bill will create enormous economic benefits. I say that because the certainty that flows from the bill will stimulate capital investment. It will also preserve existing jobs and create new jobs as well.

I had hoped that we would bring this bill to the floor before the end of this session, but we were unable to achieve that goal. Chairman *Hatch* and Senator *Leahy* worked hard to resolve many difficult issues at the committee level. Senator *Daschle* and I, along with our staff, have continued to work with stakeholders to put more issues behind us over the past several months.

While there are several issues that remain outstanding, the core principles of an effective bill are now clear.

What are they?

First, the bill must create a trust fund that is capable of awarding adequate compensation to victims while providing more financial certainty and finality to the business community. The new funding proposal that I put on the table would generate payments that would exceed by \$10 billion the expected funds which victims would receive if the current flawed tort system is left intact.

Second, the legislation must establish a schedule of claims values that will ensure victims consistent and equitable awards. We cannot tolerate the current system where payments can depend on where a plaintiff lives or which is capable of awarding only pennies for every dollar promised.

I am also prepared to consider further modest increases in claims values as requested by the Democrats and as requested by organized labor, provided that any new increase is targeted to the most severe disease categories where the relationship to asbestos exposure is most certain.

We must make sure, however, that lung cancer claims not caused by asbestos are not allowed to overwhelm the fund.

Third, the fund must be a nonadversarial program that ensures prompt payment of awards to eligible claimants while minimizing transaction costs, including attorney's fees. Care must be taken to ensure that the fund is established on an expedited basis, and adequate moneys are available to pay exigent claims from the outset.

Fourth, we must preserve the bipartisan medical criteria included in S. 1125 as reported by the Judiciary Committee. Only by ensuring the use of real diagnoses of asbestos-related illnesses can the fund avoid the pitfalls that plague the current mass tort system.

Fifth, and finally, asbestos victims should not bear the risk of inadequate funding or incorrect predictions about future claims, as is the case under the current tort system.

The legislation should make clear that if the fund cannot guarantee that victims will receive all of their claims, a program review is triggered, and if not corrected the fund should end and claims should revert to the tort system. To work, however, such a reversion would have to be to Federal court and should contain certain additional protections to ensure the current litigation morass is not recreated.

Such an approach reduces, if not eliminates, the need to worry about which claims projections are correct.

Clearly, a more thorough discussion of these observations, recommendations, and outstanding issues is warranted.

I ask unanimous consent that a document entitled ``Moving Forward in Asbestos Injury Resolution Act, S. 1125" be printed in the **RECORD** at the conclusion of my remarks.

The PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit I)

Mr. FRIST. Mr. President, this allows a more complete discussion of the principles and observations I have made thus far. I do hope people take a look at that document.

As for the future, if we intend to make good on our collective hope to pass legislation, at some point the ongoing discussions and negotiations must cease and a bill must be brought to the floor. Victims are still going uncompensated today, companies are still going bankrupt today, and the economy is still unnecessarily burdened. We must act.

The minority leader as well as Senator *Leahy* and other Democratic Members have made clear to me their interest in working toward consensus legislation. It is clear we still need a little more time for discussion. Consequently, we will not force a vote on the FAIR Act this session. Instead, I will give stakeholders more time to negotiate a compromise. There will, however, be a limit to these discussions because we must act. Thus, I will commence floor action on an asbestos bill by the end of March 2004. Again, I will commence floor action on an asbestos bill by the end of March of 2004.

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There is no perfect solution to the current asbestos litigation crisis, but it is clear that maintaining the status quo is unacceptable. We have a responsibility to act, and we will act in this body. We must not let this historic opportunity to enact fair and meaningful reform pass in order to pursue a perfect solution that is unachievable. The time has come for the Senate to fashion the right solution to one of the most pressing issues facing us, facing our economy and this Nation today.

Exhibit I

Moving Forward on the Fairness in Asbestos Injury Resolution Act, S. 1125--Statement of Senator Frist

To bring an end to the current asbestos litigation crisis, Congress must pass legislation creating a national no-fault asbestos trust fund ("Fund") that ensures adequate compensation to victims, while providing financial certainty to the business community. This kind of program would provide more direct compensation, more quickly to victims than the current system can deliver. Moreover, it would provide that compensation without the bankruptcies or the lost workers' jobs, incomes, and retirement savings that asbestos personal injury litigation produces. It represents, therefore, a tremendous achievement in the creation of a solution to a problem whose future economic consequences are enormous--in the magnitude of more than \$100 billion if the claims stay in the tort system.

This past July, under the leadership of Chairman Hatch, the Senate Judiciary Committee approved S. 1125, the Fairness in Asbestos Injury Resolution Act ("FAIR Act"), which establishes the framework for reaching a bipartisan solution. To reach a consensus, we must build upon that structure, making improvements where possible but not jeopardizing the two most fundamental elements of the legislation--adequate, timely, and equitable compensation for claimants and financial predictability for the business community.

I. ENSURING ADEQUATE COMPENSATION FOR VICTIMS

According to the two actuarial studies on the magnitude of the problem, one by Tillinghast-Towers Perrin and the other by Milliman USA, ultimate loss and expenses under asbestos personal injury litigation are projected to reach \$200 to \$265 billion. With \$70 billion already spent, total estimated future costs thus range from \$130 to \$195 billion. Victims, however, can expect to receive barely half that amount in actual compensation.

According to RAND's analysis of asbestos compensation, transaction costs under the current system--plaintiffs' attorney fees, defense costs, and expenses--consume more than half of the money that goes into the asbestos litigation system. In other words, only about 40 cents on every dollar spent in the asbestos tort system actually reaches victims. Thus, while today's system has a future price tag of \$130 to \$195 billion, victim compensation is estimated at only \$61 to \$92 billion of that total.

If adopted, the Act will rein in those runaway transaction costs and provide quick, certain, and fair payment for victims. In fact, my funding proposal, which has been agreed to by the defendant companies and insurers, will actually provide asbestos victims at least \$10 billion more than they would receive if the current litigation crisis is left intact.

The primary source of funding under the Act is derived from mandatory contributions: the Act (as reported) required \$104 billion in total mandatory contributions from defendants and insurers. In reaching that total, companies and insurers were to be assessed equally and according to specific statutory provisions. Meanwhile, confirmed bankruptcy trust contributions are estimated to provide an additional \$4 billion, bringing total mandatory funding under the Act (as reported) to \$108 billion.

That funding proposal represented a very fair amount to solve the problem, and provided victims more in direct compensation than they would receive under the current system. The Committee, however, went well beyond this benchmark during markup. S. 1125 (as reported) included significant additional funding provisions. An amendment offered by Senators **KOHL** and **FEINSTEIN** authorized the Administrator to compel companies and insurers to pay additional contingent contributions of up to \$31 billion, and allowed the Administrator to request back end contributions that could have reached a combined total of \$48 billion.

The net effect of these changes to the Act was dramatic. S. 1125 (as reported) could have required businesses and insurers to provide compensation at up to two times the most credible estimates of total future plaintiffs' recoveries under the tort system. As a result, insurers almost uniformly withdrew their support for the Act, calling it "dangerously unaffordable" and "potentially worse than the existing system."

In order to get the legislation back on track, I initiated a mediation process between insurers and defendant companies. We were able to reach agreement on such major issues as overall funding, allocation of funding obligations, and insurance policy erosion, and gain renewed insurer support for the Act. The agreed-upon revisions not only garnered the support of the business community and insurers for the Act, but would also ensure greater Fund liquidity.

Under my funding proposal, insurers would make nominal mandatory contributions of \$46.025 billion on an accelerated payment schedule. Meanwhile, defendants would pay \$57.500 billion in total mandatory contributions and, if necessary, defendants would provide \$10 billion in additional contingency funding. Most importantly, with confirmed bankruptcy trust assets and interest earned, my proposal would provide at least \$10 billion more than the current tort system. It will also preserve one of the great breakthroughs that made widespread business community support for the Act possible--the landmark agreement on a fair and reasonable formula for sharing the funding obligation among defendants. Chairman Hatch is to be commended for shepherding the larger business community to his unprecedented agreement.

In addition, my proposal would better address the Fund's liquidity needs than the Act (as reported). The greatest stress on the Fund is expected to be in the early years when it is required to pay pending as well as current claims. In order to address the resulting liquidity demands, the Act (as reported) allows the Administrator to borrow against the Fund in an amount equal to that of the following calendar year's anticipated contributions. My proposal would give the Administrator authority to obtain billions of dollars of additional funds, if needed, by expanding the Administrator's borrowing authority. All of the Fund's repayment obligations would be fully collateralized by the defendants' and insurers' mandatory contributions, ensuring that federal monies are not put at risk.

Although there are still some funding issues to be worked out, the progress we have made to date is the result of unprecedented cooperation between industry and insurers to find an acceptable solution to the asbestos litigation crisis. We are confident that we can bridge the few remaining differences in the time frame provided.

II. AWARD VALUES

A further step on the path to providing fair compensation for asbestos victims is the establishment of a schedule of claim values that will result in consistent awards. The history of awards under the current tort system is one plagued by uncertainty and unfairness to asbestos victims. Many plaintiffs receive little or nothing, or die before their cases can be heard in court. Of those who do receive awards, the amount of compensation typically depends more on where and when the claims are filed than on the nature of the plaintiffs's illness. In one 1999 Mississippi case involving 4,000 plaintiffs, allocation of a \$160 million settlement was based on how far plaintiffs lived from the courthouse in Mississippi. The Mississippi residents each received \$263,000. Similarly situated plaintiffs from Ohio, Pennsylvania, and Indiana received only \$14,000 each. (See David Cosey, et al. v. E.D. Bullard, et al).

As introduced, S. 1125 contained claim values that were among the highest of any federal compensation program: For example, the award value for claimants compensated under disease level X (mesothelioma) exceeded by three times the maximum death benefits generally available under the National Childhood Vaccine Injury Act, one of the most generous of comparable existing federal programs. Claimant compensation under the FAIR Act's other most serious disease levels was also very generous compared with existing federal programs. Moreover, although the Act's claim values were based loosely on those awarded in existing bankruptcy trusts, it ultimately paid more in real dollars. The Manville Trust, for example, has a scheduled value of \$350,000 for mesothelioma claimants, but is only able to pay 5 cents on the dollar, resulting in an award of \$17,500. Under S. 1125 (as introduced) such a claimant would have received \$750,000--about 43 times the amount actually paid by the Manville Trust. Nonetheless, many Democrats indicated that the values under the Act should be even more generous to claimants.

During Committee consideration of S. 1125, a bipartisan amendment offered by Senators Graham and Feinstein significantly increased the claim values. This amendment was approved by a 14-3 vote of the

Judiciary Committee. The Committee also considered and rejected an amendment offered by Senators Leahy and Kennedy to provide even higher claim values. That amendment misallocated funds too heavily toward those with illnesses less clearly linked to asbestos exposure. In addition, the Committee adopted an amendment to index claim award values to inflation, further providing billions of dollars in additional payments. Moreover, all claimants meeting Level I requirements--potentially over a million exposed workers--would be eligible for medical monitoring reimbursement and would have their statute of limitations tolled so that, if they do get sick, they would have recourse to all the benefits of the Fund. Since the Committee's consideration, Democrats and organized labor have suggested that the medical monitoring should include the out-of-pocket cost of the physician's examination. I believe this is reasonable and should be in the final bill.

With the changes reported out of Committee, the scheduled values under the FAIR Act were even more generous than before. Continuing an example previously mentioned, S. 1125 (as reported) set the Level X (mesothelioma) claim value at an amount that was not three times, but four times

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higher than the death benefits generally available under the National Childhood Vaccine Injury Act--a difference of \$750,000. Similarly, in the bill as reported, mesothelioma claimants would have received not 43 times, but 57 times the amount at which the Manville Trust actually compensates similarly situated victims.

Finally, as introduced, S. 1125 granted the Administrator broad authority with respect to the timing of award payments. Organized labor expressed concerns that payments would drag out over a long period of time, and argued that claimants should receive payments over three to four years. The Judiciary Committee addressed this concern by providing that payments should be disbursed over a period of three years, and in no event more than four years from the date of final adjudication of the claim. Organized labor has continued to express concern, however, that there is no standard to guide how much of their awards claimants should receive each year. Again, this concern should be more adequately addressed, if possible. To address organized labor's concerns, negotiators have accepted a presumption for payment of awards over three years in the following percentages: 40 percent in the first year, and 30 percent in each of the next two years. However, if necessary to protect the fund from short-term liquidity problems, the Administrator has the authority to make payments in equal 25 percent installments over four years.

Notwithstanding the Committee's action to substantially increase claim values, my Democratic colleagues and organized labor continue to believe further increases are warranted. Although I believe the values in S. 1125 are more than fair, even generous, in a no-fault system, and will bring more to claimants in the aggregate than the current system, I am prepared to consider further modest increases in claims awards in an effort to forge a bipartisan consensus, provided they are targeted to categories most uniquely caused by asbestos exposure (versus other possible causes). Consistent with the express philosophy of S. 1125, the greatest increases must be targeted to the most severe disease categories in which the causal relationship to asbestos exposure is most certain.

A remaining challenge, and a prerequisite to any additional increase in claim values, is to address the concern that the criteria for eligible claims under Level VII are sufficiently broad that they could potentially sweep in claimants whose lung cancer is not caused by asbestos but by alternative causes, such as smoking. The American Cancer Society estimates that in 2003 alone there will be over 170,000 new lung cancer cases from all possible causes--or 30,000 more than the Fund's highest projected total of eligible claims over 50 years and over 110,000 more than the highest projections made by Dr. Mark Peterson (who testified before the Senate Judiciary Committee during the debate over the FAIR Act) for the same period. Exacerbating that risk is claims experience demonstrating that well over 90 percent of Manville Trust lung cancer claimants are

current or former smokers. There is a substantial risk that, in moving to a no-fault system and eliminating the need to establish asbestos as the cause of the disease, compensating a large number of smoking-caused lung cancer claims could jeopardize the solvency of the Fund. If the current exposure criteria do not adequately narrow eligibility to those lung cancer claims where asbestos exposure significantly increases the risk over smoking, the Fund could potentially collapse.

Accordingly, a provision should be added to the legislation to make sure that lung cancer claims not related to asbestos exposure are not allowed to overwhelm the Fund's ability to compensate claimants who have disease caused by asbestos. I will continue to work with my Republican and Democratic colleagues to craft a program review which would authorize the Administrator (in consultation with Congress) to protect the fund if the total number of Level VII claims substantially exceeds projections.

III. ADMINISTRATION AND STARTUP

In addition to ensuring the availability of adequate funds to pay fair and consistent awards to asbestos victims, another critical element of any solution is to create a system that ensures prompt and efficient payment of awards to eligible claimants, while minimizing transaction costs. Again, this is an area in which we have made great headway towards resolution, but there are still some aspects to be worked out.

A number of parties have expressed concerns with the system for filing, evaluating, and reviewing claims established by the FAIR Act. Under S. 1125 as reported from Committee, claims would be filed with, and reviewed by, special masters operating under the guidance of the U.S. Court of Federal Claims. If a claimant were not satisfied with his or her initial award determination, the claimant could appeal to a separate panel of three special asbestos masters. From there, a claimant could appeal an adverse decision to an en banc panel of three judges of the Court of Federal Claims, sitting as the United States Court of Asbestos Claims. Appeals from the Court of Asbestos Claims would be heard by the U.S. Court of Appeals for the Federal Circuit. A separate Administrator would manage the Fund and pay final claims awards. Because the system was court based, there was no provision authorizing the promulgating of substantive regulations, which could help guide special asbestos masters through the establishment of generally applicable policies for claims evaluations and eligibility determinations. Instead, these issues have necessarily been addressed on an ad hoc basis in the context of individual claims determinations.

This court-based system was heavily criticized by Democrats and by organized labor as too complex and adversarial from the perspective of claimants. Labor in particular has insisted instead on an administrative review process, which it believes could resolve more claims in less time using a no-fault, non-adversarial system. With an administrative process, substantive regulations could be utilized to establish generally applicable presumptions and to help guide those evaluating claims to ensure eligibility criteria are fairly and consistently applied. Such a process could also be more "user friendly" and would allow claimants themselves, if they so desired, to navigate the process for filing claims without the need to retain counsel. While all parties recognize that legal representation may be beneficial or even necessary at some level of claims review, organized labor has consistently expressed the desire for an administrative system that minimizes the need for attorneys in order to maximize the recovery of a award values by claimants.

I recognize the benefits of such a system. I believe we can find common ground on developing a non-adversarial system that can effectively and quickly deliver benefits to claimants. I urge the parties to continue working towards a consensus on this issue. Such a system should significantly reduce transaction costs. We should therefore include a provision limiting plaintiffs' attorney fees to ensure that actual awards to victims are maximized. If done correctly, a new administrative process can also address another problem with the bill as reported by the Committee, by ensuring that the program is operating and processing claims in the minimum amount of time following passage of the FAIR Act.

On a related note, S. 1125, as introduced, provided that the new federal trust fund would be the exclusive remedy for all asbestos claims under state and federal law, and that all other remedies were preempted and barred as of the date of enactment. Exclusivity and finality are key elements of the necessary reform. The current tort system has failed victims, and it has done so largely because filing claims on behalf of the unimpaired has become too profitable a business for too many lawyers. Any legislation we pass must end the massive misallocation of limited funds to unimpaired claimants and their lawyers at the expense of those who are ill from asbestos-related disease. We cannot continue to tolerate the expenditure of limited funds into this broken system, a system which spawns inventory-style settlement agreements entered into by attorneys on behalf of claimants who have not even been identified much less bound by the agreement. Nor can we leave insurers and businesses exposed to collusive default judgments or other efforts to evade the Act's exclusivity provisions. Similarly, the bill should plainly foreclose all asbestos-related litigation by claimants against insurers and businesses, including direct actions. In short, given the consensus that the tort system is terribly flawed, we cannot allow the current abuses to persist. Proposals that would have the effect of continuing the status quo--and draining resources that would otherwise be available under the Fund for the truly impaired--are unacceptable.

During the markup, Democrats, organized labor, and the trial bar expressed concerns that asbestos victims could be faced with a period of time during program startup when they would have no remedy for their injuries--all tort suits would be preempted but the Fund would not yet be processing claims. In response to this concern, the Committee adopted an amendment offered by Senator Feinstein, which provided that the preemption and bar on asbestos claims would not be effective until the Administrator determined that the Fund was ``fully operational and processing claims." Until that time, all remedies would remain available under state law, and defendants' and insurers' contributions to the Fund would be offset by ``the amount of any claims made payable" during the startup period.

The Feinstein amendment was intended to address the legitimate concern that asbestos victims could face a potentially lengthy period of time during which they would be without a remedy. Unfortunately, the amendment would leave the current tort system, with all of its inherent problems, intact for too long and would allow some parties to manipulate this interim period for their personal benefit. No one wants to see the expectations of asbestos claimants undermined by the kind of legal chicanery that created the current crisis. If not fixed, the amendment could cause the very problem the bill is attempting to fix--even more bankruptcies and the continued diversion of resources away from legitimate victims.

Moreover, in practice, the Amendment would effectively doom the prospects of the Fund. As was the experience in states that have recently adopted tort reform laws, such as medical malpractice limits, the pending demise of a segment of the tort system inevitably leads to a flood of claims before the courthouse door is effectively closed. Under the Feinstein amendment, awards to plaintiffs, but not defense costs, could be offset against future Fund contributions. As a result, settling claims would be cost free to defendants and insurers, while defending

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claims in the tort system would continue to be prohibitively expensive. The certain result of this provision would be a very strong incentive, perhaps even a duty for publicly traded companies, to immediately settle all pending claims at potentially elevated values in order to avoid the expense of defending even the most illegitimate claims. Because all these settlement costs would be offset against Fund contributions, the financial effect on funding would be disastrous. Therefore, it is clear that the amendment is not the right solution to a very real problem.

To ensure that victims are not left without a remedy for an unjust period of time, I believe we need an alternative to the Feinstein amendment that will address the concerns raised by (1) authorizing the creation of an administrative program on an expedited basis that will be capable of quickly processing the most serious claims, and (2) enhancing the funding provisions to ensure adequate funds are available from the outset to pay these exigent claims on an expedited basis. The bill as reported by the Committee goes a long way toward ensuring that the Fund receives the mandated contributions within a reasonable time frame. Since that time, there has been a number of innovative suggestions relating to the funding and administrative provisions that would work in concert to address the concerns raised, without the dire consequences of the Feinstein amendment. I am confident we can resolve this issue, so that claimants with the most serious injuries are not left without a remedy, and I intend to continue working in conjunction with my Democratic colleagues toward a solution.

IV. ELIGIBILITY AND MEDICAL CRITERIA

Once the necessary funding is assured, and an administrative process is in place to manage claims fairly and efficiently, the next essential element is to make sure that available resources are directed to the most deserving claimants. In contrast to the existing tort system, in which many if not most asbestos claimants are unimpaired, the FAIR Act will ensure that awards are directed principally to those who have suffered the most from exposure to asbestos. This is assured through the consensus eligibility criteria in the bill, which set forth the applicable exposure, latency, medical, and diagnostic requirements for receiving compensation from the Fund.

The basic premise of the FAIR Act is to ensure that true victims of asbestos disease receive fair and consistent awards. To be eligible for compensation from the Fund, claimants must satisfy the eligibility criteria for various disease categories. The FAIR Act also provides a mechanism for consideration of exceptional cases, where claimants can clearly establish the presence of an asbestos-related disease but may not satisfy the otherwise applicable medical criteria. Exceptional cases, as well as those related to "take home" exposures where asbestos was brought into the home by an occupationally exposed person and those related to the high levels of environmental exposures of residents and workers in Libby, Montana, are eligible for review by a Medical Advisory Committee, made up of objective, experienced physicians, to determine whether the claimant is eligible for compensation. Because the medical conditions of Libby residents are currently being studied by various agencies, claims filed by Libby claimants are automatically designated as exceptional medical claims and referred to the Medical Advisory Committee.

The consensus criteria reflected in S. 1125 provide a solid foundation to ensure that eligibility decisions are based on sound medical practices and real diagnoses by the claimants' physicians. As a doctor, I cannot emphasize enough the importance of a diagnosis by the claimant's physician. The success of the program hinges on ensuring that the Fund compensates only those with conditions caused by asbestos exposure and not other causes. Only by ensuring the use of real diagnoses of asbestos-related illnesses can the Fund avoid the pitfalls that plague the current mass tort system.

The eligibility criteria reflected in S. 1125, as reported, are the result of an unprecedented agreement among the various stakeholders working to find a solution to the current asbestos litigation crisis. I commend Chairman Hatch and Ranking Member Leahy for an achievement few thought possible. I appreciate how complex and contentious an issue the medical criteria presented. The approval of these criteria by a unanimous vote in the Judiciary Committee markup created the opportunity we have for an historic achievement.

V. PROTECTING VICTIMS FROM RISK

From the very beginning, one of the key goals of S. 1125 has been to ensure that compensation is directed at

those legitimately ill from asbestos exposure and is awarded on a timely basis. The bill accomplishes this fundamental change from the status quo by moving from a system that compensates claims of questionable validity to one based on sound medical evidence and real doctors' diagnoses.

Nonetheless, legitimate concerns remain about the accuracy of estimates of the number of future claimants that will be eligible for compensation under the Act. Obviously, prior attempts to forecast asbestos claimants have proven inaccurate, leaving the very people who most deserve compensation with no real recourse. For example, claims to the Manville Trust have exceeded initial projections, and the Trust has been forced to reduce claim values to the point where today the Trust pays claimants as little as five cents on the dollar. Congress cannot and will not recreate the Manville experience.

Various experts have developed estimates about future claims, and the Congressional Budget Office has offered its own predictions based upon its review of the available evidence. The truth, however, is that there is no guarantee that any of these estimates is accurate. The legislation creates new eligibility criteria and establishes a new system for processing claims, one designed to weed out unimpaired claimants and those who suffer from diseases not caused by exposure to asbestos. Since there is no comparable system operating today, what is happening with the existing private asbestos trusts can at best offer only some general indication of what may happen over the 50-year life of the proposed Fund. Obviously, this reality makes it even more important for Congress to make sure that if we establish a national asbestos trust fund, that we also make sure that asbestos victims have someplace to go to seek compensation if the Fund cannot handle all future claimants.

The FAIR Act, as reported by the Judiciary Committee, includes an amendment offered by Senator Biden that requires the Fund to terminate and claims to revert to the tort system if funding proves inadequate. Specifically, the Administrator would be required to certify annually that 95 percent or more of the eligible claimants that year had received 95 percent of their compensation under the FAIR Act. If not, and the situation could not be remedied within 90 days, the program would sunset immediately. Although this language clearly shifts the risk away from claimants, it unnecessarily jeopardizes the Fund from its very inception and fails to provide sufficient flexibility to address unexpected, and possibly fixable, fluctuations in claims.

I agree with the key principle that the risk of inadequate funding cannot fall on those truly ill from asbestos exposure. However, the business community cannot be subjected to an open-ended funding commitment to accommodate an unknown and unlimited number of claimants into the future. Similarly, American businesses cannot risk paying over \$100 billion dollars into a Fund only to see it sunset in a few short years. Either of these outcomes would be worse than the current broken system. To succeed, the business community believes the solution must provide at least a limited window of "peace" to bring certainty to business and to allow the economy to recover from the burden that asbestos litigation has imposed on it.

Therefore, I propose an alternative that will balance these competing tensions while fully protecting sick victims. Under my proposal, if victims do not receive 100 percent of their claim values, the Fund would end and claims would revert to the tort system so that claimants will still have a guaranteed avenue to receive compensation. This approach significantly reduces the need to worry about which claims projections are correct. If the estimates of eligible claims over the next 50 years are too low and the funding is exhausted, then claims will automatically return to the tort system and claimants will be able to preserve their ability to receive compensation. To avoid many of the abuses that have created the current crisis, however, this reversion to the tort system must be to the federal courts and must contain certain additional protections to ensure that the current litigation crisis is not recreated. Obviously, while protecting asbestos victims from risk, my proposal does impose a price on the business community. It compromises to a degree the absolute certainty and finality that have been the hallmarks of a solution for those that must fund the program. They will be forced to bear the risk that the total program funding is not sufficient.

There is also a legitimate concern that the Fund could sunset, not because of inaccurate claims projections, but because the new and untested eligibility criteria in the FAIR Act end up compensating the wrong kinds of claims. These would include claims for injuries not caused by asbestos (for example, smoking-related lung cancers, idiopathic pulmonary fibrosis, rheumatoid arthritis, byssinosis, etc.) or because the Fund's medical, diagnostic, and exposure criteria do not sufficiently eliminate unimpaired claimants. Future victims of asbestos-related disease, as well as those funding the program, have a legitimate and strong interest in ensuring that the Fund is not exhausted because of those kinds of claims. To address that risk, I propose the Fund undertake a periodic review of the program to ensure it is compensating legitimate asbestos-related illnesses. This program review would regularly evaluate the claims submitted, the quality of the supporting evidence, and eligibility and award determinations to determine whether the Fund is compensating the wrong kinds of claimants and to provide the authority and opportunity for the Administrator to address the problem early if that occurs.

My proposal also would address another reality--under the current tort system, too much of the risk already falls on victims. Today, some victims go uncompensated because they cannot remember the product to which they were exposed. Others are without recourse because they were exposed in connection with military service and cannot sue the federal government. Other victims who should be compensated too often experience long delays before they receive payment,

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waiting for their litigation and all possible appeals to be exhausted, and then only seeing half of their award, the rest taken by the lawyers. This is especially true for claimants who are suing companies that have been forced into bankruptcy. There, the legal process can take half a decade and consume millions of dollars, leaving claimants able to recover only pennies on the dollar from the resulting bankruptcy trust. In short, victims bear much of the risk under the status quo, and they will continue to bear that risk until Congress acts. My proposal protects victims from those risks, and offers asbestos victims far more protection and certainty than they have today.

The PRESIDING OFFICER (Mr. **CORNBYN**). The Senator from Nevada.

Mr. REID. Mr. President, I want to make sure, having heard the distinguished majority leader speak about asbestos, that we understand, as he has indicated, it is a very complicated, difficult issue. But there are concerns that I have, and I think I speak for lots of people in this country. I am very concerned about how it affects business, but I am also concerned how it affects individual people.

I called Mrs. Bruce Vento this week, a woman from Minnesota whose husband served in the House of Representatives, a wonderful man. He worked in an asbestos facility for a few months as a young man. He is 58 years old, he gets sick, he is dead within a year as a result of the disease that comes from being around asbestos, mesothelioma. The average life expectancy of a person who is diagnosed with this disease is a little over a year. They die quickly.

Then we have asbestosis, where people live longer but it has a detrimental effect on their health.

What we have to do is get rid of the spurious lawsuits, those that don't deal with those two conditions about which I just spoke.

So I hope, as we proceed through asbestos legislation, we worry about and are concerned about these very sick people. People in this Senate have worked extremely hard to come up with a solution. The distinguished Senator from Utah is in the Chamber, the chairman of the Judiciary Committee. He and the ranking member,

Senator *Leahy*, have worked days and weeks to try to come up with something. We always get close but never quite close enough.

So I hope as we proceed, as the distinguished majority leader indicated, toward legislation dealing with this, that we keep in mind the main reason we are doing it. The main reason we need to legislate, in my opinion, is to take care of the people who get afflicted with the diseases that are related to asbestos. In the process, I hope we can ban the importation of asbestos into our country. We continue to import thousands of tons of this stuff on a yearly basis, even as we speak.

So I appreciate the concern of the majority leader. I have concerns also. But if I were giving a speech in a prolonged fashion, I would speak about the people who get sick, as Bruce Vento did, and are now dead.

Mr. LEAHY. Mr. President, I thank the distinguished Senate Majority Leader for his remarks today on the need for the Senate to consider asbestos legislation next year. I wholeheartedly agree with him on the need for reform to establish a better system for providing fair and efficient compensation to victims of asbestos-related diseases. I remain committed to working with Senator *Frist*, Senator *Daschle*, Senator *Hatch*, Senator *Dodd*, Senator *Specter*, and others, to forge a bipartisan solution to this complex challenge.

Last fall, as Chairman of the Judiciary Committee, I held the Committee's first hearing to begin a bipartisan dialogue about the best means to compensate current asbestos victims and those yet to come. Chairman *Hatch* wisely held two additional hearings this year. Our knowledge of the harms wreaked by asbestos exposure has certainly grown since last fall, as have the harms themselves. Not only do the victims of asbestos exposure continue to suffer, and their numbers to grow, but the businesses involved, along with their employees and retirees, are suffering from the economic uncertainty surrounding this litigation. More than 60 companies have filed for bankruptcy because of their asbestos-related liabilities.

These bankruptcies create a lose-lose situation. Asbestos victims who deserve fair compensation do not receive it, and bankrupt companies can neither create new jobs nor invest in our economy.

A solution has never before been closer than it is today. Since the beginning of 2003, we have come to complete accord on the idea that the fairest, most efficient way to provide compensation for asbestos victims is through the creation of a national fund that will apply agreed-upon medical criteria in evaluating patients' injuries. We have been working tirelessly with representatives from organized labor, defendant companies, insurers, and other interested parties, to craft an effective trust fund system that will bring the certainty of fair payments to victims and financial certainty to industry. A myriad of issues have been resolved, from the definitions of the panoply of illnesses resulting from asbestos exposure to a ban on the use of asbestos in the United States. We are working, even today, on the details of other aspects of this scheme, down to the fine points of the administrative mechanism for processing claims.

We have made real progress in finding common ground. But we have yet to reach consensus, and without consensus we cannot end this crisis. Too much is at stake for us to walk away when we have come so far. An effective and efficient means to end the asbestos litigation crisis is within reach, and we must grasp it. Although the year is drawing to a close, our bipartisan commitment to this effort remains strong. I look forward to continuing to work with my colleagues and all stake holders to craft a consensus bill that we can move through the legislative process and into law next year.

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