

Testimony of

# The Honorable Patrick Leahy

June 4, 2003

Statement of Senator Patrick Leahy

Senate Judiciary Committee Hearing

"Solving the Asbestos Litigation Crisis:

S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003"

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I thank Chairman Hatch for calling this hearing on the asbestos litigation crisis, the third that the Committee has had since I convened the first one last September. Last fall, I hoped to begin a bipartisan dialogue about the best means for providing fair and efficient compensation to the current victims and those yet to come. My message today is simple: To end this crisis we need to re-start negotiations among the stakeholders and interested Senators to finish hammering out the details of an effective national trust fund for victims of asbestos-related disease.

Our knowledge of the harms wreaked by asbestos exposure has certainly grown since last fall, and so 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 deserving fair compensation do not receive it, and bankrupt companies can neither create new jobs nor invest in our economy.

Chairman Hatch and I have been working for months with Senators Dodd, DeWine, Carper, Ben Nelson, Feinstein and others to encourage representatives from organized labor and industry to reach a consensus solution, and to bring our own ideas and efforts to the table. The stakeholders have made real progress in finding common ground around a national trust fund. But they have not yet reached consensus, and without consensus we cannot end this crisis.

I commend Senator Hatch for his hard work in drafting this legislation. I agree with him that the most effective solution to the asbestos litigation crisis is taking all asbestos cases out of the tort system and establishing a national trust fund. That is what I urged at our last hearing and still believe. I am continuing to work to develop medical criteria for use with such a trust fund that will be fair to all asbestos victims and can lead to the quick compensation of legitimate claims and to weed out frivolous claims.

I disagree, however, with some of the key provisions of the Fairness in Asbestos Injury Act, and I cannot support the bill as currently written. Senator Hatch has said he is open to suggestions to improve the legislation. I have made several detailed suggestions already, but I want to point out a few of the remaining major issues to help us move forward.

First, this bill shifts the financial risk from defendants and insurers to victims. The bill guarantees businesses a lifetime of absolute legal and financial certainty, but it leaves asbestos victims completely out of luck if the trust fund runs out of money at any time in the next 50 years. The one constant in our experience with projections of asbestos liabilities is that the projections of today will be wrong tomorrow. Twenty years ago, all the experts predicted that the Manville Trust Fund would be paying asbestos victims full compensation for many years. Now, asbestos victims get 5 cents on the dollar because the Manville Trust Fund is nearly insolvent. The risk of insolvency, and indeed the risk of

inadequate funding short of insolvency, in a national trust fund must be addressed in order to provide certainty to asbestos victims as well as to defendants and insurers.

This bill also fails to cover victims who were exposed to asbestos outside the workplace, such as spouses and family members who get exposure from workers' clothes, and community poisoning cases like the one in Libby, Montana. I have already heard from Senator Murray about the importance of addressing "take home" exposure, and from Senator Baucus about the basic fairness of covering victims of tremolite asbestos exposure in Libby. I agree wholeheartedly with Senator Murray and Senator Baucus.

This bill also raises unnecessary hurdles that would bar many legitimate asbestos victims from receiving any compensation. For example, the bill does not compensate anyone who was exposed to asbestos in the workplace after December 31, 1982. I see no reason to deny asbestos victims their rightful recovery because of their exposure occurred after an arbitrary date, particularly because asbestos is still used today. An arbitrary cutoff in a national trust will only compound this injustice over time.

The bill also offsets any compensation to asbestos victims by "collateral sources" such as previous payments from disability insurance, health insurance, Medicare, Medicaid, and death benefit programs. This dramatic change from current law would result in a cost shift of millions, or perhaps billions, of dollars. This cost shift is from defendants and their insurers to other insurance companies, health care plans, and the federal government.

The use of these "collateral sources" would also reduce or eliminate compensation pledged to asbestos victims. For instance, a mesothelioma victim, who had disability and medical insurance and who lived more than the usual 18-month survival time, might not receive any of the scheduled \$750,000 award under the bill because of these collateral source offsets. I cannot support reducing compensation to asbestos victims simply because they survived, or because they had the good fortune and foresight to purchase insurance.

Moreover, the bill requires a physician to independently verify a victim's exposure to asbestos that may have occurred 10, 20, 30, or even 40 years ago - an impossible bar to clear to be eligible for any compensation.

Finally, I believe that any alternative compensation system must be truly no-fault to be fair to asbestos victims who will no longer have recourse to the courts. Under this bill, before the thousands of pending asbestos victims may receive any compensation, Congress would have to create and staff a brand-new asbestos court at the federal taxpayers' expense. Such a court appears to be inconsistent with a "no fault" system and may prove unworkable.

Now we need to work with all the stakeholders to resolve the remaining complex and inter-related issues -- such as medical criteria, award values, and insolvency risk -- necessary to enact an effective trust fund solution. I look forward to hearing from our expert witnesses today to help us craft bipartisan solutions to these outstanding issues.

Our undertaking is complex and unprecedented. It will not be easy to work out the details necessary for consensus. But the stakes are too high for us to leave the field before trying our utmost to complete this task.

My two grandfathers worked as stonecutters in the granite quarries of Vermont. They both suffered from silicosis because of their workplace exposures to stone dust. One of my grandfathers died at the age of 35 because of the disease. Thinking of them, and of the hundreds of thousands of present and future asbestos victims, I want to make every effort to solve this crisis, and I commend and encourage all who are working in good faith to help do that.

Acting together, and encouraging the private negotiations to resume is, in my view, the best way to move a consensus bill through the legislative process and into law. There remain a number of important issues on which we need to find common ground. Working together we stand the best chance of success. Our guiding principles should be fairness to the victims and certainty for the corporations involved, through a workable process that will function effectively over time and in the real world.

I look forward to continuing to work with Chairman Hatch, Senator Dodd, Senator DeWine, Senator Carper, Senator Nelson, Senator Feinstein and other Members on the Committee to craft an effective solution to the asbestos litigation crisis.

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