

Testimony of  
**Mr. Jonathan Hiatt**

March 5, 2003

My name is Jonathan Hiatt. I am the General Counsel of the American Federation of Labor and Congress of Industrial Organizations. I want to begin by thanking the Committee for the opportunity to again appear before you and commending the Judiciary Committee for its interest in the state of asbestos compensation and for the thoughtful manner in which the Committee has been considering this issue.

Last fall the AFL-CIO was pleased to participate in the Senate Judiciary Committee's hearing on asbestos-related litigation. At that time we told the Committee we felt that the asbestos litigation system was far from optimal and that we were prepared to work with all interested parties to craft a solution that would benefit both asbestos victims and our economy.

I am pleased to now report that the AFL-CIO is engaged in serious and detailed discussions with a range of major asbestos defendants and insurers on a comprehensive reform proposal centered on the creation of a no-fault administrative system for compensating all asbestos victims. These negotiations have been characterized in some press accounts as a "trust fund" solution. The AFL-CIO believes this approach, properly structured, can provide asbestos victims with the compensation they deserve with greater speed and certainty while providing defendants with the certainty they need to access the capital markets, and can do so at a lower overall cost than the current system.

In the last month these discussions have both become increasingly detailed and have grown to include a wider range of participants. They have been characterized by a degree of good will and a willingness to share information that in our view is unprecedented in the history of efforts to address problems in the asbestos compensation system. Although there are still a number of major issues where agreement has yet to be reached, we are cautiously optimistic that out of these negotiations a proposal will emerge that will be of assistance to this Committee in its efforts to draft legislation that will both improve the asbestos compensation system and be able to garner the wide support necessary to be enacted into law.

I am aware that the Asbestos Study Group has provided the Committee with written testimony describing this dialogue from the perspective of some of the major defendants in that dialogue. I wish to take a moment to describe for the Committee the AFL-CIO's view of where these discussions are and where they need to go to be of value to the Committee.

We have been discussing a no-fault administrative compensation plan for asbestos victims that would largely replace civil court litigation as the means by which asbestos victims are compensated for their injuries. The goal would be a system that provides victims with the compensation they are entitled to more rapidly and more certainly than civil court litigation, while giving defendant companies the certainty they need to access the capital markets and

manage their businesses.

We agree this plan should have the following features:

The basic payment structure would be a national no-fault administrative system with a payment schedule for asbestos-related conditions that would provide victims with fair compensation.

The payment schedule would be based on medical criteria that distinguished between different types of asbestos related disease and different levels of severity within certain types of asbestos related disease. The schedule would also make allowances for the age of the victim and other exceptional circumstances. The labor movement is working to develop these medical criteria with a distinguished group of medical experts in this area who have helped our affiliates develop state of the art pulmonary health programs for their members. A number of these physicians are or have been associated with the Selikoff Center at Mount Sinai Medical School where the pioneering work in the area of asbestos disease was done by Dr. Irving Selikoff in the 1960's and 1970's.

While the schedule would take account of victims whose condition may have involved a variety of causes, it would not deny compensation to those with asbestos-related disease who also smoked or were exposed to other harmful substances.

The administrative system would be funded by statutorily mandated payments from asbestos defendants and insurers, including bankrupt defendants. Existing asbestos trusts should be merged into the administrative system.

Statutes of limitations would be revised so that victims who received a payment for one asbestos related condition who then developed a second condition would receive a second payment for that condition.

All asbestos victims would have some ultimate access to the courts structured so as not to undermine the overall integrity of the program.

Companies contributing to the funding of the system would have no standing to contest eligibility of victims for payments.

Part of the compensation provided to asbestos victims would be in the form of medical testing and monitoring. We are also exploring the possibility of some compensation being provided in the form of health care for victims.

Asbestos victims who have pending claims for compensation in the tort system would be covered by this system. Any monies collected to date would be offset against the system's claim schedule.

Finally, the federal government played a significant role in the widespread use of asbestos, particularly in defense-related industries. The parties to these discussions agree the federal government should accept its share of the responsibility for the harm caused by the use of asbestos in the workplace.

We are currently addressing together with our partners in these discussions a range of difficult issues. Some of these issues reflect the inevitable work that must be done to bring parties together who though they have different interests share a common interest in reaching agreement. Some of these issues are more in the form of technical problems that need to be solved in a spirit of common purpose.

There are certain matters the AFL-CIO believes must be satisfactorily addressed if this process is to result in a plan that the labor movement can support. I will mention two of the most important issues.

First, and most importantly, all parties to these discussions need certainty. This is true for victims at least as much as it is true for companies. This is a very major concern given the under-funding of existing asbestos trusts due in part to the underestimate of disease cases and claims. While estimates of future disease cases have been made, there is some uncertainty about these estimates given incomplete information about the number of workers exposed and the actual levels of exposure. While exposures and risk have been significantly reduced, they have not been eliminated. Moreover, the long latency associated with many asbestos-related diseases means that cases associated with past high level exposures will be manifested for some years to come. We are exploring a number of ways in which this risk related to the uncertainty of the number of future cases and claims can be bounded and assumed by those both willing and able to bear it.

Second, this system cannot simply be a way defendants are relieved of liability while victims are left no better off than before. This system must leave victims as a group better off than they now are in the tort system. It must also provide individual victims with a fair level of compensation for their injury.

We are acutely aware of the pressures of the legislative calendar, as are our counterparts in these discussions. We are likewise optimistic that these discussions can produce a proposal that would be of value to you on a timeline that would allow the Congress to address this issue this year.

As you may know, the AFL-CIO is strongly opposed to S. 413, a recently introduced bill embodying the approach forwarded for some time by the National Association of Manufacturers and the Asbestos Alliance on behalf of certain asbestos defendants and insurance carriers. S. 413 is profoundly unfair to the majority of asbestos victims, whom it will bar from ever recovering any compensation for their injuries. Furthermore, it is unlikely in our view to provide the certainty that defendants need to access the capital markets and create and preserve jobs. Perhaps most importantly, a legislative process focused on S. 413 is likely to polarize this issue at a time when a genuine consensus solution seems within reach.

The approach embodied in S. 413 recently received some support from the House of Delegates of the American Bar Association. The Committee should be aware that the process by which this occurred deviated dramatically from the usual evenhanded deliberateness of the American Bar Association.

Mr. Archer established a Task Force of lawyers to adopt medical criteria in late November, 2002. These lawyers reported back in late January, 2003. The labor movement only became aware of the existence of Mr. Archer's Task Force on Asbestos a few days before it completed its work. No

ABA member representing the labor movement's views participated in the Task Force, nor did the Labor and Employment Section of the ABA, representing both union and management side lawyers with expertise in occupational safety and health issues. That Section as well as the Litigation Section, the largest in the ABA, both asked the House of Delegates not to adopt the Report of the Task Force. I have attached my correspondence with Mr. Archer regarding these matters.

Despite the increased polarization caused by these events, the AFL-CIO remains willing to engage in discussions with all parties, including supporters of S. 413, as part of what we view as the necessary process of building a broad consensus behind fair and constructive reform.

The AFL-CIO would be pleased to be of any assistance we can to the Judiciary Committee as you continue your work in this important area. Thank you again for the opportunity to share our views with the Committee.