

Statement of

The Honorable Edward Kennedy

United States Senator
Massachusetts
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Statement of Senator Edward M. Kennedy
Regarding the Asbestos Trust Legislation
Voted on by the Senate Judiciary Committee

At the beginning of this markup several weeks ago, I identified ten areas in which this legislation was seriously deficient - both unfair and unworkable. Unfortunately, none of those problems have been corrected. Amendments have been offered to address many of the deficiencies. Unfortunately, they have been rejected. As a result, what we have before us today is an Asbestos Trust Fund that excludes many seriously ill victims from receiving compensation and that fails to provide a guarantee of adequate funding to make sure the victims who are eligible will actually receive what the bill promises them.

As I have said before, the real crisis which confronts us is not an "asbestos litigation crisis," it is an asbestos-induced disease crisis. Asbestos is the most lethal substance ever widely used in the workplace.

All too often, the tragedy these seriously ill workers and their families are enduring becomes lost in a complex debate about the economic impact of asbestos litigation. We should not allow that to happen. The litigation did not create these costs. Exposure to asbestos created them. They are the costs of medical care, the lost wages of incapacitated workers, and the cost of providing for the families of workers who died years before their time. Those costs are real. No legislative proposal can make them disappear. All legislation can do is shift those costs from one party to another.

It is not enough to say that there are serious inadequacies in the way asbestos cases are adjudicated today. That does not mean that any legislation is better than the current system. Our first obligation is to do no harm. I regret to say that, despite the best intentions of its sponsors, this legislation will do harm.

There are major flaws in the bill.

1) Experts tell us that the Asbestos Trust created by this legislation is seriously underfunded. The funding plan in this bill relies on very substantial borrowing in the early years as the only way to pay the flood of claims. The result will be huge debt service costs over the life of the Trust that could reduce the \$140 billion intended to pay claims by as much as 40% or more. The amount remaining would be far too little to pay the claims of all of those who are entitled to compensation under the terms of the bill. The legislation does not guarantee that sufficient resources will be available to keep the commitments which this bill makes to eligible victims.

2) Seriously ill victims are not allowed to continue their cases in court until the Trust Fund is ready to process and pay claims. These victims will be left in a legal limbo, unable to recover either in the courts or from the Trust Fund, while time is running out for them.

3) Thousands of lung cancer victims who have had very substantial asbestos exposure are denied any compensation from the Trust Fund. Under the legislation, these victims are losing their right to go to court, but receiving nothing from the Fund.

4) The bill makes it harder for asbestos victims to recover compensation from the Trust Fund by unfairly raising the standard of proof. Victims should simply have to prove that asbestos exposure was a contributing factor to their

disease. That is the standard used in most state courts and workers' compensation proceedings today. This bill requires a much tougher standard.

5) The current bill does not honor all existing court settlement agreements. Some victims whose claims have been resolved in court will have to start pursuing their claims all over again.

6) The bill lacks a clear, automatic sunset that allows victims to quickly seek compensation in the courts if the Trust Fund becomes insolvent and unable to pay their claims. The Committee's 2003 legislation contained such a provision, but this bill does not. Under the current bill, workers could end up trapped in the Trust with reduced benefits and long delays in receiving their payments.

7) Residents of other asbestos-contaminated communities are denied the same opportunity to receive compensation from the Trust Fund that the residents of Libby, Montana have under the bill.

8) Victims with complex cases will be unable to get a qualified attorney to pursue their claims because the legislation imposes an inflexible cap on attorneys' fees that ignores the amount of work that the case actually requires.

9) The bill takes rights away from victims of silica disease even though they are not eligible to receive any benefits from the Trust Fund.

10) Before victims lose their right to proceed in court, the legislation should require full disclosure of the corporations and insurers who will fund the trust and the amounts each of them will pay. It does not.

These shortcomings cannot be overlooked. They are too fundamental. They will end up hurting the seriously ill victims of asbestos disease who we are trying to help. I had hoped that these problems would be addressed by the Committee. Since they have not been, I must vote "no."