

Testimony of

# The Honorable Max Baucus

June 4, 2003

Statement of Senator Baucus  
Senate Committee on the Judiciary  
Hearing on S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003  
June 4, 2003  
10:00 a.m.

Mr. Chairman, Senator Leahy - I appreciate the opportunity to testify today on the Chairman's bill, the Fairness in Asbestos Injury Resolution Act of 2003, also known as the FAIR Act. I know that both of you are working hard to resolve the complicated issue of asbestos litigation in this country. I believe that's a worthy effort.

I applaud the Chairman for attempting to move the ball forward in this debate by introducing the FAIR Act. I know he hopes that by doing so, all sides will soon come to swift agreement on a final bill. I hope that a healthy bi-partisan negotiation process will continue, so that good companies providing good paying jobs are not wrongly forced into bankruptcy over mounting asbestos claims, and the true victims of asbestos receive just compensation for their injuries.

However, as I outlined in a letter to the Chairman and every other member of this Committee two weeks ago, I have serious concerns about how the Chairman's bill will impact my constituents in Libby, Montana. I will briefly outline those concerns for the Committee, so they will become part of the record on S. 1125. At the end of my statement, I would like to make some suggestions to the Committee as to how the bill could be best altered to make sure that Libby is treated fairly in any final asbestos bill.

My greatest concern Mr. Chairman, is that your bill would give W.R. Grace a sweetheart deal, while at the same time denying any compensation to the majority of the people in Libby who were injured by W.R. Grace's actions. That is not just or fair.

Let me be specific. Section 124 of the FAIR Act, the Medical Criteria Requirements, would exclude the vast majority of current and future Libby claimants. Except for those persons who have mesothelioma, the criteria would require "meaningful and credible" evidence of both 6 months of occupational exposure to asbestos prior to December 31, 1982 and significant occupational exposure, which you define as cumulative employment for a period of at least 5 years in an asbestos-related industry.

Mr. Chairman, a large number of persons in Libby who have become sick, or will become sick, from their exposure to asbestos never had any occupational exposure to asbestos. They were the families of W.R. Grace workers or ordinary residents of Libby. Unlike almost every other part of the country, asbestos was everywhere in Libby - in the air, in the ground, in the houses, in the school track, on people's cars, clothes and on the people themselves.

To illustrate the significant non-occupational nature of asbestos related disease in Libby, I will quote again from the March 4 letter from Dr. Brad Black, Medical Director of the Center for Asbestos Related Disease in Libby:

"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 [asbestos] 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 [asbestos] exposure, one would not expect non-occupationally exposed individuals to develop such extensive asbestos-related disease."

This letter was included in the record of your March 5 hearing on asbestos.

Another odd problem with the medical criteria in S. 1125, is the requirement that a claimant demonstrated occupational exposure prior to 1982. What's magical about 1982? Grace was operating its vermiculite mining and milling facilities in Libby and releasing asbestos fibers until the early 1990's. Perhaps the year 1982 made sense in the context of one company - the Johns Manville Company and the Johns Manville Trust - but when applied to Grace, or other companies, it's completely arbitrary.

Mr. Chairman, I understand that W.R. Grace, a company that was less than honest with Grace workers and the Libby community about the asbestos that contaminated Libby vermiculite, has suggested language to "address" this occupational exposure problem. To their credit they agree with me that the definition of occupational exposure in your bill would negatively impact deserving Libby claimants. However, their proposed language would give the Asbestos Court created by S. 1125 the discretion to waive the exposure criteria requirements of section 125 of the bill. That's it. They would still have to meet the overly stringent medical criteria of Section 124, criteria that are arbitrary and difficult for Libby claimants to meet. They would still be subject to the collateral source requirements that I will address below. It would still not be clear whether or not occupational exposure would be required, before or after 1982.

So, Mr. Chairman - under Grace's proposal, Grace gets certainty and is obligated to pay a minimal amount to a national trust. The Libby victims get uncertainty and a chance to receive a minimal amount of compensation for their injuries. The Asbestos Court may waive the exposure requirements. The decisions of that Court are not reviewable. That Court is not required to consult with any experts or the public in establishing rules to implement exposure or other medical criteria in the bill, for the people of Libby, or anyone else. I apologize for being skeptical of Grace's proposal, but they have failed again, and again, and again to prove that they are a friend of Libby, Montana.

Now, why do I believe that Grace will get certainty and a sweetheart deal under S. 1125? If I have read the legislation correctly, W.R. Grace will be required to pay into the trust fund created by your bill only 1.45% of their 2002 revenues for years 1 through 5, with that amount declining over the next 20 years out to year 25. Even on revenues of \$1 billion, that would mean a company like W.R. Grace would only have to contribute approximately \$1.45 million per year in years 1-5. Over the life of the trust, such a company would contribute less \$25 million, based on \$1 billion in 2002 revenues. Grace has protested that \$25 million was a one year contribution. That's great. But, I am curious as to how their calculations differ from mine. Perhaps their insurers will contribute more than that amount. I don't know. But, my calculations are based on what the bill requires from a company like Grace in the early stages of bankruptcy. Their liability is fixed and settled. They can move on.

But justice for people in Libby will not be fixed. They won't know what will happen. They don't know if this new Court will allow them any compensation. Some of them, although they are not sick yet, don't know if they will get sick, don't know if money will be around to compensate them if they do get sick 15, 20, 25 or 30 years from now. Or more. The Agency for Toxic Substances and Disease Registry (ATSDR), part of the U.S. Department of Health and Human Services, has documented up to a 47-year latency period for the onset of asbestos-related disease resulting from exposure to asbestos in and around Libby, Montana. The Trust created by S. 1125 will be long gone by the time a person exposed in the 1990's might get sick. But many of these people can't get health insurance now. They have no safety net, for themselves or their families. This is wrong. This bill punishes the wrong party here - the victims, not Grace.

Mr. Chairman, there is also so much that we don't know about asbestos exposure in Libby, and its relation to the onset of asbestos related diseases. The Agency for Toxic Substances and Disease Registry recently released a study - based on medical screenings and studies of thousands of current and former Libby residents - that concluded more research into low-level exposure and lung disease in the town is still needed. The medical science of diagnosing and identifying categories of asbestos-related disease in Libby is still developing, particularly as concerns the differences between what is traditionally known as asbestosis or pleural disease, and what manifests itself as debilitating pleural disease in Libby. S. 1125 does not accommodate this medical uncertainty.

Mr. Chairman, as I indicated in my letter to you, I am also concerned about the collateral source requirements in S. 1125. Section 134 would require a reduction in the amount paid to an asbestos victim by the amount of any collateral source payments he or she has received, or is entitled to receive, for their asbestos-related injury. This would include payments from Medicaid, Medicare, health insurance, and disability insurance. Mr. Chairman, this under-cuts one of the main points of an asbestos trust or other compensation mechanism, which is to fairly compensate victims for their injuries that were caused by others.

In addition, I have read about your concerns that the taxpayer should not bear any liability for this trust fund, or for the payment of asbestos claims in general. The FAIR Act's collateral source requirements could have exactly this undesired effect by shifting the cost of treating a person's asbestos-related illness to state and federal taxpayers through Medicare and Medicaid, or similar medical benefits program funded in whole or in part by the state or federal government.

Mr. Chairman, the evidence that the people of Libby, Montana have been exposed - over a period of decades - to dangerously high levels of asbestos, is undisputed. That W.R. Grace's vermiculite mining and milling operations caused this asbestos contamination is undisputed. That Libby, Montana is on the Superfund National Priorities List because of high concentrations of asbestos and environmental damage from Grace's vermiculite mining and milling operations is undisputed. That hundreds have become sick or died of asbestos-related diseases is undisputed. These people have nothing more to prove. If they are sick, they deserve compensation. Period.

Any asbestos bill that the Congress considers must take this reality into account, including S. 1125.

Grace workers and current and former Libby residents should not have to comply with the medical criteria or the exposure criteria in S. 1125. If they are a former worker or they lived and worked in Libby for a minimum amount of time, and they have an asbestos-related disease, that should be enough to qualify them for real and adequate compensation from the trust fund.

I also believe that the collateral source requirements of S. 1125 also should not apply to Grace workers or the people of Libby - and frankly, I don't believe they should apply to anyone. The health care costs of treating those who are sick in Libby has already placed an enormous strain on the state and local community. Many concerns have been expressed about the eventual impacts on the state Medicaid program from treating these people. It just seems patently unfair to continue to shift the burden for treating sick people in Libby to the taxpayers and to continue the drain on local resources.

I have also proposed my own bill that would create a Libby Health Care trust fund to pay for the health care costs associated with treating current and former Libby residents or Grace workers for asbestos-related disease.

This Libby Trust would be funded by amounts eventually recovered from W.R. Grace by the Environmental Protection Agency. Until those funds became available, the fund would be financed through the appropriations process. This fund would serve as a critical means of defraying the enormous costs of treating those in Libby who are ill, particularly those who are uninsured and uninsurable. Many of these people are young, with families. Even if the trust fund created by S. 1125 runs out of money, or is not available to claimants from Libby, they will always have some place to turn to pay for their medical expenses.

Mr. Chairman, everyone agrees the situation in Libby is unique. But what W.R. Grace wants in S. 1125 is a far cry from what the people in Libby need and deserve. That's why I look forward to continuing to work with you on asbestos legislation and addressing the needs of my constituents in Libby, Montana. I believe you have the best of intentions in proposing your legislation and attempting to bring closure to this complex issue.

Thank you again, Mr. Chairman, for allowing me to submit this testimony today.