

Testimony of

The Honorable Max Baucus

March 5, 2003

Mr. Chairman, Senator Leahy, thank-you for allowing me to testify before your Committee today. This is an issue that raises a lot of passion in people, on both sides, because so much is at stake. I think this is an extremely important issue for the Committee to address and I applaud you for continuing to gather information about the status of asbestos litigation in this country, and where it may or may not be appropriate for Congress to become involved.

However, Mr. Chairman, I am concerned that in a rush to address a real or perceived crisis in our courts, Congress may do an injustice to hundreds or thousands of injured people by arbitrarily denying those people the ability to protect their rights. Our number one concern here should be justice - how do we ensure that asbestos victims - all asbestos victims - are treated fairly and compensated for their injuries.

Why am I so concerned about where we are headed? Because we seem to continue to circle back to the idea of requiring all claimants to meet strict medical criteria before they can file an asbestos-related claim. It sounds clean, neat and logical - people can't file for compensation until they are actually sick, theoretically allowing defendant companies to protect their assets, and ensuring a greater chance that victims will be able to recover some compensation if and when they become sick.

As I understand it, a major concern about the current asbestos litigation "crisis" is the repeated attempts to reduce procedural bars to claims, by lumping together hundreds and thousands of people together in a class action, even though those people may have little relation to each other in terms of when and where they were exposed to asbestos, how they were exposed, how long they were exposed and what kind of injuries they suffered. The Supreme Court has noted that this approach in many cases was fundamentally unfair to the claimants involved.

Yet, asbestos litigation reform relying on the very strict medical criteria proposed by the American Bar Association and others would have the exact same effect of treating all people in the same manner, regardless of their circumstances, regardless of when, where and how they were exposed, and in many cases, regardless of what kind of injury they have suffered - it would narrowly define an acceptable injury. It would also impose significant costs on claimants before they have any assurance that they can even file a claim for compensation.

Mr. Chairman, what this shows us - as with all issues as complicated as this one - is that the devil is in the details. What constitutes an injury? What does being "sick" mean? How can we know that money will be around in the next five, ten, fifteen, twenty or more years to compensate those who will become sick in the future? How do we address the concern that some people are far more likely to become seriously sick than others, depending on when, where and how they were

exposed to asbestos? And frankly, how do we address the fact that there is still a lot that we just don't know about the causes and effects of different durations and types of asbestos exposure?

The point is, no matter how a medical criteria standard is developed, Congress will have to choose a more or less arbitrary standard that will cut off people who have been injured. We had better be very, very sure that this is the only just way to address the asbestos litigation issue. I just can't believe that we can't be creative about this.

Mr. Chairman, I have spoken in detail about the little town of Libby, Montana, before this and other Committees, and on the floor of the Senate. I won't go back into the details of the terrible things that happened to the people of this town at the hands of a company called W.R. Grace. But, this town and the people that live there or used to live there, dramatically illustrate the points I've been trying to make, so I would like to touch upon a few facts.

The vermiculite mining and milling operations of W.R. Grace blanketed the town of Libby with asbestos-tainted dust for decades, until the early nineties. The dust was everywhere - on clothes, cars, on children, on the clothes of workers when they came home from the mine. It was in the high school track, the little league field, in people's homes and in their gardens. They didn't know the dust was poison; but W.R. Grace knew.

What W.R. Grace knew was that this dust was contaminated with deadly tremolite asbestos fibers. These fibers have killed hundreds of current and former Libby residents. Hundreds more are sick, and many of these people will die from asbestos related diseases and cancers. Thousands may become sick in the future. And, unlike almost any other place in the country, many of these people were significantly exposed as children.

W.R. Grace lied to these people; now they have watch their families, their friends and neighbors die or steadily become more sick. They have to watch them struggle to tend to their garden, or just take a walk to the local café. They have to watch them struggle to provide a secure future for their children, all the while wondering if their children will become sick, too. At the same time, these people are struggling to rebuild their community, to make it a vibrant, prosperous town, to keep local businesses and help their friends and neighbors. Many of them wonder if or when they will become sick.

They have to do all of this with little or no help from W.R. Grace.

I have requested that a letter from the representatives of many of the Libby claimants, as well as two letters from doctors who have treated or screened many of the folks in Libby for asbestos related disease, be included in the hearing record. These documents outline how the experience of the people in Libby, Montana is unique, and demonstrate that the pattern and progression of their disease does not fit within the ABA or other proposed medical criteria. These documents speak for themselves, including illustrating the simple fact that tremolite-related lung disease does not appear on a chest x-ray like chrysotile-related lung disease, chrysotile being the most common form of asbestos that most people have been exposed to in this country.

I would like to quote in detail from Dr. Brad Black's letter, because he makes some very important points. Dr. Black is the Medical Director of the Center for Asbestos Related Disease in Libby. Dr. Black said:

"I entered medical practice in the [Libby] community in 1977 . . . At that time, like most physicians, I was trained to recognize disease due to chrysotile asbestos, from which significant lung disease manifested as . . . scarring in the lung tissues. This [scarring in the lung tissues] has a characteristic pattern on a chest x-ray . . .

"During the period of 1979 to 1999, asbestos-related disease was incubating in a large number of Libby residents, but remained undiagnosed. Why did our community physicians not recognize it? Simply because tremolite-related lung disease does not appear on a [chest x-ray] like chrysotile-related lung disease . . . [T]remolite usually causes scarring in the lining around the lungs (pleura) and infrequently shows up on x-ray as scarring inside the lung, even in the heavily exposed Zonolite workers . . . and is much better seen on CT scanning. . . ."

"In the last 18 months I have observed the diagnosis of five mesotheliomas, with three individuals already having died. Four of these individuals (nurse, office receptionist, forest service administrator and a non-resident who traveled to Libby for basic services) were exposed to tremolite simply by living and working in Libby. Another gentleman who lived near a vermiculite processing facility in the residential area of Libby died from progressive pleural fibrosis. His spouse has advanced asbestos-related disease. A significant number of residents who were exposed environmentally are experiencing advancing lung disease, some of whom require supplemental oxygen. Based on past observations with chrysotile exposure, one would not expect non-occupationally exposed individuals to develop such extensive asbestos-related disease."

"The relative potency of tremolite fibers in causing disease (progressive lung disease, mesothelioma, and lung cancer) has been striking."

This is all included in Dr. Black's letter. It is only two pages long. I would respectfully ask that all members of the Committee personally read Dr. Black's letter.

Mr. Chairman, medical criteria, such as that proposed by the ABA or in the Fairness in Asbestos Compensation Act of 1999, would devastate the people of Libby, Montana. The standard in the 1999 Act would exclude 73% of the Libby patients from filing a claim for compensation. The remaining 27% are either dead, or in the end-stages of asbestos-related disease, and in the process of dying.

It's been made clear to me that we've likely lost ground under the ABA medical standard, with even more Libby patients barred from filing a claim under the ABA Standard than were barred under the 1999 Act. I would refer members of the Committee to the letter from Dr. Whitehouse that I have submitted for the record, where he describes in detail the arbitrary nature of the ABA standard as applied to tremolite asbestos patients.

I would also ask to include in the record a list of 10 people in Libby who would be excluded from seeking compensation under medical criteria such as that proposed by the ABA.

Mr. Chairman, we are no better off today than we were in 1999 when we battled the Fairness in Asbestos Bill, because we continue to ignore the differences between tremolite and chrysotile. The sheer magnitude of the tragedy in Libby illustrates how hard it is to define the nature of an asbestos-related "injury."

Am I frustrated when I hear about the thousands of people who may have had little or no real exposure to asbestos, but who have filed asbestos-related claims for compensation? Yes, because I know that many of those people will be competing against the folks in Libby for compensation. However, do I know with any real certainty that some of those people aren't sick now, or won't become very sick, depending on where they're from, when they were exposed and for how long? Do I know if most of those people will be treated fairly by medical criteria such as that proposed by the ABA? No. And, neither does the Congress.

Mr. Chairman, I have stated before that I am sympathetic to the concerns of companies that have not filed for bankruptcy and that do not share W.R. Grace's or other defendants' liability or responsibility for asbestos-related disease and death, but who have been tagged with liability precisely because they are solvent. These companies are also being treated unfairly and unjustly by the actions of W.R. Grace and other companies that are able to hide their assets and declare bankruptcy - in essence, shifting their rightful share of liability and responsibility to other businesses.

I have also told this Committee before that I think a review of the injustices inherent in corporate bankruptcies would be an appropriate piece of the asbestos puzzle for this Committee to take a hard look at. It seems pretty clear that W.R. Grace hid a vast amount of its assets - up to four to six billion dollars - from the reach of the bankruptcy court, and by extension, from the Libby victims. About a billion of those assets will be returned to the bankrupt estate. But, W.R. Grace didn't suffer for this - the Department of Justice had to do all the work, at taxpayer expense, to unravel this transaction.

At the end of all this, W.R. Grace will likely emerge from bankruptcy lean and whole - able to continue to prosper as a business. The Libby victims, unless we are able to protect them in some fashion, will receive pennies on the dollar. This is just disgusting. Add to this the fact that many of them can't get medical insurance and that the total cost of treating all those who have been sick, who are sick or who will become sick as a result of their exposure to asbestos in Libby is just staggering - the cost of treating the former W.R. Grace mine-workers alone threatens to bankrupt the State of Montana's medicaid program. This is another case of W.R. Grace masterfully shifting liability and responsibility to someone else.

Mr. Chairman, so many people have come together to do the right thing in Libby -- the Montana delegation, the State of Montana, the federal government, the community of Libby and many concerned private citizens have been working hard to bring new economic development and much needed health care resources to Libby. Federal dollars have flowed to Libby for cleanup, healthcare, and revitalizing the economy. The Director of the Libby Clinic for Asbestos Related Disease, Dr. Brad Black, has called for developing a leading edge, world class research facility with the mission of one day developing cures for asbestos related disease, so that Libby's tragedy could be used to protect the health of men, women and children across the country.

It is just amazing to see how everyone has come together to create something positive from a terrible situation. Everyone, that is, except W.R. Grace.

Mr. Chairman, I say all of this because I want to circle back to the idea of making sure that when we attempt to step into the middle of the asbestos litigation debate, that we are doing justice by the people of Libby, and by the people of this country.

We keep being drawn away from the key issue here, which is that asbestos companies like W.R. Grace caused the death and serious illness of hundreds if not many thousands of people. We shouldn't be overly concerned about protecting them. However, are there others that ultimately bear a share of responsibility for what happened to these hundreds and thousands of people? There's a good argument to be made that the federal government does share some responsibility for failing to take action to protect its citizens when the hazards of asbestos became known, many decades ago, and that is something for this Committee to consider.

Clearly, we won't be able to come up with an acceptable resolution to the problems associated with asbestos litigation that is perfect, or that everyone will agree with, or think fair. But, we have to do our best, and we have to put the victims first. That is key.

The medical criteria put forward by the ABA and others do not meet this standard - the criteria are arbitrary, unfair and excessively burdensome, particularly to people like those in Libby who have every right to demand that W.R. Grace make their town whole, and pay for their medical expenses and suffering.

Thank-you again Mr. Chairman, Senator Leahy, for allowing me to testify before the Committee today. There is no other issue that is more personal or important to me than making sure the people of Libby, Montana finally get a clean bill of health.

Thank-you.