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# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

DAVID BROG, *Staff Director*  
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June 22, 2005

Dear Colleague:

We write to detail the problem our nation now faces with the asbestos crisis and to inform you on the substance of Senate Bill 852, the Fairness in Asbestos Injury Resolution Act of 2005, which was voted out of committee on May 26 with a bipartisan 13-5 majority. We urge you to support this bill, and reiterate our interest in working with you to improve this legislation while preserving its core provisions. This is more detailed than the customary "Dear Colleague" letter, but we felt this extensive discussion was necessary because of the complexities of the issues and proposed legislation.

## *Introduction*

The asbestos issue has been before the Senate Judiciary Committee for more than twenty years, since Senator Gary Hart of Colorado sought the assistance of Judiciary Committee members in enacting federal legislation to address Johns-Manville's asbestos claims.

Since that time:

- asbestos litigation has overwhelmed both federal and state court systems;
- 77 companies have gone into bankruptcy, with more on the brink, due to the rising tide of asbestos claims; and
- thousands of impaired asbestos victims have received pennies on the dollar since many of the companies liable for their exposure have gone into bankruptcy.

Since the 1980's, the number of asbestos defendants has risen from about 300 to more than 8,400, spanning approximately 85 percent of the U.S. economy. As a result, some 60,000 workers lost their jobs. Employees' retirement funds have shrunk by an estimated 25 percent. This is a problem that extends beyond the victims of asbestos disease alone. It has a growing impact on the average American and little question remains that it is a crisis of serious proportions.

## *The Courts Enlist the Help of Congress*

In 1997, the Supreme Court commented for the first time on the growing asbestos problem by stating (in the context of holding that asbestos litigation was not susceptible to class action treatment):

The most objectionable aspects of this asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether....<sup>1</sup>

Given the escalating problem, the Supreme Court has repeatedly called upon Congress to act through national legislation:

- “[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation.”<sup>2</sup>
- The current asbestos crisis “cries out for a legislative solution.”<sup>3</sup>
- “Members of this Court have indicated that Congress should enact legislation to help resolve the asbestos problem. Congress has not responded.”<sup>4</sup>
- As recently as 2003, the high court observed that “this Court has recognized the danger that no compensation will be available for those with severe injuries caused by asbestos...It is only a matter of time before inability to pay for real illness comes to pass.”<sup>5</sup>

### ***The 2005 Rand Report***

On May 10, 2005, the Rand Corporation issued a report highlighting the problems that many asbestos victims face in today’s tort system. In addition to discussing the number of corporate bankruptcies, and other alarming economic consequences of asbestos liability, the report summarized the average disbursements on asbestos payments to claimants for the year 2002, the most recent year available:

- Asbestos victims filing claims receive an average of forty-two (42¢) cents for every dollar spent on asbestos litigation;

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1 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997).

2 *Ortiz v. Fibreboard Corporation* (hereinafter “*Ortiz*”), 527 U.S. 815, 821 (1999).

3 *Id.* at 865 (Rehnquist, C.J., Scalia, J. & Kennedy, J., concurring in the judgment).

4 *Ayers*, 538 U.S. 135, 186-87 (Breyer, J. concurring in part and dissenting in part).

5 *Norfolk & Western Railway. Co. v. Ayers* (hereinafter “*Ayers*”), 538 U.S. 135, 168-69 (2003).

- Thirty-one (31¢) cents of every dollar have gone to defense costs; and
- Twenty-seven (27¢) cents have gone to plaintiffs attorneys and related court cost.

### ***Legislative History Leading to S. 852***

The current bipartisan bill is the product of years of negotiations, discussion, and compromise. On May 22, 2003, then-Chairman Hatch introduced S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003. He deserves great credit for establishing in that bill a national trust fund with a schedule of payments, analogous to workers' compensation. We have built on that aspect of S. 1125, ever mindful that the primary objective of legislation must be to ensure fair and timely compensation to victims of asbestos disease.

In July 2003, the Judiciary Committee voted out S. 1125, largely along party lines, in an effort to move the legislation forward. However, the bill foundered on unresolved issues. In August, Judge Edward R. Becker, who had recently taken senior status after being Chief Judge of the Third Circuit, and having authored the opinion in the asbestos class action suit which was affirmed by the U.S. Supreme Court,<sup>6</sup> convened a two-day conference in Philadelphia – with manufacturers, labor (AFL-CIO), insurers, and trial lawyers to determine if some common ground could be found. Subsequently, from September 2003 through January 2005, we held 36 stakeholder meetings here, with Judge Becker as a *pro bono* mediator. These meetings were usually attended by at least 25 stakeholder representatives with as many as 75 representatives attending on some occasions. These stakeholder sessions have included many Senators, as well the staffs of Senators Feinstein, Carper, Cornyn, DeWine, Ben Nelson, Baucus, Biden, Chambliss, Craig, Dodd, Durbin, Feingold, Graham, Grassley, Kennedy, Kohl, Kyl, Landrieu, Levin, Lincoln, Murray, Pryor, Schumer, Sessions, Snowe, Stabenow, and Voinovich.

Over the last few months, in anticipation of bill introduction and during Committee markup, we convened 26 meetings with our Judiciary Committee colleagues to address their concerns with the bill. During these deliberative sessions, we addressed issues including disease categories, award amounts, Fund sunset, and judgments and verdicts pending at the time of enactment.

After hundreds of hours of extensive analysis and deliberation, we found we could accommodate many, if not most, of the myriad issues raised by stakeholders and Senators before formal introduction of S. 852. After introduction, the Judiciary Committee held six markups lasting over a month. During this bipartisan process, and

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<sup>6</sup> See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3<sup>rd</sup> Cir. 1996), *aff'd*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

through continuing meetings, we were able to further resolve a number of complex issues, including medical criteria, Fund start-up, insurer allocation, the Equitas hardship issue, and Fund contribution transparency. Indeed, the markup process resulted in the Committee’s acceptance of over 70 amendments from Republican and Democratic members. After extensive deliberation, the Committee discharged S. 852 on a solid bipartisan vote of 13-5.

### ***S.852***

We have sought an equitable bill which takes into account, to the maximum extent possible, the concerns of stakeholders and Senators. The bill establishes a privately-funded \$140 billion trust fund that compensates asbestos victims through a no-fault system administered by the Department of Labor. S. 852 in no way holds the taxpayer responsible for contributing to the Fund. In fact, during markup, the Committee accepted an amendment that explicitly absolves the federal government from any funding obligations or liabilities with respect to the Fund.

Once established and capitalized through the private contributions from defendant and insurer participants, asbestos victims will simply submit their claims to the fund through an administrative process designed to compensate them quickly. Claimants would be fairly compensated if they meet medical criteria for certain illnesses and if they show past asbestos exposure.

The major features of this bill reflect consensus on core principles, but all are directed to ensuring fair and adequate compensation to the victims of asbestos exposure:

***Funding:*** The size of the fund was a principal issue of contention during the 108<sup>th</sup> Congress. Last October, Majority Leader Frist and then-Democratic Leader Daschle agreed that the Fund should be set at \$140 billion, which has been generally accepted as sufficient to ensure adequate payment to victims and is now embodied in S. 852. The manufacturers and insurers have agreed to pay that sum – a guaranteed amount -- into the trust fund.

***Removal of the Old Level VII’s:*** Some members raised concerns about compensating the so-called “exposure only” Level VII lung cancers, fearing that this disease category would create a “smokers” compensation fund. Without sufficient markers to show a stronger causal connection between asbestos exposure and lung cancer, this disease category could have required \$7 billion from the Fund. After serious consideration, we removed this disease category from the bill.

**No Subrogation:** A key issue for to determine compensation for asbestos victims has been workers’ compensation subrogation. Allowing for subrogation would permit insurers to impose a lien on Fund awards recovered by claimants. The value of an award to the claimant depends on whether the claimant may have to pay a substantial amount of it to others. To be fair to victims, claimants should be allowed to retain and receive the full value of both their Fund awards and workers’ compensation payments.

**More Effective Start-Up:** Perhaps one of the most difficult issues was how pending claims in the tort system will be treated upon S. 852’s enactment. With general agreement that if the fund was not up and running within a reasonable amount of time, some or all pending claims could return to the tort system. The bill as introduced provides for a 9 month stay of claims for exigent cases and a 24 month stay for non-exigent cases. Furthermore, the legislation creates a procedure enabling exigent claimants to receive prompt payment even during the initial start-up period authored by Senator Feinstein. Taking into consideration concerns raised by victims, insurers, and defendant participants, Senators Kyl and Feinstein worked through compromise language during the markup process that greatly improves the start-up process.

**Sunset:** The stakeholders generally agree that if the Fund cannot pay all valid claims, a claimant’s right to a jury trial cannot be barred. But such a sunset should not occur before there is an extensive and rigorous “program review.” During markup, Senators Kyl and Leahy worked towards refining the sunset procedures by enabling the Administrator to submit recommendations to Congress regarding possible changes to the medical criteria or the funding formula. In the event of a sunset, the bill now allows claimants to bring their lawsuits only in federal court or in a state court in the state in which the plaintiff resides or where the exposure took place.

**Attorneys’ Fees:** Before S. 852 was introduced, and after extensive deliberation with Judiciary Committee members, agreement was reached on a 5% attorneys’ fee cap for all monetary awards received by asbestos victims within the Fund. The nature of the claims process justifies this cap, for once the fund is established, recovery is fairly straightforward and there will no longer be a need for substantial and time-consuming attorney involvement. Moreover, fee caps in federal compensation

programs are fairly common.<sup>7</sup> We are working on further refinements in the bill to assist claimants in processing their claims through a paralegal program that the Administrator will be authorized to implement.

**Level VI Claimants:** Members raised concerns about the strength of the causal connection between asbestos exposure and the development of cancer in areas other than the lungs (e.g., colon, stomach, esophageal and laryngeal cancers). To assuage these concerns, the bill commissions an Institute of Medicine study to assess this causal connection, which will come out no later than April 2006. The findings of the study will become binding on the Administrator when compensating asbestos victims for each cancer in this disease category.

**Silica Claims:** We heard concerns that many asbestos claims might be “repackaged” as silica claims in the tort system. We also, however, heard concerns that liability for non-asbestos diseases not be abrogated simply because S. 852 becomes law. The stakeholders agree that this is an asbestos bill, designed to dispose of all asbestos claims, but that workers with genuine silica exposure disease should be able to pursue their claims in the tort system. A hearing was held on this issue on February 2, 2005, which established that exposure to asbestos and silica are easily distinguishable on x-rays and that markings from asbestos and silica disease are rarely found in the same patient. Consequently, the bill requires claimants, prior to pursuing a silica claim in the tort system, to provide rigorous medical evidence establishing that their injury was caused by exposure to silica, and that asbestos exposure was not a significant contributing factor to their injuries.

**Medical Screening:** Some Committee members were concerned about a medical screening program within the Fund. Although earlier versions of the asbestos bill excluded such a program, we concluded that one was necessary as an offset to the reduced role of a claimant’s attorney. It is reasonable to have routine examinations for a discrete population of high-risk workers as a matter of basic fairness. By establishing a program with rigorous standards (such as a provision offered by Senator Coburn requiring service providers to be paid at Medicare rates), as has been done in this bill, unmeritorious claims can be avoided with the fair determination of those entitled to compensation under the statutory standard. This program is vastly different from any screening in the current tort system.

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<sup>7</sup> See, e.g., *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002) (upholding attorneys’ fees cap in the Social Security Act and discussing nearly a dozen other statutes that include analogous caps).

**Pending Claims and Settlements:** Prior to bill introduction, and as a result of the numerous stakeholder meetings, agreement was reached on how the bill affects pending claims and settlements in the tort system. The bill preserves: (1) cases with a verdict or final order or final judgment entered by a trial court; (2) any civil claim that, on the date of enactment, is in trial before a jury or judge at the presentation of evidence phase; and (3) written settlement agreements, executed prior to date of enactment, between a defendant and a specific named plaintiff, so long as the agreement expressly obligates the defendant to make a future monetary payment to the plaintiff and plaintiff fulfills all conditions of the settlement agreement within 30 days.

**CT Scans:** Unlike prior iterations of the asbestos bill, S. 852 permits greater use of CT scans. During markup, the Committee accepted an amendment that commissions a study by the Institute of Medicine to evaluate whether CT scans are well accepted and reasonably reliable to diagnose certain lung cancer claims. In addition, after extensive discussions between Senators Leahy and Coburn, the Committee accepted an amendment that calls on the American College of Radiologists to establish guidelines for comparing claimants' CT scans.


**Transparency:** Several members raised concern over the specific sources of defendant funding. After numerous briefing sessions from claims analysts and financial projection experts, the Committee accepted an amendment which provides that within 60 days after the date of enactment the contributors to the Fund must submit to the Administrator information sufficient to determine their contribution levels. The Administrator must publish this funding allocation information in the Federal Register within 60 days of receipt and before the Fund can be deemed operational.

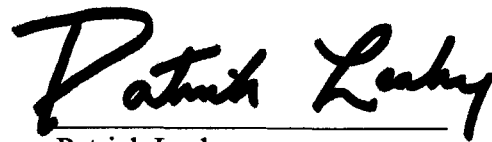
**Asbestos Ban:** Despite the known danger involved with asbestos, a number of products and processes still use asbestos today. As Congress considers creating an alternative compensation program to address past exposures to asbestos, it is only sensible that we also prevent future asbestos-related illnesses from occurring by banning asbestos use. Therefore, this bipartisan bill contains a ban on the commercial manufacture, use and distribution of asbestos and asbestos-containing products, originally authored by Senator Murray. This provision was unanimously modified in Committee last month by the adoption of Senator Kyl's amendment to provide narrow exceptions to the ban for national security purposes.

*"S. 852 – Dear Colleague"*

S. 852 has benefited from a thorough process during this Congress. This legislation is complicated, but it is both integrated and comprehensive and reflects a remarkable and widespread will to enact legislation to finally resolve the asbestos crisis. On the state of a 20 year record, the choice we are presented with is not between this bipartisan bill and one that takes a dramatically different approach. The choice is between this bipartisan bill and the continuation of the present chaotic system which leaves thousands of victims suffering from deadly diseases without compensation and scores of companies threatened with bankruptcy.

Sincerely,

  
Arlen Specter

  
Patrick Leahy